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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BESS BAIR; et al.

Plaintiffs,

v.

STATE OF CALIFORNIA DEPARTMENT OF TRANSPORTATION, CINDY McKIM, in her official capacity as Director of the State of California Department of Transportation,

Defendants.

Case No.3:10-cv-04360 WHA

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION; MEMORANDUM IN SUPPORT OF MOTION

DATE: June 30, 2011
TIME: 2:00 PM
COURTROOM: 9, 19th Floor

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

REGULATIONS

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE THAT at 2:00 p.m. on June 30, 2011, or soon thereafter as counsel may be heard, in the courtroom of the Honorable William H. Alsup, located on the 19th Floor of the Federal Courthouse at 450 Golden Gate Avenue, San Francisco, California, Plaintiffs will move for a preliminary injunction pursuant to Fed. R.Civ. Proc. 65.

Plaintiffs seek a preliminary injunction restraining and enjoining Defendants State of California Department of Transportation ("Caltrans") and its officers, agents, servants, employees, contractors, attorneys, and all those in active concert or in participation with Caltrans to prevent Caltrans from taking any actions to implement in the Richardson Grove Operational Improvement Project ("Project"). This motion is made on the ground that immediate and irreparable injury will result to Plaintiffs, the public and the environment unless the Project is enjoined pending trial of this action, and is supported by the accompanying Memorandum of Points and Authorities and Declarations of Plaintiffs, Sharon E. Duggan, and Dr. Joe McBride.

I. INTRODUCTION

"The redwoods, once seen, leave a mark or create a vision that stays with you always ... they are not like any trees we know, they are ambassadors from another time." John Steinbeck's words are posted on a sign next to ancient Redwoods which line Highway 101 in Richardson Grove State Park (the "Park" or "Grove"). If allowed to proceed, the road widening project through the Park that Defendant Caltrans has approved will irreparably harm these irreplaceable Redwoods and the health of the forest as a whole that they support. Plaintiffs bring the instant motion to prevent this result and save these Redwoods for future generations.

II. FACTUAL BACKGROUND

Richardson Grove State Park is a "heritage park" with worldwide significance, serving as the gateway to the Redwood Region and the unique beauty of Northern California. It provides millions of tourists breathtaking views of gigantic Redwood trees, as its towering ancient Redwoods shelter State Highway 101 with a magnificent cathedral of trees and branches which interlace above the road. The Grove includes the ninth tallest coast Redwood tree in the world. The trees are primary constituent elements of the designated critical habitat for the protected

marbled murrelet, and provide nesting habitat for both the murrelet and the federally listed northern spotted owl. Richardson Grove is considered a pristine environment and is culturally significant to Native Americans. The South Fork of the Eel River threads through Richardson Grove and along Highway 101 is designated as a Wild and Scenic River under California law (1972) and the Federal Wild and Scenic Rivers Act (1981). (Declaration of Sharon E. Duggan ["Duggan Dec."], Ex. 1, Draft Environmental Assessment App. I, at 11-18.)

A. Genesis Of Project And Issuance Of The Draft EA And FONSI

Caltrans claims the Project is necessary to permit the passage of STAA trucks[1] through the grove. Yet STAA trucks have passed **safely** through the Grove for years, with no record of accidents attributed to them (*Id.*, Ex. 4, EPIC Comments, at CHP Report), under legislative exemptions for livestock and moving vans. Cal. Veh. Code §§ 35401.5 (f), 35401.7 (West 2001).

In December 2008, Caltrans issued a Draft Environmental Assessment and Section 4(f) analysis ("Draft EA") for the Project. It provided little or no analysis of the Project's impacts to the Redwoods, with largely unreadable Project maps. (Duggan Dec., Ex. 1.) It revealed Caltrans' intention to approve the Project regardless of the outcome of the review process, declaring that "[a]fter the public circulation period, all comments will be considered, and **the Department will confirm the proposed build alternative** ... " (*Id.*, at iii, emphasis added.)

In response to the Draft EA, Caltrans received hundreds of comments from Plaintiffs and others throughout California and the world in opposition to the Project. These comments objected, particularly, on the ground that cutting the roots of the old growth Redwoods to widen the highway would harm or kill the trees. Despite this outpouring of opposition to the Project and ongoing controversy about the Project's adverse effects on the Redwoods,[2] Caltrans did not prepare an Environmental Impact Statement ("EIS"), as would have been appropriate; rather,

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[1]"STAA" refers to the Surface Transportation Assistance Act of 1982, and STAA trucks are slightly larger than "California Legal" trucks. (*Id.*, at 7.)

[2]Caltrans' record documents establish that thousands of comments opposing the Project were submitted over the course of many months, from all over the world.

Caltrans issued a final Environmental Assessment and Finding of No Significant Impact ("FONSI"), and approved the Project, on May 18, 2010. (*Id.*, Ex. 2.)

However, the Project approved in the FONSI was not the same as the one in Draft EA. During the 15-month delay between the issuance of the two documents, Caltrans more than doubled the number of trees to be impacted and gathered new information. Changes included:

- moving a retaining wall to the opposite end of the highway, upslope from the Eel River (*id.*, at App. L 19-20);
- identifying the land to be taken from State Parks (*id.*, at 195-199);
- more than doubling to 86 the number of trees whose root structure would be impacted (*id.*, at 109-110);[3]
- identifying for the first time, in Table 10, 68 Redwoods which would be impacted by the cut and fill of soil (*id.*, at 111-112);
- relying on two arborists' opinions to claim no impact to the old growth Redwoods, which post-date the Draft EA, and are not included in the FONSI or cited as references (*id,* at 110, 166-167; Ex. 3, Bramlett at 18); and
- changing Project maps without changing their date, to include separate marking for cut and for fill, more trees whose roots will be impacted, the location of Park land to be taken, and the relocated retaining wall (*id.*, Ex. 2, at App. L).

Thus, Caltrans not only approved the Project in the face of widespread opposition and scientific controversy, but also deprived the public of any opportunity to review and comment on substantial portions of the Project. (*Id.*, Ex. 2, at pdf 6.)

B. Project Description and Its Purpose and Need

Caltrans **describes** the Project as just over one mile in length with "minor realignments and widening of Route 101 to correct STAA restrictions at three locations." (*Id.*, Ex. 2, at 17.) However, the Project would **include** significant ground disturbance, vegetation and tree removal, slope excavation, fill of material, removal of leaded soils, culvert removal and replacement, stream diversion, disposal sites, equipment staging areas, utility relocation, right-of-way acquisition of Park lands, and temporary construction easements. (*Id.*, at App. I at 6.)

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[3] *Compare* Table 9 in Draft EA, listing 40 trees. (*Id.*, Ex. 1, at 84-85.) As discussed herein, according to Plaintiffs' expert, the true number of trees that would be impacted is actually much higher than 86. *Infra* at p. 7.

The Project's stated **purpose** is "to adjust the roadway alignment so that two STAA trucks passing in opposite directions could be accommodated." (*Id.*, Ex. 2, at 2.) Specifically, Caltrans maintains it is necessary to widen the highway through the Grove and change the highway's alignment to prevent these STAA trucks from "off-tracking," that is, straying outside the travel lane into the opposing lane. (*Id.*, at 4.) To reach this conclusion, Caltrans relied on computer modeling, about which the public was given very little information. Yet the FONSI provides no actual evidence that STAA trucks currently allowed to pass through Richardson Grove are "off-tracking" or otherwise unable to safely pass in opposite directions. In fact, Caltrans abandoned its claim that the Project was necessary for safety reasons, stating repeatedly in the FONSI that this "is not a safety project." (*Id.*, Ex. 3, at EPIC 11,18; Clark 4; Spreen 19.)

C. Project Alternatives

Despite this very shaky justification of the Project's purported purpose and need, the Draft EA and the FONSI presented only two alternatives: the massive restructuring of the highway called for by the Project, and a no build alternative. (*Id.*, Ex. 2 at 17-18, 25.) The Project alternative approved by Caltrans has three construction segments along the highway:

- Segment one is entirely within the Park, where old growth Redwoods grow on either side of the road, in many cases right next to the road. It will widen the road, change curves and their banking, replace culverts, cut trees, and realign the road from the existing centerline by approximately 2 to 6 feet on average. (*Id.*, at 18.) It will cut soil and place fill up against old growth Redwoods. The entire road pavement would be removed and replaced.
- Segment two is located at the northern end of the Park, and will remove and repave the roadbed, and berm it to divert water to a culvert.
- Segment three is located just outside the Park. It will widen and realign the road up to 10' feet from the centerline and replace culverts. It will cut and fill significant soil to create shoulders, build a 200' retaining wall 10-13 feet below the road, and cut a slope 4500 square feet long on the opposite side of the road. (*Id.*, at 18-19.)

There is a one-paragraph discussion of the No Build Alternative, referring to the Project area as a "non-standard" alignment, noting that STAA trucks are "restricted through Richardson Grove due to the physical constraints of the roadway." (*Id.*, at 19.) Yet, the Project would not fix the non-standard alignment, requiring a number of "***highway design exceptions*** including minimum design speed and curve radii, shoulder width, minimum superelevation rate, stopping

sight distance, minimum distances to a fixed object and corner site distance." (*Id.*, at 21.)

Caltrans rejected several alternatives, including slower speeds, signalization, and continuing the exemptions for, or permitting of, and STAA truck access. (*Id.*, at 25-33.)

D. Impacts Analysis

Like the Draft EA, the FONSI concludes the Project impacts would have "less than significant effects" on old growth Redwood trees, endangered species, aesthetics, cultural resources, the community, and the Park, and requires **no** mitigation measures. (*Id.*, at 147.) However, the FONSI concedes the excavation and fill needed for realignments, removal of trees, construction of the retaining wall, and construction activity within the structural root zone of trees may all impact the forest ecology and trees. (*Id.*, at 106-107; App. I at 22.) Specifically, construction will occur within the root zone of 86 trees, the majority being old growth Redwoods three feet or more in diameter. (*Id.*, at 109-110, Table 9).

Purportedly to minimize the impacts to the structural root zones of the trees, the Project calls for: excavating by hand and air spade, but with the caveat that mechanized equipment may be used with permission; cutting roots less than 2 inches with a sharp instrument; using Cement Treated Permeable Base pavement; irrigation around trees; and using a brow log when greater than 4 inches of fill is placed next to trunks of redwoods which are greater than 18 inches in diameter. (*Id.*, at 113-115.) However, Caltrans provided no studies to show these techniques would be effective, and, in fact, as discussed herein, some of these measures could actually increase the negative impacts of the Project on the trees.

III. LEGAL STANDARD

A preliminary injunction should issue if the plaintiff establishes: "[(1)] that he is likely to succeed on the merits, [(2)] that he is likely to suffer irreparable harm in the absence of preliminary relief, [(3)] that the balance of equities tips in his favor, and [(4)] that an injunction is in the public interest." *Am. Trucking Assns. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009). A preliminary injunction "preserve[s] the status quo pending at least some discovery and further hearing on the merits." *Alliance For The Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134 (9th Cir. 2011). An injunction should issue where there are "serious questions going to the

merits" and where the balance of hardships sharply in plaintiffs' favor, provided that there is a likelihood of irreparable injury and that the injunction is in the public interest. *Id.* at 1132, 1135.

IV. ARGUMENT

A. In The Absence of Injunctive Relief, Plaintiffs Are Likely To Be Irreparably Injured By The Loss Of Irreplaceable Ancient Redwoods And Other Factors

An injury is "irreparable" where it cannot be adequately remedied by money damages or other legal remedies, where such injury is "permanent or at least of long duration," *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987), and where failure to enter the injunction would essentially render final judgment useless. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975). "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable." *Amoco*, 480 U.S. at 545. An injury is "likely" so long as it is not speculative or remote, meaning that the potential for such harm must be imminent. *See Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988).

1. The Project Would Likely Endanger Survival Of Numerous Ancient Redwoods In the Grove And Irreparably Harm Overall Forest Health

In a detailed declaration filed herewith, Dr. Joe McBride, a Professor of Forestry and Landscape Architecture at the University of California, Berkeley, a licensed professional forester, California License No. 1306, and author of over 250 scientific articles states unambiguously: "substantial irreparable damage would occur to the trees in the Project area as a result of the proposed project . . . [which] would, in turn, cause negative impacts to the overall health of the forest in the vicinity of the Project area." (Declaration of Joe McBride ["McBride Dec."], ¶¶ 3-6, 44.) Dr. McBride based his conclusion on a thorough evaluation of the Project's potential impacts on the old growth Redwoods in the project area, which involved reviewing the FONSI and related materials, including the two arborist reports included therein, and a site visit, during which he conducted a tree-by-tree analysis of the Project (*id.*, ¶¶ 9, 16, 17 & Ex. 2).

In the process, Dr. McBride not only found numerous shortcomings in the analysis conducted by Caltrans, including Caltrans' omission of 34 redwood trees that would likely be impacted by the Project (*id.*, at ¶¶ 21, 22); he identified four categories of irreparable impacts

likely to result from the Project: (a) damage to structural and feeder root systems of 108 trees from proposed soil cutting and fill, including 37 trees which are likely to be severely impacted and thus die; (b) damage to structural and feeder root systems of 7 ancient Redwoods as the result of proposed culvert replacement work; (c) damage to trees caused by increased wind velocity in the grove as a result of the Project; and (d) damage to the overall health of the forest caused by Caltrans' planned removal of 54 trees. Dr. McBride provided a chart recording his observations about the Project's impacts on each tree. (*Id.*, ¶¶ 18-19, & Ex. 3.)

a. <u>Likely Loss Of Thirty-Seven Redwoods From Damage To Structural And Feeder Roots By Soil Cutting And Filling In Their Vicinities</u>

Caltrans admits soil cutting and filling is likely to cause irreparable harm to old growth Redwoods. The April 2010 Natural Environment Study ("Final NES") included in the FONSI states that soil cutting and filling would occur in "the structural root zones of approximately 66 old growth redwood trees ranging from 3 to 18 feet in diameter..." (Duggan Dec., Ex. 5, App. I at 21.) It continues:

> Additional paving and the placement of shoulder backing could cause soil compaction and disturbance within the structural root zones of old growth Redwoods. Studies have shown that compaction of the soil within the root zone can have an adverse effect on these trees (Arnold 1973). ***Adverse effects to old growth trees may be a significant impact to this unique natural community***. (*Id.* at 22, emphasis added.)

Indeed, Caltrans identified 86 trees which would experience potential root impacts. Most of these trees are large Redwoods; 73 are 30 inches or greater in diameter (the standard Caltrans uses to define "old-growth"), and 40 are between 7 and 18 feet in diameter. (*Id.*, at 109-110, Table 9.) According to the FONSI:

> Construction activities in close proximity to these trees could result in impacts to the root systems. There would be both cut and fill activities occurring within the structural root zone. The maximum depth of excavation would be approximately two feet and the maximum fill depth would be approximately three and a half feet. (*Id,* at 40-41.)

Omitted is a discussion of the likely mortal effects of such impacts.

Redwoods lack a deep tap root, and instead rely on a dense platform of roots for both stability and to absorb the water, oxygen, and nutrients they need for survival. (McBride Dec., ¶¶ 11-14.) The soil cutting and filling called for by the Project is, therefore, likely to have significant and likely mortal effects on old growth Redwoods. Root cutting is likely to

significantly impact the nutrient and water acquisition capability of the trees, reduce their stability, and inhibit asexual reproduction through stump sprouting. (*Id.*, ¶¶ 28-31.) Soil compaction and fill would both disrupt the respiration process, effectively cutting off air to these trees, and prevent the trees from gaining access to one of their key sources of hydration, the downward movement of moisture derived from fog drip in the summer. (*Id.*, ¶¶ 11-12, 37-39.) According to Dr. McBride, the likely consequence of these impacts would be the "failure" of the affected Redwoods, "the technical term for a tree losing its structural support and falling under its own weight or being thrown by the wind." (*Id.*, ¶ 14; *see also id.*, ¶¶ 38-39.) McBride identifies thirty-seven trees likely to be severely impacted in this way, including a substantial number old growth Redwoods likely several thousand years old. (*Id.*, ¶ 38.)

Moreover, McBride notes that because many of these impacted trees occur adjacent to other impacted trees the "demise" of these trees would likely create an opening in the canopy, leading to a domino effect of mortality among surrounding trees, as a result of increased desiccation (described below). (*Id.*, ¶ 39.)[4]

Finally, Dr. McBride concluded that Caltrans' purported mitigation of these impacts are, at best, completely untested and unproven, and, at worst likely to have "negative effects to the trees around which the procedure is employed." (*Id.*, ¶¶ 30-31.)

b. <u>Seven Old Growth Redwoods Likely To Be Severely Impacted By Structural And Feeder Root Damage Caused By Culvert Work</u>

Dr. McBride also found "[t]rees adjacent to culverts that are to be replaced or modified would suffer loss of both structural and feeder roots." (*Id.*, at ¶ 40.) Specifically, Dr. McBride noted that even if an air spade were used, the finer roots exposed by the excavation would likely dry out and die before they are covered again by soil. (*Id.*) Dr. McBride further noted that soil

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[4]Dr. McBride's findings echo California State Park tree standards, which provide: "There should be no construction activities in the Structural Root Zone of a protected tree," because "[a]ny intrusion into this zone is usually accompanied by significant injury to roots further from the trunk; this will shorten the useful life of the tree in the developed area by reducing vigor and introducing root disease. Furthermore, damage to any structural roots may cause an already structurally compromised tree to become hazardous." (Duggan Dec., Ex. 5, at 3.)

compaction would be necessary around the new culverts, causing harm as discussed above. (*Id.*) At least seven old growth trees would be negatively impacted due to the culvert work. (*Id.*)

c. Thirty-Five Trees Threatened By Desiccation

Redwoods depend for their survival, in part, on moist foliage; when a Redwood's foliage dries out, the foliage dies, a phenomenon known as desiccation. (*Id.*, ¶ 10.) Desiccation can lead to the die off of the tops of affected Redwoods, which, in combination with other factors, such as increased wind velocities and loss of structural root supports and access to soil moisture as a result of root cutting and/or soil compaction, can lead to tree failure. (*Id.*, at ¶¶ 32, 41.)

d. Overall Forest Health Impacted By Loss Of Fifty-Four Smaller Trees

Dr. McBride concluded the removal of 54 smaller trees would have a significant adverse impact on the overall health of the forest. (*Id.*, ¶ 42.) Although Caltrans dismissed this impact, Dr. McBride noted these trees "play an important role in redwood forest ecology," providing nesting cover and food for wildlife species, and potential recruits (*i.e.* replacements for lost trees) in the forest canopy. (*Id.*) McBride noted that loss of these trees could also imperil Redwoods in their vicinity by exposing these trees to increased wind velocities and thus desiccation, triggering a domino effect of mortality from the margins to the interior of the forest. (*Id.*, ¶ 43.)

In summary, Dr. McBride concluded:

> The importance of this old growth forest stand, in view of the important heritage of the redwood forest, requires special consideration before projects that would impact the stand are allowed to go forward... ***a substantial, irreparable damage would occur*** to the trees in the Project area as a result of the proposed project. It is my opinion that this would, in turn, cause negative impacts to the overall health of the forest in the vicinity of the Project area. (McBride Dec., ¶ 44.)

2. Project Work Is Likely To Irreparably Harm Two Protected Bird Species

Two federally protected bird species are likely to be irreparably harmed by these impacts to the forest's health. Caltrans admits that the Project "may affect and **is likely to adversely affect** two federally protected species, the marbled murrelet and the northern spotted owl." (Duggan Dec., Ex. 2, at 136, 137, emphasis added.) These species depend on the old growth Redwood trees for nesting (*id.*, at 187); by conceding the Project's likely adverse impact on these species, Caltrans admits the likely adverse impact of the Project on old growth Redwood trees.

More generally, Caltrans conceded that the Project "could negatively affect . . . wildlife." (*Id.*, Ex. 3, General Response 4.)

3. Project Work Is Likely To Irreparably Harm Park Visitor Experience

Finally, Caltrans acknowledges, as it must, that the Project "could negatively affect visitor experience at the park." (*Id.*, at General Response 4.)

B. There Are Serious Questions Going To The Merits And Plaintiffs Are Likely To Succeed On The Merits.

Plaintiffs allege Caltrans has violated NEPA, 42 U.S.C. § 4331 et seq., Section 4(f) of the Department of Transportation Act of 1966, 23 U.S.C. § 138 and 49 U.S.C. § 303 ("DTA"), the Wild and Scenic Rivers Act ("WSRA"), 16 U.S.C. § 1271 et seq., and by extension the Administrative Procedures Act ("APA"), 5 U.S.C. § 551, et seq. (*See* Complaint at ¶¶ 96-127.) Plaintiffs are likely to prevail on all of these claims.[5]

1. Standard Of Review - Caltrans' Action Is Reviewable Under The APA

Pursuant to a Memorandum of Understanding with the Federal Highway Administration, Caltrans assumed the role of the FHWA for the Project: Caltrans assumed all of the obligations the FHWA would have had, pursuant to 23 U.S.C. § 327, to provide environmental review, consultation, or other such actions pertaining to the review or approval of the Project, as required by NEPA, the DTA and its implementing regulations at 23 C.F.R. § 774, and the WSRA (*See* Duggan Dec., Ex 6: at §§ 3.11, 3.2.)

Because none of these provisions contain provisions for judicial review, whether Caltrans has met its obligations under each is reviewable under the APA. *See Friends of Yosemite Valley*

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[5]Plaintiffs have standing to pursue this action, as they and/or their individual members face imminent injury to concrete recreational, aesthetic, spiritual, and educational interests in the Grove caused by the Project. (*See* Declarations of Patricia Clary, Bruce Edwards, Loreen Eliason, Peter Galvin, Jeffrey Hedin, and Gary Hughes filed herewith.) Caltrans' failure to comply with NEPA injures Plaintiffs by depriving them of procedural rights intended to protect these concrete interests. Enjoining the Project and ordering Caltrans to comply fully with NEPA and other applicable laws would redress these injuries. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 129 S. Ct. 1142, 1149 (2009); *Ctr. for Food Safety v. Vilsack*, 636 F.3d 1166, 2011 U.S. App. LEXIS 3790 at *11-16 and n.6, 7 (9th Cir. 2011).

v. Norton, 348 F.3d 789, 793 (9th Cir. Cal. 2003) (NEPA and WSRA); *Conservation Law Found. v. FHA*, 630 F. Supp. 2d 183, 200 (D.N.H. 2007) (NEPA and DTA). Under the APA, a reviewing court must "hold unlawful and set aside agency actions that are . . . arbitrary, capricious, and an abuse of discretion, or otherwise not in accordance with law . . [or] without observance of procedure required by law." 5 U.S.C. §§ 706(2)(A), 706(2)(D). A court must "engage in a searching and careful inquiry, the keystone of which is to ensure that the [agency] engaged in reasoned decision making," *Nw. Coal. for Alternatives to Pesticides v. U.S. E.P.A.*, 544 F.3d 1043, 1052 n.7 (9th Cir. 2008) (internal quotations omitted), to determine whether the agency's conclusions are rationally supported, complete, reasoned, and adequately explained. *Id.* "Ultimately, [the court's] role 'is to insure that the agency has taken a "hard look" at environmental consequences [of the proposed action].'" *Cal. Wilderness Coal. v. U.S. DOE*, 631 F.3d 1072, 1097 (9th Cir. 2011) (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)).

2. Plaintiffs Are Likely to Prevail On Claims That Caltrans Violated NEPA

a. Caltrans Failed To Adequately Establish Project's Purpose And Need

Courts "evaluate an agency's statement of purpose under a reasonableness standard." *Nat'l Parks & Conservation Ass'n v. BLM*, 606 F.3d 1058, 1070 (9th Cir. 2010) (internal quotations omitted).

> However, . . . [a]n agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action, and the EIS would become a foreordained formality. *Id.* (internal quotations omitted).

Moreover, where the agency's stated purpose and need for the project is based on a computer model, this assessment of reasonability must take into account the reliability of the model used for this purpose. *See Lands Council v. Forester of Region One of the U.S. Forest Serv.*, 395 F.3d 1019, 1031-32 (9th Cir. 2005).

Here, the FONSI fails to establish the Project is needed to accomplish its stated purpose: to "adjust the roadway alignment so that two STAA trucks passing in the opposite directions could be accommodated." (Duggan Dec., Ex. 2, at 2.) STAA trucks currently pass through the Grove without any documented evidence of accidents or "off-tracking" across the centerline.

The most recent report to the Legislature, existing as of the 2008 Draft EA, documented only six accidents involving trucks in the Project area in the reported 5-year period, and two of those accidents were within one minute of each other. (*Id.*, Ex. 4, EPIC Comments, at CHP Report 2.) Only one of these accidents involved trucks traveling opposite directions, and there is no evidence that these were STAA trucks. (*Id.*) Indeed, despite the fact that STAA trucks regularly pass through the Grove, there is no evidence that any of these six accidents involved STAA trucks, and ***no record*** of any collisions, citations, verbal warnings, or even complaints involving STAA trucks traveling through the Grove. (*Id.*)

Caltrans purports to justify the Project on the grounds that the existing highway alignment does not meet current highway design standards, including curve radii, shoulder width, distances to a fixed object, stopping sight distances, corner sight distance, and superelevation rate.[6] (*Id.*, Ex. 2 at 3, 56.) However, the FONSI concedes the Project **will not fix these purported alignment deficiencies**, and requires "design exceptions" to excuse compliance. (*Id.*, at 21.) Nowhere in the FONSI or elsewhere are these highway design standards produced or the current roadway's failures to meet them described. (*Id.*, Ex.3, at EPIC 2, 3.) In response to a comment inquiring "what are the minimum roadway standards to accommodate STAA trucks and how will the proposed project meet these minimum standards," Caltrans responded:

> There are no written curve radii standards per se. There are truck turning templates which are graphic portrayals. Caltrans used a computer model that utilizes these truck turning templates and applied it to the existing alignment to determine where curve modifications are necessary in order to pass STAA vehicles. The project would modify the curve dimensions that result in the STAA restriction. (*Id.*, Ex. 3, at Clark 21.)

In other words, Caltrans created a computer model because it had no actual evidence to establish need for the Project. This computer model purportedly demonstrates "where the deficiencies [in the current design of the highway] were that would cause off-tracking." (*Id*, at EPIC 2.) However, in the absence of any evidence of STAA trucks "off-tracking" in the Grove, there is no reason to use a computer model to show the current design "***would***" cause off-

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[6] "Superelevation rate" is tilting of the roadway that results in a banked turn. Inadequate superelevation rate can cause vehicles to skid as they travel through a curve. (*Id.*, Ex. 2, at 3.)

tracking. Caltrans never provided any information clarifying this discrepancy or disclosed to the public the information used to develop the computer model and the Project design. Thus, Caltrans not only failed to show the Project would accomplish the agency's stated goals, but also deprived the public of any meaningful opportunity to evaluate the Project's nature and impacts.

Despite having no real-world evidence that STAA trucks "off-track" or cannot pass each other without accident, Caltrans nonetheless claims that by making the "realignment improvements to accommodate STAA trucks, the prohibition for STAA vehicles would be removed and the safety and operation of the US Route 101 would be improved while also improving goods movement." (*Id.*, Ex. 2, at 2.) But the FONSI does not explain how the roadway widening and activities will accommodate STAA trucks, since the Project **will not fix** the very design deficiencies which purportedly prohibit STAA access. Indeed, Caltrans insists that this is "not a safety project." (*Id.*, Ex. 3, at EPIC 11, 18; Clark 4; Spreen 19.)

b. Caltrans Failed To Adequately Explore And Evaluate Reasonable Alternatives To The Project.

NEPA requires an agency to include a "detailed statement . . . on . . . alternatives to the proposed action," 42 U.S.C. § 4332(2)(C)(iii), and to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E). "NEPA regulations describe this alternatives requirement as the 'heart' of the EIS and require the agency to produce an EIS that '[r]igorously explore[s] and objectively evaluate[s] all reasonable alternatives' so that the agency can 'sharply defin[e] the issues and provid[e] a clear basis for choice among options by the decisionmaker and the public.'" *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1120 (9th Cir. 2002) (quoting 40 C.F.R. § 1502.14). "The existence of a viable but unexamined alternative renders an [EIS] inadequate.'" *Natural Resources Defense Council v. U.S. Forest Serv.*, 421 F.3d 797, 813 (9th Cir. 2005) (internal quotation omitted). *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1245 (9th Cir. 2005) (applying the same standard to an EA). An agency must look at every reasonable alternative within the range dictated by the nature and scope of the proposed action, sufficient to permit a reasoned

choice. *See Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1519, 1520 (9th Cir. 1992).

As discussed *supra,* the problem which Caltrans seeks to ameliorate through the Project is not a safety problem – indeed, Caltrans has admitted as much – but rather a regulatory problem: current regulations prevent some, but not all, STAA trucks from passing through the Grove. However, by stating the purpose and need of the Project in the way it did, Caltrans confined itself to analyzing only two alternatives: the Project and the no build alternative. Moreover, it led Caltrans to select an alternative that would neither accomplish Caltrans' purported purpose or fix its regulatory problem: the Project would neither sufficiently change the current roadway's alignment to make it compliant with STAA regulations, nor fix any purported "off-tracking" problem. Thus, even assuming *arguendo* that Caltrans's stated purpose and need for the project were adequate, the Project alternative is not a reasonable means to meet them.

Not surprisingly, therefore, Caltrans improperly rejected several reasonable alternatives that, individually or in combination, would not only provide greater access for STAA trucks through the Grove but also make the roadway safer, with little or no impact on the sensitive environment along the roadway. These alternatives include lowering the speed, signage (e.g., "slow for the curves," "slow for the Park"), installing roadway dividers, and/or allowing STAA trucks through permits or legislative exemption. (Duggan Dec., Ex. 3, at CSPF 7; Piercy Fire, at 7-8.) Caltrans gave these alternatives only a "cursory review in the narrative, without sufficient technical analysis," (*id.* at 22-25), rejecting them as not accomplishing the stated purpose and need of the Project. (*Id.*, Ex. 2, at 25, 32). However, the Project as approved does **not** accomplish the purpose and need.

Caltrans also paradoxically rejected an alternative rerouting the highway based on the findings in a 2001 Feasibility Study, which found that the environmental impacts of such a project would be too great (*id.*, Ex. 3, at CSPF 8); however, that same study also rejected widening of the highway through the Park (which the Project calls for) stating:

> Widening the existing Route 101 **is not acceptable**, as it would **seriously affect the environment due to the significant take of old-growth redwoods within a State Park**. It would be difficult to document that this alternate could meet 4(f) criteria. (*Id.* Ex. 7, 2001 Feasibility at 10, emphasis added.)

As discussed herein, the Project would have an irreparable impact on Redwoods in the Park. (McBride Dec., ¶ 44.) Thus, Caltrans' decision to select the Project alternative does not reflect the rigorous exploration and objective evaluation of all reasonable alternatives that NEPA requires. *See Kootenai Tribe*, 313 F.3d at 1120.

Finally, Caltrans rejected the no-build alternative in one paragraph on the ground that it would not accomplish the Project's purpose. However, there is no evidence that safety or operational issues currently exist requiring roadway design modifications. (Duggan Dec., Ex. 4, at CHP Report.) The no build alternative, in combination with other measures such as slower speed or permitting STAA trucks, could easily allow STAA trucks access through the Grove, without irreparably injuring the Grove's giant old-growth Redwoods.

In short, by premising its evaluation of the Project on a flawed statement of purpose and need, Caltrans foreclosed adequate consideration of several common-sense alternatives that would facilitate STAA access through the Grove while preserving the Grove's irreplaceable old-growth Redwoods for future generations. The purpose of NEPA is to prevent precisely this type of uninformed decision-making.

c. Caltrans Failed To Adequately Consider, Evaluate, Analyze, Or Disclose the Project's Individual And Cumulative Environmental Impacts.

NEPA requires agencies take a "hard look" at the environmental impacts of their actions, including all foreseeable direct and indirect impacts of the project, synergistic as well as individual; in short, NEPA requires a candid discussion of the project's adverse impacts which does not improperly seek to minimize them. *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1159 (9th Cir. 2006). In applying this "hard look" requirement to an evaluation of an EIS or an EA, courts use a "rule of reason" standard, "which requires 'a pragmatic judgment whether the EIS's [or EA's] form, content and preparation foster both informed decision-making and informed public participation.'" *Native Ecosystems v. U.S. Forest Serv.*, 418 F.3d 953, 960 (9th Cir. 2005); *see Klamath-Siskiyou Wildlands Ctr. v. BLM*, 387 F.3d 989, 993 (9th Cir. 2004). As for an EA, its objective is to "[b]riefly provide sufficient evidence and analysis for determining whether to prepare" an EIS. 40 C.F.R. § 1508.9(a)(1). If the agency elects to forego preparation

of an EIS, the FONSI must be accompanied by a convincing statement of reasons explaining this conclusion. *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 730 (9th Circ. 2001). This is "crucial to determining whether the agency took a 'hard look' at the potential environmental impact of a project." *Save the Yaak Comm .v. Block*, 840 F.2d 714, 717 (9th Cir. 1988) (internal quotation omitted).

i. Caltrans Employed Inadequate Methodologies To Assess Project's Impact And Produced Inadequate Documents Based Thereon

Rather than take the required "hard look" at the Project's impacts, Caltrans did not look at certain types of impacts and inadequately examined others. Indeed, Caltrans failed to conduct a tree-by-tree assessment of the Project's impact. As Dr. McBride states:

> To assess the potential for the above described impacts to occur in a redwood stand as a result of roadwork that includes soil cutting and filling in the vicinity of large old growth redwoods, cutting of structural roots, soil compaction, and increased exposure of tree canopies to wind, one must examine each tree and make conclusions about the site specific impacts each tree will suffer. **A tree by tree analysis of all trees in the area of potential impact is required**. (McBride, at ¶15, emphasis added.)[7]

Several factors indicate that Caltrans did not do so.

First, the FONSI fails to identify ***over 20%*** of the Redwoods, in the structural root zone of which construction activities will occur. The FONSI puts the number of such trees at just 74 redwood trees; however, Dr. McBride, during his site visit identified 108 redwood trees in this category. (McBride Dec., ¶ 21.) Indeed, 9 trees, including a Redwood 91" in diameter, do not show up on Caltrans' maps at all. (*Id.*)

Second, of the trees that Caltrans did identify, several are reported with substantially incorrect diameters. (*Id.*, ¶ 26.) Because Caltrans purports to use diameter as a basis to calculate the extent of the trees' root platforms, these errors affect analysis of the extent to which construction activities will affect tree roots. (*Id.*, ¶ 26.)

Third, Caltrans fails to accurately report the amount of proposed cut and fill to be conducted around each tree. (*Id.*, ¶¶ 23-25 & Ex. 6.)

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[7]Save the Redwoods League requested that Caltrans provide "in an EIS" information quantifying how much of the root systems will be removed **from each tree**, and the expected impacts from removal of those roots. (Duggan Dec., Ex. 3, at SRL 12, emphasis added.)

Fourth, Caltrans fails to discuss the impact of compaction of soils over root platforms, impacts flowing from proposed culvert work, or impacts from placing impervious surfaces over root platforms. (*Id.*, ¶¶ 27-29.) Caltrans knew about these impacts, but failed to accurately evaluate them. Indeed, as State Parks commented on the Draft EA:

> The hardened surface associated with the roadbed and shoulder is a significant adverse effect on the health of any mature tree, including old-growth redwood, where it encroaches into that tree's critical root zone . . . However the [Draft EA] does not document whether or not the proposed action will increase the cumulative amount of hardened surface on the critical root zone or decrease it. Unless such a detail analysis is conducted, the significance of the proposed action on old-growth redwoods cannot be evaluated. Once this information is provided, it can be evaluated for the significance of the impact to the trees. If that information is not provided, there is not enough substantial evidence to make a finding of significant or less than significant.

(Duggan Dec., Ex. 3, at Parks 9.) State Parks further commented:

> "The [Draft EA] ... does not provide an assessment of the number of trees that will have their structural root zone compromised through the placement of an impervious surface within the structural root zone or an estimate of the number of trees that will have structural roots severed. Without such an assessment the State Parks cannot adequately assess the proposed actions impacts on old-growth redwoods and other mature trees. The Department therefore must assume that the proposed action will result in significant adverse effects to old-growth redwoods and that adequate mitigation needs to be developed."

(*Id.*, at 31.) The FONSI did not cure these shortcomings.

Fifth, as Dr. McBride explains, the general statements of the two arborists are inadequate because they do not reflect that the impact on each tree depends on the extent of the soil cutting and fill that would occur in the vicinity of each tree. (McBride Dec., ¶ 20 [FONSI makes no distinction between the impacts on a certain tree of 20" of soil cutting and 41" of fill in its vicinity and the impacts on another tree of no cutting and just 2" of fill in its vicinity].)

The FONSI identifies 68 total trees that will have cut and fill activities within their root zone (Table 10), but provides **no** technical study or documentation assessing the impacts on each structural root zone of placement of impervious surface, fill, or root cutting. Stephen Sillett, Professor of Redwood Forest Ecology at Humboldt State University had advised Caltrans to not cut **any woody roots**. (Duggan Dec., Ex. 3, at Sillett 1.) Yet, Caltrans admitted that "it may not be possible to avoid cutting roots greater than two inches." (*Id.*, at Parks 39.) Caltrans did not conduct any "field studies" of the Redwood's structural root systems affected by this Project (*id.*,

at Hesseltine 30), and does not know where roots may be encountered (*id.*, at Parks 39). In the absence of any studies, Caltrans cannot predict the construction impacts. (*Id.*, at Blake 2.)

As a result, Caltrans not only failed to adequately assess the environmental impacts of the Project, but also made it impossible for the public to do so. (McBride Dec., ¶ 20-26.) For example, the FONSI newly created Table 10 purports to show information about cut and fill, yet fails to identify all affected trees and reconcile the cut and fill around trees with the Project maps and the list of trees in Table 9. (*Id.*, at ¶¶ 23-25.) Indeed, so inadequate are these documents that Dr. McBride created his own table, Table A (Exhibit 3 to his declaration) that identifies and describes the Project impact on each tree, his own corresponding map (Exhibit 4 to his declaration) that identifies and numbers *all* of the impacted trees, and Table B (Exhibit 6 to his declaration) that reconciles the information in Caltrans' Table 9 and Table 10.

ii. Caltrans Completely Failed To Identify And Evaluate Several Environmental Impacts

Caltrans also failed to identify and adequately evaluate the Project's significant environmental impacts, many of which were raised in public comments. These include: effects on Redwoods caused by increased wind velocities or increased collisions caused by an increase in traffic speed resulting from the Project (McBride Dec., ¶¶ 32-33); potential negative effects of the Caltrans proposal to use "brow logs" around Redwoods as a mitigation method (*id.*, ¶¶ 30-31); effects on the ancient Redwoods adjacent to the highway throughout the Project (*see e.g*, Duggan Dec., Ex. 3, at Parks 18, 31, 32, 34; CSPF 20-22; EPIC 21-25; FOER 1; Save the Redwoods League 2); effects on protected fish and wildlife species and other biological resources, from tree damage and removal, increased noise and light during and after construction, and from release and disposal of toxic materials (*see e.g, id.*, at Parks 15, 26, 27, 46-51; EPIC 33, 34; CSPF 21, 25, 28; NRDC 2-5); greenhouse gas emissions (*id.,* at NRDC 6); and the cumulative and growth-inducing effects from expanding STAA truck access and goods movement throughout Humboldt, Mendocino, and Del Norte counties (*id.*, at 2nd EPIC 1-7; Sierra Club 1, 2; Bramlett 13; Gillespie 3; Hessletine 74.) The Draft EA did not evaluate whether road widening would result in a degraded park experience for park visitors, with the

removal of understory vegetation, increased exposure to the highway in areas of tree removal, and increased noise and light impacts. (*See e.g.*, *id.*, at CSPF 21; Bramlett 19.)

iii. Caltrans Fails To Explain In The FONSI Why Environmental Impacts Will Not Be Significant

Caltrans conceded that its Project could impact the old growth Redwoods (*id.*, Ex 2, at App.I at 22), but refused to evaluate that impact, claiming there was no significant impact (*id,* Ex. 2, at 147). Instead, Caltrans invented minimization measures, unsupported by credible or technical scientific reports or opinions. Caltrans also did not remedy in the FONSI any of the problems in the Draft EA identified in public comments.[8] Instead, it changed the Project, adding information that was never subject to public review.[9] The new information, however, still fails to provide the analysis required by NEPA.

Caltrans increased to 86, from the 40 identified in the Draft EA, the number of trees which would have potential root impacts. Most of these trees are large Redwoods; 73 are 30 inches or greater in diameter (the standard Caltrans uses to define "old-growth"), and 40 are between 7 and 18 feet in diameter. (*Id.*, at 109-110, Table 9.) According to the FONSI, "[c]onstruction activities in close proximity to these trees could result in impacts to the root systems. There would be both cut and fill activities occurring within the structural root zone. The maximum depth of excavation would be approximately two feet and the maximum fill depth would be approximately three and a half feet." (*Id.*, at 40-41.)

The revised Final NES included in the FONSI provides no better information than the FONSI itself. Moreover, while the Final NES was revised ostensibly to address the relocation of

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[8]Caltrans failed to adequately respond to comments. (*See e.g.*, *Id.*, Ex. 3, at General Responses 2, 3 6,11 and 12; CSPF 19; Parks 52; Carkeet; Elkins; Hessletine 64; Parks 42; EPIC 31; CSPF 4.)

[9]*See*, *supra*, at p. 3. The ability of the public to comment on a proposed agency action is a critical component of the NEPA process, and denying the public this opportunity makes the process a sham. *See W. Watersheds Project v Kraayenbrink*, 632 F.3d 472, 492-93 (9th Cir. 2011); *see also Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1150 (9th Cir. 1988). Moving the retaining wall the required Caltrans to reconsult with the National Park Service, which it failed to do. (16 U.S.C. § 1278(a); Duggan Dec., Ex. 2, at 209.)

the retaining wall, it also was changed in other notable ways.

- It **removed** the commitment to "no impact," claiming only that Project impacts would not be "substantial." (*Id.*, App. I at 2, 3, 16, 21.)
- It **removed** the commitment to ensure 80% success for revegetation efforts, agreeing only to monitor with no defined success rate. (*Id.*, at 26.)
- It **removed** the commitment to "prevent" impacts to the root structure of old growth Redwoods, saying instead Caltrans would "minimize" root impacts. (*Id.*, at 16.)
- It **added** proposed design modification and special construction techniques – use of an air spade or hand work for excavation, and irrigation – within the structural root zone of old growth redwood trees in the Park, but provided **no studies** to document their effectiveness. (*Id.*, at 28-29.)

These changes suggest that Caltrans knew potential impacts to Redwoods would be more severe than acknowledged in the Draft EA. In any event, the Final NES **failed** to detail or cite to technical or scientific studies about the effectiveness of proposed mitigation. It **failed** to provide a tree-by-tree analysis of the potential impacts of road realignment and widening, cut and fill activities, culvert work, and paving work on root structure. It thus failed to remedy the deficiencies in the Draft EA and FONSI.

In the face of these **impacts**, the FONSI proposes to protect trees by using an air spade to dig up roots, adding brow logs to minimize the impact of fill on the trunks of the trees, and watering the trees weekly once excavation below the finish grade occurs. (*Id.*, at 113-115.) Caltrans also proposes to remove invasive plants as a mitigation measure. (*Id.*, at 113.) Like the Draft EA, the FONSI however fails to document how these or other measures would be effective and sufficient to protect the trees from harm, or to supply sufficient support, water and nutrients to meet their demands. (*Id.*, Ex. 2; *see also* Ex. 3, at Carkeet 1; McBride Dec., ¶ 27.) And as Dr. McBride points out, the brow logs themselves may cause harm. (*Id.*, ¶ 31.) Caltrans also fails to provide any actual plan to ensure that effective monitoring to **prevent** impacts will occur. (Duggan Dec. Ex. 3, at Hesseltine 43, 45, 48, 49.)

After the public criticized Caltrans' failure to address these impacts in the Draft EA, Caltrans belatedly solicited the opinions of two arborists. (*Id.*, Ex. 2, at 110-111; Ex. 3, at Hesseltine 37, Bramlett 18.) These opinions are not based on a careful analysis of the Project's

impacts on Redwood root systems and ecology. They fail to examine variations in the potential impacts to each tree, and do not distinguish between the impacts of soil cutting and filling, soil compaction, and increased exposure of individual trees to greater wind velocity. (McBride Dec., ¶ 20.) They are no substitute for the tree-by-tree analysis "in an EIS" requested by Save the Redwoods League. (Duggan Dec., Ex. 3, at SRL 12.) Moreover, they **post-date** close of public comment, and were unavailable for public comment prior to Project approval.[10] In the absence of identifying the documentation and area they reviewed, it cannot be known whether the arborists considered the new information provided in the FONSI, or the approved Project.

In violation of NEPA, Caltrans failed to evaluate the Project's significant adverse impacts on the Redwoods trees and habitat. (McBride Dec., ¶¶ 27-44.)

d. Caltrans Failed To Prepare An Environmental Impact Statement.

An EIS is mandated if "substantial questions are raised as to whether a project . . . may cause significant degradation of some human environmental factor." *Center for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 508 F.3d 508, 552 (9th Cir. 2007) (citations omitted). The threshold for an EIS is low. The presence of just one of the ten factors listed in the NEPA regulations may be sufficient to deem the action significant, *Ocean Advocates v. U. S. Army Corps of Engineers*, 402 F.3d 846, 865 (9th Cir. 2003), and a plaintiff need only raise substantial questions whether a project may have a significant effect. *LaFlamme v. F.E.R.C.*, 852 F.2d 389, 397 (9th Cir. 1988) (citations omitted).

In evaluating whether a proposed action may have a "significant" impact, an agency should consider both the **context** and **intensity** of the action. **Context** requires evaluation of the action in consideration of several contexts such as society on a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action and both short-term and long-term effects are relevant. 40 C.F.R. § 1508.27(a); *see also Nat'l Parks & Conservation Ass'n. v. Babbitt*, 241 F.3d at 730.

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[10]The two arborists' reports are dated June 1, 2009 and March 23, 2010. (*Id.*, Ex. 8.) Caltrans included them in the administrative record documents provided to the Plaintiffs, but neither report is included or listed as a reference in the FONSI or its Appendices.

The **intensity** of an action refers to the severity of the impacts, and requires consideration of ten factors to determine whether an action "significantly" affects the environment within the meaning of Section 102(2)(C). Here, the project's impacts, including cumulative effects, (1) involve unique geographic characteristics such as park lands, cultural resources, or wild and scenic rivers; (2) are highly uncertain; (3) involve unique or unknown risks; (4) involve highly controversial actions; (5) establish a precedent for future actions or represent a decision in principle about a future consideration; (6) may adversely impact endangered or threatened species; and (7) threaten a violation of federal, state, or local law. 40 C.F.R. § 1508.27(b)(3), (5).

Under this standard, the highway widening Project through Richardson Grove State Park requires an EIS. Serious and substantial questions exist as to whether the Project will cause significant degradation of one of the most precious resources in California. These concerns are raised not only by Plaintiffs, but equally by agencies, organizations, foresters, scientists and concerned citizens from throughout California and beyond, many of whom asked that an EIS be prepared in the face of the Projects impact on the old growth Redwoods. Indeed, "[i]n dense forests where drip lines of trees touch each other **it is impossible to install a new facility without causing damage**." (Duggan Dec., Ex. 5, at 1, emphasis added.) Instead of preparing an EIS, Caltrans tried to dismiss these concerns by relying on the tardy opinions of two arborists whose credentials and reports were not included in the FONSI, and mitigation measures the effectiveness of which were never analyzed or demonstrated.

The **context** of the Project underscores the significance of the impact, because the Project area is world-renowned, and the old growth stands cannot be replaced. (McBride Dec., ¶ 35.) Any potential for impact to these treasures is significant.

The **intensity** of the Project requires an EIS. The hundreds of comments opposing the Project underscore the highly controversial nature of the Project. The Project impacts are highly uncertain because Caltrans failed to undertake the necessary technical and scientific analysis to understand those impacts. To the extent Caltrans did rely on technical information, such as the computer model, it failed to make it available to the public. Widening Highway 101 through the Grove will establish a precedent for future actions, in terms of opening other roadways to STAA

access, and leading to a four-lane highway. (Duggan Dec., Ex. 3, at Parks 13, Piercy Fire 9.)

The Project also threatens the violation of state and federal laws. Caltrans also conceded that the project may adversely impact protected species. (*Id.*, Ex. 2, at 136, 137.) The Project thus threatens to violate the state and federal endangered species laws by destroying habitat for the protected marbled murrelet and northern spotted owl. The Project also threatens to violate Section 4(f) of the Transportation Act as discussed below.

3. Caltrans Violated Section 4(f) of The Department of Transportation Act

Plaintiffs are also likely to prevail in their claims that Caltrans violated Section 4(f) of the Department of Transportation Act. Because the Project calls for the use of State Parks land, Caltrans was obliged to conduct a Section 4(f) analysis. 49 U.S.C. § 303. Caltrans uses a "programmatic" Section 4(f) analysis, particularly based on its characterization of the project as "operational improvement" and its unsupported conclusion that the Project would not impair Park resources. (Duggan Dec., Ex. 2, at 180.) This required that Caltrans before approving the Project to show **"(1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such [resources]**.' " *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 411, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971), quoting 23 U.S.C. § 138; 49 U.S.C. § 1653(f) (now codified at 49 U.S.C. § 303) (emphasis added). Caltrans failed to meet either leg of this burden.

To reject alternatives, the agency must find "that as a matter of **sound engineering** it would not be feasible to build the highway along any other route." The Supreme Court has defined "no prudent alternative" to mean that the Secretary must "find [ ] that alternative routes present unique problems." *Id.*, at 412, 91 S.Ct. 814." Caltrans had no "sound engineering" to justify rejection of the no build alternative or other alternatives; Caltrans relied only on an undisclosed computer model. The Section 4(f) analysis rejects the no build alternative because it "would not correct existing operational deficiencies." (Duggan Dec., Ex. 2, at 186.) However, the Project itself does not correct these deficiencies, and design exceptions are required. (*Id.*, at 186; 21.) Because the Project fails to meet its purpose, the prudent alternative route in this case is Highway 101, **without** widening.

Caltrans also failed to include all possible planning to minimize harm to Park resources, and particularly to the old growth Redwood trees and their root structure. It failed in analysis of impacts, documentation for that analysis, and in the conclusions that the Project would have no impact on the old growth Redwoods. In fact, "substantial irreparable damage would occur to the trees in the Project area as a result of the proposed project." (McBride Dec., ¶ 44.) Caltrans did not provide effective mitigation to fully minimize this harm.

C. The Balance Of The Equities Tips Sharply In Favor Of Plaintiffs' Requested Relief.

The balance of the equities tips heavily in favor of granting Plaintiffs the requested injunction. Ninth Circuit courts apply a traditional balance of harms analysis. *Lands Council v. McNair*, 537 F.3d 981, 1004 (9th Cir. 2008). Under this analysis, a court should give substantial weight to the irreparability of the environmental harm that a plaintiff would suffer if the injunction was not issued, but cannot disregard the economic consequences that a defendant may suffer if the injunction is issued. *Id.* Where, as here, the environmental harm that Plaintiffs would suffer if the injunction is not issued would be irreparable and substantial, but the economic consequences to the defendant would be comparatively insignificant, as the Project has not even been advertised for bid, courts find that the balance of the hardships "tip sharply in favor of [the plaintiff]." *Alliance For The Wild Rockies v. Cottrell*, 632 F.3d at 1137.

D. Plaintiffs' Requested Injunctive Relief Would Serve The Public Interest.

Finally, granting Plaintiffs' request for injunctive relief serves the public interest. The Ninth Circuit has recently "recognize[d] the well-established 'public interest in preserving nature and avoiding irreparable environmental injury.'" *Id.* at 1138 (quoting *Lands Council*, 537 F.3d at 1005). The court continued:

> This court has also recognized the public interest in careful consideration of environmental impacts before major federal projects go forward, and we have held that suspending such projects until that consideration occurs "comports with the public interest." *Id.* (quoting *S. Fork Band Council of W. Shoshone v. U.S. DOI*, 588 F.3d 718 (9th Cir. 2009).

These public interests are equally applicable in the context of NEPA claims as they are in the context of the Transportation Act and WSRA claims. Ensuring that Caltrans, when it steps into the shoes of the FHWA, actually complies with all of the federally mandated requirements to

which FHWA would be subject "invokes a public interest of the highest order: the interest in having government officials act in accordance with the law." *Seattle Audubon Soc'y v. Evans*, 771 F. Supp. 1081, 1096 (W.D. Wash. 1991), *aff'd* 952 F.2d 297 (9th Cir. 1991).

Protecting these ancient trees against injury protects the public interest. "The redwood forest in Richardson Grove State Park supports old growth stands of redwood that are an important part of California's natural heritage. This heritage has nearly disappeared as a result of logging and conversion to agriculture of the original redwood forest. Of the close to 2,000,000 acres of redwood forest in California in 1850, only about 39,000 acres are protected in state and national parks. These old growth stands cannot be replaced and special consideration should be given to any projects that would impact the remaining old growth forests." (McBride Dec., ¶ 35.)

E. No Bond Should Be Required.

There are no grounds to require that Plaintiffs post any more than a nominal bond as a condition of granting the requested relief. Federal courts in the Ninth Circuit consistently reject defendants' requests for substantial bonds in environmental cases, emphasizing that "[t]here seems to be little reason for requiring more than a nominal bond of these plaintiffs, who are acting much as private attorneys general." *See, e.g., City of Tenakee Springs v. Clough*, 915 F.2d at 1308, 1314, n. 4 (no bond required for preliminary injunction against logging); *accord, The Wilderness Society v. Tyrrel*, 701 F. Supp. 1473, 1492 (E.D. Cal. 1988); *California v. Tahoe Regional Planning Agency*, 766 F.2d 1319, 1325-1326 (9th Cir. 1985).

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that their Motion for Preliminary Injunctive Relief be granted.

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Respectfully submitted,

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