State of California • Department of Transportation

NEWS RELEASE

12-061

Today's Date: July 9, 2012
District: 1- Eureka
Contact: Scott Burger
Phone: (707) 441-3998

FOR IMMEDIATE RELEASE

STATE RULING FOR RICHARDSON GROVE IMPROVEMENT PROJECT

Eureka – Caltrans announced today that Judge Dale Reinholtsen of the Humboldt County Superior Court has issued a favorable decision for Caltrans in the case of Lotus v. Department of Transportation. In this case, the Petitioners, a group of individuals and organizations, challenged Caltrans' Environmental Impact Report for the Richardson Grove Improvement Project. The Court stated at the beginning of today's decision:

> "Caltrans is **not** going to cut down or otherwise remove any old-growth redwoods from Richardson Grove State Park… There is absolutely **no** basis in reality for believing that Caltrans 'wants' to 'destroy' old-growth redwoods. The evidence is quite obviously and overwhelmingly to the contrary."

The decision concludes that "[t]he Court has not found a violation of CEQA [California Environmental Quality Act] at this time." In its 30 page opinion, the Court addressed and rejected the allegations in the Petitioners' challenge to Caltrans' analysis in its Environmental Impact Report. The Court decided that it needed additional information regarding only one aspect of the project: it asked Caltrans to show that it has adopted a reporting or monitoring program that is designed to ensure that it will employ the impact minimization measures discussed in its environmental study. The parties were requested to meet and agree on the timing for Caltrans to present this additional information to the Court.

Today's ruling brings the challenges to the project a major step closer to resolution. Route 101 at Richardson Grove has been under study for more than ten years and Richardson Grove Improvement Project has been actively in development since 2006. Minor changes to the existing alignment will be made without removal of any old growth redwood trees in order to allow industry-standard sized truck access along this portion of Route 101. As the court emphasized in its decision, the project was planned and designed to avoid removing any old-growth trees, and many measures are in place to protect the surrounding trees throughout the area.

(more)

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Richardson Grove Ruling - Continued

In light of the Court's ruling substantially rejecting the Petitioner's arguments, Caltrans will proceed as soon as possible to comply with the State Court's remaining request. In addition, Caltrans will be finalizing the re-survey of nearly 1,500 trees ordered by the federal court in its April 2012 decision. Caltrans will be able to provide an estimated completion date of both these aspects later this summer.

Caltrans' mission is to improve mobility across California, including the North Coast. Route 101 through Richardson Grove is a beautiful area that Caltrans has a long history of maintaining. The Court's decision confirms the importance of that need. Caltrans is committed to delivering the least impactful alternative to accomplishing transportation goals that balance environmental protection and the economic needs of the entire region.

Caltrans maintains a web page with more information about the project at: www.dot.ca.gov/dist1/d1projects/richardson_grove/

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FILED

JUN 28 2012

SUPERIOR COURT OF CALIFORNIA
COUNTY OF HUMBOLDT

SUPERIOR COURT OF CALIFORNIA, COUNTY OF HUMBOLDT

TRISHA LEE LOTUS, et al.,

Petitioners,

vs.

CALIFORNIA STATE DEPARTMENT OF TRANSPORTATION, et al.,

Respondents.

_____/

CASE NO. CV110002

ORDER RE:

PETITION FOR WRIT OF MANDATE AND INJUNCTIVE RELIEF

Presently before the Court is the petition for writ of mandate and injunctive relief of petitioners Trisha Lee Lotus, Bruce Edwards, Jeffrey Hedin, Loreen Eliason, the Environmental Protection Information Center, the Center for Biological Diversity, and Californians for Alternatives to Toxics (collectively, "Petitioners"). The Court has considered the papers submitted by Petitioners and respondents State of California Department of Transportation and Cindy McKim (collectively referred to in the singular, "Caltrans"), and has considered the arguments presented by their counsel. In light of the materials and arguments submitted, the

Court rules as follows:

DISCUSSION

The Court begins with disclaimers for anyone other than the parties who may read this, the most necessary disclaimer being the following: Caltrans is **not** going to cut down or otherwise remove any old-growth redwoods from Richardson Grove State Park (the "Park"). There is absolutely **no** basis in reality for believing that Caltrans "wants" to "destroy" old-growth redwoods. (*See* Verified Petition, ¶ 1.) The evidence is quite obviously and overwhelmingly to the contrary. There is also no evidence that the project was undertaken to satisfy the needs of "big-box" retailers or "corporate giants." (*See id.*, ¶¶ 7, 41.)

It would make this Court's job much easier if this case were so simple. As discussed below, however, this case presents rather difficult issues, with both sides presenting thoughtful, well-researched arguments meriting serious consideration.

I. BRIEF FACTUAL BACKGROUND

A. The Problem

Parts of Humboldt County have been identified among California's "worst pockets of poverty and joblessness" for which "specific transportation improvements, coupled to other economic development initiatives, will help attract new businesses and create more secure, year-round employment." (AR 17:5397, 5399.) At least as of 1999, Humboldt County ranked 34th out of 58 California counties in average annual, individual income. (AR 17:5459.)

The record is clear that one important drag on the economy in this suffering region is the inability of larger trucks, referred to as Surface Transportation Assistance Act (STAA) trucks, to travel legally on Highway 101 through the Park. The lack of STAA truck access to Humboldt County has contributed to lost local businesses, lost employment, and higher costs to consumers. (*See* quoted reports and studies below, surveyed by Caltrans at AR 1:21-23, 64-69.) And, the problem appears to be getting worse as truck manufacturers and shippers nationwide shift to

STAA trucks, making Humboldt County an obsolete outlier with a competitive disadvantage:

- "Truck manufacturers are no longer making non-STAA trailers. As a result, shipping companies must pay extra for custom-made short trailers or incur higher maintenance costs to keep older, short trailers on the road. Humboldt County businesses incur extra costs associated with transferring goods between non-STAA and STAA trucks. In addition, many businesses, such as the local newspaper and manufacturers, must maintain higher inventory due to erratic deliveries, damage during transfers, and lack of nearby port access. Companies with major freight activities have relocated or gone out of business due in part to transportation problems. Local businesses and residents pay about 10 to 15 percent more for goods due to poor truck access, increasing the leakage of retail business out of Humboldt County. Several businesses, including lumber, floral, food manufacturing, and the local newspaper, have noted higher costs and have considered relocating out of Humboldt County." (Cambridge Systematics, Inc. report dated June 2003, AR 17:5357.)

- "A number of companies that started in Humboldt County relocated or went out of business due, at least in part, to transportation issues. These include Yakima, Premier Meats, Cascade Paper Company, and Eureka Fish. Del Norte [County] faces similar access problems. ...As local companies grow and the freight portion of their business gets larger, they must consider relocating. Only companies that have a value-added production with a small freight component can stay in business. Companies staying in Humboldt are at a competitive disadvantage due to STAA truck limitations. The cost of trucking is an issue not only for manufacturing, but also for local residents in the way that it affects the cost of living." (*Id.* at AR 17:5466-5467.)

- "The STAA truck restriction on Highway 101 at Richardson Grove imposes significant income losses on businesses located in Humboldt and Del Norte Counties, both in terms of higher transportation costs and the loss of export sales." (Report by David Gallo, Center for Economic Development, Chico State University, dated March 2008, AR 20:6175; *see id.* at AR 20:6168 ("One possible consequence of higher truck transportation costs is that area employers are forced to pay lower wages in order to offset the market disadvantage imposed by location.").)

- "Route 101 is the life-blood for Humboldt County and the north coast. Route 101 is the primary route used by the trucking industry including the timber industry. Truck length restrictions and backhaul opportunities in Humboldt County are preventing businesses from being profitable and competitive with other similar business along the West Coast. Truck manufacturers have indicated they will not totally phase out 28-foot trailers, but economics is driving the industry to longer trailers. It is therefore imperative that Route 101 be improved to keep commerce moving into and out of the County." (Dyett & Bhatia report dated October 2002, AR 17:5277.)

- "Improvements to the road alignment of U.S. Highway 101 through Richardson Grove south of Garberville, combined with recent state regulatory reforms, may

eliminate the constraint on large truck access. This would reduce costs of shipping and may help local businesses become more profitable. ...The benefits to existing businesses are significant and large truck access is critical to new business development, especially marine industrial use of Humboldt Bay. The shrinking nation-wide fleet of smaller trailers that are legally allowed access to Humboldt will make these improvements a necessity over time." (Humboldt County General Plan Update dated November 20, 2008, AR 17:5284.)

- "Because trucks traveling into [Humboldt County] must use smaller trailers that are becoming less common as the STAA trucks become the industry standard, businesses must pay higher trucking costs to import and export products and materials. The impedance of goods movement adversely affects the economic competitiveness of North Coast businesses." (Caltrans study dated April 2005, AR 18:5614.)

- "In summary, truck length restrictions and backhaul operations in Humboldt County are preventing businesses from being profitable and competitive with other similar business along the West Coast." (Humboldt County 2006 Regional Transportation Plan Update, AR 20:5936.)

Notwithstanding the above, the STAA truck restriction is not the most important constraint on business development in Humboldt County. (AR 1:48.) And, it appears that lifting the restriction may only prevent further economic losses; it would not generate significant new growth. (AR 1:68.)

B. The Park Cannot be Bypassed

Since at least 1955, California's government has been considering improving Highway 101 in the area around the Park. (AR 1:31; 11:3092.) The original idea was to provide a four-lane freeway to replace the two-lane road through the Park, an idea that was put on hold and revisited several times over the decades between 1945 and 2001. (AR 11:3092.)

More recently, Caltrans formally studied a four-lane improvement; an effort that culminated in a feasibility study report dated September 12, 2001. (*See* AR 11:3090-3172.) The report identified a number of problems with the existing road, including that trees along the road jeopardize road safety (*e.g.*, by restricting "sight distance" and by creating sharp curves), and that the contours of the road prevent STAA truck access. (AR 11:3093, 3094.)

Nevertheless, the report concluded that a four-lane road could *not* be constructed feasibly.

(AR 11:3090.) Four alternatives were considered and discarded: one to expand the road *within* the Park and three to expand the road while *bypassing* the Park. (AR 11:3096-3098.)

The idea of expanding the road to four lanes while keeping the road within the Park was summarily rejected as not "environmentally feasible" because "it would mean cutting a large number of old-growth redwood trees within and adjacent to Richardson Grove State Park." (AR 11:3098.)

Two of the bypass alternatives (alternatives "A" and "B") were also deemed environmentally infeasible because, among other reasons, they would entail the construction of millions of cubic feet of new roadway and extensive excavation of environmentally sensitive land. (AR 11:3095, 3096-3097, 3101.) Caltrans also deemed alternatives A and B *economically* infeasible, as they had an estimated cost of $75-100 million (for alternative A) and $450-600 million (for alternative B). (AR 11:3096-3097, 3101.)

The final bypass alternative (alternative "C") involved the construction of two, 4900-foot long tunnels within the boundaries of the Park, which the report concluded was economically infeasible because it would cost an estimated $340-450 million. (AR 11:3097-3098, 3101.) In comparison, the project being challenged here has an estimated cost of $5.65 million. (AR 1:19.)

The 2001 report concluded with the recommendation that Caltrans abandon the idea of bypassing the Park, because of the environmental and financial consequences that bypassing the Park would entail. (AR 11:3101.)

C. <u>This Project and its Relationship to Safety</u>

The parties agree that the current project—the Richardson Grove Operational Improvement Project (hereafter, the "Project")—began in 2006 as a "Goods Movement Access Feasibility Study." (AR 1:33; Petitioners' Opening Brief at 5:6-8 ("This Project had its genesis in 2006 with Caltrans' initiation of a 'Goods Movement Feasibility Study'....").) Consistent with the recommendation in Caltrans's 2001 report, the Project does not propose bypassing the

Park; rather, the Project proposes minor realignments and widening of the road to allow safer STAA truck access. (AR 1:11-12.)

The Verified Petition asserts that providing STAA truck access was Caltrans's "secret agenda," which Caltrans was forced to "make explicit." (*See* Verified Petition, ¶ 11.) The suggestion is that Caltrans had to disclose its "secret agenda" of making the highway accessible to STAA trucks only after its supposedly pretextual safety justification became implausible. (*Id.*). But the very study that Petitioners contend was the "genesis" of this project was, by its title, a "goods movement" study in which providing STAA truck access was a central concern. (AR 7:1940 ("This Study will...develop and consider alternative ways of providing safe and economically feasible goods movement, including Surface Transportation Assistance Act (STAA) truck access to Humboldt County."); *see id.* ("A multi-disciplinary team...will provide a broad perspective on the issues and potential solutions to this truck access concern.").)

That the main problem was STAA truck access was also not remotely a "secret." Caltrans invited stakeholders to participate in the above-mentioned goods movement study (the "genesis" of the project), including the Sierra Club and the Save the Redwoods League, both of which attended the study's kick-off meeting in September 2006. (AR 1:33; 7:1942-1951, 1953-1965.) One of the Petitioners, the Environmental Protection Information Center, was on the study group's mailing list. (AR 7:1962.) Caltrans later made clear to the general public, in a press release dated July 26, 2007, that Caltrans was considering "a realignment plan reached with local stakeholders to allow larger trucks through Richardson Grove." (AR 7:1992.) Caltrans's draft environmental impact report reaffirmed that the purpose of the project was STAA truck access in December 2008. (AR 4:1233-1235.)

In short, the purpose of the project—to allow STAA truck access through the portion of Highway 101 running through the Park—was disclosed by Caltrans from the outset and was never a "secret."

The Court is a bit frustrated by Petitioners' suggestion that safety was Caltrans's *pretextual* justification[1]—with the necessary inference being that Caltrans is dishonest or corrupt—when the safety issue is only muddled because of Caltrans's respect for the very old-growth redwoods Petitioners so dearly defend. As Petitioners well know, a true "safety project" on Highway 101 through the Park would require Caltrans to cut down old-growth redwoods. (*See, e.g.,* AR 11:3093 ("The trees within park boundaries restrict sight distance and horizontal clearances, as well as causing small radius curves."); AR 4:4042 ("The size and location of old growth redwoods that may not be removed constrain potential improvement of the roadway....").)

But Caltrans has not dared to suggest that any old-growth redwoods be removed. Indeed, as explained above, Caltrans summarily rejected the idea of building a four-lane road through the Park in 2001 precisely because it would require the removal of old-growth redwoods adjacent to the highway. (AR 11:3098.)

Accordingly, Caltrans has candidly disclosed that the Project would require "mandatory design exceptions," including exceptions to California's standards for shoulder-width, distance to fixed objects, and corner sight distance (AR 1:38), *precisely to accommodate the old-growth redwoods that are adjacent to the highway*. (Fact Sheet for Exceptions to Advisory Design Standards, AR 4:4044 ("These exceptions are not being pursued to minimize cost. The exceptions are needed to avoid impacts to large redwood trees and to Richardson Grove State Park."); *see also* AR 1:45.) Human safety yielded to the trees from the outset, as perhaps it should have. Meanwhile, Caltrans is in the difficult position of attempting to explain that safety requires that the road be broadened and realigned for STAA trucks (inasmuch as two STAA

[1] (*See* Verified Petition, ¶¶ 11, 53-54.) The Court's frustration, however, is tempered by fact that Petitioners did not have the administrative record at the time they made the assertions in the Verified Petition, and thus Petitioners did not have all the material facts at that time.

trucks currently may collide when traveling in opposite directions, *see* AR 1:19) but, simultaneously, that the Project will not result in a roadway that meets the state's minimum design standards. In short, the Court rejects Petitioners' attempts at capitalizing on the confusion that has necessarily resulted from a project that both promotes safety and, because of the old-growth redwoods, cannot improve the road to meet minimum design standards.[2]

D. <u>The Old-Growth Redwoods in the Park</u>

The Park is approximately 2,000 acres. (AR 4:4844.) The Project would disturb an estimated total of 0.73 acres (AR 1:125), with a portion of that disturbance taking place outside the Park.

The evidence cited by Petitioners for the importance of the old-growth redwoods in and around the Park derives entirely from two sources: (1) Caltrans; and (2) the California Department of Parks and Recreation (hereafter, "DPR").[3] (*See* Petitioners' Opening Brief at 1:19-2:10, and citations to the administrative record therein.)

Specifically, Petitioners point to the following facts and statements provided by Caltrans and DPR:

- The Park is home to ancient redwoods 300 feet tall and thousands of years old, including the ninth tallest redwood known to exist. (Citing DPR pamphlet and DPR online information, AR 23:7483; 20:6278.)
- "This forest is of particular national importance due to the high quality and limited extent of its trees. The park's location makes it a gateway to 'Redwood Country' as it is the first significant forest of large redwoods the public passes through while traveling north on US Route 101." (Caltrans statement, AR 14:4044.)
- "The majority of the Project would run through [the Park], a unique and valuable recreational area that protects old-growth redwoods in Humboldt County. The project

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[2] (*See, e.g.,* Verified Petition, ¶¶ 42-43; Opening Brief at 3:4-6, 3:11-17, 12:15-22.)

[3] Caltrans is the agency that approved the Project. (AR 1:1.) DPR stated with respect to the Project, "We agree that the proposed realignment action has included all possible planning by your department to minimize long term harm to Richardson Grove State Park." (AR 219.)

proposal threatens to impact the redwoods grove and degrade the recreational experience for the park's visitors as well as the visually stunning views of redwoods that are enjoyed by millions of people who drive through Richardson Grove on Route 101." (DPR statement, AR 2:403.)

- "Within the project location is the first significant forest of large redwoods the public passes through while traveling north on route 101; therefore impacts to large redwoods must be minimal." (Caltrans statement, AR 13:3759.)

- "Richardson Grove is a 'heritage park' with worldwide significance. These forests are enjoyed by millions of people extending from those in the region to more distant statewide visitors; people come from the furthest reaches of our nation and all corners of the planet to experience the Redwoods and most pass through Richardson Grove to do so. [¶] Many of these visitors have strong legacy ties to Richardson Grove State Park, and a family connection that spans generations. Any project that affects the historic patina and the natural fabric of Richardson Grove State Park can have far reaching impact to millions of people as they enter the Redwood Region." (DPR statement, AR 2:376.)

- "What distinguishes this segment of Highway 101 from other highways is the way in which the roadway is threaded through the redwood forest, with trees very close to the edge of pavement. The distinctive aesthetic experience of driving along this segment of Highway 101 may be important to area residents and travelers. However, it is an issue of aesthetic value rather than historic preservation, and would be more appropriately addressed in some way other than through compliance with Section 106 of the National Historic Preservation Act." (Caltrans statement, AR 11:3259.)

To summarize, the record evidence is that the old-growth redwoods in the Park provide a profound aesthetic experience enjoyed by millions of drivers and an unknown number of Park visitors. The old-growth redwoods inspire awe because they are ancient, enormous, and signal the entry into "redwood country."

To Petitioners' credit, they have not argued that the old-growth redwoods in the Park are a statistically significant portion of the total old-growth redwoods in California, such that their survival is meaningful in terms of the total population. Nor could they. The record demonstrates that 85,000 to 106,000 *acres* of old-growth redwood forests exist. (AR 21:6619, 20:6326-6327.) This is not to downplay the history of the destruction of old-growth redwood forests. Indeed, statistics in the record regarding remaining acreage are used to emphasize the extent of the

forests that have already been wiped out, which is estimated to be **2,000,000 acres**. (*See id.*) Nevertheless, the record reflects that the value of the old-growth redwoods in the Park stems not from the fact that they represent a significant portion of scarce old-growth redwoods, but from the fact that their location allows them to provide a profound aesthetic experience to millions of drivers and an unknown number of Park visitors.

II. ANALYSIS

A. CEQA and the Applicable Review Standard

Petitioners assert ten causes of action, each of which is based on Caltrans's alleged violation of the California Environmental Quality Act (CEQA), a set of statutes that are codified in division thirteen of the California Public Resources Code. *See* Pub. Resources Code §§ 21000-21189.3.

A number of regulations implement CEQA, *see* Cal. Code Regs., tit 14, § 15000-15387, and hereafter this Court will refer to them as the "CEQA Guidelines."

The basic purposes of CEQA and the CEQA Guidelines are to: (1) inform governmental decision makers and the public about the potential, significant environmental effects of proposed activities; (2) identify ways that environmental damage can be avoided or significantly reduced; (3) prevent significant, avoidable damage to the environment by requiring changes in projects through the use of alternatives or mitigation measures when the governmental agency finds the changes to be feasible; and (4) disclose to the public the reasons why a governmental agency approved the project in the manner the agency chose if significant environmental effects are involved. CEQA Guidelines § 15002(a).

The Court interprets both CEQA and the CEQA Guidelines broadly to afford the fullest protection to the environment, so long as the interpretation adopted is within the reasonable scope of the legislative language. *See, e.g., Friends of Mammoth v. Bd. of Supervisors of Mono County*, 8 Cal. 3d 247, 259 (1972); *Kings County Farm Bureau v. City of Hanford*, 221 Cal. App.

3d 692, 720 (1990).

"In a lawsuit charging noncompliance with CEQA, judicial inquiry is limited to the question of abuse of discretion, which is established if the agency has not proceeded as required by law or if its decision is not supported by substantial evidence. [Citations.] The court does not pass upon the correctness of the EIR's environmental conclusions, but only upon its sufficiency as an informative document." *County of Inyo v. City of Los Angeles*, 71 Cal. App. 3d 185, 189 (1977).

B. Caltrans's Finding of No Significant Effects

Caltrans determined that the Project would not have significant effects on the environment. (AR 1:166.) More specifically, Caltrans stated in the final environmental impact report ("FEIR"), "No significant environmental effects are expected as a result of this project with the implementation of the stated special construction techniques." (*Id.*) As explained below, the Court finds that substantial evidence supports Caltrans's determination, but the Court also finds that Caltrans may not have fully complied with CEQA in its adoption of mitigation measures.

1. Substantial Evidence Supports Caltrans's Finding of No Significant Effects

An agency's finding that a project will have one or more significant effects on the environment does not mean that the project cannot go forward. *See, e.g.,* Cal. Pub. Resources Code § 21002.1(c). Such a finding, however, requires that the agency take additional action, such as making the further determination that mitigation measures are infeasible, if appropriate. *See id.*, § 21081(a).

"'Significant effect on the environment' means a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance." CEQA Guidelines, § 15382.

The Court highlights that the above definition makes clear that the "environment" being analyzed is the environment "within the area affected by the project." In other words, the fact that this Project is relatively small in its geographic scope, and therefore affects only a relatively small aspect of California's overall environment, does not mean the Project's effects are less significant than an otherwise identical project affecting a larger area. To Caltrans's credit, it has not argued otherwise. (*See* Respondents' Opposition at 13:22-25.)

Section 15382 of the CEQA Guidelines (quoted above) refers to a "substantial" adverse change in the physical environment without defining "substantial." In interpreting section 15382, the Court must use the "usual and ordinary meaning" of its terms, construed in the context of the statute as a whole, *see Leonte v. ACS State & Local Solutions, Inc.*, 123 Cal. App. 4th 521, 526-27 (2004), while still interpreting CEQA broadly to afford the fullest protection to the environment, *Friends of Mammoth*, 8 Cal. 3d at 259. In the context of section 15382 and CEQA as a whole, the usual and ordinary meaning of "substantial" is "important, essential." Merriam-Webster online dictionary, http://www.merriam-webster.com/dictionary/substantial. The Court also believes that "important, essential" is the most environmentally protective definition that is still within the reasonable scope of the statutory language. *Friends of Mammoth*, 8 Cal. 3d at 259.

The Court's inquiry, therefore, is whether substantial evidence supports Caltrans's determination that the Project would not have an important, essential (or potentially important, essential) adverse change in the physical conditions of the area of the Project. With respect to the old-growth redwoods in and around the Park, the record evidence is that their value derives from their providing a profound aesthetic experience enjoyed by millions of drivers and an unknown number of Park visitors. With respect to the old-growth redwoods, a significant effect in the environment of the Project area (or phrased differently, an important, essential adverse change in the physical conditions of the Project area) is therefore one that would potentially (or

actually) ruin that profound aesthetic experience.[4]

The Court agrees with much of Caltrans's analysis of this issue. The question is not whether there is substantial evidence to support Petitioners' position; the question is whether there is substantial evidence to support Caltrans's conclusion. *Laurel Heights Improvement Ass'n of San Francisco, Inc. v. Regents of the Univ. of Cal.*, 47 Cal. 3d 376, 407 (1988). In answering that question, this Court must consider the evidence as a whole. *Id.* at 408. That Caltrans's analysis of the effects of the Project "might be imperfect in various particulars does not necessarily mean it is inadequate." *Id.* "The proper judicial goal...is not to review each item of evidence in the record with such exactitude that the court loses sight of the rule that the evidence must be considered as a whole." *Id.*

Substantial evidence supports the conclusion that the Project will not actually, and will not potentially, ruin the profound aesthetic experience provided by the old-growth redwoods, in light of the special construction techniques and other mitigation measures provided for in the Project. In reaching that determination, the Court has considered each piece of evidence cited by Petitioners and Caltrans. The Court does not intend to engage in a detailed repetition of the evidence and arguments on both sides, but will present the key points.

The most important evidence for Caltrans consists of the opinions of two arborists. (*See* AR 6:1880-1883; 14:4037-4039.) Darin Sullivan is a certified arborist (AR 9:2696) who evaluates tree failures, has observed around a thousand such failures, and has over 27 years of

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[4] The Court specifically rejects the notion that the inquiry is simply a matter of whether the Project has adverse effects on the old-growth redwoods, without regard for whether or not those adverse effects would ruin the aesthetic experience the redwoods provide. If the relevant question under CEQA is simply whether adverse effects will take place, then any changes in the environment considered "adverse," no matter how trivial, would be significant under CEQA so long as there are enough of them. In this case, for example, 54 trees other than old-growth redwoods will be removed. (AR 1:124.) No serious person would suggest that removing those trees has the same significance as removing 54 old-growth redwoods. But that suggestion would be the law under CEQA unless the value of the environmental resource (here, aesthetics) is used in measuring significance.

experience working with trees (AR 14:4037). Sullivan reviewed the Project information, including the layout maps depicting which trees would be affected, and concluded that, in light of the mitigation measures, the Project "can be performed with minimum impact to the root vitality of these wonderful trees." (*See* AR 14:4037-4039.) Sullivan's opinion is bolstered by the opinion of a consulting arborist retained by Save the Redwoods League, Dennis Yniguez, who concluded that "the highway alterations, as proposed, will have no significant detrimental effect on root health or the availability of water to the roots of old-growth redwoods adjacent to the highway construction." (*See* AR 6:1880-1883.) These opinions go directly to the efficacy of the mitigation measures in the Project. In light of those opinions, the Court is not troubled by blanket warnings cited by Petitioners such as that there "should be no construction activities in the Structural Root Zone of a protected tree" (AR 18:5601), because those warnings do not account for the unusually careful measures incorporated into the Project.[5]

The Court is aware of Petitioners' arguments attacking the evidentiary value of the opinions of Sullivan and Yniguez, and has reviewed the cited authorities. (*See* Opening Brief at 21:10-25:12.) The Court simply disagrees with Petitioners that the opinions lack foundation and are not supported by facts. *See* CEQA Guidelines § 15384(b) ("Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts."). To the contrary, the opinions of Sullivan and Yniguez appear no different than the majority of expert opinions regularly allowed in our courts: the two arborists are applying their experience and expertise to a unique set of facts presented by this case.

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[5] The Court is also not persuaded by Petitioners' repeated reference to Caltrans's admission that it did not do any "field studies." (AR 3:806). Quite obviously, Caltrans spent considerable time and resources examining the effect of the Project on the old-growth redwoods. (*See, e.g.,* Respondents' Opposition at 20:13-28.) The cited admission was in response to the following question: "What field studies [original emphasis] have you conducted to determine the effect of cutting into the shallow-rooted system of trees as heavy and large as redwoods?" (AR 3:790.) Obviously, Caltrans did not conduct such a "field study," given that a core issue in this case is whether "cutting into the shallow-rooted system" of trees will even be allowed for the Project.

It should surprise no one, least of all Petitioners, that Caltrans was unable to cite studies and literature of the sort Petitioners demand. (*See* Opening Brief at 21:10-11 ("Caltrans failed to identify any studies or other literature demonstrating the effectiveness of these techniques").) Such studies would require the invasion of old-growth redwoods' root zones, which is precisely the evil against which Petitioners rail and which, undoubtedly, is not something arborists are inclined to do merely for the sake of research. Likewise, it is also unsurprising that there are no studies in the record demonstrating that Caltrans's special construction techniques would not be effective. In any event, the opinions offered by Sullivan and Yniguez are sufficiently credible to be considered as part of the total evidence that supports Caltrans's conclusion. *See Laurel Heights*, 47 Cal. 3d at 409; *cf. San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus*, 27 Cal. App. 4th 713, 728 (1994) ("[T]he lead agency is not required to conduct all suggested testing or experimentation.").

Other evidence supporting Caltrans's position, as well as a rebuttal to Petitioners' argument and evidence, is detailed at length in Caltrans's opposition. (*See* Respondents' Opposition at 14:3-23:3.) Among that evidence, the Court finds noteworthy: (1) the evidence from the Natural Resources Handbook stating that even low vigor trees can bear a 10% root loss within their root health zones without losing vigor (AR 8:2274); and (2) Sullivan's observations and photographs evidencing that old-growth redwoods along the Avenue of the Giants are in good health despite root flare damage (AR 8:2319-2323).

The Court is also aware of Petitioners' point that mechanized equipment may be used, and root damage may take place, in the areas of the culvert improvements. (*See, e.g.,* AR 1:132-133; 8:2390.) But as explained above, the question is not whether some old-growth redwoods will be adversely affected; the question is whether the Project would potentially, or actually, ruin the profound aesthetic experience provided by the old-growth redwoods. The culvert improvement work would take place over about two-tenths of a mile (or about two city blocks),

in proximity to only six old-growth redwoods. (*See* AR 1:132-133; AR 1:272-A (showing one old-growth redwood in proximity), 273-A (showing three), 274-A (showing two).)[6] Even assuming significant root damage to these six trees—an assumption that would be based on the further, questionable assumption that Sullivan and Yniguez did not consider the impact of mechanized work in forming their opinions—the culvert improvement work would not, actually or potentially, ruin the profound aesthetic experience provided by the old-growth redwoods.

Finally, the Court wishes to dispose of Petitioners' argument that "[t]he very fact that Caltrans chose to prepare an EIR suggests the agency viewed at least some of the Project's effects as significant; after all, an EIR is proper only where there is substantial evidence of significant environmental effects." (Opening Brief at 16:20-23.) That is simply untrue, as Petitioners must know. The reality is that an EIR *must* be prepared "whenever it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impact." *No Oil, Inc. v. City of Los Angeles*, 13 Cal. 3d 68, 75 (1974); *see also* CEQA Guidelines § 15064(f)(1). That standard is quite broad, and is deliberately so in order to afford the fullest protection to the environment. *No Oil, Inc.*, 13 Cal. 3d at 75; *see also* CEQA Guidelines § 15064(g) ("[In determining whether to prepare an EIR,] in marginal cases where it is not clear whether there is substantial evidence that a project may have a significant effect on the environment, the lead agency shall be guided by the following principle: If there is disagreement among expert opinion supported by facts over the significance of an effect on the environment, the Lead Agency shall treat the effect as significant and shall prepare an EIR.").

Indeed, the Court wonders what sorts of projects, if any, are so benign that it cannot be "fairly argued" that they "may" result in a significant impact, especially since (as explained above) the significance of the effects are judged in relation to the "area affected by the project,"

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[6] Citations to the record with an "A" at the end refer to pages attached to the Notice of Supplementation and Replacement of Administrative Record Excerpts, which Caltrans filed on February 15, 2012.

CEQA Guidelines § 15382, meaning that even a tiny project will require an EIR so long as adverse physical changes *may* be significant within the tiny area affected. Accordingly, it is unremarkable that Caltrans felt it necessary to prepare an EIR, and the fact that Caltrans did so does not suggest to this Court in the slightest that Caltrans "viewed...some of the Project's effects as significant."

2. Caltrans may not have Complied with CEQA in Adopting Mitigation Measures

If a project will not have a significant effect on the environment, then mitigation measures need not be adopted. *See* CEQA Guidelines § 15126.4(a)(3); *Santa Clarita Org. for Planning the Env't v. City of Santa Clarita*, 197 Cal. App. 4th 1042, 1058 (2011); Pub. Resources Code, §§ 21100(b)(3), 21150.

On the other hand, if a project *will* have a significant effect, one way to comply with CEQA is to incorporate measures into the project that would "avoid or substantially lessen the significant environmental effect...." CEQA Guidelines § 15091(a)(1); *see also* Pub. Resources Code § 21081(a)(1). An agency adopting such mitigation measures, however, must also adopt a "reporting or monitoring program" that is "designed to ensure compliance during project implementation." Pub. Resources Code, § 21081.6(a)(1); *see also* CEQA Guidelines § 15097.

The fact of the matter is that Caltrans *has* adopted mitigation measures, some of which are labeled "special construction techniques." (*See* arguments and evidence cited in Petitioners' Opening Brief at 18:7-17.) More important, Caltrans's finding of no significant environmental effects is explicitly premised on mitigation measures; namely "the implementation of stated special construction techniques." (AR 1:166.)

The Court does not believe that Caltrans violated CEQA simply by taking into account its mitigation measures in making its determination that no significant effects will occur. It seems perfectly appropriate and realistic for an agency in a case like this and in many others to: (1) be uncertain as to whether a project, without mitigation, will have a "significant effect" within the

meaning of CEQA (a fundamentally vague standard that this Court admits it had considerable difficulty applying); and (2) be entirely certain that a project will *not* have a significant effect if appropriate mitigation measures are adopted.[7]

But where, as here, an agency decides to incorporate mitigation measures into its significance determination, and relies on those mitigation measures to determine that no significant effects will occur, that agency must treat those measures as though they were required, *i.e.*, the agency must treat those measures as though they were adopted following a finding of significance, in accordance with CEQA Guidelines section 15091(a)(1) and Public Resources Code section 21081(a)(1). The Court will not punish Caltrans for taking into account its mitigation measures when making its significance determination, but at the same time the Court will not provide Caltrans a shortcut to CEQA compliance by allowing Caltrans to rely on mitigation measures that have not been adequately adopted.

The question, then, is whether Caltrans adopted mitigation measures in the same manner as though they had been adopted following a finding of significance. *See* CEQA Guidelines § 15091(a)(1); Pub. Resources Code § 21081(a)(1). One need only review the FEIR to determine that the mitigation measures have been "incorporated into" the Project. What the Court questions is whether Caltrans has adopted a "reporting or monitoring program" that is "designed to ensure compliance during project implementation." Pub. Resources Code § 21081.6(a)(1); *see also* CEQA Guidelines § 15097. The Court is not troubled by the fact that such a program does

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[7] The legislature has attempted to provide a mechanism for this very situation. Specifically, CEQA allows the preparation of a less onerous "mitigated negative declaration" ("MND") in lieu of an EIR where a project, once believed to have potentially significant effects, is determined not to have any with the adoption of mitigation measures. *See* Pub. Resources Code §§ 21064.5; CEQA Guidelines §§ 15064(f), 15070. But preparing an MND is a hollow alternative in a case like this one, and no doubt in many others. As explained above, EIRs are required "whenever it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impact." In light of that standard, preparing an MND in lieu of an EIR would leave an agency *wide* open to litigation asserting that a full EIR should have been prepared. For that reason, among many others, it is unsurprising that Caltrans chose not to prepare an MND for the Project.

not appear to be disclosed in the FEIR, as CEQA does not require that it be contained there. *Christward Ministry v. County of San Diego*, 13 Cal. App. 4th 31, 49 (1993). Caltrans must, however, come forward with evidence that such a program has been adopted. At the conclusion of this discussion, the Court will therefore include an order to show cause requiring that.

C. <u>Caltrans Provided Adequate Descriptions of the Setting and the Project</u>

The Court agrees with Petitioners that the adequacy of the EIR's descriptions of the environmental setting and the project is reviewed *de novo*. (*See* Petitioners' Opening Brief at 7:12-15 and authorities cited therein; Petitioners' Reply Brief at 1:19-2:6 and authorities cited therein.)

1. <u>Adequacy of the Environmental Setting Description</u>

CEQA's requirement that an EIR adequately describe the physical environment is elaborated in the case law and set forth in section 15125 of the Guidelines, which states in relevant part:

> (a) An EIR must include a description of the physical environmental conditions in the vicinity of the project...from both a local and regional perspective. This environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant. The description of the environmental setting shall be no longer than is necessary to an understanding of the significant effects of the proposed project and its alternatives.
>
> ...
>
> (c) Knowledge of the regional setting is critical to the assessment of environmental impacts. Special emphasis should be placed on environmental resources that are rare or unique to that region and would be affected by the project. The EIR must demonstrate that the significant environmental impacts of the proposed project were adequately investigated and discussed and it must permit the significant effects of the project to be considered in the full environmental context.

In brief, and as relevant here, section 15125 requires a "description of the environmental setting" that is "no longer than is necessary to an understanding of the significant effects of the proposed project and its alternatives" and which would "permit the significant effects of the

project to be considered in the full environmental context."

The Court finds that the EIR's description of the environmental setting complied with CEQA. The EIR is extremely detailed with respect to the affected environment. It includes maps of the region (AR 1:24; 4:1236) and the subject section of roadway (AR 1:25, 1:39; 4:1237, 4:1247). It describes the "human environment" in terms of the area's current and potential human uses, including: (a) existing and potential land uses, such as that the South Fork of the Eel River is designated "recreational" and Highway 101 from Leggett to the Oregon border is eligible for scenic highway status (AR 1:55-61; 4:1259-1263); (b) economic and social factors in the area, including the existence of nearby businesses and the existence of a substance abuse recovery center (AR 1:69-73; 4:1268-1271); (c) utilities and emergency services in the area (AR 1:73-74; 4:1271-1272); (d) traffic and transportation facilities, including the fact that the affected section of Highway 101 is part of the Pacific Coast Bike Route (AR 1:74-79; 4:1272-1276); (e) visual and aesthetic uses of the area, including the results of a 2008 Visual Impact Assessment prepared for the Project and photographs showing the highway and its adjacent forest (AR 1:79-89; 4:1276-1284); and (f) cultural resources in the area, including a reference to the 2008 Historic Property Survey Report that was prepared for the project (AR 1:89-95; 4:1285-1289).

The EIR also describes the "physical environment" in great detail, including: (a) the current manner in which water drains from the highway, and the pros and cons of the project with respect to water quality in the area (AR 1:95-100; 4:1289-1292); (b) the terrain in the project area, its soil content, and a reference to two subsurface geotechnical investigations performed in 2007 and 2008 (AR 1:100-102; 4:1292-1294); (c) an examination of whether toxic materials are present in the area, including a description of exhaustive testing conducted to measure the amount of aerially deposited lead from motor vehicles contained in the soil (AR 1:102-107; 4:1294-1298); (d) the air quality and climate conditions in the area (AR 1:108-114;

4:1299-1303); (e) an assessment of the current noise level in the area, including a reference to a 2007 noise report prepared for the project as well as decibel measurements of the typical daytime and evening noise levels, as detected by a sound meter placed in the area (AR 1:114-121; 4:1303-1309); and (f) an assessment of energy consumption caused by the current roadway and how it may increase or decrease after the project, including a reference to the State's 2008 Energy Analysis that was prepared for the project (AR 1:121-122; 4:1309-1310).

Finally, the EIR describes the "biological environment" in great detail, including: (a) a description of the "vegetation communities" (composition of trees, plants, *etc.*) and common wildlife in the area as revealed by the State's 2008 Natural Environment Study (AR 1:122-135; 4:1311-1319); (b) a description of the waterways in the area (AR 1:135-141; 4:1320-1325); (c) a detailed discussion of special-status species (plants and animals) in the area that are protected but not considered threatened or endangered, such as the sticky pea, the yuna myotis bat, and the southern torrent salamander (AR 1:141-147; 4:1326-1330); (d) a detailed discussion of the threatened or endangered species in the area, including the coho salmon, the marbled murrelet, and the northern spotted owl (AR 1:147-157; 4:1331-1337); and (e) a description of undesirable, invasive species in the area such as the Himalayan blackberry and the yellow star thistle (AR 1:157-159; 4:1337-1338).

With respect to the old-growth redwoods in particular, the EIR properly placed "special emphasis on them...." CEQA Guidelines § 15125(c). The EIR candidly disclosed concerns with soil compaction and harm to tree roots, and described precisely where mechanized equipment may be allowed with the permission of the construction engineer. (AR 1:126-133; 4:1315-1317, 1318.) The EIR also included a list showing the number, location, and size of trees that would have root effects. (AR 1:128-129; 4:1316-1317.) Finally, Caltrans prepared and included in the EIR a detailed appendix showing the size and location of trees that would be affected in relation to the road. (AR 1:270-A-289-A; 4:1414-A-1433-A.)

Despite all of the above, Petitioners contend that the EIR's description of the environmental setting is inadequate, solely because the EIR did not provide an additional analysis of the "nature, location, and extent of the structural root zones of the old-growth redwood trees alongside Highway 101." (Opening Brief at 8:3-7).

The Court rejects Petitioners' argument for a number of reasons. First, the EIR's omission of a tree-by-tree structural root zone analysis is not remotely like the omissions in the cases cited by Petitioners. *See Galante Vineyards v. Monterey Peninsula Water Mgmt. Transit Dist.*, 60 Cal. App. 4th 1109, 1114, 1122 (1997) (environmental setting description inadequate where project for a 24,000-acre-foot[8] dam contained only one passing reference to the existence of vineyards despite evidence that "numerous vineyards" in the vicinity were a "thriving" industry); *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus*, 27 Cal. App. 4th 713, 718, 722-29 (1994) (environmental setting description for a 154-acre development project was "inaccurate, incomplete, and misleading" because, among other shortcomings, it "completely fail[ed] to mention and consider a nearby wetland wildlife preserve"). The present case would be like *Galante Vineyards* and *San Joaquin Raptor/Wildlife* if Caltrans had completely omitted any discussion of the old-growth redwoods, or made one passing reference to the effect of, "By the way, some old-growth redwoods are also present." That is not what happened.

Second, the Court finds that the description with respect to the old-growth redwoods was sufficient to provide "an understanding of the significant effects of the proposed project" while still limiting the discussion to "no longer than is necessary...." Guidelines § 15125; *see also* Cal. Pub. Resources Code § 21003(c) ("it is the policy of the state" that "[EIRs] omit unnecessary description of projects and emphasize feasible alternatives to projects"). As one court observed,

[8] An "acre-foot" is the volume of water that would cover one acre of land to a depth of one foot.

CEQA demands that an EIR be a "user-friendly" document. *Dry Creek Citizens Coalition v. County of Tulare*, 70 Cal. App. 4th 20, 26 (1999); *see also id.* ("CEQA requires an EIR to reflect a good faith effort at full disclosure; it does not mandate perfection, nor does it require an analysis to be exhaustive."). Providing a three-dimensional cross-section of every affected old-growth redwood's structural root zone (as Petitioners' Opening Brief demands by calling for an analysis of the "nature, location, and extent" of the structural root zones) or providing a two-dimensional map with structural root zones indicated with a circle in relation to planned construction activities (as Petitioners' Reply Brief implies would be required, despite that such a map would not satisfy the demand made in the Opening Brief), would be providing a level of detail uncalled for by CEQA, and indeed possibly unlawful under CEQA as being more than is necessary. The level of detail already provided—diagrams showing the size and location of the trees whose structural root zones will be affected by construction—is sufficient.

Finally, the Court takes issue with the notion that the State's failure to include a tree-by-tree analysis of the "nature, location, and extent" of the structural root zones is a "simple and glaring" omission. (Reply Brief at 1:15-17.) If the stated omission is "simple and glaring" to anyone, then that can only be because it is the one Petitioners have focused on. Members of the public concerned with endangered species, and not old-growth redwoods, may believe the EIR is obviously inadequate because it does not provide an analysis of the "nature, location, and extent" of the marbled murrelet and northern spotted owl populations in the area and the region. Members of the public concerned with improving roadway bicycle access may believe that the EIR is obviously inadequate because it does not provide an analysis of the "nature, location, and extent" of the bicycle-inaccessible sections of the road that will remain upon completion of the project.[9] The list goes on and on, and illustrates an important point: The requirement of an

[9] It is no answer to this bicycle hypothetical to say that an EIR need only consider "environmental" issues in the sense that ordinary people understand that term, and that Caltrans need not concern itself with the

adequate description of the environment should be met where, as here, the EIR identifies the existence of the resource and explains in detail how the project will affect that resource, *see* Guidelines § 15125; otherwise no one could even hope to comply with CEQA's descriptive requirements. *Cf. Residents Ad Hoc Stadium Comm. v. Bd. of Trs. of the Cal. State Univs. & Colleges*, 89 Cal. App. 3d 274, 286 (1979) ("The statute does not demand what is not realistically possible given the limitation of time, energy, and funds.").

Petitioners may protest that the public in this case was *most* concerned with the effects on old-growth redwoods, and therefore extra attention should have been devoted to them. But extra attention *was* devoted to them. And, although CEQA requires public opinion to be considered in determining whether an effect should be considered adverse or beneficial, CEQA Guidelines § 15064(c), it does not appear to allow, much less require, Caltrans to describe some resources in greater detail than others based on the various resources' relative popularity. *Cf.* Public Resources Code § 21082.2(b) ("The existence of public controversy over the environmental effects of a project shall not require preparation of an environmental impact report if there is no substantial evidence in light of the whole record before the lead agency that the project may have a significant effect on the environment.").

2. Adequacy of the Description of the Project

Section 15124 of the CEQA Guidelines provides the basis for evaluating the adequacy of a project's description. In relevant part, it provides:

> The description of the project shall contain the following information but should not supply extensive detail beyond that needed for evaluation and review of the

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effects of the project on matters such as bike safety. CEQA summons into its vast domain such disparate harms as noise, population growth, adverse changes to the "significance of an historical resource," and *any* adverse "economic and social changes" caused by a physical change to the environment. *See* Guidelines, § 15064(d)(e), Public Resources Code § 21084.1. The Guidelines themselves provide, as an *illustration* of an environmental harm subject to CEQA, the "adverse effect on people" of having to live with overcrowding of a public facility, if such overcrowding is caused by a project. Guidelines, § 15064(e). It is hard to imagine an effect that is less like a layperson's understanding of an "environmental" problem than overcrowding of public buildings.

environmental impact.

(a) The precise location and boundaries of the proposed project shall be shown on a detailed map, preferably topographic. The location of the project shall also appear on a regional map.

(b) A statement of the objectives sought by the proposed project. A clearly written statement of objectives will help the lead agency develop a reasonable range of alternatives to evaluate in the EIR and will aid the decision makers in preparing findings or a statement of overriding considerations, if necessary. The statement of objectives should include the underlying purpose of the project.

(c) A general description of the project's technical, economic, and environmental characteristics, considering the principal engineering proposals if any and supporting public service facilities.

The Court finds that the EIR complies with the above, and otherwise that it provides an adequate description of the Project, particularly in light of the EIR's inclusion of maps showing the exact contours of the proposed improvement to the roadway. (AR 1:270-A-289-A; 4:1414-A-1433-A.) Detailed discussion of Petitioners' arguments is unnecessary. The Court agrees with the counterarguments advanced by Caltrans. (*See* Respondents' Opposition at 7:9-9:5.)

D. <u>Cumulative Impact Analysis</u>

Caltrans evaluated the cumulative impacts of the Project and concluded that they were not significant. (AR 1:159-164.) Had Petitioners challenged that determination, the challenge would have been subject to a substantial evidence test. *See Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal. 4th 412, 435 (2007).

But Petitioners did not challenge that determination. Instead, Petitioners argue that Caltrans's cumulative impacts analysis in the EIR is deficient and therefore Caltrans did not "proceed in the manner CEQA provides"; an error subject to *de novo* review. *See id.* More specifically, Petitioners argue that the record reveals the existence of other STAA truck access projects that Caltrans failed to discuss in its cumulative impacts analysis.

The question this Court must answer is "whether it was reasonable and practical to include the [related] projects and whether, without their inclusion, the severity and significance of the cumulative impacts were reflected adequately." *Kings County Farm Bureau v. City of*

Hanford, 221 Cal. App. 3d 692, 723 (1990); *accord Friends of the Eel River v. Sonoma County Water Agency*, 108 Cal. App. 4th 859, 869 (2003).[10]

The Court concludes that Caltrans's omission of the other STAA access projects did not result in a cumulative impacts analysis that inadequately reflected the "severity and significance" of the cumulative impacts. More to the point, the Court believes this entire issue is a red herring.

In the first place, it is not even clear that increased truck traffic is an effect of the Project. The EIR does not assert that truck traffic would increase; Petitioners appear to simply assume that it would. To the contrary, the EIR says that, for a number of reasons, "eliminating STAA restrictions in southern Humboldt County would not significantly change truck traffic." (AR 1:65.) Indeed, truck traffic could actually decrease, because the greater carrying capacity of STAA trucks would allow fewer shipments to transport the same volume of goods, potentially offsetting the increased number of trips that would result from lowered transportation costs. (*Id.*) If increased truck traffic is not an effect of the Project, then the Court does not see how it is properly the subject of a cumulative impacts analysis. *See* CEQA Guidelines § 15355 ("'Cumulative impacts' refer to two or more individual *effects*....") (emphasis added).

But even assuming increased truck traffic would be an effect of the Project, the record evidence is that the increase would be so trivial that omitting the entire issue from the cumulative impacts analysis would have no effect on whether the "severity and significance" of cumulative impacts were "reflected adequately." Petitioners trumpet the fact that a study on which Caltrans relied *actually* shows that, by 2030, improving STAA truck access on Highways 197/199 would result in an estimated 92 additional trucks per day. (*See* Opening Brief at 26:17-23.) What Petitioners fail to point out is that by 2030 the traffic volumes for various segments of those

[10] A separate question, which the Court need not answer, is whether the other projects are "closely related" and "reasonably foreseeable [and] probable." CEQA Guidelines § 15355(b). That question may or may not be subject to *de novo* review.

highways would be a minimum of 2,622 vehicles per day and a maximum of 12,524 per day, depending on the segment. In other words, we are talking about a net increase in traffic of between 0.7% to 3.5%, assuming the estimated increase in trucks (92) applies equally to each segment of the highway. The triviality of this increase readily demonstrates why Caltrans did not even identify truck traffic as an effect for which a cumulative impacts analysis was required. (*See* AR 1:160 (identifying State parklands, two endangered species, and old-growth redwood forest as the resources subject to cumulative impacts consideration).)

The forecasted traffic volume for Highway 101 through the Park is 7,750 vehicles per day in the year 2028. (AR 1:28.) To be generous to Petitioners, let us assume for the sake of argument that the increase in new trucks for Highway 101 through the Park will be three times as high as the estimated increase for Highways 197/199, resulting in an estimate of 276 new trucks. Let us further double that number to provide an outsized estimate of the cumulative effect of having STAA access in multiple locations in Northern California. We are left with 552 new trucks added to traffic estimated at 7,750, or a 7% increase. Hence, even using assumptions that are extremely generous to Petitioners, the cumulative impact of the Project in terms of truck traffic is simply not "severe" or "significant" such that Caltrans violated CEQA by failing to discuss them. In that respect, this case is completely unlike *Friends of the Eel River*, the decision on which Petitioners most rely. 108 Cal. App. 4th at 866-67 (water agency's EIR for a project to substantially increase water withdrawal from the Russian River omitted discussion of a separate proposal that the agency itself had recognized "would have severe environmental consequences to the Russian River, including the risk of dewatering portions of that river during critically dry years because of the impossibility of maintaining 'prudent water storage reserves'").

We are simply not talking about effects that "when taken in isolation, appear insignificant, but when viewed together, appear startling." *Kings County Farm Bureau*, 221 Cal. App. 3d at 721. We are instead talking about effects that when taken in isolation, appear

absolutely trivial (or even non-existent), and when viewed together, appear a little less trivial.

E. Feasible Alternatives

Section 15126.6 of the CEQA Guidelines provides in part:

> An EIR shall describe a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives. An EIR need not consider every conceivable alternative to a project. Rather it must consider a reasonable range of potentially feasible alternatives that will foster informed decisionmaking and public participation. An EIR is not required to consider alternatives which are infeasible. The lead agency is responsible for selecting a range of project alternatives for examination and must publicly disclose its reasoning for selecting those alternatives. There is no ironclad rule governing the nature or scope of the alternatives to be discussed other than the rule of reason.

The Court finds that Caltrans complied with the above, and otherwise complied with its obligations in presenting and discussing reasonable alternatives. Detailed discussion of this issue is unnecessary. The Court agrees with Caltrans on this issue. (*See* Respondents' Opposition at 25:2-27:28.)

F. Recirculation

In brief, an EIR must be recirculated when information is added after public review but before certification, and the addition of the new information "deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect...." CEQA Guidelines § 15088.5(a); *see also* Cal. Pub. Resources Code § 21092.1.

The question the Court must answer is whether substantial evidence supports Caltrans's decision not to recirculate the EIR. CEQA Guidelines § 15088.5(e); *Laurel Heights Improvement Ass'n of San Francisco, Inc. v. Regents of the Univ. of Cal.*, 6 Cal. 4th 1112, 1135 (1993); *Western Placer Citizens for an Agric. & Rural Env't*, 144 Cal. App. 4th 890, 901 (2006).

The Court finds that substantial evidence supports Caltrans's decision not to recirculate

the EIR. The Court will not discuss this issue in detail, but will make a few observations.

First, Petitioners are less than forthcoming in claiming that the DEIR failed to disclose that cut and fill operations would take place in the structural root zones of old-growth redwoods. (Petitioners' Opening Brief at 30:11-14; Petitioners' Reply Brief at 16:23-17:3, 17:19-21.) "Cut" is just another word for excavation. The DEIR: (1) disclosed that most of the ground disturbance caused by the Project was the result of "excavation and fill" at a number of locations specifically identified by individual post-mile marker (AR 4:1312); (2) disclosed that "construction activity" including "excavation," "placement of fill over the roots," and "compaction" could result in both long term and short term impacts to trees (AR 4:1314); (3) disclosed that this "construction activity" "would occur within the structural root zone of approximately 30 redwood trees ranging in diameter from 18 inches to 15 feet" (AR 4:1315); and (4) included both a table (AR 4:1316) and an appendix (AR 4:1417-A-1433-A) "showing where construction occurs within the structural root zone of trees" (AR 4:1315). It is nothing more than an exercise in wordplay to claim that the above is not a full disclosure that cut and fill operations would take place in the structural root zones of old-growth redwoods.

Second, although Petitioners are quite right in arguing that the FEIR disclosed an increase in the number of trees whose structural root zones would be affected, that disclosure does not trigger the recirculation requirement if "mitigation measures are adopted that reduce the impact to a level of insignificance." CEQA Guidelines § 15088.5(a)(2). The Court has already found that Caltrans's mitigation measures do just that.

Finally, the Court agrees with Caltrans that mere tree count is not the relevant measure of the severity of the Project's effects. (Respondents' Opposition at 29:7-31:19.) Again, the Court rejects the notion that a "significant" effect on the old-growth redwoods is shown by simply pointing to a number of old-growth redwoods and saying that that number is too great. To put it simply, the severity (or "significance" or "substantiality") of this Project's effects on the old-

growth redwoods must be tied to some value they provide for CEQA to make any sense; otherwise CEQA is just a numbers game in which courts arbitrarily decide, *ad hoc*, what number is too high. Substantial evidence supports the conclusion that the FEIR's disclosure of additional old-growth redwoods whose roots would be affected did not reveal a substantial increase in the severity of the Project's impact on the profound aesthetic value provided by the old-growth redwoods.

G. Injunctive Relief

The Court has not found a violation of CEQA at this time. A violation may be found if Caltrans has not adopted a "reporting or monitoring program" that is "designed to ensure compliance during project implementation." Pub. Resources Code, § 21081.6(a)(1); *see also* CEQA Guidelines § 15097. Accordingly, Petitioners' request for injunctive relief is not ready for determination.

ORDER

Based on the foregoing, the Court rules as follows:

1. Caltrans is ordered to show cause as to whether it has adopted a "reporting or monitoring program" that is "designed to ensure compliance during project implementation." Pub. Resources Code, § 21081.6(a)(1); *see also* CEQA Guidelines § 15097.

2. The parties are ordered to meet and confer in an attempt to reach an agreement, subject to the Court's approval, on the timing and procedure for determining whether Caltrans has adopted such a program, including whether they wish to proceed on written submissions. If the parties are able to reach an agreement, they shall submit a stipulation. If the parties are unable to reach an agreement, both sides shall submit a proposal for the Court's consideration. The deadline for filing a stipulation or separate proposals is July 30, 2012.

Dated: June 28, 2012

DALE A REINHOLTSEN

Dale A. Reinholtsen, Judge of the Superior Court

STATE OF CALIFORNIA,)
COUNTY OF HUMBOLDT) SS. AFFIDAVIT OF SERVICE BY MAIL

I, Audrey Ortiz, say:

That I am a citizen of the United States, over 18 years of age, a resident of the County of Humboldt, State of California, and not a party to the within action; that my business address is Humboldt County Courthouse, 825 5th St., Eureka, California, 95501; that I served a true copy of the attached ORDER RE: PETITION FOR WRIT OF MANDATE AND INJUNCTIVE RELIEF by placing said copies in the attorney's mail delivery box in the Court Operations Office at Eureka, California on the date indicated below, or by placing said copies in envelope(s) and then placing the envelope(s) for collection and mailing on the date indicated below following our ordinary business practices. I am readily familiar with this business practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service at Eureka, California in a sealed envelope with postage prepaid. These copies were addressed to:

Attorney for Petitioner - Sharon E. Duggan,. 370 Grand Ave # 5, Oakland, CA 94610

Attorney for Petitioner - Kevin P. Bundy, Center for Biological Diversity. 351 California St # 600, San Francisco, CA 94104

Attorneys for Respondent - Lucille Y. Baca and Douglas C. Jensen - 595 Market St # 1700, San Francisco, CA 94105

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

Executed on the 28 day of June, 2012, at the City of Eureka, County of Humboldt, State of California.

KERRI L. KEENAN, Clerk of the Court

By Audrey Ortiz
Deputy Clerk