I. SUMMARY OF OPENING BRIEF

The wildfires are always raging out of control.

More than two years after the October 2007 wildfire, respondent COUNTY OF SAN DIEGO claims wildfires are always raging out of control for purposes of CEQA review, and it can declare all projects designed to reduce the conditions which may contribute to the occurrence of wildfires exempt from CEQA under the emergency exemption.

The claim has no merit. The Court should issue a writ of mandate ordering three things:

First, the writ should set aside the Board of Supervisors' May 13, 2009, Minute Order (order). (AR 174-175.)[1] The order approved an activity to be conducted "over multiple years" to spend $7.78 million to clear trees, brush and vegetation from an estimated 3,112 acres of San Diego County's rural backcountry. (AR 66, 132-133.) The order specifically approved the "removal of dead, dying and diseased trees within 500 feet of evacuation corridors and habitable structures," the use of "strategic fuels treatments" to clear vegetation "within 100 feet of habitable structures and 30 feet of evacuation roads," and the use of strategic fuels treatments to clear vegetation "outside these areas . . . when determined necessary" (hereinafter the "subproject"). (*Id.*) The order also found the subproject "exempt from the California Environmental Quality Act (CEQA) as specified under Section 15269(c) of the State CEQA Guidelines." (AR 175.)

Second, the writ should order respondent to prepare an Environmental Impact Report (EIR) on respondent's whole project, to use strategic fuels treatments to clear trees, brush and other vegetation from more than 304 square miles of San Diego County's rural backcountry over the next five years (hereinafter the "project"). (AR 3, 26, 29-30, 66.)

Third, the writ should order respondent to suspend all project activities, except for applications for funding, until respondent has shown to the Court it has fully complied with CEQA.

The Court should issue the writ for two reasons:

One, respondent violated CEQA when it subdivided the project into smaller individual subprojects in order to avoid considering the environmental impacts of the project as a whole; and

Two, substantial evidence does not exist in the administrative record to establish each element of the emergency exemption of Cal. Code Regs., Title 14, § 15269(c).[2]

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[1] A cite to a document in the Administrative Record is referred to as AR [Page #]

[2] A cite to Cal. Code Regs., Title 14, §§ 15000, et seq. is referred to as "CEQA Guidelines."

II. STATEMENT OF FACTS

A. Conditions Leading To The Occurrence Of Wildfires

It is respondent's position that San Diego County's rural backcountry has five conditions which lead to the occurrence of wildfires: Overstocked forests; drought; infestation of trees by bark beetles; dead, dying and diseased trees; and Santa Ana wind conditions. (AR 2-3, 30, 117-118.)[3] The October 2003 fire burned more than 398,000 acres. (*Id.*; AR 25, 29, 34, 141.) The October 2007 fire burned more than 337,000 acres. (*Id.*) Smaller fires have burned more than 133,000 acres since 2000. (*Id.*)

B. The Governors' Emergency Proclamation and Executive Orders

California's Governors have issued one proclamation and two executive orders about the conditions which may contribute to the occurrence of wildfires:

On March 7, 2003, Governor Gray Davis proclaimed a state of emergency existed in San Diego and other counties due to imminent fire danger from dead, dying and diseased trees caused by drought and bark beetle infestation; and ordered state agencies to, among other things, "expedite the clearing of dead, dying and diseased trees and other vegetation that interfere with emergency response and evacuation needs" and "encourage landowners to meet their responsibilities for removing dead, dying and diseased trees and clearing fuel breaks on their lands." (AR 144-145.) The proclamation suspended the requirements of Public Resources Code § 4571, that only licensed timber contractors may perform timber removal operations, and 14 Cal. Code Regs. § 1038, requiring a landowner to submit a plan to remove trees to the California Department of Forestry and Fire Protection ("Cal Fire"). (AR 144.) The proclamation did not suspend any requirements of CEQA or CEQA Guidelines. (AR 144-145.)

On May 9, 2007, Governor Arnold Schwarzenegger issued an Executive Order which concluded there was an emergency situation of imminent fire danger caused by dead, dying and diseased trees caused by drought and bark beetle infestation; and ordered Cal Fire to, among other things, "support all local and regional responses to the bark beetle affected tree eradication . . . efforts." (AR 147-148.) The order did not suspend any requirements of CEQA or CEQA Guidelines. (AR 147-149.)

And on May 9, 2008, Governor Schwarzenegger issued a second Executive Order which

[3] Respondents' Vegetation Management Report candidly notes that there is no consensus among scientists and fire agencies whether these conditions actually contribute to wildfires, and no consensus whether respondent's planned clearing of vegetation could lessen the impact of wildfires. (AR 34-36.) "Many workshop participants considered the proposed vegetation treatments to be experimental." (AR 37.) There was a consensus among scientists and fire agencies, however, that "Santa Ana wind events conceivably could develop enough energy to burn across almost any vegetation." (AR 36.)

concluded there was an imminent threat of wildfires and ordered Cal Fire to, among other things, "continue to support local and regional responses to the bark beetle affected tree eradication . . . efforts." (AR 151-153.) The order did not suspend any requirements of CEQA or CEQA Guidelines. (*Id*.)

C. The Project

Respondent has committed itself to a definite course of action to use strategic fuels treatments to clear trees, brush and other vegetation from 304.85 square miles of San Diego County's rural backcountry over the next five years. (AR 25-26, 29-30, 66, 98-.) "Strategic fuels treatment" is the clearing of land by "prescribed fire, mechanical or biochemical fuel treatments." (*Id*.)

Respondent has been planning the project for more than seven years:

During September 2002, respondent formed a Forest Area Safety Task Force (FAST) to assess high risk fire areas. (AR 3, 25, 30, 49.)

During August 2003, the Board of Supervisors authorized staff to seek Federal funding for wildland fire mitigation projects. (AR 121, 135.) Staff then applied to the Federal government for grants of $487,767,500. (AR 66.) The applications were based on an estimate of $2,500 per acre to remove vegetation. (AR 26, 66.) This means the "whole of the project" is the clearing of trees, brush and vegetation from 304.85 square miles of San Diego County's rural backcountry. (*Id*.) [4]

During May 2004, respondent accepted more than $39 million in grants. (AR 135.)

During June 2004, respondent established the "Fire Safety and Fuels Reduction Program" to "maximize federal grants and provide comprehensive fuels treatment in all high-risk areas." (AR 121.)

Respondent then spent nearly $47 million to remove "about 530,000 dead, dying and diseased trees" on "roughly 3,350 parcels" in Palomar Mountain and Julian. (AR 3-4, 33, 132.) There is no evidence in the administrative record (record) whether respondent ever evaluated whether these actions were subject to CEQA. (AR 1 - 185.) The record does not contain any notice of exemption, negative declaration or EIR for these actions. (*Id.*)

During January 2008, respondent applied to the Federal government for $7 million to pay for the subproject. (AR 1, 3.)

During April 2008, the FAST task force identified and ranked nine high fire risk areas:

"The list of the areas of concern in order of priority include Palomar Mountain; Laguna

[4] $487,767,500 % $2,500 = 195,107 acres. 195,107 acres % 640 acres in a square mile = 304.85 square miles.

> Mountain east I-8 Corridor; Southeast County; Greater Julian; San Luis Rey West; Rancho (Santa Fe); Santa Margarita; Northeast County - Warners; and, Cuyamaca -- Laguna." (AR 25; see further AR 4-5, 9, 30, 33, 51-55)

During May 2008, the Board of Supervisors directed staff to develop a "comprehensive program" to remove trees, brush and vegetation. (AR 28.)

During September 2008, staff provided the Board with a status report on the development of the comprehensive program. (*Id*.) Staff was directed to report back in 180 days. (*Id*.)

During November and December 2008, respondent held workshops on the comprehensive program to be summarized in a "vegetation management report." (AR 34-39.) "Rick Halsey representing the Chaparral Institute" participated in the workshops. (AR 114.)

On March 25, 2009, the Board of Supervisors held a hearing on the final "Vegetation Management Report" (report).[5] The report (AR 20-115) discussed the following:

* Summarized the seven-year history of the project (AR 25-26, 28-30, 33-39, 49-55);

* Summarized the expenditure of nearly $47 million to clear trees from Palomar Mountain and Julian (AR 43);

* Provided "a list of vegetation management projects sorted by FAST target area and lead agency --- what has been completed in the last five years *and what is planned in the next five years."* (AR 26, italics added; see AR 49-55.)

* Summarized the "strategic fuels treatment" methods by which trees, brush and vegetation can be cleared from land. (AR 25, 29-30, 40-43);

* Summarized the applications for $487,767,500 of federal funding (AR 66-67); and

* Admitted there "is *a limited knowledge base on the efficiency, environmental costs, or consequences* of large-scale vegetation management actions across the nine priority areas." (AR 37; italics added.)

On March 25, 2009, the Board of Supervisors adopted an order which received the report (attached). The Supervisors also ordered staff to conduct CEQA review:

> "Direct staff to conduct appropriate California Environmental Quality review for any new proposed projects which will implement actions identified in the Vegetation Management Report." (*Id*.)

/././

[5] Respondent agreed the attached March 25, 2009 Minute Order No. 2 will be added to the record.

D. Approval of the Subproject and the Emergency Exemption

On March 18, 2009 -- seven days *before* the Board of Supervisors directed staff to conduct appropriate CEQA review on actions identified in the report -- the Deputy Director of the Department of Planning and Land Use (Planning Department) completed a "Notice of Exemption" form for the subproject. (AR 122.) He checked the box that the subproject was "Exempt" as an "Emergency Project [C 21080(b)(4); G 15269(b)(c)]." (*Id*.) This "Notice of Exemption" form was not disclosed to the public at the time of the March 25, 2009, hearing on the report. (AR 1 - 185.)

Staff scheduled a hearing on the subproject for April 22, 2009. (AR 116.) Staff recommended the Board of Supervisors authorize acceptance of $7 million of federal funds "to carry out hazardous fuel reduction activities through Fiscal Year 2012-2013;" and that the Board find the subproject exempt from CEQA "as specified under Section 15269(c) of the State CEQA Guidelines." (*Id*.)

Respondent received the comment letter of Anne S. Fege, Ph.D., M.B.A., an Adjunct Professor in the Department of Biology at San Diego State University, which requested that "the Board direct County staff to . . . Comply with CEQA environmental documentation." (AR 123, 126.) Dr. Fege also opined about the meaning of the emergency exemption, CEQA Guideline 15269(c):

> "The exemption from CEQA would apply to the removal of vegetation within 100 feet of structures (defensible space) and a reasonable distance (up to 200 feet) within evacuation corridors, as this is a short-term one-time project that immediately and directly reduces risks of loss of life and property. . . .
>
> The exemption is <u>not supported</u> for vegetation removal outside of defensible space (100 feet from structures), for community fuelbreaks, or for any open space areas that are 'treated to minimize the fire threat to communities.' Such projects are '<u>long-term projects</u> undertaken for the purpose of preventing or mitigating a situation that has a low probability of occurrence in the short-term.'" (AR 124; emphasis in original.)

The record does not disclose Dr. Fege's qualifications to interpret CEQA regulations, nor disclose how she could conclude one part of the subproject is a "short-term project" given respondent's statements it would implement the subproject "through Fiscal Year 2012-2013." (AR 116.)

On April 22, 2009, the Supervisors withdrew the item from their agenda. (AR 128.) Staff scheduled a new hearing for May 13, 2009. (AR 130.)

On April 30, 2009, the Planning Department's Deputy Director completed a new Notice of Exemption form, which changed the project description to the following:

"The project involves the acceptance of grant funds from the United States Department of Agriculture, Forest Service. If received, these funds will be used as follows:

* Removal of dead, dying and diseased trees within 500 feet of evacuation corridors and habitable structures. . . .

* Strategic vegetation treatments within 100 feet of habitable structures and 30 feet of evacuation roads. . . . However, strategic fuels treatments may also be applied outside these areas pursuant to National Fire Protection Association Standard 1144 (which specifies up to 200 feet) when determined necessary by a registered forester and wildlife fire authority that it is necessary to support the defensible space in order to prevent impacts to evacuation corridors and structures during fires.

  These strategic fuels treatments involve selective thinning of the vegetation, forest or shrub species, either manually, utilizing mechanical devices or other means. Strategic vegetation treatments will be limited to the thinning of 30 to 50 percent of the native vegetation, allowing up to 75 percent thinning in insolated situations dependent on topography, fire history, fuel loading and fire weather history." (AR 137.)

The new form also changed the "statement of reasons why project is exempt" to the following:

"The project qualifies for a CEQA exemption under Section 15269(c), Emergency Projects, which allows for projects with specific actions necessary to prevent or mitigate an emergency, when such projects are not long-term or undertaken for the purpose of preventing or mitigating a situation that has a law probability of occurrence in the short term.

The San Diego region has been devastated by two major firestorms, in October 2003 and again in October 2007, as well as over 50 other smaller wildfires that burned 100 acres each in the past 10 years. Attachment A to this Notice of Exemption illustrates a map of the County of San Diego Fire History from 2006 to the present and the Wildfire History in San Diego County consisting of fires over 100 acres in size. Combined, these fires involved loss of human life, destroyed animals and livestock, consumed hundreds of thousands of acres, destroyed hundreds of homes and businesses, and forced the evacuation of hundreds of people. These conditions were largely due to imminent fire danger caused by the extraordinary number of dead, dying and diseased trees resulting from prolonged drought, overstocked forests and infestation by bark beetles and other decay organisms.

On March 7, 2003, a State of Emergency Proclamation was declared in the State of California declaring extreme peril from imminent fire danger caused by dead, dying and diseased trees and vegetation. A copy of the Proclamation is attached as Exhibit B hereto.

On May 9, 2007 and May 9, 2008, the Governor issued Executive Orders making reference to the continuing emergency situation of imminent fire danger due to the

> extraordinary number of dead, dying and diseased trees in the State resulting from prolonged drought, overstocked forests and infestation by bark beetles and other decay organisms. Copies of these Executive Orders are attached as Exhibit C hereto.
>
> The County of San Diego continues to be threatened by very high fire risk as evidenced these recent major fires and required evacuations. Removal of these dead, dying and diseased trees and vegetation treatments along evacuation corridors is required in order to minimize the loss of life and property in the next wildfire event and is necessary to prevent or mitigate a wildlife emergency. The removal of dead, dying and diseased trees and vegetation thinning activities will occur within the Wildlife Urban interface areas and the Fire Hazard Severity Zones of San Diego County where the risks of imminent fires are most severe. A map depicting such areas is attached as Exhibit D hereto. Given the continue emergency of imminent threat from wildfires, this project satisfies the requirements for a CEQA Exemption under Section 15269(c), Emergency Projects." (AR 138.)

Attached to the Notice of Exemption form was a drawing depicting San Diego County's fire history from 1996 through 2007 (AR 140); a tabulation of this history (AR 141); Governor Davis' March 7, 2003, Emergency Proclamation (AR 143-145); Governor Schwarzenegger's May 9, 2007, Executive Order (AR 147-149); Governor Schwarzenegger's May 9, 2008, Executive Order (AR 150-153); and a summary of the nine high fire risk areas (AR 155).

The day before the hearing, petitioner California Chaparral Institute lodged a letter with the Board of Supervisors, objecting to the project on the grounds that respondent "is improperly 'piecemealing' or 'segmenting' the environmental review of the County's full vegetation clearing project" and "there is no substantial evidence in the record" to support the elements of the emergency exemption. (AR 170-173.) Petitioner requested an EIR be prepared on the whole project. (Id.)

At the May 13, 2009, hearing, Peter St. Clair representing the California Chaparral Institute spoke in opposition to the subproject. (AR 158, 178-179.)

Hon. Bill Horn stated: "As far as the CEQA issue goes, the back part, I think we're exempt *because of the emergency proclamations from the Governor*." (AR 182:26-27; italics added.)

Hon. Dianne Jacob asked Thomas E. Montgomery of County Counsel's office to respond to the CEQA question raised by the California Chaparral Institute. (AR 183:25-26.) Mr. Montgomery stated: "We've determined it is an appropriate use of an exemption in this particular case." (AR 184:1-2.)

The Supervisors voted unanimously to approve the subproject and find it exempt. (AR 175.)

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III. RESPONDENT IMPROPERLY SUBDIVIDED THE PROJECT INTO A SMALLER INDIVIDUAL SUBPROJECT

The Court should order respondent to prepare an EIR on the whole project. This case presents one of the clearest examples of the proponent of a project improperly subdividing a larger project into a smaller individual subproject in an attempt to avoid CEQA review:

First, respondent's project is the "whole of the action" to clear trees, brush and other vegetation from 304.85 square miles of San Diego County's rural backcountry over the next five years. (AR 25-26, 29-30, 66.) CEQA Guidelines § 15378 broadly defines "project" as follows:

> " (a) 'Project' means *the whole of an action*, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and that is any of the following:
>
> (1) An activity directly undertaken by any public agency *including but not limited to . . . clearing . . . of land . . .*
>
> (c) The term "project" refers to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies. The term "project" does not mean each separate governmental approval." (Italics added.)

This definition of "project" is given a broad interpretation to maximize protection of the environment. (*RiverWatch v. Olivenhain Municipal Water Dist.* (2009) 170 Cal.App.4th 1186, 1203.)

In this case, the "whole of the action" summarized in the report and reflected in the applications for federal funding is respondent's activity to clear trees, brush and other vegetation from 304.85 square miles of San Diego County's rural backcountry over the next five years. (AR 25-26, 29-30, 66.)

Second, respondent has "approved" the whole project. CEQA applies at the time an agency proposes to "approve" a project. (Public Resources Code § 21080(a).) "'Approval' means the decision by a public agency which commits the agency to a definite course of action in regard to a project . . ." (CEQA Guidelines § 15352(a).) In *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116 (*Save Tara*), the Supreme Court evaluated whether "approval" of a preliminary agreement for a proposed project required CEQA review, and held the test for determining whether an agency has "approved" a project is as follows:

> ". . . (B)efore conducting CEQA review, agencies must not 'take any action' that significantly furthers a project 'in a manner that forecloses alternatives or mitigation measures that would ordinarily be part of CEQA review of that public project.' (Cal. Code Regs., tit. 14, § 15004, subd. (b)(2)(B) . . .)

> In applying this principle to conditional development agreements, *courts should look* not only to the terms of the agreement but *to the surrounding circumstances to determine whether, as a practical matter, the agency has committed itself to the project as a whole or to any particular features,* so as to effectively preclude any alternatives or mitigation measures that CEQA would otherwise require to be considered, including the alternative of not going forward with the project. (See Cal. Code Regs, tit. 14, § 15126.6, subd. (e).) . . .
>
> A frequently cited treatise on CEQA (Remy et al., Guide to the Cal. Environmental Quality Act (CEQA) (11th ed. 2006)) summarizes this approach in a useful manner. 'First, the analysis should consider whether, in taking the challenged action, the agency indicated that it would perform environmental review before it makes any further commitment to the project, and if so, whether the agency has nevertheless effectively circumscribed or limited its discretion with respect to that environmental review. Second, *the analysis should consider the extent to which the record shows that the agency or its staff have committed significant resources to shaping the project. If, as a practical matter, the agency has foreclosed any meaningful options to going forward with the project, then for purposes of CEQA the agency has 'approved' the project.*" (*Id*. at p. 71.) As this passage suggests, we look both to the agreement itself and to the surrounding circumstances, as shown in the record of the decision, to determine whether an agency's authorization or execution of an agreement for development constitutes a "decision … which commits the agency to a definite course of action in regard to a project." (Cal. Code Regs., tit. 14, § 15352.)" (45 Cal.4th 116 (*Save Tara, supra,* 45 Cal.4th at pp. 138-139; italics added.)

In this case, and as a practical matter given all of the surrounding circumstances -- the planning of the project for more than seven years, the early applications for federal grants, the receipt of more than $39 million in grants, the commitment of significant resources to the project including the expenditure of nearly $47 million to remove trees from Palomar Mountain and Julian, the applications for another $487,767,500 of federal grants, the identification and ranking of high risk fire areas, the preparation and adoption of the report, and the approval of the subproject -- respondent has committed itself to a definite course of action to implement the whole project, the clearing of trees, brush and vegetation from 304.85 square miles of the backcountry, and has precluded the alternative of not going forward with the project. (AR 25-26, 28-30, 34-43, 49-55, 66, 116-122, 127-128, 130-138, 174-175.) Under CEQA, respondent has "approved" the whole project.

Third, the Board of Supervisors' order clearly approved a "smaller individual subproject" of the whole project. A public agency is not permitted to subdivide a single project into smaller individual subprojects in order to avoid the responsibility of considering the environmental impact of the project as

a whole. (*Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, 281.) "The rationale behind the 'piecemealing' prohibition is that "'[t]he requirements of CEQA[,] "cannot be avoided by chopping up proposed projects into bite-size pieces which, individually considered, might be found to have no significant effect on the environment or to be only ministerial." ' " (*Id*.) Respondent violated these fundamental principles of CEQA when it "piecemealed" the project.

Respondent will undoubtedly argue the whole "vegetation management project" involves only feasibility or planning studies for possible future actions which respondent has not approved and that respondent is therefore not required to prepare an EIR. (CEQA Guidelines § 15262.) Nothing could be further from the truth. Respondent has not only completed planning studies which are summarized in the report on the "comprehensive program," but has applied to the Federal government for grants of $487,767,500, has accepted more than $39 million in grants, has spent nearly $47 million to remove trees from Palomar Mountain and Julian, and has approved the first "subproject" emanating out of the comprehensive program. (AR 3-4, 33, 66, 132, 135, 174-175.)

Respondent will also undoubtedly argue that CEQA review of the whole project is premature because all of the project's parameters to clear vegetation from the nine high risk fire areas have not been planned. However, the Supreme Court in *Save Tara* rejected this type of argument, explaining:

> "Moreover, when the prospect of agency commitment mandates environmental analysis of a large-scale project at a relatively early planning stage, before all the project parameters and alternatives are reasonably foreseeable, the agency may assess the project's potential effects with corresponding generality. With complex or phased projects, a staged EIR (Cit.om.) or some other appropriate form of tiering (Cit.om.) may be used to postpone to a later planning stage the evaluation of those project details that are not reasonably foreseeable when the agency first approves the project." (*Save Tara, supra*, 45 Cal.4th at p. 139.)

In this case, respondent has clearly subdivided the larger project -- the clearing of vegetation from 304.85 square miles -- into the smaller subproject -- the clearing of vegetation from an estimated 3,112 acres. (AR 25-26, 30, 49-55, 66, 174-175.) The Court should order an EIR on the whole project.

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IV. SUBSTANTIAL EVIDENCE DOES NOT EXIST IN THE RECORD TO ESTABLISH THE ELEMENTS OF THE EMERGENCY EXEMPTION

A. Introduction

The CEQA emergency exemption is contained in Public Resources Code §§ 21080(b)(4) and 21060.3 and CEQA Guidelines § 15269(c).[6] Section 21080(b)(4) provides: "This division does not apply to . . . Specific actions necessary to prevent or mitigate an emergency." Section 21060.3 defines "emergency":

> "'Emergency' means a sudden, unexpected *occurrence*, involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to, life, health, property, or essential public services. *"Emergency" includes such occurrences as fire*, flood, earthquake, or other soil or geologic movements, as well as such occurrences as riot, accident, or sabotage." (Italics added.)

The CEQA emergency exemption, CEQA Guidelines § 15269(c), then provides:

> "The following emergency projects are exempt from the requirements of CEQA.
>
> . . . (c) Specific actions necessary to prevent or mitigate an emergency. *This does not include long-term projects undertaken for the purpose of preventing or mitigating a situation that has a low probability of occurrence in the short-term*." (Italics added.)

The standard of review on a mandamus action seeking to set aside the CEQA emergency exemption is whether substantial evidence exists in the administrative record of every element of the exemption. (*Calbeach Advocates v. City of Solana Beach* (2002) 103 Cal.App.4th 529, 540-541 (*Calbeach Advocates*); *Western Municipal Water District v. Superior Court* (1986) 187 Cal.App.3d 1104, 1113 (*Western*).)[7] CEQA Guidelines § 15384 defines substantial evidence:

> "(a) "Substantial evidence" as used in these guidelines means enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached. . . . Argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, . . . does not constitute substantial evidence.
>
> (b) Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.

The only appellate opinion which found substantial evidence existed in the record to establish the elements of the emergency exemption is *Calbeach Advocates*, 103 Cal.App.4th at p. 529, 534-535, 538, where a civil engineer, and a civil geotechnical engineer with extensive experience studying the coasts

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[6] All statutory references are to the Public Resources Code.

[7] Disapproved on other grounds (admissibility of extra-record evidence) in *Western States Petroleum Association v. Superior Court* (1995) 9 Cal.4th 559, 569-570

of North County and designing coastal stabilization projects, opined that a coastal bluff in Solana Beach "could collapse 'within a few weeks' requiring 'immediate action'." In this case, there is no such expert opinion. (AR 1 - 185.)

An example where substantial evidence did not establish the elements of the emergency exemption is *Western, supra*, 187 Cal.App.3d at p. 1108, where the only evidence of "imminent danger" of subsidence damage from a major earthquake was that three years before, the California Division of Mines concluded that a catastrophic earthquake would take place along the southern San Andreas fault at some time over the next fifteen years. In this case, there is not even this kind of evidence, a prediction that a catastrophic fire would take place at some defined time in the future. (AR 1 - 185.)

In this case, the record does not contain substantial evidence of each element of the emergency exemption of CEQA Guidelines § 15269(c) as discussed in detail below.

B. <u>The Interpretation of the Emergency Exemption by All Courts of Appeal Establishes The Exemption Does Not Apply In This Case</u>

In *Western, supra*, 187 Cal.App.3d at p. 1104, a water district was concerned that groundwater under a city was so saturated that liquefaction could occur causing subsidence damage from a major earthquake. (*Western, supra*, 187 Cal.App.3d at p. 1107-1109.) The water district decided to take preventive action under CEQA's emergency exemption by drilling two wells to dewater the aquifer. (*Id.*) Petitioners challenged the emergency exemption and obtained a preliminary injunction. (*Western, supra*, 187 Cal.App.3d at p. 1107.) The trial court thereafter ruled the water district's use of the emergency exemption was supported by substantial evidence and dissolved the preliminary injunction. (*Id.*)

Petitioners filed a petition for a writ of mandate in the Court of Appeal to set aside the order dissolving the injunction. (*Id.*) Petitioners argued the trial court failed to properly interpret the emergency exemption and deferred instead to the water district's erroneous interpretation. (*Western, supra*, 187 Cal.App.3d at p. 1110.) The Court of Appeal agreed and gave the following interpretation of the emergency exemption:

> "The "emergency" exception of section 21080, subdivision (b)(4) is obviously extremely narrow. "Emergency" as defined by section 21060.3 is explicit and detailed. We particularly note that the definition limits an emergency to an "*occurrence*," not a condition, and that the occurrence must involve a "*clear and imminent danger, demanding immediate action*."

> As one commentator has noted: "At least in principle, the emergency exemptions are appropriate, common sense provisions. The theory behind these exemptions is that **if a project arises for which the lead agency simply *cannot* complete the requisite paperwork within the time constraints of CEQA, then pursuing the project without complying with the EIR requirement is justifiable. For example**, **if . . . a fire is raging out of control and human life is threatened as a result of delaying a project decision, application of the emergency exemption would be proper**." (Comment, *The Application of Emergency Exemptions Under CEQA: Loopholes in Need of Amendment*? (1984) 15 Pacific L.J. 1089, 1105, fn. omitted.)
>
> Although (real party) urges that 'CEQA, including its environmental impact report requirements, shall not apply to specific actions necessary to prevent or mitigate earthquakes or other soil or geological movements,' this interpretation is unsupported by the text of the exemption. Such a construction completely ignores the limiting ideas of "sudden," "unexpected," "clear," "imminent" and "demanding immediate action" expressly included by the Legislature and would be in derogation of the canon that a construction should give meaning to each word of the statute. (See *Pacific Legal Foundation* v. *Unemployment Ins. Appeals Bd*. (1981) 29 Cal.3d 101, 114 [172 Cal.Rptr. 194, 624 P.2d 244].) **Moreover, in the name of "emergency" it would create a hole in CEQA of fathomless depth and spectacular breadth. Indeed, it is difficult to imagine a large-scale public works project, such as an extensive deforestation project** . . . , **which could not qualify for emergency exemption from an EIR on the grounds that it might ultimately mitigate the harms attendant on a major natural disaster**. The result could hardly be intended by the careful drafting of the Legislature, and is unmistakably opposed to the policy of construing CEQA to afford the maximum possible protection of the environment. (See *Friends of Mammoth, supra*, 8 Cal.3d at p. 259.)" (*Western, supra,* 187 Cal.App.3d at pp. 1111-1112; italics in original; bold added.)

All of the appellate opinions which have addressed the emergency exemption have quoted or cited to this interpretation. (*Calbeach Advocates, supra,* 103 Cal.App.4th at p. 536; *Castaic Lake Water Agency v. City of Santa Clarita* (1995) 41 Cal.App.4th 1257, 1267-1268) (*Castaic Lake*); *Los Osos Valley Associates v. City of San Luis Obispo* (1994) 30 Cal.App.4th 1670, 1682 (*Los Osos Valley*).

Western, Calbeach Advocates, Castaic Lake and *Los Osos Valley* are on point. They are the only authorities on the meaning of the emergency exemption. There are no conflicting decisions. The interpretation is binding on all trial courts under principles of *stare decisis*. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 497, p. 558.)

In this case, when the Board of Supervisors voted to approve the subproject and find it exempt under the emergency exemption, no fire was raging out of control. Human life was not threatened as a result of delaying a project decision. Respondent had adequate time in May to complete the requisite CEQA paperwork before the late-September through early-October period of the high fire season.

Indeed, respondent had been planning the project for more than seven years and had that time to complete CEQA review. The Board of Supervisors' decision to declare the subproject exempt did exactly what the Court warned of in *Western*: An extensive deforestation project has effectively been approved under the emergency exemption because it might ultimately mitigate the harms attendant on a major natural disaster. A hole has been created in CEQA of fathomless depth and spectacular breadth.

C. No Substantial Evidence of the "Occurrence" Element

One of the elements of "emergency" in CEQA is " a sudden, unexpected *occurrence*." (§ 21060.3.) This definition limits an emergency to an "occurrence" not a "condition." (*Western, supra*, 187 Cal.App.3d at p. 1111; *Calbeach Advocates, supra,* 103 Cal.App.4th at p. 536.)

An occurrence is defined as "'something that occurs, happens, or takes place; an event, incident.' (Oxford English Dict. (2d ed. 1989) [as of Oct. 9, 2002].)" (*Calbeach Advocates, supra,* 103 Cal.App.4th at p. 537.) "Fire" is an "occurrence." (§ 21060.3.)

A condition, on the other hand, is defined as "'a mode or state of being.' (Webster's 3d New Internat. Dict. (1993) p. 473 (Webster's).)" (*Calbeach Advocates, supra,* 103 Cal.App.4th at p. 537.)

In this case, when the Board of Supervisors approved the subproject and invoked the emergency exemption on May 13, 2009, no fire was burning in San Diego County. (AR 130-185.) There was no "occurrence" only conditions which may lead to a wildfire in one year and not in others.

The last decade of the history of wildfires in San Diego County is not substantial evidence (facts or reasonable inferences of facts) establishing an "occurrence" of wildfire. There were only minor wildfires from 2000 through 2002. The wildfire of October 2003 had been over for five years and seven months. (AR 141.) There were only minor wildfires from 2004 through 2006. (*Id*.) The wildfire of October 2007 had been over for one year and seven months. (*Id*.) There was no evidence of any wildfires during 2008 and 2009. (*Id.*) What can at best be derived from this history is that an occurrence of wildfire is highly unpredictable.

When the emergency exemption was invoked, there existed only "conditions" which may contribute to the "occurrence" of wildfires: Overstocked forests, drought, infestation of trees by bark beetles, and dead, dying and diseased trees. (AR 2-3, 30, 117-118.) And there was not even consensus among scientists and fire agencies whether these conditions actually lead to the occurrence of wildfires.

(AR 34-36.)

The administrative record does not contain facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts, which establish the element of the "occurrence" of fire.

D. The Governors' Emergency Proclamation and Orders Do Not Establish The "Occurrence" Element

It is anticipated that respondent will argue that Governor Davis' 2003, emergency proclamation (AR 143-145), and Governor Schwarzenegger's 2007 and 2008, executive orders (AR 147-153), establish the elements of an "occurrence." Nothing could be further from the truth. The proclamations and orders are not facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts, establishing the "occurrence" element of a fire.

The express language of the proclamation and orders themselves use the term "condition" not "occurrence." Governor Davis' proclamation proclaims there are "*conditions* of imminent fire danger." (AR 143; italics added.) Governor Schwarzenegger's 2008, order states "immediate action is needed to respond to these *conditions*" referring to "current below-normal precipitation," "bark beetle infestation" and "dead, dying and diseased trees." (AR 150; italics added.)

The only reasonable inference from the language of the proclamation and orders is that the Governors did not intend that the "conditions of imminent fire danger" were an "occurrence" that would justify a lead agency invoking the CEQA emergency exemption.

If Governors Davis and Schwarzenegger had intended by the proclamation and orders that there was an "occurrence" justifying the use of the emergency exemption, they would have suspended the requirements of CEQA based on the emergency exemption. The Governor has the power during a state of emergency to suspend a statute or regulation "where the Governor determines and declares that strict compliance with any statute, . . . or regulation would in any way prevent, hinder or delay the mitigation of the effects of the emergency." (Government Code § 8571.) In this case, the Governors did not suspend the requirements of CEQA.

And Governors do suspend the requirements of CEQA when there is a sufficient "occurrence" justifying the suspension of CEQA based on the emergency exemption. For example, on February 27, 2009, Governor Schwarzenegger issued a "Proclamation" of a "State of Emergency - Water Shortage."[8]

[8] Petitioner has filed a request for judicial notice of this Emergency Proclamation under Evidence Code § 452(c). The Court can take judicial notice of official records on a CEQA petition. (*County of San Diego v. Grossmont-Cuyamaca Community College District* (2006) 141 Cal.App.4th 86, 97, fn. 4.)

Governor Schwarzenegger proclaimed a state of emergency existed in California because of drought. Governor Schwarzenegger directed state agencies to take numerous actions and efforts to mitigate and respond to the drought emergency. And Governor Schwarzenegger then suspended the requirements of CEQA regarding these actions based on the emergency exemption:

> "The emergency exemption in Public Resources Code sections 21080(b), 21080(b)(4) and 21172, and in California Code of Regulations, title 14, section 15269(c), shall apply to all actions or efforts consistent with this Proclamation that are taken to mitigate or respond to this emergency. . . . The Secretary for the California Environmental Protection Agency and the Secretary for the California Natural Resources Agency shall determine which efforts fall within these exemptions and suspension, ensuring that these exemptions and suspension serve the purposes of this Proclamation while protecting the public and the environment. The Secretaries shall maintain on their web sites a list of the actions taken in reliance on these exemptions and suspension."

The administrative record does not contain facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts, which establish the element of the "occurrence" of fire.

E. No Substantial Evidence of the Elements of "Imminent Danger" And "A Situation That Has A High Probability of Occurrence in the Short Term"

Two other elements of the emergency exemption are "imminent danger" and a "situation" that has a high "probability of occurrence in the short term." (§ 21060.3; CEQA Guidelines § 15269(c).)

In this case, there is no substantial evidence in the record that wildfires had a high probability of occurrence in the short term as of May 13, 2009. The only evidence is that catastrophic wildfires occur in October of some years. (AR 2-3, 25, 29-30, 34, 117-118, 141.) Catastrophic wildfires did not occur from 2000 through 2002, 2004 through 2006, and 2008. (*Id*.) Indeed, the Board of Supervisors invoked the emergency exemption four months before the onset of the high risk fire season of late-September through early-October. (*Id*.)

Indeed, given the seven years that respondent has taken to plan the whole project, respondent had more than sufficient time to prepare the requisite CEQA paperwork.

F. No Substantial Evidence of the Short-Term Project Element

Another element of the emergency exemption is a short-term project. (CEQA Guidelines § 15269(c). In this case, there is no substantial evidence in the record establishing the "short-term project" element. The Board of Supervisors' order itself states the "$7 million . . . will be used over multiple

years . . ." and the "hazardous fuels reduction activities" will be carried out "through Fiscal Year 2012-2013." (AR 127-128.)

G. Dr. Fege's Opinion Is Not Substantial Evidence Establishing The Elements of the Emergency Exemption

The record contains the opinion of Dr. Fege that the "exemption from CEQA would apply to the removal of vegetation within 100 feet of structures (defensible space) and a reasonable distance (up to 200 feet) within evacuation corridors, as this is a short-term one-time project . . ." (AR 124.)

Dr. Fege's "opinion" as to the meaning of the emergency exemption is not substantial evidence of any of the elements. Substantial evidence does not include unsubstantiated opinion. (§ 21080(e).) "(Q)uestions of interpretation or application of the requirements of CEQA are matters of law" for the Courts not biologists. (*County of San Diego v. Grossmont-Cuyamaca Community College District* (2006) 141 Cal.App.4th 86, 96.)

H. No Other Substantial Evidence

A failure to describe substantial evidence that is favorable to an agency is fatal to a mandamus action. (*Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 541.) Petitioner has repeatedly poured over the record and cannot reasonably find any other facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts, which is favorable to respondent.

V. CONCLUSION

The Court should issue the writ of mandate setting aside approval of the subproject and the emergency exemption, order respondent to prepare an EIR on the whole project, and suspend all project activities, except for applications for funding, until there is full compliance with CEQA.

DATED: October 5, 2009

COAST LAW GROUP LLP

Rory R. Wicks

Attorneys for Petitioner
THE CALIFORNIA CHAPARRAL INSTITUTE

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