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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SONOMA

SIERRA CLUB, BOHEMIAN REDWOOD RESCUE CLUB,

Petitioners,

v.

CALIFORNIA DEPARTMENT OF FORESTRY AND FIRE PROTECTION, and Does I through X inclusive;

No.: SCV-246716

UNLIMITED CIVIL CASE

PETITIONERS' REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDATE

Date: November 12, 2010
Time: 2:30 p.m.

Respondents. Dept: 17

_____/

THE BOHEMIAN CLUB and DOES XI through XX, inclusive,

Real Parties in Interest.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

INTRODUCTION

Refusing to concede error, Cal-Fire and the Bohemian Club (BC) are forced to create evermore bizarre arguments in defense of the NTMP. They contend that earlier versions of the NTMP constitute reasonable alternatives. Never mind that these versions were discarded because of oversight or legal error, were never described or treated as alternatives, and were not in the administrative record during public comment.

They contend that Cal-Fire had to consider the boilerplate alternatives because it must consider alternatives raised by the public. Never mind that the public did not request the boilerplate and that Cal-Fire did not consider the alternatives that the public and scientists did request.

They contend that the no project alternative is no logging on the theory that Cal-Fire is not at liberty to suppose that BC would ever log again. Never mind that BC has actively logged its land annually for more than two decades and even had a logging operation open when the NTMP was filed.

They contend that the project itself was, somehow, an alternative, not only an alternative but the environmentally superior one. In Respondents' rabbit hole, there is no project, only alternatives to it.

They contend that the NTMP need not meet AB 32's 2020 target for GHG reductions as long as it is consistent with AB 32. Never mind that AB 32 *is* the 2020 target, and that the NTMP's reduction of carbon storage by 2020 exceeds its own threshold of significance.

And they make these arguments without citation to legal authority and without responding to Petitioners' authorities to the contrary. But this should not come as a surprise. Cal-Fire comes to Court with scant credibility. No California agency has tried as hard to avoid CEQA's mandates, and none has lost as many times in the courts of appeal. Indeed, in virtually every published decision in which Cal-Fire has resisted compliance with CEQA, it has lost.[1] Recently, the First

[1] (*E.g., Sierra Club v. Board of Forestry* (1994) 7 Cal.4th 1215 [CDF commanded to conduct wildlife studies under CEQA to evaluate effects of THP]; *Katzeff v. California Depart. of Forestry and Fire Protection* (2010) 181 Cal.App.4th 601 [Cal-Fire cannot destroy a mitigation without CEQA review]; *Environmental Protection Information Center v. Department of*

District Court of Appeal took Cal-Fire to task for its specious reasoning in trying to evade CEQA's mandate that significant new information about a project requires recirculation for public comment:

> Nevertheless, CDF has continued to resist complying with CEQA by advancing increasingly contorted interpretations of settled law. We urge CDF to heed the law as consistently interpreted by the courts of this state, and to commit its time and resources toward the more productive end of conforming its "process" to comply with CEQA.

(*Joy Road Area Forest Watershed Association v. CDF* (2006) 142 Cal.App.4th 656, 672-673.)

Unfortunately, Cal-Fire continues its historic refusal to comply with CEQA's mandates.

FACTUAL BACKGROUND

Respondents make a number of factual assertions that we correct. Cal-Fire states that management of the Grove before the present NTMP ignored fire hazard. (Cal-Fire br. 9, 19.) This is untrue. Since the early 1980s, BC has viewed fire hazard as a priority. (18 AR 4373-4374, 4378.)

Respondents point out that there were more letters in support of the NTMP than opposed. (Cal-Fire brief 1, 11; BC brief 13.) Of those in support, well more than half were from Bohemian Club members (8 AR 1821-9 AR 1930.), and a good number of those would appear to be products of letter writing campaigns, like the 60 letters that had identical but incorrect numbers for the NTMP. (10 AR 2174–11 AR 2269.)

Forestry and Fire Protection (2008) 44 Cal.4th 459, 500-504 [CDF commanded to consider cumulative impacts]; *Schoen v. Department of Forestry and Fire Protection* (1997) 58 Cal.App.4th 556 [CDF commanded to consider cumulative impacts under CEQA in approving a major amendment to a timber harvest plan]; *Friends of the Old Trees v. Department of Forestry* (1997) 52 Cal.App.4th 1383 [CDF commanded to consider alternatives under CEQA]; *Environmental Protection Information Center v. Johnson (EPIC)* (1985) 170 Cal.App.3d 604 [CDF commanded to consider cumulative impacts under CEQA]; *Laupheimer* v. *State of California* (1988) 200 Cal.App.3d 440 [CDF commanded to consider cumulative impacts under CEQA]; *Gallegos v. State Board of Forestry* (1978) 7 Cal.App.3d 945 [CDF commanded to respond to public comment under CEQA].)

ARGUMENT

I. THE PREVIOUS VERSIONS OF THE NTMP DO NOT CONSTITUTE FEASIBLE, LESS DAMAGING ALTERNATIVES UNDER CEQA

In their opening, Petitioners argue that the NTMP's boilerplate treatment of alternatives, and Cal-Fire's concession that the treatment was "circumscribed" violated CEQA. (Petitioners' br. 8-11, 17-20.)

Evidently, fearing that the boilerplate alternatives will not survive judicial review, Respondents argue that there are others, what might be called "stealth" alternatives. They argue that environmental review of an NTMP is a unique, lengthy, iterative process that results in prior versions of the NTMP, and that these prior versions are alternatives in addition to the boilerplate ones found in the NTMP. (BC br. 5, 15-16; Cal-Fire br. 16-17.) The argument is bizarre, unprecedented, and wrong.

We will address it in two parts. We will show first that CEQA review of an NTMP is not unique or especially iterative. We will then refute the claim that such review creates alternatives that satisfy CEQA.

A. CEQA Review by Cal-Fire Is Supposed to Be Streamlined and Quick, Not Ongoing, Lengthy and Iterative

Contrary to Respondents' claims, there is nothing unusual or especially iterative about Cal-Fire's environmental review of an NTMP. In fact, such review is intended to be quicker and more streamlined than an agency's review using an EIR. This is why a certified program's plan is called an "abbreviated EIR," the "functional equivalent" of an EIR. (*Environmental Protection Information Center v. Johnson* (1985) 170 Cal.App.3d 604, 609-611.)

We demonstrate this by comparing Cal-Fire's review as a certified program with the EIR process. Once an NTMP is received, Cal-Fire has two working days to provide notice of its filing, place it in a file for public review, invite public comment, and distribute it to review team agencies and interested members of the public. (Cal. Code Regs., tit. 14, §§ 1090.16-1090.17.) Cal-Fire must then determine if a preharvest inspection is necessary; if so, it must conduct the inspection

within 10 days of the plan's filing, unless it and the plan submitter mutually agree on a later date. (Public Res. Code, § 4604, subd. (a).)[2]

If no inspection is necessary, Cal-Fire has 45 days from the date of filing to review the NTMP, take and consider public comment, and approve or disapprove the plan; if an inspection is necessary, Cal-Fire has 45 days from the inspection to do the same. During this period, Cal-Fire shall make sure the review team has had an opportunity to review and comment on the NTMP. (Cal. Code Regs, tit. 14, § 1090.18.)

This process is exceptionally brief. An NTMP must be reviewed and approved or disapproved within 45 days from its filing or preharvest inspection, unless agreed otherwise. It hardly contemplates the lengthy, iterative process that Respondents describe. Indeed, it is far quicker and simpler than the CEQA procedure—the use of an EIR or negative declaration—that governs most projects.

As to the latter, once a lead agency decides that a project requires an initial study, it must consult with all responsible agencies and trustee agencies responsible for resources affected by the project regarding whether a negative declaration or EIR should be prepared. (CEQA Guidelines, §15063, subd. (g); § 21080.3, subd. (a).)

If the lead agency decides to prepare an EIR, it must send out a notice of preparation to all responsible and trustee agencies, and it must consult with them regarding the scope and substance of the draft EIR. (Guidelines, §§ 15082, subd. (a), 15086; § 21080.4.) The EIR shall include information regarding the impacts anticipated by those agencies. (§ 21080.4(a).)

This process by which the lead agency determines the scope of an EIR may lead to multiple meetings with the applicant, public, and responsible and trustee agencies. (§§ 21004, subd. (a); 21080.4, subds. (b), (d); 21083.9, subd. (a); 21153, (a)-(b); Guidelines, § 15082(c).)

Once the draft EIR is prepared, notice and comment must be provided. (§ 21092; Guidelines, § 15087.) During this period, the lead agency must again solicit comments from responsible and trustee agencies, any other state, federal and local agencies with jurisdiction over the project, and

[2] Further statutory references are to the Public Resources Code, unless otherwise noted.

every city or county that borders on a city or county within which the project is located. (Guidelines, § 15086, subd. (a); §§ 21104, subd. (a); 21153, subd. (a).)

If the lead agency adds significant new information to the EIR after the commencement of public review, it must issue a new notice and recirculate the EIR for another round of public comment and consultation. (§ 21092.1; Guidelines, § 15088.5.) That means it must once again consult at a minimum with all responsible and trustee agencies, any other state, federal and local agencies with jurisdiction over the project, and every city or county that borders on a city or county within which the project is located. (Guidelines, § 15086, subd. (a).)

In the final EIR, the lead agency must evaluate and respond to all the environmental comments it receives within the public review period, including responding to comments from other agencies. (§ 21091, subd. (d)(2)(A); Guidelines, § 15088, subds. (a)-(b).)

In certifying the EIR, the lead agency must issue findings. (§ 21002; Guidelines, §§ 15002, subd. (a)(3); 15021, subd. (a)(2).) And it must adopt a mitigation monitoring plan. (§ 21081.6, subd. (a)(1); Guidelines, § 15091, subd. (d); 15097, subd. (d).)

One can see from the above that the EIR process is far lengthier than Cal-Fire's process, requires more consultation at more points with numerous agencies, and is more likely to result in what BC calls an ongoing, iterative process. Yet nowhere in CEQA jurisprudence will this Court find the notion that the modification of a project during environmental review leaves in its wake a series of covert alternatives.

BC appears to argue that Cal-Fire's review is unique because it is "two-tiered." But it does not identify either tier. (BC brief 15.) Respondents do, however, make much of the interdisciplinary review team that reviews an NTMP or THP and makes recommendations if necessary. (BC br. 5, 14-16; Cal-Fire br. 16-17.) But under CEQA there is nothing unusual in such "other agency" review. The review team requirement can be analogized to the far more onerous consultation requirements that a lead agency must follow in preparing an EIR: At least three times during the EIR process, a lead agency must consult with responsible and trustee agencies and seek comment regarding whether to prepare an EIR, the scope of the EIR, and the contents of the EIR; and it must

solicit comments from any other local, state and federal agencies with jurisdiction, as well as with contiguous cities and counties.

In short, Cal-Fire's environmental review is not a unique iterative process. Therefore, Respondents' claim that that process creates additional alternatives fails. But even if such review were intended to result in numerous, rejected iterations, the latter would not constitute alternatives under CEQA. We make this argument next.

B. Respondents' Modification of the NTMP Does Not Create Additional Alternatives

On two occasions during its review, the NTMP was substantially modified. Respondents argue that the two previous versions of the plan constitute reasonable alternatives under CEQA, and augment the boilerplate alternatives in the approved plan. (BC br. 5, 15-16; Cal-Fire br. 16-17, 22.) This argument fails on numerous grounds—factual, legal, and logical.

1. The Previous Versions of the NTMP Were Rejected Because They Were Based on Factual and/or Legal Errors

The lengthy review in this case and the previous versions of the NTMP that were rejected were caused by Respondents' factual oversights and/or legal errors, not by CEQA, the FPA, or the Forest Practice Rules. They were "rejects," not alternatives.

The first version of the NTMP was revised because BC failed to identify the significant patches of large old trees and old-growth on the property outside the 106-acre Main Grove. A member of the public brought this oversight to the attention of the Department of Fish and Game (DFG). DFG in turn criticized the NTMP's failure to disclose this information "[w]ell into the NTMP's review period," and identified nine patches of mature coniferous forest that were nowhere mentioned in the NTMP. (4 AR 854-855.) Two of those patches (#3 and #5) comprise the Upper Bull Barn stand. As a result of this discovery, BC agreed that the Upper Bull Barn stand would be off limits to any logging. (4 AR 854-855, 860, 888.) But this did not end BC's reluctance to map the old-growth on its property.

DFG also called upon BC to revise the NTMP with maps showing the nine patches as well as

residual old-growth and large old trees found throughout the property. (1 AR 855, 861.) BC refused. (4 AR 886-887.) The NTMP, now in its second version, was then noticed for recirculation on April 2, 2007, because of changes, including the no-harvest designation for the Upper Bull Barn stand. (4 AR 898.) DFG was not satisfied. On April 19, 2007, it brought BC's refusal to the attention of Cal-Fire and reiterated its demand that the NTMP disclose and map "all old-growth and large old trees" on the property. (4 AR 913.) The following month, BC grudgingly agreed to the mapping and disclosure. (4 AR 919.)

Still, more old-growth and large old trees were to be discovered. DFG re-inspected the property in May 2007 and found another patch with old-growth trees suitable as habitat for the marbled murrelet, a threatened species under the federal Endangered Species Act. And then in July 2007, again as a result of information provided by a member of the public, it found two more. All three patches received further protection. (4 AR 963-965, 971.)

To summarize: Other than the 106-acre Main Grove, the first version of the NTMP did not acknowledge the existence of any patches of old-growth or large old trees. The second version recognized nine and later three more, and set aside the two patches comprising the Upper Bull Barn stand for no harvest. All of this was thanks to a member of the public. The recognition of the Upper Bull Barn stand was particularly significant and not a little ironic. In the radical revision that became the third version, the Upper Bull Barn stand—not even recognized in the first version—became the old-growth model for the rest of the forest. (1 AR 127.)

The second version was then revised, because Dr. Rundel and the public discovered a remarkable error. (11 AR 2365-2366; 12 AR 2595-2596.) An NTMP must demonstrate sustained yield, namely that growth will equal or exceed harvest. (§§ 4593.2-4593.3.) The first and second versions of the NTMP grossly overestimated the amount of timber available for logging; as a result, it permitted a rate of logging that would have decimated the forest, violating the sustained yield mandate. The basis of the error is easy to demonstrate.

The Main Grove, the 106-acre old-growth stand within BC's 2,400-acre forest, contains a full one-third of the forest's timber. (20 AR 4848, 4851.) But that timber has never been available for

harvest, because BC has never intended to log its sacred Main Grove. (20 AR 4785.) Nonetheless, BC included the huge volume of timber in the Main Grove in the total volume of timber available for harvest. Because it overestimated timber volume, it overestimated the amount that could be logged. As a result, the logging rate exceeded the rate of growth in violation of the Forest Practice Act. (11 AR 2365-2366; 12 AR 2595-2596.)

BC argues that Dr. Rundel and the public were wrong. (BC br. 11.) The assertion is incredible in light of what followed. After the error was brought to Respondents' attention, the second version of the NTMP was abandoned and the NTMP came to a standstill for one and a half years, from October 2007 until March 2009, when the final version was released. (7 AR 1334; Cal-Fire br. 11.) The final version corrected the error: Timber volume in the Main Grove was removed from the timber volume available for logging. (7 AR 1383, 1387, 1389-1390.) As a result, the final version *reduced* the total conifer volume available for harvest by approximately a third, from 75,700,888 board feet to 47,906,272 board feet; and *reduced* the annual harvest during the first period from 1,137,888 board feet to 699,636 board feet, somewhat more than a third. (7 AR 1389-1390.) BC corrected the error by making the very change demanded by Dr. Rundel and others. It had no other choice.

In its brief, Cal-Fire does not deny that BC's mistake resulted in abandonment of the 2007 version. In its Official Response, Cal-Fire conceded the error. In the section entitled *Harvest Level Calculations*, it explained that during review "plan acreage was removed that affected growth and yield calculations," namely the 106-acre Main Grove and the Upper Bull Barn stand. (7 AR 1383.) In addition, in its responses to Dr. Rundel and others, Cal-Fire repeatedly explained that the Main Grove had been removed from calculations and that the rate of harvest was substantially reduced. (7 AR 1387, 1388 ["The Department has found the issues raised by Mr. Rundel to have been resolved and that sustained yield will be achieved."], 1389-1390.)

Notwithstanding the above, BC asserts that the criticism by Rundel and others was not why the NTMP's rate of harvest was reduced. But it does not explain why, except to say it happened "as part of the NTMP review process." (BC br. 11.) BC's defense of so obvious an error leaves it

with little credibility.

In sum, the previous versions of the NTMP can hardly be called feasible alternatives. They were discarded because they were factually and/or legally inadequate. The first version failed to identify numerous patches of old-growth and large old trees, including the Upper Bull Barn stand, which became the model for the future of the Grove; and the second version would have decimated the Grove, violating the principle of sustained yield. (§§ 4593.2-4593.3.)

2. The Previous Versions Are Not Alternatives Because They Were Not Available for Public Review

Under CEQA, an NTMP and its alternatives must be available for public review: "[P]ublic review and comment regarding such alternatives is a crucial component of CEQA." (*Joy Road, supra,* 142 Cal.App.4th 656, 667; accord *Friends of the Old Trees*, *supra*, 52 Cal.App.4th 1383, 1403-1405; *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 197-198.)

In *Joy Road supra,* 142 Cal.App.4th 656, the First Appellate District held that Cal-Fire violated CEQA when it added to a THP four pages regarding alternatives without notifying the public of their insertion into the record. (*Id*. at pp. 667, 670-673.) In *Friends of the Old Trees*, *supra,* 52 Cal.App.4th 1383, the First Appellate District held that Cal-Fire violated CEQA where the only discussion of alternatives occurred in the Official Response, and therefore was not available for pubic review and comment. (*Id*. at pp. 1403-1405.)

Respondents' argument that the prior versions of the NTMP are alternatives is defeated by these authorities. The two prior versions of the NTMP were not available for public review, because they were not part of the administrative record during the public comment period for the final NTMP. This is because Cal-Fire did not keep previous versions of the NTMP as it was amended. (See Stipulation Regarding Augmentation of Administrative Record and Order, p. 2.) Indeed, the only reason that the previous versions are in the record is because Petitioners insisted they be and threatened a motion to augment if they were not. To avoid such a motion, the parties stipulated to augment the record with the two previous versions as they were kept by the RPF. (See *Ibid*.)

Thus, when the final NTMP was made available for public comment from March 25, 2009, to May 11, 2009, the prior versions were not in or part of the administrative record, and therefore were not available for public review. (7 AR 1330, 1334 [dates of public review].)

This proves one of two things, both of which are fatal to Respondents' arguments: It proves that the prior versions were not alternatives, since alternatives must be available for public comment. Or, if we go down Respondents' rabbit hole and pretend they were alternatives, it follows that Cal-Fire violated *Joy Road* and *Friends of the Old Trees,* because it considered alternatives that were not available to the public for comment and criticism.

Without citation to any authority, BC tries to bolster its novel theory by criticizing Petitioners for thinking that the final, approved NTMP should contain the complete alternatives analysis. (BC br. 16.) This argument backfires. CEQA requires the "plan" to include the alternatives analysis. (§ 21080.5, subd. (d)(3)(A).) The plan in this case is the final NTMP. Had the previous versions constituted alternatives, they could and should have been treated as alternatives *in* the NTMP. Each prior version was at one time the "plan," not an alternative to it. As soon as it became a prior version, it was discarded from the administrative record. Thus, the prior versions never existed in the administrative record as alternatives to a later version. They only became "alternatives" as Respondents realized they needed to come up with something to compensate for the boilerplate in the NTMP.

In addition, even if the prior versions could be said to have existed briefly as alternatives, the public could not be expected to have known that. They were not called alternatives and the public was never on notice that Respondents would consider them alternatives. (§ 21080.5, (d)(2)(F) [certified program must notify public of plan].)

Nor can the public be expected to keep apprised of an ever-changing administrative record and guess at what might be called an alternative at the end of the process. In *Joy Road, supra,* 142 Cal.App.4th 656, Cal-Fire complained that it was too burdensome to notify the public when it made significant changes to a THP, and that the burden should be placed on members of the public who were free to check the administrative record for changes. The Court of Appeal rejected the

argument: "In our view, placing the onus on members of the public to repeatedly review a lengthy THP and determine for themselves what changes CDF has made to it is simply inconsistent with the fundamental policy goals of CEQA." (*Id*. at p. 671.)

In addressing Respondents' argument, we ask this Court to reject the notion that the prior versions of the NTMP were alternatives. Even if rejected, dignifying them as alternatives will create mischief and confusion. CEQA review typically results in changes to a project. To call previous versions of a project "alternatives" will introduce an utterly confusing concept, and will undermine one of CEQA's most important assurances of thorough environmental review. (*Wildlife Alive, supra,* 18 Cal.3d at pp. 197-198.)

II. THE NTMP DOES NOT CONSIDER A SINGLE, FEASIBLE ALTERNATIVE

A. The Public Is Not Responsible for the Alternatives Analysis

BC defends the alternatives analysis by arguing that the public failed to provide Cal-Fire with additional alternatives to consider. (BC br. 17.) This argument was rejected by the Supreme Court in *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376.

There, the Regents defended the EIR's cursory discussion of alternatives by arguing that the public had not come forward with any. The Court responded: "It is the project proponent's responsibility to provide an adequate discussion of alternatives. [Citation.] [¶]…Under the Regents' view, a project proponent would never have to discuss alternatives. It would merely respond to alternatives proposed by others. There is not even a hint in CEQA that the Legislature intended such a result." (*Id*. at p. 405.)

In any event, the public suggested obvious alternatives. Dr. Rundel was very critical of the NTMP and opined that its objectives could only be met by less logging. He called for consideration of alternative harvest levels: "The forest management plan would have much greater credibility if it were to highlight a series of alternative harvest levels and modeled the implications of these implementation plans in achieving a realistic reestablishment of the pre-European stand structures and low flammability that are desired." (18 AR 4470.) Members of the public asked for

the same. (E.g., 16 AR 3829.)

The public also provided Cal-Fire with the alternatives analysis that the Board of Forestry recently performed for the Jackson Demonstration State Forest (JDSF) management plan. There, the Board considered a range of alternatives that contemplated *less* logging than the proposed project. The project contemplated cutting 70 percent of growth. The alternatives considered the following percentages: Alternative A (no project); B (82 percent of growth); D (55 percent of growth); E (18 percent of growth); F (42 percent). (16 AR 3841-3846.)

B. The NTMP Was Not Required to Consider the Rejected Alternatives under *Friends of the Old Trees*

BC contends that the NTMP was required to consider the boilerplate alternatives because *Friends of the Old Trees*, *supra,* 52 Cal.App.4th 1383, held that Cal-Fire should consider alternatives raised by members of the public. (BC br. 19.) Cal-Fire makes the same argument in connection with the alternative approach to logging. (Cal-Fire br. 19-20.) To the contrary, the NTMP did exactly what *Friends of the Old Trees* condemned.

In *Friends of the Old Trees,* the First District Court of Appeal held that "feasible less damaging alternatives to the proposed harvesting project" must be considered in the THP itself. (52 Cal.App.4th at p. 1404.) The only alternatives discussed were raised by the public and appeared for the first time in Cal-Fire's official response to comments. There were two: a lighter harvest that spared larger trees, and purchase of the grove by the county open space district. The First District Court of Appeal held that these and other feasible less damaging alternatives should have been considered in the THP. (52 Cal.App.4th p. 1404.)[3]

Far from assisting Respondents, *Friends of the Old Trees* eviscerates their position. Not one of the NTMP's infeasible, more damaging alternatives was requested by a member of the public. And what the public did request—a series of less intensive harvests per Dr. Rundel and the Board

[3] The undersigned was attorney for the petitioner in *Friends of the Old Trees* in superior court and on appeal. The purchase of the grove was considered feasible because the open space district had expressed interest in a purchase.

of Forestry's analysis for JDSF—Cal-Fire refused to consider. The NTMP thus completely disobeyed *Friends of the Old Trees.* It considered infeasible alternatives that the public did not request, and refused to consider feasible ones that it did .

Cal-Fire's misuse of *Friends of the Old Trees* is particularly telling. As we have explained, the NTMP considers only one supposedly feasible, less damaging alternative besides the no project, namely the alternative approach to harvesting. But the NTMP acknowledges that it is infeasible and more damaging. Cal-Fire attempts to defend this alternative by arguing that *Friends of the Old Trees* required the NTMP to consider "infeasible" alternatives raised by members of the public. (Cal-Fire br. 19-20.)

This argument contains a legal error, a factual error, and a concession: *Friends of the Old Trees* does *not* require an agency to consider infeasible alternatives raised by the public. The public did *not* request Cal-Fire to consider the alternative approach to harvesting. And Cal-Fire *concedes* that the alternative approach is neither feasible nor less damaging.

C. The Alternative Approach to Harvesting Was Not Potentially Feasible

BC defends the alternative approach to harvesting by stating that it was "potentially feasible." (BC br. 21.) But there is nothing potentially feasible about it. First, it is admittedly more destructive. (1 AR 199-200.) The alternative approaches are evenaged management (a type of clearcutting) and clearcutting, neither of which are permitted under an NTMP, because they are more damaging than unevenaged management. (§§ 4593.2, subds. (c), (e); 4593.3.) In addition, the NTMP admits that the alternative would result in increased visual, noise, and sedimentation impacts. (1 AR 217-218.)

Moreover, all of this was known when the first version of the NTMP was filed in 2006 and the second in 2007. Both say the same thing as the final NTMP about the infeasibility and destructiveness of the alternative approach. (19 AR 4718-4719; 20 AR 4942-4943.)

It is one thing for an environmental review document to discuss a "potentially" feasible alternative, and for the reviewing agency to learn through the review process and public comment

that the alternative is not feasible. But that is a far cry from what occurred here. The alternative approach was infeasible boilerplate from the beginning, appearing in each version of the NTMP. It was never a meaningful alternative, let alone potentially feasible. "The purpose of an EIR is *not* to identify alleged alternatives that meet few if any of the project's objectives so that these alleged alternatives may be readily eliminated." (*Watsonville Pilots Association v. City of Watsonville* (2010) 183 Cal.App.4th 1059, 1089.)

D. The Use of Boilerplate in Place of a Real Consideration of Alternatives Is an Egregious Violation of CEQA

Respondents defend the NTMP's use of boilerplate for the consideration of alternatives. (BC br. 21-22; Cal-Fire br. 22.) Offering no citations to the record, BC claims that the "actual comparison of the 2009 NTMP to the alternatives is not boilerplate, but specifically compares the impacts from the 2009 NTMP to the No Project and alternative approach to harvesting scenarios. This is also true of the alternatives considered but rejected." (BC brief 22.) But this argument assumes that there can be a meaningful comparison between the project and infeasible, more damaging, boilerplate alternatives.

In any event, BC is wrong if its argument is that the NTMP's comparison of boilerplate alternatives with the NTMP is somehow not boilerplate. For example, the NTMP's comparison of the alternative approach to harvesting with the project (1 AR 218-219) is virtually word-for-word the same as the comparison in the YMCA NTMP (14 AR 3425-3426), the Hathaway NTMP (15 AR 3478-3479), the Osier-Mixon THP (15 AR 3486-3487), and the Nobles THP (15 AR 3496). So are the other comparisons. In short, boilerplate alternatives result in boilerplate comparisons.

Cal-Fire takes a different tack. First, it defends the boilerplate by arguing that it was dictated in part by the "unique nature of the project." (Cal-Fire br. 15.) It then defends the boilerplate by stating that all logging operations are the same except for "different acreages or locations." (Cal-Fire br. 22.) Besides being contradictory, these positions beg a more important question, namely Cal-Fire's failure to consider *feasible* alternatives, even if it is true that different logging projects may warrant consideration of similar alternatives.

III. RESPONDENTS IMPROPERLY DEFINE THE NO PROJECT ALTERNATIVE

In their opening, Petitioners explained that the NTMP committed two errors in connection with the no project alternative: It posited that the no project would be no logging whatsoever; or that it would be the maximum allowed by law. (Petitioners' opening 13-15.)

Without citing to any authority, Respondents both argue that Cal-Fire would have improperly "speculated" to assume logging would continue if the NTMP were not approved. (BC br. 20; Cal-Fire br. 18.) But that does not stop Cal-Fire from speculating more absurdly in the opposite direction by assuming that years of logging and management of the Grove would come to a standstill if the NTMP did not go forward.

Respondents both argue that since no prior logging operation was open when the NTMP was submitted, they were entitled to assume that if the NTMP did not go forward, the Grove would never be logged again. (BC br. 20; Cal-Fire br. 17-18.) First, Respondents' supposition that no prior logging plans were open is wrong.

THP 1-01-252 SON was open. The NTMP was filed on May 11, 2006. On July 28, 2006, the review team noted that the stocking report for the THP had not been filed; accordingly, it decided that the THP's stocking would be evaluated during the preharvest inspection of the NTMP. (4 AR 761.) The THP's "Work Completion and/or Stocking Report" was signed by Cal-Fire on September 6, 2006, four months after the NTMP was filed. (4 AR 821-823.)

But even assuming no open plans, Respondents' assumption that no logging would occur in the absence of the NTMP violates the law and is not justified by the facts. Respondents ignore the relevant provisions of Guideline section 15126.6 that Petitioners discussed at length in their opening. (Petitioners' opening 13-15.) The Guideline provides:

> When the project is the revision of an existing land use or regulatory plan, policy or ongoing operation, the "no project" alternative will be the continuation of the existing plan, policy or operation into the future. Typically this is a situation where other projects initiated under the existing plan will continue while the new plan is

> developed. Thus, the projected impacts of the proposed plan or alternative plans would be compared to the impacts that would occur under the existing plan.

(Guidelines, § 15126.6, subd. (e)(3)(A).)

The NTMP is a 100-year logging plan for the 2,400-acre Bohemian Grove. It replaces decades of logging and land management using THPs. As just discussed, THP 1-01-252 SON did not close until months after the NTMP was filed, and according to Cal-Fire's official Response, another one, THP 1-13-134 SON, was completed in February 2006, just three months before the NTMP was filed. (7 AR 1459.) What is more, a BC 2004–2005 annual report demonstrates that in 2005 BC was transitioning from THPs to an NTMP to carry out the "*continuation of our timber harvest* with the emphasis on maintaining a healthy and safe forest." (10 AR 1979, italics added.)

The transition from management by THPs to management by an NTMP falls squarely under Guideline section 15126.6, subdivision (e)(3)(A). The past management of the Bohemian Grove using THPs constitutes an "ongoing operation"; the NTMP constitutes the "revision of an… ongoing operation." (Guidelines, § 15126.6, subd. (e)(3)(A).)

Even though Respondents are wrong on the facts, for purposes of argument, we accept their claim that no THPs were open when the NTMP was filed. This is not a principled distinction. It ignores the basic reality that up until the NTMP was filed, the land had been logged for more than two decades under a regime of successive THPs. Furthermore, even respondents concede a THP closed only 90 days before the NTMP was filed (which undoubtedly means the NTMP was being drafted *while* the THP was open). Why should so much hinge on 90 days? Respondents cannot answer this question.

Furthermore, the NTMP argues that logging is necessary to restore the Grove to its original condition and to avert the threat of fire. Are we to suppose that if the NTMP were not approved, BC would abandon these goals and encourage the conditions it seeks to avoid?

Finally, Respondents' position is refuted by numerous statements in the administrative record. For example, Cal-Fire provides this quote from the NTMP: "The property owner has purchased each acre of timberland and each stand of timber with the purpose of managing those acres and

timber stands for recreation and *timber production*…." (Cal-Fire br. 20, quoting 1 AR 215, italics added.)[4] Since BC manages its Grove *for* timber production, it is illogical to assume that such production would stop if the NTMP did not go forward.

Other examples: Members of the public complained that one of the NTMP's alternatives contemplated clearcutting, which is illegal under an NTMP. Cal-Fire responded by stating that clearcutting would be allowed under a THP: "[T]he option to forego seeking approval of an NTMP and instead filing for a THP that includes clearcutting would not be 'invalid.'" (7 AR 1605; accord 7 AR 1600.) Cal-Fire thus contemplated that in the absence of an NTMP, logging would go forward under THPs. (See also, e.g., 7 AR 1528 [Official Response: "Because the property is already in the second cycle of timber operations, most of the transportation system…already exist."]; 8 AR 1640 [Official Response: "The harvesting practices are to remain similar to those in the past with greater emphasis on improvement of stand conditions…."].)

The no project alternative violates CEQA on a second ground. Having first argued there would be no logging if the NTMP were not approved, in the following sentence the NTMP assumes that the no project alternative would involve the maximum logging allowed by law. (1 AR 27.) "The No Project Alternative would also result in greater greenhouse gas emissions over the life of the NTMP than the Proposed Project because, as discussed above, the Proposed Project would result in a net capture of 254,000 tons of CO2e over the No Project baseline." (1 AR 217.) But the "No Project baseline" referenced in the above quote contemplates the maximum amount of logging permitted by law—logging that essentially harvests all growth—significantly more than the NTMP allows. (2 AR 397-402.) If this seems hopelessly confused, it is, because it combines a baseline error, which we address *infra* at pp. 24-25, with a no project error that we address here.

What happened is this. In analyzing the project's effects on GHG emissions, the NTMP compared the project with a hypothetical that logs more and sequesters less. (2 AR 397-402.) In analyzing the no project alternative, the NTMP mistakenly assumed that the no project is this

[4] We note this quote is from the section on alternatives and therefore is boilerplate, but it is only fair that Respondents be held to the boilerplate they defend.

maximum logging hypothetical. (1 AR 217.)

In sum, we have shown that the no project alternative is the logging regime that preceded the NTMP; it is not *no* logging nor is it *more* logging.

IV. THE PROJECT CANNOT BE THE ENVIRONMENTALLY SUPERIOR ALTERNATIVE

One of Respondents' strangest claims is that the approved project is the environmentally superior alternative. Both argue that the approved project is an alternative to the version filed in 2006. BC states that the "2009 NTMP is the third alternative version of the project." (BC br. 22.) Cal-Fire states that "the current 2009 Plan can be considered an alternative to the 2006 Plan, the original plan." (BC br. 22.) These contentions are conceptually incoherent and contrary to CEQA's basic framework.

The NTMP must identify the environmentally superior alternative. (Guidelines, § 15126.6, subd. (e)(2).) If the environmentally superior alternative is the no project alternative, the NTMP must also identify the environmentally superior alternative among the other alternatives. (*Ibid*.) This directive, although referring to an EIR, applies to certified regulatory programs. (See *Mountain Lion Foundation v. Fish and Game Commission* (1997) 16 Cal.4th 105, 135-136 [Supreme Court requires consideration of "no project alternative" by certified regulatory program based on former Guidelines, § 15126].)

Under CEQA, there is a clear demarcation between the project or activity being approved and its alternatives. "The term 'project' refers to the activity *which is being approved*…." (Guidelines, § 15378, subd. (c), italics added.) A "project" is defined as "[a]n activity directly undertaken by a person" that "may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." (§ 21065, subd. (a).)

An environmental review document must describe a "range of reasonable alternatives *to* the project." (Guidelines, § 15126.6, subd. (a).) An NTMP must "[i]nclude[] a description of the proposed activity *with* alternatives to the activity…." (§ 21080.5, subd. (d)(3)(A).)

Under these authorities, a project and its alternatives are fundamentally different: A project

cannot be an alternative to the project, let alone the environmentally superior alternative. The project in this case is the NTMP, the only "activity which is being approved." (Guidelines, § 15378, subd. (c).) The alternatives to it are those listed in the NTMP section entitled "Project Alternative Analysis." (1 AR 213, 215.)

Moreover, Cal-Fire correctly defined the project in its Official Response: "The plan considered for approval by the Department is the plan that was recirculated on March 25, 2009. The versions of the plan that lead up to that point may be of historical interest but only the content of the recirculated plan is (sic) be considered for approval." (8 AR 1705.)

Respondents do not address these authorities, nor cite to others. And we know of none that conflates the concept of project and alternative. Respondents' position leads to an absurdity: If the NTMP is an alternative, there is no project.

The NTMP violated CEQA by failing to identify an environmentally superior alternative.

V. THE NTMP VIOLATES ITS OWN STANDARD OF SIGNIFICANCE REGARDING GHG EMISSIONS

Petitioners contend that the NTMP violated CEQA because the project will reduce carbon storage by the year 2020 and thereby exceed the NTMP's own threshold of significance, resulting in an unmitigated significant or cumulative effect. (Petitioners' brief 21-24.)

CEQA encourages agencies to establish thresholds of significance for evaluating environmental effects. (Guidelines, § 15064.7.) In evaluating a project's impacts on GHG emissions, an agency should consider whether they exceed the agency's threshold of significance. (Guidelines, § 15064.4, subd. (b)(2).)

Respondents both argue that the NTMP's threshold does not contain the 2020 deadline. (BC br. 24-25; Cal-Fire br. 23-25.) But their argument is refuted by the NTMP's plain language and the Official Response. First, some background. As the NTMP explains, its threshold of significance for determining whether a logging project will have a cumulative or significant environmental effect in connection with GHG emissions is derived from the California Global Warming Solutions Act of 2006 (AB 32): "AB 32 requires a reduction in statewide GHG

emissions to 1990 levels by 2020." (1 AR 184.)

The heart of AB 32 is its mandate to reduce emissions by 2020 to 1990 levels. (Health & Saf. Code, §§ 38550-38551.) It provides no other goals or timelines for reducing GHG missions. (See Health & Saf. Code, § 38501 [Findings and Declarations].) The remaining sections of the statute are intended to assist in reaching the 1990/2020 goal through a variety of means, including mandates to enact regulations for reporting GHG emissions (Health & Saf. Code, §§ 38530); for reducing GHG emissions (Health & Saf. Code, §§ 38560-38565); and for creating market-based compliance mechanisms. (Health & Saf. Code, §§ 38570-38574.)

As the NTMP explains, AB 32 directs the California Air Resources Board (CARB) to implement GHG reductions for various sources, including forests. (Health & Saf. Code, §§ 38560-38560.5; 1 AR 184-185.) To that end, it directs CARB to prepare a scoping plan to achieve the reductions. (Health & Saf. Code, § 38561; 1 AR 184.)

The CARB plan, as quoted by the NTMP, plainly states that 2020 is the target date for emissions reductions, and refutes Respondents' arguments to the contrary: "The 2020 target for California's forest lands is to achieve a 5MMTCO2E [5 million metric ton CO2E] reduction through sustainable land management practices…." (1 AR 184, quoting CARB plan.) California forests currently sequester 5MMTCO2E. The 2020 target is to ensure that they do not sequester less in 2020 than the 5MMTCO2E they sequester today. (1 AR 184.) The CARB plan explains that the 2020 goal can be achieved if forestry practices are sustainable, that is, if they do not reduce current carbon stocks: "California forests are now a net carbon sink. The 2020 target would provide a mechanism to help ensure that this carbon stock is not diminished over time." (1 AR 184, quoting CARB plan.)

Having explained the CARB plan's 2020 target, the NTMP then adopts it as a threshold of significance for evaluating the NTMP's emission effects: "Applying the draft Scoping Plan to this project, the NTMP would have a significant impact on climate change if it were to implement land use changes that reduce carbon storage, lead to diminishing carbon stocks over time, or are inconsistent with the 'sector-wide' reduction target of 5MMTCO2E." (1 AR 185.) All of this is

reiterated in the Official Response. (8 AR 1648-1650.)

Under this threshold, a project that reduces carbon storage by 2020 will have a cumulative or significant environmental effect. (1 AR 185.) Nickerson's analysis plainly shows that the project will reduce carbon stocks and storage through 2035, well past the 2020 goal; and will work against the 2020 goal of maintaining 5MMTCO2E in California forests. (2 AR 401-402.)

BC argues in response that the NTMP's threshold only requires that the NTMP be "consistent with AB 32," not with AB 32's 2020 target. (BC brief 25.) But this is contrary to the NTMP's plain language. The NTMP expressly adopts the CARB scoping plan's reduction target date (1 AR 185); that date is 2020: "The 2020 target for California's forest lands is to achieve a 5MMTCO2E reduction through sustainable land management practices….The 2020 target would provide a mechanism to help ensure that this carbon stock is not diminished over time." (1 AR 184, quoting CARB plan.)

Furthermore, if accepted, BC's argument would negate AB 32. One cannot miss AB 32's 2020 target and be consistent with it: AB 32 *is* the 2020 target.

BC's final argument is that, even though the NTMP reduces carbon storage through 2020 and beyond, it begins to sequester it as 2020 approaches. (BC brief 26.) This argument is sophistic, as the following example demonstrates. Say BC clearcut its entire 2,400-acre Grove in 2010, then left it to regrow. According to BC, such a strategy would comply with AB 32 and the CARB standard because the forest is sequestering carbon as it regrows and approaches 2020, never mind that it will have *reduced* carbon stocks by that date and well beyond.

The simple fact, as Respondents concede, is that the project will cause *less* carbon to be stored in the Bohemian Grove in 2020 (indeed in 2035), than there is today. This is contrary to AB 32, the CARB standard, and the NTMP's threshold of significance. It constitutes an unrecognized and unmitigated environmental effect and therefore violates CEQA. (*Mountain Lion, supra,* 16 Cal.4th at pp. 134-135; §§ 21002, 21080.5, subd. (d)(2)(A).)

VI. RESPONDENTS' REFUSAL TO IDENTITFY, MEASURE AND ASSESS GHG EMISSIONS (PARTICULARLY GRAY CARBON) BECAUSE OF

MARKET LEAKAGE VIOLATED CEQA

Petitioners complain that the NTMP does not mention, let alone identify and quantify, the project's "gray" carbon emissions, even though they can be considerable. (15 AR 3509.) In its Official Response, Cal-Fire justified this omission on the ground of "market leakage." (8 AR 1676-1677.) Petitioners claim that this omission and its rationale violated CEQA.

In a one-paragraph response, BC argues that the NTMP did in fact consider the project's emissions, citing to the NTMP's two-page section on climate change (1 AR 184-186), and Nickerson's sequestration analysis (2 AR 397-402). (BC brief 26-27.) BC confuses different issues. These sections address *only* green carbon. They conclude that over the latter two-thirds of the 100-year horizon the Grove's trees will store more carbon than they presently do. Neither section addresses gray carbon.

Cal-Fire concedes that gray carbon was only considered for the first time in the Official Response, and that the Response raised market leakage as an excuse for not identifying and quantifying the project's gray carbon. (Cal-Fire br. 27.) But it cites to numerous places in the Official Response where it addressed gray carbon and concluded that such emissions are offset by other factors. (Cal-Fire br. 28.) But this strategy—waiting until the Official Response to address environmental effects—violates CEQA, as Cal-Fire knows, having been caught doing it on a number of occasions.

The courts of appeal have rejected the argument that information found in the official response can substitute for information required in the plan subject to public review: "We also reject CDF's contention that it adequately addressed the potential cumulative impact of future housing development in its official response….[T]he official response, which is not subject to public review or comment until after an approval decision has been made, cannot be utilized to fill gaps in the THP itself." (*Joy Road, supra,* 142 Cal.App.4th at p. 680.)

Cal-Fire committed the identical error in *Friends of the Old Trees*, *supra*, 52 Cal.App.4th 1383. There, it argued that cumulative impacts on water supply were addressed at length in its official response to public comment, even though they had not been addressed adequately in the THP:

"Certainly, the Department cannot expect the public's access to information after–the–fact to substitute for the opportunity to influence the Department's decisions before they are made." (*Id*. at p. 1402; accord *Sierra Club*, *supra*, 7 Cal.4th at pp. 1228-1230, 1235-1237.)

The error here is particularly serious, because of the sheer amount of analysis in the Official Response that is not in the NTMP. For example, the Official Response contains a 19-page introduction on GHG emissions (8 AR 1646-1665) that itself is more than twice the number of pages devoted to GHG emissions in the NTMP. (1 AR 184-186; 2 AR 397-402.)

This case well illustrates the danger of insulating environmental review from public comment. In rejecting concerns about gray carbon, the Official Response relies exclusively on calculations by Green Diamond Resource Company, a logging concern. (8 AR 1647, quoting from THP; 1672, citing to THP.) But the public never had the opportunity to review and possibly challenge Green Diamond's calculations.

In sum, the NTMP failed to evaluate gray carbon, a potentially significant effect. (*Joy Road supra,* 142 Cal.App.4th at p. 674, fn. 12 [addressing issue in official response acknowledges its significance].) It improperly justified its failure based on market leakage. And Cal-Fire cannot excuse its oversight by pointing to the Official Response.

VII. THE BASELINE OF INCREASED LOGGING VIOLATES CEQA

In their opening, petitioners complain that the NTMP violated CEQA, because it used an incorrect baseline in evaluating GHG emissions. (Petitioners' opening 27.) The NTMP posits a baseline that allows the maximum amount of logging under law, far more than the NTMP allows. (2 AR 397, 400.)

The baseline is supposed to be the existing environmental conditions, not the "the level of development or activity allowed by a plan or regulatory framework." (*Communities for a Better Environment v. South Coast Air Quality* (2010) 48 Cal.4th 310, 321.) Where a baseline incorrectly forecasts *more* development, it misleads the public and prevents analysis of a project's actual environmental effects. (*Id*. at p. 322.)

BC appears to concede that the NTMP used an incorrect baseline, but blames the error on the Forest Protocols: "It is true that the Nickerson report also calculated an assumed 'projected growth' scenario and compared the GHG emissions under that scenario to those under the 2009 NTMP. But this was a function of the Forest Protocols Nickerson used in his calculations….the Forest Protocol dictated that Nickerson include a 'projected growth' scenario." (BC brief 27.) This argument fails. First, the baseline as defined by CEQA cannot be overridden by the Forest Protocol, which is not a law. The simple fact is that the NTMP uses a blatantly incorrect baseline to exaggerate the benefits of the project.

Second, BC's argument is based on its request that the Court take judicial notice of the Forest Protocol, which was not submitted as evidence during the administrative proceedings. It is inadmissible under *Western States Petroleum Association v. Superior Court* (1995) 9 Cal. 4th 559. Petitioners object to it. (See Petitioners' Opposition to Request for Judicial Notice.)

Third, assuming the Court accepts the Forest Protocol as evidence, BC's claim that it was required to follow it is bizarre (BC br. 27), since the protocol has absolutely no bearing on an application for an NTMP and BC points to none. The Forest Protocol is a framework and set of guidelines that allow companies to report their GHG emissions, reductions, and emission offsets and register with the California Climate Reserve as a means of advertising their "greenness." (Cal-Fire br. 24; RJN, Ex. F, p. 9.) It has nothing to do with CEQA's baseline requirement, nor Cal-Fire's approval of an NTMP. (As far as we know, BC has not attempted to use the Forest Protocol to register the NTMP and its forestry projects with the Climate Reserve. Certainly, nothing in the record suggests it has.)

In sum, the NTMP errs, as even BC appears to concede, in using a baseline that contemplates the maximum amount of logging, rather than existing conditions. The NTMP's error misleads the public into believing that it has sequestration benefits that it does not have. (*Communities for a Better Environment, supra,* 48 Cal.4th at pp. 320-321; *Woodward Park Homeowners v. City of Fresno* (2007) 150 Cal.App.4th 693, 690, 707-708.)

Dated: September 22, 2010

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Paul Carroll,
Attorney for Petitioners

PROOF OF SERVICE BY MAIL (CCP 1013A; 2015.5)

I am a citizen of the United States and a resident of the County of San Mateo. I am over the age of eighteen years and not a party to the within entitled action; my business address is: 1103 17th Avenue, Redwood City, CA 94063.

On September 22, 2010, I served one true copy of: PETITIONERS' REPLY MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF MANDATE, by placing a true copy thereof enclosed in a sealed envelope, and postage thereon fully prepaid, in the United States mail at Redwood City, California, addressed as follows:

Tiffany Yee, Esq.
Bradley Solomon, Esq.
Attorney General, Resources Div.
455 Golden Gate Ave., 11000
San Francisco, CA 94102

Ronald Van Buskirk, Esq.
Pillsbury Winthrop Shaw Pittman
50 Fremont Street
San Francisco, CA 94105-2228

I, Paul V. Carroll, declare, under penalty of perjury, that the foregoing is true and correct. Executed on September 22, 2010, at Redwood City, CA.

_____