

Case No. C095091

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT

**BATTLE CREEK ALLIANCE and MARILY WOODHOUSE,**  
*Plaintiffs-Petitioners and Appellants,*

v.

**CALIFORNIA DEPARTMENT OF FORESTRY & FIRE  
PROTECTION,**  
*Defendant-Respondent and Respondent,*

and

**SIERRA PACIFIC INDUSTRIES,**  
*Real Party in Interest and Respondent.*

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Appeal from the Superior Court for the County of Tehama  
Case No. 20CI-00070  
Honorable C. Todd Bottke

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**APPELLANTS' OPENING BRIEF**

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<b>CERTIFICATE OF INTERESTED ENTITIES OR PERSONS</b>	
(Check one): <input checked="" type="checkbox"/> INITIAL CERTIFICATE <input type="checkbox"/> SUPPLEMENTAL CERTIFICATE	
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1. This form is being submitted on behalf of the following party (name ): Appellants Battle Creek Alliance and Marily Woodhouse
2. a.  There are no interested entities or persons that must be listed in this certificate under rule 8.208.
- b.  Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (Explain):
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- (1)
- (2)
- (3)
- (4)
- (5)

Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: June 23, 2022

William J. White  
(TYPE OR PRINT NAME)

s/William J. White  
(SIGNATURE OF APPELLANT OR ATTORNEY)

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## INTRODUCTION

Battle Creek, a tributary of the Sacramento River whose cold, clear waters were long home to healthy and thriving populations of Chinook salmon and steelhead trout, has become so inhospitable to salmonids over the last two decades that the recovery of two threatened species—steelhead and spring-run Chinook—is at risk, and another species, the endangered winter-run Chinook, has disappeared from the creek altogether and is facing extinction. One of the primary causes of this decline is an increase in sedimentation and higher temperatures in the creek and its tributaries that has accompanied the denuding of much of the watershed’s natural forested landscape—in large part due to the clearcutting of vast swaths for industrial timber beginning in the late 1990s.

Despite the unmistakable evidence of these impacts, the agency responsible for approving this logging—Respondent California Department of Forestry and Fire Protection (“CalFire”)—has done so without ever identifying a significant cumulative impact to salmonids in Battle Creek. How has it managed to avoid contending with this problem? By adopting an approach to reviewing individual timber harvest plans (“THPs”) that focuses solely on impacts of each project within a circumscribed area in the immediate vicinity of the project, and refusing to even consider the evidence of cumulative impacts the projects are having outside of that line.

This appeal involves CalFire’s approval of one such THP—a proposal by real party in interest Sierra Pacific Industries (“SPI”) known as the Rio Gatito Timber Harvest Plan. The Rio Gatito project (“Project”) would involve the harvest of over 800 acres in Tehama County—mostly by clearcutting—near Panther Creek, a direct tributary of the south fork of Battle Creek (“South Fork”). Despite the fact that the South Fork is just a mile and a half downstream from the Project site, supports Chinook and steelhead, and is known to be one of the Battle Creek tributaries most impacted by sediment and temperature increases, the THP did not consider the Project’s downstream impacts on the South Fork at all. Instead, it limited its analysis of cumulative impacts to salmonids to a one-mile radius of the Project—enough to capture Panther Creek (which does not contain salmonids due to physical barriers) but just shy of the creek’s confluence with the South Fork. In this way, the THP was able to ignore the severe problems facing salmonids just downstream from the area analyzed, and thus conclude that Project’s cumulative impacts would be less than significant.

Petitioners and Appellants Battle Creek Alliance and Marily Woodhouse (collectively “Appellants”) brought this action challenging CalFire’s approval of the THP as contrary to the California Environmental Quality Act (Pub. Resources Code § 21000 et seq. (“CEQA”)), the Forest Practice Act (Pub. Resources Code §§ 4581-4592.5 (“FPA”)), and the

Forest Practice Rules (Cal. Code Regs., tit. 14 § 895 et seq. (“FPRs”)), all of which mandate that CalFire fully disclose and provide feasible mitigation for the significant cumulative effects of a timber harvesting project. By restricting the geographic scope of its inquiry to the smaller Panther Creek planning watershed—despite substantial evidence of cumulative impacts occurring just downstream—the THP kept the public in the dark about the existence of those impacts, and the Project’s incremental contribution to them, in violation of the law.

The THP’s cumulative impacts assessment also lacks any of the basic elements of a legally adequate analysis under CEQA. It provides virtually no information regarding the existing baseline conditions of salmonids or water quality downstream of the Project, without which the Project’s impacts cannot be properly measured. And its cursory analysis of the Project’s cumulative effects is fraught with inadequacies, improperly assuming that an impact that is not significant *individually* cannot be significant *cumulatively*, and taking the position—without analysis or supporting evidence—that compliance with management practices required by the FPRs precludes the possibility that timber harvesting can cause cumulatively significant effects. This approach to environmental review is flatly inconsistent with CEQA.

But CalFire’s unlawful approach to THP review is not limited to the Rio Gatito project—it has been employed repeatedly in THPs throughout

the Battle Creek watershed for over a decade. As a result, no significant cumulative effects of logging on water quality or salmonids have been identified in any of these THPs, despite the fact that such effects are well documented. CalFire’s pattern and practice of ignoring the cumulative impacts of logging amounts to a de facto policy that is contrary to CEQA, and through this action Appellants seek declaratory and injunctive relief to end it.

In denying Appellants’ writ claims, the trial court accepted without scrutiny or reasoned analysis CalFire’s bare assertions that it need not have considered impacts beyond the limits of its assessment areas, that the THP’s three sentence “analysis” of salmonids was adequate, and that logging projects adhering to the FPRs do not cause significant cumulative impact. These rulings—which this Court reviews *de novo*—fly in the face of longstanding CEQA authority affirming the vital importance of disclosing even small contributions to severe cumulative problems. With respect to the declaratory relief claim, the trial court never even considered the evidence of CalFire’s pattern and practice, erroneously ruling that, since the earlier THP approvals had not been challenged in court, the claim could not proceed.

As discussed more fully below, because CalFire has acted unlawfully in approving the Rio Gatito THP, and in pursuing a de facto policy of approving THPs without considering known cumulative impacts,

Appellants respectfully request this Court reverse the trial court’s decision, order that a writ be granted setting aside CalFire’s approval of the Rio Gatito THP, and granting the declaratory and injunctive relief requested by Appellants.

## I. STATEMENT OF FACTS

### A. The South Fork of Battle Creek—Just Downstream of Panther Creek—Provides Essential Habitat for Threatened and Endangered Salmonids, but that Habitat Is Disappearing.

The Project site lies within the Panther Creek planning watershed, a sub-watershed of the larger Battle Creek. Administrative Record (“AR”) 1377, 3419. A “Class II” stream,<sup>1</sup> Panther Creek runs directly through the Project site and meets the South Fork of Battle Creek just 1.5 miles



*Figure 1. The Panther Creek sub-watershed within the Battle Creek watershed. AR 1377 (excerpt). The green dot on the far left indicates the confluence of Panther Creek with the South Fork.*

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<sup>1</sup> A Class II stream is generally defined as one in which fish are always or seasonally present within 1,000 feet downstream, or that provides aquatic habitat for non-fish aquatic species. FPR § 916.5, Table I.

downstream of the area to be logged. *Id.*; AR 311-12; *see* Fig. 1. The South Fork then flows another 20 miles west where it merges with the North Fork of Battle Creek to become the main stem of Battle Creek, a tributary of the Sacramento River. AR 1377, 2812, 4055.

Battle Creek contains critical cold-water habitat for three salmonid species listed under the federal Endangered Species Act: steelhead trout, and winter-run and spring-run Chinook salmon. AR 1379, 1392. Steelhead and spring Chinook are listed as threatened, and winter Chinook is listed as endangered.<sup>2</sup> AR 2778. Steelhead and Chinook are both known to occur in the South Fork of Battle Creek. AR 253, 3440-41, 3877.

In its natural state, Battle Creek provides conditions that are ideal for salmonids. One of these conditions is the creek's historically low turbidity—that is, the cloudiness of water caused by sediment, organic debris, and other fine particles. Because the creek's natural streamflow comes primarily from sediment-poor groundwater from the watershed's porous volcanic bedrock, the water is clear, and the creek supports many high quality "holding pools" that are essential for salmonid spawning. AR 537-38, 549, 725.

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<sup>2</sup> Winter-run Chinook is also listed as endangered under the California Endangered Species Act, and spring-run Chinook is listed as threatened under that act. AR 538.

Battle Creek also provides the cold water that is essential to Chinook holding and spawning. AR 3995. Chinook and steelhead are poikilotherms, meaning their temperature and metabolism is determined by the ambient temperature of the water they inhabit. AR 510. Cold water is necessary for disease resistance and for successful reproduction, incubation, rearing, migration, feeding, and competition. AR 3995, 527-30. Holding areas should generally not exceed 16-17°C. AR 513. Water temperatures above 22°C will “totally eliminate salmonids from a location.” AR 512.

Battle Creek historically contained large and diverse populations of both Chinook and steelhead. AR 538. But over the last few decades, that has changed dramatically. These once thriving populations are now “at remnant levels.” *Id.* In 2017, the U.S. Fish and Wildlife Service (“USFWS”) observed the lowest spring Chinook population estimate since data collection began 23 years ago. AR 3430. Winter run Chinook have been virtually extirpated from Battle Creek. AR 2778, 2788. This decline is all part of what USFWS described as “worrisome trends,” threatening the survival of salmonids in Battle Creek. AR 3430. And the main culprits behind this trend are well known: increased sedimentation and higher water temperatures. AR 3430-1, 3751.

High levels of sediment in streams threaten salmon and steelhead survival. AR 549. Excess sediment impairs water quality, ruins habitat, and causes illnesses in salmonids. AR 4039. Sediment can also fill in holding



pools that are critically important for salmonids at multiple life stages. AR 549. This has led to the elimination of spawning habitat and holding pools in the lower South Fork, and in turn reduced spawning and fewer fish holding in this section of the creek. AR 2791, 3751, 3878.

Salmonids in Battle Creek are also threatened by elevated water temperatures. AR 3209-10, 4030-31. Impacts of increased temperature in the South Fork are particularly severe. Data gathered from a Department of Water Resources gaging station in the South Fork in 2008 revealed water temperatures with a maximum weekly maximum temperature (“MWMT”)<sup>3</sup> above 19.5°C, and peaking at above 20°C—well above the temperatures salmonids require. AR 507, 513. More recent measurements taken by the USFWS show maximum temperatures exceeding 22°C on 28 days in 2015. AR 4030. In 2018, temperatures peaked above 24°C, with a MWMT above 22°C. AR 507. Such temperatures—which are high enough to eliminate all salmonids—are now common during the summer in the South Fork of Battle Creek. AR 3210. A 2017 USFWS report concluded that increased temperatures in the Battle Creek watershed are a likely cause of the significant decline of Chinook populations. AR 3430-31.

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<sup>3</sup>MWMT is the maximum seasonal or yearly-value of the daily maximum temperatures over a running seven-day consecutive period. AR 510. The MWMT is useful because it describes the maximum temperatures in a stream, but is not overly influenced by the maximum temperature of a single day. *Id*; *see also* AR 4004.

The combined effect of sedimentation and raised temperatures on salmonid habitat in the lower South Fork has been devastating. The Central Valley Regional Water Quality Control Board (“RWQCB”) and USFWS found that habitat degradation impacted up to 97% of the lower South Fork. AR 3878. Impacts to the South Fork spiked in 2015, when the combined effects of the 2012 Ponderosa wildfire, salvage logging of the burned area, and heavy rains resulted increased sediment loads. AR 536-37, 550, 3410, 4039-41. There has been some reduction in fine sediments since the 2015 peak, but large deposits of fine sediments remain in the lower South Fork; USFWS has identified a large plume of fine sediments mobilizing downstream into the mainstem of Battle Creek, filling in pools and covering spawning habitat in the lower river.<sup>4</sup> AR 1387.

USFWS has concluded that the survival and recovery of Chinook and steelhead in California’s Central Valley depends on restoring habitat in the Battle Creek watershed. AR 3418. Currently, the geographic range of the endangered winter Chinook is limited to a single population in the main stem of the Sacramento River, which makes it susceptible to “catastrophic loss.” *Id.* Establishing a second winter Chinook population in Battle Creek

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<sup>4</sup> In fact, sediment aggradation was so severe that RWQCB, USFWS, and other state and federal resource agencies collaborated to install an exclusionary weir to temporarily prevent spring-run Chinook from entering the South Fork, where they would face predation and stress, and find no suitable spawning ground. AR 3878.

could save the species from extinction. *Id.* A restored Battle Creek could also support self-sustaining populations of spring-run Chinook and steelhead, critical to the recovery of those species. *Id.*

However, reversing the “worrisome trends” of sedimentation and rising temperatures in Battle Creek requires acknowledging and addressing one of their primary causes: the vast increase in industrial clearcutting of the watershed.

**B. The Rise of Widespread Clearcutting Has Contributed Significantly to the Degradation of Water Quality and Aquatic Habitat in Battle Creek.**

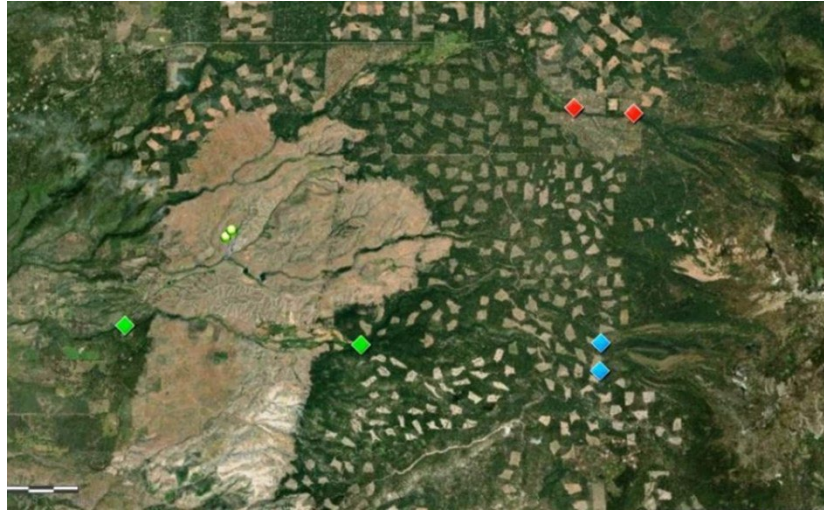
Timber harvesting in the Battle Creek watershed is nothing new—it has been the primary land use for more than a hundred years. AR 536, 538. But throughout most of the second half of the 20th century, harvesting activities caused minimal disturbance to the landscape. AR 538, 548. That changed in 1998, when clearcutting<sup>5</sup> became the dominant harvesting method in the watershed. *Id.*; *see also* AR 1381-83 (showing change in watershed landcover 1985-2017).

In recent decades, nearly one-third of the Battle Creek watershed has been logged, primarily by clearcutting. AR 565-66. No fewer than sixty-seven individual THPs—covering over 61,000 acres—were filed in the Battle Creek watershed between 1997 and 2016. AR 566, 594; *see* Fig. 2.

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<sup>5</sup> Clearcutting is a silvicultural practice where essentially all trees are removed from the harvested area. AR 4816.

These THPs are concentrated in the middle of the watershed, where 75,874 contiguous acres of land are identified as private industrial timberland, extending from the watershed’s northernmost edge to its southernmost. AR 566.



*Figure 2. Battle Creek watershed, showing clearcut patches (each about 20 acres) and Ponderosa fire scar in the industrial timberlands of the Battle Creek watershed. The uncut area on the right is Lassen National Forest. AR 594 (excerpt).*

This clearcut logging—together with the impacts of the 2012 Ponderosa wildfire and subsequent salvage logging of the burned trees—has had a significant impact on sedimentation and water temperature, and thus salmonid habitat, in Battle Creek. AR 536-52.

Timber-harvest activities can increase erosion rates by several orders of magnitude over natural rates. AR 3773. Much of this increase results from logging roads, which are “an inseparable part of logging operations.” AR 550, 7384, 6570 (map of roads in Battle Creek watershed). Disturbance

of the ground, including bare, unpaved roads like those proposed in the Project, enhance sediment supply to streams and sedimentation in channels. AR 7381. Use of roads in the dry season crushes the roadbed sediment and generates a large amount of fine sediment. AR 7384. When the rains come, this fine sediment washes into nearby streams, leading to sediment loading in rivers. *Id.* The impacts of sediment delivery from roads on water quality and salmonid health and habitat has been extensively documented. AR 3875, 4106.<sup>6</sup>

But roads are not the only source of sedimentation arising from clearcutting activities. Studies have shown that increasing the rate of harvest is closely correlated to higher percentiles of turbidity, even after accounting for road density, the type of road, or its proximity to a stream. AR 549. One study showed that logging of 50% of a drainage is likely to cause a five-fold increase in turbidity, while completely logging a drainage is likely to increase turbidity by a factor of 23. *Id.*

Clearcutting also has an impact on increasing water temperatures. Removing tree cover along tributaries eliminates shade and leads to increased heating of watercourses from exposure to the sun, and from heat exchange with adjacent cleared land. *See* AR 230, 3995-96, 6410-11, 6425-

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<sup>6</sup> According to a 2011 Task Force Report relied on by SPI and CalFire, 69% of road crossings, 100% of tractor crossings, and 17% of landings delivered sediment to waters of the state. AR 4843; see also AR 7381.

26. While THPs generally require logging projects to leave a buffer of vegetation along larger Class I and Class II watercourses, they do not include the same protection for the smaller Class III streams that feed into the larger streams. *See* AR 155, 3995-96. Logging along these tributaries can increase water temperatures in these streams, which then flow into the larger receiving stream. *See* AR 6410-11, 6425-26. In many studies of harvesting near streams, substantial warming has been observed even where buffers have left tree cover partially or fully intact. AR 4030-31, 6425-26.

The impacts of clearcutting on the tributaries of Battle Creek are well documented. For example, a published, peer-reviewed study examining water quality data collected from 2009 to 2015 from over two thousand samples at 13 stream locations within the Battle Creek watershed indicates that the sampling locations with the most harvest areas and highest road densities had the highest turbidity. AR 539, 550.

These impacts were observed despite the implementation of standard “best management practices” (“BMPs”) for sedimentation that are required in THPs. BMPs can reduce sedimentation, but they cannot completely prevent it. AR 549-50. Other watershed-scale studies of turbidity and sedimentation have likewise shown that BMPs do not prevent significant sediment-related impacts from logging activities. AR 537 (citing studies).

The impacts of logging in the Battle Creek watershed were significantly compounded by the 2012 Ponderosa Fire, which burned

27,676 acres in the watershed. AR 3875, 3879. Soon after the fire, most of the lands within the burn scar were salvaged logged. *Id.*; *see also* AR 1375. Two years after the fire, high intensity rainfall and flooding washed large amounts of sediment into Battle Creek and its tributaries. AR 3879. The fire also led to further increases in water temperatures. AR 4030-31. These conditions further exacerbated the harm to salmonids and their habitat in Battle Creek. AR 1386, 4030.

But the impacts from the fire, while severe, are far from the sole cause of degradation of Battle Creek. The study of watershed turbidity impacts in the Battle Creek watershed showed a clear correlation between turbidity and harvest areas in the years before the fire, as well as after. AR 550; *see also* AR 4926 (pre-fire 2009 report citing earlier studies concluding that “cumulative effects from timber harvest have. . .caused substantial diminishment of holding capacity for winter run Chinook”). Studies have also shown that post-fire salvage logging—by removing standing dead trees that provide shade, and by compacting soil which increases runoff and soil erosion—caused substantially more severe sedimentation and temperature impacts than did the fire alone. AR 537, 548, 3209, 4028-31, 6425-26. In sum, clearcutting in the watershed has elevated stream turbidity and temperature in Battle Creek, and continued logging will increase this harmful impact, harming valuable native fish populations downstream. AR 506. Prevention of these cumulative impacts

cannot be accomplished by BMPs alone; it requires reducing the rate and total area affected by logging operations. AR 550.

**C. The Rio Gatito Timber Harvest Plan**

SPI owns over 1.2 million acres of industrial timberlands in the Sierra Nevada, including the majority of such lands in the Battle Creek watershed. AR 217. But logging in the watershed has typically proceeded by individual harvesting projects, generally between 800-1,200 acres in size, each seeking a separate THP approval from CalFire. *See* AR 3486, 4413; AA<sup>7</sup> 1:94, 3:657, 3:974, 5:1563, 6:1616.

Under the FPA, logging on private timberlands may not commence until a Registered Professional Forester has prepared, and CalFire has approved, a THP for the logging operation. Pub. Resources Code § 4581. A THP serves as the environmental review document under CEQA and must include, among other things, a description of the proposed silvicultural methods to be used and proposed measures to mitigate the impacts of the project. Pub. Resources Code §§ 4582, 21080.5(a), (d)(3). THPs must be made available for public review and comment before they are approved. Pub. Resources Code §§ 4582.7, 21080.5(d)(3)(B).

On November 1, 2019, SPI submitted to CalFire a THP proposing to harvest 822 acres of timber land in the southeastern part of Panther

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<sup>7</sup> Citations to the Appellants Appendix are denoted “AA [Volume]:[Page].”



Creek planning watershed. AR 107, 109. The THP’s logging sites are clustered along Panther Creek and several of its tributaries. AR 312.

Under the THP, the vast majority of the 822-acre project area—80%—is proposed to be clearcut. AR 115. Another 15% would be logged as a fuel break, 4.5% would be commercially thinned, and the remainder would be used for roads. *Id.* The THP calls for 8,000 feet of new unpaved roads to be constructed onsite, replacing 5,700 feet of existing logging roads located near watercourses that will be abandoned. AR 153. The THP would also permit an unspecified amount of temporary roads to be constructed. AR 139.

The THP includes a “Cumulative Impacts Assessment” that purports to address the cumulative environmental impacts of the Project. AR 216-313. As part of its analysis, the assessment defines “assessment areas” describing the geographic scope of analysis for the subject areas analyzed. AR 225. For its analysis of cumulative water quality impacts, the THP utilized a “Watershed Assessment Area” of 10,991 acres, consisting solely of the Panther Creek “planning watershed.”<sup>8</sup> AR 225-26, 311. To analyze cumulative impacts on wildlife, the THP used a “Biological Assessment

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<sup>8</sup> “Planning Watershed” is defined in the FPRs as the contiguous land base and associated watershed system typically 10,000 acres or less in size, as mapped by the Director of CalFire. FPR § 895.1.

Area” by drawing a one-mile radius around the project site, totaling 11,060 acres. AR 226, 312.

As indicated in Figures 3 and 4, both assessment areas stop just short of the confluence of Panther Creek and the South Fork—which is 1.5 miles from the project site and just outside the Panther Creek planning watershed—and thus completely exclude any portion of the South Fork (and the remainder of Battle Creek) lying downstream of the Project.

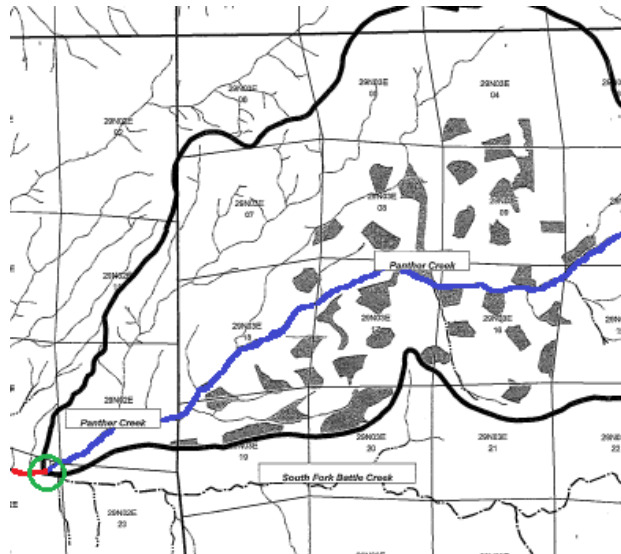


Figure 3. Watershed Assessment Area. AR 311(excerpt, highlights added<sup>9</sup>).

<sup>9</sup> For clarity, on Figures 3 and 4, the confluence of Panther Creek and the South Fork of Battle Creek is circled in green, with Panther Creek marked in blue and the downstream portion of South Fork marked in red.

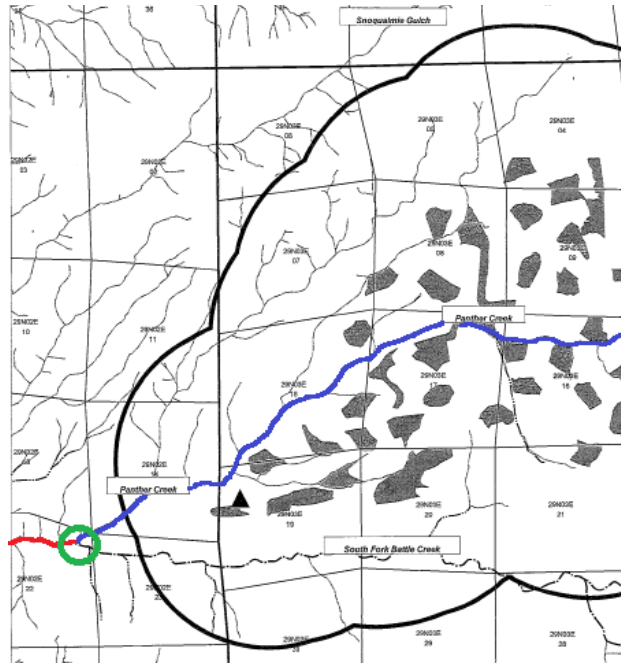


Figure 4. Biological Assessment Area. AR 312 (excerpt, highlights added).

The THP concluded that the Project would have no significant environmental impacts, either at the individual project level or cumulatively. AR 113, 225. In discussing cumulative impacts, the THP did not look beyond the bounds of the Biological and Watershed Assessment Areas. No mention was made of the high levels of sedimentation and elevated temperatures in the South Fork; rather, the sedimentation and temperature analyses looked only at conditions in Panther Creek, and simply assumed—with no analysis or evidentiary support—that implementation of standard BMPs would prevent any significant impacts. AR 230-31.

The “analysis” of impacts to fish consisted of a mere three sentences: one stating that the Biological Assessment Area includes a portion of the South Fork,<sup>10</sup> one acknowledging that the South Fork supports runs of Chinook and steelhead, and one stating that the THP would comply with Anadromous Salmonid Protections (“ASPs”) as required by the FPRs. AR 253. The THP includes no acknowledgement of the severe impacts currently suffered by salmonids in the South Fork *downstream* of the project site, much less an evaluation of the Project’s cumulative contribution to those impacts—even though such evaluation is one of the main requirements of the ASPs. *See id.*; FPR § 936.9(b).

Appellants timely submitted comments on February 4, 2020, identifying numerous flaws in the THP. AR 563-611. Appellants submitted evidence showing the presence of steelhead and Chinook downstream in the South Fork, and of the severe sedimentation and water quality impacts to their habitat caused by logging activities and the Ponderosa fire. *See, e.g.*, AR 571-72, 574, 579, 582-83, 591-93, 609. Petitioners noted that the THP, by limiting the geographic scope of its cumulative impacts analysis to the Panther Creek planning watershed, failed to acknowledge these

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<sup>10</sup> The only portion of the South Fork within the Biological Assessment Area is *upstream* of the confluence of Panther Creek and the South Fork, and outside of the Panther Creek planning watershed. See Fig. 4 above. Thus, unlike the downstream segment, it does not receive, and is unaffected by, project runoff.

downstream impacts or the Project's cumulative contribution to them. AR 564, 567, 570, 582. The comments noted that the THP failed to adequately describe existing conditions in the area, including existing degradation of water quality and salmonid habitat, and lacked analysis or evidence to support its conclusion that the project would have no significant cumulative impacts. AR 563, 567-69, 573-75, 577-79, 582, 585-86, 589, 606-07.

Despite the flaws identified by Appellants, CalFire approved the THP on April 1, 2020. AR 1-3 (Letter of Conformance). On the same day, CalFire published its "Official Response" ("OR") to public comments, including its responses to Appellants' comments. AR 4-106. CalFire's OR argued that the scope of the cumulative assessment areas was proper as consistent with the minimum "Planning Watersheds" required by the FPRs. AR 8-11. The OR further concluded that there was no need to look downstream of the circumscribed assessment areas, because THPs are designed to eliminate a project's significant *individual* impacts, and thus there is "no reason to believe a downstream impact would occur." AR 11. The OR further dismissed as "speculative" Appellants' peer-reviewed evidence showing a correlation between clearcutting in the watershed and sedimentation impacts. *Id.*

In effect, the OR took the position that clearcutting in conformance with a THP simply cannot result in significant cumulative impacts:

“[W]hen properly implemented, the Forest Practice Rules do not cause a significant adverse effect on the environment.” AR 12.

CalFire’s “see no evil” approach to cumulative impacts in the Rio Gatito THP is not unique. In the past fifteen years, CalFire has approved at least ten THPs (almost all submitted by SPI) in the Battle Creek watershed, all of which strictly limited the cumulative impact analysis to defined assessment areas, and relied on compliance with FPRs to conclude that the THP would not contribute to a significant cumulative impact. *See* AR 1243, 1245-52 (Graceland), AR 3601, 3604-16 (Artemis), AR 4506, 4513-14, AR 4525-26 (Blue Ridge); AA 2:240, 249-257 (Reynolds Flat); AA 3:670-676 (Dry Gulch); AA 3:1050-65 (Plateau Flat); AA 5:1567-74 (Lookout); AA 6:1698-1707 (Long Ridge); AA 6:1812-21 (Baileys); *see also* Fig. 5. These approvals are part of a consistent pattern and practice by CalFire—amounting to a de facto policy—that systematically sidesteps any meaningful consideration of the incremental contribution of individual THPs to the cumulative problem in Battle Creek.

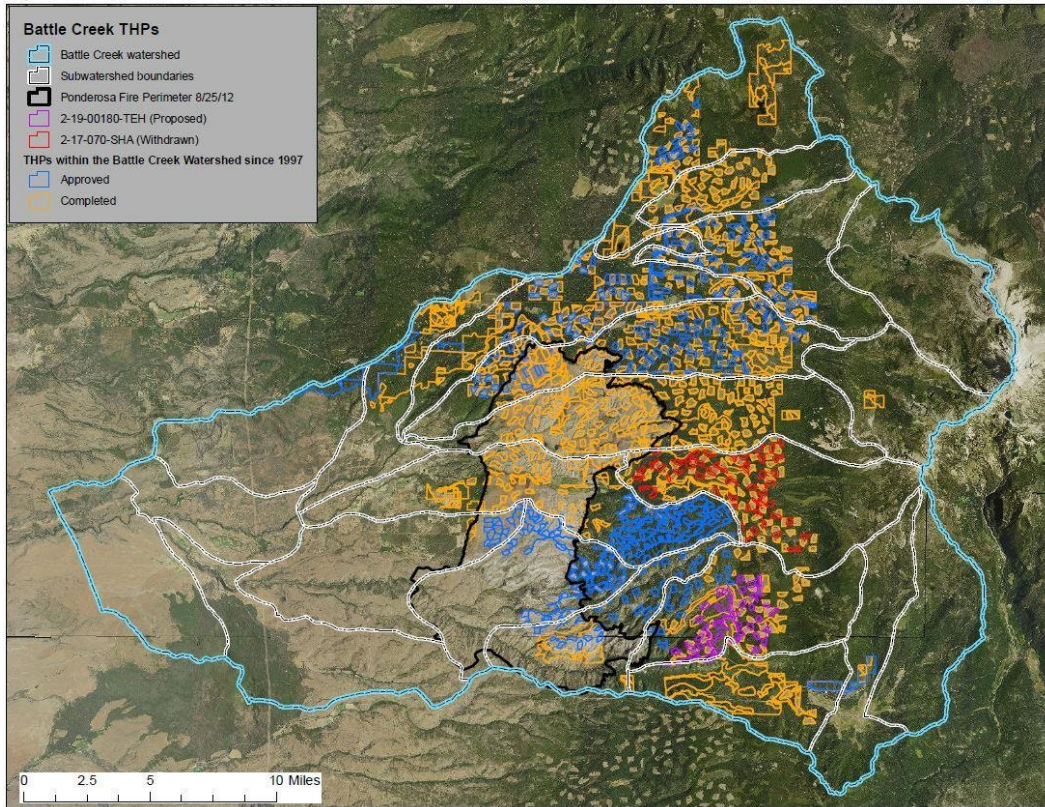


Figure 5 Map of units from THPs approved (blue) and completed (yellow) within the Battle Creek watershed. Proposed Rio Gatito THP marked in violet. AR 566

## II. PROCEDURAL HISTORY

On May 1, 2020, Appellants filed a petition and complaint in Tehama County Superior Court challenging CalFire’s approval of the THP (“Petition”). The Petition sought a writ of mandate to set aside the approval on the grounds that alleged that THP violated CEQA, the CEQA Guidelines (Cal. Code Regs., tit. 14, § 15000 et seq. (“Guidelines”)), the FPA, and the FPRs by failing to adequately analyze the Project’s cumulative impacts on water quality and salmonids in the South Fork of Battle Creek. AA 1:8-10.

The Petition also sought declaratory and injunctive relief on the ground that that CalFire has engaged in an illegal pattern and practice of failing to adequately study, assess and mitigate the cumulative water quality and aquatic habitat impacts of THPs within the Battle Creek watershed. AA 1:9.

After briefing by the parties and a bench trial, the trial court issued its decision on July 21, 2021 (“Ruling”). The Court denied Appellants’ petition for a writ of mandate and its request for declaratory and injunctive relief. AA 7:2078-79.

The court’s ruling is rife with legal and factual error. The court incorrectly concluded that CalFire’s decision to limit its cumulative impacts analysis to the Panther Creek planning watershed complied with the FPRs and was supported by substantial evidence. AA 7:2073-74. The Court also wrongly stated that the THP analyzed the impacts not only within Panther Creek planning watershed “but also outside of that watershed as well as it pertains to the south fork of Battle Creek,” based solely on a quoted passage from a memo that merely recognizes that salmonids in the South Fork cannot currently reach Panther Creek due to downstream dams, and states that if the dams are removed in the future, impacts on salmonids will be addressed in future THPs. AA 7:2074-76.

The trial court went on to state—without any examples or discussion—that the THP adequately addressed water quality impacts from



turbidity, sedimentation, and runoff from logging roads. AA 7:2075-76.

The court then dismissed Appellants’ claim that the THP failed to provide an adequate description of baseline water quality and salmonid conditions, relying on authority that agencies may “choos[e] between conflicting expert opinions or differing methodologies” in determining a baseline—even though the claim involves an *omission* of baseline information, not conflicting opinions or methodologies. AA 7:2076.

The court also erred in concluding that CalFire was correct in relying on the generic, minimum BMPs required for all THPs to find no significant impacts under CEQA, on the ground that the FPRs are mandatory and include “all reasonable measures” to provide a “measured balance to the environment and responsible use of the land.” AA 7:2077.

Finally, the court rejected Appellants’ argument that CalFire has a “pattern and practice” of approving THPs that do not comply with CEQA, erroneously concluding that the court cannot require CalFire to go beyond the FPR’s minimum requirements “until the Legislative or Executive branch requires more than what is currently deemed reasonable or what is required in the [Rules].” AA 7:2078.

The trial court entered judgment in favor of CalFire on August 13, 2021. AA 7:2087-88. Appellants filed notice of this appeal on October 22, 2021. AA 7:2104-05.

## STATEMENT OF APPEALABILITY

This matter is an appeal from the August 13, 2021 final judgment of the Superior Court for the County of Tehama. The judgment is appealable under California Code of Civil Procedure section 904.1(a)(1). Appellants were served with a Notice of Entry of Judgment on September 1, 2021, and timely filed a Notice of Appeal on October 22, 2021, within the requisite 60-day time period. *See* Cal. Rules of Court, Rule 8.104(a).

### LEGAL FRAMEWORK

#### I. THE FOREST PRACTICES ACT AND CEQA

CEQA was enacted to effectuate the policy of the Legislature that “public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects.” Pub. Resources Code § 21002. The primary means of achieving this is the requirement that agencies prepare an environmental impact report (“EIR”), which serves as an “environmental alarm bell. . . to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.” *Laurel Heights Improvement Assn. v. Regents of the University of California* (1988) 47 Cal.3d 376, 392 (quotations omitted).

The FPA, while having a goal of “maximum sustained production of high-quality timber products,” requires that CalFire consider other values

such as wildlife and fisheries, and directs CalFire to “protect the soil, air, fish and wildlife, and water resources, including...streams.” Pub. Resources Code §§ 4513, 4551. Thus, a THP is required to review the environmental impacts of logging projects. *Id.* §§ 4581-4592.5.

CEQA recognizes that certain regulatory programs may serve similar functions as CEQA and authorizes the Secretary of the Resources Agency to certify regulatory programs that meet specified requirements. *Id.* § 21080.5. Certified regulatory programs are exempt from certain procedural requirements of CEQA, including the requirement to prepare an EIR. *Id.* § 21080.5(c). The regulation of timber harvesting under the FPA is a certified regulatory program. As such, the THP process is considered the “functional equivalent” of the EIR process. *Friends of the Old Trees v. Dept. of Forestry & Fire Protection* (1997) 52 Cal.App.4th 1383, 1388.

However, while a THP need not comply with CEQA’s procedural requirements, it is not exempt from compliance with its substantive requirements. In approving a THP, CalFire “must conform not only to the detailed and exhaustive provisions of the [Forest Practice] Act, *but also* to those provisions of CEQA from which it has not been specifically exempted.” *Sierra Club v. Bd. of Forestry* (1994) 7 Cal.4th 1215, 1228 (emphasis added). “CEQA and its substantive criteria for the evaluation of a proposed project’s environmental impact apply to the timber harvesting industry, and are deemed part of the [Forest Practice Act] and the Forestry

Rules.” *Environmental Protection Information Center v. Johnson* (1985) 170 Cal.App.3d 604, 620 (“*EPIC*”).

Thus, a THP, like an EIR, must disclose baseline environmental conditions, analyze the environmental impacts of the proposed project, determine whether those impacts are significant, and adopt feasible mitigation measures or project alternatives if significant impacts would occur. Pub. Resources Code § 21080.5(d)(3)(i)-(ii); FPR §§ 898, 898.1. The THP must contain sufficient information to enable informed decision-making, and must provide an opportunity for public review and comment before the lead agency makes a final decision. *See Sierra Club*, 7 Cal.4th at 1230-31; *Schoen v. Dept. of Forestry & Fire Protection* (1997) 58 Cal.App.4th 556, 573-574. The FPRs require that CalFire “shall disapprove a Plan as not conforming to the rules” if it does not contain enough information to evaluate potential environmental impacts. FPR § 898.2.

## **II. THE REQUIREMENT TO ANALYZE CUMULATIVE IMPACTS**

One of CEQA’s substantive requirements that THPs must follow is the requirement to analyze a proposed project’s cumulative impacts. A cumulative impact is one that may not be significant individually, but is considerable when considered together with the impacts of other past, present and foreseeable future projects. Guidelines § 15355; *see* FPR § 895.1. The concept of cumulative effects requires an assessment of

“cumulative damage as a whole greater than the sum of its parts.” *EPIC*, 170 Cal.App.3d at 625; accord *Friends of the Old Trees*, 52 Cal.App.4th at 1394. The cumulative impact analysis is critical to CEQA review. As one court explained:

Cumulative impact analysis is necessary because the full environmental impact of a proposed project cannot be gauged in a vacuum. One of the most important environmental lessons that has been learned is that environmental damage often occurs incrementally from a variety of small sources. *These sources appear insignificant when considered individually, but assume threatening dimensions when considered collectively with other sources with which they interact.*

*Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 114 (emphasis added; disapproved on other grounds by *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086).

The analysis of cumulative impacts in a THP must comply with both CEQA’s requirements and those of the FPRs. See FPR §§ 898, 932.9, 1034; *EPIC*, 170 Cal.App.3d at 624-25; *Friends of the Old Trees*, 52 Cal.App.4th at 1393-94. The FPRs require a THP to evaluate the cumulative effects of a logging project on watersheds and biological resources, among other things. FPR § 932.9(c)(A), (C). A THP must consider the project’s onsite and offsite effects when combined with the impacts of past and reasonably foreseeable future projects. FPR § 932.9, Tech. Rule Addendum No. 2; *Friends of the Old Trees*, 52 Cal.App.4th at 1401. In addition, CalFire must

supplement the THP’s impacts analysis as needed to ensure that “all relevant information is considered.” FPR § 898. In reviewing THPs, CalFire must use its “best efforts to find out and disclose all [it] reasonably can.” *San Franciscans for Reasonable Growth v. City & County of San Francisco* (1984) 151 Cal.App.3d 61, 74 (quotations omitted).

### STANDARD OF REVIEW

In an CEQA appeal, the appellate court plays the same role as the trial court. *Environmental Protection Information Center v. Dept. of Forestry & Fire Protection* (2008) 44 Cal.4th 459, 479. The appellate court reviews the administrative record de novo, and is not bound by the trial court’s conclusions. *Id.*

CEQA requires this Court to determine whether CalFire prejudicially abused its discretion when approving the THP by either (1) failing to proceed in the manner required by law, or (2) failing to support its determinations or decisions with substantial evidence. *See* Pub. Resources Code §§ 21168, 21168.5; *Laurel Heights Improvement Assn.*, 47 Cal.3d at 392.

A claim that an agency failed to proceed in the manner required by law is reviewed de novo. *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 512, 514 (“*Friant Ranch*”). As the California Supreme Court has made clear, claims challenging the adequacy of an EIR’s discussion of environmental impacts generally fall into this category. *Id.* at 516. A

“conclusory discussion” of a significant environmental impact makes an EIR “inadequate as an informational document” and thus contrary to CEQA as a matter of law. *Id.* at 514. Similarly, whether an EIR “is insufficient because it lacks analysis or omits the magnitude of the impact is *not* a substantial evidence question.” *Id.* (emphasis added). “The ultimate inquiry . . . is whether the EIR includes enough detail ‘to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.’” *Id.* at 516 (quoting *Laurel Heights Improvement Assn.*, 47 Cal.3d at 405). This presents “a mixed question of law and fact” and thus “*it is generally subject to independent review.*” *Id.* (emphasis added).

The independent review standard applies to virtually all of the claims made by Appellants here. The failure of a THP to consider (or to properly consider) cumulative impacts is a failure “to proceed in the manner required by law.” *EPIC*, 170 Cal.App.3d at 625. Indeed, courts have held that “[t]he substantial evidence standard is not applied to [the] type of challenge” that, like the challenge here, alleges an agency avoided consideration of significant cumulative impacts by improperly circumscribing the geographic radius of its analysis. *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1207-08; *Ebbetts Pass Forest Watch v. Dept. of Forestry and Fire Protection* (2008) 43 Cal.4th 936, 949 (“*Ebbetts Pass II*”).

Only as to those issues in which “factual questions predominate” do courts utilize the more lenient substantial evidence standard of review. *Friant Ranch*, 6 Cal.5th at 516. Substantial evidence is “enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion.” Guidelines § 15384(a). Substantial evidence includes “facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts;” it does not include “[a]rgument, speculation, unsubstantiated opinion, [or] clearly erroneous evidence.” *Id.* § 15384(a), (b).

## ARGUMENT

### **I. BY REFUSING TO CONSIDER SIGNIFICANT CUMULATIVE IMPACTS TO SALMONIDS OUTSIDE THE BOUNDARIES OF ITS ASSESSMENT AREAS, DESPITE SUBSTANTIAL EVIDENCE OF THOSE IMPACTS, CALFIRE VIOLATED CEQA.**

In analyzing cumulative impacts, it is “vitally important” that the CEQA document “avoid minimizing the cumulative impacts” of the project; rather, it must “provide public agencies and the general public with adequate and relevant detailed information about them.” *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 723 (quotations omitted).

The Rio Gatito THP violated this mandate by rigidly circumscribing the geographic scope of its cumulative impacts analysis and refusing to consider impacts outside of Panther Creek or a mile from the Project site,



despite substantial evidence of significant impacts to salmonids occurring just beyond those boundaries. CEQA does not sanction putting on blinders to minimize a project's cumulative impacts. By failing to even consider the Project's contributions to downstream cumulative impacts in the South Fork, the THP obstructs informed decision-making and is legally inadequate.

**A. There Is Substantial Evidence that Listed Salmonids in the South Fork Are Severely Impacted by Sedimentation and Temperature Increases, and that Clearcutting Is Contributing to those Impacts**

As discussed in Statement of Facts Sections I.A. and I.B. above, extensive evidence in the record shows that water quality and aquatic habitat in the South Fork of Battle Creek have been significantly impacted by the cumulative effects of logging projects and wildfire in the Battle Creek watershed, and that such impacts are threatening the recovery of threatened steelhead and Chinook, and indeed the very survival of the endangered winter-run Chinook. *See, e.g.*, AR 509-35, 3208-12, 3992-4036. The evidence shows these impacts were well underway prior to the 2012 Ponderosa fire, that logging in the watershed is contributing to the documented sedimentation and temperature increases, and that the predicament facing salmonids in Battle Creek has become particularly dire in the wake of the fire and its aftermath. *See, e.g.*, AR 536-52, 3208-12, 3992-4036, 4314-41, 4924-57.

In light of this evidence, the THP was mandated to analyze the Project’s potential to contribute to cumulative impacts on salmonids in the South Fork. The decision of whether to require a timber harvester to analyze cumulative impacts is governed by the “fair argument” test—that is, the impacts must be considered if “substantial evidence in the record supports a fair argument that significant individual or cumulative impact will result from the proposed timber operations.” *Friends of the Old Trees*, 52 Cal.App.4th at 1396-97. Even if there were contrary evidence in the record—which, as discussed in Sections III.A. and III.B below, there is not—the THP may not simply refuse to consider an impact where there is a fair argument that such impact exists. *Id.* at 1402; *see also* FPR § 1051.1 (THP must include cumulative impacts analysis when a “fair argument” of such impact is raised). Yet this is precisely what the THP did, refusing to disclose the impacts faced by salmonids downstream of the Project or consider the Project’s potential to contribute to those impacts.

**B. CalFire May Not Rely on Rigid Assessment Areas to Avoid Consideration of Known Cumulative Impacts Just Outside of those Areas.**

CalFire attempts to justify its failure to consider cumulative impacts in the South Fork downstream of Panther Creek by pointing to the fact that the impacted segment is outside the geographic scope of its “assessment areas,” which fall just shy of the confluence of Panther Creek and the South Fork. AR 8-11; *see* Figs. 3 and 4, *supra*. According to this approach, if a

cumulative impact of the project lies outside of the assessment area, it may be ignored. This approach violates CEQA.

It is true that the first step in the cumulative impact analysis is to “define the geographic scope of the area affected by the cumulative effect and provide a reasonable explanation for the geographic limitation used.” CEQA Guidelines § 15130(b)(1)(B)(3). However, that geographic scope “cannot be so narrowly defined that it necessarily eliminates a portion of the affected environmental setting.” *Bakersfield Citizens*, 124 Cal.App.4th at 1216 (“*Bakersfield Citizens*”) (citing Guidelines § 15126.2(a)). “[A]n EIR may not ignore the regional impacts of a project proposal, including those impacts that occur outside of its borders; on the contrary, a regional perspective is required.” *Sierra Watch v. County of Placer* (2021) 69 Cal.App.5th 86, 98 (quoting *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 575.) “A lead agency cannot ignore a project’s expected impacts merely because they occur. . . ‘outside an arbitrary radius.’” *Id.* at 107.

The problem was starkly illustrated by *Bakersfield Citizens*. In that case, a city approved EIRs for two separate shopping centers with “Supercenter” anchor tenants, located within 3.6 miles of each other. 124 Cal.App.4th at 1193-94. Despite evidence demonstrating the shopping centers “may have several cumulatively significant adverse impacts,” each EIR defined a geographic scope for analyzing project impacts that excluded

the other shopping center, and thus neither EIR considered the cumulative impacts of both shopping centers together. *Id.* at 1216.

The Court of Appeal rejected the city's approach as contrary to CEQA: "Simply put, selection of 'appropriate' geographic areas that *just happen to narrowly miss* the other large proposed shopping center," despite evidence that the projects' impacts would be cumulative, "does not constitute the good faith disclosure and analysis that is required by CEQA." *Id.*

Courts have repeatedly rejected similar attempts to artificially limit the geographic scope of an impact analysis to avoid consideration of known potential impacts outside of that scope. *Kings County Farm Bureau*, 221 Cal.App.3d at 720-24 (rejecting cumulative air quality analysis that looked only at projects within a subarea of the air basin); *Citizens to Preserve the Ojai v. County of Ventura* (1985) 176 Cal.App.3d 421, 429-32 (exclusion of outer continental shelf emissions from cumulative impacts scope was improper where agency was aware such emissions may be substantial); *Sierra Watch*, 69 Cal.App.5th at 106-07 (rejecting noise impact analysis that failed to consider impacts to receptors outside of defined radius).

Here, too, the THP has defined assessment areas that "just happen to narrowly miss" known, significant impacts to threatened and endangered salmonids, despite substantial evidence that logging activities like those proposed by the Project may contribute to those impacts. CEQA prohibits

this “underinclusive and misleading” approach to cumulative impacts analysis. *Bakersfield Citizens*, 124 Cal.App.4th at 1217.

**C. The THP’s Purported Justifications for Limiting the Scope of its Water Quality and Salmonid Impact Analysis Are Unavailing.**

In upholding the THP, the trial court asserted—without explanation—that the determination of the geographic scope of review “appears to have taken into account” the standards applicable to THPs, in particular section 895.1 of the FPRs. AA 7:2073-74. But nothing in that section—which defines the term “planning watershed”—or anywhere else in the FPRs says that a THP’s cumulative impacts analysis shall be *limited* to the planning watershed.

Indeed, the opposite is true. The FPRs specifically require THPs to include an “evaluation of . . . off-site interactions of proposed Project activities with the Impacts of Past Projects” in the vicinity, including “Watershed Effects produced by timber harvest and other activities, which may include . . . earth materials transported by surface or mass wasting erosion enter[ing] a Watercourse or Watercourse system at separate locations and [then] combined at a downstream location to produce a change in water quality or channel condition,” and “[a]ny known Listed Species that may be directly or indirectly affected by Project activities.”

FPR § 932.9, Tech. Rule Addendum No. 2, Cumulative Impacts Assessment § A, Cumulative Impacts Assessment Guidelines §§ A, C. By

ignoring the cumulative impacts of sedimentation on listed salmonids downstream of the assessment area, CalFire violated all of these requirements.

The Court also posited—again without any analysis—that CalFire’s scope of analysis was “supported by substantial evidence.” AA 7:2073-74. This too is baseless. None of the reasons given in the THP for the assessment areas justify ignoring known impacts in the South Fork. The THP’s asserted justification for limiting the water quality analysis to the Panther Creek planning watershed was that area represents a “distinct hydrological unit.” AR 225. It is certainly true that the Panther Creek planning watershed is a “hydrological unit.” What is meant by “distinct” is not explained. But it certainly does not mean that Panther Creek is unconnected to the South Fork, since it is undisputed that the two waterways have a direct hydrological connection. As the FPRs recognize, pollutants entering Panther Creek from the Project and other sources on Panther Creek and the South Fork can be “combined at a downstream location to produce a change in water quality or channel condition.” FPR § 932.9, Tech. Rule Addendum No. 2, Cumulative Impacts Assessment Guidelines § A.

The THP also asserts that using a larger assessment area would somehow “dilute” the significance of the THP’s impacts. AR 217. But the THP contains no reasoned explanation of how expanding the analysis to

include known cumulative water quality and aquatic habitat impacts *just downstream* of the assessment area boundary could possibly “dilute” the significance of the THP’s impacts. On the contrary, *ignoring* those impacts dilutes their significance by failing to acknowledge them at all.

Finally, the THP claims that the Panther Creek planning watershed was chosen because it “suits the scale of the proposed timber operations.” AR 225. But this conclusory statement is contrary to CEQA, which requires that the scale of the cumulative impact assessment area be based on the nature of the resources being impacted, not the scale of the project. *Bakersfield Citizens*, 124 Cal.App.4th at 1216 (scope of CEQA review is the “area that is affected by the project”). Here, the affected area includes the South Fork of Battle Creek.

In the proceedings below, CalFire relied heavily on *Ebbetts Pass Forest Watch v. Dept. of Forestry & Fire Protection* (2004) 123 Cal.App.4th 1331 (“*Ebbetts Pass I*”) to justify its approach. AA 6:1892; *see also* AA 6:1930; AA 7:2070-71. The two cases could not be more different. In *Ebbetts Pass I*, petitioners challenged CalFire’s analysis of a THP’s cumulative impacts on spotted owl habitat, claiming that the agency’s assessment area was too small to adequately evaluate the impacts from habitat loss, a claim which the Court rejected. *Id.* at 1350-55.

But in that case, petitioners had sought to require the THP expand its assessment area “to include *the entire Sierra Nevada ecosystem*, so as to

include *the entire range of the California spotted owl*. . . as well as *all of SPI's foreseeable projects in the Sierra Nevada*.” The court agreed with CalFire that such a breathtakingly broad assessment area would not be “practical or reasonable.” The record supported CalFire’s explanation that adequate information covering an assessment area the size of the Sierra Nevada was not reasonably available, that there were insufficient specifics regarding SPI’s future activities within that area to make a thorough analysis, that the project’s relative contribution within such a vast area would be so small as to disappear, and that there was no evidence that the species traveled so far as to be “impacted by activities that occur a hundred or more miles away.” *Id.* at 1352-53.

In stark contrast, the specific cumulative impacts at issue here—sedimentation and temperature impacts to salmonids in the South Fork—are well documented and limited to a known geographic location that is directly downstream of the Project. Analysis of these impacts merely requires acknowledging and describing these impacts, assessing the Project’s potential contribution thereto, and, if warranted, identifying additional mitigation measures or alternatives that would reduce that contribution. Because such analysis is plainly “reasonable and practicable,” and failure to undertake it would “prevent[] the severity and significance of the cumulative impacts from being accurately reflected,” the THP was required to include it; the THP’s failure to do so renders it “legally



inadequate” under CEQA. *Bakersfield Citizens*, 124 Cal.App.4th at 227-228.

## **II. THE THP FAILS TO ADEQUATELY DISCLOSE EXISTING BASELINE CONDITIONS.**

The starting point for any CEQA analysis is an adequate description of existing physical conditions in the project area, which serve as the “baseline” against which a project’s impacts are evaluated. *See Save Our Peninsula Com. v. Monterey County. Bd. of Sups.* (2001) 87 Cal.App.4th 99, 120-124; Guidelines §§ 15125, 15126.2(a). A THP’s failure to adequately disclose baseline information frustrates the purpose of public comment and makes “any meaningful assessment of the potentially significant environment[al] impacts of timber harvesting and the development of site-specific mitigation measures impossible.” *Sierra Club*, 7 Cal.4th at 1235-37. Here, The THP’s discussion of baseline conditions for salmonids, sedimentation, and water temperature is so inadequate as to preclude any meaningful environmental review.

### **A. Salmonids**

The THP’s entire description of baseline conditions for salmonids consists of a single sentence, which states merely that the South Fork “is known to support runs” of Chinook and steelhead. AR 253. No information at all is provided about these existing salmonid populations or their health. *Id.* The THP does not even identify the species’ threatened and endangered

status.<sup>11</sup> One would have no idea from reading the THP that they are facing severe threats to their habitat and continued viability in Battle Creek due to increased sedimentation and temperatures, or that winter-run Chinook have been virtually extirpated from Battle Creek. *Id.* The only other mention of salmonids in the THP is a statement that the USFWS in 2017 found “improving salmonid habitat conditions” which indicate signs of recovery from the Ponderosa fire. AR 230. This rosy-sounding assessment gives no indication of what those prior “conditions” were, let alone what they are today.

Likewise, a review memo prepared for the THP by the California Department of Fish & Wildlife (“CDFW”)—which the trial court cited in upholding the THP’s baseline analysis (AA 7:2074-2075)—provides no information on the downstream condition of salmonids. That memo merely informs us that downstream dams and natural barriers prevent salmonids from migrating upstream into Panther Creek, and that if future restoration efforts eliminate those barriers, that information will be considered in “future THPs.” AR 397-38. It is silent on the plight of existing salmonid populations in the South Fork. *See* AR 253, 397-398.

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<sup>11</sup> The THP omits the species entirely from the table titled “Listed and Sensitive Animal Species Table.” AR 170-73. The brief discussion of salmonids in the THP text is under the heading “Listed Species,” but no listing information (state or federal, threatened or endangered) is given. AR 253.

The THP’s failure to provide information regarding the baseline conditions of salmonids in the South Fork is a violation not only of CalFire’s duty under the FPRs to identify “pre-plan adverse cumulative watershed [e]ffects” downstream of the Project” (FPR § 936.9(b)), but also of CEQA. *See Sierra Club*, 7 Cal.4th at 1236-37 (THP which “contained no site-specific data” regarding existing populations of four wildlife species violated CEQA); *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 722-29 (EIR inadequate where discussion of environmental setting understated the extent and quality of wildlife habitat).

**B. Temperature**

In its brief discussion of current “watercourse conditions” in Panther Creek, the THP gives no description whatsoever of existing baseline water temperatures, either for Panther Creek or the South Fork. AR 228-29, 230-231. After describing what water temperature effects are, it jumps right to the conclusion that no impacts will occur. AR 230-31. The lack of baseline data is particularly egregious since there is a long-established Department of Water Resources gaging station, “South Fork Battle Creek near Manton (BAS),” that provides relevant and informative data on the temperature of Battle Creek. AR 507.

### C. Sediment

As to sediment, the THP states that current sediment conditions in the Panther Creek planning watershed were “observed” and that these observations did not indicate “any of the commonly found characteristics associated with high levels of sediment delivery . . . at levels of significance to cause concern.” AR 230. But there is no citation to any survey or report containing information to support these conclusions, and nothing in the record indicates where or when these “observations” were made, by whom, and with what credentials.<sup>12</sup>

The THP also asserts that “cumulative effects to sediment conditions from past activities within the THP area are negligible. Clearcut areas from past projects show no signs of having any significant adverse sediment effect.” *Id.* But these statements are nothing more than bare conclusions and narrative, unsupported by any substantial evidence. There is no record of any survey being conducted, any sediment samples being taken, or any hydrologist report prepared to assess baseline environmental conditions. Nor does this assertion address sediment loading and adverse effects from the many THP-related roads throughout the Battle Creek watershed.

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<sup>12</sup> Appellants requested CalFire provide the number of acres inspected, a map of the route followed, and the area that was covered. AR 10318. They were told only that “a sampling of the project area” was inspected, and that the information requested was “not required to be reported, and would be difficult to actually determine.” AR 10321.

Rather than provide a baseline assessment, the THP cites a 2011 report summarizing a multi-agency field study of sediment delivery from clearcut harvests conducted in the Battle Creek watershed, which it quotes as follows: “Overall, the Task Force saw no significant direct water quality impact related to clearcut harvesting in the assessment area.” AR 230. But this decade-old report—published before *any* of the cumulative projects listed in the THP were undertaken (see AR 221-24)—can hardly provide the basis for current baseline conditions. More importantly, the THP grossly misrepresents the conclusion of the 2011 report by omitting the remainder of the quoted paragraph:

Overall, the Task Force saw no significant direct water quality impact related to clearcut harvesting in the assessment area. ***Most observed timber-harvest-related water-quality impacts were found to be associated with publicly and privately managed roads. These roads are used for all types of timber harvesting in the watershed, whether clearcutting, selection, or some intermediate silvicultural method.*** Due to the limited time period of the assessment, the Task Force was ***unable to evaluate the potential for indirect water quality impacts that may result from clearcut harvesting (such as possible increases in suspended sediment and turbidity associated with logging-induced increases in peak flows).***

AR 4808 (emphasis added). In other words, while *direct* impacts from clearcutting were not observed, impacts from timber-related roads (including those used for clearcutting) *were* observed, and *indirect* impacts from clearcutting were never evaluated, but were also possible. *Id*; *see also* AR 550 (“roads are an inseparable part of logging operations”). This report

does not support but *undermines* the THP’s assertion that impacts from past logging projects are “negligible.”

The THP also cites to the 2017 USFWS report indicating “significant decreases” in fine sediment levels in the South Fork. AR 230. The fact that sediment levels have “decreased” since the peak following the Ponderosa fire and subsequent floods does not mean that they are *insignificant*. Indeed, the 2017 report concluded they are not: “Even though this was a positive trend for the South Fork, the movement of fine sediments has now stretched throughout the entire main stem and all the way to the mouth of Battle Creek. These fine sediments are now effecting spawning area and holding pools in all the lower reaches (Reaches 4-6).” AR 3430.

In short, the THP made no serious attempt to accurately describe the baseline setting for salmonids, temperature, or sedimentation. The THPs baseline analysis “inaccurate, incomplete and misleading” and thus fails to comply with CEQA. *San Joaquin Raptor*, 27 Cal.App.4th at 729.

**D. CalFire’s Omission of Baseline Information is Not Entitled to Deference.**

Nonetheless, the trial court—without any discussion of specifics—upheld the THP’s baseline analysis. In doing so, the court relied on *Save our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 120, for the proposition that “[i]f the determination of a

baseline condition requires choosing between conflicting expert opinions or differing methodologies, it is the function of the agency to make those choices based on all of the evidence.”<sup>13</sup> AA 7:2076.

But that case is inapplicable to the baseline analysis at issue here. The THP was not required to choose between “conflicting expert opinions or differing methodologies” regarding the proper baseline. Rather, the THP simply fails to provide *any* adequate baseline information. The absence of accurate and complete information pertaining to the project’s baseline setting is not only itself “inadequate as a matter of law,” but also “renders the identification of environmental impacts legally inadequate.” *San Joaquin Raptor*, 27 Cal.App.4th at 729.

**III. THE THP’S FAILURE TO PROPERLY ANALYZE CUMULATIVE IMPACTS RENDERS IT INADEQUATE AS AN INFORMATIONAL DOCUMENT.**

THP’s analysis of cumulative impacts is not only inadequate for failing to include any meaningful baseline information, but also because its treatment of the Project’s cumulative effects on water quality and

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<sup>13</sup> For the same proposition, the trial court also cited an unpublished portion of *Stop Syar Expansion v. County of Napa* (2021) 63 Cal.App.5th 444, 460, which cannot be relied on as legal authority. Cal. Rules of Court, Rule 8.1115(a). But in any event, the facts in *Stop Syar Expansion* are inapposite: the agency in that case prepared a detailed water supply assessment to evaluate baseline water usage, unlike the THP here, which simply omitted baseline information. 63 Cal.App.5th at 460.

salmonids is so cursory that it renders the THP inadequate as an informational document.

A pervasive flaw in the THP is its assumption that as long as a Project impact is not significant when considered *individually*, that impact will not be *cumulatively* significant. Guided by this assumption, the THP gives virtually no consideration to the question of the Project's incremental contribution to the catastrophic conditions occurring just downstream. Instead, it relies on standard logging BMPs that will "minimize" Project impacts. *See, e.g.*, AR 11-12 ("when properly implemented, the Forest Practice Rules do not cause a significant adverse effect on the environment" and thus there is "no reason to believe that a downstream impact would occur").

This approach is fundamentally at odds with CEQA's requirement to analyze impacts that are individually small, but contribute to a significant environmental problem. *Kings County*, 221 Cal.App.3d at 718-21; *Communities for a Better Environment*, 103 Cal.App.4th at 114, 119. Courts have repeatedly found that CalFire's reliance on required BMPs to sidestep analysis of cumulative impacts amounts to a failure "to proceed in the manner required by law" and amounts to a "prejudicial abuse of discretion." *EPIC*, 170 Cal.App.3d at 624-25; *see Friends of the Old Trees*, 52 Cal.App.4th at 1394.



**A. The THP Lacks Any Analysis of Cumulative Impacts to Salmonids.**

The THP’s entire discussion of salmonid impacts, both individually and cumulatively, consists of the following statement:

The South Fork of Battle Creek is known to support runs of Chinook (Central Valley Spring) and steelhead (Central Valley) salmon. Because of this the entire THP area will be afforded Anadromous Salmonid Protections under 14 CCR 936.9.

AR 253. This cannot be fairly described as an “analysis,” much less one that meets the disclosure requirements of CEQA. Nowhere does the THP actually address the cumulative impacts on salmonids. There is no disclosure of the current threats to downstream salmonids from sedimentation and temperature increases, no discussion of the past, present and potential future sources contributing to those impacts, and no attempt to understand the Project’s incremental contribution to those impacts.

Nor does the CDFW review memo, cited in the trial court’s ruling, include any semblance of an analysis of the Project’s impact to salmonids “as it pertains to the south fork of Battle Creek,” as the trial court claimed.

AA 7:2075. As discussed above, that memo mentions only a portion of the South Fork that is *not downstream* of the Project, and its discussion is limited to stating that impacts to salmonids will be considered in future THPs if barriers to salmonids’ accessing Panther Creek are ever removed.

*Id.*; AR 397-98. The impacts of the Project on *downstream* salmonid habitat

in the South Fork—where the habitat impacts are actually being felt—are not considered.

Rather, the THP simply assumes, without analysis, the Anadromous Salmon Protections required by section 936.9 of the FPRs will eliminate any cumulative impacts.<sup>14</sup> AR 253. CalFire’s reliance on the ASPs as a substitute for a proper cumulative impact analysis is particularly egregious because one of those ASPs is itself a requirement that the THP identify significant cumulative watershed effects on salmonids and incorporate additional measures to mitigate them. FPR § 936.9(b).

The approach taken here is precisely the one rejected in *EPIC*. In that case, as here, CalFire had sought to address cumulative impacts by assuming that “if the adverse effects are minimized to the maximum on each individual operation, then the total effect in the surrounding area will also be minimized to an acceptable level.” *EPIC*, 170 Cal.App.3d at 624-25. The court held that such approach “was at odds with the concept of cumulative effect.” *Id.* at 625; *see also Friends of the Old Trees*, 52 Cal. App.4th at 1394 (implementation of FPA-required mitigation “does not grant a blanket exemption from the normal requirements for drafting a

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<sup>14</sup> The ASPs require timber harvesting within anadromous salmonid watersheds to adhere to enhanced Watercourse and Lake Protection Zones (“WLPZs”)—areas designated along Class I and II watercourses in which harvesting, road construction and equipment operation are limited. *See* FPR § 936.9.

legally sufficient THP.”); *Gallegos v. State Bd. of Forestry* (1978) 76 Cal.App.3d 945, 954 (statement that compliance with required FPRs would adequately mitigate water supply and fire impacts was “totally conclusory”).

The trial court’s ruling that it was proper for CalFire to rely on the FPRs is likewise at odds with CEQA. The trial court found it relevant that CalFire is “required to follow” the FPRs, and that the FPRs have been updated over the years “to ensure that all reasonable measures are taken to *provide a measured balance* to[*sic*] the environment and responsible use of the land.” AA 7: 2077 (emphasis added). But as discussed in Legal Framework Section I above, CalFire is required to comply with *both* FPA regulations *and* the substantive requirements of CEQA. And the trial court’s observation that the FPRs are designed to strike a “measured balance” between environmental protection and the FPA’s goal of fostering timber production encapsulates perfectly why the courts have so held. Unlike the FPA, CEQA does not permit such “balancing” when it comes to identifying and disclosing environmental impacts; full disclosure is required. *EPIC*, 170 Cal.App.3d at 616, 625. The FPA may lessen the regulatory burden on THP submitters, but it “does not allow for important environmental considerations to be swept under the rug.” *Friends of the Old Trees*, 52 Cal.App.4th at 1395.

Both CEQA and the Forest Practice Rules require the THP to explain *why* the THP's impacts would be less than significant. FPR §§ 932.9, 936.9; Pub. Resources Code § 21100(c); Guidelines § 15128; *City of Maywood v Los Angeles Unified School Dist.* (2012) 208 Cal.App.4th 362, 393 (conclusion that impact is not significant must be supported by analysis and explanation). CalFire failed to do that here. By assuming, without analysis, that compliance with ASPs would eliminate the Project's contribution to the known, significant cumulative impacts to listed salmonids in the South Fork, the THP violates CEQA.

**B. The THP's Cursory Analysis of Temperature Impacts Is Inadequate.**

The THP's discussion of water temperature is similarly inadequate. As discussed above, the record shows that logging along watercourses, by removing shade, results in increased water temperatures. *See* AR 4030-31, 6425-26; Statement of Facts Section I.B., *supra*. The THP's brief discussion of temperature impacts fails to include any discussion of the cumulative temperature problem in the South Fork, any information on existing temperatures in Panther Creek or its tributaries, any description of the waterways within the project site that would be impacted by shade tree removal, or any analysis of the potential impacts of that shade tree removal on water temperatures. AR 230-31.

Instead, as with its discussion of salmonid impacts, it relies entirely on implementation of ASPs, concluding that because no logging is permitted within a designated WLPZ, no significant temperature impacts will occur. *Id.* However, the WLPZ for the Project is only designated along *Class II* waterways. AR 155. Class III waterways—which make up 70% of the Panther Creek planning watershed<sup>15</sup>—receive no such protection. The THP makes no mention of this, and fails to analyze the extent to which removing tree cover adjacent to Class III watercourses would incrementally contribute to the significant temperature impacts downstream in the South Fork. The THP’s reliance on a “conclusory statement[], unsupported by empirical or explanatory information, [is] wholly insufficient to allow the public to intelligently assess the impact of the proposed logging.” *See Friends of the Old Trees*, 52 Cal.App.4th at 1401.

**C. The THP Fails to Properly Address Cumulative Sediment Impacts.**

As discussed in Statement of Facts Section I.A. and I.B. above, there is overwhelming evidence in the record that increases in sedimentation are wreaking havoc on salmonid habitat in Battle Creek, especially in the South Fork. AR 2791, 3751, 3878, 4314-41, 4924-59. There is also substantial

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<sup>15</sup> There are approximately 34-miles of classified watercourses within the watershed assessment area. Class I watercourses total 1.4 miles. Class II watercourses total 9.0 miles. Class III watercourses make up the remaining 23.6 miles. AR 246

evidence that clearcutting, watercourse crossings, and new road construction are contributing to those impacts. AR 536-52, 3878, 3992-4036, 4915, 4926, 6576, 7761.

The THP’s brief analysis of cumulative sedimentation ignores these impacts. AR 230. The THP’s determination that the Project would have no significant cumulative impacts is based primarily on its assertion that that “[c]umulative effects to sediment conditions from past activities within the THP area are negligible” and “[c]learcut areas from past projects show no signs of having any significant adverse sediment effects.” *Id.*

But as discussed in Argument Section II.C. above, these assertions are unsupported. They rely on (1) unspecified “observations” somewhere “within the watershed” that failed to observe evidence of “high levels” of sediment delivery and (2) a 2011 report that predated all the past logging projects on the THP’s cumulative project list, and in any case found that clearcut logging roads *did* have significant sediment effects. AR 221-24, 230, 4808. “Conclusory statements, unsupported by empirical or explanatory information, are wholly insufficient.” *Friends of the Old Trees*, 52 Cal.App.4th at 1401.

The THP’s sedimentation analysis also briefly describes some of the BMPs—such as erosion control facilities, road rocking, maintenance and other measures—that the Project must implement to comply with the FPRs. AR 230. But at most, the analysis states that these measures will “lessen the

potential” for sediment input and “reduce” the impact of concentrated runoff during peak flows. *Id.* The THP does not contend that BMPs will eliminate sediment discharges from the Project, nor could it in light of the record evidence: the 2011 report cited in the THP’s own analysis found among other things that over two thirds of road crossings and 100% of tractor crossings observed delivered sediment to waters of the state.<sup>16</sup> AR 4843; *see also* AR 7381.

The THP also asserts that the Project’s plan to “abandon” 5,700 feet of existing roads within the WLPZ would reduce sedimentation from those roads. AR 35-36, 201, 229. But the Project would also construct 8,000 feet of *new* roads, a more than 40% *increase* in the site’s logging roads, not including temporary roads also authorized by the THP. AR 139, 153. The THP does not claim that reductions in sediment from the abandonment would outweigh the impacts from the new roads, nor does it attempt to analyze the net overall effects of the Project on sedimentation.

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<sup>16</sup> In the OR, CalFire asserts that roads and logging are not the only source of sedimentation impacts, noting that it “continues to believe that there are myriad factors influencing impacts in Battle Creek that precludes a single variant causation” (AR 36) and that “pinning these impacts solely on timber harvesting and specifically [clearcutting] is not supported by the record” (AR 11). But Appellants have never claimed that clearcutting or roads are the *sole* cause of those impacts, only that they are contributing factors, which CalFire has not disputed. *See, e.g.*, AR 35 (“[r]oad-related sediment impacts continue to be the primary concern noted within contemporary research.”)

The THP simply makes no attempt to determine whether, after applying BMPs, sediment discharges from the Project would be *cumulatively considerable* in light of the severe sedimentation problems in the South Fork. Even relatively small contributions to significant problem can be cumulatively considerable. *San Francisco Baykeeper*, 242 Cal.App.4th at 223-4. “In the end, the greater the existing environmental problems are, the lower the threshold should be for treating a project's contribution to cumulative impacts as significant.” *Communities for a Better Environment*, 103 Cal.App.4th at 120. The “relevant question” is not the *relative* amount of a project’s pollutants, “but whether *any* additional amount . . . should be considered significant in light of the serious nature of the . . . problem[.]” *Kings County Farm Bureau*, 221 Cal.App.3d at 718 (emphasis added). The THP simply ignores this question with regard to sediment impacts, despite the undeniable magnitude of the sedimentation problem in the South Fork. The failure to properly consider these cumulative impacts is a prejudicial abuse of discretion. *EPIC*, 170 Cal.App.3d at 625.

**D. CalFire Cannot Rely on Analysis in the Official Response to Cure the THP’s Flaws.**

In briefing before the Superior Court, CalFire repeatedly relied on discussion found in the agency’s Official Response as evidence of the adequacy of the THP’s baseline conditions and cumulative impact analyses,



and the trial court cited the document in upholding the adequacy of those analyses. *See, e.g.*, AA 6:1894-95, 1897-98; AA 7:2074, 2076. But the Official Response—which was released concurrently with CalFire’s approval of the THP and was not subject to public review—cannot save the THP.

The FPRs require CalFire to prepare an Official Response responding to comments on the THP raised by the public. FPR §§ 1037.3, 1037.8. But while CalFire may use the Official Response to augment the evidence in support of analysis in the THP, it cannot rely on the Official Response to cure a THP’s inadequacy as an informational document. *Joy Road Area Forest & Watershed Assn. v. California Dept. of Forestry & Fire Protection* (2006) 142 Cal.App.4th 656, 676-78. “Certainly, [CalFire] cannot expect the public’s access to information after the fact to substitute for the opportunity to influence [its] decisions before they are made.” *Friends of the Old Trees*, 52 Cal.App.4th at 1401-02 (rejecting CalFire’s argument that its discussion of cumulative impacts in the Official Response cured its failure to include such analysis in the THP). CalFire’s belated acknowledgement in the Official Response of salmonid impacts in the South Fork cannot cure the utter lack of public disclosure of those impacts before the THP was approved.

In any event, nothing in the Official Response supports CalFire’s conclusion that the Project will not have a significant cumulative impact.

Like the THP, the Official Response relies on its assumption that implementation of ASPs and other measures required by the FPRs “do not cause a significant adverse effect on the environment.” AR 12; *see id.* at 10-11 (applying same rationale to justify limiting geographic scope of review). And the literature discussed in the Official Response, like that cited in the THP, does not support CalFire’s conclusion; on the contrary, it confirms what CalFire is unwilling to admit: that logging activities contribute sediment to waterways. *See* AR 37-46.

**IV. APPELLANTS ARE ENTITLED TO DECLARTORY RELIEF TO END CALFIRE’S DE FACTO POLICY OF ARTIFICIALLY LIMITING THE SCOPE OF ITS CUMULATIVE IMPACT ANALYSIS.**

CalFire’s failure to comply with CEQA, the FPRs, and the Forest Practice Act is not limited to the Rio Gatito THP. On the contrary, its handling of Rio Gatito is part of an unlawful pattern and practice applied to THPs throughout the Battle Creek watershed, amounting to a de facto policy by which CalFire, irrespective of project-specific evidence, artificially limits the analysis of cumulative water quality impacts to the planning watershed in which a THP is located, and assumes that compliance with the FPR’s minimum required BMPs will automatically eliminate any cumulative contribution to downstream impacts.

As a result of this unlawful policy, CalFire has *never concluded* that a THP in the watershed will contribute to a significant cumulative water

quality impact, despite substantial evidence that the cumulative effect of industrial logging in the watershed is devastating aquatic habitats in Battle Creek, especially the South Fork. Appellants demonstrated at trial how this pattern and practice was evidenced in at least 10 separate THP approvals impacting the watershed since 2007.

But the trial court never considered this evidence, instead dismissing it out of hand because Appellants had not shown that a “tribunal” had found any prior project to be contrary to law. AA 7:2078. The court went on to conclude that it could not require CalFire to do more than “what is currently deemed reasonable or what is required in the FPRs.” *Id.* The cases, however, emphatically reject the notion that a pattern and practice claim requires a judicial challenge to individual agency decisions, and, as discussed above, the trial court misapprehends what CEQA requires in a cumulative impact analysis for a THP. Because the trial court erred as a matter of law, its ruling must be reversed.

**A. Declaratory Relief Is Warranted Where, as Here, a Pattern and Practice of Disregarding the Law Is Shown.**

Declaratory relief is an equitable remedy available to an interested party in a case of an “actual controversy relating to the legal rights and duties of the respective parties.” Code Civ. Proc. § 1060; *see Californians for Native Salmon and Steelhead Assn. v. Dept. of Forestry* (1990) 221 Cal.App.3d 1419, 1426 (“*Native Salmon*”). An action “challenging an

administrative agency policy of ignoring or violating applicable laws and regulations” constitutes an actual, justiciable controversy for which declaratory relief is available. *E. Bay Mun. Utility. Dist. v. Dept. of Forestry & Fire Prot.* (1996) 43 Cal.App.4th 1113, 1119; accord *Native Salmon*, 221 Cal.App.3d at 1426-30. Declaratory relief is appropriate to resolve a public entity’s “fundamental misunderstanding of its responsibilities under the [law] to avoid continued violations or nonenforcement in the future.” *Venice Town Council, Inc. v. City of Los Angeles* (1996) 47 Cal.App.4th 1547, 1566.

To obtain declaratory relief, it is not necessary to show that the unlawful policy was formally adopted by the agency. Rather, an agency’s pattern and practice of violating the law can be sufficient to show that the agency has adopted an informal or “de facto” policy warranting relief. *Id.* at 1565-66 (allegations of informal policy of nonenforcement, despite formal policy to the contrary, sufficient to state claim for declaratory relief); *Agnew v. State Bd. of Equalization* (1997) 64 Cal.Rptr.2d 771, 774, 776-777 (allegations of “unwritten,” “de facto” policy that conflicts with the law is sufficient to state claim for declaratory relief).

Indeed, in a case strikingly similar to the present action, it was held that petitioners had properly stated a claim for declaratory relief where they alleged that CalFire, based on its “pattern and practice” of approving THPs,

had a policy of failing to properly analyze the cumulative impacts of logging activities. *Native Salmon*, 221 Cal.App.3d at 1424, 1426-31.

In the present case, Appellants demonstrated—based on 10 THPs previously approved by CalFire, including the seven most recent THPs in the Battle Creek watershed—that CalFire has consistently taken the unlawful position that compliance with the generic BMPs required by the FPRs automatically means the THP will not contribute to any downstream cumulative impacts, and that it is unnecessary to consider impacts beyond the planning watersheds, even when presented with substantial evidence that such impacts are occurring. *See* AR 1243, 1245-52, AR 3601, 3604-16, AR 4506, 4513-14, AR 4525-26; AA 2:240, 249-257; AA 3:670-676; AA 3:1050-65; AA 5:1567-74; AA 6:1698-1707; AA 6:1812-21.

As a result, CalFire has never concluded that a THP will result in a cumulative impact on Battle Creek—despite the evidence that logging is substantially contributing to a significant impairment of the South Fork’s water quality that is threatening the viability of endangered fish. *See* AR 549, 3875, 4915, 4926, 6576, 7289-7369, 7758-68. These repeated failures to do what CEQA requires amount to an unlawful policy warranting declaratory relief.

Where, as here, the facts justifying declaratory relief are shown, the granting of relief is not discretionary with the court; rather, “[d]eclaratory relief must be granted . . . . Any doubt should be resolved in favor of

granting declaratory relief.” *Native Salmon*, 221 Cal.App.3d at 1427 (citations omitted); accord *Venice Town Council*, 47 Cal.App.4th at 1565.

**B. It Is Irrelevant that CalFire’s Prior Unlawful Actions Were Not Challenged in Court.**

Despite the clear evidence that CalFire’s past practices amount to a policy of improperly constraining its cumulative impact analysis for Battle Creek THPs, the court dismissed the evidence because none of the examples involved a THP where “a tribunal has found the project to be contrary to law.” AA 7:2078.

The court’s ruling indicates a fundamental misunderstanding of the purpose and requirements for obtaining declaratory relief. To show an unlawful pattern and practice, it is not necessary for an agency’s prior actions to have been found unlawful by a court. On the contrary, courts have held that the very purpose of awarding declaratory relief is to *avoid* the need to bring legal challenges to multiple individual actions. *Native Salmon* is directly on point:

Appellants also urge that declaratory relief would avoid a multiplicity of actions, i.e., a large number of mandate proceedings challenging specific THP approvals all raising identical or nearly identical questions concerning CDF's policies. There is authority for the use of declaratory relief to avoid multiple actions. . . . As against the piecemeal review of similar issues by individual THP challenges, the present action appears singularly economical. . . . Indeed, piecemeal litigation of the issues in scores of individual proceedings would be an immense waste of time and resources.

*Native Salmon*, 221 Cal.App.3d at 1430-31; *accord, Venice Town Council*, 47 Cal.App.4th at 1565-67.

The trial court also applied the same erroneous interpretation of CEQA that it did in upholding the Rio Gatito THP's impact analysis, namely, that the FPRs dictate a narrow approach to cumulative impacts analysis, and the court is thus powerless to require any more than "what is required in the FPRs" or (as the court put it) "what is currently deemed reasonable." AA 7:2078. But what CalFire deems "reasonable" is flatly contrary to what both CEQA and the FPRs require. As discussed above, CEQA prohibits CalFire from narrowing the scope of its cumulative impact analysis so as to eliminate consideration of the affected environment when the evidence shows impacts occurring at a larger scale. *Bakersfield Citizens*, 124 Cal.App.4th at 1216; *Kings County Farm Bureau*, 221 Cal.App.3d at 720-723; Guidelines § 15126.2(a); *see* FPR § 898 (CalFire must supplement its cumulative impacts analysis to ensure "all relevant information is considered").

The trial court's erroneous interpretation of the law governing declaratory relief and CEQA's requirements for analyzing cumulative impacts warrants reversal on Appellants' pattern and practice claims. In light of the overwhelming evidence that CalFire takes the same approach to cumulative impacts in all THPs within the Battle Creek watershed as it did for the Rio Gatito THP, Appellants request that the Court grant the

requested declaratory relief. At a minimum, however, the ruling should be reversed and the matter remanded to the trial court to assess Appellants' evidence of an unlawful policy under the proper legal standard.

### CONCLUSION

For the foregoing reasons, CalFire's approval of the THP violated CEQA. Appellants respectfully request that this Court reverse the Superior Court's decision, and remand with instructions to enter judgment for Appellants.

DATED: June 23, 2022

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## CERTIFICATE OF COMPLIANCE

In accordance with California Rules of Court Rule 8.204(c)(1), I certify that, exclusive of this certification and the other exclusions referenced in Rule of Court 8.204(c)(3), the foregoing brief contains 13,730 words, as determined by the word count of the computer used to prepare this brief.

DATED: June 23, 2022

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**PROOF OF SERVICE**

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of San Francisco, State of California. My business address is 396 Hayes Street, San Francisco, CA 94102.

On June 23, 2022, I served true copies of the foregoing document described as:

**APPELLANTS’ OPENING BRIEF**

on the parties in this action as follows:

**SEE ATTACHED SERVICE LIST**

**BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Shute, Mihaly & Weinberger LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

**BY ELECTRONIC SERVICE:** I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered TrueFiling users will be served by the TrueFiling system. Participants in the case who are not registered TrueFiling users will be served by mail or by other means permitted by the court rules.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 23 2022, at San Francisco, California.

s/ Sara L. Breckenridge  
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