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 15

16 NANCY CRAWFORD-HALL, an individual, and
 17 SAN LUCAS RANCH, INC., a California
 corporation,

18 Petitioners,

19 v.

20 CACHUMA OPERATION AND MAINTENANCE
 21 BOARD, and DOES 1-20,

22 Respondents.

23 CACHUMA CONSERVATION RELEASE
 24 BOARD, and DOES 21-50,

25 Real Parties in Interest.
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 COUNTY OF SANTA BARBARA
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Case No. 1171135

OPENING BRIEF OF PETITIONERS
 NANCY CRAWFORD-HALL AND
 SAN LUCAS RANCH, INC.

(CCP §§ 1085, 1094.5; PRC §§ 21168,
 21168.5)

Date: October 25, 2006
 Time: 9:30
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The Honorable Diana R. Hall

OPENING BRIEF OF PETITIONERS NANCY CRAWFORD-HALL AND SAN LUCAS RANCH, INC.

WC-119180

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1 **I. INTRODUCTION**

2 Petitioners Nancy Crawford-Hall and San Lucas Ranch, Inc. bring this action under the
3 California Environmental Quality Act (“CEQA”) to challenge Respondent Cachuma Operation and
4 Maintenance Board’s (“COMB”) violation of CEQA in its preparation and certification of the
5 Environmental Impact Report/Environmental Impact Statement for the Fish Management Plan for the
6 Lower Santa Ynez River (“FMP EIR”). COMB previously attempted to carry out the Fish
7 Management Plan (“FMP”)—a variety of water release measures for Bradbury Dam and construction
8 activities on the tributaries of the Lower Santa Ynez River, ostensibly aimed at improving habitat
9 conditions for the Southern California steelhead—without environmental review. But this Court
10 ordered COMB to comply with CEQA by preparing an Environmental Impact Report (“EIR”).
11 COMB’s EIR, however, violates several of CEQA’s mandatory provisions and must be set aside.

12 First, COMB violated CEQA by improperly acting as the “lead agency” for environmental
13 review of the proposed water release activities. CEQA mandates that there be only one lead agency
14 to conduct environmental review of a project, and that this should be the agency with primary
15 responsibility for carrying out a project. The State Water Resources Control Board (“State Water
16 Board”), not COMB, is primarily responsible for the water releases that COMB proposes in the FMP.
17 Thus, the State Water Board, not COMB, should have acted as the lead agency. The State Water
18 Board, in fact, has prepared its own draft EIR analyzing many of the same activities that COMB
19 analyzes in the FMP EIR, but reaching different conclusions than COMB concerning the activities’
20 environmental effects. COMB’s attempt to usurp the lead agency role has caused confusion among
21 the public and the expert agencies. This is precisely what CEQA seeks to avoid.

22 Moreover, COMB’s improper arrogation of itself as lead agency has compromised the entire
23 environmental analysis. COMB even resorted to discarding uncontroverted expert testimony
24 showing that one set of proposed FMP activities would amount to “trout murder.” This is telling of
25 COMB’s true purpose in preparing the FMP EIR. Far from seeking to protect steelhead, COMB’s
26 primary goal seems to be to ensure its water deliveries at the lowest costs. Indeed, it was not until the
27 California Sportfishing Protection Alliance filed a complaint with the State Water Board in 1987
28 alleging that operation of the Bradbury Dam was harming steelhead that COMB was forced to take

1 an interest in the fish. Fearing that the State Water Board might respond to the complaint by
2 curtailing water deliveries from Bradbury Dam, or mandating expensive mitigation measures, COMB
3 has attempted to be the first to define the proper measures for protecting steelhead in hopes that the
4 State Water Board will acquiesce to its proposals. But CEQA does not permit an interested agency to
5 commandeer the lead agency role from the proper agency. Here, COMB's failure to allow State
6 Water Board to act as lead agency violated CEQA.

7 Second, the FMP EIR's environmental setting, project description, and cumulative impacts
8 analysis were prepared in violation of CEQA because they omit meaningful discussions of the on-
9 going proceedings before the State Water Board concerning the status of Reclamation's permits for
10 water releases from the Bradbury Dam as well as the State Water Board's attendant environmental
11 review, and of how the proceedings could impact the activities considered in the FMP EIR. The State
12 Water Board, not COMB, has exclusive jurisdiction over permitting water releases from Bradbury
13 Dam and is actively considering a different water release plan than COMB has approved. Indeed, the
14 State Water Board's draft EIR designates an environmentally superior alternative that would not
15 allow for the water releases COMB proposes in the FMP EIR. Should the State Water Board decide
16 not to approve permits tailored to COMB's preferences, the new water release permits will essentially
17 nullify the analysis in the FMP EIR. Rather than address these issues squarely in the FMP EIR,
18 COMB attempted to hide the ball, downplaying the potential ramifications of the State Water Board's
19 proceedings and declaring that no analysis is necessary because the State Water Board's review is
20 "distinctly different" and too "speculative." But CEQA requires public disclosure, not concealment.
21 The FMP EIR's failure to address the potential consequences of the State Water Board's on-going
22 proceedings violates CEQA.

23 Third, the FMP EIR violates CEQA because it relies on conclusions not supported by
24 substantial evidence. Specifically, the FMP EIR concluded that upper Hilton Creek, a tributary that
25 feeds into the Lower Santa Ynez River, has suitable habitat for steelhead. However, the FMP EIR
26 ignores unrebutted expert evidence submitted by Petitioner that upper Hilton Creek has only sporadic
27 water flows during the rainy season, runs completely dry during the summer months when steelhead
28 need water for rearing, and contains unsuitable substrate for steelhead spawning. The FMP EIR cites

1 no reliable data or other scientific evidence or reports to support its conclusion that upper Hilton
2 Creek has adequate steelhead habitat, nor does it provide reasoned analysis supported by evidence to
3 explain why it ignored the significant environmental issues raised by Petitioner's expert.

4 Finally, COMB violated CEQA by finding that it could mitigate to a level of less than
5 significance the dramatic impacts of surcharging Cachuma Reservoir (which COMB proposes to do
6 in order to guarantee its water deliveries from Bradbury Dam). Among other things, surcharging
7 Cachuma Reservoir will flood 90 acres of land and several critical public facilities, including a water
8 treatment plant. COMB found that this flooding impact was less than significant because the water
9 treatment plant would be moved prior to the surcharging. In fact, the record shows that there is *no*
10 obligation to move the water treatment plant prior to surcharging, and that surcharging can occur
11 even if the water treatment plant is not moved. Contrary to CEQA's requirements, COMB cannot
12 support its finding that the impacts from surcharging have been, or will be, mitigated to a level of less
13 than significance.

14 COMB's failure to comply with CEQA's requirements, and its failure to provide substantial
15 evidence to support the FMP EIR's conclusions and its own findings are error. This Court should
16 issue a writ of mandate setting aside COMB's certification of the FMP EIR.

17 **II. FACTUAL BACKGROUND**

18 **A. The Bradbury Dam And Related Facilities Are Operated By Reclamation And** 19 **COMB Pursuant To Permits Issued By The State Water Board.**

20 In 1953, the Bureau of Reclamation ("Reclamation") completed construction of the Bradbury
21 Dam on the Santa Ynez River, creating Lake Cachuma. (39 AR 371:17395.)¹ Though Reclamation
22 continues to own and operate the Bradbury Dam, in 1956, the federal government transferred
23 operation and maintenance of dam-related facilities to several local water agencies pursuant to a joint
24 powers agreement. The local water agencies operate under the name of COMB (*see also* 47 AR
25 445:21323), and its members are sometimes collectively referred to as the Cachuma Project Member
26 Units ("Cachuma Member Units.") (39 AR 371:17395.)

27 ¹ Citations to the Administrative Record ("AR") are in the following format: "[Volume Number] AR
28 [Tab Number]:[Bates Page Number]."

1 The California State Water Resources Control Board (“State Water Board”) has exclusive
2 jurisdiction to determine the timing and amount of water released from Bradbury Dam and controls
3 dam operations in California through a permit process. In 1958, the State Water Board’s predecessor
4 issued Permits 11308 and 11310 to Reclamation, which allowed Reclamation to divert and store
5 water from the Santa Ynez River using Cachuma Project facilities. (47 AR 445:21323.) The State
6 Water Board has continued its jurisdiction through a series of subsequent water rights permits, Order
7 WR 73-37 in 1973 and Order WR 89-18 in 1989, and has retained jurisdiction over the amount and
8 timing of release of water from Bradbury Dam. (*Id.* at 21323-324.)

9 **B. The State Water Board Is Currently Conducting Proceedings And Completing**
10 **An EIR Concerning Cachuma Project Water Rights And Public Trust Resources**
11 **Such As Steelhead.**

12 The Bradbury Dam was constructed at a time when its impacts on the Southern California
13 steelhead trout were not considered or evaluated. Steelhead are born in freshwater, migrate to the
14 ocean, and then return to freshwater to spawn. (29 AR 176:13479.) The upper reaches of the Santa
15 Ynez River provided important spawning habitat for steelhead, and the majority of steelhead in the
16 Santa Ynez River spawned and reared above the current site of the Bradbury Dam. (*Id.* at 13481.)
17 Construction of the Bradbury Dam completely blocked upstream passage of steelhead, and eliminated
18 the Santa Ynez River’s upper watershed as habitat for spawning steelhead. (*Id.* at 13464.) This
19 decimated the steelhead population on the Santa Ynez River. (*Id.* at 13480.) While it is believed that
20 the Santa Ynez River system once supported one of the largest runs of steelhead in southern
21 California (an estimated 20,000 adult fish per year), the current run of adult steelhead in the Santa
22 Ynez River system is believed to be less than 100 adult fish per year. (*Id.*)

23 In 1987, the California Sportfishing Protection Alliance (“CSPA”) filed a complaint with the
24 State Water Board alleging that Cachuma Project operations had impacted steelhead trout in violation
25 of the constitutional prohibition against the misuse of water. (47 AR 445:21324.) In 1990, the State
26 Water Board held a consolidated hearing on outstanding issues in the Santa Ynez River watershed,
27 including Reclamation’s permits and the CSPA’s complaint. (*Id.*) Among other things, the State
28 Water Board recognized that it needed to evaluate “potential mitigation measures for the remnant
steelhead fishery.” (7 AR 35:2663.) Accordingly, in December 1994, the State Water Board issued

1 Order WR 94-5, setting a December 2000 deadline to commence hearings on whether Reclamation's
2 permits should be modified to protect public trust values (such as steelhead) and downstream water
3 rights on the Santa Ynez. (*Id.*)

4 On May 19, 1999, the State Water Board issued a Notice of Preparation ("NOP") of an
5 Environmental Impact Report ("EIR") analyzing the environmental impacts of various alternatives
6 for operating Bradbury Dam, with each alternative designed to protect downstream water rights and
7 public trust resources. (47 AR 445:12324-325.) Also, per Order WR 94-5, the State Water Board
8 initiated hearings in November 2000 to determine if changes were needed to Reclamation's permits
9 to protect public trust values and downstream water rights on the Santa Ynez River. (*Id.* at 21312.)
10 Reclamation, the Cachuma Member Units, the California Department of Fish and Game ("Fish &
11 Game"), the National Marine Fisheries Service and other interested parties are participating in the on-
12 going hearings. (*See* 49 AR 447; 50 AR 450; 54 AR 452, 453, 454 and 457.)

13 On August 8, 2003, in connection with its permit hearing, the State Water Board released for
14 public comment a draft EIR on modifications to Reclamation's permits ("State Water Board Draft
15 EIR"). (47 AR 445:21292-542.) The State Water Board Draft EIR evaluates the impacts of various
16 permitting alternatives, including: (1) revised water release requirements for fishery resources and
17 downstream water rights protection in the Santa Ynez River;² (2) the proposed surcharge of Lake
18 Cachuma; and (3) a reduction in the water supply of the Cachuma Member Units, which could occur
19 if the State Water Board imposes revised release requirements on Reclamation. (*Id.*) The
20 alternatives being analyzed in the State Water Board EIR include many, if not most, of the same
21 activities that COMB has attempted to analyze in the FMP EIR. (*Id.* at 21350-57.) The State Water
22 Board hearings on Reclamation's permits are on-going, and the State Water Board has not yet issued
23 a Final EIR.

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27 ² The main purpose of the revised water releases is to improve summer rearing habitat conditions and
28 to facilitate upstream migration for steelhead below Bradbury Dam. (*See* 47 AR 445:21339-41.)

1 **C. COMB And Reclamation Developed The Fish Management Plan And Biological**
2 **Opinion To Attempt To Protect Water Deliveries.**

3 In 1993, after the State Water Board's 1990 hearing that suggested that changes may be
4 imposed on COMB as a result of the Cachuma Project's impact on steelhead, COMB and others
5 became concerned about the potential impact steelhead would have on its water deliveries. To
6 address this concern, COMB and others began a "voluntary" effort to investigate native fishery
7 resources along the lower Santa Ynez River below Bradbury Dam. (39 AR 371:17396.) In June
8 1994, various agencies, including some of the Cachuma Member Units, agreed to establish the Santa
9 Ynez River Technical Advisory Committee ("SYRTAC"), which was to study and develop
10 recommendations for long-term fishery management downstream of Bradbury Dam. (29 AR
11 177:13574.) Ultimately, SYRTAC was tasked with preparing the Fish Management Plan for the
12 Lower Santa Ynez River ("FMP"). (*Id.*)

13 Prior to development of the FMP, on August 18, 1997, the National Marine Fisheries Service
14 ("NOAA Fisheries") listed the Southern California steelhead as an endangered species under the
15 federal Endangered Species Act ("ESA"). (39 AR 371:17398.) This required Reclamation to consult
16 with NOAA Fisheries pursuant to section 7 of the ESA regarding the effects of the Bradbury Dam
17 and dam-related activities on the steelhead. (29 AR 176:13458.) Accordingly, on April 7, 1999,
18 Reclamation initiated consultation with NOAA Fisheries. Thereafter, Reclamation submitted a
19 Biological Assessment to NOAA Fisheries, which described downstream releases for steelhead and
20 habitat conservation measures for tributaries and the main stem of the Santa Ynez River below the
21 dam. (39 AR 371:17398.) The Biological Assessment plan was designed to minimize costs
22 associated with implementing measures for mitigating incidental take of the steelhead, while
23 preserving options for the maximum amount water delivery. (*Id.* at 17398.)

24 On September 11, 2000, in response to the Biological Assessment proposals, NOAA Fisheries
25 issued a Biological Opinion ("BO"), examining whether or not the operation and maintenance of the
26 Bradbury Dam and dam-related facilities, as proposed in the Biological Assessment, would
27 jeopardize the continued existence of the steelhead. (*Id.* at 17399.) The BO concluded that the
28 activities were not likely to jeopardize the continued existence of the steelhead, but were expected to

1 result in some incidental take of steelhead. (*Id.*) Accordingly, an incidental take statement was
2 issued with the Biological Opinion including a number of “reasonable and prudent measures to
3 minimize ‘take’ (*i.e.* harm or mortality) of the southern steelhead. (*Id.*) Many of the “reasonable and
4 prudent measures” were suggested by COMB as low-cost ways to assuage NOAA Fisheries without
5 threatening water deliveries. Under the BO, if the proposed surcharges, as well as other aspects of
6 the BO, were not implemented by 2005, Reclamation would have to reinitiate formal consultation
7 with NOAA Fisheries. (29 AR 176:13534.) Shortly after NOAA Fisheries issued the BO, COMB
8 issued the final FMP, which included many of the same measures suggested in the BO. (39 AR
9 371:17405.) Generally, the FMP and BO propose to (1) implement various programs for surcharging
10 Bradbury Dam and releasing water from Bradbury Dam,³ and (2) perform a variety of construction
11 activities on tributaries that feed into the Lower Santa Ynez River with the hope that they can serve
12 as habitat for steelhead. Reclamation’s plan also included a proposal to surcharge Lake Cachuma to
13 provide additional water for fish releases. (*Id.* at 17398.)

14 **D. COMB Initially Tried To Implement the Fish Management Plan Without**
15 **Environmental Review, But Was Ordered By The Court To Prepare An**
16 **Environmental Impact Report.**

17 Several of the proposed activities in the FMP and BO involved modifications to the timing
18 and amount of water released from Bradbury Dam, precisely the topics under review in the State
19 Water Board’s Cachuma Project hearings. (*See* 39 AR 371:17419-24 (FMP EIR); *compare* 47 AR
20 445:21350-57 (State Water Board EIR).) Other proposed activities in the FMP and the BO included
21 “tributary enhancement measures,” allegedly designed to create new steelhead habitat, improve
22 existing habitat, and create or improve access to new and existing habitat. (39 AR 371:17428-60.)
23 Three of the tributary enhancement measures involved construction activities on Hilton Creek, a
24 small intermittent stream that feeds into the Santa Ynez River just below Bradbury Dam. (*Id.* at
25 17428.) The first 2,980 feet of Hilton Creek nearest the Santa Ynez River is on federal land. (*Id.*)

26 ³ “Surcharging” refers to raising the water level of Lake Cachuma, thereby flooding over 90 acres of
27 land around the periphery of Lake Cachuma and necessitating the removal and relocation of several
28 critical facilities for Lake Cachuma, including a water treatment plant. (*See* 39 AR 371:17585; 29
AR 177:13654.) This includes approximately 24 acres of oak woodland habitat, which would result
in the death of over 450 oak trees. (39 AR 371:17585-87.)

1 The remaining portion is located on private land owned and occupied by Petitioners. (*Id.*) The vast
2 majority of Hilton Creek was not historically used by steelhead and is not suitable for steelhead, but
3 the Hilton Creek measures sought to remove natural and manmade barriers to steelhead access and
4 divert steelhead to upper Hilton Creek, on Petitioners' property. (*Id.* at 17428-37.) Sadly, any fish
5 that is successfully diverted to upper Hilton Creek will not survive because there is no suitable habitat
6 for spawning or summer rearing—upper Hilton Creek dries up shortly after rains. (*See* Section F1,
7 *infra.*)

8 In December 2005, Reclamation completed the first Hilton Creek proposal, which involved
9 altering naturally-existing cascade and chute located approximately 1,380 feet up Hilton Creek from
10 the Santa Ynez River.⁴ The remaining two Hilton Creek projects involve a channel extension on
11 lower Hilton Creek, and a barrier removal project on upper Hilton Creek. (39 AR:371:17430.) The
12 channel extension involves building a 1,500-foot channel at the base of Hilton Creek alongside the
13 existing channel of the Santa Ynez River, which would essentially be another creek for steelhead
14 trout and other fish. (*Id.* at 17436.) The Highway 154 barrier removal project involves alteration of a
15 concrete culvert that, during rains, conveys water underneath Highway 154. (*Id.* at 17434-36.) The
16 culvert exists approximately 4,200 feet up Hilton Creek from the Santa Ynez River, and presents
17 another barrier to fish from going upstream. (*Id.* at 17434.)

18 COMB previously attempted to implement the chute removal and Highway 154 culvert
19 projects without undertaking the proper environmental review. Without support, COMB concluded
20 that the chute removal project would have no potentially significant impacts on, among other things,
21 agricultural resources, mineral resources, and land use and planning and issued a mitigated negative
22 declaration. (31 AR 193:14380-425.) Despite comments from Petitioners, COMB made no attempt
23 to investigate the impacts of the chute removal project on San Lucas Ranch. (32 AR 197:14550-51.)

24 Petitioner Ms. Crawford-Hall challenged COMB's approved of a mitigated negative
25 declaration for the cascade/chute project on CEQA grounds. (40 AR 372:18108-111.) On October 9,
26 2001, the Santa Barbara County Superior Court found that COMB violated CEQA, and issued a writ

27 ⁴ This project, examined in the FMP EIR, was completed by the federal government and is not at
28 issue in this action.

1 of mandate. (*Id.*) Among other things, the court found that COMB had violated CEQA by failing to
2 investigate or properly evaluate potential impacts to agriculture, mineral resources, water supply, land
3 uses, or the impact of the overall Hilton Creek construction activities on the steelhead. (*Id.*) The
4 court ordered COMB to set aside its mitigated negative declaration and approval of the Hilton Creek
5 cascade/chute project. (*Id.*)

6 **E. COMB And Reclamation Prepared A Joint EIR/EIS That Attempts To Analyze**
7 **Many Of The Same Activities Being Analyzed In The State Water Board's EIR.**

8 On October 8, 2001, more than a year after the State Water Board issued its public notice that
9 it was preparing an EIR to analyze alternatives for Bradbury Dam to protect downstream water rights
10 and public trust resources, COMB issued its own public notice for the FMP EIR to analyze the
11 actions described in the FMP and the BO, including the three Hilton Creek construction activities
12 (“Project”). (32 AR 214:14735.) Several parties, including State Water Board, commented that
13 COMB was not the proper lead agency as the State Water Board, not COMB, has primary
14 responsibility for carrying out many of the proposed actions, particularly those involving changes to
15 the timing and amount of water released from Bradbury Dam. (40 AR 372:17894-96.)

16 In June 2003, COMB issued a Draft Program and Project Specific EIR/EIS.⁵ (36 AR
17 312:15910.) COMB received comments from numerous parties, including Petitioners, expressing
18 concern about the inadequacies of the Draft FMP EIR. (*See* 40 AR 372:17941-18009; 18042-166.)
19 Petitioners’ comments included a report and a narrated DVD prepared by a well-regarded fisheries
20 biologist, Dr. Alice A. Rich, concluding that implementing the Highway 154 culvert project would
21 amount to “trout murder.” (*Id.* at 18115.) Dr. Rich’s report, based on extensive studies of Hilton
22 Creek, demonstrated that Hilton Creek was not suitable habitat for steelhead because it: (1) lacks
23 sufficient water and, in fact, dries up shortly after rains, (2) lacks rearing habitat, (3) lacks spawning
24 habitat, (4) does not have any remaining pools over the summer that have suitable water temperatures
25 (and no remaining pools in upper Hilton Creek), and (5) has low dissolved oxygen in the few pools

26 _____
27 ⁵ While the FMP EIR included an EIS component, as prepared by Reclamation, that aspect of the
28 environmental document is not relevant to a CEQA challenge. Therefore, neither Reclamation nor its
EIS are discussed in this brief except where required for context or clarity of background.

1 that last through June. (*Id.* at 18116; *see also* 18166A (DVD 5:30).) A hearing on the Draft FMP
2 EIR was held on August 27, 2003, during which Petitioners, along with several other entities,
3 provided additional oral comments. (*Id.* at 18196.)

4 COMB rejected the un rebutted evidence and expert opinion from Dr. Rich based on its
5 speculation that the Hilton Creek would provide suitable habitat for steelhead. (*Id.* at 18298-304.)
6 COMB issued the Final FMP EIR on February 24, 2004. (*Id.* at 17875.) On June 1, 2004, Petitioners
7 submitted additional comments to COMB. (42 AR 391:19394-468.) On November 22, 2004,
8 COMB held a hearing, at which Petitioners commented again on the Final FMP EIR. (45 AR
9 425:20405-451.) On November 22, 2004, COMB passed Resolution No. 416, certifying the Final
10 FMP EIR, adopting overriding considerations, a mitigation monitoring and reporting plan, and
11 approving the Project, with one exception: COMB did not approve the Hilton Creek chute removal
12 project (which was not complete at the time) or the Highway 154 culvert project. (44 AR 423:20292-
13 332.) COMB provided no explanation for its removal of these actions. (*Id.*) Petitioners timely
14 brought this action challenging COMB's certification of the FMP EIR and approval of the Project.

15 **III. ARGUMENT**

16 **A. Standard of Review**

17 Where a proposed project may have significant environmental effects CEQA requires the
18 preparation of an EIR. An EIR must describe the project being considered by the agency, disclose
19 the potential significant environmental impacts of the project, present alternatives to the project, and
20 discuss ways to mitigate or avoid the project's significant environmental impacts. CEQA Guidelines
21 § 15210-15312. Moreover, an EIR "must include detail sufficient to enable those who did not
22 participate in its preparation to understand and to consider meaningfully the issues raised by the
23 proposed project." *Bakersfield Citizens for Local Control v. City of Bakersfield*, 124 Cal. App. 4th
24 1184, 1198 (2004) (citation omitted). When reviewing an EIR for legal adequacy, courts apply an
25 abuse of discretion standard. CEQA § 21668. Under this standard, an agency has abused its
26 discretion, and the EIR must be set aside, if 1) it did not proceed as required by law or 2) its
27 determinations on questions of fact are not supported by substantial evidence in light of the whole
28

1 record. *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.*, 47 Cal. 3d 376, 392-393
2 (1988); CEQA § 21668.

3 **1. An Agency Abuses Its Discretion If It Fails To Proceed In The Manner**
4 **Required By CEQA.**

5 “CEQA contains substantive provisions with which agencies must comply.” *Sierra Club v.*
6 *Gilroy City Council* 222 Cal. App. 3d 30, 41 (1990). Courts must “scrupulously enforce” CEQA by
7 reviewing an EIR to determine if it is in compliance with the CEQA’s requirements. *Citizens of*
8 *Goleta Valley v. Bd. of Supervisors*, 52 Cal. 3d 553, 564 (1990).

9 An EIR may only be prepared by a public agency meeting the criteria set forth for a lead
10 agency. See CEQA Guidelines §§ 15051-15053. Thus, an agency fails to proceed in the manner
11 required by CEQA if it is not the proper public agency to act as lead agency for the purposes of
12 preparing and certifying an EIR. *Planning and Conservation League v. Dep’t Water Resources*, 83
13 Cal. App. 4th 892 (2000) (“PCL”). The Court owes no deference to an agency’s determination that it
14 is the proper lead agency. The designation of lead agency is a question of law on which the Court
15 exercises its independent judgment. *PCL*, 83 Cal. App. 4th at 906.

16 An agency fails to proceed as required by CEQA where an EIR’s discussion and analysis of a
17 mandatory EIR topic is so cursory that it does not comply with a requirement of CEQA. See *San*
18 *Joaquin Raptor/Wildlife Rescue Ctr. v. County of Stanislaus*, 27 Cal. App. 4th 713 (1994) [holding
19 that discussion of project description, environmental setting, alternatives and cumulative impacts
20 were inadequate as a matter of law]. Similarly, an EIR must identify all significant environmental
21 effects of a proposed project and indicate the manner in which significant effects may be mitigated or
22 avoided. See, e.g., CEQA §§ 21002.1, 21061 and 21081.

23 An EIR must include a sufficient analysis of the Project’s cumulative impacts and growth-
24 inducing impacts. CEQA Guidelines § 15130. An agency fails to proceed as required by CEQA if its
25 analysis is based on an erroneous interpretation of CEQA’s requirements, such as too narrowly
26 interpreting the CEQA Guidelines concerning what constitutes a reasonably foreseeable project
27 during preparation of an EIR’s cumulative impacts analysis. *San Franciscans For Reasonable*
28 *Growth v. City and County of San Francisco*, 151 Cal. App. 3d 61,71 (1984).

1 As well, an agency fails to proceed as required by CEQA if it fails to provide reasoned
2 responses, supported by evidence, to EIR comments by experts with specialized expertise who raise
3 significant environmental issues. *Santa Clarita Org. for Planning the Env't v. County of Los*
4 *Angeles*, 106 Cal. App. 4th 715 (2003). Where a credible expert opines that an EIR's assessment of a
5 significant impact is lacking and further studies are essential to a reasonable analysis, and where the
6 final EIR's response to the comments does not provide a reasonable explanation, supported by
7 evidence, for not undertaking the suggested studies, a court may conclude that the EIR's analysis is
8 fatally deficient. *Berkeley Keep Jets Over the Bay Comm'n v. Bd. of Port Comm'rs*, 91 Cal. App. 4th
9 1344 (2001).

10 Finally, each public agency must "mitigate or avoid the significant effects on the environment
11 of projects that it carries out or approves whenever it is feasible to do so." CEQA § 21002.1(b). If
12 impacts remain significant even after mitigation measures, the lead agency may proceed with the
13 project *only* if the agency finds that specific economic, legal, social, technological, or other benefits
14 of a proposed project outweigh the unavoidable adverse environmental effects. CEQA § 21002;
15 CEQA Guidelines § 15093(a), (b).

16 CEQA does not require a perfect EIR, but it does require "an EIR to reflect a good faith effort
17 at full disclosure" and "failure to comply with the information disclosure requirements constitutes a
18 prejudicial abuse of discretion when the omission . . . has precluded informed decisionmaking and
19 informed public participation." *Bakersfield*, 124 Cal. App. 4th at 1197-98 (citations omitted).
20 Where, as here, an EIR was not prepared and approved in compliance with CEQA's requirements, it
21 constitutes a prejudicial abuse of discretion and requires the issuance of a writ of mandate setting
22 aside the FMP EIR.

23 **2. An Agency Abuses Its Discretion If Its CEQA Determinations Are Not**
24 **Supported By Substantial Evidence.**

25 An agency also abuses its discretion if its "determination or decision is not supported by
26 substantial evidence." *Friends of the Eel River v. Sonoma County Water Agency*, 108 Cal. App. 4th
27 859, 867 (2003). "Substantial evidence" is defined as "enough relevant information and reasonable
28 inferences from this information that a fair argument can be made to support a conclusion, even

1 though other conclusions might also be reached.” *Bakersfield*, 124 Cal. App. 4th at 1198; CEQA
2 Guidelines § 15384(a). Substantial evidence includes “facts, reasonable assumptions predicated upon
3 facts, and expert opinion supported by facts,” but it does not include “[a]rgument, speculation,
4 unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, or evidence
5 of social or economic impacts which do not contribute to or are not caused by physical impacts on the
6 environment. . . .” CEQA Guidelines § 15384(a), (b). Thus, an “EIR must contain facts and analysis,
7 not just the bare conclusions of the agency.” *Bakersfield*, 124 Cal. App. 4th at 1198 (citation
8 omitted).

9 Moreover, an EIR “must include detail sufficient to enable those who did not participate in its
10 preparation to understand and to consider meaningfully the issues raised by the proposed project.”
11 *Id.* (citation omitted). CEQA does not require a perfect EIR, but it does require “an EIR to reflect a
12 good faith effort at full disclosure.” *Id.* at 1197-98 (citations omitted). “Failure to comply with the
13 information disclosure requirements constitutes a prejudicial abuse of discretion when the
14 omission . . . has precluded informed decisionmaking and informed public participation.” *Id.*

15 As explained in detail below, Respondents failed to proceed in the manner required by law
16 and abused their discretion in certifying the FMP EIR and approving the Project, both because the
17 FMP EIR does not satisfy the basic statutory criteria for an adequate EIR, and because Respondents’
18 determinations and decisions are not supported by substantial evidence in the record.

19 **B. The FMP EIR Violates CEQA Because COMB Is Not The Proper Lead Agency**
20

21 Respondents violated CEQA by acting as lead agency for environmental review of projects
22 that, at the same time, were under environmental review by another agency, the State Water Board. It
23 is undisputed that the State Water Board is the sole state agency with permitting authority to regulate
24 the amount and timing of water releases from Bradbury Dam. As such, it has the principal
25 responsibility for determining what measures are required to protect steelhead in the Santa Ynez
26 River. CEQA thus requires that the State Water Board, not COMB, act as lead agency for projects
27 involving potential changes to the timing and amount of water released from Bradbury Dam, such as
28 those in the FMP EIR. COMB violated CEQA by acting as the lead agency for the FMP EIR.

1 1. **Under CEQA A Lead Agency Must Have Principal Responsibility For**
2 **Carrying Out A Project.**

3 Only the “lead agency” may prepare the EIR. *PCL*, 83 Cal. App. 4th at 903-05; CEQA
4 Guidelines § 15050(a). The lead agency plays a pivotal role in defining the scope of environmental
5 review and it must “*independently* participate, review, analyze and discuss the alternatives in good
6 faith.” *PCL*, 83 Cal. App. 4th at 904 (citing *Kings County Farm Bureau v. City of Hanford*, 221 Cal.
7 App. 3d 692, 736 (1990)) (emphasis in original). It is critical that the correct agency act as the lead
8 agency because, among other things, the lead agency “may determine an environmentally superior
9 alternative is more desirable or mitigation measures must be adopted.” *Id.* (quoting *Kings County*
10 *Farm Bureau*, 221 Cal. App. 3d at 737). The lead agency defines “the scope of environmental
11 review,” and lends its expertise in areas within its particular domain” in arriving at its
12 recommendation for the most environmentally sound alternative. *Id.* “So significant is the role of the
13 lead agency that CEQA proscribes delegation.” *Id.* at 907 (citing *Kleist v. City of Glendale*, 56 Cal.
14 App. 3d 770, 779 (1976)). Accordingly, an EIR prepared by an agency that is not the proper lead
15 agency is error and requires preparation of a new EIR under the direction of the proper lead agency.
16 *Id.* (ordering preparation of new EIR under direction of proper lead agency).

17 CEQA and the CEQA Guidelines carefully delineate who should be lead agency. A “lead
18 agency” is the public agency “which has the principal responsibility for carrying out or approving a
19 project which may have a significant effect upon the environment.” CEQA § 21067; CEQA
20 Guidelines, § 15367. Where, as here, a project will be carried out by more than one public agency,
21 “the lead agency will normally be the agency with *general* governmental powers, such as a city or
22 county, rather than an agency with a *single or limited purpose* such as an air pollution control district
23 or a district which will provide a public service or public utility to the project.” CEQA Guidelines
24 § 15051(b)(1) (emphasis added). If more than one public agency equally satisfies this criteria, then
25 the lead agency will be the one “which will act first on the project in question.” CEQA Guidelines
26 § 15051(c). The issue of who should be the proper lead agency is a question of law that this Court
27 decides in the exercise of its own independent judgment. *PCL*, 83 Cal. App. 4th at 906.
28

1 2. **The State Water Board Should Be The Lead Agency Because It Has**
2 **Principal Responsibility For Protecting Steelhead In The Santa Ynez**
3 **River And Its Governmental Authority Is Broader Than COMB's**
4 **Authority.**

5 Here, the State Water Board, not COMB, should be the lead agency for the Project because it
6 is the agency that has principal responsibility for determining what measures should be implemented
7 to protect steelhead in the Santa Ynez River. CEQA § 21067; CEQA Guidelines § 15367. The State
8 Water Board, not COMB, has exclusive jurisdiction to regulate the use of water in the Santa Ynez
9 River and Lake Cachuma. *See, e.g.*, Cal. Const., Art. X, Sec. 5 (use of all water is “subject to the
10 regulation and control of the State”); Cal. Water Code § 174, *et seq.* (State Water Board “shall
11 exercise the adjudicatory and regulatory functions of the state in the field of water resources.”); Cal.
12 Water Code § 1375, *et seq.* (State Water Board permitting powers). In the course of this regulation,
13 the State Water Board is expressly charged by statute with protecting public trust resources in the
14 Santa Ynez River, including water and steelhead. *See, e.g.*, Cal. Water Code § 1243 (the State Water
15 Board “shall take into account, whenever it is in the public interest, the amounts of water required
16 for . . . the preservation and enhancement of fish and wildlife resources”). Even NOAA Fisheries
17 agrees that the State Water Board, not COMB or any other agency, has the primary responsibility for
18 ensuring the protection of the steelhead:

19 It is the province of the [the State Water Board] alone to determine if
20 the technical feasibility and related anticipated costs of any potential
21 measures to protect public trust resources harmed by the permittee’s
22 facilities and operations outweigh the anticipated benefits. . . . Only the
23 [the State Water Board], through its own authorities, can ensure that
24 public trust values in the Santa Ynez watershed are protected and that
25 the permittee implements appropriate measures in accordance with
26 California law.

27 (42 AR 391:19411-13, 19418.⁶)

28 ⁶ In response to COMB’s issuance of the NOP for the draft FMP EIR, the State Water Board asserted
that it was “the appropriate lead agency under [CEQA] for purposes of considering whether the flow
release requirements contained in [Reclamation’s] water rights permits should be modified.” (39 AR
371:17857.) The State Water Board warned that conflicts could easily arise between the analysis and
recommendations reached by the State Water Board and those reached by COMB. (*Id.*) In
comments to the Draft DMP EIR/EIS, the State Water Board confirmed “that those potential conflicts
have materialized.” (40 AR 372:17887.) COMB was unable to resolve these conflicts. (*See Id.* at
18358.)

1 In contrast, COMB does not, and cannot, claim that it has the any statutory charge specific to
2 the protection of steelhead. COMB was formed for the limited purpose of carrying out the
3 “responsibilities” for “[o]peration and maintenance of the Cachuma Project facilities, other than
4 Bradbury Dam.” (39 AR 371:17396.) COMB’s primary objective is to operate the facilities in a
5 manner that ensures sufficient water deliveries to its members’ customers at the lowest possible price.
6 (See 47 AR 445:21327.) COMB has no statutory obligation to steelhead under its charge as a Joint
7 Powers Authority, apart from its responsibility to comply with CEQA before approving and carrying
8 out discretionary projects, such as the Highway 154 culvert activity. It is thus the State Water Board,
9 not COMB, that is “principally responsible” for measures aimed at preserving steelhead, such as
10 those evaluated in the FMP EIR.

11 That the State Water Board should be the lead agency is made obvious by the Project itself. A
12 significant aspect of the Project is the proposed “Releases for Fish” activities. (39 AR 371:17408.)
13 These involve surcharging Lake Cachuma, and releasing water from Lake Cachuma—activities
14 within the exclusive jurisdiction of the State Water Board. For example, one of the activities
15 analyzed in the FMP EIR is a permanent three-foot surcharge of Lake Cachuma (*Id.* at 17425-27),
16 which, if implemented, will allow several other activities to proceed. (*Id.* at 17408, 17423-24 (noting
17 that the “Fish Passage Account” and the “Adaptive Management Account” and associated releases
18 “would only be implemented after the 3.0-foot surcharge project”).) But far from authorizing this
19 3.0-foot surcharge, the State Water Board is currently evaluating several alternatives that exclude it
20 (*see* 47 AR 445:21352), including the State Water Board’s “environmentally superior alternative,”
21 which does not include a 3.0 foot surcharge. (*Id.* at 21316.) Many of COMB’s projects also involve
22 changes to water releases (*see, e.g.*, 39 AR 371:17419 (“ramping down” water rights releases)),
23 which even COMB admits is within the State Water Board’s primary jurisdiction. (40 AR 372:18200
24 (“[T]he State Water Board retains primary jurisdiction to determine water release
25 requirements. . . .”); *Id.* at 18209 (“The proper amount of rearing flows is not within the jurisdiction
26 of the lead agencies.”).) COMB simply has no discretion to approve or implement any of these
27 activities, and, therefore, is not the proper lead agency to direct environmental review of them.
28

1 The harm and confusion caused by COMB’s improperly acting as the lead agency is palpable,
2 particularly given that there are *two* EIRs for public consideration with conflicting conclusions. As
3 just one example, COMB determined that the impacts to native vegetation and oak trees resulting
4 from surcharging Cachuma Reservoir was “Significant and Mitigable” and that, after mitigation, the
5 impact would be less than significant. (39 AR 371:17386-87.) In contrast, the State Water Board
6 properly determined that the surcharging impact *could not* be mitigated to a level of less than
7 significance. (47 AR 445:21317.) COMB dismissed this conflict (40 AR 372:18202), reasoning that
8 the “lead agency has the discretion to formulate standards for significance” of the impacts. (*Id.* at
9 18211 (citing CEQA Guidelines, § 15064(b)), *see also* 18202.) But it is precisely because the lead
10 agency has this “discretion” that COMB’s improper assertion that it is the proper lead agency
11 amounts to reversible error. CEQA grants a lead agency this discretion so that it can exercise
12 “expertise in areas within its particular domain” and recommend “the most environmentally sound
13 alternative.” *PCL*, 83 Cal. App. 4th at 904. Here, impacts caused by surcharging and water releases,
14 and the resulting impacts on the public trust resources, such as steelhead, are unquestionably with the
15 State Water Board’s domain. CEQA does not permit COMB to commandeer the lead agency role
16 and supplant its discretion for that of the State Water Board.⁷

17
18
19 ⁷ By denying the State Water Board’s status as lead agency, COMB also prepared an EIR with a
20 deficient alternatives analysis. The State Water Board proposed that if COMB “were to prepare an
21 EIR/EIS that evaluates only non-flow related measures, the revised flow requirements contained in
22 the Biological Opinion and to be considered by the [State Water Board] could be evaluated in the
23 cumulative impacts section of the EIR/EIS.” (40 AR 372:17891.) Further, the State Water Board
24 again proposed that COMB revise its “project description to exclude any flow related measures.” (*Id.*
25 at 17888.) COMB’s only response was to “respectfully decline to exclude flow related measures
26 from [the FMP EIR’s] analysis of environmental impacts. (*Id.* at 18203.) COMB’s failure to
27 consider this proposal as a project alternative is error. The alternative, which would have included
28 most of the Project, would have satisfied the Biological Opinion, would have been as feasible, if not
more so, than the proposed Project, and would have accomplished a majority of the Project’s goals,
as evidenced by COMB’s statement that “many of the [FMP EIR] projects are completely
independent of others, and do not rely upon the success of one project to ensure success of the
others.” (*Id.* at 18296.) Certainly the proposal would not have met *all* Project objectives, but CEQA
does not require that an alternative fully accomplish every project objective. CEQA Guidelines §
15126.6 (An EIR must “[d]escribe a range of reasonable alternatives to the project, or to the location
of the project, which could feasibly attain the basic objectives of the project. . . .”) A reasonable
range of alternatives for the FMP EIR should have included a project excluding water releases.

1 The court’s opinion in *PCL* is instructive and dictates that the State Water Board is the proper
2 lead agency. There, the Department of Water Resources (“DWR”) entered into a contract, the
3 Monterey Agreement, with six local water contractors. The Monterey Agreement contemplated
4 changes in the operation of certain State Water Project facilities. *Id.* at 897. Although DWR was the
5 principal agency overseeing the State Water project, the parties agreed that one of the contractors,
6 Central Coast Water Authority (“CCWA”), should act as the lead agency to prepare the EIR for the
7 Monterey Agreement. *Id.* The court held that this violated CEQA:

8 Section 21067 plainly requires the public agency with principal
9 responsibility to assume the role as lead agency. CCWA, a regional
10 water contractor, does not have the principal responsibility for
11 implementing the Monterey Agreement, although it may have a
12 substantial stake in seeing it implemented. By contrast, DWR, the state
13 agency charged with the statutory responsibility to build, manage, and
14 operate the [State Water Project], clearly retains the principal
15 responsibility to execute amended long-term contracts, to convey the
16 kern Fan Element, and to facilitate the water transfers allowed under
17 the Monterey Agreement.

18 *Id.* at 906; *see also Friends of Cuyamaca Valley v. Lake Cuyamaca Recreation and Park Dist.*, 28
19 Cal. App. 4th 419, 427 (1994) (finding CDFG, not the recreation district, was the proper lead agency
20 to conduct environmental review for approval of the duck hunting season because CDFG, not the
21 district, had authority to approve the season). Like DWR, the State Water Board is the “state agency
22 charged with the statutory responsibility” for determining what measures, if any, are needed for the
23 steelhead as it concerns Lake Cachuma’s impact on the steelhead. And here, like the local water
24 agency in *PCL*, COMB, a local agency with a limited role in a much larger project, has improperly
25 asserted itself as the lead agency for environmental review that must be led by the State Water Board.

26 Finally, as discussed above, the State Water Board issues the permits that govern operation of
27 Lake Cachuma and its related facilities, including COMB’s operations. (Section II(A), *supra*.)
28 COMB’s ability to undertake any action relating to Lake Cachuma, including the activities proposed
in the FMP, depends in the first instance upon the authority flowing from the State Water Board’s
permits. As the agency with the broader governmental powers and principal authority for

1 implementing measures to protect steelhead on the Santa Ynez River, the State Water Board, not
2 COMB, should be the lead agency. *See* CEQA Guidelines, § 15051(b)(1).⁸

3 **3. COMB Cannot Support Its Assertion That It Is The Appropriate Lead**
4 **Agency.**

5 COMB justified its role as lead agency by relying on CEQA Guideline 15051(c), which
6 provides that “where more than one public agency equally meet the criteria in subdivision (b), the
7 agency which will act first on the project in question shall be lead agency.” COMB asserts that it was
8 the proper lead agency because it was the “first state or local agency to take action to fund, design,
9 and implement FMP/BO projects.” (39 AR 371:17400.) COMB’s argument fails for two reasons.

10 First, *before* an agency may apply the standards set forth in CEQA Guideline 15051(c) to
11 declare itself lead agency it must first “equally meet the criteria in subdivision [15051](b).” CEQA
12 Guidelines §15051(c). COMB incorrectly assumed that it satisfied the criteria in section 15051(b),
13 but it does not. The relevant criteria in 15051(b)(1) states:

14 The Lead Agency will normally be the agency with general
15 governmental powers, such as a city or county, rather than an agency
16 with a single or limited purpose such as an air pollution control district
or a district which will provide a public service or public utility to the
project.

17 As discussed above, the State Water Board has the broader governmental powers, while COMB
18 exists for the limited purpose of operating some of the Cachuma Project facilities. (Section B2,
19 *supra*; 39 AR 371:17396.) It does not matter whether COMB “acted first” under 15051(c) because
20 section 15051(c) does not apply here. *Friends of Cuyamaca Valley*, 28 Cal. App. 4th at 428
21 (rejecting application of section 15051(c) where the facts dictated the proper lead agency).

22 ⁸ Even if COMB *could* claim jurisdiction over some of activities within the Project (and it cannot) it
23 was at least obligated to name the State Water Board as a “responsible agency.” Under CEQA
24 section 21069, a responsible agency is an agency “other than the lead agency which has responsibility
25 for carrying out or approving a project.” It is beyond dispute that the State Water Board *alone*
26 approves water releases from Lake Cachuma, a key component of the Project. Given that a
27 responsible agency may require changes in a project to lessen or avoid environmental effects of the
28 part of a project to be approved by the responsible agency, perhaps COMB was concerned that the
State Water Board, whose Draft EIR for water releases from the Cachuma Project reaches different
conclusions regarding significant impacts that the FMP EIR, would have exercised its obligations as a
responsible agency to COMB’s disadvantage. CEQA Guidelines §§15041, 15096(g)(1); *see also*
Sierra Club v. Cal. Coastal Comm’n, 35 Cal. 4th 839 (2005).

1 Even if section 15051(c) applied, the State Water Board, not COMB, was the first state agency to
2 take action on measures to protect the steelhead. The State Water Board, in fact, took steps to
3 evaluate what measures were necessary to protect steelhead as early as 1990. (*See, e.g.*,
4 7 AR 35:2663 (WR 94-5, noting that in December 1990, State Water Board Chairman stated that
5 before State Water Board could act on pending actions, it had to first evaluate “potential mitigation
6 measures for the remnant steelhead fishery”).) Respondents, on the other hand, admit that their initial
7 inquiry into the status of public trust resources, such as the steelhead, did not arise by virtue of
8 statutory responsibility, but began in 1993 as a “*cooperative program* to investigate native fisheries
9 along the lower Santa Ynez River below Bradbury Dam.” (39 AR 371:17396 (emphasis added); 40
10 AR 372:18233.) Given this, the State Water Board, not COMB, was the first state agency to act and
11 it would be the proper lead agency even if the Court applied CEQA Guidelines section 15051(c).

12 The FMP EIR’s failure to identify the proper lead agency renders it deficient under CEQA,
13 and requires it to be set aside, with any further environmental review of the Project to be conducted
14 by the appropriate lead agency.

15 **C. The FMP EIR’s Description Of The Environmental Setting Violates CEQA.**
16

17 CEQA requires that an EIR contain an accurate description of the project’s “environmental
18 setting,” which is a “description of the physical environmental conditions in the vicinity of the
19 project. . . . from both a local and regional perspective.” CEQA Guidelines § 15125(a). The
20 description must be sufficient to allow “an understanding of the significant effects of the proposed
21 projects and its alternatives.” *Id.* The description “must permit the significant effects of the project
22 to be considered in the full environmental context.” CEQA Guidelines § 15125(c). An accurate and
23 complete description of the environmental setting is “critical to the assessment of environmental
24 impacts,” and for that reason, failure to adequately describe the environmental setting is error. *Eel*
25 *River*, 108 Cal. App. 4th at 874-75. Indeed, “the ultimate decision of whether to approve a project,
26 be that decision right or wrong, is a nullity if based upon an EIR that does not provide the decision
27 makers, and the public, with the information about the project that is required by CEQA.” *San*
28 *Joaquin Raptor*, 27 Cal. App. 4th at 721-722 (quoting *Santiago County Water Dist. v. County of*

1 *Orange*, 118 Cal. App. 3d 818, 829 (1981)). Accordingly, an EIR’s description of the environmental
2 setting must be as accurate as possible. *Id.*

3 The FMP EIR’s characterization of Reclamation’s water rights permits for the Cachuma
4 Project is inaccurate and misleading because it failed to provide sufficient information about the
5 circumstances and potential ramifications to the Project resulting from the State Water Board’s
6 hearings to modify Reclamation’s permits. More specifically, the FMP EIR states that
7 “implementation of the FMP/BO projects will not require modification of Reclamation’s current
8 water rights permits from the State Water Board as the proposed flow-related projects (i.e., release
9 ramping, and releases from Bradbury Dam for fish purposes) and reservoir surcharging are allowable
10 under the current water rights permits.” (36 AR 312:15945-46.) But the FMP EIR fails to provide
11 sufficient information about the probable changes to the Project likely to occur due to the State Water
12 Board’s on-going proceedings to modify Reclamation’s permits.

13 As discussed, the Project’s seven “fish release” activities are matters which the State Water
14 Board is currently reviewing in connection with its hearings on Reclamation’s permits. (*See* Section
15 D, *supra*; *see also* 47 AR 445:21350-57.) COMB admits that State Water Board’s on-going hearings
16 could result in modifications to the water releases proposed in the Project, i.e., the seven “Releases
17 for Fish” activities. (40 AR 372:18203 (“The lead agencies agree that ‘the . . . water rights
18 hearings . . . may result in changes to the amount and timing of water releases.’”)) And COMB
19 further concedes that the timing and amount of any fish releases from Lake Cachuma are determined
20 by the State Water Board, not COMB:

21 The lead agencies agree with the State Water Board that “the [State Water
22 Board], not COMB is the sole agency with discretionary authority to modify
23 the Reclamation’s water rights to protect public trust resources and
24 downstream water rights.” Within that right is the State Water Board’s right to
set flow requirements. The State Water Board EIR will be the definitive
document regarding the environmental impacts of modifying the release
requirements contained in the Reclamation’s permits.

25 (*Id.* at 18202.)

26 Moreover, COMB was well aware that the FMP EIR’s environmental setting was inadequate.
27 The State Water Board repeatedly objected to the FMP EIR’s presumptions regarding the water rights
28 for the Cachuma Project, first submitting a comment letter in November 2001, in response to the

1 NOP for the FMP EIR, cautioning that COMB’s preparation of the FMP EIR was premature and
2 “likely to be inadequate because it fails to adequately address the flow requirements that will
3 apply. . . .” (39 AR 371:17857.) In April 2002, the State Water Board again cautioned COMB that a
4 key hearing issue before the State Water Board was “what flow requirements or other measures
5 should be incorporated into [Reclamation’s] water right permits in order to protect public trust
6 resources, including steelhead, in the Santa Ynez River below Bradbury Dam.” (40 AR 372:17891.)
7 And in September of 2003, for the third time, the State Water Board pointed out inaccuracies in the
8 FMP EIR/EIR’s discussion about the on-going State Water Board hearings:

9 [I]f the COMB EIR/EIS is finalized before completion of the SWRCB
10 Phase II hearing, the EIR/EIS may not accurately reflect any changes to
11 [Reclamation’s] water rights permits as a result of the hearing. At this
time, the Division cannot predict the final release requirements or other
measures that will be included in [Reclamation’s] permits.

12 (*Id.* at 17888.)

13 Despite these admonitions, the FMP EIR failed to disclose that the Project’s very existence is
14 threatened by the State Water Board’s proceedings. Nowhere in the FMP EIR’s project setting does
15 it disclose that the Project may be radically revised based on the outcome of the State Water Board’s
16 on-going proceedings. (*See generally* 39 AR 371:17405-62.) Even when discussing activities within
17 the exclusive province of the State Water Board, the FMP EIR fails to discuss probable changes due
18 to the State Water Board’s hearings. (*See Id.* at 17419-27.)

19 Rather than apprising the public of the potential changes, the FMP EIR misleads the public by
20 mischaracterizing the State Water Board proceedings as insignificant. For example, the FMP EIR
21 states that the State Water Board’s Draft EIR addresses a “distinctly different” purpose and focus
22 than the FMP EIR. (*See* 39 AR 371:17402; 40 AR 372:18200.) This is just wrong. Seven of the
23 project’s activities call for “releases for fish,” *i.e.*, releases of water from the Bradbury dam. (*See* 39
24 AR 371:17408.) That is precisely the activity under consideration in the State Water Board hearings.
25 (47 AR 445:21350-57.) The FMP EIR also claims that the Project’s proposed water releases are
26 allowable under Reclamation’s existing permits without explaining that the State Water Board is
27 currently considering modifications to those very permits. (39 AR 371:17419 (stating that the “ramp-
28 down schedule is consistent with, and allowable under, Reclamation’s water rights permit”).) And in

1 the limited places the FMP EIR mentions the State Water Board hearings, it fails to disclose in any
2 meaningful detail the various alternatives being considered by the State Water Board, and how
3 adoption of those alternatives could change the Project. (*Id.* at 17471-72.)

4 In its responses to comments, COMB summarily dismissed concerns about the potential
5 changes resulting from the State Water Board proceedings as “speculative.” (40 AR 372:18202.)
6 This is patently insufficient given the wealth of knowledge that COMB possessed concerning the
7 alternatives proposed in the State Water Board hearings. Also, even COMB recognized that unless
8 the State Water Board adopted the *same* proposals COMB approved in the Project, the FMP EIR’s
9 analysis would be inadequate, and thus it urged the State Water Board to adopt a proposal in line with
10 COMB’s Project. (*Id.* at 18203.)

11 Recent case law provides strong precedent for rejecting the FMP EIR’s flawed environmental
12 setting description. In *Eel River*, the Court of Appeal considered an EIR prepared by the Sonoma
13 County Water Agency for a project to increase water diversions from the Russian River to meet
14 customer water demands. 108 Cal. App. 4th at 864. Petitioners challenged the EIR, asserting that it
15 failed to adequately discuss and disclose that the Federal Energy Regulatory Commission (“FERC”)
16 was considering proposals to substantially curtail the amount of water the Russian River could divert
17 from Eel River due to the impacts of those diversions on salmonid species. *Id.* The Court of Appeal
18 held that the EIR’s failure to sufficiently disclose that there were on-going hearings before FERC, in
19 which the Agency was an active participant, rendered the environmental setting discussion
20 inadequate. The environmental setting did not comply with CEQA because it “fail[ed] to alert the
21 public and the decision makers to the real possibility that [water] diversions, on which the Agency[’s]
22 [project] depends, will be curtailed.” *Id.* at 874. The Court held:

23 the EIR’s incomplete description of the Project’s environmental setting
24 fails to set the stage for a discussion of the cumulative impact of the
25 FERC proceeding and the Project. We conclude the EIR must disclose
26 to the public and decision makers that, because of the harm caused by
27 Eel River diversions to salmonid species in that river, proposals are
pending before FERC to curtail these diversions, on which the Agency
depends. Without this information, the EIR does not comply with
Guidelines section 15125.

28 *Id.* at 874-875.

1 Here, as in *Eel River*, the FMP EIR’s environmental setting discussion is inadequate because,
2 though the FMP EIR mentioned the State Water Board’s Draft EIR, it failed to alert the public and
3 decision makers to the scope of the likely imminent changes in Reclamation’s water rights permits, as
4 already set forth in the State Water Board’s EIR. Just as in *Eel River*, COMB was well aware that the
5 State Water Board’s on-going proceedings would directly impact the analysis in the FMP EIR.
6 COMB, in fact, lobbied the State Water Board to prevent it from making any water rights permit
7 alterations that would render the FMP EIR inaccurate and obsolete. (40 AR 372:18203.) But at the
8 same time, COMB refused, even when requested by the State Water Board, to include a discussion of
9 the potential changes in the FMP EIR. Further, by providing a description of the existing permitting
10 status that presumed no change in Reclamation’s water rights permits, just as in *Eel River*, COMB
11 artificially truncated any meaningful discussion of the Project’s impacts under the alternatives
12 discussed in the State Water Board’s Draft EIR. This is prejudicial error and on these grounds alone
13 the FMP EIR must be set aside.

14 **D. The FMP EIR Violates CEQA Because It Uses An Inaccurate and Unstable**
15 **Project Description**

16 CEQA requires an accurate, stable and finite project description that includes foreseeable
17 modifications to the proposed project. *See, e.g., County of Inyo v. City of Los Angeles*, 71 Cal. App.
18 3d 185, 193 (1977); CEQA Guidelines, § 15124. A “curtailed” project description—one that
19 artificially narrows the description of the project— may “stultify the objectives of the reporting
20 process” and “frustrate[] CEQA’s public information aims.” *County of Inyo*, 71 Cal. App. 3d at 192,
21 200. “Only through an accurate view of the project may affected outsiders and public decision-
22 makers balance the proposal’s benefit against its environmental cost, consider mitigation measures,
23 assess the advantage of terminating the proposal (i.e., the “no project” alternative) and weigh other
24 alternatives in the balance.” *Id.* at 192-93. The FMP EIR failed to set forth an accurate and stable
25 project description, and thus fails to comply with CEQA.

26 First, for the reasons discussed above, the FMP EIR’s project description is inadequate and
27 violates CEQA because it fails to provide sufficient information about the probable changes to the
28 project that could occur due to the State Water Board’s on-going proceedings to consider

1 modifications to Reclamation’s permits. (*See* Section C, *supra*.) The FMP EIR’s curtailed project
2 description omitting information about the State Water Board’s proceedings deprived the public of
3 important information about how the State Water Board’s proceedings could change the Project, in
4 violation of CEQA. *See Laurel Heights*, 47 Cal. 3d at 394-98 (EIR inadequate because it failed to
5 discuss anticipated future uses of building, even when the precise future uses were unknown).

6 Second, the FMP EIR inconsistently describes the activities that the Project comprises, and
7 the predicate conditions for implementing the Project. For example:

8 The FMP EIR is unclear and contradictory as to how, or whether, the 3-foot surcharge will be
9 implemented. The FMP EIR initially states that surcharging would be accomplished in two phases: a
10 1.8 foot surcharge and a 3.0 foot surcharge. (39 AR 371:17425.) The FMP EIR then states that
11 COMB later “decided to pursue a 3.0-foot surcharge without an interim surcharging at 1.8 feet.” (*Id.*)
12 Then, just two pages later, the FMP EIR states that it would pursue an interim 1.8 foot surcharge
13 pursuant to an MOU between CCRB and County of Santa Barbara. (*Id.* at 17426-27.) Even more
14 confusing, the FMP EIR states that if Reclamation does not achieve the 3.0-foot surcharge by Spring
15 2005, it would need to “reinitiate their endangered species consultation with NOAA Fisheries” (*Id.* at
16 17426), which, of course, could lead to a different surcharge. (40 AR 372:18209.) At the same time,
17 the FMP EIR appears to acknowledge that reconsultation is inevitable because the agreement with the
18 County of Santa Barbara “effectively postpone[s] a potential 3-foot surcharge for up to five years”
19 (2009), well after Reclamation’s obligation to reinitiate consultation with NOAA Fisheries in 2005.
20 (39 AR 371:17427.)

21 The FMP EIR contains contradictory descriptions of the role that the State Water Board plays
22 with respect to COMB’s proposed “fish releases” projects. In some places, the FMP EIR states that
23 the Project’s proposed water releases can be accomplished under Reclamation’s existing permits with
24 the State Water Board. (*See, e.g., Id.* at 17419 (“The ramp-down schedule is consistent with, and
25 allowable under, Reclamation’s water rights permit from the State Water Board.”); 40 AR 372:18200
26 (“The FMP/BO project does not include any modification of water rights permits or water release
27 requirements.”); 40 AR 372:18233 (“These projects and management actions are independent of the
28 State Water Board’s action, and are allowable under Reclamation’s water rights permits.”).) Yet, in

1 other places, the FMP EIR claims that this Project involves “water release requirements higher than
2 those under the State Water Board’s currently valid water rights orders” (40 AR 372: 18200) and
3 concedes that the State Water Board hearings “may result in changes to the amount and timing of
4 water releases” (*Id.* at 18203.) The FMP EIR is unclear and contradictory in its discussion of
5 whether the proposed “fish release” projects will require modified permits from the State Water
6 Board.

7 The FMP EIR is ambiguous as to whether the Project includes feasibility studies for fish
8 passage over Bradbury Dam. In responses to comments, the FMP EIR states that the feasibility study
9 of fish passage of the dam is “part of Project No. 28 in Table 2-1 of the Draft EIR/EIS.” (40 AR
10 372:18205; *see also* 39 AR 371:17413 (noting generally that COMB will “conduct future feasibility
11 studies on passage projects over Bradbury Dam”).) However, neither the draft EIR nor the final EIR
12 include a description of fish passage feasibility studies as part of Project No. 28. (*See* 36 AR
13 312:15956; 39 AR 371:17410, 17462.)

14 Given this, the FMP EIR’s unstable, confusing and contradictory description of the project, and
15 failure to discuss probable changes arising from the State Water Board’s hearings, violates CEQA
16 and requires that COMB’s certification of the FMP EIR be set aside. *County of Inyo*, 71 Cal. App. 3d
17 at 199-200 (agency failed to proceed in a manner required by law and violated CEQA by describing a
18 narrower project in EIR than the actual project); *Laurel Heights*, 47 Cal. 3d 376 at 394-98.

19 **E. The FMP EIR Violates CEQA By Failing To Analyze The Project’s Cumulative**
20 **Impacts In Light of The State Water Board Draft EIR.**

21 The CEQA Guidelines require local agencies to consider “past, present, and probable future
22 projects producing related or cumulative impacts. . . .” CEQA Guidelines § 15130(b)(1)(A). A local
23 agency must interpret this requirement to “afford the fullest possible protection of the environment.”
24 *Citizens Assn. for Sensible Dev. of Bishop Area v. County of Inyo*, 172 Cal. App. 3d 151, 168 (1985);
25 *see also Friends of Mammoth v. Bd. of Supervisors*, 8 Cal. 3d 247, 259 (1972). In considering
26 whether an EIR must include related projects, “[t]he primary determination is whether it was
27 reasonable and practical to include the projects and whether, without their inclusion, the severity and
28

1 significance of the cumulative impacts were reflected adequately.” *Kings County Farm Bureau*, 221
2 Cal. App. 3d at 723.

3 As discussed in Section C above, in *Eel River*, the Court of Appeal considered a challenge to
4 a Sonoma County Water Agency (“Agency”) EIR for a project to increase water diversions from the
5 Russian River to meet customer water demands. Petitioners challenged the Agency’s EIR for its
6 failure to adequately discuss and disclose that FERC was concurrently considering proposals to
7 curtail the amount of water the Russian River could divert from Eel River. The Court of Appeal in
8 *Eel River* identified six reasons the Agency’s failure to discuss and disclose FERC’s on-going
9 proceedings was “prejudicial” and rendered the EIR’s cumulative impacts discussion “deficient”; the
10 same six reasons apply in this case: (1) the EIR’s discussion of the FERC proceedings conflicted with
11 evidence in the record; (2) the Agency was aware when it prepared its EIR that FERC was
12 considering proposals that might limit the Agency’s ability to carry out its project; (3) at the time the
13 EIR was prepared, the proposals before FERC had progressed to the point that an Environmental
14 Impact Statement, the federal equivalent of an EIR, had been initiated; (4) the Agency was an active
15 participant in the FERC proceedings; (5) the Agency’s failure to analyze the FERC proceedings
16 denied decisionmakers and the public the information necessary to evaluate the project; and (6) if the
17 Agency had taken the FERC proceedings into account in its EIR, it might have reached a different
18 conclusion regarding its project. *Eel River*, 108 Cal. App. at 868-883. Here, the FMP EIR failed to
19 take into account and adequately analyze the proposals pending before the State Water Board
20 regarding modifications of Reclamation’s water rights permits, and the cumulative impacts that the
21 State Water Board’s decision could have on the environment and on the Project approved by COMB.
22 This failure violates CEQA, and requires that the FMP EIR be set aside.

23 Just as the Court of Appeal observed in *Eel River*, “the record tells a far different story from
24 the one [COMB] relates in its EIR.” *See Id.* at 869. The FMP EIR’s Cumulative Impacts analysis
25 concedes:

26 The State Water Board convened the WR 94-5 hearing on the Cachuma
27 Project in late 2003 to determine if there is a need to modify
28 Reclamation’s water rights permits to divert, store, and use water from
the Santa Ynez River to protect downstream water rights and public
trust resources. The outcome of the hearing cannot be predicted. The

1 State Water Board has the authority to modify the permits, including
2 (1) changes in the allowable storage; (2) changes in the amount and
3 timing of downstream water rights; (3) changes in the method to
4 measure and account for downstream releases; and (4) new downstream
5 releases to address new public trust resource issues.

6 (39 AR 371:17755-56.) However, the FMP EIR asserts that no cumulative impacts analysis of the
7 pending State Water Board action is possible, because, “there is *no available information* on what
8 type of action, if any, the State Water Board may take in the WR 94-5 hearings. . . .” (*Id.*) (emphasis
9 added). In fact, the FMP EIR reveals that COMB *did* have information concerning the type of
10 actions pending before the State Water Board. The FMP EIR states that “[i]n May 1999, the State
11 Water Board issued a Notice of Preparation (NOP) for an EIR on the Cachuma Project water rights
12 permits. A Draft EIR was issued in August 2003 by the State Board. The State Water Board will use
13 their EIR in its determination as to whether any modification is required in Reclamation’s permits.”
14 (*Id.* at 17402.) Thus, at the time COMB prepared the FMP EIR, COMB was aware that the State
15 Water Board was considering proposals to modify Reclamation’s water rights permits, and that a
16 CEQA analysis of the State Water Board’s proposals was publicly available.

17 The record also demonstrates that the State Water Board’s proposed modifications to
18 Reclamation’s permits could directly impact COMB’s ability to carry out the Project’s flow-related
19 activities. (*See Id.* at 17408.) The FMP EIR is prefaced on the assumption that the Project’s flow-
20 related activities can be carried out under Reclamation’s current water rights permits. (*Id.* at 17399-
21 400 (“implementation of the FMP/BO Projects will not require modification of Reclamation’s current
22 water rights permits from the State Water Board. . . .”)) However, the State Water Board Draft EIR
23 considers seven alternatives for modifying Reclamation’s permits, including the alternative that the
24 State Water Board selected as the environmentally superior alternative, Alternative 3A. (47 AR
25 445:21314.)

26 Alternative 3A calls for implementation of the Biological Opinion, but would only allow for
27 water releases for fish rearing and passage at the Bradbury Dam’s “current 0.75-foot surcharge.”
28 (*Id.*) This is in stark contrast to the Project approved by COMB pursuant to the FMP EIR, which
Project is prefaced on COMB’s assumption that the State Water Board will permit water releases at
the Bradbury Dam with a 3.0 foot surcharge. (44 AR 423:20332.) COMB certainly is aware of this

1 distinction, in fact, the FMP EIR states that “[t]he lead agencies have requested the State Water
2 Board to select Alternative 3C” (the alternative that calls for the 3.0 foot surcharge). (40 AR 372:
3 18202-203.) Also, the Cachuma Conservation Release Board (made up of many Cachuma member
4 units) submitted a comment letter on the State Water Board Draft EIR objecting to the State Water
5 Board’s selection of Alternative 3A as the environmentally superior alternative, and advocating for
6 the State Water Board to designate Alternative 3C as environmentally superior. (38 AR 346:17016-
7 17.)

8 As the Court in *Eel River* held, “CEQA requires more than this.” 108 Cal. App. 4th at 870.
9 “[I]t was both reasonable and practical to include the [State Water Board] proposals pending before
10 [State Water Board] in [COMB’s] cumulative impacts analysis.” *Id.* Based on the [State Water
11 Board’s preparation of a Draft EIR] alone, [a court] can conclude the possible [modification of
12 Reclamation’s water rights permits] was a reasonably foreseeable future project, which should have
13 been included in the EIR’s discussion of cumulative impacts.” *Id.*, see also *San Franciscans for*
14 *Reasonable Growth*, 151 Cal. App. 3d at 75 (projects that had progressed far enough to be under
15 environmental review must be considered in a cumulative impacts analysis because “experience and
16 common sense indicate that projects which are under review are ‘reasonabl[y] foreseeable probable
17 future projects.’”).

18 Although COMB down-plays the relevance of the State Water Board’s EIR, arguing that “the
19 purpose and focus” of the two documents “are distinctly different,” COMB admits that it is a
20 participant in the State Water Board proceedings, noting that “at the WR 94-5 water rights hearing in
21 November 2003, Reclamation and COMB requested that the State Water Board adopt the FMP/BO
22 releases for the protection of public trust resources. . . .” (39 AR 371:17403.) In fact, the record
23 demonstrates that the Cachuma Member Units were and are active participants in the State Water
24 Board proceedings, who understood fully the nature and scope of the permit changes under
25 consideration by the State Water Board and lobbied for the State Water Board to approve water rights
26 permits that would correspond to water releases required to pursue the FMP EIR Project.

27 In its February 13, 2004 “Closing Brief” to the State Water Board (submitted 11 days before
28 COMB issued its Final FMP EIR and 9 months before COMB certified the FMP EIR,) the Cachuma

1 Member Units appealed to the Board not to “modify Reclamation’s Cachuma Project permits,” and
2 recommended that the Board “adopt [State Water Board Draft EIR] Alternative 3C as [the Board’s]
3 preferred method of Cachuma Project operation.” (54 AR 452:25485.) Just as in *Eel River*, COMB
4 is “participating actively in [the State Water Board] proceeding” and “was aware of the nature of the
5 proposals pending before [the State Water Board] and the environmental consequences of those
6 proposals. . . .” which is “evidence that environmental information omitted by [COMB] was, in fact,
7 available for inclusion in the EIR” such that “the EIR could reasonably and practically have included
8 such projects in its analysis.” *Eel River*, 108 Cal. App. 4th at 870-871.

9 Finally, COMB’s failure to consider the impact of the potential modification of Reclamation’s
10 water rights permits resulted in an EIR that failed to alert decisionmakers and the public to the
11 possibility that COMB will not be able to release water as called for in the Project. As in *Eel River*,
12 had COMB taken into account the possible changes to the water rights permits, including the State
13 Water Board’s selection of its environmentally superior alternative, which is in direct conflict with
14 COMB’s Project, “it might well have reached a different conclusion” about the Project. *Id.* at 871-
15 872. Such error is prejudicial as “the failure to include relevant information precludes informed
16 decision making and informed public participation, thereby thwarting the statutory goals of the EIR
17 process.” *Id.* (citing *San Joaquin Raptor*, 27 Cal. App. 4th at 721–722).

18 The FMP EIR argues that no cumulative impacts analysis of the pending State Water Board
19 proceedings is necessary because “any prediction would be purely speculative.” (39 AR 371:17755-
20 56.) Further, COMB received comments on the draft FMP EIR noting:

21 we find it incredulous [sic] that COMB and Reclamation would issue
22 and fast track this EIR/EIS during same time frame as the State Water
23 Board issued a Notice of Preparation for their own EIR on the
24 Cachuma Project water rights permits when it recognizes the State
Water Board’s jurisdiction on the question of minimum releases from
the Cachuma Project

25 COMB’s only response was to assert that “the timing of a decision by the State Water Board and the
26 issuance of a Final EIR are unknown . . . [h]ence there is no need to delay the implementation of the
27 FMP/BO pending the State Water Board’s decision. . . .” (40 AR 372:18233, *see also* 17954.)
28 Again, as in *Eel River*, this Court must reject that argument. In *Eel River* the Court of Appeal

1 concluded, “[w]e do not agree that a lengthy review process means a project is speculative . . . the
2 proposals pending before FERC to decrease Eel River diversions may not be considered speculative
3 simply because the FERC process appears to be a lengthy one.” 108 Cal. App. 4th at 870.

4 **F. The FMP EIR Violates CEQA Because No Substantial Evidence Supports Its**
5 **Conclusion That Upper Hilton Creek Is Suitable Habitat For Steelhead**

6 One of the Project’s proposed activities is removing an existing barrier for fish passage
7 underneath the Highway 154 Culvert on Hilton Creek. (39 AR 371:17408, 17428-29.) The FMP
8 EIR concluded that “excellent rearing” and “some spawning” habitat for steelhead exists on Hilton
9 Creek above the Highway 154 culvert (*Id.* at 17627-28) and impacts to steelhead resulting from this
10 project would be less than significant. (*Id.* at 17629.) Far from finding support for its conclusions,
11 the unrebutted expert evidence in the record demonstrates that upper Hilton Creek does not have
12 suitable habitat for steelhead, and that removing the existing Highway 154 culvert barrier to lure fish
13 up Hilton Creek is tantamount to “trout murder.” (40 AR 372:18115.)

14 **1. No Substantial Evidence Supports The FMP EIR’s Conclusion That**
15 **Hilton Creek Is Suitable Habitat for Steelhead**

16 The record is devoid of evidence supporting the FMP EIR’s conclusion that upper Hilton
17 Creek contains habitat suitable for steelhead. (*See* 39 AR 371:17628-29.)⁹ To the contrary, the
18 unrebutted evidence in the record, including testimony by Petitioners’ expert, fish biologist Dr. Alice
19 Rich, demonstrates that upper Hilton Creek *does not* have suitable habitat for steelhead.¹⁰

20 First, upper Hilton Creek lacks sufficient water be viable steelhead spawning or rearing
21 habitat. Viable steelhead habitat requires, among other things: (1) flowing water containing an
22 adequate amount of dissolved oxygen, (2) access to and from spawning habitat, and (3) access to and
23 from rearing habitat. (40 AR 372:18166A (DVD 5:30).) Adequate stream flows are “absolutely

24 ⁹ The term “upper Hilton Creek” refers to that portion of Hilton Creek upstream of Reclamation
25 property, which is the definition that Petitioners’ expert, Dr. Rich used in her analysis. (*See* 40 AR
372:18115.)

26 ¹⁰ Dr. Rich is highly qualified to analyze the suitability of Hilton creek as habitat for steelhead. For
27 the last twenty years, she has, among other things, studied the thermal impacts on salmonids,
and conducted multiple studies of, fish and fish habitat in California. (*See Id.* at 18140-51.)

1 critical” to the survival of steelhead. (*Id.* (DVD at 6:50); *see also* 39 AR 371:17543 (FMP EIR
2 noting correlation between higher flows and the frequency and quality of rearing habitat).)

3 Dr. Rich conducted multiple surveys of upper Hilton Creek in 2002 and 2003 in multiple
4 months during all seasons of the year to determine the suitability of Hilton Creek as habitat for
5 steelhead. (*See generally*, 40 AR 372:18114-66; 18166A (DVD).) Dr. Rich concluded that upper
6 Hilton Creek does not have suitable rearing or spawning habitat for steelhead because, among other
7 things, it lacks sufficient water. (*Id.* at 18118; *see also* 18116, 18126.) In both 2002 and 2003, Dr.
8 Rich observed that upper Hilton Creek went completely dry during the summer months, when
9 steelhead need water for rearing. (*Id.* at 18125, 18166A (DVD at 7:45, 10:30), 18121, and 18166A
10 (DVD at 11:30, 12:00).)¹¹ A creek that completely dries during the summer, of course, is insufficient
11 to support steelhead. (*Id.* at 18166A (DVD at 10:30), 18117; *see also* 18166A (DVD at 2:45).)¹²
12 Indeed, the FMP’s technical appendices recognize that natural conditions in Hilton Creek preclude

13
14 ¹¹ Dr. Rich noted that 2002 was a dry year, but also confirmed that the lack of water in Hilton Creek
15 is a natural phenomenon that has been documented for over 70 years. (40 AR 372:18166A (DVD at
16 11:50).) COMB mischaracterizes 2003 as a “below normal water year” (*Id.* at 18299) even though its
17 own biologist testified that 2003 was a normal year for water (46 AR 444:21117; *see also* 40 AR
18 372:18373 (testimony of Ali Shahroody noting that 1998 resulted in largest amount of water spilling
19 from Bradbury Dam for the decade between 1993 and 2002). COMB summarily discards Dr. Rich’s
20 surveys as mere “snapshot[s] in time of specific locations” and thus lacking the “necessary
21 documentation to modify the conclusions drawn by Reclamation and COMB....” (40 AR
22 472:18299.) In fact, Dr. Rich’s surveys were conducted throughout 2002 and 2003 during multiple
23 months (January, February, April, May, August, September, and December), to provide an accurate
24 picture of year-round conditions on Hilton Creek and representative example of conditions on Hilton
25 Creek upstream from Reclamation’s property. (*See* 40 AR 372:18151; 42 AR 392:19474.) It is
26 telling that COMB summarily dismissed Dr. Rich’s comprehensive surveys as inadequate while
27 basing its own conclusions regarding upper Hilton Creek on the observations of Mr. Engblom, who
28 made only a single, four-hour visit to Hilton Creek and took no samples or surveys, and unspecified
aerial photos, which tell you very little about the habitat and are not in the record. (39 AR
371:17626; *see also* 42 AR 392:19472-73.)

¹² COMB dismissed Dr. Rich’s conclusion that “Upper Hilton Creek does not provide enough water
‘long enough for steelhead to complete their journey,’” claiming that she “[did] not provide
documentation” in support. (40 AR 372:18299.) COMB’s own technical appendices to the FMP
provide the documentation. (30 AR 178:13775.) The report of Stetson Engineers (COMB’s expert)
also supports Dr. Rich’s conclusion. From the scant data that it had, Stetson Engineers attempted to
simulate the flows in Hilton Creek. (40 AR 372:18331c-57.) Putting aside the problems with the
report’s unsupported assumptions and lack of supporting data, it *still* concludes that, even in a very
wet year (1998), water flows in Hilton Creek cease during the several summer months when
steelhead need water flows for rearing habitat. (*See, e.g.*, 40 AR 372:18335; 46 AR 444:21117.)
Thus, COMB’s own experts demonstrate that Hilton Creek lacks sufficient water flow to be
successful rearing habitat for steelhead.

1 successful rearing of steelhead. (See 30 AR 178:13775; see also 30 AR 178:13775;
2 39 AR 371:17527; 30 AR 178:13916.)

3 Based on her multiple surveys, Dr. Rich concluded that it was absurd to proceed with the
4 Highway 154 culvert project. (40 AR 372:18129.) She concluded that if “any trout are able to
5 immigrate under Route 154, they would be stranded in pools upstream early in the year and,
6 ultimately, die of desiccation or predation by mammals and/or birds.” (*Id.*) “Enticing
7 rainbow/steelhead to immigrate to an area of the creek, which does not have year-round flowing
8 water and which dries up at the earliest by spring and latest by summer, will result in more dead
9 rainbow/steelhead, not an increased steelhead population.” (*Id.* at 18131; see also 18166A (DVD at
10 14:30) (“Encouraging adult fish to move upstream if water is temporarily available will certainly
11 result in high fish mortality.”).)

12 Second, upper Hilton Creek does not contain steelhead spawning habitat. Dr. Rich and her
13 associates took three dozen samples of the substrate material along various points along upper Hilton
14 Creek—none contained suitable spawning habitat. (*Id.* at 18166A (DVD at 13:00).) The streambed
15 of upper Hilton Creek either contains boulders too large for spawning, or has a high degree of fine silt
16 that, even when water is flowing, smothers eggs. (*Id.* (DVD at 13:35).)

17 The “evidence” relied upon by COMB does not support the FMP EIR’s conclusion that Hilton
18 Creek has suitable habitat for steelhead. COMB has no concrete data on conditions in Upper Hilton
19 Creek, but instead relies solely on a “brief field visit . . . in January 2003” by Mr. Engblom, for which
20 there is apparently no written report. (39 AR 371:17626.)¹³ COMB has no data on the frequency and
21 amount of flows in upper Hilton Creek, or of the number and persistence of any pools in upper Hilton
22 Creek. Even COMB’s technical reports concede that no surveys were conducted upstream of
23 Reclamation’s boundary line on Hilton Creek. (30 AR 178:13872.)¹⁴ Mr. Engblom’s brief,

24 _____
25 ¹³ COMB also claims that it relied on “aerial photographs,” but these alleged photographs are
26 unidentified and do not appear in the record. (39 AR 371:17626.) In any event, aerial photographs
27 would not reveal any useful information about the suitability of upper Hilton Creek for steelhead due
28 to Upper Hilton Creek’s canopy, which would block the view from above. (40 AR 372:18125.)

¹⁴ COMB’s submission of a report by Stetson Engineering does not support its claims because the
report only addresses flows in *lower* Hilton Creek, and provides no data for conditions in upper
Hilton Creek upstream from the Highway 154 culvert. (See 40 AR 372:18331c-18357) Moreover,

(Footnote continues on next page.)

1 unwritten observations of a four-hour visit to upper Hilton Creek in winter 2003 do not amount to
2 substantial evidence supporting the FMP EIR's conclusion that upper Hilton Creek has suitable
3 habitat for steelhead. Mr. Engblom did not take any measurements, conduct any surveys, take any
4 samples, or otherwise compile any data during his brief visit. (42 AR 293:19472.) The record does
5 not contain data or any recording, written or otherwise, of Mr. Engblom's 2003 tour of Hilton Creek.
6 Moreover, Mr. Engblom could not reasonably conclude that upper Hilton Creek has good rearing
7 habitat, which by definition is habitat needed by steelhead during the summer months, based on a
8 single, four-hour visit during to Hilton Creek in the winter. (*See, e.g.*, 40 AR 372:18166A (DVD at
9 14:10) (noting that steelhead rearing occurs for 1 to 2 years and thus fish would have to survive one
10 to two summers on Hilton Creek). Thus, as an initial matter, Mr. Englom's "opinion" about the
11 suitability of upper Hilton Creek for steelhead habitat amounts to nothing more than an
12 unsubstantiated narrative that has no objective factual support in the record. As such, it is not
13 substantial evidence. CEQA Guidelines, § 15384(a); *Berkeley Keep Jets Over the Bay*, 91 Cal. App.
14 4th at 1355 ("[T]he reviewing court is not to 'uncritically rely on every study or analysis presented by
15 a project proponent. . . . A clearly inadequate or unsupported study is entitled to no judicial
16 deference.'") (*Laurel Heights*, 47 Cal. 3d at 409, fn. 12).

17 In any event, Mr. Engblom's observations actually undermine the FMP EIR's conclusion that
18 upper Hilton Creek has suitable habitat for steelhead. His observations were that: (1) the "creek was
19 dry except for the reach immediately upstream of Highway 154 and at the second road crossing
20 where flow was visible"; (2) the "creek was sporadically wetted with minimal flowing water (<2
21 gallons per minute) followed by long sections of dry creek channel";¹⁵ and (3) "[p]ool habitats were

22 (Footnote continued from previous page.)

23 the report confirms that "general flows in the Hilton Creek cease to exist during the summer months"
24 and that the "dry period could extend into November." (40 AR 372:18332.) And the FMP EIR itself
25 acknowledges that Hilton Creek flows are "very sporadic" and "highly dependent on seasonal
26 rainfall." (39 AR 371:17534.) "Flows do not persist in the lower reach for more than a few days
27 during average years." (*Id.*)

28 ¹⁵ Mr. Engblom also stated that in one section above the Highway 154 culvert, he observed water
flowing at "an estimated rate of 5 gallons per minute." (39 AR 371:17627.) Even if true, this would
only amounts to .01 cubic feet per second (cfs). This is patently insufficient flow for steelhead, and
there is no evidence in the record demonstrating that .01 cfs can sustain steelhead or even allow
steelhead to move up or downstream.

1 present but limited in number.” (39 AR 371:17627.) This is not evidence supporting the FMP EIR
2 conclusion that “excellent rearing habitat was available and a limited amount of spawning locations
3 was observed.” (*Id.* at 17628.)

4 Finally, the FMP EIR’s reliance on random sightings of fish in Hilton Creek, and particularly
5 Dr. Rich’s observation of a three-inch fish, is insufficient. (40 AR 372:18299.) In the more than two
6 years that Dr. Rich conducted surveys on Hilton Creek, she observed only one rainbow/steelhead on
7 Hilton Creek and it was found in 2-foot wide pool that was only 2 inches deep. (*Id.* at 18125.)¹⁶
8 There was no evidence as to how the fish came to be in the pool. (42 AR 392:19471.) It was
9 “extremely emaciated” and it ultimately died after the pool in which it was observed dried up. (40
10 AR 372:18126; 42 AR 392:19470-71, 19473.) This is what will occur to any steelhead lured
11 upstream of Highway 154 during the sporadic winter flows, only to be stranded in isolated pools that
12 eventually dry up.¹⁷

13 In short, uncontroverted evidence in the record shows that upper Hilton Creek is naturally dry,
14 even just days after significant rain, and that fish that are lured to the upper reaches, beyond existing
15 boundaries, will have no hope of surviving the summer months, or traveling downstream to more
16 favorable conditions. There is no evidence in the record supporting the FMP EIR’s conclusion that
17 upper Hilton Creek has rearing or spawning habitat.

18 **2. The FMP EIR Incorrectly and Inadequately Analyzes The Potential**
19 **Impacts To Steelhead Resulting From The Highway 154 Chute Removal**
20 **Project**

21 For the same reasons discussed above, substantial evidence does not support the FMP EIR’s
22 conclusions that the impacts to steelhead from implementing the Highway 154 chute project will be
23 insignificant, and even beneficial. (*See* 39 AR 371:17391, 17394, 17630.) To the contrary, the
24 un rebutted evidence demonstrates that removing an existing barrier to passage upstream of the

25 ¹⁶ Moreover, the “SYRTAC project biologist has never observed steelhead in the reach upstream of
26 the chute pool to the Reclamation property boundary although fish have been observed in the pool
27 directly downstream from the Highway 154 Culvert.” (30 AR 178:13908.)

28 ¹⁷ In August 2000, Mr. Engblom allegedly observed a steelhead/rainbow immediately below the
Highway 154 culvert. (31 AR 190:14367-68.) In January 2001, he also allegedly observed a
steelhead/rainbow immediately above the bedrock chute impediment. (*Id.*) This is not evidence that
steelhead have been observed, much less survived, above the Highway 154 culvert.

1 Highway 154 culvert and luring steelhead from arguably good habitat (*i.e.*, the Santa Ynez River,
2 other tributaries and lower Hilton Creek below Reclamation’s artificial watering system) into upper
3 Hilton Creek’s lethal habitat where they will become stranded and die is, at the very least, a
4 potentially significant impact. (*See Id.* at 17478 (FMP EIR’s thresholds of significance).)

5 The FMP EIR attempts to justify the increased likelihood of steelhead death that would result
6 from the Highway 154 culvert project as significant by reasoning that steelhead death is a “natural
7 event[]” and “part of the popular dynamics for steelhead throughout the lower Santa Ynez River.”
8 (*Id.* at 17630.) This completely misses the point. The significant impact is not that steelhead will
9 continue to die due to the existing conditions of the Lower Santa Ynez river watershed, but that
10 otherwise healthy steelhead will die as a result of the Project due to the removal of an existing barrier
11 that currently prevents steelhead from migrating to upper Hilton Creek’s lethal conditions. The fact
12 that steelhead die under existing conditions is not substantial evidence that sending steelhead from an
13 arguably healthy to an unhealthy habitat, and eventually to their death, is insignificant. (*See Id.* at
14 17478 (noting that threshold for a significant impact is an impact having a “substantial adverse
15 effect . . . on any species” that is protected).)

16 The FMP EIR further hypothesizes that new streambed territory in upper Hilton Creek, even
17 if unfavorable, will not result in significant adverse impacts to steelhead because they will “seek out
18 and occupy more favorable locations (e.g., lower Hilton Creek and Salsipuedes Creek).” (*Id.* at
19 17630.) There is no evidence supporting this assumption. First, if it is true that steelhead will
20 inevitably seek out the more “favorable locations” of lower Hilton Creek, why remove the Highway
21 154 culvert barrier and give steelhead the option of getting stranded to die in upper Hilton Creek in
22 the first place? Second, there is no evidence supporting the assumption that conditions in upper
23 Hilton Creek will allow steelhead get to the more “favorable locations,” *i.e.*, get downstream before
24 getting stranded. The record demonstrates that even in wet years Hilton Creek’s flows are
25 intermittent and that it dries up quickly—within days—after rainfall. (40 AR 372:18166A (DVD at
26 7:45); 30 AR 178:13873 (FMP technical study noting that “Hilton Creek clears rapidly after storm
27 events, usually within a few days after rains have ceased”); 30 AR 178:13774 (FMP technical study
28 noting that “Hilton Creek clears quickly even after several days of rain.”).) Indeed, fish stranding is

1 such a concern on even the lower portion of Hilton Creek (where there are artificial water flows) that
2 the FMP requires a “ramping” schedule gradual reduction in water flows to avoid stranding fish. (*See*
3 30 AR 178:13900.)¹⁸ Of course, COMB has no control of the intermittent flows of upper Hilton
4 Creek, and thus cannot implement a ramping schedule to prevent steelhead stranding. And COMB
5 did not consider any other potential measures because it failed to analyze the impact of stranding fish
6 in upper Hilton Creek.¹⁹

7 Considering that the purpose of the Highway 154 culvert project is to “provide access to
8 habitat upstream of the culvert,” (*Id.* at 13911), and that the undisputed evidence demonstrates that
9 steelhead that become stranded above the culvert will die, the FMP EIR should have at least
10 classified the impact of the Highway 154 culvert project as potentially significant and analyzed these
11 impacts. The FMP EIR failed to do this and as a result, did not properly consider the impact to
12 steelhead resulting from luring them from suitable habitat to unsuitable habitat on upper Hilton Creek
13 where they will perish. The FMP EIR thus fails to comply with CEQA.²⁰

14 _____
15 ¹⁸ “Changes in water flow can result in fish stranding.” (29 AR 177:13698.) A ramping schedule
16 “limits the amount of change in flow that can be made in a given time period.” (*Id.*) Ramping down
17 flows pursuant to a schedule is intended to allow fish to move to deeper water and avoid being
18 stranded. (39 AR 371:17419.) Of course, ramping is only possible where water flows can be
19 controlled.

20 ¹⁹ The FMP EIR is inconsistent and confusing in its statements about how frequently it anticipates
21 steelhead will migrate to upper Hilton Creek. In some places it states that the Project will result in
22 the “periodic occurrence of steelhead on upper Hilton Creek.” (39 AR 371:17630.) Elsewhere it
23 asserts that “more frequent” and “more abundant” steelhead will migrate to upper Hilton Creek. (*Id.*
24 at 17829.) And still elsewhere it concedes that it “cannot predict the spawning and rearing success
25 rate in such years without more information about the hydrologic and habitat conditions along the
26 upper creek, which is not available due to landowner prohibition on access.” (*Id.* at 17629.)
27 Regardless of this confusion, the FMP EIR violated CEQA by failing to analyze the adverse impacts
28 on any steelhead migrating above the Highway 154 culvert on Hilton Creek.

²⁰ For the same reasons, the FMP EIR’s rejection of the alternative that eliminated the Highway 154
culvert project is not supported by substantial evidence. The FMP EIR concluded, and COMB found,
that eliminating the Highway 154 culvert project would not lessen the Project’s impacts. (39 AR
371:17735; 44 AR 423:20325.) As discussed, the only substantial evidence of record demonstrates
that eliminating the Highway 154 culvert project would eliminate a substantial impact of the
Project—unnecessary steelhead death. Moreover, the FMP EIR also concluded, and COMB found,
that eliminating the Highway 154 culvert project would be “not be consistent with the FMP/BO.” (39
AR 371:17735; 44 AR 423:20326.) However, when COMB adopted the Project, it excluded the
Highway 154 culvert project in direct conflict with its finding that such exclusion is inconsistent with
the Project. (44 AR 423:20292.) While Petitioners agree that permanent elimination of the Highway
154 project is the only determination supported by substantial evidence, COMB still abused its
discretion in making findings contradicted by its own project approval.

1 **G. The FMP EIR Violates CEQA Because No Substantial Evidence Supports Its**
2 **Conclusion, and COMB’s Finding, That The Impacts From Surcharging Will Be**
3 **Reduced To Less Than Significant**

4 One of the fundamental objectives of CEQA is “identification of . . . ‘feasible mitigation
5 measures which will avoid or substantially lessen’ significant environmental effects.” *Rio Vista*
6 *Farm Bureau Ctr. v. County of Solano*, 5 Cal. App. 4th 351, 376 (1992) (citing CEQA § 21002;
7 *Citizens of Goleta Valley v. Bd. of Supervisors.*, 197 Cal. App. 3d 1167, 1182 (1988)). CEQA
8 requires a public agency to “mitigate or avoid the significant effects on the environment of projects
9 that it carries out or approves whenever it is feasible to do so.” CEQA § 21002.1(b). CEQA also
10 requires that mitigation measures be “fully enforceable through permit conditions, agreements, or
11 other legally-binding instruments” (CEQA Guidelines § 15126.4(a)(1)(D)(2)) and a public agency
12 must find that mitigation measures are fully enforceable (CEQA § 21081.6(b)). This requirement
13 ensures that “feasible mitigation measures will actually be implemented as a condition of
14 development, and not merely adopted and then neglected or disregarded.” *Fed’n of Hillside and*
Canyon Ass’n. v. City of Los Angeles, 83 Cal. App. 4th 1252, 1261 (2000).

15 Here, the FMP EIR determined that the 3.0-foot surcharge of Lake Cachuma would result in
16 significant adverse impacts, including the flooding of a critical drinking water treatment plant and
17 intake and numerous other facilities located on Lake Cachuma. (39 AR 371:17389, 17603-17606.)
18 The FMP EIR concluded that these impacts would be mitigated to a less-than-significant level
19 because the facilities “will eventually be relocated” by Santa Barbara County. (*Id.* at 17608; *see also*
20 17386.) Likewise, COMB found that the impacts would be mitigated to a less-than-significant level
21 because Santa Barbara County would relocate the facilities prior to surcharging:

22 Santa Barbara County Parks will relocate the facilities before surcharge. (*Ibid.*)
23 Because critical recreational facilities and the main boat launch will be
24 relocated before the initiation of a 3 foot surcharge, those facilities will not
25 become flooded as a result of surcharge and this impact will be mitigated to a
26 less than significant level. (*Ibid.*) In addition, the MOU would effectively
27 postpone the option to surcharge the lake by 3 feet for up to five years.
28 (EIR/EIS, p. 2-12) Accordingly, this potentially significant impact will be
 mitigated to a level of less than significant level [sic]. (*Ibid.*)

(44 AR 423:20306.)

1 The FMP EIR’s conclusion, and COMB’s finding, that the impacts from surcharging will be
2 reduced to less than significant are not supported by substantial evidence in the record because there
3 is no enforceable mitigation measure to relocate Lake Cachuma facilities. Contrary to COMB’s
4 finding, Santa Barbara County has not committed to relocating the water treatment facilities. COMB
5 claims that a memorandum of understanding between Santa Barbara County and Reclamation
6 “provides additional assurances” that the significant impacts will be avoided. (*See* 39 AR 371:17609;
7 44 AR 423:20306.) This is hardly the case. Notably, the memorandum of understanding, at best,
8 commits Santa Barbara County to “expeditiously and in good faith” complete “engineering design”
9 for a new water treatment plant, and to “pursue and obtain all necessary permits and approvals and
10 funding” for a new water treatment plant. (40 AR 372:18319.) But, as the County reemphasized in
11 the hearing on the Project, it does not commit Santa Barbara County to actually construct the new
12 water treatment plant. (*See* 45 AR 425:20430-31.)

13 Moreover, there is no evidence that adequate funding for the \$12 million relocation of the
14 facilities exists, or will exist prior to surcharging. The FMP EIR admits as much:

15 Reclamation and COMB recognize that relocation of the affected facilities will
16 represent a significant financial commitment for the County. Relocation may
17 require several years to fund, design, and implement. For example, the County
18 Parks Department does not currently have the financial resources to complete
19 the relocation of all facilities listed in Table 6-15. . . . The use of state grant
20 funds for the relocation of the water treatment plant is still uncertain at this
21 time. At this time, the source of funding for relocation of other facilities listed
22 in Table 6-15 has not been identified.

23 (39 AR 371:17607.) The FMP EIR concedes that even if surcharging were delayed, “there would
24 still be insufficient time to secure funding, complete design and permitting, and complete
25 construction of all affected facilities.” (*Id.* at 17608.) And the County reiterated in the public hearing
26 that it currently did not have any funds to accomplish the relocation. (45 AR 425:20431.) Further,
27 the memorandum of understanding allows Reclamation to surcharge Lake Cachuma in 2009
28 *regardless* of whether Santa Barbara County has relocated the facilities. (40 AR 372:18318.) This
directly contradicts COMB’s findings that “Santa Barbara County Parks will relocate the facilities
before surcharge.” (44 AR 423:20306.) Because there is no enforceable or funded mitigation
measure to relocate the water treatment facilities prior to surcharging, substantial evidence does not

1 support the FMP EIR's conclusion, and COMB's finding, that the impacts of surcharging will be
2 reduced to less than significant.

3 Further, while CEQA does not require COMB to implement mitigation measures that are
4 within the jurisdiction of another agency, it does require that COMB make findings of significance
5 for those significant impacts whose mitigation it cannot ensure, and requires that COMB make
6 findings of overriding consideration concerning such significant and unavoidable impacts. *Fairview*
7 *Neighbors v. County of Ventura*, 70 Cal. App. 4th 238 (1999). COMB made no such findings
8 regarding the unavoidable significant impacts to the water treatment facility from the surcharging of
9 Lake Cachuma. This is also error.

10 **IV. CONCLUSION**

11 For the foregoing reasons, this Court should issue a writ of mandate ordering COMB to set
12 aside the FMP EIR.

13 Dated: June 2, 2006

MORRISON & FOERSTER LLP

14
15 By: 

16 Andrew B. Sabey

17 Attorneys for Petitioners
18 NANCY CRAWFORD-HALL and
19 SAN LUCAS RANCH, INC.
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22 Best Best & Krieger LLP
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26 I declare under penalty of perjury under the laws of the State of California that the above is
27 true and correct.

28 Executed at Walnut Creek, California, on June 2, 2006.

Margaret D. Rogers
(typed)

Margaret D. Rogers
(signature)