

Case No. A167278

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

NORTHCOAST ENVIRONMENTAL CENTER, REDWOOD REGION
AUDUBON SOCIETY, CITIZENS FOR A SUSTAINABLE
HUMBOLDT, and MARY GATERUD

Appellants/Petitioners,

v.

COUNTY OF HUMBOLDT, HUMBOLDT COUNTY BOARD OF
SUPERVISORS,

Respondents/Respondents

ROLLING MEADOW RANCH, LLC, ROLLING MEADOW RANCH,
INC.

Respondents/Real Parties in Interest.

APPELLANTS' OPENING BRIEF

Appeal from the Superior Court for the County of Humboldt
Honorable Barry P. Goode
Case No. CV2100518

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CERTIFICATE OF INTERESTED PARTIES

This Certificate of Interested Parties is being submitted pursuant to Rule 8.208 of the California Rules of Court on behalf of Appellants Northcoast Environmental Center, Redwood Region Audubon Society, Citizens for a Sustainable Humboldt, and Mary Gaterud. The undersigned certifies that there are no interested entities or persons that must be listed in this Certificate under Rule 8.208.

Dated: May 29, 2023

By: /s/Jennifer Rae Lovko
Jennifer Rae Lovko

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PARTIES 2

TABLE OF AUTHORITIES 5

TABLE OF ABBREVIATIONS 7

I. INTRODUCTION..... 8

II. STATEMENT OF THE CASE 9

III. STATEMENT OF APPEALABILITY 10

IV. STANDARDS OF REVIEW 10

 A. Review of Both CEQA and Planning and Zoning Challenges on Appeal is De Novo 10

 B. Prejudicial Abuse of Discretion Standard is Applied to the Lead Agency’s Decision Under CEQA Whether to Adopt a Negative Declaration..... 11

 1. Courts Must Scrupulously Enforce CEQA’s Procedural and Information Disclosure Requirements 11

 2. The Fair Argument Standard Applies to Review of the Sufficiency of the Content of a Negative Declaration 12

 C. The Abuse of Discretion Standard of Review Applies to Planning/Zoning Challenges..... 14

V. DISCUSSION 15

 A. The Project Has Not Been Properly Analyzed for Significant Environmental Impacts Related to Hydrology/Water Quality 15

 1. Respondents Failed to Proceed in a Manner Required by Law with Regards to Water Impacts. 16

 a. Respondents’ Findings Regarding Water Are Based on Conclusions That Rely on Contradictory Facts 16

 b. Respondents Did Not Address the Reasonably Foreseeable Insufficiency of Wells to Supply Project Needs 19

 2. Substantial Evidence Exists to Support a Fair Argument That the Water Demands of the Project May Have a Significant Effect on the Environment 22

 B. Conclusions Regarding Lignin Oil for Dust Suppression are Unsupported by the Record in Error of Law 28

C.	The Significant Environmental Impacts Related to Power Infrastructure Have Not Been Analyzed	30
1.	Respondents Failed to Proceed in a Manner Required by Law	31
a.	Findings Regarding Power Sources for the Project Are Based on Mere Conclusions Without Any Documentation.....	31
b.	Respondents Did Not Address Reasonably Foreseeable Future Reliance upon Generators, an Error of Law....	34
2.	Substantial Evidence Exists to Support a Fair Argument That the Power Needs of the Project May Have a Significant Effect on the Environment.	35
D.	The Project Has Not Been Properly Analyzed for Significant Environmental Impacts Related to Fire Risk and Safety nor Does It Conform to County Planning/Zoning Laws	38
1.	The Project Conflicts with Humboldt County’s General Plan and SRA Fire Safe Regulations.....	39
2.	CEQA Analysis for Fire Risk and Safety Is Based on Mere Conclusions Without Documentation	41
3.	Substantial Evidence Exists to Support a Fair Argument That the Fire Risks Associated with the Project May Have a Significant Effect on the Environment.....	43
VI.	CONCLUSION	48
	CERTIFICATE OF WORD COUNT.....	49

TABLE OF AUTHORITIES

Cases

<i>Architectural Heritage Assn. v. County of Monterey</i> (2004) 122	
Cal. App. 4th 1095	22, 24, 36
<i>Ballona Wetlands Land Trust v. City of Los Angeles</i> (2011) 201	
Cal.App.4th 455	11
<i>Bowman v. City of Berkeley</i> (2004) 122 Cal.App.4th 572.....	13, 36
<i>Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo</i> (1985) 172 Cal.App.3d 151	12
<i>Citizens for a Responsible Caltrans Decision v. Department of Transportation</i> (2020) 46 Cal.App.5th 1103	8
<i>Citizens of Goleta Valley v. Bd. of Supervisors</i> (1990) 52 Cal.3d 553.....	11
<i>Clover Valley Foundation v. City of Rocklin</i> (2011) 197	
Cal.App.4th 200	14, 39
<i>Gentry v. City of Murrieta</i> (1995) 36 Cal.App.4th 1359	11, 12
<i>Georgetown Preservation Society v. County of El Dorado</i> (2018) 30 Cal.App.5th 358	13, 36
<i>Harrington v. City of Davis</i> (2017) 16 Cal.App.5 th 420	14
<i>Herbert v. Lankershim</i> (1937) 9 Cal.2d 409	15
<i>King & Gardiner Farms, LLC v. County of Kern</i> (2020) 45	
Cal.App.5th 814	33, 43
<i>Leonoff v. Monterey County Bd. Of Supervisors</i> (1990) 222	
Cal.App.3d 1337	12
<i>Old East Davis Neighborhood Assn. v. City of Davis</i> (2021) 73	
Cal.App.5th 895	11
<i>Pocket Protectors v. City of Sacramento</i> (2004) 124 Cal.App.4th 903.....	13, 14, 47, 48
<i>Rural Landowners Assn. v. City Council of Lodi</i> (1983) 143	
Cal.App.3d 1013	12
<i>San Francisco Tomorrow v. City and County of San Francisco</i> (2014) 229 Cal.App.4 th 498	14
<i>San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus</i> (1996) 42 Cal.App.4th 608	10
<i>Sequoyah Hills Homeowners Assn. v. City of Oakland</i> (1993) 23	
Cal.App.4th 704	14
<i>Sierra Club v. California Dept. of Forestry & Fire Protection</i> (2007) 150 Cal.App.4th 370	13
<i>Sierra Club v. County of Fresno</i> (2018) 6 Cal.5th 502.....	11, 12, 13

<i>Spring Valley Lake Assn. v. City of Victorville</i> (2016) 248 Cal.App.4 th 91	14
<i>Stanislaus Audubon Society, Inc. v. County of Stanislaus</i> (1995) 33 Cal. App. 4th 144	22, 24, 36
<i>Sundstrom v. County of Mendocino</i> (1988) 202 Cal.App.3d 297	12, 13, 35
<i>Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova</i> (2007) 40 Cal.4th 412	passim
<i>Woodward Park Homeowners Ass'n v. City of Fresno</i> (2007) 150 Cal.App.4th 683	33, 43

Statutes

Code Civ. Proc., § 904.1	10
Pub. Resources Code, § 21005	12
Pub. Resources Code, § 21081.6	33, 43

Regulations

Cal. Code Regs., tit. 14 § 15144	11
Cal. Code Regs., tit. 14, § 15063	11
Cal. Code Regs., tit. 14, § 15064	13, 14, 47
Cal. Code Regs., tit. 14, § 15071	11
Cal. Code Regs., tit. 14, § 15126.4	33, 43
Cal. Code Regs., tit. 14, § 15384	13

Local Authority

Humboldt County General Plan	8, 10, 39, 40
Humboldt County’s Commercial Medical Marijuana Land Use Ordinance (“CMMLUO”)	9
Humboldt County’s State Responsibility Area (“SRA”) Fire Safe Regulations	8, 39, 40, 41

Treatises

1 California Environmental Law & Land Use Practice §21.09	22
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TABLE OF ABBREVIATIONS

CalFire	California Department of Forestry and Fire Protection
CCE	Community Choice Energy
CDFW	California Department of Fish and Wildlife
CEQA	California Environmental Quality Act
CMMLUO	Humboldt County's Commercial Medical Marijuana Land Use Ordinance
County	Humboldt County, California
DEH	Humboldt County Division of Environmental Health
EIR	Environmental Impact Report
EPA	United States Environmental Protection Agency
FRVFPD	Fruitland Ridge Volunteer Fire Protection District
Gpm	Gallons per minute
IS/MND	Initial Study/Mitigated Negative Declaration
NRM	Natural Resources Management Corporation
PG&E	Pacific Gas & Electric
PWA	Pacific Watershed Associates
RCEA	Redwood Coast Energy Authority
RIS/MND	Revised Initial Study/Mitigated Negative Declaration
SRA	State Responsibility Area

I. INTRODUCTION

Petitioners and Appellants, NORTHCOAST ENVIRONMENTAL CENTER, CITIZENS FOR A SUSTAINABLE HUMBOLDT, REDWOOD REGION AUDUBON SOCIETY and MARY GATERUD (“Appellants”), challenge the actions of the Defendants and Respondents, COUNTY OF HUMBOLDT and HUMBOLDT COUNTY BOARD OF SUPERVISORS (“Respondents”) in approving ROLLING MEADOW RANCH, LLC’s and ROLLING MEADOW RANCH, INC.’s (“ROLLING MEADOW” or “Real Parties”) application for conditional use permits that allow for an expansive commercial cannabis project (“Project”) in a remote location near the community of McCann. Appellants’ challenge is based upon Respondents’ violations of the California Environmental Quality Act (“CEQA”) and Humboldt County’s General Plan.

CEQA was created to ensure that the government and public could analyze and make informed decisions about potential, significant environmental effects of proposed actions. (See *Citizens for a Responsible Caltrans Decision v. Department of Transportation* (2020) 46 Cal.App.5th 1103, 1117.) Here, the Project has not been properly analyzed for potential, significant environmental effects related to its power infrastructure, its unstudied use of Lignin Oil for dust suppression, its reliance on on-site wells for water, and the impacts and mitigation measures intended to address wildfire risk. In relation to wildfire risks, the County’s approval of the Project also is inconsistent with the County’s State Responsibility Area (“SRA”) Fire Safe Regulations, constituting violation of Humboldt County’s General Plan. This Plan is an expression of the community’s values regarding anticipated growth and development; it serves as the basis for the County to make appropriate decisions on development approvals. (See Humboldt County General Plan, Chap. 1, §§ 1.1 and 1.2)

II. STATEMENT OF THE CASE

The Rolling Meadow Ranch Project seeks development of a large-scale cannabis cultivation and processing farm located on the main stem of the Eel River near the remote community of McCann in southeastern Humboldt County. (AR425, 428.) As approved, the overall development will cover 8.50 acres, and it will include as many as 16 greenhouses and 5 processing structures, which will be attended by up to 30 employees. (AR3, 5-6.) The Project area contains grasslands and an expansive forest at an elevation range of 200 to 1,400 feet. (AR450, 457.)

Real Parties first applied for permits under the Commercial Medical Marijuana Land Use Ordinance (“CMMLUO”) in December 2016. (AR5326-5336.) The Initial Study/Mitigated Negative Declaration (“IS/MND”) for the Project was published in July 2020, and a revised IS/MND (“RIS/MND”) was issued in November 2020. (AR47-419, 420-1339.) Numerous public comments were received for both the IIS/MND and the RIS/MND. (AR1559-1562, 1585-1663, 1665-1831, 1850-1977, 2089-2141, 2883, 3367-3373, 3566-3605, 3960-3965, 4253-4256, 4348, 4356-4357, 4374-4376, 4380-4387, 4399-4401, 4409-4411, 4413-4415, 4416, 4418, 4424, 4427, 4431-4436, 4442, 4456-4457, 4475, 4479-4480, 8884-8904.)

On January 21, 2021, the Planning Commission approved the Project through Resolution 21-11 subject to Conditions of Approval. (AR3244-3277.) Following this approval, additional public comments were accepted, and on February 2, 2021, the Planning Commission’s approval was appealed by Fran Greenleaf, John Richards, and Patty Richards who were represented by Jason Holder of the Holder Law Group. (AR2824-2829, 2893-2931, 2940-2975, 2985-3011, 4485.) The Board of Supervisors held a public hearing on March 9, 2021, to address the appeal and consider the RIS/MND. (AR9063-9221.) During the appeal, comments were heard from

Jason Holder, the Fruitland Ridge Fire Protection District, and members of the public. (*Id.*)

Through Resolution 21-26, the Board of Supervisors denied the appeal, adopted the RIS/MND, approved the Conditional Use Permits, adopted the Revised Mitigation, Monitoring, and Reporting Program, and adopted various findings of fact. (AR5-46.) The Notice of Determination was filed on March 10, 2021. (AR3.)

In April of 2021, Petitioners filed a complaint challenging the Board's decision, arguing that it violated CEQA and the County's General Plan. (JA1-60.) An amended complaint was filed in July of 2021. (JA205-258.) Following oral argument on August 12, 2022, the superior court denied the Petition, issuing a Notice of Entry of Order and Judgment on December 29, 2022. (JA1325-1352.)

III. STATEMENT OF APPEALABILITY

This appeal is from the judgment of the Humboldt County Superior Court and is authorized by the Code of Civil Procedure section 904.1, subd. (a)(1) and (a)(6).

IV. STANDARDS OF REVIEW

A. Review of Both CEQA and Planning and Zoning Challenges on Appeal is De Novo

Courts apply *de novo* review to CEQA challenges on appeal. (See *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1996) 42 Cal.App.4th 608, 618.) "The appellate court reviews the agency's action, not the trial court's decision." (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 427.) Thus, the focus is on the administrative record. (See *id.*)

Likewise, courts apply *de novo* review to planning/zoning challenges on appeal. The trial court's determination is not binding on the appellate

court. (See *Old East Davis Neighborhood Assn. v. City of Davis* (2021) 73 Cal.App.5th 895, 908.)

B. Prejudicial Abuse of Discretion Standard is Applied to the Lead Agency’s Decision Under CEQA Whether to Adopt a Negative Declaration

Prejudicial abuse of discretion occurs if the agency has *either* (1) failed to proceed in a manner required by law *or* (2) if its determination is not supported by substantial evidence. (See *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 512; *Vineyard Area Citizens for Responsible Growth*, 40 Cal.4th at 426-427; *Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455, 467-468.) Judicial review of these two types of error differs significantly.

1. Courts Must Scrupulously Enforce CEQA’s Procedural and Information Disclosure Requirements

Whether an agency has failed to proceed in a manner required by law is a question of law, and courts must determine whether the agency complied with CEQA’s procedures, “scrupulously enforce[ing] all legislatively mandated CEQA requirements.” (*Vineyard Area Citizens for Responsible Growth*, 40 Cal.4th at 435, quoting *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 563-564.)

CEQA places the burden of environmental investigation on the lead agency and not the public. (See *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1379.) As part of this burden, an agency must satisfy information disclosure requirements to (a) provide documentation of the factual basis for the findings in a negative declaration that a project will clearly not have a significant effect on the environment, and (b) include analysis of impacts from reasonably foreseeable future activities related to the proposed project. (See Cal. Code Regs., tit. 14, §§15063(c)(5), 15071(d), 15144; *Vineyard Area Citizens for Responsible Growth, Inc.*, 40

Cal.4th at 428; *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 171-172.) The failure to comply with these requirements is a prejudicial abuse of discretion, and this is so regardless of whether a different outcome would have resulted had the government complied with the law. (See Pub. Resources Code, § 21005 subd. (a); *Sierra Club*, 6 Cal.5th at 515.) This is because an agency’s omission of such necessary material “results in a subversion of the purposes of CEQA.” (*Rural Landowners Assn. v. City Council of Lodi* (1983) 143 Cal.App.3d 1013, 1023.)

In determining whether CEQA’s information disclosure requirements have been met, the reviewing court may take into consideration the whole administrative record. (See *Gentry*, 36 Cal.App.4th at 1379.) That is, “where the agency decision is based on more information than the initial study, the additional information may cure any defects in the initial study. (*Id.*, quoting *Leonoff v. Monterey County Bd. Of Supervisors* (1990) 222 Cal.App.3d 1337, 1347-1348.) However, an agency is not allowed to evade an EIR due to “its own failure to gather relevant data.” (*Id.* at 1378-137, quoting *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 297, 311.) It may not simply rely on “mere conclusions,” without the existence of some basis in the record. (*Id.* at 1378.) The agency’s discussion must contain facts and analysis and not just bare conclusions or opinions. (See *id.*; *Sierra Club*, 6 Cal.5th at 515, 522.)

2. The Fair Argument Standard Applies to Review of the Sufficiency of the Content of a Negative Declaration

Where an agency has proceeded in a manner required by law, abuse of discretion may still be found where substantial evidence demonstrates potential significant environmental effects. This is referred to as the “fair argument” standard, and it applies to an agency’s decision to adopt a

negative declaration, dispensing of an EIR. (See *Sierra Club v. California Dept. of Forestry & Fire Protection* (2007) 150 Cal.App.4th 370, 380.)

The fair argument standard does not focus on whether there is substantial evidence to support the agency's decision to forego an EIR, but instead, "the fair argument standard of review is whether, after examining the entire record, there is substantial evidence to support a fair argument that a project may have a significant effect on the environment." (*Id.* at 381.) This is a "low threshold" test, demonstrating a preference to resolve doubts in favor of an EIR. (See *id.*; see also *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 928.)

Substantial evidence "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. . . . [It includes] facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts." (Cal. Code Regs., tit. 14, § 15384.) Lay commentary also may constitute substantial evidence if based on relevant personal observations. (See *Georgetown Preservation Society v. County of El Dorado* (2018) 30 Cal.App.5th 358, 375; *Bowman v. City of Berkeley* (2004) 122 Cal.App.4th 572, 583.)

Where the government's decision to forego an EIR is the result of an agency's failure to properly study an area of possible environmental impact, a wider range of inferences may be drawn against the government from the facts in the record. (See *Sundstrom*, 202 Cal.App.3d at 311-312.)

"If there is substantial evidence, in light of the whole record before a lead agency, that a project may have a significant effect on the environment, the agency shall prepare a draft EIR." (Cal. Code Regs., tit. 14, § 15064(a), emphasis added.) Stated another way, an "agency's determination . . . not to require an EIR can be upheld only when there is no credible evidence to the contrary." (*Sierra Club*, 6 Cal.App.4th at 1318.)

To the extent that there is conflict in the evidence concerning the possibility of a significant effect, “neither the lead agency nor a court may ‘weigh’ conflicting substantial evidence to determine whether an EIR must be prepared in the first instance.” (*Pocket Protectors*, 124 Cal.App.4th at 935; see also Cal. Code Regs., tit. 14 § 15064 (f)(1).) This is because “[i]t is the function of an EIR, not a negative declaration, to resolve conflicting claims, based on substantial evidence, as to the environmental effects of a project.” (*Pocket Protectors*, 124 Cal.App.4th at 935.)

C. The Abuse of Discretion Standard of Review Applies to Planning/Zoning Challenges

Planning and zoning determinations are reviewed with greater deference than determinations made under CEQA. (See *Harrington v. City of Davis* (2017) 16 Cal.App.5th 420, 434-435; *San Francisco Tomorrow v. City and County of San Francisco* (2014) 229 Cal.App.4th 498, 515-516.) A general plan consistency determination carries a strong presumption of regularity and can only be overturned if the government abused its discretion. (See *Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 717.) The court’s function “is simply to decide whether the [government] considered the applicable policies and the extent to which the proposed project conforms with those policies, whether the city officials made appropriate findings on this issue, and whether those findings are supported by substantial evidence.” (*Id.* at 719-720.)

A project is inconsistent with a general plan “if it conflicts with a general plan policy that is fundamental, mandatory, and clear.” (*Spring Valley Lake Assn. v. City of Victorville* (2016) 248 Cal.App.4th 91, 100.) As regards substantial evidence, an abuse of discretion occurs only where, based on the evidence available to the government, “a reasonable person could not have reached the same conclusion.” (*Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, 238.) This is a question of

law; it “does not relieve an appellate court of its duty of analyzing the evidence in the light of reason and human experience and giving consideration to the motives and propensities which tend to influence or prompt human action, in an effort to solve the question as to whether the judgment is reasonably and substantially sustained by the evidence.” (*Herbert v. Lankershim* (1937) 9 Cal.2d 409, 471-472.)

V. DISCUSSION

A. The Project Has Not Been Properly Analyzed for Significant Environmental Impacts Related to Hydrology/Water Quality

“The project is located on the north side of the main stem of the Eel River in southeastern Humboldt County. There are several natural drainage courses on the Property, including Cameron & Beatty Creek as well as ephemeral drainage swales.” (AR450; see also AR614.) “Elevations within the project area range from approximately 60 to 425 m (200 to 1,400 ft).” (AR450.)

In the RIS/MND, water used for the Project’s “cultivation, processing, and employee needs” is identified as being sourced from three on-site wells. (AR433.) Rainwater collection tanks also will be installed for operational use. (AR434.) The analysis of impacts to Hydrology/Water Quality concludes that the Project will not substantially impact groundwater quality, will not substantially impact groundwater supplies, and will not substantially interfere with groundwater recharge. (AR613-622.) And further, it concludes that there is no hydrologic connectivity, stating that the “wells are not drawing from a contiguous shallow aquifer.” (AR618.) These conclusions are based on well completion reports and Hydro Connectivity Letters supplied by David Fisch, maps from BSE Consultants, Inc., and a map created by Natural Resources Management Corporation (“NRM”) (AR617-619.)

Resolution 21-26, through which the RIS/MND was adopted, mirrors the conclusions contained in the RIS/MND (AR19.) Among the Conditions of Approval, “[t]he Applicant shall install and utilize a water meter to demonstrate that there is sufficient water supply to meet the demands of the project. The water use for cultivation is limited to the use of the well and amount of water available in storage tanks and shall be provided annually prior to or during the annual inspection.” (AR29.)

As addressed below, the County failed to proceed in a manner required by law because the documentation underlying its conclusions reveals a fatal inconsistency regarding the location and elevation of the Project wells, and the County never addressed the impacts of reasonably foreseeable future activities. A fair argument also exists that the Project’s water usage may cause significant environmental impacts, presenting the need to prepare an EIR.

1. Respondents Failed to Proceed in a Manner Required by Law with Regards to Water Impacts.

An agency must satisfy information disclosure requirements to provide documentation of the factual bases for findings in a negative declaration that a project will not have a significant effect on the environment. Findings may not be conclusory and must address reasonably foreseeable future impacts of the project. Failure to comply with these requirements constitutes a prejudicial abuse of discretion. (See *supra*, section IV.B.1.)

a. Respondents’ Findings Regarding Water Are Based on Conclusions That Rely on Contradictory Facts

In concluding that the Project would not have substantial environmental impacts related to Hydrology/Water Quality, Respondents’ analysis focuses on the location and elevation of the three on-site wells.

(AR617-618, 622.) The documentation relied upon by the County, however, contains contradictory facts regarding location and elevation. As such, there is no factual basis for the County's conclusions, and its analysis is incomplete.

In February of 2018, prior to wells being drilled on the Project grounds, well driller David Fisch did a site review of four parcels (217-025-001, 217-201-001, 217-181-028, and 211-284-009) where the wells would be located. (AR783.) It was anticipated that the wells would be drilled in the Spring of 2018. (*Id.*) Mr. Fisch wrote a "Hydro Connectivity Letter" which stated the "wells will be completed in the Franciscan Sandstone; the wells will most likely be drilled into a perched bedrock with little to no hydraulic connection to any surface water or any part of a larger shallow homogeneous aquifer." (*Id.*) He charged \$95.00 for this "Hydro Connectivity Letter." (AR782.)

In actuality, only three wells were drilled, and this occurred in June of 2019. (AR784-786.) According to information provided by David Fisch, one well was drilled at Parcel 217-181-028, which was addressed in his earlier site review. (AR785, 787-789.) The other two were at sites not reviewed back in 2018, at Parcels 217-024-010 and 217-173-002. (AR784, 786, 791-793, 795-797.) In April of 2020, Mr. Fisch issued Hydro Connectivity Letters for each of these, with the language mimicking his February letter by noting that they were "completed in the Franciscan Sandstone; [and each] was drilled into perched bedrock with no hydraulic connection to any surface water or any part of a larger shallow homogeneous aquifer." (AR784-786.)

David Fisch's well completion report for the well at Parcel 217-181-028 identifies its depth as 270 feet, the water level at 148 feet, and based on a four-hour measurement conducted on June 3, 2019, its estimated yield was 13 gallons per minute (gpm). (AR787.) The report for the well at

Parcel 217-024-010 identifies its depth at 200 feet, the water level at 42 feet, and based on a four-hour measurement conducted on June 5, 2019, its estimated yield is 30 gpm. (AR795.) The report for the well at Parcel 217-173-002 identifies its depth as 240 feet, the water level at 34 feet, and based on a four-hour measurement conducted on June 14, 2018, its estimated yield is 20 gpm. (AR791.) For the estimated yield of each well, the reports note they “[m]ay not be representative of a well’s long term yield.” (AR787, 795, 791.)

The RIS/MND states that the Project will use 12,680 gallons of water per day or 4,628,200 gallons of water per year. (AR433.) “Assuming year-round flow rates as tested [by David Fisch], the project could produce a combined average of 63 gpm; 63 gpm would result in 90,720 gallons in 24hrs and a more than sufficient water supply for the projected project needs.” (*Id.*)

In addressing the Project wells, the RIS/MND relies upon David Fisch’s documents, as well as maps provided by BSE Consultants, Inc. (AR436-449, 681-605, 781-798.) However, these two sources contain contradictory information and their details do not align with the locations contained within the RIS/MND description. Specifically, while both Fisch and BSE Consultants reference wells at Parcels 217-024-010 and 217-181-028, they differ as regards the location of the third well. Fisch states the well was drilled at Parcel 217-173-002; BSE Consultants place the well at Parcel 217-026-001. (AR683.) Furthermore, the RIS/MND states that all three wells are located within legal Parcel 1, but both Fisch and BSE Consultants place two of the three wells outside of this Parcel. (AR428, 433-434, 437, 683, 784-789, 791-793, 795-797.)

Figure 61 from NRM locates the wells at Parcels 217-024-010, 217-181-028, and 217-026-001—the locations provided by BSE Consultants. (AR618.) The RIS/MND analysis does not consider the location and

elevation of any well at Parcel 217-173-002, which is where David Fisch states he drilled. And according to this figure, if the well is actually located at Parcel 217-173-002, it is much closer to Beatty Creek and the Eel River and could be at a significantly lower elevation. (*Id.*) This location was not analyzed for its environmental impact.

Because the RIS/MND and its supporting documentation contain contradictory information regarding the wells' actual locations and elevation, the RIS/MND's conclusions are unsupported and constitute a failure to satisfy CEQA's information disclosure requirements. (AR436-449, 618, 681-605, 781-798.)

b. Respondents Did Not Address the Reasonably Foreseeable Insufficiency of Wells to Supply Project Needs

As addressed *supra*, section IV.B.1, the information disclosure requirements of CEQA also require an analysis of impacts from reasonably foreseeable future activities related to the proposed project. In *Vineyard Area Citizens for Responsible Growth*, the Court addressed the analysis needed for future water supplies, noting that CEQA's information disclosure requirements are not met when a lead agency "simply ignores or assumes a solution to the problem of supplying water to a proposed land use project." (*Vineyard Area Citizens for Responsible Growth*, 40 Cal.4th at 430-431.) Additionally, "the future water supplies identified and analyzed must bear a likelihood of actually proving available; speculative sources and unrealistic allocations ('paper water') are insufficient bases for decisionmaking under CEQA." (*Id.* at 432.) CEQA requires more than identifying "several possible sources of long-term water supply" where the "likelihood of their materializing and their environmental impacts" are not analyzed. (*Id.* at 429-432.)

Here, the RIS/MND analysis does not address the impact should the wells (wherever they are actually located) be unable to provide sufficient water for the operation—an event that is completely foreseeable.

In January of 2018, Supervising Planner Steve Warner wrote a letter to the Project applicant, remarking on an early draft IS/MND. He noted that the draft IS/MND admits that “[t]he type and capacity of the ground water aquifer” was unknown but nonetheless concluded it would “not substantially deplete groundwater supplies or cause a lowering of the local ground water table level.” (AR1734.) Mr. Warner stated this conclusion was unsupported by the facts provided, and “[c]onsultation with an engineering geologist is needed.” (*Id.*)

In July of 2018, the County’s peer review consultant also remarked on deficiencies in the draft IS/MND. (AR1743-1757.) As regards the proposed wells, they inquired as to how the Project’s year-round operations would not impact the groundwater table. (AR1753.) They concurred that an engineering geologist should be consulted. (AR1757.)

Wells were drilled in 2019 by David Fisch. (AR787-798.) In June of that year, he measured flow rates based upon a four-hour testing of each well, noting that the rates he reported might not be representative of long-term yield. (AR791, 787, 795.) The California Department of Fish and Wildlife (“CDFW”) notified the County that reliance on Mr. Fisch was improper as he was only a well driller, lacking any professional certifications or licenses necessary for examining issues related to “geology and related groundwater interpretations.” (AR1523, 1549-1550.)

Nonetheless, the County’s analysis of the wells’ capacity relied *solely* on Mr. Fisch’s June flow rate tests. (AR433-434.) To be more exact, in examining future water supply for the Project, the RIS/MND specifically states that it is “[a]ssuming year-round flow rates as tested” by Mr. Fisch. (AR433.) This is the exact type of speculative analysis that the Court

forbade in *Vineyard Area Citizens for Responsible Growth*. Respondents cannot simply assume a solution based upon speculative sources. (*Vineyard Area Citizens for Responsible Growth*, 40 Cal.4th at 430-432.)

Perhaps realizing that their analysis was deficient, staff reports were issued in 2020 and 2021 which said the Conditions of Approval associated with the RIS/MND “require the applicant to meter water use to demonstrate that the well meets the water demand and provide evidence of metering at the time of annual inspection. Should the wells not provide sufficient water for the operation, the applicant is required to modify this permit and propose a different non-diversionary source of water, such as rain catchment and/or reduce the size of the cultivation area to be consistent with water availability. As conditioned, the project therefore conforms to the performance standards for water.” (AR1343, 1455.)

First, this language did not actually make its way into the adopted Conditions of Approval. When the RIS/MND was actually adopted, the Conditions did require metering of water use, but the Conditions do not state that should there be insufficient water, the Applicant would need to modify the permit and propose a different non-diversionary source of water. Nor do the Conditions state the threshold upon which the County might consider the wells to be failing in their supply of sufficient water for the operation.

Second, regardless of what was actually adopted, CEQA does not allow Respondents to simply defer the issue for future analysis. (*Vineyard Area Citizens for Responsible Growth*, 40 Cal.4th at 431.) Respondents cannot evade an EIR by stating that should the wells’ capacity be insufficient, non-diversionary sources of water will need to be found in the future. CEQA requires far more, and at a minimum, Respondents must identify the likelihood of other sources existing and analyze these sources’ environmental effects. (*Id.* at 429-432.)

In error of law, the County did not do an analysis of impacts from reasonably foreseeable future activities related to the proposed project, and thus failed to satisfy CEQA's information disclosure requirements.

2. Substantial Evidence Exists to Support a Fair Argument That the Water Demands of the Project May Have a Significant Effect on the Environment

As addressed *supra*, section IV.B.2, the fair argument standard of review focuses on whether, after examining the entire record, there is substantial evidence to support a fair argument that a project may have a significant effect on the environment. Both lay and expert opinion may establish substantial evidence. In assessing whether substantial evidence exists, where the government's decision to forego an EIR is the result of an agency's failure to properly study an area of possible environmental impact, a wider range of inferences may be drawn from the facts in the record.

Further, an agency's "own staff may unintentionally provide substantial evidence that a project may have a significant environmental impact, undermining the decision to prepare a Negative Declaration. For example, a Negative Declaration may be overturned when the administrative record includes a staff-prepared preliminary Initial Study indicating the possibility of significant impact." (Herson and Bass, *EIR Threshold Decisions and Negative Declarations* (2023); see also 1 California Environmental Law & Land Use Practice §21.09, referencing *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal. App. 4th 144, 154 and *Architectural Heritage Assn. v. County of Monterey* (2004) 122 Cal. App. 4th 1095, 1115.)

Here, a review of the administrative record demonstrates a fair argument exists that the Project may have a significant environmental effect on hydrology and/or water quality.

All of the County's conclusions regarding hydrologic connection and the capability of the Project wells to supply water for its operation are based upon documentation provided by the well driller, David Fisch, and maps provided by BSE Consultants. The County never consulted a qualified expert, such as engineering geologist, nor conducted a technical analysis addressing hydrology/water quality.

As addressed *supra*, section V.A.1.b., Staff, CDFW, and the County's peer review consultant all indicated the possibility of significant impacts associated with reliance on the Project's three wells. They also stated the County's reliance on David Fisch was insufficient and a licensed engineer should be obtained. (AR1343, 1523-1524, 1734, 1753, 1757.)

CDFW was clear in this regard, stating:

[a]lthough Mr. Fisch is a Licensed Water Well Contractor, it is not apparent that he is licensed to provide geologic interpretation and/or related evaluations of groundwater/surface water connectivity. The scientific and engineering community universally accepts the connectivity of surface water and groundwater systems and that groundwater discharge to streams constitutes a sizeable and important fraction of streamflow (Fetter 1988, Winter et al. 1998, Department of Water Resources 2003, Barlow and Leake 2012, Province of British Columbia 2016).

In light of the Project's geologic setting, mapped springs, wetlands, and other surface water features (IS/MND Figure 61 on page 197), and based on the potential total volume of groundwater extraction from the three new wells, CDFW recommends the applicant retain a qualified professional (e.g. geologist or engineer with hydrogeology background) licensed to practice in California to conduct a preliminary evaluation of the Project's potential impacts to local surface water flows, and to provide recommendations that ensure Project activities will not substantially affect aquatic resources.

(AR1549-1550.)

The County ignored all of these comments. This alone is sufficient to find a fair argument that there may be a significant environment impact for Hydrology/Water Quality. (*Stanislaus Audubon Society, Inc.*, 33 Cal.

App. 4th at 154; *Architectural Heritage Assn.*, 122 Cal. App. 4th at 1095.) Even more evidence exists though.

When discussing the ability of the wells to meet the needs of the Project, Andrew Machata, President of Rolling Meadow Ranch, Inc. stated that “[t]here is a huge abundance of water on the property. The head waters of Beatty Creek and Camron [sic] are on the property that produce large quantity of water year-round.” (AR3940.) This statement indicates Mr. Machata’s belief that the wells can draw from Beatty Creek and Cameron Creek—that they are hydrologically connected.

Appellants also retained Pacific Watershed Associates (“PWA”) to address impacts on hydrology/water quality. A letter from this company, which was written by a staff geologist and certified engineering geologist, addressed the inadequacy of the RIS/MND in addressing potentially significant impacts. (AR1710-1714.) Among PWA’s observations was the fact that the RIS/MND did not consider the well at Parcel 217-173-002, which was identified by David Fisch, and which “is 140 ft from a tributary stream to Beatty Creek.” (AR1712.) This location “may have implications as to the degree of hydrologic connectivity of well-sourced groundwater with surface waters.” (*Id.*) After addressing the location of all three wells, PWA notes:

Significant pumping from groundwater wells could have potential adverse impacts to the watershed from reduced groundwater storage and/or a lowering of the local water table. When groundwater levels are reduced, the location where groundwater intersects with the land surface can change (i.e., become lower), causing local springs and seeps to dry up. Geologic investigations to quantify the hydraulic properties of aquifers within the project area have not been conducted. Due to the proximity of the Wells #1-3 to surface waters, the cone of depression from continuous well water withdrawal may intersect and affect nearby stream and wetland resources. Additional hydrogeologic investigations should be conducted and reported to better identify and describe potentially significant impacts to these wetlands and watercourses. Alternatively, if the wells prove to be

disconnected from all surface waters, such reported investigations should transparently substantiate their lack of hydrologic connection. Additionally, pumping and storing the majority of the anticipated annual water use from the wells during the times of greatest recharge (the wet season November- March) will best protect water quality objectives and beneficial uses by minimizing the effect of groundwater extraction on groundwater levels.

(Id.)

PWA also discussed the productivity of the wells, clarifying that the Water Production Standards and Test Procedures of the Humboldt County Division of Environmental Health (“DEH”) state that “all water production tests must be conducted during the dry season and be representative of the lowest annual water production anticipated from the source.” *(Id.)* The dry season is from August 1 through September 30. The well production tests conducted by David Fisch occurred in mid-June, at the end of the wet season and outside of the dry season, and thus did not follow DEH’s protocols. *(Id.)* Additionally, all of the wells are in the rocks of the Yager terrane, which has implications regarding their sustained yield:

The subunit of Yager terrane in the project area is described by McLaughlin et al. as, “Sheared and highly folded mudstone- Includes minor rhythmically interbedded sandstone, locally with lenses of conglomerate.” Mudstones are low-permeability sedimentary rocks. Brittle deformation of mudstones results in fracturing and jointing which generally increases the permeability and aqueous transport properties of the rock strata. Conversely, ductile deformation of mudstones can result in compactional strain hardening, reducing the permeability of the rock strata. The well tests that were completed by Fisch Drilling at the time of well installation were 4-hour airlift test to determine well productivity. It is possible that short-term testing of wells in sheared mudstone rocks of the Yager terrane is misrepresentative of sustained well yield, as groundwater stored in fractures may be more rapidly drained over a short period of time and sustained yield of the well may actually be dependent on the pore structures of the rock matrix. In this circumstance, the sustained yield of the wells may be much lower than is recognized by the applicant and is assumed in the ISEC. We believe more prolonged well pump testing is needed to provide more

adequate and reliable evidence demonstrating that the property wells will indefinitely supply 4,625,200 gallons of water to the Project annually.

(AR1712-1713.)

The County discounted PWA's remarks, in part noting that they were not "hydrogeologists." (AR11.) It simply makes no sense to state that David Fisch, a well driller, has sufficient expertise to address hydrologic connectivity, but Pacific *Watershed* Associates' staff geologist and certified engineering geologist do not. And remember, the County's own staff and peer review consultant had earlier requested review by an engineering geologist. (AR1734, 1757.)

Moreover, PWA's letter contains ample foundation regarding the site location and its potentially significant impact on the environment—something that David Fisch did not address. The opinions within PWA's letter also are in alignment with documents relied upon by the County.

In addition to remarks from Staff, CDFW, the County's peer review consultant, Andrew Machata, and PWA, information supporting a fair argument can be found from documents that the County referenced in the RIS/MND. (AR662-AR669.). One such document was CDFW's 2018 "Review of The Potential Impacts of Cannabis Cultivation on Fish and Wildlife Resources. Habitat Conservation Planning Branch, Sacramento, CA." (AR662.) That report recognizes that "water diversion can be responsible for dewatering streams completely" and refers to an article that "found that estimated water demand for cannabis cultivated along the Eel River was ten times higher than could be sustained by the watershed." (AR7762.)

The County also referenced "California Department of Water Resources. 2003. California Groundwater Bulletin 118. Accessed November 2018 from: <https://water.ca.gov>," which recognizes that "in

reality groundwater and surface water are inextricably linked to the hydrologic cycle. As an example, groundwater may be recharged by spring runoff in streams, but later in the year the base flow of a stream may be provided by groundwater. So, although the land surface is a convenient division for categorizing water resources, it is a somewhat arbitrary one. It is essential that water managers recognize and account for the relationship between groundwater and surface water in their planning and operations. (AR663, 6985.)

And further, the County referenced “United States Environmental Protection Agency (EPA). 2005. Middle Main Eel River and Tributaries Total Maximum Daily Load. Accessed December 2018 from: <https://www.waterboards.ca.gov>,” which states “[t]he area’s geology is underlain by the Franciscan terrain that dominates most of California’s North Coast. Naturally unstable and prone to landslides, this type of geology is sensitive to human disturbance. All but the very downstream portion of the watershed is dry and warm in the summer, away from the influence of coastal fog. Almost all of the estimated 40 inches of annual rainfall occurs between November and April. Many smaller tributaries dry up in late summer.” (AR669.)

CDFW also referenced documents that support a fair argument. (AR1843-1846.) One document, “Barlow, P.M., and Leake, S.A. (2012). Streamflow depletion by wells—Understanding and managing the effects of groundwater pumping on streamflow: U.S. Geological Survey Circular 1376,” notes that a common misconception is that “[p]umping groundwater exclusively below a confining layer will eliminate the possibility of depletion of surface water connected to the overlying groundwater system.” (AR1843, 7441.)

In relying upon the self-serving well completion reports and “Hydro Connectivity” letters of David Fisch, the County ignored all of the

complexities surrounding the interplay between groundwater and surface water. County staff, CDFW, the County's peer review consultant, and PWA tried to bring this fact to light, but they were all ignored.

The public also commented on potentially significant impacts, relying upon their personal experience with the Eel River and associated waterways, as well as appropriate literature. (See e.g., AR1651-1656, 1809-1810, 1977, 2941-2943, 2953, 2973-2974, 2949, 9063.)

The County was repeatedly questioned about its reliance on information provided by the well driller, David Fisch. He clearly does not have the qualifications necessary to make a determination regarding hydrologic connectivity. His well completion reports also have been established to be insufficient for purposes of determining potentially significant environmental impacts. On the other hand, multiple sources have established that the location of the wells and the Project's high water demand indicate potentially significant environmental impacts.

B. Conclusions Regarding Lignin Oil for Dust Suppression are Unsupported by the Record in Error of Law

Prior to the IS/MND being released, the Project applicant proposed the use of Lignin Oil on roads for the purpose of dust suppression. (AR3938.) In evaluating the draft version of the IS/MND in 2019, the County remarked that further information was needed regarding the chemical makeup of the oil, the quantity to be used, and the frequency of its use. Such information was necessary to determine potential impacts on Biological Resources and Hydrology/Water Quality. (AR3947.) The Applicant's consultant replied to this by stating that the use of Lignin Oil was being eliminated from the Project. (AR3947, 3952.) Accordingly, both the IS/MND and the RIS/MND made no mention of Lignin Oil, and consequently, no analysis was conducted on the potentially significant impact of Lignin Oil on Biological Resources and Hydrology/Water

Quality. (AR478-576, 613-622.) Nor was Lignin Oil addressed as relates to Hazards and Hazardous Materials or Wildfires. (AR608-612, 654-658.)

On January 21, 2021, the Planning Commission adopted the RIS/MND through Resolution 21-11 subject to Conditions of Approval. (AR3244-3277.) The Staff Report prepared prior to this adoption did not mention Lignin Oil; neither the Resolution nor Conditions of Approval mentioned Lignin Oil. (AR1978-2088, AR3244-3277.)

Neighbors opposed to the Project, as proposed, filed their administrative appeal with the Humboldt Board of Supervisors on February 2, 2021. (AR3143.) In anticipation of the March 9, 2021, public hearing on this appeal, and to address public comments concerning dust emissions, the Project Applicant re-introduced the idea of using Lignin Oil to control dust. (AR2884.) And subsequently, a staff report for the Board of Supervisors' March 9, 2021, hearing states "[t]he applicant will periodically treat the dirt portion of McCann Road in front of residences with Lignin Oil or similar product to control dust." (AR2198.) This new measure requiring the use of Lignin Oil is summarily stated, with one sentence, to not cause any new environmental effects. (*Id.*)

At the March 9 public hearing, Appellants and the public contested this new dust mitigation measure, voicing concern about the environmental impacts of Lignin Oil and noting that this same concern *had been raised by the County* back in 2019. (AR9106-9107, 9126.) Despite this, the Board of Supervisors adopted the RIS/MND, adding as a Condition of Approval that road surfaces shall be treated "with Lignin Oil or similar product to control dust." (AR30.) No specific findings or analysis regarding the impacts of the use of Lignin Oil were made through this adoption. (AR5-46.)

The County's actions are a textbook example of basing approval on a "mere conclusion" without any documentation supporting its opinion that Lignin Oil poses no potentially significant impact. By so doing, the County

subverted CEQA's intention to ensure that both the public and decision makers have sufficient data upon which to analyze environmental effects and as a result, failed to proceed in the manner required by law. (See *supra*, section IV.B.1.)

C. The Significant Environmental Impacts Related to Power Infrastructure Have Not Been Analyzed

The Project site currently has no power infrastructure for its operation. The RIS/MND project description provides:

The electricity needed for this project will be supplied by PG&E. There is PG&E infrastructure currently located on the south side of Rolling Meadow Ranch property near the Eel River. This power is strung above ground on poles. Additional infrastructure will be run from this existing section to the proposed greenhouses and processing buildings North and then East. All new electrical lines will be buried under existing Ranch Roads and within the existing road prism. Power will be supplied by the local utility Redwood Coast Energy Authority (RCEA) Community Choice Energy (CCE), Repower Plus Program. This program will allow the proposed project to purchase on-grid power with 100% renewable energy resources.

(AR429.) In addition, the description notes that the Project will have four emergency standby generators, each connected to a 500-gallon propane tank. (AR428-429.) In its analysis, the County concluded that this power infrastructure would not cause any potentially significant environmental impacts. (AR474-475, 519-521, 588-590, 601-607, 625-631, 650.)

Resolution 21-26, through which the RIS/MND was adopted, describes the Project as having power provided by PG&E. (AR6.) The Conditions of Approval state that the Applicant must record a development plan approved by the Planning Department that "the electric service will only be used for cannabis cultivation areas and associated structures that support the cultivation operation." (AR28.) The Project also will have on-site generators, which the Conditions identify as being "used on an

emergency-only basis for cannabis drying, curing, and processing.” (AR32.) Neither the Resolution nor the adopted Conditions of Approval contain any further mention of PG&E or the Project’s usage of generators. Neither the Resolution nor the adopted Conditions of Approval refer to RCEA.

As addressed below, the County never provided documentation of facts that are necessary for properly evaluating the impact of the power infrastructure contained within the RIS/MND project description, and the County also failed to address related future activities that are reasonably foreseeable. Additionally, substantial evidence exists to support a fair argument that the power needs of the Project may have a significant effect on the environment.

1. Respondents Failed to Proceed in a Manner Required by Law

As addressed *supra*, section IV.B.1, an agency must satisfy information disclosure requirements to provide documentation of the factual basis for the findings in a negative declaration that a project will not have a significant effect on the environment. Failure to do so constitutes a prejudicial abuse of discretion warranting the lead agency to prepare an EIR.

a. Findings Regarding Power Sources for the Project Are Based on Mere Conclusions Without Any Documentation

For the power infrastructure identified in the Project description of the RIS/MND, the findings for the environmental checklist conclude no potentially significant impacts related to air quality, biological resources, energy, greenhouse emissions, and utilities and service systems based on the following *assumptions*: (a) that PG&E can provide the necessary infrastructure for the Project, (b) that RCEA can provide 100% renewable

energy resources, and (c) that generator usage will be limited to exercise cycles and infrequent operation of water pumps during fire emergencies. (AR474-475, 519-521, 588-590, 601-607, 625-631, 650.) No documentation supports these assumptions.

Nothing in the administrative record establishes that PG&E can or will install underground lines as presented in the Project description. Nor does the record contain any evidence that PG&E can or will meet the energy requirements of such a large cannabis cultivation farm. The County concedes as much. During the Board of Supervisors Meeting addressing appeal of Resolution 21-11, John Ford, Director of the Planning and Building Department, acknowledged that a “will serve” letter from PG&E should be obtained, stating that “the site would not be able to operate until PG&E is on-site.” (AR9178.) However, in the end, no such letter was obtained, and the adopted RIS/MND’s Conditions of Approval contain no requirement that such be produced prior to site operation. Furthermore, nothing in the Conditions of Approval or Monitoring Program require the installation of PG&E lines prior to the Project becoming operational.

In the RIS/MND, the County also recognized that the fire risk associated with electric power line installation was potentially significant. To address this, it was stated that “PG&E will conduct a site-specific review of the project and create a site specific construction plan. The project will comply with PG&E’s site-specific safety and installation requirements and thereby reduce the potential of the project to exacerbate fire risk and associated environmental impacts to less than significant.” (AR654, 658.) But no such site-specific review occurred nor was it made part of the Conditions of Approval or Monitoring Program.

Within the RIS/MND, mention is made of the project operator having a “letter from RCEA that confirms availability for the project’s power demand[,]” but it is unclear if this letter exists. It was never provided

to the public and is not in the administrative record. The County was made aware of this fact prior to adoption of the RIS/MND, but it did not cure. (AR590, 1869.) Furthermore, nothing in the Conditions of Approval or Monitoring Program require that RCEA provide 100% renewable energy for the Project's operation.

For purposes of its analysis, the RIS/MND states that each of the four generators to be installed will be activated for five-minute exercise cycles every two weeks to "maintain readiness." (AR432-433.) The RIS/MND also states that "[t]he only generators that will be utilized by the project will be standby in case of a power failure during a fire. Generators will only be used to run water pumps for fire suppression. Generators will not be used to power grow lights." (AR432.) But, these limiting conditions were not incorporated into the Conditions of Approval nor addressed in any monitoring program; therefore, they are not enforceable conditions or adequate mitigation measures. (Pub. Resources Code, § 21081.6, subd. (b) ("A public agency shall provide that measures to mitigate or avoid significant effects on the environment are fully enforceable through permit conditions, agreements, or other measures."); Cal. Code Regs., tit. 14, § 15126.4, subd. (a)(2); *Woodward Park Homeowners Ass'n v. City of Fresno* (2007) 150 Cal.4th 683, 730 ("The project proponent's agreement to a mitigation measure, by itself, is insufficient; the mitigation measure must be adopted in a way that makes it a legally enforceable requirement."); *King & Gardiner Farms, LLC v. County of Kern* (2020) 45 Cal.App.5th 814, 852-853; *Vineyard Area Citizens for Responsible Growth, Inc.*, 40 Cal.4th at 444.)

Instead, the adopted Conditions of Approval contain a provision that the use of generators is on "an emergency-only basis for cannabis drying, curing, and processing." (AR32.) The use of generators for drying, curing, and processing was never analyzed in the RIS/MND. What constitutes an

emergency is not defined, so it is unclear under what circumstances or frequency these activities would be generator-powered. An emergency could be the mere unavailability of PG&E power, for instance.

The County has concluded, based on assumptions unsupported by any evidence, that there are no potentially significant impacts related to air quality, biological resources, energy, greenhouse emissions, and utilities and service systems stemming from the Project's power infrastructure. (AR474-475, 519-521, 588-590, 601-607, 625-631, 650.) In scrupulously enforcing CEQA's procedural and information disclosure requirements, it is clear that such unsupported conclusions constitute a prejudicial abuse of discretion.

b. Respondents Did Not Address Reasonably Foreseeable Future Reliance upon Generators, an Error of Law

As addressed *supra*, section IV.B.1, the information disclosure requirements of CEQA also require an analysis of impacts from reasonably foreseeable future activities related to the proposed project. For this case, it is reasonably foreseeable that PG&E may not provide the envisioned infrastructure, that PG&E may not provide it before the Project is operational, that PG&E may not have the capacity to meet the Project's needs, and that RCEA may not be able to provide 100% renewable energy sources. It also is reasonably foreseeable that generators will be used for purposes other than emergency fire suppression. The County was thus required to address the environmental impacts for such circumstances—and it did not.

The harm here from a CEQA standpoint is that the County did not analyze the impacts of the Project as approved. They analyzed the impacts of something else—an idealized, hypothetical project with appropriate PG&E power supplied from 100% renewable resources that limited

generator reliance to emergency fire suppression. In relying upon unsubstantiated assumptions that were not a condition of operation, neither the public nor involved decision makers could properly assess potentially significant impacts of the actual project that was approved.

Respondents' utter failure to meet the information disclosure requirements of CEQA is a prejudicial abuse of discretion, and the County must therefore be required to prepare an EIR for the Project.

2. Substantial Evidence Exists to Support a Fair Argument That the Power Needs of the Project May Have a Significant Effect on the Environment.

As addressed *supra*, section IV.B.2, the fair argument standard of review focuses on whether, after examining the entire record, there is substantial evidence to support a fair argument that a project may have a significant effect on the environment. To the extent that this Court finds Respondents proceeded in a manner required by law—and it should not—the record in this case contains substantial evidence regarding the fact that PG&E will either not be able to provide power to the Project and/or will not be able to meet the needs of the Project's operation, thereby necessitating generator usage above and beyond that analyzed in the RIS/MND's environmental checklist. And certainly, Respondent's failure to properly study the environmental impacts related to the Project's power infrastructure dictates that a wide range of inferences be drawn from this evidence. (*Sundstrom*, 202 Cal.App.3d at 311-312.)

As early as January 2018, Supervising Planner Steve Werner wrote to the Project applicant that “[a]lthough power utilities are proposed to serve the cultivation areas for wells and lighting, it can be expected that power will be interrupted during winter events. . . . It can be anticipated that this area would not be a priority for PG&E to restore power during winter events.” (AR1730-1736.) That same year, the County's peer review

consultant wrote to the Planning and Building Department, asking for information on “the scenario in which PGE does not provide power, and the project is reliant on generators during winter events and the reliance on generators could potentially end up being a longer term impacts [sic] as opposed to temporary.” (AR 1754.)

In applying the fair argument standard, a lead agency’s own staff can provide substantial evidence, undermining the decision to prepare a negative declaration—even when decision makers ultimately disagree with these opinions. (*Stanislaus Audubon Society, Inc.*, 33 Cal.App.4th at 154; *Architectural Heritage Assn.*, 122 Cal.App.4th at 1115.) In 2020, the County’s peer review consultant reviewed the IS/MND, pointing out that written confirmation was needed from PG&E “describing how they plan to provide power” to the Project and from RCEA as to how “they will provide the renewable energy source.” (AR1752.) During the Board of Supervisors Meeting addressing appeal of Resolution 21-11 subject to Conditions of Approval, John Ford, Director of the Planning and Building Department, acknowledged that a “will serve” letter from PG&E should be obtained, stating that “the site would not be able to operate until PG&E is on-site.” (AR9178.) However, in the end, no such letter was obtained, and the adopted RIS/MND’s Conditions of Approval contain no requirement that such be produced prior to site operation. Instead, a condition was added referencing generator use for cannabis drying, curing, and processing. (AR32.)

Citizens also sent comments to the County upon release of the RIS/MND in December of 2020. To the extent that their comments are based on relevant personal observations, they provide substantial evidence. (*Georgetown Preservation Society*, 30 Cal.App.5th at 375; *Bowman*, 122 Cal.App.4th at 583.)

For example, Mary Gaterud wrote a letter to the County based upon her personal experiences with PG&E as a “full-time resident and property owner in McCann for twenty years.” Among her comments:

The cultivation operation planned for Rolling Meadow Ranch is fully dependent on PG&E, and expanded power line infrastructure into remote wilderness. . . . I have experienced winter power outages for up to 13 days solid. McCann is at the end of the line regarding the power grid; when a storm creates problems across a wide area, this neighborhood is frequently the last to get serviced. With that established history, as well as the new normal of PG&E Power Safety Shutdowns, any grow operation dependent year round on PG&E necessitates backup power from large generators. This poses its own set of problems around fire safety, as well as the ecological impacts of volatile, non-renewable fuel use, transportation, storage, and emissions.

(AR1621.)

Marion Collamer with Lost Creek Farms LLC, a cannabis farm, wrote that she had been told directly by PG&E that it “does not have enough power for current farm owners to obtain industrial power drops in the County.” (AR1645.) Similarly, Robie Tenorio commented that “[a]ccording to PG&E . . . they are NOT able at this time to meet the current demand of recent cannabis farms because their infrastructure was not designed for this level of industry. . . . If PG&E power is not available, will it be considered ‘an emergency’ and generators will be allowed? This deserves a serious investigation.” (AR2943.)

The administrative record reflects the reality that no evidence exists that PG&E can provide electricity as imagined in the RIS/MND. The evidence actually shows just the opposite—that PG&E cannot provide the requisite power infrastructure. As such, there is a fair argument, based upon substantial evidence in the record, that generator reliance will be far greater than addressed in the County’s analysis of impacts to air quality, biological resources, energy, greenhouse emissions, and utilities and service systems.

An EIR evaluating these foreseeable impacts was required and should have been prepared.

D. The Project Has Not Been Properly Analyzed for Significant Environmental Impacts Related to Fire Risk and Safety nor Does It Conform to County Planning/Zoning Laws

As described in the RIS/MND, the Project consists of a large-scale commercial cannabis operation located in an isolated area that has been designated by the California Department of Forestry and Fire Protection (“CalFire”) as a “Very High Fire Hazard Severity” area. (AR428-435, 609, 654.) There are “multiple factors that could increase wildfire impact on the project and the project employees[, and t]he area is an area with established fire risk.” (AR657.) The primary access route for the Project is the rudimentary McCann Road. (AR21, 429.)

Despite being in a “Very High Fire Hazard Severity” area, the County concludes that there are less than significant environmental impacts because the Project, as designed, will not contribute to the risk of wildfire or spread of wildfire. (AR656-658.) The items in the Project design that are referred to include road improvements, utilization of rainwater storage, and installation of emergency generators for fire water pumps. (*Id.*) In addition, although the Project requires an expansion of electric power, the RIS/MND concludes there will be no significant impact regarding wildfires because the power lines are to be placed under the internal roadbeds. (AR658.) Although the County has not received any “will serve” letter from PG&E, the RIS/MND states that “PG&E will conduct a site-specific review of the project and create a site specific construction plan.” (*Id.*) This review is not incorporated into the Project’s Conditions of Approval.

As discussed below, the County has violated Humboldt County’s General Plan and SRA Fire Safe Regulations, as well as CEQA, by failing

to properly analyze the fire and safety risks associated with the Project and by failing to reduce such risks through enforceable mandatory conditions.

1. The Project Conflicts with Humboldt County's General Plan and SRA Fire Safe Regulations

As addressed *supra*, section IV.C, in examining compliance with state and local planning/zoning laws, the reviewing court looks at whether government officials made appropriate findings that are supported by substantial evidence. As regards substantial evidence, an abuse of discretion occurs only where, based on the evidence available to the government, “a reasonable person could not have reached the same conclusion.” (*Clover Valley Foundation*, 197 Cal.App.4th at 238.) The focus is not on whether a significant environmental impact exists, but rather, the focus is on the County's adherence to the laws.

In this case, Humboldt County's General Plan and SRA Fire Safe Regulations are implicated by the Project's roads, which are relevant to providing access to the Project for fire and rescue equipment and egress for civilian evacuation in case of a wildfire. As explained in CalFire's comments, remote developments within remote SRA lands may hinder rapid response, thereby increasing the hazard of wildfire spread. (AR3790.)

The County's adopted SRA Fire Safe Regulations apply because, as the RIS/MND admits, the Project is located within an SRA with fire protection services provided by CalFire. (AR612.) These County regulations were established to provide minimum fire protection standards. (JA980, 1306-07.) The County, however, adopted the Project in a manner that is inconsistent with the SRA Fire Safe Regulations, resulting in violation of Humboldt County's General Plan Policies S-P19 and S-S9, both of which state that development “shall” conform to the County's SRA Fire Safe Regulations. (JA938-39, 1306-07.) The County's failure to properly coordinate with Calfire on the Project constitutes a violation of

General Plan Implementation Measure S-P17 and S-IM5, which provide for collaboration with local fire agencies and Calfire. (JA937, 940, 1306-07.)

Chapter 2 of the County's SRA Fire Safe Regulations governs emergency access for "emergency wildland fire equipment and civilian evacuation." (JA988, 1306-07.) In addressing road width, the Regulations state that all roads must meet "a minimum Road Category 4 road standard of two ten (10) foot traffic lanes, not including shoulders, capable of providing for two-way traffic flow to support emergency vehicle and civilian egress." (JA989, 1306-07.) Where roads are in mountainous terrain and/or where geologic or other natural features make infeasible full development of two (10) foot wide traffic lanes, a traffic lane meeting the standard for Road Category 3 (16 feet) shall be considered as meeting the requirements of this section." (JA990, 1306-07.) In addressing roadway surface, the Regulations provide that Road Category 4 standards must be met, with all roadways designed to "support the imposed load of fire apparatus weighing at least 75,000 pounds." (JA991, 1306-07.)

In general, exceptions to the Regulations may be made; however, the County must coordinate with Calfire before any exception is adopted. (JA981, 983-84, 989-91, 1306-07.) The County did not do this. There was no coordination with Calfire. Further, any exception must provide for "the same overall practical effect as these regulations." (JA983, 1306-07.) Importantly, an equivalency determination must find that the road "can accommodate the demands of the road and emergency response vehicles." (AR9079.)

The main access road for the Project is McCann Road.¹ The RIS/MND relies upon a 2020 Northpoint Consulting report to conclude that

¹ Currently, McMann Road will only be used during the dry season because it has a low water bridge over the Eel River which is inaccessible to traffic during the winter. (AR429, AR430.) This bridge will be replaced with a "year-round bridge sometime in the next decade." (AR21.)

McCann Road will meet Category 4 equivalency. (AR430.) That report actually states that McCann Road meets a Category 2 road standard—although does not define what a Category 2 road is nor how McCann Road meets even that standard. (AR705.) On average, it has a width of 12 feet. (*Id.*) At one point, a land slide has resulted in a narrowing of the road to 11 feet in width. (AR706.) The land slide occurred back in 2017. (AR1621.) Photographs from the report show the road to be one lane, comprised of dirt and gravel and without any shoulder (AR711-720.) Despite this, at the end of the report, the authors conclude that the road is “functionally equivalent to a Category 4 Road, with the recommended improvements included in this report and the extremely low traffic volumes.” (*Id.*) Ultimately, the only recommended improvement was to remove or modify a gate and cattle guard. (*Id.*)

The County’s reliance upon the Northpoint Consulting report is misplaced. No reasonable person could conclude from it that the access road, McCann Road, is functionally equivalent to a Category 4 road. And, Calfire was never contacted to evaluate such an exception in direct violation of SRA Fire Safe Regulations, sections 3111-4, 3111-9, and 3112-3.

2. CEQA Analysis for Fire Risk and Safety Is Based on Mere Conclusions Without Documentation

An agency must satisfy information disclosure requirements to provide documentation of the factual bases for findings in a negative declaration that a project will not have a significant effect on the environment. Findings may not be conclusory and must address reasonably foreseeable future impacts of the project. Here, the County failed to satisfy CEQA’s information disclosure requirements required. Failure to do so constitutes a prejudicial abuse of discretion warranting the lead agency to perform an EIR. (See *supra*, section IV.B.1.)

The County's conclusion that there are no potentially significant environmental impacts based upon wildfire conditions is not supported by documentation. Not only is there no documentation establishing that McCann Road can handle emergency wildland fire equipment and civilian evacuation (see *supra*, section V.D.1), but also there is a lack of substantiation regarding the ability of rainwater storage to address wildfire emergencies.

The RIS/MND states that the Project will have hard-sided rainwater catchment tanks capable of holding 320,000 gallons. (AR433-434.) These tanks "will be generally used for summertime landscaping and lawn maintenance around the facilities as well as fire protection and supplemental water for dust mitigation and irrigation." (AR434.) This fact is relied upon in concluding that there is less than a significant impact associated with wildfires. (AR656.) The adopted Conditions of Approval clarify that "[a] minimum of 50% of the stored water shall be reserved for fire suppression purposes." (AR26.) However, there is no documentation supporting the conclusion that 50% of the stored water will be available during the entirety of the fire season or that 50% of the stored water would be sufficient to address a wildfire, thereby mitigating impact. The Conditions of Approval admit as much, stating that "[p]rior to issuance of any building permits the applicant shall submit a plan with calculations showing how much rainwater can be captured and incorporate a corresponding increase in the amount of hard tank water storage." (AR30.)

The County's conclusions also relied on PG&E being able to run new electric lines underneath the existing road structure. As addressed *supra*, section V.C.1, there is no documentation supporting this. In its discussion, the RIS/MND addresses this by stating that "PG&E will conduct a site-specific review of the project and create a site specific construction plan." (AR658.) This review is not part of the Project's

Conditions of Approval, however. As such, even if the review were adequate to address the Project’s potential to increase wildfire risk (and it is not), it was not made enforceable through mandatory conditions.²

3. Substantial Evidence Exists to Support a Fair Argument That the Fire Risks Associated with the Project May Have a Significant Effect on the Environment

As addressed *supra*, section IV.B.2, the fair argument standard of review focuses on whether, after examining the entire record, there is substantial evidence to support a fair argument that a project may have a significant effect on the environment.

Early on (in 2017), Calfire wrote to the Humboldt County Planning Department regarding the proposed Project, noting that “[t]here are many hazards confronting fire protection agencies in most subdivisions on SRA lands. Steep terrain and heavy wildland fuels contribute to fire intensity and spread. The distances from fire stations and road grades encountered usually create an excessive response time for effective structure fire suppression purposes.” (AR3790.) Accordingly, “CALFIRE does not support development in areas where there is no local agency fire service for structure fires and emergency medical response.” (*Id.*)

Subsequently, County staff and the County’s peer review consultant questioned whether a significant impact associated with wildfires could be mitigated because the Project’s remote location did not allow for reasonable response times from emergency police and fire services. In January of 2018, Supervising Planner Steve Werner commented upon a draft initial

² Mitigation measures must be enforceable. (Pub. Resources Code, § 21081.6, subd. (b); Cal. Code Regs., tit. 14, § 15126.4, subd. (a)(2); *Woodward Park Homeowners Ass'n v. City of Fresno* (2007) 150 Cal.App.4th 683, 730; *King & Gardiner Farms, LLC v. County of Kern* (2020) 45 Cal.App.5th 814, 852-853; *Vineyard Area Citizens for Responsible Growth, Inc.*, 40 Cal.4th at 444.)

study that reported on the long response time for sheriff and fire services. He stated that “[a]n estimated 50 minute response time for sheriff and fire services is clearly not an acceptable risk. . . . As recent fire events in California have demonstrated, fires in remote areas can result in serious loss of property and life. The [initial study] must be responsive to this potential impact resulting from the development proposal.” (AR1735.) In June of the same year, Transcon Environmental also remarked that the draft initial study’s conclusions regarding response time were inadequate. (AR1755.)

Despite recognizing that the Project is within SRA lands and a “Very High Fire Hazard Severity” area, the RIS/MND found that wildfire risk did not create a significant environmental impact. As regards response time, it reported that the nearest Calfire station is in Weott, 12 miles away. To access the Project premises, firefighters would use the McCann Road access road, and based upon Google Maps, “a vehicle, traveling the speed limit, would take 35 minutes to reach the Southwestern boundary from the Cal Fire station in Weott.” (AR609.) This finding was later proved to be unfounded by the Fruitland Ridge Volunteer Fire Protection District (“FRVFPD”).

The FRVFPD wrote to the County on December 30, 2020, in response to the RIS/MND’s findings. They noted that the County had not contacted them about the contents of the RIS/MND despite the fact that it would be they who were the initial responders to any emergency at the Project site. (AR1816.) As regards response time:

This project is in SRA (state responsibility area) with CALFire being the responsible entity for Wildfires. But should a wildfire break out, FRVFPD will be the first called and first arriving at said incident. CALFire will be the commanding agency.

Time out to any incident is historically 22 minutes to the McCann bridge. There is additional time added for any location on the east

side of the Eel River. The project states the farthest location to be over 5 miles from the bridge. Depending on road conditions, that can take a fire engine or a water tender anywhere from 20 minutes to one hour to navigate to the incident. So now we are dealing with a total arrival time for a medical emergency or fire from 42 minutes to 1 hr. 22 minutes. Mind you, this is one way. Patient transport is equally time consuming.

The report states there will be an estimated 22 to 30 people at the scene seven days a week. There is a likelihood that some sort of medical emergency will occur.

The roads from Fruitland Ridge to McCann are Class 2 roads, gravel/dirt, with steep slopes and hairpin turns. The private roads across the river are marginal, narrow, and dangerous for large emergency vehicles. We are greatly concerned about the report's estimated 488,000 miles driven annually on these under maintained roads. We respond to about 4 incidents per year, averaging 3 medical and 1 fire in McCann. We are the responding agency for traffic collisions.

Water storage is also a concern regarding wildland fire. The 300,000+ gallons of water are not adequate. Due to the road conditions, the turn around time for a water tender is 45 minutes minimum. The use time for the 2500 gallons carried in a water tender is about 20 minutes. One million stored gallons would be an approximate need at scene for a major wildland fire.

(AR1816-1817.) The County chose to ignore the facts provided by the FRVFPD.

Many members of the public also commented about the increased fire risk posed by the Project, and based upon personal knowledge, they addressed drought conditions, road hazards, emergency response time, and more. (See e.g., AR1620-1621, 1638-1639, 1642-1643, 1653-1654, 1824-1825, 1851, 2824-2828, 2941-2945.) On December 26, 2020, Steve Salzman—a licensed civil engineer retained by the Appellants—evaluated McCann Road. He conducted a pedestrian survey of the road from its intersection with Dyerville Loop Road to the gate of the Project. (AR3434-3447.) He focused on whether the road meets the standards of a Category 4

Road and/or whether it could be considered functionally equivalent to a Category 4 Road. (AR3435.)

As stated above, Category 4 roads consist of two 10-foot traffic lanes that are capable of providing for two-way traffic flow to support emergency vehicles and civilian egress. (JA989, 1306-07.) For roads in mountainous terrain, a road meeting the standards for Category 3 roads *may* suffice. (JA990, 1306-07.) Roadways must be able to support 75,000-pound fire apparatus. (JA991, 1306-07.) In finding a road to be equivalent to a Category 4 Road, functional performance and safety considerations must be considered. (AR3436.) Inter-visible turnouts also must exist “to allow drivers to see oncoming traffic and utilize turnouts.” (*Id.*) Importantly, an equivalency determination must find that the road “can accommodate the demands of the road and emergency response vehicles.” (AR9079.)

Mr. Salzman’s report contains his findings and photographs taken during his pedestrian survey. (AR3434-3447.) From this it is clearly established that:

- Much of McCann Road is little more than a one-way road with an average width of 12 feet;
- The road utilizes an 11 foot-wide, one lane, low water bridge that has no shoulder;
- The surface of the road consists of mud, dirt, gravel, and degraded asphalt;
- McCann Road has no adequate shoulders;
- Vehicles have previously gotten stuck in the mud and gravel off the road’s travel way;
- The safe driving speed for the road varies between 10 and 25 mph;
- Portions of the road do not contain inter-visible turnouts;

- One section of the road was noted to have a “very unstable roadbed”;
- Portions of the road “cannot provide safe access for emergency services (such as fire trucks).”

(*Id.*) The survey affirms that McCann Road is not a Category 4 Road, and more importantly, it cannot be considered functionally equivalent to a Category 4 Road. (AR3446.)

Credible, substantial evidence exists that the Project is associated with an increased risk of wildfire, and the County has not properly mitigated for this impact. Specifically, the County’s reliance on rainwater catchment tanks is not a sufficient mitigation measure to address the increased risk of wildfire associated with the Project because at least 1 million gallons of water would be needed, and the RIS/MND only evaluated the tanks to hold 320,000 gallons. Moreover, the Conditions of Approval only require that the Project set aside 50% of this water for fire suppression purposes.

The County’s reliance on McCann Road for fire equipment and civilian evacuation also is not a sufficient mitigation measure because the road is too narrow and cannot handle emergency vehicles. To the extent that an emergency vehicle were able to traverse the road, the response time would be anywhere from 42 minutes to 1 hour and 22 minutes—a response time County staff have previously recognized as being insufficient.

Where substantial evidence demonstrates that a project *may* have a significant effect on the environment, an agency must prepare an EIR. (Cal. Code Regs., tit. 14 § 15064, subd. (a).) To the extent that there is conflict in the evidence concerning the possibility of a significant effect, “neither the lead agency nor a court may ‘weigh’ conflicting substantial evidence to determine whether an EIR must be prepared in the first instance.” (*Pocket Protectors*, 124 Cal.App.4th at 935; see also Cal. Code Regs., §15064,

subd. (f)(1).) This is because “[i]t is the function of an EIR, not a negative declaration, to resolve conflicting claims, based on substantial evidence, as to the environmental effects of a project.” (*Pocket Protectors* at 935.)

As established by the administrative record, a fair argument exists demonstrating potential significant effects on the environment. The County must therefore be ordered to prepare an EIR to address the very real threat of wildfire and the Project’s impact on the environment.

VI. CONCLUSION

The Project has not been properly analyzed under CEQA for potentially significant environmental impacts related to hydrology/water quality, the use of lignin oil for dust suppression, its power infrastructure, and fire risk and safety. The Project conflicts with Humboldt County’s General Plan and SRA Fire Safety Regulations. For these reasons, Petitioners request that the Court remand this case with an order that the superior court issue a writ of mandate (1) commanding Respondents to set aside its adoption of the RIS/MND for the Project and all related approvals and (2) requiring preparation of an EIR.

Date: May 29, 2023

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I hereby certify pursuant to Rule 8.204(c)(1) of the California Rules of Court that the foregoing document is proportionally spaced, has a typeface of 13 points, and contains 11,976 words, excluding the cover, the certificate of interested entities or persons, the tables, the signature block, and this certificate. Counsel relies on the word count of the word-processing program used to prepare this brief.

Dated: 5/29/23

By: /s/Rachel S. Doughty
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