

February 1, 2013

*Via Messenger to*

Sandi Potter  
San Francisco Bay Regional Water Quality Control Board  
1515 Clay St # 1400  
Oakland, CA 94612

*Via Electronic Mail to*

[smpotter@waterboards.ca.gov](mailto:smpotter@waterboards.ca.gov)

Re: Mitigated Negative Declaration for the proposed “Conditional Waiver of Waste Discharge Requirements For Discharges from Vineyard Properties in the Napa River and Sonoma Creek Watersheds”

Dear Ms. Potter:

This office represents Living Rivers Council (“Living Rivers”), a non-profit association, with respect to the Conditional Waiver of Waste Discharge Requirements for Vineyard Facilities in the Napa River and Sonoma Creek Watersheds (the “Project”). I am writing on Living Rivers’ behalf to submit comments on the Mitigated Negative Declaration prepared for this Project and to object to approval of the Project on the grounds set forth in this letter.

1. **Previous comments on the Napa River Sediment TMDL.** As you know, Living Rivers has previously submitted voluminous comments on the Basin Plan Amendment for the Napa River Sediment Total Maximum Daily Load (“Napa River Sediment TMDL”) including:

- (1) May 17, 2010 comment letter from my office to the State Board, including:
  - a.. Comment letter dated August 5, 2010 from Dennis Jackson;
  - b.. Comment letter dated August 17, 2010 from Patrick Higgins;
- (2) July 6, 2009 comment letter from my office to the Regional Board, including:
  - a.. Comment letter dated July 5, 2009 from Dennis Jackson;
  - b.. Comment letter dated July 2, 2009 from Dennis Jackson;
  - c.. Comment letter dated July 2, 2009 from Patrick Higgins;

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- (3) October 20, 2008 comment letter from my office to the Regional Board, including:
  - a.. Comment letter dated October 19, 2008 from Dr. Robert Curry;
  - b.. Comment letter dated October 17, 2008 from Dennis Jackson;
- (4) May 7, 2008 comment letter from my office to the State Board, including:
  - a.. Comment letter dated April 24, 2008 from Dennis Jackson regarding the Napa River Sediment TMDL;
  - b.. Comment letter dated May 7, 2008 from Patrick Higgins regarding the Napa River Sediment TMDL;
  - c.. Comment letter dated May 7, 2008 from Dr. Robert Curry regarding the Napa River Sediment TMDL attached hereto as Exhibit 6.
- (5) August 15, 2006 comment letter from my office to the Regional Board, including:
  - a.. Comment letter dated August 11, 2006 from Dr. Robert Curry;
  - b.. Comment letter dated August 11, 2006 from Dennis Jackson;
  - c.. Comment letter dated August 12, 2006 from Patrick Higgins.

All of these comments are included in the record of proceedings lodged with the Superior Court in the litigation entitled *Living Rivers Council vs. State Water Resources Control Board* (Alameda Superior Court Case No. RG11560171). The Superior Court's decision in this litigation is now on appeal in the case entitled *Living Rivers Council vs. State Water Resources Control Board* (Court of Appeal Case No. 137082. The cases are sometimes collectively referenced in this letter as the "litigation." A DVD containing this entire record of proceedings lodged with the Superior Court in the litigation is enclosed herewith as Exhibit 5. References to this record of proceedings in this letter are denoted by "AR" followed by the page number.

2. **CEQA: Piecemealing.** Living Rivers contends in the litigation and in this letter that the waiver policy and the Napa River Sediment TMDL are simply different aspects of the same CEQA "project" and therefore, must be assessed for environmental impacts in one CEQA document. (Exh 2, pp. 24- 28.) Therefore, Living Rivers' previous comments on the Substitute Environmental Document ("SED") prepared for the Napa River Sediment TMDL are also applicable to the waiver policy and Living Rivers requests that the Board consider them in determining whether preparation of an EIR or EIR-level Substitute Environmental Document is required before the Board adopts the waiver policy. Since Living Rivers "briefed" this claim in some detailed in the Superior Court, these

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briefs are attached as Exhibits 2, 3 and 4 to this letter.

Indeed, the MND provides ample new evidence that the waiver policy is part of the same CEQA project as the Napa River Sediment TMDL. (See e.g., ISMND, p. 8 [“The Conditional Waiver implements the Napa River and Sonoma Creek sediment TMDLs that, in part, rely on individual landowners or operators of vineyard properties submitting a report of waste discharge (ROWD), or complying with WDRs, or waiver of WDRs, to meet water quality standards and protect beneficial uses].)

3. **CEQA: Fair Argument - the TMDL will cause significant impacts.** The Substitute Environmental Document prepared for the Napa River Sediment TMDL found that the adoption of the TMDL may have significant environmental impacts and it recommended and the Board adopted mitigation measures to reduce these impacts. Therefore, if Living Rivers is correct that the waiver policy and the Napa River Sediment TMDL are parts of the same CEQA “project,” then the Board’s integrated CEQA review of that single project must be conducted by preparation of an EIR or EIR level Substitute Environmental Document, and cannot be conducted by preparation of a mitigated negative declaration.

4. **CEQA: Fair Argument - Failure to Assess the Impacts of the Napa TMDL’s Adoption of the Napa Conservation Regulations.** In the litigation, Living Rivers argues that the Napa River Sediment TMDL uses compliance with the Napa County Conservation Regulations as a “means of compliance” with the TMDL, that there is a fair argument that Napa County’s implementation of its Conservation Regulations causes significant channel incision and sedimentation effects as a result of increasing precipitation runoff from hillside vineyards, and that the Napa River Sediment TMDL SED fails to lawfully assess this mechanism of impact. (See Exhibits 2, 3, 4, and 5.) As discussed in Living Rivers’s previous comments on the Napa River Sediment TMDL, the TMDL adopts compliance with the Napa County Conservation regulations as part of the performance standard for surface erosion from vineyards set forth in Table 4.1 of the Napa River Sediment TMDL. Living Rivers previous comments demonstrate that Erosion Control Plans approved under the Napa County Conservation regulations often increase peak flows by authorizing the conversion of natural vegetation to vineyard cultivation and by efficiently channeling and directing surface and subsurface flows to downstream channels; and that this is a primary vector causing channel incision, channel instability, bank failures, and increases in sediment transport to low gradient reaches of Napa River tributary streams and to the Napa River. Living Rivers briefed this claim in the Superior Court (see Exhibits 2, 3, 4 and 5 attached hereto).

The environmental review for the waiver policy, which represents further implementation of this TMDL, must evaluate this mechanism of impact in an EIR because the evidence submitted by Living Rivers in the above comment letters is “substantial evidence” supporting a fair argument that the TMDL/waiver project will cause significant impacts in this way.

5. **CEQA: Fair Argument - Uncertain Runoff Standard.** In the litigation, Living Rivers argues that the Napa River Sediment TMDL SED admitted that the TMDLs performance standard for surface erosion could entail means of compliance that would cause significant increases in runoff, that the TMDL included and the Board adopted a mitigation measure to reduce this significant effect, and that the SED unlawfully deferred the development of the criteria and measures to achieve the mitigation contemplated by this performance standard for runoff. (Exh 2, pp. 24- 28; 3, 4, and 5.) The Board's response to this concern, made in connection with its adoption of the Napa TMDL, was that "The details of the SF Bay Water Board's analytical approach will be developed in consultation with a Technical Advisory Committee that has been formed to assist SF Bay Water Board with technical issues related to development of the WDR waiver." (AR 1760-61.)

In fact, however, the "WDR waiver" as proposed does not "develop the details of the SF Bay Water Board's analytical approach" to this issue and still does specify the criteria and measures to achieve the performance standard for runoff. This represents a violation of several CEQA requirements, including the rule against piecemealing, the rule against deferring the development of mitigation measures, and the rule requiring an EIR whenever a project may have significant adverse impacts that remain unmitigated to less-than-significant.

6. **CEQA: Fair Argument - Subsurface Flow.** The Board must prepare an EIR or EIR-level CEQA document for the waiver for an additional reason. As explained by Dennis Jackson in his comment letter (attached hereto as Exhibit 1), the waiver will cause vineyard owners to infiltrate precipitation runoff into the ground by using runoff detention basins, but the MND does not evaluate the extent to which this will lead to channel incision and downstream sedimentation as a result of concentrating and increasing subsurface flows. As explained by Mr. Jackson, this runoff mechanism is likely to cause environmental harm.

7. **CEQA: Incomplete Project Description - Covered Properties.** The MND does not present a complete description of the waiver policy because it appears that there are at least two categories of properties that are not either "covered", excluded from coverage and therefore requiring a ROWD, or excluded from coverage because the TMDL is not applicable:(1)Vineyard Properties containing a Vineyard Facility located on one or more parcels between 5 and 40 acres on slopes less than 5% where 5 or more acres are a planted vineyard; and (2) Vineyard Properties containing a Vineyard Facility located on one or more parcels between 5 and 20 acres on slopes more than 5% where 5 or more acres are a planted vineyard.

8. **CEQA: Inaccurate Project Description - Project Objectives.** The ISMND describes the "Project Objectives," in part, as follows: "Specifically, the Conditional Waiver will: • Improve and protect water quality through regulation of vineyard discharges that have previously been unregulated." In fact, however, the Conditional Waiver will do the exact opposite: it will allow vineyard discharges that have previously been unregulated, but that would now otherwise be regulated under the TMDL by Reports of Waster Discharge ("ROWD") and Waste Discharge Requirements ("WDR"), to remain unregulated by enrolling in the waiver. The claim to the contrary

in the MND is misleading and undermines public review and comment on the MND.

9. **CEQA: Unlawful Mitigation Measures.** The MND identifies several significant impacts and adopts mitigation measures to reduce them. These mitigation measures, however, consist solely of requiring compliance with other applicable regulations and permit requirements. This does not comply with CEQA because it is well-settled that compliance with another agency's regulatory standards cannot be used under CEQA as a basis for determining that a project's effects-either before or after mitigation-are insignificant. (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712-718 [agency erred by "wrongly assum[ing] that, simply because the smokestack emissions would comply with applicable regulations from other agencies regulating air quality, the overall project would not cause significant effects to air quality"]; *Ebbetts Pass Forest Watch v. Cal. Dept. of Forestry & Fire Protection* (2008) 43 Cal.4th 936, 957 [agency erred "in concluding that any use of an herbicide in compliance with Department of Pesticide Regulation label restrictions necessarily 'would not have a significant effect on the environment.'"]; *Oro Fino Gold Mining Corporation v. County of El Dorado* (1990) 225 Cal.App.3d 872, 881-882 [rejecting agency's contention that project noise level would be insignificant simply by being consistent with general plan standards for the zone in question]; see also *City of Antioch v. City Council of the City of Pittsburg* (1986) 187 Cal.App.3d 1325, 1331-1332 [EIR required for construction of road and sewer lines even though these were shown on city general plan].) Instead, lead agencies must conduct their own fact-based analysis of project impacts, regardless of whether the project complies with other regulatory standards. (See, e.g., *Californians for Alternatives to Toxics v. Dept. of Food & Agriculture* (2005) 136 Cal.App.4th 1, 16 ("CATS")) [lead agencies must review the site-specific impacts of pesticide applications under their jurisdiction, because "[Department of Pesticide Regulation's] registration does not and cannot account for specific uses of pesticides..., such as the specific chemicals used, their amounts and frequency of use, specific sensitive areas targeted for application, and the like"]; *Citizens for Non-Toxic Pest Control v. Dept. of Food & Agriculture* (1986) 187 Cal.App.3d 1575, 1587-1588 ("CNPC")) [state agency applying pesticides cannot rely on pesticide registration status to avoid further environmental review under CEQA].)

Also, the MND does not disclose the extent to which vineyard properties that may contribute to these identified significant impacts will be subject to any other applicable regulations and permit requirements.

10. **Unlawful Delegation of Authority.** The Board apparently intends to base waivers on assurances provided by private sector consultants that are embodied in so-called "Farm Plans." This approach will out-source a large share of the burden of regulating vineyard compliance with the Basin Plan through the waiver policy to private non-governmental entities. This represents an unconstitutional delegation of governmental authority to the regulated community. *Bayside Timber Co. v. Board of Supervisors* (1971) 20 Cal. App. 3d 1. In addition, the extent to which the policy includes Board reliance on private sector assurances must be clearly described in the project description and the environmental impact of such reliance thoroughly evaluated. At present, the MND does not do so.

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11. **CEQA: Limits on Public Participation.** Finally, the waiver policy will severely limit the public's ability to be informed of waiver decisions and projects that may harm the environment and to participate in the Board's decision whether to grant a waiver. Therefore, the opportunities for and constraints on public participation that will be part of the waiver policy must be clearly described in the project description and the environmental impact of limiting public participation thoroughly evaluated. At present, the MND does not do so.

Thank you for your attention to these comments.

Very truly yours,



Thomas N. Lippe

#### **List of Exhibits**

- Exhibit 1: Letter from Dennis Jackson to Thomas Lippe dated January 26 February 1, 2013
- Exhibit 2: Living Rivers Opening Trial Brief filed on November 23, 2011 in *Living Rivers Council v. State Water Control Board*, Alameda Superior Court Case No. RG11560171.
- Exhibit 3: Living Rivers Reply Trial Brief filed on February 2, 2012 in *Living Rivers Council v. State Water Control Board*, Alameda Superior Court Case No. RG11560171.
- Exhibit 4: Living Rivers Supplemental Trial Brief filed on April 25, 2012 in *Living Rivers Council v. State Water Control Board*, Alameda Superior Court Case No. RG11560171.
- Exhibit 5: DVD containing the Administrative Record of Proceedings lodged in *Living Rivers Council v. State Water Control Board*, Alameda Superior Court Case No. RG11560171.

# **EXHIBIT 1**



## Dennis Jackson - Hydrologist

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dennisjack01@att.net

January 26, 2013

Thomas N. Lippe  
329 Bryant Street, Suite 3D  
San Francisco, CA 94107

re: Napa River Sediment TMDL Vineyard Waiver and ISMND

Dear Mr. Lippe:

You have asked me to review and comment on the proposed *Conditional Waiver of Waste Discharge Requirements for Discharges from Vineyard Properties in the Napa River and Sonoma Creek Watersheds* (Draft Conditional Waiver) and its Initial Study and proposed Mitigated Negative Declaration (ISMND). The Draft Conditional Waiver for Vineyard Properties is a part of the Implementation Plans of the Sediment TMDLs for the Napa River and Sonoma Creek.

This letter addresses two issues that could result in either additional erosion as the result of implementing the Draft Conditional Waiver or additional erosion due to ongoing channel incision. I give a brief description of these issues and then a more in-depth discussion of them below.

The unjustified assumption that stormwater can be infiltrated, without careful planning, may result in increased erosion that would not occur if the Draft Conditional Waiver was not adopted. There is a lack of discussion of subsurface storm flow in the Draft Conditional Waiver and the ISMND. An assumption is made that it is always beneficial to infiltrate excess stormwater. No evidence is presented that demonstrates that such an assumption is justified. There are situations when infiltrating excess runoff is no better than keeping it on the surface or may actually be more harmful than keeping it on the surface. In instances where surface runoff is directed to an inappropriate place for infiltration there is the potential to either generate additional surface runoff, through a process called saturation-excess flow, or to increase the amount of subsurface flow which has the potential to cause erosion downslope. These mechanisms will be described in a subsequent section of this letter. The directing of storm water to an inappropriate location for infiltration would be done in order to comply with the Draft Conditional Waiver. Therefore, any adverse environmental impacts that arise from the inappropriate siting of locations for stormwater infiltration pursuant to the Draft Conditional Waiver would be the result of adopting the Draft Conditional Waiver. The mitigations proposed in the ISMND would be insufficient to prevent these impacts.

The approach of actively only reducing sediment discharge to the Napa River or Sonoma Creek has the potential to result in these two river systems having greater capacity to transport sediment than is actually available. This type of imbalance drives channel incision and produces sediment. The Draft Conditional Waiver does not directly require actions that would reduce stormwater discharge so the problem of incision may be reduced but not completely stopped which would continue adverse environmental impacts.

## Storm Runoff

The goal of the Napa River Sediment TMDL is to reduce the sediment load of the Napa River to 125% of the natural load. It is my opinion that, in addition, to reducing the sediment load to 125% of the natural background sediment load the TMDL and Basin Plan Amendment (BPA) should require that the stormwater discharge regime of the Napa River be brought into alignment with the natural hydrograph that would transport no more than 125% of the background sediment load. In contrast, the TMDL, Draft Conditional Waiver and the ISMND for the Draft Conditional Waiver aim for no net increase in storm discharge volume, velocity or duration. Staff has stated that concentrating on reducing sediment discharge will simultaneously reduce storm water discharge. I agree that there will be a reduction in storm water volume, velocity and duration if the sediment discharge is reduced to the target levels. However, Staff has offered no factual evidence to demonstrate that the reduction in storm water discharge that will result from their approach will result in a balance between the discharge regime of the Napa River and Sonoma Creek and their respective target sediment loads. I contend that, without actually reducing the runoff from vineyard properties, the resulting discharge regime in the Napa River and Sonoma Creek, after the target sediment loads are obtained, will be capable of transporting more than 125% of the background sediment load.

If the approach of only reducing sediment discharge, as outlined in the TMDL and Draft Conditional Waiver, does not sufficiently reduce storm water discharge to bring the sediment transport capacity of the Napa River and Sonoma Creek into balance with the supplied sediment load then the process of streambed incision will continue. This adverse impact to the environment is not fully mitigated by the measures proposed in the ISMND for the Draft Conditional Waiver.

In my August 2010 comments on the Napa River Sediment TMDL, I demonstrated that the water discharge regime during the 1994-2003 period (the time period used to determine that the sediment load was 185% of background) would have to be reduced between 14% and 24% to be in balance with the target sediment load of 125% of background in the Napa River. Requiring existing vineyards to reduce their peak storm water discharge by 20%, as measured by TR-55 or other model, would shift the discharge regimes of the Napa River and Sonoma Creek towards being in balance with the target sediment load of 125% of background.

## Inappropriate Infiltration

An assumption is made in the Draft Conditional Waiver and the ISMND that it is always beneficial to infiltrate excess stormwater. No evidence is presented that demonstrates that such an assumption is justified. There are situations when infiltrating excess runoff is no better than keeping it on the surface or may actually prove to be more harmful than keeping it on the surface.

This argument requires some background on the mechanisms of storm runoff. The following discussion of runoff mechanisms is based on Dunne and Leopold (1978) and on Selby (2000). See Figure 1, adapted from Selby's Figure 11.10 (2000) at the end of this letter for a conceptual drawing of the various runoff processes on a landscape.

## Runoff Processes

The rainfall-runoff process is complex and occurs through several mechanisms. According to Dunne and Leopold (1978) the runoff processes are:

1. Hortonian overland flow,
2. Subsurface flow,
3. Saturated overland flow (saturation-excess flow)

4. Groundwater flow and,
5. Channel Precipitation

Hortonian overland flow (infiltration-excess overland flow) is caused when the rainfall intensity exceeds the infiltration capacity of the soil. Hortonian overland flow is what many people imagine when thinking about the runoff process. In forested environments or areas with undisturbed vegetation and deep permeable soils, infiltration rates tend to exceed all but the most intense rainfall intensities. In forested environments, Hortonian overland flow is usually limited to rock outcrops, or to small areas during extremely intense (rare) rainfall bursts, and disturbed areas such as roads.

The following quotes, describing the runoff process are from M.J. Selby (*Hillslope Materials and Processes*, second edition, 2000, page 213):

Field observations indicate that Hortonian overland flow is a rare phenomenon, especially in areas with undisturbed vegetation cover and deep permeable soils. Overland flow is most readily generated in semiarid environments with thin, impermeable soils with low water-storage capacity, and in any environment where loss of soil structure (and therefore macropores) by compaction, removal of vegetation, freezing, and blocking of pores are associated with prolonged and/or high intensity rainfalls.

In areas of permeable soils where hydraulic conductivity decreases with soil depth, subsurface flow moves laterally as throughflow within the soil profile. When and where the profile becomes completely saturated, saturation-excess overland flow will occur. Both processes may occur at rainfall intensities and durations which are well below those required to produce Hortonian overland flow. Furthermore, both throughflow and saturation-excess flow may be generated from source areas which are variable in extent and different in location from source areas of Hortonian overland flow.

**Subsurface stormflow is now regarded as the major runoff-generating mechanism in most humid environments**, both because of its influence on the development of saturated zones and as an important contributor to stormflow in its own right (Anderson and Burt 1978). (Emphasis added)

Subsurface storm flow can occur through open rock joints, coarse talus, soil pipes and permeable soil (Selby, 2000). The following excerpts are from Selby's (2000, page 217) discussion of soil pipes.

#### Pipe-Flow

Flow in pipes has been greatly underestimated as a hydrological process, according to experimental work in a very small number of catchments (Jones 1987a, b; Bryan and Yair 1982; McCaig 1983). It is now recognized that subsurface natural pipes exist in many environments ranging from arid through semiarid to humid temperate and humid tropical. They occur in many soil types and at various depths. Natural pipes are known with diameters ranging from 0.02 m (0.8 inch) to > 1m (3.3 feet) and lengths of a few meters to >1 km; they may carry perennial or ephemeral flows. The major requirement for their existence appears to be a soil body which is strong enough to support the walls and roof of a pipe but not so strong that it inhibits pipe erosion by flows which, at least initially, are of low volume and velocity. The mechanics of pipe development are discussed in Chapter 12.

Pipe-flow may be derived from areas of saturated soil, areas of cracked surface soils or with many large, open macropores, or zones of converging saturation flow in macropores. Some pipe-flow may come from concentrated overland flow and channel flow which is diverted into a pipe. The velocity of pipe-flow has been variously estimated as being in the range of that of overland flow (0.1 m/s or 0.33 ft/s) to being an order of magnitude more rapid. It can therefore be a major contributor to storm runoff and especially to peak flows. Furthermore networks of pipes extend the areas of a catchment which contribute to storm runoff and they may be major contributors of water to saturated zones from which saturation-excess overland flow occurs. In some catchments pipe-flow has been assessed as contributing up to 50 per cent of the total storm discharge.

The total significance of pipe-flow in both catchment hydrology and in geomorphic development of hillslopes is, however, not well understood. The proportion of large regions in which pipes occur is usually regarded as being small; but as they are difficult to detect, unless their roofs collapse, they may be underestimated. Research into pipe-flows and the effects of pipes on delivering water to erodible sites, such as hollows and those with unstable soil masses, is rather neglected.

Saturated-excess flow occurs on saturated sites. A site is saturated when the water table rises to the surface. When subsurface flow encounters a saturated site some of the subsurface water flows over the ground surface and is called *return flow*. Since the water table is at the ground surface, the infiltration rate is zero and any rain falling on to the area will flow down-slope as surface runoff. Saturated-excess flow tends to occur in swale bottoms or the lower portion of hillslopes and near stream channels. The area subject to saturation-excess overland flow expands as the duration of a storm increases. Selby (2000) observes that;

Storm-runoff contributing areas commonly develop first alongside stream channels and in concavities and then expand as surface runoff occurs from operation of several processes.

Selby's (2000) entire discussion of runoff processes is attached to this letter.

A section in Chapter 12 of Selby (2000, page 241) describes the formation of soil pipes as follows.

#### Pipe Erosion

Subsurface pipe erosion has been described by a number of terms including pothole erosion, suffusion, subcutaneous erosion, tunneling, and tunnel-gullying, but the most widely used term is *piping* (Parker and Jenne 1967; Crouch 1976; Jones 1987). Natural pipes and their role in slope hydrology were described in the previous chapter.

Among the factors which dispose a soil to piping are: a seasonal or highly variable rainfall; a soil subject to cracking in dry periods; a reduction in vegetation cover; a relatively impermeable layer in the soil profile; the existence of a hydraulic gradient in the soil; and a dispersible soil layer.

Examples of piping are particularly common in semiarid badlands formed on smectite clays which have strong swelling and shrinkage properties and may also have high exchangeable sodium percentages (Heede 1971; Guterrez et al. 1988; Lopez-Bermudez and Romero-Diaz 1989; Swanson et al. 1989). Loess and loessic colluvium with high sodium content are also subject to piping (Laffan and Sutherland 1988).

The most commonly reported situation in which pipes develop is one in which a surface soil cracks as a result of desiccation. In a rainstorm water then infiltrates rapidly down the cracks and supersaturates a relatively permeable horizon in the subsoil. Lateral seepage may be fast enough to move soil particles and develop a channel, or, if the soil has dispersible clays, these may lose aggregation. Movement of water through subsurface cracks and voids is slow until water breaks through the soil surface further down the slope, and rapid flow can then work headwards within the soil and form a gully or enlarge a pipe (Figs 12.13 and 12.14).

Ziemer and Albright (1987) studied storm flow in soil pipes in two swales in the Caspar Creek watershed located in Jackson State Forest in Mendocino County, California. The following excerpts are from their 1987 paper.

ABSTRACT Pipeflow dynamics are being studied at Caspar Creek Experimental Watershed in north-coastal California near Ft. Bragg. Pipes have been observed at depths to 2 m within trenched swales and at the heads of gullied channels in small (0.8 to 2 ha) headwater drainages. Digital data loggers connected to pressure transducers monitor discharge using calibrated standpipes. During storms, pipeflow up to 8 l s<sup>-1</sup> has been measured while, within the same swales, no surface channel flow occurred. Pipeflow discharge has been correlated with antecedent precipitation.

#### INTRODUCTION

Most of the geomorphic literature attributes drainage network evolution, except in karst areas, to surface runoff processes. Recently, the influence of near-surface groundwater flow in promoting subsurface erosion in non-karst areas and the development of drainage networks has received increasing attention (Higgins, 1984). The geomorphic features resulting from erosion by the flow of subsurface water in non-calcareous rocks have been referred to as "pseudokarst" (Halladay, 1960; Parker et al., 1964). In arid regions, the role of piping in gully development has been recognized for some time. In humid regions, however, the geomorphic significance of piping was largely overlooked until Kirkby & Chorley (1967) presented a model of soil water throughflow and saturated overland flow as an alternative to Horton overland flow on vegetated slopes.

Under favorable conditions, subsurface drainage can promote accelerated erosion by chemical (solution), physiochemical (suffusion), and physical (piping and landsliding) processes. Biological processes generate organic acids that accelerate the dissolution of primary soil minerals and also disperse secondary minerals (Durgin, 1984). These minerals can be transported through the soil, and eventually to a stream channel, by subsurface drainage. As chemical erosion progresses and the soil becomes more porous, water flowing through the soil can detach and move colloids through soil pores—a process called suffusion. Suffusion can lead to soil piping as progressively larger material is eroded. In addition, stress fractures in the soil, as well as biotic activity by invertebrates and vertebrates and by root networks may contribute to the initiation and subsequent development of piping systems.

Water infiltrates the pipe as laminar flow, but within the pipe, flow becomes turbulent and erosion is primarily by corrasion and undermining of pipe walls (Dredge & Thorn, 1976). As subsurface erosion continues, pipe roofs may collapse, forming pseudokarst topography. Goldsmith & Smith (1985) summarized the conditions essential for piping: (a) a source of water, (b) a surface infiltration rate that exceeds the subsurface permeability at some depth, (c) a zone of potentially dispersive soil, (d) a hydraulic gradient to cause water to flow, and (e) an outlet for the lateral flow.

#### CONCLUSION

**Nearly all of the discharge that we observed at our sites came from pipeflow.** There was very little seepage from the excavation face, even during storm periods. This is similar to observations by Tsukamoto et al. (1982). They reported that pipeflow was responsible for 95% of the outflow from a small granitic headwater catchment in Japan. Seepage through the soil matrix at their location was negligible. In another setting, Jones & Crane (1984) found that pipeflow accounted for 46% of the streamflow generated from their study area. (Emphasis Added)

Climate and geology vary for the limited number of studies of pipeflow hydrology conducted to date. These studies firmly establish the concept that macropore and piping networks are locally significant mechanisms for routing water and sediment from steep upland watersheds.

The runoff mechanisms, described above, must be thoroughly understood to avoid creating unintended erosion when designing new drainage facilities or modifying existing drainage facilities. It is an assumption that diverting stormwater runoff into a detention basin is always less environmentally damaging than not doing so. For example, in an attempt to meet the requirements of the Draft Conditional Waiver, a property owner might convert an existing swale into a stormwater detention basin that infiltrates the water into the subsurface. Below, I discuss the potential problems of constructing a detention basin in a swale.

A swale is a concave depression on a hillslope without a surface channel. Swales are also called zero-order basins since they are upslope of Stahler first-order channels. A second-order channel is created when two first-order channels join. Class III channels, as defined in the Draft Conditional Waiver, are generally first-order or second-order streams under the Stahler system of stream order. In general, swales are located upslope of a stream channel. The point of channel initiation (channel head) is typically located at the downslope end of a swale. Subsurface flow from a swale can also enter a stream channel from the side.

Let's examine what is happening in a swale during a significant storm event. The colluvium that comprises a swale will be saturated during storm events that generate significant amounts of runoff. So, the water table in a swale will be at or close to the ground surface during storm events. The high groundwater table means that swales are sites where saturated overland flow (saturation-excess flow) occurs. Subsurface flow from the adjacent hillslopes may come to the surface along the margin of the swale and flow across the surface. Rain falling on a saturated area cannot infiltrate into the ground and so becomes surface runoff. A saturated area acts, in some respects, as an impervious surface.

Subsurface flow out of the swale may eventually come to the surface and initiate a channel head. The channel initiation process is more likely to occur when the soil is saturated. As discussed above, the soil of a swale will tend to be saturated during a significant storm event. So channel heads often form at the downslope end of a swale.

Subsurface flow out of the swale may also occur in soil pipes. In fact, Ziemer and Albright (1987) found that most of the flow from the two swales they studied was carried in soil pipes. Well-developed soil pipes are known to carry both water and sediment. Soil pipes will discharge the water and sediment they carry to the surface at some point downslope.

Now suppose that a property owner constructs a stormwater detention basin in a swale. The stormwater detention basin, formerly a swale, captures surface runoff and holds it until it seeps into the ground or evaporates. So, the stormwater runoff from the property has been decreased and it would appear that the project is meeting the goal of the Draft Conditional Waiver. However, we have to understand what happens to the stormwater that infiltrated into the swale.

The stormwater that enters the detention basin constructed in the swale would not have been delivered to the swale prior to the construction of the detention basin. Some of the stormwater will evaporate but much of this additional water infiltrates into the subsurface. The water that infiltrates will potentially increase the rate of subsurface storm flow and prolong the duration of subsurface storm flow. The increased rate and duration of subsurface storm flow may result in the point of channel initiation (channel head) moving upslope causing additional erosion that would not have occurred prior to the construction of the detention basin. This would be an unmitigated adverse impact directly attributable to adopting the Draft Conditional Waiver.

The increased volume of water infiltrating into the swale from the detention basin would increase the rate and duration of flow in any soil pipes draining the swale. An increase of the rate or duration of flow through a soil pipe would likely erode the walls of the soil pipe. The eroded material would be transported downslope and discharged to the surface, potentially into a stream channel. Or the water infiltrated from the detention basin could possibly initiate the formation of new soil pipes. This would be an unmitigated adverse impact directly attributable to adopting the Draft Conditional Waiver.

One of the processes that cause the formation of gullies is the collapse of the roof of soil pipes (Selby, 2000). The creation and/or expansion of soil pipes, from water infiltrating from an improperly sited detention basin, could result in the formation of a new gully. This would be an unmitigated adverse impact directly attributable to adopting the Draft Conditional Waiver.

In some situations, the erosion caused by the increased subsurface flow out of a swale that has been converted into a stormwater detention basin may exceed the erosion caused by not using such a detention basin. The increased subsurface stormflow from a swale containing a detention basin may result in the upslope migration of a channel head, or the erosion of soil pipes, and even the formation of a gully through the collapse of the roof of a soil pipe. These potential significant adverse impacts were not considered by the ISMND.

Vineyards are one example of a location where the permeability decreases with depth. When a new vineyard is installed, it has been common practice to rip the soil with heavy equipment. The zone of soil that was ripped will be more permeable than the undisturbed material below the ripped layer. When the ground surface has a slope, even of just a few percent, there will be subsurface storm flow at the interface of the ripped soil and the undisturbed material below it give sufficient rainfall.

Undisturbed hillslopes also tend to exhibit a decrease in permeability with depth. Therefore, subsurface storm flow can be expected to occur on most hillslopes, give sufficient rainfall. Subsurface storm flow is expected to be widespread in the Napa River and Sonoma Creek watersheds.

Soil pipes can form in soils with at least some shrink-swell potential. Such soils exist in Napa River and Sonoma Creek watersheds. Therefore, it is likely that soil pipes will be an important mechanism for transporting subsurface storm flow, after sufficient rainfall has occurred, in areas with soils that have at least some shrink-swell potential.

### **Subsurface Flow not Considered in the Draft Conditional Waiver**

The Draft Conditional Waiver does not consider the importance of subsurface storm flow as a runoff process. The following passages from the Draft Conditional Waiver demonstrate a failure to consider the importance of subsurface storm flow.

On page 23 the Draft Conditional Waiver defines point(s) of discharge.

**Point(s) of Discharge.** *Point(s) of Discharge* include all locations where storm runoff is discharged via concentrated surface flow into a defined channel that has a bed and banks. Also, at locations where engineered drainage has been installed and storm runoff is collected first (e.g., subsurface drainage pipes or tiles in a vineyard block, an inboard ditch along a Road, etc.), a Point of Discharge is located at the outlet of the engineered drainage feature, whether that location is on a hill slope or in a defined channel.

This definition does not consider the discharge of soil pipes since soil pipes are a subsurface flow process and not a surface flow process. Failing to specifically include the discharge from a soil pipe as a point of

discharge seriously undermines the effectiveness of the Draft Conditional Waiver. It is likely, that a significant amount of stormwater discharge is carried by soil pipes in the Napa River and Sonoma Creek watersheds.

Attachment D item 2(d) seeks to encourage on-site infiltration of stormwater to reduce erosion and flow peaks.

2. Vineyard Management Practices Element

- d. Management practices and infrastructure that promote and maximize infiltration on-site to reduce erosion and to prevent increase in stormwater peak flows.

However, the Draft Conditional Waiver should include statements that on-site infiltration should be designed in a manner that avoids increasing erosion from subsurface storm flow processes.

Attachment D item 5(a) also fails to mention the importance of designing on-site infiltration projects in a way that does not generate erosion from an increase in subsurface storm flow.

5. Stormwater Runoff Management Element

- a. Depict runoff flow patterns, including areas where runoff will be infiltrated, detained, and discharged via sheet flow and via a drainage system into the receiving waters.

Attachment D item 5(c) will not address erosion where soil pipes discharge since such locations are not included in the definition of point(s) of discharge.

- c. Describe erosion features, if any, at Points of Discharge and specify to address such erosion.

Attachment D item 6 does not explicitly recognize the role of subsurface storm flow in the formation of gullies (see Selby 2000).

6. Gullies and Shallow Landslides Element

Unstable areas, such as gullies, rills, landslides, mudflows, rock falls, and channel erosion are significant sources of sediment. Where they exist, the Farm Water Quality Plan shall:

- a. Describe the location of erosional features including gullies, rills, landslides, mudflows, and channel erosion that have the potential to deliver more than 10 cubic yards (as defined above) of sediment to the channel that are a result of past or current Road and vineyard operations on the Vineyard Property.
- b. Identify and implement management practices needed to promote natural recovery or to actively stabilize unstable areas and to minimize increases in sediment delivery to receiving waters, including actions to disburse runoff causing or contributing to gullies and other erosional features.
- c. Indicate areas where active restoration of gullies, shallow landslides, or other unstable areas has already occurred.

The above passages from the Draft Conditional Waiver are not meant to be an exhaustive list of all the places where the Draft Conditional Waiver disregards the importance of subsurface storm flow but serve to demonstrate its disregard for this important runoff mechanism.

## Summary

In addition to reducing the sediment load to 125% of the natural background sediment load the TMDL, BPA, and the Draft Conditional Waiver should require that the stormwater discharge regime of the Napa River be brought into alignment with the natural hydrograph that transports no more than 125% of the

background sediment load. An enforceable storm water discharge performance standard should be applied to all four land use categories listed in BPA Tables 4.1 through 4.4. The storm water discharge performance standard should be applied to all lands in the Napa River watershed including upstream of the municipal water supply reservoirs.

Reducing the sediment load from 185% down to 125% of the natural sediment load without actively reducing excess storm discharge from all land uses in the Napa watershed will create an imbalance between the target sediment load of 125% of the natural load and the sediment transport capacity of the Napa River and its tributaries. Such an imbalance has the potential to result in erosion of the banks and/or bed of the Napa River and its tributaries. Therefore, implementing the current version TMDL and BPA, through the Draft Conditional Waiver, has the potential of causing erosion of the banks and/or bed of the Napa River and its tributaries.

The Draft Conditional Waiver does not recognize the importance of subsurface storm flow in generating streamflow or erosion. Selby (2000) observes that subsurface stormflow is the major runoff mechanism in humid environments.

Subsurface stormflow is now regarded as the major runoff-generating mechanism in most humid environments, both because of its influence on the development of saturated zones and as an important contributor to stormflow in its own right (Anderson and Burt 1978).

The failure to recognize the role of subsurface storm flow in the generation of streamflow and erosion is the reason that the Draft Conditional Waiver does not point out the need for on-site infiltration projects to be designed to minimize increased subsurface storm flow. On-site infiltration projects carried out to satisfy the requirements of the Draft Conditional Waiver may result in increased subsurface storm flow and result in erosion or gully formation that would not have occurred if the Draft Conditional Waiver was not adopted. These potential significant adverse impacts were not considered by the ISMND.

Sincerely,

A handwritten signature in black ink that reads "Dennis Jackson". The signature is written in a cursive, flowing style.

Dennis Jackson  
Hydrologist

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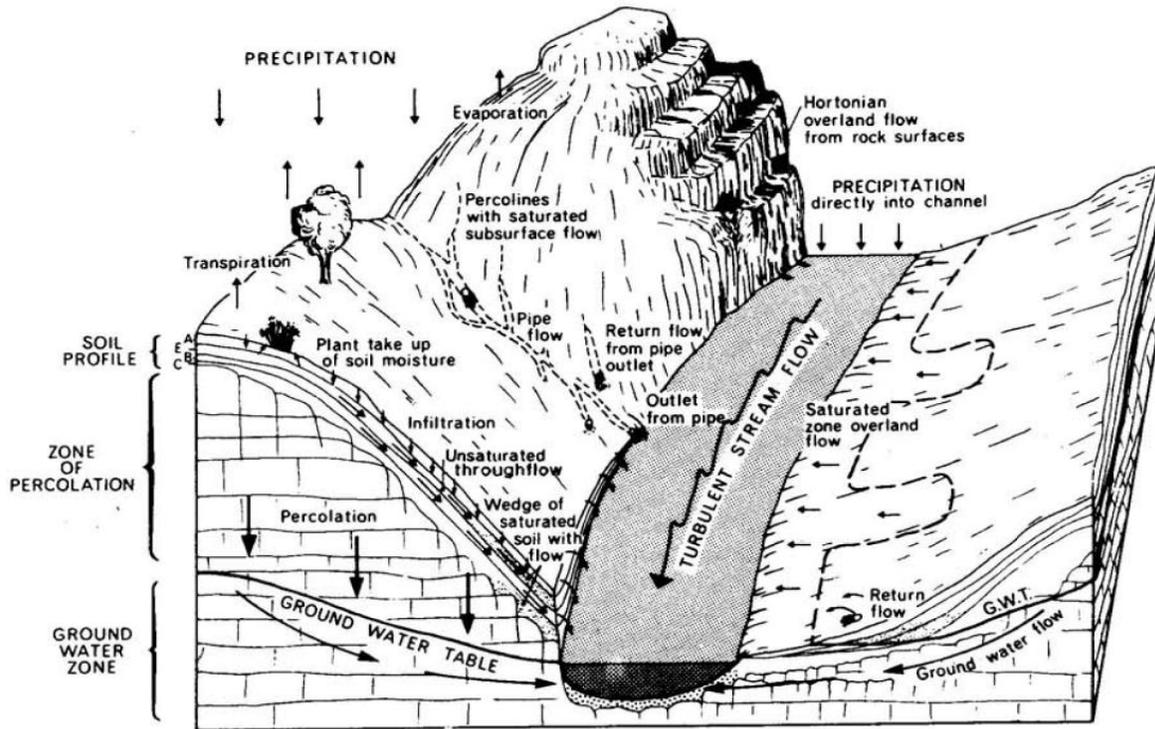


Figure 1. Adapted from Selby (2000) Figure 11.10(a). A schematic landscape with the various types of runoff from hillslopes and the sources and paths of runoff.

## **EXHIBIT 2**

ENDORSED  
FILED  
ALAMEDA COUNTY

NOV 23 2011  
CLERK OF THE SUPERIOR COURT  
By Esther Coleman, Deputy

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11  
12 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
13 **IN AND FOR THE COUNTY OF ALAMEDA**

14 LIVING RIVERS COUNCIL,

15 Petitioner and Plaintiff,

16 vs.

17 STATE WATER RESOURCES CONTROL  
18 BOARD, and DOES 1 through 10,

19 Respondents and Defendants.

Case No.: RG 11560171

**PETITIONER'S OPENING TRIAL BRIEF**

**[CALIFORNIA ENVIRONMENTAL  
QUALITY ACT]**

Date: February 15, 2012

Time: 10:30 a.m.

Dept: 31

Judge: Frank Roesch

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1 I. INTRODUCTION

2 Plaintiff Living Rivers Council ("Living Rivers") challenges Respondent State Water Resources  
3 Control Board's ("Respondent" or "Board") decision to adopt the Amendment to the Water Quality Control  
4 Plan for the San Francisco Bay Basin ("Basin Plan") to Establish a Total Maximum Daily Load (TMDL)  
5 for Sediment in the Napa River, and an Implementation Plan to Achieve the TMDL and Related Habitat  
6 Enhancement Goals ("TMDL" or "Project"), and a Substitute Environmental Document ("SED") prepared  
7 pursuant to the California Environmental Quality Act ("CEQA")<sup>1</sup>.

8 The SED for the TMDL violates CEQA because it fails to assess the potentially significant adverse  
9 impacts of the Project's incorporation of Napa County's program for approving hillside vineyards pursuant  
10 to its Conservation Regulations part of the TMDL's performance standard for controlling surface erosion.  
11 The SED also violates CEQA because it fails to evaluate the cumulative effects of the TMDL's  
12 incorporation of Napa County's Conservation Regulations.

13 Further, instead of conducting an EIR-level assessment of the impact of incorporating Napa County's  
14 Conservation Regulations as required by CEQA, the Board simply conceded that its performance standard  
15 for controlling surface erosion may have significant storm runoff impacts and then adopted a new mitigation  
16 measure for that impact, which it found then would be mitigated to "less than significant." This mitigation  
17 measure consists of a new performance standard for controlling storm runoff, as follows: "Effectively  
18 attenuate significant increases in storm runoff. Runoff from vineyards shall not cause or contribute to  
19 downstream increases in rates of bank or bed erosion." However, the SED fails to specify the measures that  
20 will be used to achieve this "attenuation" of increases in runoff or the criteria for judging whether such  
21 increases are significant, instead opting to defer the development of such measures until after project  
22 approval. The SED does not, however, comply with CEQA's legal requirements for describing the entire  
23 Project and its mitigation measures or CEQA's requirements for deferring the development of mitigation  
24 measures until after project approval.

25 The SED for the Project unlawfully "piecemeals" its environmental review of the Project by failing  
26 to include in its Project description or impact analysis the Waste Discharge Requirements waiver policy that  
27 is part of the Project, or is a reasonably foreseeable future activity associated with the project. The TMDL  
28 is implemented by requiring that landowners submit a Report of Waste Discharge pursuant to the Water  
29

30 <sup>1</sup>CEQA is codified at Public Resources Code 21000 et. seq.

1 Code to obtain "Waste Discharge Requirements" issued by the San Francisco Bay Regional Water Quality  
2 Control Board ("Regional Board"). But from the very beginning the TMDL included reference to a "waiver  
3 policy" that would allow landowners to avoid this permitting requirement. Despite Living Rivers' repeated  
4 requests to the Regional and State Boards that the SED describe and evaluate the impacts of this waiver  
5 policy, the SED does not do so.

6 All of these claims arise from the failure of the SED to include information required under CEQA.  
7 Therefore, they are claims that the Board prejudicially abused its discretion by failing to proceed in the  
8 manner required by law, and are reviewed by this court de novo.

## 9 II. STATEMENT OF FACTS

### 10 A. HISTORIC HARM TO THE NAPA RIVER ENVIRONMENT.

11 Since the late 1940s, populations of steelhead and salmon in the Napa River and its tributaries have  
12 declined substantially. (AR 1588.) While the Napa River watershed once supported runs of 6,000 to 8,000  
13 steelhead, and 2,000 to 4,000 coho salmon, by the late 1960s coho salmon were extinct in the watershed,  
14 and the steelhead run had reduced by about 85 percent, to about 1,000 adults; at present the steelhead run  
15 is estimated at less than a few hundred adults. (AR 1590.) Three of the primary contributors to decreases  
16 in salmonid populations in the Napa River watershed are related to sedimentation, including: 1) excess fine  
17 sediment in the stream bed, which decreases fish egg survival and juvenile rearing success; 2) erosion of the  
18 river's tributaries' bed and banks, which reduces the quantity of spawning and rearing habitat; and 3) low  
19 flows and warm water temperatures in the dry season, which limit growth and survival of juvenile steelhead  
20 and salmon. (AR 8248.) The five major sources of sediment in the Napa River watershed are: 1) natural  
21 erosion, 2) road-related erosion, 3) surface erosion in vineyards, 4) gullies and shallow landslides caused  
22 by historical grazing, and 5) human-caused bed and bank erosion along the River and its tributaries. (AR  
23 8248.)

### 24 B. PREVIOUS REGULATORY ACTION.

25 In 1990, based on evidence of widespread excess erosion and sedimentation and concern regarding  
26 adverse impacts to fish habitat, the Regional Board listed the Napa River as an impaired waterbody due to  
27 fine sediment deposition, pursuant to federal Clean Water Act section 303(d). (AR 6, 1584.) While the  
28 beneficial uses of the Napa River that are adversely affected by excess sediment are recreation (i.e., fishing),  
29 cold freshwater habitat, fish spawning, and preservation of rare and endangered species (AR 1584), the  
30 primary reason for the listing was concern for the decline in salmonid populations (AR 1590).

1 In 1991, Napa County adopted its so-called Conservation Regulations, codified at Napa County Code  
2 Chapter 18.108. (AR 447, 3863.) These regulations require that owners of land in Napa County, before  
3 conducting any earth-moving activities (including vegetation removal) on slopes over 5%, must submit and  
4 obtain the County's approval of an Erosion Control Plan. (County Code §§ 18.108.070, subd. (B),  
5 18.108.080; AR 10289.)

6 Beginning in the year 2000 and continuing to the present, the Sierra Club and later, Earth Defense  
7 for the Environment Now ("EDEN") and Living Rivers, have documented the fact that Napa County's  
8 program of permitting new vineyards pursuant to its Conservation Regulations causes significant sediment  
9 impacts on the Napa River. A more detailed explanation of the factual basis of these efforts is presented in  
10 Section IV.A.1 below. Briefly, these organizations retained several noted experts in the field, hydrologists  
11 Dr. Robert Curry and Dennis Jackson and fishery biologist Patrick Higgins, to review and comment on  
12 dozens of Erosion Control Plans ("ECPs") for hillside vineyard conversion projects in the Napa River  
13 watershed submitted to Napa County pursuant to the Conservation Regulations. (See, e.g. AR 8848-9442,  
14 9470-9565, 9592, 9784, 9821-10266, 10349-10388.)

15 These experts found that the vineyard conversions significantly contribute to ongoing significant  
16 sedimentation effects in the Napa River drainage. The primary mechanism of this impact is increases in  
17 runoff (peak flows) caused by the conversion of natural vegetation to vineyard, which causes channel  
18 incision leading to channel instability and bank failures, which add sediment carried by stream flows to low  
19 gradient reaches of the tributaries and main stem of the Napa River. (AR 8848-49.) These experts also  
20 consistently found that the ECPs approved by Napa County do not accurately evaluate or adequately mitigate  
21 impacts associated with these increases in runoff. (*Id.*)

### 22 C. PROCEDURAL HISTORY OF THE TMDL.

23 Because the Napa River is listed as impaired for sediment, the Regional Board is obligated under  
24 section 303(d) of the Clean Water Act to develop a Total Maximum Daily Load ("TMDL") for the Napa  
25 River to address sediment impairment. (AR 1.) A TMDL includes the development of a pollutant budget  
26 and a control plan to restore the health of a polluted water body. (AR 1584.) The Regional Board developed  
27 the TMDL as an amendment to the Water Quality Control Plan for the San Francisco Bay Region ("Basin  
28 Plan"). The Regional Board's primary goal in adoption of the TMDL is conserving the salmon and steelhead  
29 fisheries in the Napa River drainage. (AR 2847-48.)

30 The process of basin planning is a certified regulatory program subject to a limited exemption from

1 CEQA's requirement to prepare an Environmental Impact Report ("EIR") or Negative Declaration for the  
2 TMDL. (AR 7.) Thus, instead of an EIR or Negative Declaration, the Regional Board prepared a Substitute  
3 Environmental Document ("SED") for the Project, consisting of a Staff Report, a CEQA Checklist, the  
4 Basin Plan Amendment and the supporting documentation (AR 7.)

5 Here, between 2006 and final adoption in 2010, the TMDL was subject to six rounds of public  
6 comment; Living Rivers participated in all of them. (AR 8848, 9459, 9470, 9592, 9821, 10349.) As  
7 discussed in more detail in the Argument section of this brief, Living Rivers repeatedly presented all of the  
8 claims alleged in this case to the Regional and State Water Boards. (AR 8848-8850; AR 8854-8856; 8928-  
9 9043; 9427-9442)

10 In June 2006, the Regional Board circulated the draft SED for public review, and on August 15,  
11 2006, Living Rivers submitted public comments and expert studies on those draft documents. (AR 8848-  
12 9442.) On January 23, 2007, the Regional Board adopted the TMDL and forwarded it to the State Board  
13 for approval. (AR 30-31.) On May 7, 2008, Living Rivers submitted public comments and expert studies  
14 to the State Board objecting to the State Board's proposed adoption of the TMDL. (AR 9470-9565.)

15 On June 6, 2008, the Regional Board withdrew the TMDL from State Board consideration (AR  
16 7990) and in September 2008, circulated a revised version for comment (AR 7). On October 20, 2008,  
17 Living Rivers submitted additional public comments detailing the continued failure of the TMDL and SED  
18 to comply with CEQA. (AR 9592-9784.) On May 19, 2009, Regional Board Staff publicly circulated a  
19 second set of revisions. (AR 7.) On July 6, Living Rivers again submitted public comments encouraging  
20 changes to the environmental review for, and content of, the TMDL and SED. (AR 9821-10266.)

21 On September 9, 2009, the Regional Board adopted the revised TMDL (AR 4) finding that the SED  
22 in compliance with the State Board's certified regulatory CEQA process. (AR 4.) The Board concedes that  
23 this TMDL will have significant unavoidable impacts. (AR 7.) The Regional Board's agenda packet for its  
24 September 9, 2009 hearing on the TMDL included a Staff Summary Report with appendices including the  
25 Tentative Resolution with Proposed Basin Plan Amendment, Proposed Basin Plan Amendment showing  
26 changes since May 19, 2009, a Staff Report, and a Response to Comments (AR 650-1446) and the  
27 Environmental Checklist prepared pursuant to CEQA. (AR 794 to 817.) The Regional Board then  
28 transmitted the TMDL to the State Board for approval.

29 On August 18, 2010, Living Rivers submitted public comments to the State Board, again detailing  
30 the failure of the Basin Plan Amendment and SED to comply with CEQA. (AR 10349-10388.) The State

1 Board approved the TMDL as adopted by the Regional Board on October 5, 2010. (AR 5.) The final Basin  
2 Plan Amendment, as adopted by the Regional and State Boards, establishes: 1) a sediment TMDL for the  
3 Napa River at 125% of background levels (185,000 metric tons per year); 2) numeric targets for spawning  
4 gravel permeability and the depth of streambed scour; 3) allocations for significant sediment sources; and  
5 4) an implementation plan to achieve the TMDL and related habitat goals. (AR 4.) The Notice of Decision  
6 for the Project was posted on January 6, 2011.

### 7 III. LEGAL FRAMEWORK

#### 8 A. THE BOARD'S LEGAL OBLIGATIONS UNDER THE CLEAN WATER ACT AND 9 PORTER COLOGNE WATER QUALITY ACT.

10 This action raises only CEQA claims, and does not raise any claims under the federal Clean Water  
11 Act ("CWA") and Porter Cologne Water Quality Act. The Court of Appeal decision in *City of Arcadia v.*  
12 *State Water Res. Control Bd.* (2006) 135 Cal.App.4th 1392, 1403-05 provides a good summary of this legal  
13 context, which is incorporated by reference here.

#### 14 B. THE BOARD'S LEGAL OBLIGATIONS UNDER CEQA.

##### 15 1. The Board's Adoption of TMDLs Is a "Certified Regulatory Program" under CEQA.

16 The Board's program for adopting TMDLs is a "certified regulatory program" under section 21080.5  
17 of CEQA. (*City of Arcadia, supra*, 135 Cal.App.4th at pp. 1421-22; Public Resources Code § 21080.5,  
18 CEQA Guidelines at Title 14, Cal. Code Regs. § 15251(g) (hereinafter "CEQA Guidelines.")) Therefore,  
19 the Board must prepare an SED that functions as the equivalent of an Environmental Impact Report ("EIR")  
20 for purposes of complying with CEQA's substantive requirements, though the Board is exempt from the  
21 specific public and agency review and comment procedures applicable to EIRs set forth in Chapters 3 and  
22 4 of CEQA. (Pub. Res. Code § 21080.5; *Sierra Club v. State Board of Forestry, supra*, 7 Cal.4th at 1230;  
23 *Mountain Lion Foundation v. Fish & Game Commission* (1997) 16 Cal.4th 105, 113 (*Mountain Lion*  
24 *Foundation*); 23 Cal. Code Regs. § 3777 [Any water quality control plan must include or be accompanied  
25 by SED and be supported by substantial evidence in the administrative record.] )

26 Except for this limited exemption, CEQA's substantive provisions and policies apply to the Board  
27 and approval of TMDLs. (*Sierra Club, supra*, 7 Cal.4th at 1233; *City of Arcadia, supra*, 135 Cal.App.4th  
28 at pp. 1421-22.) These include general CEQA policies requiring the lead agency to assess environmental  
29 impacts, consider feasible alternatives and mitigation, and to provide the public an adequate opportunity to  
30 review and comment on the information relied on by the agency in making its determination. (*Id.*) Finally,

1 CEQA and the organic statutes governing certified regulatory programs must be harmonized as much as  
2 possible. (*Mountain Lion Foundation, supra*, 16 Cal.4th at p. 122.)

3 **2. CEQA's Requirements That Apply to the SED for this TMDL.**

4 CEQA has two purposes: informed self-government and protection of the environment. (*Woodward*  
5 *Park Homeowners Assn., Inc. v. City of Fresno* (2007) 150 Cal.App.4th 683, 690-691 (*Woodward Park*)  
6 [CEQA's purposes are "to inform the public and decision makers of the consequences of environmental  
7 decisions before those decisions are made" and "to require public agencies to adopt feasible mitigation  
8 measures to lessen the environmental impacts of the projects they approve."].) To achieve these purposes,  
9 CEQA establishes mandatory information disclosure and public participation requirements. (Guidelines, §  
10 15002(a).) CEQA also requires that public agencies must identify and adopt mitigation measures to reduce  
11 or avoid projects' significant impacts to the point where the remaining impacts will be less than significant  
12 or no further mitigation measures are feasible. (Guidelines, § 15021(a).)

13 **a. CEQA's public participation requirements.**

14 Public participation "is an essential part of the CEQA process." (Guidelines, §§ 15002(j), 15201.)  
15 The public holds a privileged position in the CEQA process. (*Concerned Citizens of Costa Mesa v. 32nd*  
16 *District Agricultural Assn.* (1986) 42 Cal.3d 929, 935-936.) "Public review provides the dual purpose of  
17 bolstering the public's confidence in the agency's decision and providing the agency with information from  
18 a variety of experts and sources." (*Schoen v. Cal. Dept. of Forestry and Fire Protection* (1997) 58  
19 Cal.App.4th 556, 574.)

20 The EIR process is the primary means by which a lead agency fulfills CEQA's informed  
21 decisionmaking mandate. As explained by the Court of Appeal in *Protect the Historic Amador Waterways*  
22 *v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1106 (*Amador Waterways*):

23 An environmental impact report is an informational document, the purpose of which is to  
24 provide public agencies and the public in general with detailed information about the effect  
25 which a proposed project is likely to have on the environment; ... [Citation.] The purpose  
26 of an environmental impact report is to identify the significant effects on the environment  
27 of a project, to identify alternatives to the project, and to indicate the manner in which those  
28 significant effects can be mitigated or avoided.

29 (See also Guidelines, §§ 15126.2, 15126.6, 15130 [same].) The Supreme Court has stated that to meet  
30 CEQA's informational requirements, "[a]n EIR must include detail sufficient to enable those who did not  
participate in its preparation to understand and to consider meaningfully the issues raised by the proposed

1 project.” (*Laurel Heights Improvement Assn. v. Regents of the University of California* (1988) 47 Cal.3d  
2 376, 405 (*Laurel Heights I*); see also *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d  
3 692, 712 (*Kings County*) [“An adequate EIR must be ‘prepared with a sufficient degree of analysis to  
4 provide decisionmakers with information which enables them to make a decision which intelligently takes  
5 account of environmental consequences.’”]; Guidelines, § 15151.) Indeed, the Supreme Court has  
6 recognized the EIR as “the heart of CEQA,” explaining that “An EIR is an ‘environmental ‘alarm bell’  
7 whose purpose it is to alert the public and its responsible officials to environmental changes before they have  
8 reached ecological points of no return.... The EIR process protects not only the environment but also  
9 informed self-government.” (*Laurel Heights I, supra*, 47 Cal.3d at p. 392.)

10 The lead agency has a duty to “use its best efforts to find out and disclose all it reasonably can.”  
11 (Guidelines, § 15144; *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*  
12 (2007) 40 Cal.4th 412, 428 (*Vineyard*). Where the lead agency omits relevant information from an EIR,  
13 precluding informed decision-making and/or informed public participation, the omission constitutes a  
14 prejudicial abuse of discretion. (*Kings County, supra*, 221 Cal.App.3d at 712.) “Certification of an EIR  
15 which is legally deficient because it fails to adequately address an issue constitutes a prejudicial abuse of  
16 discretion regardless of whether compliance [with CEQA] would have resulted in a different outcome.”  
17 (*Citizens to Preserve the Ojai v. County of Ventura* (1985) 176 Cal.App.3d 421, 428; see also CEQA, §  
18 21005, subd. (a).)

19 In addition, CEQA’s procedural requirements place the burden on the lead agency – not the public  
20 – to independently ensure the objectivity and informational adequacy of the lead agency’s environmental  
21 documents and analysis. (CEQA, § 21082.1, subd. (c)(1); Guidelines, § 15084(e).

22 **b. CEQA’s environmental protection mandate**

23 CEQA expresses the State’s policy to require governmental agencies to “take all action necessary  
24 to protect, rehabilitate, and enhance the environmental quality of the state.” (CEQA, § 21001, subd. (a).)  
25 CEQA substantively mandates that agencies should not approve projects “if there are feasible alternatives  
26 or ... mitigation measures available” which would substantially lessen the project’s significant  
27 environmental effects. (CEQA, § 21002.) In enacting CEQA, the Legislature sought to establish  
28 “administrative procedures drafted to [e]nsure that the long-term protection of the environment shall be the  
29 guiding criterion in public decisions.” (*No Oil, Inc. v. Los Angeles* (1974) 13 Cal.3d 68, 74 (*No Oil*)  
30

1 [quoting CEQA, § 21001, subd. (d).] “[T]he public agency bears the burden of affirmatively demonstrating  
2 that, notwithstanding a project’s impact on the environment, the agency’s approval of the proposed project  
3 followed meaningful consideration of alternatives and mitigation measures.” (*Mountain Lion Foundation*,  
4 *supra*, 16 Cal.4th at 112, 134.)

5 Based on these principles, the California Supreme Court has held repeatedly that CEQA is “to be  
6 interpreted to afford the fullest possible protection to the environment within the reasonable scope of the  
7 statutory language.” (*Mountain Lion Foundation, supra*, 16 Cal.4th at p. 112; *Laurel Heights I, supra*, 47  
8 Cal.3d at p. 390; *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259 (*Friends of*  
9 *Mammoth*.) The high court has also acknowledged, “[I]t is ... too late to argue for a grudging, miserly  
10 reading of CEQA.” (*Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 274 (*Bozung*)).

11 c. CEQA’s findings requirements.

12 CEQA requires the decisionmaking agency to make one or more of the following findings before  
13 approving a CEQA project: (1) that changes have been made to the project which mitigate or avoid the  
14 identified effects; (2) that such mitigation measures are required but are within the jurisdiction of another  
15 agency; and/or (3) that specific economic, legal, social, technological or other considerations make infeasible  
16 mitigation measures or project alternatives identified in the EIR. (CEQA, § 21081, subds. (a)(1)-(3);  
17 Guidelines, § 15091(a); see also *Protect Our Water v. County of Merced* (2003) 110 Cal.App.4th 362, 371.)

18 The Supreme Court has explained that an agency’s CEQA findings must be supported by “substantial  
19 evidence” to demonstrate that the agency has actually considered the project’s impacts and revealed to the  
20 public the means by which it has arrived at its decisions:

21 The requirement ensures there is evidence of the public agency’s actual consideration of  
22 alternatives and mitigation measures, and reveals to citizens the analytical process by which  
23 the public agency arrived at its decision. [citations.] Under CEQA, the public agency bears  
24 the burden of affirmatively demonstrating that, notwithstanding a project’s impact on the  
25 environment, the agency’s approval of the proposed project followed meaningful  
26 consideration of alternatives and mitigation measures.

27 (*Mountain Lion Foundation, supra*, 16 Cal.4th at p. 134; see also CEQA, § 21081.5.)

28 The Supreme Court has also held that where an agency is required to make evidentiary findings, the  
29 findings must specifically cite the “substantial evidence,” or at least the documents containing such  
30 evidence, that the agency contends supports its findings. (*Environmental Protection & Information Center*  
*v. California Dept. of Forestry & Fire Protection* (2008) 44 Cal.4th 459 (*EPIC*); *Topanga Association for*

1 a *Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506.) In *EPIC*, the Supreme Court stated  
2 that Code of Civil Procedure section 1094.5 “leaves no room for the conclusion that the Legislature would  
3 have been content to have a reviewing court speculate as to the administrative agency’s basis for decision”;  
4 and “mere conclusory findings without reference to the record are inadequate.” (*EPIC, supra*, 44 Cal.4th  
5 at pp. 515, 516.) In *Topanga*, the Supreme Court stated, “Absent such road signs, a reviewing court would  
6 be forced into unguided and resource-consuming explorations; it would have to grope through the record  
7 to determine whether some combination of credible evidentiary items which supported some line of factual  
8 and legal conclusions supported the ultimate order or decision of the agency.” (*Topanga, supra*, 11 Cal.3d  
9 at 516.) Lastly, the burden of identifying substantial evidence to support its decisions is on the lead agency.  
10 (*Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1111.)

11 **C. STANDARD OF REVIEW.**

12 This proceeding is for traditional mandamus under Code of Civil Procedure section 1085 because  
13 the State Board’s approval of the TMDL is a quasi-legislative action. (*City of Arcadia, supra*, 135  
14 Cal.App.4th at p 1408.) In this case, like all CEQA cases, the court reviews the agency’s actions for non-  
15 compliance with CEQA under the “prejudicial abuse of discretion” standard. (*City of Arcadia, supra*, 135  
16 Cal.App.4th at 1408.) Abuse of discretion is established if the agency has not proceeded in a manner  
17 required by law or if the determination or decision is not supported by substantial evidence. (*Id.*; Pub.  
18 Resources Code, § 21168.5.) “Judicial review of these two types of error differs significantly: While we  
19 determine de novo whether the agency has employed the correct procedures, ‘scrupulously enforc[ing] all  
20 legislatively mandated CEQA requirements’ [citation], we accord greater deference to the agency’s  
21 substantive factual conclusions. (*Vineyard, supra*, 40 Cal.4th at 435.)

22 The Court in *Vineyard* also noted that the standard of review in CEQA cases is determined by the  
23 nature of the alleged violation, i.e., whether the violation is a procedural error or an unsupported factual  
24 determination:

25 In evaluating an EIR for CEQA compliance, then, a reviewing court must adjust its scrutiny  
26 to the nature of the alleged defect, depending on whether the claim is predominantly one of  
27 improper procedure or a dispute over the facts. For example, where an agency failed to  
28 require an applicant to provide certain information mandated by CEQA and to include that  
29 information in its environmental analysis, we held the agency “failed to proceed in the  
30 manner prescribed by CEQA.” [citations] In contrast, in a factual dispute over “whether  
adverse effects have been mitigated or could be better mitigated” [citation], the agency’s  
conclusion would be reviewed only for substantial evidence.

(*Id.* at p. 435.)

1 Thus, an allegation that an EIR or EIR equivalent document such as an SED fails to contain required  
2 information is a procedural defect reviewed de novo. Examples include: failure to describe the entire  
3 project;<sup>2</sup> failure to describe the environmental setting;<sup>3</sup> failure to assess the effects of reasonably foreseeable  
4 future activities or expansion of the project;<sup>4</sup> failure to lawfully evaluate cumulative effects;<sup>5</sup> failure to  
5 circulate a cumulative effects evaluation for public review and comment;<sup>6</sup> failure to apply the correct  
6 definition of cumulative effects;<sup>7</sup> using an erroneous threshold of significance;<sup>8</sup> erroneous use of a threshold  
7 of significance;<sup>9</sup> deferral of the development of mitigation measures;<sup>10</sup> and error regarding the legal  
8 feasibility of mitigation measures.<sup>11</sup>

9 Living Rivers' claims in this case arise from the failure of the SED to contain several categories of  
10 information required under CEQA. Therefore, the claims are primarily procedural, and subject to de novo  
11 review. Also, "the existence of substantial evidence supporting the agency's ultimate decision on a disputed

12 \_\_\_\_\_  
13 <sup>2</sup>*Citizens Association for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d  
14 151, 165-166; *Bozung, supra*, 13 Cal.3d at 283-284.

15 <sup>3</sup>*San Joaquin Raptor, supra*, 27 Cal.App.4th at 722-723; *Friends of the Eel River v. Sonoma County Water*  
16 *Agency* (2003) 108 Cal.App.4th 859, 881-882.)

17 <sup>4</sup>*See Laurel Heights I, supra*, 47 Cal.3d at 395-396.

18 <sup>5</sup>*EPIC v. Johnson, supra*, 170 Cal.App.3d at 624-625.

19 <sup>6</sup>*Schoen v. CDF, supra*, 58 Cal.App.4th at p.565.

20 <sup>7</sup>*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1216;  
21 *Communities For a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 114;  
22 *Kings County, supra*, 221 Cal.App.3d at 722; *EPIC v. Johnson* (1985) 170 Cal.App.3d 604, 624-625.

23 <sup>8</sup>*Endangered Habitats League v. County of Orange* (2005) 131 Cal.App.4th 777, 793 ("the use of an  
24 erroneous legal standard is a failure to proceed in the manner required by law that requires reversal.")

25 <sup>9</sup>*Amador Waterways* (2004) 116 Cal.App.4th 1099, 1109; *Mejia v. City of Los Angeles* (2005) 130  
26 Cal.App.4th 322, 342.

27 <sup>10</sup>*Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 90.

28 <sup>11</sup>*City of Marina, supra*, 39 Cal.4th at p.355 (where the Court held that the University of California's  
29 incorrect legal interpretation of article XIII, section 3, subdivision (a) of the California Constitution as  
30 preventing it from contributing public funds to mitigate significant environmental effects of project is subject  
to the *de novo* review.)

1 issue is not relevant when one is assessing a violation of the information disclosure provisions of CEQA.”  
2 (*Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 82 [“CBE”].)

#### 3 IV. ARGUMENT

#### 4 A. THE SUBSTITUTE ENVIRONMENTAL DOCUMENT VIOLATES CEQA WITH 5 RESPECT TO THE ENVIRONMENTAL IMPACTS OF THE PROJECT'S 6 PERFORMANCE STANDARD FOR CONTROLLING SURFACE EROSION.

7 CEQA generally requires that the lead agency must evaluate the environmental impacts of the project  
8 as proposed, as well as any impacts that may be caused by mitigation measures adopted to reduce project  
9 impacts. For TMDLs adopted by the Water Board specifically, the Board must evaluate the environmental  
10 effects of the “means of compliance” specified in any TMDL, including performance standards. (*City of  
11 Arcadia,, supra*, 135 Cal.App.4th at pp. 1424-25.)

12 Here, the TMDL includes a performance standard for controlling surface erosion as part of project  
13 as originally proposed and as finally adopted. (AR 8634, 19.) The TMDL also provides that compliance  
14 with the Napa Conservation Regulations meets this performance standard. (AR 19, n. 5.) The TMDL thus  
15 incorporates Napa County’s program for approving hillside vineyards pursuant to its Conservation  
16 Regulations into its performance standard for controlling surface erosion.

17 The record contains substantial evidence to support a fair argument that this “means of compliance”  
18 (i.e., the surface erosion performance standard) may have significant environmental impacts by causing  
19 increased storm runoff, which leads to increased sediment delivery to the Napa River. Therefore, the Board  
20 was required to conduct an EIR-level evaluation of this issue. (*City of Arcadia,, supra*, 135 Cal.App.4th at  
21 p. 1424 [“Moreover, an EIR is required since the Trash TMDL itself presents substantial evidence of a fair  
22 argument that significant environmental impacts may occur. ‘Because a negative declaration ends  
23 environmental review, the fair argument test provides a low threshold for requiring an EIR.’ [citation]”].)  
24 Despite Living Rivers’ repeated requests to the Regional and State Boards that the SED for this Project  
25 evaluate the potentially significant effects of this program, the SED does not do so.

26 Instead of conducting an EIR-level assessment of the impact of incorporating Napa County’s  
27 program for approving hillside vineyards pursuant to its Conservation Regulations, as is required by CEQA,  
28 the Board simply conceded that its performance standard for controlling surface erosion may have significant  
29 runoff impacts and then adopted a new mitigation measure for that impact, which it found mitigated to “less  
30 than significant.” Therefore, this portion of the SED is akin to a mitigated negative declaration. (See

1 generally *City of Arcadia, supra*, 135 Cal.App.4th at pp. 1423-26.)

2 This mitigation measure consists of a new performance standard for controlling runoff, as follows:  
3 “Effectively attenuate significant increases in storm runoff, so that the runoff from vineyards shall not cause  
4 or contribute to downstream increases in rates of bank or bed erosion.” (AR 8, 19.) Thus, instead of  
5 specifying the measures that would be used to achieve this “attenuation” of increases in runoff or the criteria  
6 by which to judge the “significance” of increases in runoff, the Board opted to defer the development of such  
7 measures and criteria until after project approval and to specify a performance standard now, in violation  
8 of CEQA’s requirements. (See section IV.B below.)

9 **1. The TMDL Incorporates the Napa County Conservation Regulations as a “Means of  
10 Compliance.”**

11 In its June 30, 2006 proposed TMDL, the Regional Board defined its performance standard for  
12 controlling surface erosion to be: “Comply with conservation regulations (County Code; Chapter 18.108)”  
13 (AR 8634.) In its August 15, 2006 letter, Living Rivers submitted detailed evidence that Napa County’s  
14 program of permitting new vineyards pursuant to its Conservation Regulations causes significant sediment  
15 impacts on the Napa River. (AR 8848-8849; Exhibits 7-17 at AR 8928-9051; Exhibits 30-32 at AR 9426-  
16 9442). In its January 16, 2007 Response to Comments (AR Tab 007), the Board responded to Living Rivers’  
17 comments by concurring that increased runoff from vineyard development is causing significant increases  
18 in sediment supply to the Napa River, and suggesting that the Board may adopt a limit on peak flow of 10-  
19 15% increase over pre-vineyard conditions. (AR 516.)

20 But in adopting its January 23, 2007 version of the TMDL, the Regional Board refused to change  
21 its performance standard for controlling surface erosion in any way. (AR 41.)<sup>12</sup> Therefore, in its May 7, 2008  
22 letter to the State Board, Living Rivers reiterated its opposition to this performance standard, concluding  
23 that: “The Staff Report entirely fails to assess the impact of increases in peak flow as a result of the  
24 installation of these engineered drainage facilities.” (AR 9472.)

25 After obtaining the return of the TMDL from the State Board, in its September 5, 2008 proposed

26  
27 <sup>12</sup>The proposed TMDL implementation program regarding sediment discharges associated with vineyards  
28 specifies, in the “actions” section of Table 4.1, the “identification of specific erosion control measures  
29 needed to achieve performance standards ...” (See Resolution R2-2007-0011, Exhibit A, p. 1763.) The Staff  
30 Report and the “Sources and Performance Standards” section of Table 4.1 makes clear that these “erosion  
control measures” include the engineered drainage facilities that Napa County requires, pursuant to its  
Conservation Regulations, on new vineyards on slopes over 5% to reduce surface soil erosion.

1 TMDL, the Regional Board again defined its performance standard for controlling surface erosion to be:  
2 “Comply with conservation regulations (County Code; Chapter 18.108)” (AR 9574.) In its October 20,  
3 2008 letter to the Regional Board, Living Rivers addressed the Board’s legal obligation to assess the impacts  
4 of this measure. (AR 9594 - 9594.) In its May 19, 2009 Response to Comments,<sup>13</sup> the Board responded to  
5 LRC’s comment by taking the position that the TMDL is not “requiring the County Conservation  
6 Regulations, only acknowledging they are in effect” that County Conservation Regulations “do not specify  
7 means of compliance” (AR 629.) Nevertheless, in its May 19, 2009 proposed TMDL, the Regional Board  
8 continued to define its performance standard for controlling surface erosion to be: “Comply with  
9 conservation regulations (County Code; Chapter 18.108)” (AR 9794 (emphasis added).)

10 Therefore, in its July 6, 2009 letter, Living Rivers commented that: “This response defies the  
11 language of the TMDL and the facts on the ground in Napa County....Also, the fact that the County  
12 Conservation Regulations “do not specify means of compliance” is immaterial. At this point, the ‘means  
13 of compliance’ are a matter of readily available historical record.” (AR 9824.)

14 On September 9, 2009, after having withdrawn the TMDL from State Board consideration, the  
15 Regional Board again considered the TMDL. (AR 8245.) In its September 9, 2009 Response to Comments,  
16 the Regional Board responded to Living Rivers’ comment by changing the language of the performance  
17 standard for controlling surface erosion, stating:

18 In order to avoid further confusion with regard to the comment that we are requiring  
19 compliance with the County Conservation Regulations (Napa County Code, Chapter 18.108),  
20 we have edited Table 4.1 to clarify that we only are acknowledging the existence of this local  
21 regulatory program and its effectiveness with regard to control of sediment delivery to  
22 channels from vineyard surface erosion.

23 (AR 874.)

24 At its September 9, 2009 hearing, the Regional Board re-adopted the TMDL and sent it on to the  
25 State Board for approval with amendments to Table 4.1 that replaced this text: “Comply with conservation  
26 regulations (County Code; Chapter 18.108)” and with this text “Control excessive rates of sediment delivery  
27 to channels resulting from vineyards;” and added new footnote 5 stating: “Napa County Conservation  
28 Regulations (County Code, Chapter 18.108) are effective in the control of excessive rates of sediment  
29 delivery resulting from vineyard surface erosion.” (AR 875; AR 31 [Regional Board resolution adopting

30 <sup>13</sup>“Staff responses to written comments submitted in response to September 5, 2008, Staff Report and  
proposed Basin Plan amendment” starting at AR 604.

1 the TMDL and forwarding it to the State Board for consideration], 41 [TMDL Table 4.1 as adopted by the  
2 Regional Board and forwarded to the State Board for consideration], 8306 [transcript of September 9, 2009  
3 hearing in which the Regional Board adopted the TMDL].)

4 Living Rivers' August 18, 2010 letter to the State Board (which again included expert studies (AR  
5 10349-10388), again argued that the SED must evaluate the environmental effects of the TMDL's  
6 incorporation of Napa County's program for approving new hillside vineyards pursuant to its Conservation  
7 Regulations into its performance standard for controlling surface erosion (AR 10350).

8 With respect to incorporating the Napa County Conservation Regulations for purposes of the  
9 performance standard for controlling surface erosion, the State Board's final version of the TMDL, in its  
10 October 5, 2010 Resolution, remained unchanged, stating "Control excessive rates of sediment delivery to  
11 channels resulting from vineyards[,]" with a footnote stating: "Napa County Conservation Regulations  
12 (County Code, Chapter 18.108) are effective in the control of excessive rates of sediment delivery resulting  
13 from vineyard surface erosion." (AR 19, Table 4.1.)

14 In its October 1, 2010 response to comments, the State Board stated that "The TMDL does not adopt  
15 the program as a performance standard or as a mitigation measure for the TMDL; it simply acknowledges  
16 the existence of the program as one program that may be helpful for achieving the TMDL." (AR 1743-44.)

17 The Board's position that this does not require "compliance" with Napa's Conservation Regulations  
18 is wrong for several reasons. First, deleting the word "compliance" is meaningless because the footnote  
19 recognizes that "compliance" with Napa's Conservation Regulations equals compliance with the surface  
20 erosion performance standard. Also, the Board's interpretation renders the text of footnote 5 entirely  
21 meaningless, violating "the 'cardinal rule of statutory construction' to give effect to all words and provisions  
22 of a statute and leave no part superfluous or inoperative." (*Leavitt v. County of Madera* (2004) 123  
23 Cal.App.4th 1502, 1519.) Finally, the Staff Report prepared for the Board's final hearing on October 5,  
24 2010 confirmed Living Rivers' understanding of footnote 5 of BPA Table 4.1, stating: "The Basin Plan  
25 amendment relies on landowner compliance with Napa County's Conservation Regulations to achieve  
26 sediment allocations for vineyard surface erosion." (AR 1780.)

27 **2. Substantial Evidence Supports a Fair Argument That Napa County's Implementation**  
28 **of its Conservation Regulations May Cause Significant Environmental Harm; So an**  
29 **EIR-level Assessment of this Impact Is Required.**

30 The record contains substantial evidence supporting a fair argument that Napa County's program for  
approving vineyards under its Conservation Regulations may cause significant environmental harm.

1 Therefore, CEQA requires an EIR level assessment of the TMDL's adoption of this standard. (*City of*  
2 *Arcadia, supra*, 135 Cal.App.4th at p. 1424.) . . . . .

3 Over the last 10 years, the Sierra Club and later Earth Defense for the Environment Now ("EDEN")  
4 have repeatedly demonstrated, both to Napa County and more recently to the Regional and State Boards in  
5 connection with this TMDL, that implementing projects in compliance with the Napa County Conservation  
6 Regulations may have significant, adverse impacts on the environment. The principal mechanism causing  
7 this harm is the installation of engineered drainage facilities to reduce surface erosion. These facilities have  
8 the unintended consequence of routing rainfall off the site more efficiently, thereby increasing the amount  
9 of downstream runoff. The increased runoff, in turn, causes downcutting of the stream beds (also known  
10 as channel incision) which both directly moves more sediment downstream, and which causes stream banks  
11 to collapse and add their sediments to the stream flow as well. (AR 8848-49.) . . . . .

12 These organizations retained the services of experts in the field, Dr. Robert Curry, Dennis Jackson  
13 and Patrick Higgins, to comment on a number of vineyard conversion projects in the Napa River watershed  
14 and the Erosion Control Plans ("ECPs") prepared by vineyard owners pursuant to the Napa County  
15 Conservation Regulations.<sup>14</sup> (See, e.g., AR 8829-9043, 9427-9442.) Those experts consistently found that  
16 the ECPs do not accurately evaluate or adequately mitigate impacts associated with increases in runoff from  
17 the changes in land use attendant to vineyard conversions. (*Id.*) Again, the problem is that the focus of the  
18 Erosion Control Plans used in the Napa County program is to reduce surface erosion, and the methods used  
19 to do so, including cross-slope ditches, drop inlets and underground pipes, concentrate and rout rainfall off  
20 of the property as quickly as possible before it can erode the surface. (See AR 10351-52.) The result is to  
21 *increase* runoff and peak discharge, causing channel incision, which causes destabilization of stream and  
22 river banks which then collapse and contribute additional sediment to the streams system. (*Id.*) This in turn  
23 lowers stream and river beds, separating the channels from their natural flood plain, which has many diverse  
24 and well-documented negative impacts on the riparian environment. (AR 710-711.)

25 Indeed, both Dr. Curry and Mr. Jackson have consistently found that the Erosion Control Plans and  
26 facilities for new vineyards under the Napa County Conservation Regulations do not accurately evaluate or  
27 adequately mitigate significant impacts associated with increases in runoff from vineyard projects. (See AR  
28  
29

30 <sup>14</sup>For the expert credentials of Dr. Robert Curry, Dennis Jackson and Patrick Higgins, see AR 8871-745  
(Curry), 8897-8900 (Jackson), and 8924-27 (Higgins).

1 8928-9051, 9426-9442 [Living Rivers August 15, 2006 comment letter].)

2 As explained by Dr. Curry in his review of the Conservation Regulations in 2000:

3 “The approach of the Napa County ordinances is fundamentally incorrect and cannot  
4 protect either public health and safety or long-term land productivity. The existing  
5 ordinances seem to assume that by attempting to capture sediments from upland  
6 vineyard conversion areas, downstream cumulative effects are reduced to  
7 insignificance. This is not correct. Increased upland sediment yields, while  
8 important, are less hazardous to Napa Valley than are the changes in runoff timing,  
9 volumes, and rates. Increased runoff does have cumulative downstream effects  
through changes in rates of runoff and frequency of runoff events of a given  
magnitude. These changes are likely to be a significant factor in changing sediment  
loads in the main Napa River through changes in stability of its side tributaries.”

10 (AR 8930.) In response to this comment by Dr. Curry, the Regional Board expressed no disagreement,  
11 concurring that increased runoff from vineyard development is causing significant increases in sediment  
12 supply to the Napa River. (AR 516.) Indeed, the contribution to increased runoff from the installation of  
13 engineered drainage facilities designed to bring new vineyards into compliance with the Napa County  
14 Conservation Regulations is cumulatively significant. As explained by Dr. Curry:

15 “The recommended structural drainage facilities such as culverts, lined ditches, and  
16 drainage facilities such as culverts, lined ditches, and drainage channels as applied  
17 over large areas of Napa Valley will reduce sediment input from uplands but will  
18 exacerbate off-site channel and stream-bed erosion through increased yield of  
19 runoff. The public and the fish in the Napa River are directly impacted by the  
cumulative downstream impacts of increased frequency and duration of flood flows  
in the main river and its primary tributaries.”

20 (AR 9565.)

21 At the September 9, 2009 Regional Board hearing on this TMDL, Mike Napolitano, Environmental  
22 Scientist with the Regional Board, testified to seeing projects approved under the Conservation Regulations  
23 that had caused environmental harm due to increased runoff, stating: “In some cases, the methods that have  
24 been used have definitely increased the flow of runoff off-site and have lead to local gully[ing] at the site  
25 of discharge, and we have noted that as a significant source in our sediment budget analysis.” (AR 8283)  
26 Similarly, at the October 5, 2010 hearing in which the State Board approved the TMDL, Joe Dillon of the  
27 National Marine Fisheries Service testified that he had seen vineyards that had negative runoff impacts  
28 despite having complied with the Conservation Regulations. (AR 8035.)

29 The Board’s Substitute Environmental Document unlawfully fails to assess and identify these  
30 potentially significant adverse impacts for the same reasons found by the court in *City of Arcadia, supra*.

1 In that case, the Court found that the environmental document prepared by the Board failed to assess the  
2 environmental impacts of the means of compliance with the Trash TMDL at issue there, holding that  
3 “substantial evidence raises a fair argument the Trash TMDL may have significant impacts on the  
4 environment.” (135 Cal.App.4th at pp. 1421-22.)

5 **3. The SED Fails to Lawfully Evaluate the Cumulative Effects of the TMDL’s**  
6 **Incorporation of the Napa County Conservation Regulations.**

7 “Cumulative effects” are “the incremental impact of the project when added to other closely related  
8 past, present, and reasonably foreseeable probable future projects. (Guidelines § 15355.) The CEQA  
9 Guidelines provide:

10 An EIR must be prepared if the cumulative impact may be significant and the project’s  
11 incremental effect, though individually limited, is cumulatively considerable. “Cumulatively  
12 considerable” means that the incremental effects of an individual project are considerable...  
13 when viewed in connection with the effects of past projects, the effects of other current  
14 projects, and the effects of probable future projects.

13 (Guidelines § 15064(i)(1); *see also* CEQA Guidelines § 15065(c).

14 EIRs/SEDs must evaluate the Project’s cumulative impacts:

15 “Cumulative impacts” refer to two or more individual effects which, when considered  
16 together, are considerable or which compound or increase other environmental impacts. (a)  
17 The individual effects may be changes resulting from a single project or a number of separate  
18 projects. (b) The cumulative impact from several projects is the change in the environment  
19 which results from the incremental impact of the project when added to other closely related  
20 past, present, and reasonably foreseeable probable future projects. Cumulative impacts can  
21 result from individually minor but collectively significant projects taking place over a period  
22 of time.

21 (Guidelines § 15355.) The significance of a cumulative impact depends on the environmental setting in  
22 which it occurs, especially including the severity of existing environmental harm. (*Communities for a Better*  
23 *Environment v. California Resources Agency* (“*Communities*”) (2002) 103 Cal.App.4th 98, 120 [“[T]he  
24 relevant question”... is not how the effect of the project at issue compares to the preexisting cumulative  
25 effect, but whether “any additional amount” of effect should be considered significant in the context of the  
26 existing cumulative effect. [footnote omitted] In the end, the greater the existing environmental problems  
27 are, the lower the threshold should be for treating a project’s contribution to cumulative impacts as  
28 significant. [footnote omitted]”]; *Kings County, supra*, 221 Cal. App. 3d at 720-721.)

29 Whether viewed as a failure of this “Mitigated Negative Declaration-level” SED to present an “EIR-  
30 level” assessment of the TMDL’s cumulative effects, or as a failure of the SED, as an EIR-level

1 environmental document, to include in its cumulative impact assessment Napa County's program for  
2 approving hillside vineyards under its Conservation Regulations or the many vineyard projects in that  
3 program, the SED fails as an informational document under CEQA.

4 Here, the SED fails to assess the incremental runoff increasing impact of this TMDL's adoption of  
5 the Conservation Regulations with two types of other projects: (1) the Napa County program for approving  
6 vineyards under its Conservation Regulations as well as the many vineyard projects approved and to be  
7 approved thereunder; and (2) the many projects that increase sediment concentrations in the Napa River by  
8 reducing stream flows, either from surface water diversions or groundwater withdrawals.

9 As explained in Living Rivers' August 15, 2006 comment letter, CEQA requires that the Board  
10 consider the cumulative effects of the project in combination with other closely related projects (AR 8854)  
11 and the SED fails to consider many aspects of the hydrologic regime in the Napa River watershed, and the  
12 changes in land use that are responsible for this hydrologic regime (AR 8907). Specifically, expert Patrick  
13 Higgins explained:

14 "The Napa River TMDL fails to recognize cumulative watershed effects (CWE) with respect  
15 to 1) increased peak flow associated with land management and its relationship to channel  
16 incision and 2) the sediment effects of new hillside vineyards and roads despite mitigation  
17 measures proposed, erosion control and use of Best Management Practices (BMPs). The  
18 *Proposed Basin Plan Amendment* (SFR WQCB, 2006) fails to meet the requirements of the  
California Environmental Quality Act because it fails to properly describe and prevent  
cumulative watershed effects."

19 (AR 8907.) Mr. Higgins detailed that numerous types of development activity, such as increased road  
20 density and hillside development, negatively impact sedimentation and peak flows in the Napa River  
21 watershed. (AR 8907-08.)

22 In its January 2007 Response to Comments, the Regional Board dismissed Living Rivers' request  
23 that it assess such cumulative impacts, stating "We know of no projects that in combination with this project  
24 would result in significant cumulative effects to the environment. ... Please keep in mind that the Water  
25 Board is not a land-use planning agency and we are not in a position to prohibit urban or vineyard  
26 development as suggested in [Mr. Higgins' letter]." (AR 526.)

27 Living Rivers notes that this response is both factually and legally wrong. This TMDL commits the  
28 Water Board to being a "land-use planning agency" because the TMDL will be implemented through the  
29 Report of Waste Discharge permit requirements administered by the Regional Board under the Water Code.  
30 (AR 19, 20, 21, 22.) Also, CEQA is not concerned with whether or to what extent the agency can entirely

1 prohibit particular land uses; it is concerned with the evaluation and disclosure of environmental effects.

2 Living Rivers' May 7, 2008 comment letter again raises these issues:

3 The comment letters by Curry, Jackson and Higgins provide detailed analyses of a number  
4 of mechanisms by which human activity adversely effects the beneficial uses of water in the  
5 Napa River watershed. Many of these mechanisms are directly related to sediment-caused  
6 impacts. These include, without limitation, increases in peak flows that increase downstream  
7 sedimentation by causing channel incision and bank failures; trapping of coarse sediment  
8 behind and passing fine sediments through dams; reductions in stream flow by  
9 impoundments and diversions, both legal and illegal; groundwater withdrawals from stream  
10 channel underflow, which exacerbates low flow effects of sediment deposition in channels  
11 and many others.

12 (AR 9473.)

13 **a. The SED fails to assess the cumulative effects of the TMDL in combination with**  
14 **Napa County's approval of vineyards.**

15 Living Rivers' October 20, 2008 letter urged the analysis of cumulative impacts, stating: "The  
16 Environmental Checklist's cumulative impacts analysis includes only four other projects: 'a) The Napa River  
17 Flood Control Project; b) The Saint Helena Flood Control Project; c) The Napa Salt Marsh Restoration  
18 Project; and d) The Upper York Creek Dam fish passage restoration project.' ... The omission of the ECP  
19 program, which consists of numerous past, present and reasonably foreseeable future projects (including  
20 open projects at this time such as Stagecoach, Rogers, Abbot and Abreu) from the cumulative impacts  
21 section is an unfortunate example of trying to ignore the elephant in the room." (AR 9594.)

22 The Regional Board's May 19, 2009 staff report attempted to disclaim any responsibility to analyze  
23 the effects of particular ECPs by stating "[w]ithout the details of specific compliance projects, it is  
24 impossible to determine the scope and extent of such impacts." (AR 6814.) However, Living Rivers  
25 submitted to the Board Dr. Curry's and Mr. Jackson's comments on numerous Erosion Control Plans  
26 ("ECPs") and a number of the actual ECPs on which they had commented. (AR 8928-9051, 9426-9442  
27 [Exhibits 7 - 16 and 30-32 to August 15, 2006 comment letter]; 9597-9747 [Exhibits 1-8 to October 20,  
28 2008 Living Rivers comment letter]; 10165-10266 [Exhibits 9-14 to Living Rivers July 6, 2009 comment  
29 letter].) The comments and ECPs provide great detail regarding the nature and extent of engineered drainage  
30 facilities that are typically used to comply with the Conservation Regulations, including cross drains,  
terracing, drop inlets, underground culverts, energy dissipators, etc. Moreover, a day trip to the Napa County  
Planning Department would provide Board staff with access to files the many hundreds of ECPs approved  
for vineyard conversion projects since the program began in 1991. (AR 9594.) The Board could also access

1 County enforcement records or do its own effectiveness monitoring on past ECPs as part of its EIR level  
2 analysis of the environmental effects of the ECP program performance standard. (AR 9595.) In short, there  
3 is a wealth of factual evidence which the Board can use to perform an environmental evaluation of using  
4 compliance with Napa County's program as a means of compliance for this TMDL. Thus, the Board did  
5 not "use its best efforts to find out and disclose all it reasonably can." (Guidelines, §§ 15144; 14145.)

6 Moreover, even for the four identified projects, the September 2008 Environmental Checklist  
7 provided no useful information regarding how their effects will combine with the effects of TMDL  
8 implementation, but rather simply said "we have considered" the four projects. (AR 6814.) The September  
9 2009 Environmental Checklist similarly dismisses the potential impacts of those four projects, stating "[o]f  
10 the above listed projects, only vineyard development may have a significant impact on sensitive natural  
11 communities that may experience significant impacts from Basin Plan compliance actions." (AR 833.) What  
12 information that consideration brought to light is not disclosed. CEQA requires more.

13 **b. The SED fails to assess the cumulative effects of the TMDL in combination with**  
14 **groundwater extraction activities and surface water diversions.**

15 Living Rivers' consultants' reports submitted with its October, 2008 comment letter detail other  
16 cumulative impacts that the Regional Board failed to consider or analyze. For example, Dennis Jackson  
17 explained that "[s]urface water diversions, groundwater pumping and the process of channel incision can  
18 all decrease the flow in the Napa River and its tributaries [and therefore] should be considered under the  
19 cumulative impact discussion of the CEQA analysis for the sediment TMDL." (AR 9477-78.) In addition,  
20 Mr. Jackson explains why groundwater management is essential to the primary purpose of the TMDL, i.e.,  
21 protecting and enhancing habitat for steelhead and salmon in the Napa River watershed. Mr. Jackson  
22 observed that groundwater pumping may lower the water table, reducing flow in the Napa River and its  
23 tributaries; indeed domestic and municipal diversions "take substantial amounts from the Napa River  
24 drainage. As a result, the cumulative, unregulated demand for water is so great it appears possible for even  
25 winter flows to be entirely diverted in some years." (AR 9478.) Yet "the environmental factor most  
26 important to the successful completion of the steelhead life cycle is sufficient water flow. Sufficient flow  
27 is needed for steelhead to ascend the river to their spawning grounds; sufficient flow is needed over the  
28 spawning gravels for completion of the spawning act; sufficient flow is needed to provide oxygen to the eggs  
29 and fry in the gravel; sufficient flow is needed for the downstream migration of both adults and juveniles  
30 to the ocean. Most critical of these needs in the Napa River at the present time is sufficient flow for the

1 upstream spawning migration and the maintenance of nursery habitat in the summer and fall.” (AR 9477.)  
2 Therefore, Mr. Jackson states, “[n]ear-stream wells should be examined to determine if they are impacting  
3 streamflow either by directly tapping the underflow of a stream or by contributing to lowering the water  
4 table.” (AR 9478.)

5 Fisheries biologist Patrick Higgins documented the “major cumulative effects contributions from  
6 legal and illegal diversions that also compound sedimentation problems” (AR 9512) and that analysis and  
7 monitoring of groundwater extraction is essential to the TMDL:

8 For the Napa Sediment TMDL to credibly deal with flow issues, it should have more  
9 explicitly acknowledged the likely relationship between ground water extraction and lack of  
10 surface flow and specifically called for groundwater monitoring. Stillwater and Dietrich  
11 (2002) note that CDFG staff in the Napa River basin believe that increasing use of  
12 groundwater is depleting surface flows and reducing steelhead passage and rearing habitat.  
13 Withdrawal of water from the aquifer can lower the groundwater levels and decrease water  
14 available to riparian trees. The TMDL objective of restoring native riparian zones to help  
15 prevent channel incision could be confounded, if groundwater pumping retards riparian  
16 restoration.

17 (AR 8914-15.) Dr. Curry similarly explained: “if local groundwater levels are drawn down below the level  
18 of the bed of the Napa River or its valley-floor tributaries, as is commonly the case, then even a zero percent  
19 change in pre-project [peak flow] conditions may be too much to prevent further erosion of unvegetated  
20 channel banks. Preexisting legacy conditions make channels more susceptible to erosion than they were in  
21 pre-development times.” (AR 9750.) Moreover, he explained, the problem with focusing exclusively on one  
22 water quality issue, as the Boards do in failing to address project alternatives such as regulating groundwater  
23 diversions, is that “the effects are additive and groundwater withdrawal, paving and urbanization, stream  
24 incision due to past storm-flow changes and dams on tributaries, loss of riparian protection, etc., etc. all are  
25 cumulative. Hydrologically, you can’t change only one thing.” (AR 9751.)

26 Regional Board staff responded, in their August 2009 Response to Comments, by stating:  
27 with regard to the concern that near-stream wells need to be examined to determine if they  
28 are affecting streamflow, please note that as a condition of the WDR waivers, staff will  
29 propose that the Water Board require compliance with all water rights laws in order to obtain  
30 coverage. We also are open to receiving additional input regarding analytical approaches that  
could be used to determine whether well pumping affects streamflow.

(AR 924.) Moreover, in that same Response to Comments, the Regional Board conceded that:

it is reasonable to hypothesize that groundwater pumping (or a decline in recharge) may  
contribute to widespread decline in baseflow persistence and magnitude in the Napa River

1 and the lower reaches of its tributaries. Given the potential significance of groundwater  
2 pumping with regard to fisheries conservation, we strongly support review of all available  
3 information and follow up studies to provide a basis for confirming or rejecting this  
4 hypothesis. ... [But n]ote that the State and Regional Water Boards have limited authority to  
regulate groundwater pumping ....

5 (AR 880.)

6 While the Boards acknowledged that they have the power to use alternative regulatory authorities  
7 to achieve the water quality standards the TMDL is intended to achieve (AR 496), nowhere does the SED  
8 undertake any assessment of the impact of increasing sedimentation by increasing peak storm runoff and  
9 reducing in combination with reduced stream flow from surface water diversions and groundwater pumping.

10 Moreover, as Living Rivers argued in its comments, the Regional Board's response that the Basin  
11 Plan cannot include groundwater standards because of the Board's limited authority is "non-responsive and  
12 misses the crucial point" because the TMDL establishes the Board's authority to require a WDR permit for  
13 any change in land use that will result in the discharge of sediment to the Napa River. No project proponent  
14 has a ministerial right to a WDR in these circumstances. Thus, where a project requiring a WDR includes  
15 groundwater extraction, and such extraction will cause or exacerbate sediment impacts on the Napa River,  
16 the Board has the authority require compliance with standards that will mitigate such groundwater extraction  
17 impacts. (See AR 10357-58.) In any case, the Boards' acknowledgment that it might, in the future, pursue  
18 an alternative regulatory strategy or its protest that it has limited authority over groundwater does not obviate  
19 its current obligation under CEQA to disclose impacts now.

20 Living Rivers' August 18, 2010 comments to the State Board raised the issue, once again, of the  
21 TMDL's failure to assess and mitigate *all* impacts on sediment-related water quality in the Napa River  
22 watershed, including, for example, analysis of existing impoundments and reservoirs which function as  
23 impervious surfaces, once filled, and therefore contribute to runoff, or groundwater withdrawals that reduce  
24 base stream flows, as documented by hydrologist Dennis Jackson. (AR 10357, 10169, 10176-10183.)

25 The State Board failed to respond with any specificity, simply stating: "The impacts that may result  
26 from the SF Bay Water Board's TMDL are those impacts associated with the construction or operation of  
27 compliance measures, not the discharges that will result from the land use decisions themselves. The Water  
28 Boards are not allowing or permitting vineyard conversions; the TMDL instructs that if discharges do result  
29 from such decisions they must be result in compliance with water quality standards." (AR 1753.)

30 This response is wide of the mark because the "impacts associated with the construction or operation

1 of compliance measures” and the “the discharges that will result from the land use decisions themselves”  
2 are not distinguishable. Because the TMDL establishes that compliance with Napa County’s program for  
3 approving hillside vineyards meets the TMDL’s requirements for control of surface erosion, the “discharges  
4 that will result from the land use decisions,” i.e., increased runoff with consequent additional delivery of  
5 sediment, are the “impacts associated with the construction or operation of compliance measures.”

6 **B. THE SUBSTITUTE ENVIRONMENTAL DOCUMENT VIOLATES CEQA BY FAILING**  
7 **TO DESCRIBE THE PROJECT’S PERFORMANCE STANDARD FOR CONTROLLING**  
8 **INCREASES IN RUNOFF.**

9 The SED must describe and evaluate the impacts of the “whole” of the project. *County of Inyo v. City*  
10 *of L.A.* (1981) 124 Cal.App.3d 1, 9 (*County of Inyo II*) [“[An] accurate, stable and finite project description  
11 is the sine qua non of an informative and legally sufficient EIR;” *Kings County, supra*, 221 Cal.App.3d at  
12 738.) “A curtailed or distorted project description may stultify the objectives of the reporting process.”  
13 (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 192-193 (*County of Inyo I*.) Where a  
14 project’s environmental review documents do not accurately describe the entire project, the “truncated  
15 project concept” results in a “fallacy of division,” which causes the environmental review to overlook the  
16 project’s “cumulative impact by separately focusing on isolated parts of the whole.” (*San Joaquin*  
17 *Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 729-730 (*San Joaquin*  
18 *Raptor*.)

19 With respect to the new mitigation measure/performance standard for controlling runoff  
20 (i.e., “Effectively attenuate significant increases in storm runoff, so that the runoff from vineyards shall not  
21 cause or contribute to downstream increases in rates of bank or bed erosion” (AR 19)), the SED fails to  
22 describe the measure and illegally defers the identification of how it will be achieved until after project  
23 approval. The general rule is that where a project will have significant environmental effects, the EIR may  
24 not rely on mitigation measures to be developed after project approval except in the limited circumstances  
25 where (1) the mitigation measures require compliance with other existing regulatory requirements; or (2)  
26 “[F]or kinds of impacts for which mitigation is known to be feasible, but where practical considerations  
27 prohibit devising such measures early in the planning process . . . , the agency can commit itself to eventually  
28 devising measures that will satisfy specific performance criteria articulated at the time of project approval.”  
29 ((*Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359; 1393-96 (*Gentry*) (emphasis added).) There must  
30 also be evidence supporting a conclusion that the use of a performance standard will be feasible and effective

1 in reducing significant impacts. (*CBE, supra*, 184 Cal.App.4th 70, 95; *Sacramento Old City Ass'n v. City*  
2 *Council of Sacramento* (1991) 229 Cal.App.3d 1011; *Sundstrom v. County of Mendocino* (1988) 202  
3 Cal.App.3d 296, 308-309 (*Sundstrom*)). No such showing has been made here.

4 Reliance on tentative plans for future mitigation after completion of the CEQA process significantly  
5 undermines CEQA's goals of full disclosure and informed decisionmaking....” (*CBE, supra*, 184  
6 Cal.App.4th at p. 92.) For this reason, courts routinely overturn EIRs that place the onus of mitigation on  
7 a future plan, leaving the public “in the dark about what [] steps will be taken, or what specific criteria or  
8 performance standard will be met...” (*Id.* at p. 93.) For instance, in *CBE*, the court overturned an EIR that  
9 merely proposed a generalized goal of mitigation and then set out a handful of “cursorily described  
10 mitigation measures for future consideration that might serve to mitigate” the project’s impacts. (*Id.* at p.  
11 92.) This SED suffers from the same deficiency with respect to the performance standard adopted to  
12 mitigate the runoff increase impacts of the performance standard for surface erosion.

13 The Board concedes the performance standard set forth in Table 4.1 of the BPA to “Effectively  
14 attenuate significant increases in storm runoff” is a mitigation measure to reduce the project’s potentially  
15 significant effect of altering drainage patterns and hydrology (i.e., increases in runoff) caused by its surface  
16 erosion performance standard, stating in the first paragraph of Board Resolution 2010-0047:

17 Although the proposed project has the potential to alter drainage patterns and otherwise  
18 affect hydrology, changes have been incorporated into the project in the form of a  
19 performance standard to effectively attenuate significant increases in storm runoff to lessen  
any environmental effects to less than significant levels.”

20 (AR 2.) See also AR 1519 [“August 2, 2009 Response to Comments: “To avoid and minimize potential  
21 adverse impacts of compliance actions, we have added mitigation measures including performance standards  
22 for vineyard stormwater runoff quantity...”]; The Board’s Environmental Checklist makes this point  
23 expressly, stating: Therefore, the Basin Plan amendment would not increase the rate or amount of runoff,  
24 exceed the capacity of storm water drainage systems, or degrade water quality, and the impact is less than  
25 significant with mitigation incorporation. (AR 833-834 (emphasis added).)

26 However, from its inception the TMDL has been fatally vague with respect to both the criteria for  
27 determining the “significance” of increases in surface runoff and the measures that will be used to attenuate  
28 these increases to less than significant levels. The June 2006 version of the TMDL did not propose any  
29 limits on increases in peak flows as a result of changes in land use. (See AR 8634.) In its August 15, 2006  
30 letter, Living Rivers noted the importance of committing to such limits (AR 8849) and provided the

1 Regional Board with expert analysis with respect to this issue (AR 8910-8911).

2 In its January 2007 Response to Comments, the Regional Board expressed its intention to adopt a  
3 limitation on peak runoff from vineyard conversions at approximately 10-15% above pre-vineyard  
4 conditions. (AR 516.) The Regional Board also stated in response to comments that it revised the project  
5 description, yet the revised project description does nothing to address or cure the deficiently vague  
6 performance standard for runoff. (AR 577-578.) Then, on September 5, 2008 the Regional Board circulated  
7 a revised TMDL/Basin Plan Amendment (AR 9566-9584), which added the performance standard for runoff  
8 from vineyards, stating: "Effectively attenuate significant increases in storm runoff. Runoff from vineyards  
9 shall not cause or contribute to downstream increases in rates of bank or bed erosion." (AR 9574.) The  
10 September 5, 2008 Staff Report indicated that the Board might adopt a criterion for whether peak flow  
11 increases are deemed "significant," of 10-15% above pre-project rate, a number derived from the Fish  
12 Friendly Farming Program. (AR 6770.) In its October 20, 2008 letter, Living Rivers objected to this  
13 criterion for several reasons: (1) it does not account for the changes in the watershed's peak flow response  
14 to storm events that result from the cumulative effects of past, closely related projects; (2) it does not  
15 account for past peak flow impacts having made many of the stream beds and banks in the Napa River  
16 drainage more sensitive to further damage; and (3) other variables, such as riparian vegetation, depth of  
17 channel incision, and duration of storm flows would have to remain at pre-project levels to allow tolerance  
18 for a 15% increase in storm flood runoff without further damage, yet for all of those conditions, the baseline  
19 is changing and the effects are additive to other causes of increased peak flows such as groundwater  
20 withdrawal, paving and urbanization, etc. (AR 9592-9593.)

21 Again on May 19, 2009, the Regional Board circulated a revised TMDL. (AR 9785-9804.) With  
22 respect to the measures to "effectively attenuate significant increases in runoff", the TMDL remained  
23 unchanged and still fatally vague. (AR 9794.) The May 2009 revision of the TMDL deleted reference to the  
24 Fish Friendly Farming Program as being "effective with regard to control of pollutant discharges associated  
25 with vineyards," but maintained reference to implementation of a "farm plan certified under Fish Friendly  
26 Farming Environmental Certification Program or other farm plan certification program" as an "Action"  
27 option. (AR 9794.) Moreover, the May 2009 Staff Report maintained the same indication that the Regional  
28 Board might be prepared to accept a 10-15% above pre-project rate for peak storm runoff as criterion for  
29 whether peak flow increases are deemed significant. (AR 6923.) Living Rivers continued to object to the  
30 vague performance standard and to the 10-15% above pre-project rate criterion in its July 6, 2009 comment

1 letter. (AR 9823.) In addition, during the September 2009 Regional Board hearing on the Project, counsel  
2 for Living Rivers objected to the lack of any description of criteria or process to achieve the performance  
3 standard for attenuating significant increases in runoff, noting that this work has been deferred to a later time  
4 when the Waste Discharge Requirement waiver policy, discussed in section IV.C below, is developed. (AR  
5 8271:9-11 ; 8274:16-8275:3.)

6 In its September 9, 2009 Response to Comments the Regional Board admits that the TMDL does  
7 not include any definition of or threshold of significance for the terms contained in this performance  
8 standard, stating: “we have not reached a decision yet on numeric expression of the vineyard storm runoff  
9 performance standard (e.g., effectively attenuate significant increases in storm runoff) listed in Table 4.1 of  
10 the Basin Plan amendment.” (AR 1463.)

11 In its August 18, 2010 comment letter to the State Board, Living Rivers’ continued to object, stating:  
12 “critical information is not provided. No detail is provided as to what criteria or thresholds will be used to  
13 identify significant vs less-than significant increases. No information is provided regarding how baseline  
14 runoff will be determined. How the TMDL will control increases in runoff is a black box that is entirely  
15 dependent on the WDR waiver policy....” (AR 10351, 10355-56.)

16 The State Board’s response to Living Rivers’ concern was dismissive, inconsistent and untrue. The  
17 State Board dismissed Living Rivers’ concern, stating: “The County’s program is not a mitigation measure  
18 for the TMDL; as such, requiring the attenuation of significant increases in storm runoff describes one  
19 objective of the TMDL; not a way to mitigate the impacts of the TMDL.” (AR 1745.) As shown above,  
20 however, this is simply untrue; the performance standard is a measure to mitigate the impacts of the TMDL.

21 The State Board also argued that an adequate project description is not necessary in the TMDL  
22 because it did not receive project-level review; “A deferred analysis is not comparable with the SF Bay  
23 Water Board’s tiered approach to environmental review – from plan level, to general permit or waiver of  
24 WDRs, to project specific environmental review.” (AR 1752.) But the Board cannot just decide to violate  
25 CEQA’s requirements.

26 Finally, the State Board argued that the performance standard is specific and enforceable, and  
27 proceeded to describe a process for determining the significance of runoff increases in the field, stating:

28 The measure of significance for the vineyard storm runoff performance standard is: “so that  
29 runoff ... shall not cause or contribute to downstream increases in bank or bed erosion.” ...

30 ¶ Compliance shall be evaluated through: a) field inventories of vineyard sites; b) review of  
available information ...; and c) field observations of channel condition in channel reaches

1 draining onto the property, at the point(s) of discharge immediately from the vineyard, and  
2 in the first downstream response reach (e.g., gravel-bedded channel reach with a streambed  
3 slope  $\leq 0.02$ ). Evidence of active down-cutting or head-cutting, and/or anomalous patterns  
4 or intensity of bank erosion (e.g., extensive bank erosion along one or both banks), at/near  
5 the point of discharge or in the first downstream response reach will be interpreted to indicate  
6 that the upstream vineyard may be contributing to damaging increases in bed and/or bank  
7 erosion. In such cases, the landowner and/or manager will be required to implement actions  
8 to facilitate recovery of channel habitat structure and balanced fine and coarse sediment  
9 budgets in the unstable channel reach. *The details of the SF Bay Water Board analytical  
10 approach will be developed in consultation with a Technical Advisory Committee that has  
11 been formed to assist SF Bay Water Board with technical issues related to development of  
12 the WDR waiver.*

13 (AR 1760-61 (emphasis added.))

14 This is too little too late. Too late because the public had no opportunity to comment on this  
15 measure. Too little because this measure describes a review process, not a criteria for determining the  
16 significance of runoff increases or measures to avoid significant increases. Plainly then, even if an  
17 enforceable standard is *to be* developed, it is *not yet* developed or included in the TMDL, in violation of  
18 CEQA.

19 In the end, the final TMDL adopted by the Regional and State Boards contains the same, fatally  
20 vague standard for controlling runoff. Thus, the SED's deferral of a description of the measures that will  
21 be used to achieve the runoff standard violates CEQA's requirements for describing the project and its  
22 mitigation measures before project approval. And it does not fall within any exception to the general rule  
23 against deferring the development of mitigation measures.

24 The Board cannot invoke the exception noted in *Gentry, supra*, for mitigation measures that require  
25 compliance with other existing regulatory requirements because for the runoff performance standard, the  
26 TMDL does not incorporate the Napa Conservation Regulations or any other regulatory scheme. Nor does  
27 the TMDL or the Board find that compliance with the Napa Conservation Regulations is effective for  
28 "attenuating significant increases in runoff."

29 Also, the Board cannot invoke the exception noted in *Gentry, supra*, for mitigation measures "for  
30 kinds of impacts for which mitigation is known to be feasible, but where practical considerations prohibit  
devising such measures early in the planning process" because there is no evidence that achieving this  
performance standard is feasible. Indeed, this mitigation plan is similar to the mitigation plan the Court  
found defective in *CBE*, where the lead agency "divulged little or no information about how it quantified

1 the Project's greenhouse gas emissions, offered no assurance that the plan for how the Project's greenhouse  
2 gas emissions would be mitigated to a net-zero standard was both feasible and efficacious, and created no  
3 objective criteria for measuring success." (*CBE, supra*, 184 Cal.App.4th at pp. 93, 95.) Similarly here, the  
4 Board has not quantified the potential increases in runoff from that must be mitigated by the runoff  
5 performance standard and has no basis for assuming it will be effective and no criteria to judge its efficacy.

6 **C. THE SUBSTITUTE ENVIRONMENTAL DOCUMENT VIOLATES CEQA BY**  
7 **PIECEMEALING ITS ENVIRONMENTAL REVIEW OF THE "WHOLE" OF THE**  
8 **PROJECT WITH RESPECT TO THE "WDR WAIVER POLICY."**

9 In determining whether a project may have a significant effect on the environment requiring  
10 preparation of an EIR, the Board must consider "[a]ll phases of project planning, implementation, and  
11 operation." (Guidelines, § 15063, subd. (a)(1).) Whether the SED is a "checklist" resembling a Negative  
12 Declaration or a more in depth "EIR-level" study, the agency may not treat one project as a succession of  
13 smaller projects which, by themselves, do not cause significant impacts, but rather must consider the entire  
14 project, and disclose and mitigate the impacts of the whole of the project. (*Citizens Association for Sensible*  
15 *Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 156-66.)

16 In addition, the Board's SED must evaluate the environmental impacts of reasonably foreseeable  
17 future activities associated with the project or expansion of the project where these activities may contribute  
18 to significant environmental effects. (*Laurel Heights I, supra*, 47 Cal.3d at 395-396.) This obligation  
19 attaches whether the future activities are considered a foreseeable future activity under *Laurel Heights I* or  
20 a separate project subject to cumulative effects analysis; one way or the other the EIR or EIR-level document  
21 must conduct this assessment. (*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994)  
22 27 Cal.App.4th 713, 733 (*San Joaquin Raptor I*).

23 Here, the TMDL is implemented by requiring that landowners submit a Report of Waste Discharge  
24 pursuant to Water Code § 13260 to obtain "Waste Discharge Requirements" issued by the Regional Board.  
25 (AR 19.) But from the very beginning the TMDL included reference to a "waiver policy" that would allow  
26 landowners to avoid this permitting requirement. (AR 8634.) Despite Living Rivers' repeated requests to  
27 the Regional and State Boards that the SED describe and evaluate the impacts of this waiver policy (AR  
28 9593, 9593, 9822-23, 10351), the SED does not do so.

29 The omission of the waiver policy is particularly prejudicial to informed public participation because  
30 at least two critical project description issues have been deferred: the criteria and measures to achieve the

1 performance standard for runoff, as discussed in section IV.B (see AR 1760-61 ["The details of the SF Bay  
2 Water Board's analytical approach will be developed in consultation with a Technical Advisory Committee  
3 that has been formed to assist SF Bay Water Board with technical issues related to development of the WDR  
4 waiver"]); and the geographic area that will be subject to regulation under the TMDL.

5 With respect to the geographic scope of the Project, i.e., whether it will be applied to areas upstream  
6 of municipal reservoirs, the "TMDL sediment targets" in Table 1 do not apply "upstream of municipal water  
7 supply reservoirs." (AR 12.) The TMDL also asserts that "dams trap almost all upstream sediment inputs  
8 to channels." (AR 14.) Therefore, Living Rivers commented that this critical issue remains uncertain. (AR  
9 10360-10362.) The Regional Board responded that "we will consider these and other resource protection  
10 issues in determining the geographic scope and requirements for the WDR waiver programs." (AR 921.)  
11 Thus, the public was denied the opportunity to review and comment upon a project with a stable and  
12 accurate description and scope.

13 In its June 30, 2006 proposed TMDL, the proposed performance standards that will govern new  
14 vineyards on rural lands specify the "Actions" that must be taken to comply with the TMDL. The "Actions"  
15 include submitting a "Report of Waste Discharge [n] 2 to the Water Board" (AR 8638.) but footnote 2 states:  
16 "Waiver conditions may allow for other submittals in lieu of a Report of Waste Discharge." (AR 8638.)  
17 In its September 5, 2008 revised proposed TMDL, the Regional Board changed its reference to the WDR  
18 waiver policy, stating:

19 Submit a Report of Waste Discharge [n]2 (RoWD) to the Water Board that provides, at a  
20 minimum, the following: a description of the vineyard; identification of site-specific erosion  
21 control measures needed to achieve performance standard(s) specified in this table; and a  
22 schedule for implementation of identified erosion control measures.

23 Or

24 Implement farm plan certified under Fish Friendly Farming Environmental Certification  
25 Program or other farm plan certification program, as approved as part of a WDR waiver  
26 policy. All dischargers applying for coverage under a WDRs waiver policy also will be  
27 required to file a notice of intent (NOI) for coverage, and to comply with all conditions of  
28 the WDR waiver policy [n]4. ¶ Comply with applicable waste discharge requirements  
29 (WDRs) or waiver of WDRs.

30 2. Or compliance with applicable conditional waivers of WDRs that may be adopted by the  
Water Board.

4. This Basin Plan amendment recognizes farm plans certified under the Fish Friendly  
Farming Environmental Certification Program as effective with regard to control of pollutant  
discharges associated with vineyards. Additional conditions will be required under a General  
WDR and/or waiver program consistent with State Board (2004), and/or as needed to avoid  
potentially significant environmental impacts.

1 (AR 9574 (underscore in original, italics added.)

2 In its October 20, 2008 letter to the Regional Board, Living Rivers commented on the Board's legal  
3 obligation to assess the impacts of the waiver policy." (AR 9593.) The Regional Board's May 19, 2009  
4 response to comments does not specifically address this comment. After obtaining the return of the TMDL  
5 from the State Board, the May 19, 2009 revised proposed TMDL amended footnote 4 of the "Actions" set  
6 forth in BPA Table 4.1 again, stating:

7 *4. Additional conditions will may be required under a General WDR and/or waiver program*  
8 *consistent with the Policy for Implementation and Enforcement of the Non-Point Source*  
9 *Control Program (State Board, (2004), and/or as needed to avoid potentially significant*  
*environmental impacts.*

10 (AR 9794 (underscore in original, italics added.)

11 Thus, "for purposes of both ensuring that the TMDL achieves Basin Plan water quality standards and  
12 avoiding significant adverse impacts from implementation of the TMDL, the Regional Board is essentially  
13 saying 'Trust Us' based on the fact that future projects will either undergo project specific review through  
14 issuance of WDRs, or will have to meet conditions specified in a future WDR waiver policy to avoid project  
15 specific review through issuance of WDRs." (AR 9822-23 [July 6, 2009 Living Rivers letter].) The  
16 problem is that the Board has not yet published the Waiver Policy, and without it, "the public cannot  
17 evaluate whether the conditions that project applicants will be required to meet to avoid project specific  
18 review ... will be stringent enough to ensure that only projects not needing additional analysis or mitigation  
19 measures are allowed within the WDR waiver." (AR 9823.)<sup>15</sup>

20 Living Rivers August 18, 2010 letter to the State Board again argued that the SED must describe and  
21 evaluate the TMDL waiver policy. (AR 10351.). On October 1, 2010, the State Board responded:

22 State Board Staff Disagrees. ... ¶ Commenter incorrectly implies that a waiver constitutes the  
23 absence of regulation. On the contrary, a Waiver of WDRs regulates in the same manner as a  
24 general permit; it covers a category of dischargers or discharges and establishes requirements  
25 that are common to all.... ¶ The environmental documentation that accompanies a TMDL  
cannot be project specific, because no projects have yet been proposed to meet the specific  
requirements of the TMDL....

26 (AR 1746-48.)

27 As this chronology shows, the waiver policy is an integral part of the TMDL's implementation

28  
29  
30 <sup>15</sup>In its September 9, 2009 Response to Comments, the Regional Board disagreed, stating: "We disagree that  
the project description is incomplete and future development of the WDR waiver violates CEQA." (AR  
1462.)

1 program. The Board's rationale that "The environmental documentation that accompanies a TMDL  
2 cannot be project specific" is beside the point because the WDR waiver policy is not a "project  
3 specific" action, it is another quasi-legislative action that will, just like the TMDL, govern the many  
4 specific projects that actually involve land disturbance. Further, the Board's rationale that a WDR  
5 waiver policy is just a "possibility" is belied by the many references to the waiver policy in the final  
6 TMDL's performance standards. (AR 17, 19, 20, 21, 22.) Finally, the Board's rationale that a WDR  
7 waiver policy is not "the absence of regulation" is exactly Living Rivers' point. Because the WDR  
8 waiver policy will regulate land use, the way in which it does so must be disclosed and evaluated.

9 Therefore, whether considered part of the Project, a reasonably foreseeable future activity  
10 associated with the project or a separate reasonably foreseeable future project subject to CEQA's  
11 cumulative impact analysis requirement, the waiver policy must be described and evaluated for  
12 environmental impact. The SED reflects the same error found by the Court of Appeal in *San Joaquin*  
13 *Raptor I, supra*. In that case, the EIR for a development project did not include an assessment of the  
14 environmental effects of the likely future expansion of the Project's sewer line. The Court recognized  
15 that whether considered a foreseeable future activity under *Laurel Heights I* or a separate project  
16 subject to cumulative effects analysis, one way or the other the EIR was required to conduct this  
17 assessment. (*Id.* at p. 733.)

18 In sum, deferring development of the WDR waiver policy violates CEQA because it  
19 piecemeals the environmental review of the TMDL and its implementation standards.

20 **D. RESPONDENT'S ABUSE OF DISCRETION IS PREJUDICIAL.**

21 As described above, the SED violates CEQA's public participation requirements, therefore,  
22 approval of the underlying project must be reversed:

23 "When the informational requirements of CEQA are not complied with, an agency has  
24 failed to proceed 'in a manner required by law' and has therefore abused its discretion."  
25 Furthermore, "when an agency fails to proceed as required by CEQA, harmless error  
26 analysis is inapplicable. The failure to comply with the law subverts the purposes of  
27 CEQA if it omits material necessary to informed decisionmaking and informed public  
28 participation. Case law is clear that, in such cases, the error is prejudicial."

29 (*Amador Waterways, supra*, 116 Cal.App.4th at pp. 1105-1106 [citations omitted].)

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V. CONCLUSION.

For the reasons set forth above, Living Rivers seeks a writ of mandate pursuant to 2168.9(a)(1), compelling Respondent to set aside its adoption of the Amendment to the Water Quality Control Plan for the San Francisco Bay Basin (Basin Plan) to Establish a Total Maximum Daily Load (TMDL) for Sediment in the Napa River, and an Implementation Plan to Achieve the TMDL and Related Habitat Enhancement Goals (also known as the "Napa River Sediment TMDL"); and pursuant to 21168.9(a)(3), compelling Respondent to recirculate and adopt a Substitute Environmental Document that complies with CEQA.

DATED: November 23, 2011

LIPPE GAFFNEY WAGNER LLP

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1 **PROOF OF SERVICE**

2 I am a citizen of the United States, employed in the City and County of San Francisco,  
3 California. My business address is 329 Bryant St., Suite 3D, San Francisco, CA 94107. I am over the  
4 age of 18 years and not a party to the above entitled action. On November 23, 2011, I served the  
5 following document:

6 • **PETITIONER'S OPENING TRIAL BRIEF**

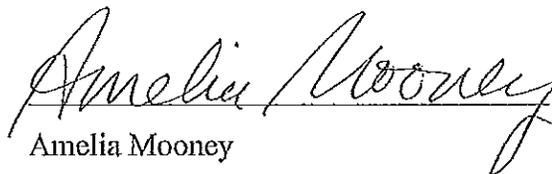
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13 first-class postage thereon fully prepaid in a sealed envelope.
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15 addressee on the date written below.
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19 carrier to receive documents, in an envelope or package designated  
20 by the express service carrier with delivery fees paid or provided  
21 for.
- 22  By Facsimile I caused such document to be served via facsimile electronic  
23 equipment transmission (fax) on the parties in this action by  
24 transmitting a true copy to the following fax numbers listed under  
25 each addressee below.
- 26  By Personal Delivery by Courier I caused each such envelope to be delivered to an authorized  
27 courier or driver, in an envelope or package addressed to the  
28 addressee below.

29 I declare under penalty of perjury under the laws of the State of California that the foregoing  
30 is true and correct. Executed on November 23, 2011, in the City and County of San Francisco,  
California.

  
Amelia Mooney

# **EXHIBIT 3**

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ENDORSED  
FILED  
ALAMEDA COUNTY

FEB - 2 2012

CLERK OF THE SUPERIOR COURT  
By  Deputy

9 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
10 IN AND FOR THE COUNTY OF ALAMEDA  
11

12 LIVING RIVERS COUNCIL,  
13 Petitioner and Plaintiff,  
14 vs.  
15 STATE WATER RESOURCES CONTROL  
16 BOARD, and DOES 1 through 10,  
17 Respondents and Defendants.  
18  
19  
20  
21  
22

Case No.: RG 11560171  
ASSIGNED FOR ALL PURPOSES TO:  
JUDGE Evelio Grillo  
DEPARTMENT 31  
  
PETITIONER'S REPLY TRIAL BRIEF  
  
[CALIFORNIA ENVIRONMENTAL  
QUALITY ACT]  
  
Date: February 15, 2012  
Time: 10:30 a.m.

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1 **I. INTRODUCTION**

2 Respondent State Water Resources Control Board’s (“Respondent” or “Board”) opposition brief  
3 does not refute the merits of Plaintiff Living Rivers Council’s (“Living Rivers”) legal claims. For the most  
4 part, it either wilfully mischaracterizes or ignores those claims or defends them on bases that are not on  
5 point. For example, with respect to Living Rivers’ claim that the Board’s CEQA document fails to assess  
6 the environmental effect of the TMDL’s incorporation of Napa County’s program of approving hillside  
7 vineyards pursuant to its Conservation Regulations, the Board simply ignores Living Rivers’ argument as  
8 to why the TMDL does incorporate these regulations. The Board then argues that, even if the TMDL  
9 incorporates these regulations, its CEQA document somehow contains the required assessment. The  
10 Board’s record cites, however, do not support its assertion.

11 **II. LEGAL FRAMEWORK**

12 **A. THE TMDL BASIN PLAN AMENDMENT CARRIES THE FORCE OF LAW.**

13 Under the Clean Water Act, states are responsible for developing water quality standards and  
14 regulating nonpoint<sup>1</sup> sources of water pollution. (*City of Arcadia v. State Water Resources Control Bd.*  
15 (2006) 135 Cal.App.4th 1392, 1403-1404, citing *Scott v. Hammond* (7th Cir. 1984) 741 F.2d 992, 994.)  
16 Additionally, states must implement a “water-quality based” program for cleaning up polluted rivers,  
17 streams or smaller water segments that regulation of point source pollution (the NPDES permit system) has  
18 not adequately addressed. (*Id.* at p. 1404, citing *San Francisco BayKeeper v. Whitman* (2002) 297 F.3d  
19 877, 880; 33 U.S.C. § 1313(d)(1)(A); 40 C.F.R. § 130.7(b) (2003).) Specifically, states must (1) make a  
20 list of polluted water bodies (referred to as a “303(d) list”); (2) rank them in order of priority; and (3)  
21 determine the maximum amount of a pollutant, from all sources, that may be discharged or “loaded” into  
22 each impaired water body. (*Id.*)

23 The maximum amount of permissible pollution is called a “total maximum daily load” or “TMDL”  
24 and “must be ‘established at a level necessary to implement the applicable water quality standards’.” (*Id.*,  
25 quoting *Communities for a Better Environment v. State Water Resources Control Bd.* (2003) 109

26 \_\_\_\_\_  
27 <sup>1</sup> “Nonpoint” sources are those which do not discharge from a “discernable, confined and discrete  
28 conveyance” or “point source.” (*City of Arcadia, supra*, 135 Cal.App.4th at p. 1403, citing *Defenders of*  
29 *Wildlife v. EPA* (10th Cir.2005) 415 F.3d 1121, 1123-1124.) Nonpoint pollution sources recognized by the  
30 Environmental Protection Agency include sediment from improperly managed construction sites, crop and  
forest land, and eroding stream banks. (*Id.* at fn 3.)

1 Cal.App.4th 1089, 1095-1096.) A TMDL assigns a waste load allocation to each point source, and once  
2 developed, effluent limitations in NPDES permits must be consistent with the TMDL’s waste load  
3 allocation. (*Ibid.*) The EPA has authorized California to adopt and administer the NPDES permit program  
4 for the state. (*Id.*, citing 54 Fed. Reg. 40664 (Oct. 3, 1989).)

5 “California implements the Clean Water Act through the Porter–Cologne Act (Wat. Code, § 13000  
6 *et seq.*)” (*City of Arcadia, supra*, 135 Cal.App.4th at p. 1405.) Under the Porter–Cologne Act, regional  
7 water boards (operating under the purview of the State Water Board) must “formulate and adopt water  
8 quality control plans, commonly called basin plans, which designate the beneficial uses to be protected,  
9 water quality objectives and a program to meet the objectives.” (*Id.*, citing Wat. Code, §§ 13050, subd. (j),  
10 13240.) “‘Water quality objectives’ means the limits or levels of water quality constituents or  
11 characteristics which are established for the reasonable protection of beneficial uses of water or the  
12 prevention of nuisance within a specific area.” (*Id.*, quoting Wat. Code, §§ 13050, subd. (j), 13240; § 13050,  
13 subd. (h).)

14 **B. STANDARD OF REVIEW**

15 The Board apparently accepts that Living Rivers’ claims in this case are reviewed under a de novo  
16 standard rather than the more deferential “substantial evidence” standard of review. The Board, however,  
17 draws from this fact an unwarranted conclusion that all questions of fact are outside the scope of this court’s  
18 review. This is unwarranted because, as the Supreme Court held:

19 In evaluating an EIR for CEQA compliance, then, a reviewing court must adjust its scrutiny  
20 to the nature of the alleged defect, depending on whether the claim is predominantly one of  
21 improper procedure or a dispute over the facts. For example, where an agency failed to  
22 require an applicant to provide certain information mandated by CEQA and to include that  
23 information in its environmental analysis, we held the agency “failed to proceed in the  
24 manner prescribed by CEQA.” [citations] In contrast, in a factual dispute over “whether  
25 adverse effects have been mitigated or could be better mitigated” [citation], the agency’s  
26 conclusion would be reviewed only for substantial evidence.

27 (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412,  
28 435 (*Vineyard*)). Thus, the fact that the informational sufficiency of a CEQA document is “primarily” a  
29 question of procedure does not mean questions of fact are absent from the Court’s analysis.

30 **III. STATEMENT OF FACTS**

The Board criticizes Living Rivers for citing to draft documents. (See Respondent’s opposition brief  
(ROB) 18: n. 7; 20:14-20.) This criticism is misplaced because Living Rivers cites draft staff reports and  
draft Basin Plan amendments going back to 2006 to describe how the TMDL and its environmental analysis

1 evolved over time in response to public comments and the Board’s responses. Nevertheless, Living Rivers’  
2 Opening Brief always cites to the final Staff Report and the final Basin Plan Amendment when discussing  
3 its legal argument.

4 **IV. ARGUMENT**

5 **A. THE THE BOARD’S CEQA DOCUMENT VIOLATES CEQA WITH RESPECT TO THE**  
6 **PROJECT’S PERFORMANCE STANDARD FOR CONTROLLING SURFACE EROSION.**

7 **1. The CEQA Document Fails to Assess the Environmental Effects of “Means of**  
8 **Compliance” With the TMDL’s Surface Erosion Performance Standard.**

9 **a. The Board must assess the impacts of Napa County’s program of approving**  
10 **hillside vineyards pursuant to its Conservation Regulations.**

11 In response to Living Rivers’ claim that Board’s CEQA document fails to assess the environmental  
12 effect of the TMDL’s incorporation of Napa County’s program of approving hillside vineyards pursuant to  
13 its Conservation Regulations, the Board first argues that the TMDL does not incorporate these regulations,  
14 asserting that “... nothing in the plain text or anything else in the SED implies, much less states, that  
15 compliance with those regulations is incorporated as part of the clearly stated and defined performance  
16 standard.” (ROB 10:12.) This argument ignores the facts and the law.

17 The relevant document is not the “SED,” it is the TMDL, as codified in the Basin Plan Amendment  
18 (BPA). Also, the Board does not dispute that the BPA is a regulation subject to the normal rules governing  
19 statutory interpretation. Nor could it. As discussed in section II.A above, the Basin Plan, as an integral part  
20 of California’s regulatory system for controlling water pollution, carries the force of law.

21 The fact remains that the Board’s final TMDL establishes a regulatory standard for controlling  
22 surface erosion (*i.e.*, “Control excessive rates of sediment delivery to channels resulting from vineyards”)  
23 and then unequivocally states: “Napa County Conservation Regulations (County Code, Chapter 18.108) are  
24 effective in the control of excessive rates of sediment delivery resulting from vineyard surface erosion.” (AR  
25 19, Table 4.1, n. 5.) Since the BPA is a law, its unequivocal conclusion that the Napa Conservation  
26 Regulations “are effective” in doing exactly what the law requires means that complying with the  
27 regulations constitutes compliance with the TMDL’s surface erosion standard. Thus, landowners subject  
28 to the TMDL can rely on this law to comply with this TMDL standard by obtaining an Erosion Control Plan  
29 permit from Napa County pursuant to its Conservation Regulations.

30 The Board ignores Living Rivers’ argument that the Board’s interpretation of the BPA/TMDL  
renders the language regarding the Conservation Regulations entirely meaningless, violating “the ‘cardinal  
rule of statutory construction’ to give effect to all words and provisions of a statute and leave no part

1 superfluous or inoperative.” (*Leavitt v. County of Madera* (2004) 123 Cal.App.4th 1502, 1519; POB 14:20.)  
2 The Board also ignores Living Rivers’ argument that Board staff confirmed Living Rivers’ understanding  
3 of this language, stating: “The Basin Plan amendment relies on landowner compliance with Napa County’s  
4 Conservation Regulations to achieve sediment allocations for vineyard surface erosion.” (See POB 14:23;  
5 AR 1780.)

6 Aside from whether the TMDL “incorporates” Napa County’s regulatory program, clearly one of  
7 the “means of compliance” with the TMDL is compliance with the Napa regulations, which include  
8 approval of an Erosion Control Plan (ECP) by the County. The Board must evaluate the environmental  
9 effects of the “means of compliance” with performance standards specified in the TMDL. (*City of Arcadia*,  
10 *supra*, 135 Cal.App.4th at pp. 1424-25.) Here, because the record contains substantial evidence to support  
11 a fair argument that this “means of compliance” (*i.e.*, compliance with the Napa regulations) may have  
12 significant impacts by causing increased storm runoff leading to increased sediment delivery to the Napa  
13 River, CEQA requires an EIR-level evaluation of this issue. (*Id.*)

14 **b. The SED Does Not Include the Required Analysis of Impacts.**

15 The Board artfully argues that its CEQA document assesses the impacts of the effects of “what the  
16 Napa Regulations entail,” stating: “Second, and more importantly to LRC's contention that the Water Board  
17 failed to perform an ‘EIR level analysis’ of the effects of complying with the Napa Regulations, once one  
18 recognizes what the Napa Regulations entail, it becomes obvious that the SED contains an extensive  
19 discussion of their effects.” (ROB 10:15.) This argument lacks merit for many reasons.

20 **(1) The Board’s record cites do not discuss Napa County’s administration  
21 of its regulatory program.**

22 The portions of the record on which the Board relies do not support this assertion. (See ROB 10-14.)  
23 The most striking feature of the Board’s record cites is that not one of them reflect any assessment of  
24 whether and to what extent Napa County’s administration of its Erosion Control Plan permit program is  
25 causing adverse environmental impacts. Nowhere does the Board demonstrate that the SED disclosed the  
26 Regulations’ content or any details of the County’s administration of erosion control plans that would  
27 engender meaningful analysis of their impacts. (See ROB 10-14 and included AR cites.) Similarly, the  
28 Board does not point to any portion of the SED identifying the “reasonably foreseeable” actions people may  
29 take to comply with the Conservation Regulations. (*Ibid.*; POB, 19-20.) Instead, as detailed below, the cited  
30 portions of the SED address certain environmental effects of measures that concentrate runoff, which is not  
the same thing as assessing how Napa County administers its program of implementing the Conservation

1 Regulations.

2 (2) **The Board Erroneously Construes the SED’s Discussion of Upland**  
3 **Surface Erosion as A Discussion of Stream Channel Erosion.**

4 The Board’s record cites do not, in fact, demonstrate that the SED assesses the mechanism of impact  
5 that Living Rivers’ comments show is not adequately controlled by Napa County’s regulatory program. As  
6 discussed in Living Rivers’ opening brief, its investigations over the last 10-plus years have shown that  
7 hillside vineyard conversions approved by Napa County increase storm runoff. This significantly  
8 contributes to ongoing significant sedimentation effects in the Napa River drainage by increasing runoff in  
9 stream channels, which causes channel incision leading and associated bank erosion. This process entrains  
10 sediment from the stream bed and banks into the stream flow, whence it is carried to low gradient reaches  
11 of Napa River tributaries and the river’s main stem. The primary causes of this process and its impacts are  
12 the conversion of the land from natural vegetation to vineyard and the installation of engineered drainage  
13 facilities to reduce surface erosion. (See POB 3:15-21; 15:3-16:20.)

14 Instead of showing that the SED assesses these causes and processes of sediment impacts, the  
15 Board’s record cites reflect an assessment of an entirely different set of causes and mechanisms of sediment  
16 impacts, namely, the effects of concentrating and diverting surface runoff onto erodible uplands. This  
17 process causes surface erosion by entraining “upland” surface sediments and delivering them to stream  
18 channels. The thrust of Living Rivers’ comments to the Board, in contrast, is that Napa’s ECP regulatory  
19 program fails to assess or control the effects of increasing runoff into the stream channel, which causes  
20 channel incision and bank erosion (“stream channel erosion”). Thus, Living Rivers’ claim that the SED fails  
21 to assess the Napa program’s effects on stream channel erosion (as opposed to surface erosion) remains  
22 unrefuted.

23 The distinction between stream channel erosion and surface erosion (and their respective causes and  
24 processes), is important because, although both upland surface erosion and stream channel erosion degrade  
25 water quality through sediment deposition, channel incision “has the highest priority for treatment because  
26 sediment from channel incision is produced locally therefore, it likely has a greater effect on fine sediment  
27 deposition at spawning sites in the Napa River, than distal sources.”<sup>2</sup> (AR 1634.) Further, whereas the

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28 <sup>2</sup> The Source Analysis explained that large segments of Napa River terrain are composed of highly erodible  
29 deposits of coarse-grained sediments (valley fills and alluvial fans). (AR 1630.) “Channel incision [occurs]  
30 where human actions have destabilized streams underlain by deep alluvial deposits.” (AR 1602.) Erosion  
of stream channel sediments contributed an average of about 45,000 tonnes of sediment per year to the Napa  
River and the rate of channel incision over the past four decades was greater than 50 times the natural

1 impacts of upland surface erosion flow solely from the delivery of sediment to a stream, the impacts of  
2 stream channel erosion extend far beyond its significant sediment contributions. As the stream channel  
3 erodes, the basic physical habitat structure of the river is obliterated. (AR 1634.) Essential salmonid habitat  
4 (e.g., gravel bar, riffle margins, side channels, and sloughs) is “simplified,” or replaced with homogeneous  
5 long, deep pool-run habitats, which favor fishes that prey upon juvenile salmonids. (AR 83, 1634.) As the  
6 Board found, pervasive channel incision (and resultant habitat simplification) appears to be the primary  
7 factor limiting salmon populations. (AR 83.) “Complex habitat structure must first be restored on a large  
8 scale before habitat quality as affected by sediment ... would begin to influence Chinook salmon population  
9 size.” (*Ibid.*)

10 It is thus vital to properly assess and mitigate actions that cause stream channel erosion—especially  
11 actions that may be taken to comply with the TMDL, such as implementing erosion control measures to  
12 comply with the Napa Conservation Regulations (which divert surface runoff into stream channels.)  
13 Analysis of the sedimentation consequences of upland surface erosion does not accomplish this task.

14 The Board asserts that the Final Staff Report’s sediment “Source Analysis” addresses the impacts  
15 of ECPs on stream channel erosion. (Opp. Br. at p. 11.) The portions of the Source Analysis upon which  
16 the Board relies, however, discuss upland surface erosion, not stream channel erosion.

17 The Board points to statements in the Source Analysis that “if vineyard development involves  
18 installation of subsurface drainage pipes, more storm runoff, at a faster rate, may be discharged off-site than  
19 under natural conditions” and “if discharges from drainage pipes are collected at a single point of discharge,  
20 there is the potential to further concentrate runoff volume.” (Opp. Br. at p. 11, quoting AR 1600, Figure  
21 3.) However, the Source Analysis continues on to explain that “these effects have the potential to cause  
22 off-site gully erosion and/or shallow landslide failures, most often at or near the points of discharge from  
23 the site and in locations where hillslope soils are deep and bedrock is soft (easily eroded).” (*Id.*, quoting  
24 AR 1600, emphasis added.) “Hillslope soil” erosion, “off-site gully erosion and/or shallow landslide  
25 failures” refer to the erosion and deposition of upland surface sediments caused by diverting concentrated  
26 stream runoff over erodible land features, which is separate and distinct from erosion of the stream channel  
27 itself. (See AR 1624, 1630. See also AR 1602 [establishing separate sediment source categories for, *inter*  
28 *alia*, (1) colluvial bank (hillslope soil) erosion, gullies, and shallow landslides and (2) channel incision].)  
29 The quoted statements are limited to upland surface erosion, and thus do not address stream channel erosion.

30 \_\_\_\_\_  
background rate. (AR 1630.)

1 Additional citations to the SED suffer from the same flaw. For instance, the Board quotes the  
2 statement that “[a]t all existing hillside vineyards ... the potential for concentrated runoff from the vineyard  
3 or road network should be evaluated through site inspection and analysis by qualified registered professional  
4 scientists or engineers. The goal for management of existing vineyards should be to reduce peak storm  
5 runoff rates into actively eroding gullies or landslides or other potentially unstable areas, as needed to avoid  
6 and control human-caused increase in sediment delivery from unstable areas.” (Opp. Br. at p. 13, quoting  
7 AR 1662, emphasis added.) The emphasized portion clearly indicates that the SED analysis is directed at  
8 upland surface, rather than stream channel, erosion because it does not address the delivery of runoff into  
9 stream channels.

10 Finally, the Board fails to address the fact that the SED attributes channel incision primarily to past  
11 land use disturbances. The Final Staff Report states that “[a] suite of management actions have likely  
12 caused or contributed to channel incision, including (but not necessarily limited to): levee building, large  
13 tributary dams, straightening of some mainstem channel reaches, filling of side channels, historical gravel  
14 mining, dredging to reduce flood risk, and intensive removal of large woody debris.”<sup>3</sup> (AR 1637.) Nowhere  
15 does the SED either (1) identify erosion control measures permitted by the County pursuant to its  
16 administration of its Conservation Regulations as cause of stream channel erosion or (2) analyze and  
17 disclose the extent of their influence. (See AR 1673.)

18 **(3) The Board Improperly Relies On Material Outside Of the SED.**

19 The Board relies on numerous statements made by staff during hearings and in internal memoranda  
20 in effort to show that the SED analyzed and disclosed the impacts of erosion control measures on stream  
21 channel erosion. (Opp. Br. at p. 12, quoting AR 8283 [meeting transcript] and citing 8022-8023 [meeting  
22 transcript], 8283-8284 [meeting transcript], 3875 [staff (Napolitano) memo to file].) This is improper. It  
23 is a fundamental CEQA rule that significant impacts must be disclosed and analyzed in the environmental  
24 document itself. “The data in an EIR must not only be sufficient in quantity, it must be presented in a  
25 manner calculated to adequately inform the public and decision makers, who may not be previously familiar  
26 with the details of the project. “[I]nformation ‘scattered here and there in EIR appendices’ or a report  
27 ‘buried in an appendix,’ is not a substitute for ‘a good faith reasoned analysis.’” (*Vineyard, supra*, 40 Cal.4th  
28

29 <sup>3</sup> See also AR 1633 (“Almost all incision is found to be anthropogenic based on the very high estimated rate  
30 [of incision], and initiation during historical period, which is coincident with a period of intensive levee  
building and dam construction, filling of flood basins adjacent to channels, navigational dredging, intensive  
removal of debris jams, and historical gravel mining and channel straightening.”).

1 at p. 442.) As the Supreme Court observed:

2 The audience to whom an EIR must communicate is not the reviewing court but the public  
3 and the government officials deciding on the project. That a party's briefs to the court may  
4 explain or supplement matters that are obscure or incomplete in the EIR, for example, is  
5 irrelevant, because the public and decision makers did not have the briefs available at the  
6 time the project was reviewed and approved. The question is therefore not whether the  
7 project's significant environmental effects *can* be clearly explained, but whether they *were*.

8 (*Id.* at p. 443 (emphasis in original.)

9 For instance, the staff memorandum cited by the Board acknowledges that erosion control measures  
10 on hillslope vineyards cause stream channel erosion:

11 Where engineered drainage systems are used on hillslope sites to capture sheetflow and  
12 discharge it through subsurface drainage pipes, and where these same vineyards are  
13 developed on soft sedimentary bedrock and/or were forested prior to development, we often  
14 found that storm runoff from vineyards was concentrated in time and/or space, appearing to  
15 contribute to active bed and bank erosion in headwaters channels at or near the point(s) of  
16 discharge from the vineyard.

17 (AR 3875, emphasis added.) However, the Board's reliance on this internal memorandum is misplaced  
18 because disclosure and analysis of potentially significant impacts must occur in the SED. (*Vineyard, supra*,  
19 40 Cal.4th at pp. 442-443.) Casual acknowledgment of a significant impact at a hearing, or in an internal  
20 agency memorandum, is not "information in an [SED]" and, without question, does not "inform" the reader  
21 of the project's potentially significant impacts.<sup>4</sup> (See *id.* at p. 442.)

22 Again, the above-described portions of the record on which the Board relies do not reflect any  
23 assessment of whether and to what extent Napa County's administration of its Erosion Control Plan permit  
24 program is causing adverse environmental impacts. The general acknowledgment that increases in peak  
25 flows can and do cause channel incision and bank erosion is not the same as evaluating whether and to what  
26 extent Napa County's administration of its permit program is contributing to this mechanism of harm.

27  
28 **(4) Adoption Of A Mitigation Measure Does Not Cure the Board's Failure  
29 To Analyze The Impact.**

30 The Board asserts that EIR-level analysis was conducted, in part, because the Board adopted "a

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<sup>4</sup> The remainder of the Board's citation to material outside of the SED is either irrelevant or mis-cited. For instance, the Board describes, at great length, its investigation and analysis of sediment sources. (See Opp. at pp. 11, 13-14.) Yet, the fact that the Board thoroughly studied the issue does not compel a conclusion that it adequately communicated its findings to the public and the decision makers in the SED. Similarly, the facts that some erosion control measures do not cause significant impacts does not obviate the admitted fact that others do. (See Opp. Br. at p. 12; AR 8022-8023, 3875.)

1 separate performance standard for controlling excessive storm runoff and to mitigate the effects of  
2 sub-optimally implemented erosion control structures such as those studied by [Living Rivers’] experts.”  
3 (Opp. Br. at pp. 12-13, citing AR 55 [Finding 16]; AR 19 [“Effectively attenuate significant increases in  
4 storm runoff, so that the runoff from vineyards shall not cause or contribute to downstream increases in rates  
5 of bank or bed erosion.”].) Nothing in CEQA, however, permits an agency to simply adopt mitigation  
6 measures in lieu of conducting full analysis of a project’s potentially significant environmental impacts  
7 (including the potentially significant impacts of “reasonably foreseeable means of compliance” such as  
8 implementation of the erosion control measures set forth in the Conservation Regulations).

9 Quite to the contrary, mere acknowledgment that an impact would be significant is inadequate—the  
10 EIR must include a detailed analysis of “how adverse” the impact would be. (*Galante Vineyards v.*  
11 *Monterey Peninsula Water Management Dist.* (1997) 60 Cal.App.4th 1109, 1123, quoting *Santiago County*  
12 *Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 831.) Moreover, if the agency does not  
13 analyze the nature and extent of the impact, there is no basis upon which to determine that any particular  
14 mitigation measure would adequately address the impact. Similarly, the Board’s lengthy string citation of  
15 portions of the AR discussing mitigation measures for impacts that are identified in the SED does not  
16 indicate that the Board disclosed and adequately analyzed the stream channel erosion impacts at issue. (See  
17 Opp. Br. at pp. 12 [citing AR 19 [regarding mitigation measures for sediment delivery to streams] and 13-14  
18 [citing numerous AR cites regarding mitigation measures for disclosed impacts].)

19 **(5) CEQA Requires Analysis of All Reasonably Foreseeable Impacts.**

20 The Board argues that analysis of the stream channel erosion impacts of implementing erosion  
21 control measures in accordance with the Napa regulations is not required because, in its view, it need not  
22 analyze significant impacts that are merely “possible,” rather than “likely.” (ROB 14:9-19.) But CEQA  
23 requires analysis in an EIR where “there is substantial evidence in the record to support a fair argument that  
24 the project may have a significant effect on the environment.” (Guidelines, § 15064, subd. (f)(1).) “Under  
25 the fair argument standard, a project ‘may’ have a significant effect whenever there is a ‘reasonable  
26 possibility’ that a significant effect will occur.” (*Citizens for Responsible Equitable Environmental*  
27 *Development v. City of Chula Vista* (2011) 197 Cal.App.4th 327, 331 (*CREED*), quoting *No Oil, Inc. v. City*  
28 *of Los Angeles* (1974) 13 Cal.3d 68, 75, 118 (*No Oil*).) Accordingly, the threshold for “EIR-level” CEQA  
29 analysis is not that a significant impact is probable or “likely,” but that it is “reasonably possible.”

30 Indeed, the Board’s opposition brief concedes that evidence in the record supports a fair argument  
that erosion control measures used to comply with the Napa regulations (for example, underground drainage

1 pipes and drainage ditches) may significantly impact the environment by intensifying storm runoff and  
2 thereby causing stream channel erosion. (ROB 15 [The Board “concluded that there was exactly the fair  
3 argument that LRC claims exists.”]; 11 [correctly summarizing Living Rivers’ claim that “erosion control  
4 plans that utilize engineering approaches, such as underground drainage pipes and cross-slope ditches ...  
5 concentrate storm runoff, and thereby contribute to off-site erosion and sedimentation through destabilizing  
6 beds and banks of streams.”].) Also, Living Rivers’ opening brief (at POB 14-17, § IV.A.2) and the  
7 Board’s own recognition below (at AR 3875) demonstrate that significant impacts are “reasonably  
8 possible.”

9 Additionally, CEQA requires analysis of all potentially significant direct and indirect impacts.  
10 Analyzing some impacts does not excuse not analyzing others. Accordingly, the Board’s argument that it  
11 generally conducted “EIR-level” analysis is inapposite. The salient question is whether the Board  
12 conducted “EIR-level” analysis for each potentially significant impact.

13 **2. The Board’s CEQA Document Fails to Assess the Cumulative Environmental Effects**  
14 **of the TMDL’s Incorporation of the Napa County Conservation Regulations.**

15 In its opening brief, Living Rivers argues that the SED fails to evaluate the cumulative  
16 environmental effects of the TMDL, particularly its effect of increasing sedimentation by increasing runoff,  
17 in combination with two other closely related categories of projects: (1) vineyard projects approved under  
18 the Napa County Conservation Regulations, and (2) projects that exacerbate sediment impacts on salmonids  
19 by reducing stream flows, either from surface water diversions or groundwater withdrawals.

20 With respect to the first category, the Board argues that the TMDL has no significant cumulative  
21 impacts in combination with projects under the Napa regulations because the TMDL does not “incorporate  
22 the Napa County regulations” and because “the project’s purpose and effect is *to reduce* sediment inputs.”  
23 (ROB, 16:20-28 (emphasis in original).) These arguments lack merit for several reasons.

24 First, whether the TMDL incorporates the Napa regulations is irrelevant to Living Rivers’  
25 cumulative impact claim because the Board concedes that measures used to reduce surface erosion can cause  
26 increased sediment inputs by increasing runoff to stream channels. Indeed, that is why the Board added a  
27 runoff performance standard to the TMDL. (POB 24:13-25, AR 1714-1715.) Thus, other projects that can  
28 cause increased sediment inputs by increasing runoff are “closely related” projects that must be included  
29 in the CEQA-required discussion of cumulative impacts. Since the TMDL is a “program” subject to  
30 “programmatically” environmental review under CEQA, this category of projects (*i.e.*, vineyard projects  
approved under the Napa County Conservation Regulations) must be evaluated.

1 Second, if the question of whether the TMDL incorporates the Napa regulations is relevant, Living  
2 Rivers has demonstrated that it does so.

3 Third, the fact that the project’s purpose is to reduce impacts does not excuse the Board from  
4 assessing whether its “means of compliance” will cause adverse impacts. (*City of Arcadia*, *supra*, 135  
5 Cal.App.4th at pp. 1424-25.)

6 Fourth, the Board cannot simply assert in this litigation that the project’s “effect is to reduce  
7 sediment inputs” when it conceded in the administrative process that measures used to reduce surface  
8 erosion can cause increased sediment inputs by increasing runoff to stream channels. (POB 24:13-25.)

9 In the same vein, the Board argues that “[b]ecause the TMDL specifically requires no significant  
10 increase in storm runoff, so that that runoff does not contribute to any increase in bank or bed erosion, the  
11 Water Board reasonably concluded that the project cannot contribute to any ‘cumulatively considerable’  
12 impact in this regard.” (ROB 17:16-19.) The Board does not provide a cite to the AR where the Board made  
13 this finding. Perhaps the Board is referring to this statement in the Final Staff Report:

14 Basin Plan amendment related activities are, by design, intended to decrease peak runoff  
15 rates from upland land uses, as needed to reduce fine sediment input to channels and channel  
16 erosion. Therefore, the Basin Plan amendment would not increase the rate or amount of  
17 runoff, exceed the capacity of storm water drainage systems, or degrade water quality, and  
18 the impact is less than significant with mitigation incorporation. Of the projects considered  
19 in the cumulative effects analysis, only existing and projected future vineyard development  
20 has the potential to cause significant long-term impacts to water quality as a result of  
21 increases in storm runoff quantity. The performance standard for vineyard storm runoff  
22 would apply to all existing, replanted, and new vineyards. Therefore by definition,  
23 incremental effects of the Basin Plan amendment on peak runoff increases associated with  
24 vineyards would be beneficial, and as such, not contribute to any cumulatively considerable  
25 effects.

22 (AR 1714-1715.)

23 This finding and the Board’s argument restating it assumes that the TMDL’s performance standard  
24 for controlling increases in runoff will be achieved. But this assumption is not supported by any evidence  
25 in the record.<sup>5</sup>

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27 <sup>5</sup> Thus, the Board repeats and makes the same error it did in its responses to comments, where it stated: “The  
28 performance standard for vineyard storm runoff would apply to all existing, replanted, and new vineyards.  
29 Therefore *by definition*, incremental effects of the Basin Plan amendment on peak runoff increases  
30 associated with vineyards would be beneficial, and as such, not contribute to any cumulatively considerable  
effects. (ROB 18:2; citing AR 1714-1715 (emphasis added).) The Board cannot simply assume that its  
performance standard for controlling increases in runoff is achievable. As discussed in the next section, it  
must support that conclusion with evidence.

1           Moreover, the notion that the “incremental effects of the Basin Plan amendment on peak runoff  
2 increases associated with vineyards would be beneficial” is nonsensical and unsupported. The most the  
3 BPA promises is” “[e]ffectively attenuate significant increases in storm runoff. Runoff from vineyards shall  
4 not cause or contribute to downstream increases in rates of bank or bed erosion.” (AR 19.) As discussed,  
5 this measure was added to reduce runoff impacts caused by the TMDL requiring people to install engineered  
6 drainage facilities to reduce surface erosion. There is nothing about “attenuating” increases in runoff to  
7 less-than-significant that is “beneficial” when compared to the environmental baseline (though it may be  
8 beneficial as compared to approving the project without this measure.) In *Communities for a Better*  
9 *Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310, the Supreme Court  
10 held that CEQA requires that the baseline against which the significance of impacts is measures is the  
11 existing environmental conditions and established levels of a particular use. (*Id.* at p. 322); accord,  
12 *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 89 (*CBE*). The level  
13 of impact caused by the project before mitigation is not the baseline against which to measure whether the  
14 project’s effects will be adverse or beneficial.

15           In sum, the project will cause some incremental increase in runoff. Whether that incremental  
16 increase is “cumulatively considerable,” thus causing significant cumulative impacts, requires a cumulative  
17 impact assessment that complies with CEQA’s requirements. That process cannot be short-circuited by  
18 resort to unsupported assumptions.

19           Moreover, the Board’s argument quoted above (from ROB 17:16-19) sounds like the same argument  
20 rejected by numerous courts of appeal: the fact that the incremental impacts of the project are less-than-  
21 significant does not mean its cumulative impact is less-than-significant. The significance of a cumulative  
22 impact depends on the environmental setting in which it occurs, especially including the severity of existing  
23 environmental harm. (*Communities for a Better Environment v. California Resources Agency* (2002) 103  
24 Cal.App.4th 98, 120 (*Communities*) “[T]he relevant question”... is not how the effect of the project at issue  
25 compares to the preexisting cumulative effect, but whether “any additional amount” of effect should be  
26 considered significant in the context of the existing cumulative effect. [footnote omitted] In the end, the  
27 greater the existing environmental problems are, the lower the threshold should be for treating a project’s  
28 contribution to cumulative impacts as significant. [footnote omitted]”]; accord, *Kings County Farm Bureau*  
29 *v. City of Hanford* (1990) 221 Cal.App.3d 692, 720-721.)

30           With respect to the second category (*i.e.*, projects that exacerbate sediment impacts on salmonids  
by reducing stream flows, either from surface water diversions or groundwater withdrawals), the Board

1 argues that “[t]he record is simply devoid of evidence that diversions or extractions actually contribute to  
2 significant sedimentation problems in the Napa River.” (ROB 18:8-10.) But as Living Rivers demonstrated  
3 (POB § IV.A.3.b), there is substantial evidence in the record that many projects reduce stream base flows,  
4 either from surface water diversions or groundwater withdrawals, and thereby exacerbate sediment impacts  
5 on salmonids by causing additional stresses on these species during low flow times of the year.

6 For example, the Board found that the increased concentration of fine sediments in the Napa River  
7 inhibits the growth and survival of juvenile salmonids by decreasing the amount of available food. (AR 10-  
8 11 [further noting that decreased food supply causes aggressive behavior and attacks between juvenile  
9 salmon and steelhead as they compete for food].) Decreased flows, like sedimentation, inhibit the growth  
10 and survival of juvenile salmonids by reducing the amount of available food. (AR 11.) Accordingly,  
11 because water diversions decrease flows (see AR 9476), they compound the impacts of sedimentation on  
12 salmonids by further reducing the food supply necessary for their growth and survival. This is further  
13 compounded by reductions in flows due to channel incision. (AR 9476.) Additionally, both flow reductions  
14 and sedimentation degrade the value of the Napa River as salmonid nursery habitat by greatly reducing  
15 physical habitat and access to spawning gravels, as well as lowering water quality. (AR 10-11; 131, 9492-  
16 9494 [also noting that lowered flows equate to reduced capacity to effectively dilute waste discharges].)<sup>6</sup>

17 In short, the Board’s statement that “The record is simply devoid of evidence that diversions or  
18 extractions actually contribute to significant sedimentation problems in the Napa River” simply ignores the  
19 evidence discussed in section IV.A.3.b of Living Rivers’ opening brief regarding other categories of projects  
20 that contribute to the decline of salmonids in the Napa River watershed.

21 Since this TMDL includes a “means of compliance” that will cause additional sediment inputs (i.e.,  
22 its performance standard for controlling surface erosion), the SED must evaluate the cumulative impact of  
23 the TMDL in combination with other closely related projects - meaning other land uses whose impacts  
24 interact or combine with the impacts of the TMDL.<sup>7</sup> This is especially true with respect to programs over  
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26 <sup>6</sup> See also, AR 7985 [Staff Report for State Board, May 20, 2008: “Studies show that channel incision,  
27 caused by excessive erosion, has reduced the quantity and quality of gravel bars, riffles, side channels, and  
28 sloughs, which provide spawning and rearing habitat for the salmon and trout. Channel incision in the Napa  
29 River and lower baseflows in the tributaries appear to be the key factors limiting reproductive success and  
30 fry survival for the Chinook salmon. Steelhead trout spawn further upstream in the tributaries, and are not  
as affected by channel incision. Low summer stream baseflow and poor habitat access and passage appear  
to be the most important factors in the decline of steelhead trout.”

<sup>7</sup> See Guidelines § 15064(i)(1); § 15065(c);§ 15355.)

1 which the Board has jurisdiction, such as surface water diversions and certain types of groundwater  
2 extraction.<sup>8</sup> And with respect to the Napa County ECP program, “the lead agency has a duty to “use its best  
3 efforts to find out and disclose all it reasonably can.” (Guidelines, § 15144; *Vineyard, supra*, 40 Cal.4th at  
4 p. 428.)

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18 <sup>8</sup> California employs a dual system of surface water rights that recognizes both appropriative and riparian  
19 rights. (*People v. Shirokow* (1980) 26 Cal.3d 301, 307.) Under the riparian doctrine, the owner of land  
20 contiguous to a watercourse has the right to the reasonable, beneficial use of the natural flow of water on  
21 his or her land. (*Ibid.*) Under the appropriation doctrine, a person may obtain a statutory entitlement from  
22 the State Water Board to take “water for other than riparian or overlying uses.” (*Id.*, citing *City of Pasadena*  
23 *v. City of Alhambra* (1949) 33 Cal.2d 908, 925; (Water Code, § 1225.) The appropriation doctrine applies  
24 to “appropriations of water from surface streams and subterranean streams flowing through known and  
25 definite channels.” (Water Code, § 1200.)

26 California law recognizes two categories of groundwater. The first, referred to as a “subterranean  
27 stream,” consists of groundwater flowing through a subsurface channel with relatively impermeable bed and  
28 banks, where the course of the channel is known or capable of being determined by reasonable inference.  
29 (*North Gualala Water Co. v. State Water Resources Control Bd.* (2006) 139 Cal.App.4th 1577, 1589 (*North*  
30 *Gualala*.) Diversions from subterranean streams reduce stream flows in the surface stream and are subject  
to the Board’s authority to permit the appropriation of surface water. The second, referred to as “percolating  
groundwater,” consists of any groundwater not flowing within a subterranean stream and is not traditionally  
considered subject to the Board’s authority to permit the appropriation of surface water. (*Id.*) Courts and  
commentators have perceived, however, an “Alice-in-Wonderland”-like quality in the distinction “because  
the legal categories (*e.g.*, “ ‘subterranean streams flowing through known and definite channels,’ ”  
“percolating water”) are drawn from antiquated case law and bear little or no relationship to hydrological  
realities.” (*Id.* at p. 1591.)

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2 **B. THE SUBSTITUTE ENVIRONMENTAL DOCUMENT VIOLATES CEQA BY FAILING**  
3 **TO DESCRIBE THE PROJECT’S PERFORMANCE STANDARD FOR CONTROLLING**  
4 **INCREASES IN RUNOFF.**

5 In section IV.B of its opening brief, Living Rivers argues that the SED’s incomplete description of  
6 the project’s performance standard for controlling increases in runoff violates two CEQA requirements:  
7 to provide a complete project description and not to defer the development of mitigation measures. The  
8 Board’s argument in response is that:

9 Regarding the “criteria for determining the ‘significance’ of increases in surface runoff,” the  
10 standard clearly states: “Effectively attenuate significant increases in storm runoff, *so that*  
11 *the runoff from vineyards shall not cause or contribute to downstream increases in rates*  
12 *of bank or bed erosion.*” (AR 19, emphasis added.) LRC never explains why this definition  
13 of significance is impermissibly vague; it just alleges that it is.

14 (ROB 20:21 (emphasis in original).) This argument confuses the performance standard with the criteria for  
15 judging whether it is achievable or has been achieved. The language the Board emphasized in the above  
16 quote is the performance standard. But nothing in the TMDL or SED tells the public what criteria will be  
17 used to determine that is has been achieved. As noted in Living Rivers opening brief, the Board considered  
18 but decided against using a criterion of 10-15% above background. (POB 25.) Thus, the Board well knows  
19 the difference between a performance standard and a criterion for judging its success. As do the Courts.  
20 (See *CBE, supra*, 184 Cal.App.4th at p. 93- 95 (*CBE*) [lead agency “divulged little or no information about  
21 how it quantified the Project's greenhouse gas emissions, offered no assurance that the plan for how the  
22 Project's greenhouse gas emissions would be mitigated to a net-zero standard was both feasible and  
23 efficacious, and created no objective criteria for measuring success”].)

24 The Board’s argument that this performance standard/mitigation measure is not “fatally vague” is  
25 apparently based on the fact that it is written in plain English and can be understood. But Living Rivers’  
26 argument does not arise in a legal vacuum. It arises in the context of well-established CEQA jurisprudence  
27 discussed at POB, 23:287. These cases establish the criteria that must be met in order to defer the  
28 development of specific mitigation measures. “[F]or kinds of impacts for which mitigation is known to  
29 be feasible, but where practical considerations prohibit devising such measures early in the planning process  
30 . . . , the agency can commit itself to eventually devising measures that will satisfy specific performance  
criteria articulated at the time of project approval.” (*Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359;  
1393-96 (*Gentry*) (emphasis added).) There must be evidence supporting a conclusion that the use of a  
performance standard will be feasible and effective in reducing significant impacts. (*CBE, supra*, 184

1 Cal.App.4th at p. 95; *Sacramento Old City Ass’n v. City Council of Sacramento* (1991) 229 Cal.App.3d  
2 1011; *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308-309 (*Sundstrom*.) No such  
3 showing has been made here. The Board cannot reasonably dispute that the runoff standard is a mitigation  
4 measure added to the TMDL to reduce the impacts of having people install engineered drainage facilities  
5 to control surface erosion. (See POB 24:13-25.) Therefore, these cases control.

6 These CEQA requirements also apply to program level EIRs or equivalent environmental  
7 documents. For, example, in *Vineyard, supra*, the Supreme Court held that a Program-level EIR that “leaves  
8 consideration of long-term impacts until after project approval’ does not serve the purpose of sounding an  
9 ‘environmental alarm bell’ before the project has taken on overwhelming bureaucratic and financial  
10 momentum” (40 Cal.4th at p. 441). Similarly, in *Stanislaus Natural Heritage Project v. County of*  
11 *Stanislaus* (1996) 48 Cal.App.4th 182, 195 (*Stanislaus Natural Heritage* ), the Court held that a Program  
12 EIR violated CEQA’s requirement to “programmatically” evaluate the impacts of later phases that  
13 constitute the “whole” of the project, stating:

14 The County in essence approved an EIR for a 25-year project when water for the project had  
15 not been assured beyond the first five years of the fifteen-year first phase of the project. The  
16 County knew neither the source of the water the project would use beyond the first five  
17 years, nor what significant environmental effects might be expected when the as yet  
18 unknown water source (or sources) is ultimately used. In our view, the County’s approval  
19 of the project under these circumstances defeated a fundamental purpose of CEQA: to  
20 “inform the public and responsible officials of the environmental consequences of their  
21 decisions before they are made.” [citations.] The CEQA EIR process “protects not only the  
22 environment but also informed self- government. See also Guidelines, California Code of  
23 Regulations title 14, section 15002, subdivision (a)(1), which points out that one of the  
24 “basic purposes” of CEQA is to “[i]nform governmental decision-makers and the public  
25 about the potential, significant environmental effects of proposed activities.”

26 (*Id.* at pp. 195-196.)

27 The Board argues that its performance standard for controlling increases in runoff is “sensible” based  
28 on the evidence in the record. The issue in this case is not whether it is “sensible,” the issue is whether the  
29 Board complied with its legal obligations to disclose the nature and extent of the environmental impacts  
30 associated with this TMDL to the public before reaching that conclusion. Because “the existence of  
substantial evidence supporting the agency’s ultimate decision on a disputed issue is not relevant when one  
is assessing a violation of the information disclosure provisions of CEQA.” (*CBE, supra*, 184 Cal.App.4th  
at p. 82; accord, *Schoen v. CDF* (1997) 58 Cal.App.4th 556, 572 [“Such information is relevant to a  
substantial evidence review, but is irrelevant to a review of CDF’s authority to permit a forester to bypass

1 the public review process.”]

2 **C. THE BOARD’S CEQA DOCUMENT VIOLATES CEQA BY PIECEMEALING ITS**  
3 **REVIEW OF THE “WHOLE” OF THE PROJECT BY EXCLUDING THE WDR WAIVER**  
4 **POLICY**

5 Whether deliberately or due to misunderstanding, the Board’s brief takes the same approach as the  
6 Board’s Response to Comments in mis-characterizing Living Rivers’ argument. The opposition brief  
7 states: “Here, LRC alleges that the Water Board is not permitted to evaluate the Basin Plan amendment  
8 alone in one EIR, and to defer development and consideration of the issuance of a waiver of waste discharge  
9 requirements (relating to sediment discharges) to a subsequent CEQA document.” (ROB, 23:9-11.)

10 Of course, Living Rivers does not argue that CEQA review for the TMDL must include CEQA  
11 review for each landowner’s waiver from the TMDL that the Board final waiver policy authorizes. Instead,  
12 Living Rivers argues that CEQA review for the TMDL must include review of the “waiver policy” that the  
13 Board intends to adopt and that will govern and authorize the specific waivers from the TMDL that  
14 individual landowners will be able to obtain.

15 The Board’s mis-characterization of Living Rivers’ argument is not the result of a one-time choice  
16 of words. The Board devotes three full pages of its brief to an extensive legal argument that CEQA does  
17 not require joint CEQA review of the TMDL and individual waivers from the TMDL for any given  
18 landowner. (ROB, 24:5 - 26:27) This entire section of the Board’s brief is entirely irrelevant because  
19 Living Rivers’ legal claim is not about these individual waivers, it is about the forthcoming waiver policy.

20 The only reference the Board makes to Living Rivers’ actual legal claim is its statement that  
21 “[n]othing in the Basin Plan amendment (which LRC does not even cite) contains or requires, a waste  
22 discharge waiver ‘policy.’” (ROB 23:28.) It may be true that nothing in the BPA says that a waste discharge  
23 waiver policy is “required,” but that is not the legal test for whether the Board has violated CEQA’s  
24 prohibition on piece-mealing environmental review and on providing an incomplete project description.  
25 Here, the relevant fact is that the BPA clearly “anticipates” the adoption of a waste discharge waiver  
26 ‘policy.’” Indeed, the final TMDL’s performance standards include many references to the anticipated  
27 waiver policy. (See AR 17, 19, 20, 21, 22.) Thus, under applicable case law, the Board was obligated to  
28 describe the WDR waiver policy and subject it to CEQA review with the TMDL. See *Laurel Heights*  
29 *Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376, 395-396; *Bozung*  
30 *v. Local Agency Formation Commission* (1975) 13 Cal.3d 263, 283-284; *San Joaquin Raptor/Wildlife*

1 *Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 733 (*San Joaquin Raptor I*); *City of*  
2 *Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438, 1452-1453; *City of Carmel-By-the-Sea v.*  
3 *Board of Supervisors* (1986) 183 Cal.App.3d 229, 241-243; *Citizens Association for Sensible Development*  
4 *of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 165-166.

5 Indeed, the Board has invited the Court to review its web page providing information on the Board's  
6 ongoing development of the waiver policy. For the Court's convenience, Living Rivers has printed and  
7 attached to its First Request for Judicial Notice the web page corresponding to the URL included in the  
8 Board's opposition brief (at ROB 25:19.) The most relevant text from this web page states:

9 Water Board staff is developing a Conditional Waiver of Waste Discharge Requirements for  
10 Vineyard Facilities in the Napa River and Sonoma Creek Watersheds (Vineyard Waiver).  
11 The implementation plans for the Napa River and Sonoma Creek Sediment Total Maximum  
12 Daily Loads(TMDLs) identified waste discharge requirements or waivers thereof as a  
regulatory tool to achieve sediment load allocations specified in the TMDLs.

13 Staff will solicit input from stakeholders during this waiver development process. The  
14 essential component of the Vineyard Waiver will be the vineyard owner/operator's  
15 completion of a farm water quality plan (farm plan). A farm plan includes a comprehensive  
16 inventory and assessment of natural resources, agricultural lands, and management practices.  
17 The farm plan must address surface erosion, storm water runoff, sediment delivery from  
18 roads, pesticide use, nutrient management, and protection of stream areas.

19 The proposed conditions would require vineyard owners and/or operators to:

- 20 1. Enroll in the Vineyard Waiver program by submitting a Notice of Intent form, stating their  
intent to comply with the conditions of the Vineyard Waiver;
- 21 2. Develop a farm water quality management plan (Farm Plan) that addresses, at a minimum,  
erosion control, attenuation of increases in peak runoff, roads, pesticide and fertilizer  
22 applications, and sediment delivery sites such as gullies, rills, and landslides;
- 23 3. Implement and maintain management practices in accordance with the Farm Plan to meet  
the performance standards;
- 24 4. Conduct compliance monitoring and undertake corrective action as necessary; and
- 25 5. Report annually on the status of their current and anticipated management practices.

26 This web page demonstrates that the form and content of the "vineyard waiver" is a quasi-legislative  
27 policy decision that will set "conditions" that individual landowners must meet to qualify for "enrollment"  
28 in the waiver. The Board's determination as to whether any landowner does or does not so qualify based  
29 on whether he or she meets these general conditions would then be a quasi-adjudicative decision based on  
30 the facts presented in the "Farm Plan" and "Annual Reports." See also AR 1691, which states:

"The implementation plan would require actions to reduce sediment discharges associated

1 with key sources: vineyards; grazing lands; rural lands; and parks and open space and/or  
2 municipal public works. Required actions by landowners include 1) submittal of reports of  
3 waste discharge (ROWDs) and 2) compliance with waste discharge requirements (WDRs)  
or WDR waiver conditions.”

4 Under CEQA, the waiver policy is part of the TMDL “project” because it directly affects the scope  
5 of the TMDL’s application; whereas, the determination whether any particular landowner qualifies for  
6 “enrollment” in the waiver is not.

7 In its opening brief, Living Rivers pointed out that segmentation of the project description as  
8 between the TMDL and the TMDL waiver policy left several key issues unresolved, including the criteria  
9 for judging the achievability and achievement of the runoff standard and the geographic scope of the  
10 TMDL’s application. With respect to the runoff standard, those issue are fully briefed above and in Living  
11 Rivers’ opening brief.

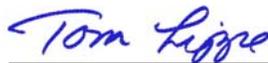
12 With respect to the project’s geographic scope, the Board cites to AR 1676, No. 9. (ROB 27:9 [“The  
13 proposed Basin Plan amendment would affect the entire Napa River watershed, except for land areas  
14 upstream of municipal water supply reservoirs. Implementation would involve specific land and water  
15 management actions throughout the watershed.”] This text is ambiguous because the second sentence  
16 appears to contradict the second sentence. Therefore, the geographic scope of the TMDL remains uncertain

17 **V. CONCLUSION.**

18 For the reasons set forth above, Living Rivers seeks a writ of mandate pursuant to Public Resources  
19 Code 21168.9(a)(1), compelling Respondent to set aside its adoption of the Amendment to the Water  
20 Quality Control Plan for the San Francisco Bay Basin (Basin Plan) to Establish a Total Maximum Daily  
21 Load (TMDL) for Sediment in the Napa River, and an Implementation Plan to Achieve the TMDL and  
22 Related Habitat Enhancement Goals (also known as the “Napa River Sediment TMDL”); and pursuant to  
23 21168.9(a)(3), compelling Respondent to recirculate and adopt a Substitute Environmental Document that  
24 complies with CEQA.

25 DATED: February 2, 2012

LIPPE GAFFNEY WAGNER LLP

26  
27 

28 \_\_\_\_\_  
Thomas N. Lippe  
Attorneys for Petitioner

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30 C:\Data\LIPPE FILES\NAPA4\TMDL\Trial\Briefs on Merits\B003m SENT Reply Trial Brief.wpd

1 **PROOF OF SERVICE**

2 I am a citizen of the United States, employed in the City and County of San Francisco, California.  
3 My business address is 329 Bryant St., Suite 3D, San Francisco, CA 94107. I am over the age of 18 years  
4 and not a party to the above entitled action. On February 2, 2012, I served the following document:

5 • **PETITIONER’S REPLY TRIAL BRIEF**

6 on the parties designated on the attached service list by placing said document into a sealed envelope  
7 addressed to the parties designated on the attached service list; and

8 **MANNER OF SERVICE**

9 **(check all that apply)**

- 10  By First Class Mail In the ordinary course of business, I caused each such envelope to  
11 be placed in the custody of the United States Postal Service, with  
12 first-class postage thereon fully prepaid in a sealed envelope.
- 13  By Personal Service I personally delivered each such envelope to the office of each such  
14 addressee on the date written below.
- 15  By Overnight FedEx I caused such envelope to be placed in a box or other facility  
16 regularly maintained by the express service carrier or delivered to  
17 an authorized courier or driver authorized by the express service  
18 carrier to receive documents, in an envelope or package designated  
19 by the express service carrier with delivery fees paid or provided  
20 for.
- 21  By Facsimile I caused such document to be served via facsimile electronic  
22 equipment transmission (fax) on the parties in this action by  
23 transmitting a true copy to the following fax numbers listed under  
24 each addressee below.
- 25  By Personal Delivery by Courier I caused each such envelope to be delivered to an authorized  
26 courier or driver, in an envelope or package addressed to the  
27 addressee below.

28 I declare under penalty of perjury under the laws of the State of California that the foregoing is true  
29 and correct. Executed on February 2, 2012, in the City and County of San Francisco, California.

30 \_\_\_\_\_  
Amelia Mooney

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# **EXHIBIT 4**

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10 LIVING RIVERS COUNCIL

ENDORSED  
FILED  
ALAMEDA COUNTY

APR 25 2012

CLERK OF THE SUPERIOR COURT  
By  Deputy

11  
12 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
13 **IN AND FOR THE COUNTY OF ALAMEDA**

14 LIVING RIVERS COUNCIL,  
15  
16 Petitioner and Plaintiff,  
17 vs.  
18 STATE WATER RESOURCES CONTROL  
19 BOARD, and DOES 1 through 10,  
20  
21 Respondents and Defendants.

Case No.: RG 11560171

ASSIGNED FOR ALL PURPOSES TO:  
JUDGE EVELIO GRILLO, DEPARTMENT 31

**PLAINTIFF'S SUPPLEMENTAL TRIAL  
BRIEF**  
- Re Court's April 19, 2012 Order (1)  
Continuing Hearing and (2) Permitting  
Supplemental Briefing

**[CALIFORNIA ENVIRONMENTAL  
QUALITY ACT]**

Date: April 27, 2012  
Time: 10:00 a.m.  
Dept: 31  
Judge: Evelio Grillo

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**1. Question No. 1. .... 1**

    a. The Basin Plan Amendment is the "project.". .... 1

    b. The SED in this case is equivalent to a Mitigated Negative Declaration.. .... 1

    c. The Board did not specify the type of EIR to which the SED is equivalent.. .... 2

    d. For purposes of the legal issues raised in this case, it does not matter  
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**2. Question No. 2. .... 4**

    a. It is unknown what level of CEQA review may occur for matters this SED defers. .... 4

    b. The SED fails to assess the effect of the Napa County Conservation Regulations  
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**7. Question No. 8. .... 10**

**8. Questions No. 9. .... 10**

1 **1. Question No. 1.**

2 **a. The Basin Plan Amendment is the “project.”**

3 The Basin Plan Amendment (“BPA”) is the “project” as that term is defined in CEQA, which  
4 consists of a regulation establishing a Total Maximum Daily Load (“TMDL”) for sediment pollution in the  
5 Napa River and regulations establishing an Implementation Plan to achieve the sediment reductions  
6 necessary to meet the TMDL. Thus, the Court’s question is properly directed to whether the Board’s  
7 “Substitute Environmental Document” is equivalent to one of the EIR types listed in the Court’s question.

8 The adoption of a rule or regulation may cause significant impacts, even if it does not itself authorize  
9 any particular action, because impacts may flow from the “methods by which compliance with that rule or  
10 regulation will be achieved.” (Guidelines, § 15187, subd. (a).) Thus, for water quality regulations adopted  
11 by the Board, the Board’s Substitute Environmental Document (“SED”) must analyze the environmental  
12 impacts of the methods of compliance, as well as mitigation measures for those impacts. (*City of Arcadia*  
13 *v. State Water Resources Control Board* (2006) 135 Cal.App.4th 1392, 1424-1426 (*City of Arcadia*);  
14 Guidelines, § 15187, subds. (c)(1), (c)(2).) “The difficulty of assessing future impacts of adopting a general  
15 level plan does not excuse preparation of an EIR, but merely reduces the level of specificity demanded and  
16 shifts the focus to secondary effects.” (*Rio Vista Farm Bureau Center v. County of Solano* (1992) 5  
17 Cal.App.4th 351, 374, citing Guidelines, § 15146, subd. (b).)

18 **b. The SED in this case is equivalent to a Mitigated Negative Declaration.**

19 The SED in this case is equivalent to a Mitigated Negative Declaration rather than any of the three  
20 types of EIRs listed in the Court’s question. The Board contends the SED consists of the Staff Report,  
21 including the Environmental Checklist (at page 94 of the Staff Report (AR 795), and the Responses to  
22 Comments. (AR 4 ¶ 3). To determine what “level” of CEQA document this SED is, it is necessary to  
23 examine what these documents actually do, or fail to do, especially with respect to the channel incision  
24 impacts caused by the BPA’s requirement, in Table 4.1, that landowners control “excessive” amounts of  
25 surface erosion, including its identification of the Napa Conservation Regulations as a means of compliance.

26 The portion of the Staff Report preceding the Environmental Checklist is a description of the  
27 environmental setting (or “baseline”) as it relates to salmonid habitat. This portion of the Staff Report does  
28 not examine, at all, the “reasonably possible” adverse environmental impacts that the BPA itself may cause.  
29 This task is left to the Environmental Checklist. The use of this Checklist is required by the Board’s  
30 regulations at Cal. Code of Regs., title 23, § 3777(a). (AR 794.) The form of the Checklist is the same form

1 provided in appendix G of the CEQA Guidelines, which is the form the Guidelines recommend for use in  
2 preparing an Initial Study. (Guideline 15063(f).)

3 Here, the Checklist finds that all impacts but one are either “less-than-significant” or “less-than-  
4 significant with mitigation.” (AR 7960808.) The Checklist finds one broadly stated “Biological Resources”  
5 impact to be “potentially significant,” both incrementally and cumulatively. (AR 798, § IV.b [“Have a  
6 substantial adverse effect on any riparian habitat or other sensitive natural community identified in local or  
7 regional plans, policies, and regulations or by the California Department of Fish and Game or U.S. Fish and  
8 Wildlife Service?”]; AR 807-808 §§ XVII a), b).) Where an impact is “potentially significant,” an EIR, or  
9 EIR-level SED is required. (*City of Arcadia*, 135 Cal.App.4th at 1424-1426.)

10 The Checklist does not specify what, exactly, this “potentially significant” impact is, but the  
11 discussion at AR 816-817 indicates that it refers to impacts on the 26 sensitive natural communities listed  
12 in Table 11.b. Thus, it does not assess the extent to which the BPA’s requirement, in Table 4.1, that  
13 landowners control “excessive” amounts of surface erosion, or Napa County’s Conservation Regulation  
14 program, may cause or contribute to channel incision impacts. With respect to this impact, the Staff Report  
15 is equivalent to a Mitigated Negative Declaration.

16 **c. The Board did not specify the type of EIR to which the SED is equivalent.**

17 Assuming, arguendo, that the SED provides EIR-level review for impacts on the 26 sensitive natural  
18 communities discussed at AR 816-817, and would therefore be considered an EIR of some type, it is clearly  
19 not equivalent to a “Staged EIR” because it is not a “large capital project” as required by Guideline 15167.  
20 However, to answer whether the SED is equivalent to a Project or Program EIR in the abstract is not  
21 possible. The question must be placed in a specific context, i.e., “equivalent” for what purpose?

22 If the question is whether the Board could prepare and certify an SED that is the “equivalent” of a  
23 Program EIR, the answer is “yes,” because the BPA meets criteria (1) and (3) of Guideline 15168 and  
24 possibly (2) and (4) as well. If the question is whether the Board “accurately identified” the SED as the  
25 “equivalent” of a Project or a Program EIR,<sup>1</sup> the answer is “no,” because it did not define the SED as  
26 equivalent to any type of EIR. The SED does, however, indicate that at least portions of its environmental  
27 review are “programmatic” (AR 813 [“this analysis considers the abovementioned reasonably foreseeable  
28

29 \_\_\_\_\_  
30 <sup>1</sup> *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1316 (*Sierra Club*) [“The 1981 ARM Plan  
EIR accurately defines itself as a program EIR”]

1 methods of compliance with the Basin Plan amendment in general programmatic terms”].)

2 **d. For purposes of the legal issues raised in this case, it does not matter whether the SED**  
3 **is equivalent to a Negative Declaration or an EIR.**

4 In this case it does not matter whether this SED is considered to be like a Negative Declaration or  
5 an EIR. Either way, the same legal requirements that Living Rivers claims were violated apply.  
6 Specifically, whether conceived as a Negative Declaration or an EIR, a challenge to the informational  
7 sufficiency of the document due to its failure to conduct an EIR-level investigation of the project’s potential  
8 to cause or contribute to a particular type of impact is judged by the “EIR-friendly” fair argument standard.  
9 (See *Protect The Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1109  
10 [“Thus, in preparing an EIR, the agency must consider and resolve every fair argument that can be made  
11 about the possible significant environmental effects of a project” (emphasis added)]; see also *Bakersfield*  
12 *Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1207-1208 (*City of*  
13 *Bakersfield*) [when an EIR fails to assess a particular impact, the court reviews the record de novo, not under  
14 the deferential “substantial evidence test.”].) In both of these cases, plaintiffs alleged that the EIRs, which  
15 briefly mentioned a particular impact and found it less-than-significant, failed to conduct any actual  
16 assessment of the particular impact at issue.

17 Finally, while the decisions in *City of Arcadia* and *San Joaquin River Exchange Contractors Water*  
18 *Authority v. State Water Resources Control Board* (2010) 183 Cal.App.4th 1110 (*River Exchange*  
19 *Contractors*) appear to treat the determination of whether the SED is equivalent to a Negative Declaration  
20 or EIR as an important issue (e.g., *River Exchange Contractors*, 183 Cal.App.4th at 1128) both cases quickly  
21 get on with the more important task of determining whether the SED failed to assess a “means of  
22 compliance” based on whether such “means” were “speculative” or not. *Id.* In *City of Arcadia*, the court  
23 rejected the Board’s contention that the expected means of compliance are “speculative,” because the facts  
24 showed there was only one means of compliance that would achieve the TMDL target. (*City of Arcadia*,  
25 135 Cal.App.4th at 1425.) Similarly, here the expected means of compliance with the surface erosion  
26 standard are well known. (See Petitioner’s Opening Trial Brief (“POB”) 19:19-20:5.)

27 In *River Exchange Contractors*, the court accepted the Board’s contention that the SED did all it  
28 reasonably could to assess the impacts of the TMDL’s expected means of compliance, finding that “the Final  
29 Staff Report for the Salt/Boron TMDL Amendment evaluated 15 options for implementing this TMDL based  
30 on their feasibility, cost, flexibility, time to implement and likelihood of success, leaving this decision to the

1 discharger” and that further analysis was impracticable until dischargers chose the methods they would use.  
2 (183 Cal.App.4th at 1128.) Here, in contrast, the Board disclaimed any responsibility to assess the impacts  
3 of the BPA’s expected means of compliance. (POB 19:19.)

4 In sum, both results are based on the facts relating to the TMDL’s expected means of compliance,  
5 not on whether the SED was more like an EIR or a Negative Declaration.

6 **2. Question No. 2.**

7 **a. It is unknown what level of CEQA review may occur for matters this SED defers.**

8 The case law relating to Program EIRs fall into two categories. One category consists of challenges  
9 to the legality of an agency’s subsequent environmental review of “second tier” phases of a multi-phase  
10 project. (See *Sierra Club, supra*; *Center for Sierra Nevada Conservation v. County of El Dorado* (2012)  
11 202 Cal.App.4th 1156, 1171 (CSERC); *Citizens For Responsible Equitable Environmental Development*  
12 *v. City of San Diego Redevelopment Agency* (2005) 134 Cal.App.4th 598, 615 (CREED) and *California Oak*  
13 *Foundation v. Regents of University of California* (2010) 188 Cal.App.4th 227, 281 (Oak Foundation).)

14 Guideline 15152 defines “tiering” as three steps, i.e., (1) “using the analysis of general matters  
15 contained in a broader EIR (such as one prepared for a general plan or policy statement) with later EIRs and  
16 negative declarations on narrower projects”; (2) “incorporating by reference the general discussions from  
17 the broader EIR”; and (3) “concentrating the later EIR or negative declaration solely on the issues specific  
18 to the later project.” Two of these three steps apply to the later “second tier” environmental document.  
19 Here, the SED does not tier to any prior EIR, therefore, the above cases are inapposite.

20 *Sierra Club, CREED* and *CSERC* are relevant, however, because, assuming the instant SED is a  
21 programmatic environmental document under CEQA, these cases show that it is impossible to predict now,  
22 at the first tier, what, if any, environmental document will be prepared to review the matters the instant SED  
23 defers, including the matters listed in the Court’s Questions No. 2 and 3(a) and (b).

24 The decision in *Oak Foundation* provides an example of how “tiering” is supposed to work. In that  
25 case, the EIR at issue was a second tier, project-level EIR that tiered to the University’s prior 2020 Long  
26 Range Development Plan (“LRDP”) Program EIR. With respect to biological resources impacts in Memorial  
27 Grove, the second tier EIR incorporated by reference the discussion of this impact from the first tier Program  
28 EIR. The court found the Program EIR’s conclusion that such impacts are not significant to be supported  
29 substantial evidence. (*Id.* at 281.)

1           **b.     The SED fails to assess the effect of the Napa County Conservation Regulations and the**  
2           **Board's anticipated Waste Discharge group policy on vineyard waivers.**

3           A second category of Program EIR cases involves challenges to the informational sufficiency of  
4 Program EIRs prepared for the first tier approvals of multi-phase projects on grounds that the EIR unlawfully  
5 defers to an uncertain future a detailed description of future aspects of the project description and their  
6 environmental impacts. Examples include: *Stanislaus Natural Heritage Project v. County of Stanislaus*  
7 (1996) 48 Cal.App.4th 182 (*Stanislaus Natural Heritage*); *Vineyard Area Citizens for Responsible Growth,*  
8 *Inc. v. City of Rancho Cordova, supra*, 40 Cal.4th 412 (*Vineyard*); *Rio Vista Farm Bureau Center v. County*  
9 *of Solano* (1992) 5 Cal.App.4th 351 (*Rio Vista*) and *In re Bay-Delta Programmatic Environmental Impact*  
10 *Report Coordinated Proceedings* (2008) 43 Cal.4th 1143 (*In re Bay-Delta*).

11           The decisions agree that a lead agency cannot defer the analysis of impacts from planning,  
12 construction or operation of a project simply because the project is a “program” and the EIR is a Program  
13 EIR. In *Stanislaus Natural Heritage*, the EIR provided “project” level review for some phases of the project  
14 and “program” level review for others. In response to a challenge to the EIR’s level of detail regarding the  
15 project description and scope of impact analysis, the County argued that it was permissible for a Program  
16 EIR to defer more detailed analysis until later phases of the project. The Court disagreed, stating:

17           The decision to ‘tier’ environmental review does not excuse a governmental entity from  
18 complying with CEQA’s mandate to prepare, or cause to be prepared, an environmental  
19 impact report on any project that may have a significant effect on the environment, with that  
20 report to include a detailed statement setting forth ‘[all significant effects on the environment  
21 of the proposed project.]’ (Pub. Resources Code, § 21100.)

22 (*Id.* at 197.) In language that is on point here, the Court held that:

23           Calling it a ‘program’ does not relieve the County from having to address the significant  
24 environmental effects of that project. Respondents are therefore incorrect in asserting that  
25 the County may (1) deem the environmental effects of adopting the specific plan, whatever  
26 those effects may be, to be significant, then (2) approve the specific plan [the project], and  
27 then (3) at some later time determine what the significant environmental effects are of the  
28 specific plan that has already been approved.

29 (*Id.* at p. 202-203.)

30           In all of these cases, the courts determined the informational sufficiency of the Program EIR based  
on whether the EIR provided a appropriate level of detail regarding future aspects of the project description  
and their environmental impacts. This issue was resolved by these courts by assessing whether, in light of  
the scale or general nature of the first tier approval, it was realistic or possible for the EIR to provide the

1 requested details in the first tier environmental document. Accordingly, the Court in *In re Bay-Delta* noted  
2 that: “Although the project in *Stanislaus* was to be developed ‘in four overlapping phases over twenty-five  
3 years’ [citation], it was in no relevant sense comparable to the broad, general, multi-objective, policy-setting,  
4 geographically dispersed CALFED Program.” (*In re Bay-Delta*, 43 Cal.4th at 1171.) The Court also  
5 distinguished *Vineyard* on the same grounds. (*Id.* at 1171, n.5.) With respect to *Rio Vista*, the Supreme  
6 Court in *In re Bay-Delta* quoted with approval its language that: “Where, as here, an EIR cannot provide  
7 meaningful information about a speculative future project, deferral of an environmental assessment does not  
8 violate CEQA.” [citation] ... ‘Considering the speculative nature of any secondary effects from an uncertain  
9 future facility, which will be subject to its own separate environmental review, we conclude that no further  
10 findings on environmental impacts or the rationale for such findings was reasonably required from the [final  
11 EIR].’” (*In re Bay-Delta*, 43 Cal.4th at 1172.)

12 Applying these principles to the CALFED program, the Court in *In re Bay-Delta* concluded that:

13 [t]he description of potential water sources for the CALFED Program's future projects and  
14 the environmental effects of obtaining water from those sources must be appropriately  
15 tailored to the current first-TIER stage of the planning process, with the understanding that  
16 additional detail will be forthcoming when specific second-tier projects are under  
17 consideration. [citation] .... The CALFED Program is to be implemented over a 30-year  
18 period and the sources of water actually used depend on future decisions between willing  
19 buyers and sellers. It is therefore impracticable to foresee with certainty specific sources of  
20 water and their impacts.

21 (*In re Bay-Delta*, 43 Cal.4th at 1172.)

22 Here, SED provides insufficient detail regarding at least three matters: (1) the environmental impacts  
23 of its surface erosion control standard, including the Napa County regulations; (2) the feasibility of achieving  
24 and criteria for measuring the success of its runoff control standard; and (3) the RoWD/WDR waiver policy.  
25 Unlike the future water sources and the Environmental Water Account at issue in *In re Bay-Delta*, none of  
26 these matters are “second tier” approvals. They are all operative at the same scale as the BPA; therefore,  
27 they are all part of this project, and must be evaluated in this SED. Consequently, “tiering” analysis does not  
28 apply, or if it does, the cases that are most on point are *Stanislaus Natural Heritage* and *Vineyard*. The SED  
29 provides no evidence to support a conclusion that it is impracticable to (1) assess the environmental impacts  
30 of its surface erosion control standard; (2) assess feasibility of achieving and specify the criteria for  
measuring the success of its runoff control standard; or (3) develop and disclose the conditions that  
landowners must satisfy to obtain a waiver from the RoWD/WDR requirement, or develop and disclose the

1 “thresholds” that will trigger the RoWD/WDR requirement. The Board has done even less than the agency  
2 in *Stanislaus Natural Heritage*, because here the SED evidences no intent by the Board to ever assess the  
3 channel incision effects of the BPA’s surface erosion control standard or the Napa County program.

4 Conversely, the SED’s deferral of analysis of specific RoWD/WDR waivers for specific landowners  
5 is permissible because providing more detail on these at this time is not possible.

6 **(1) The effect of the Napa County Conservation Regulations.**

7 This Court’s tentative ruling characterizes the Napa County regulations as part of the regulatory  
8 baseline. Assuming, arguendo, that this is accurate regarding the Napa regulations’ effects on new  
9 vineyards, it is not accurate with respect to vineyard operations in existence when the BPA becomes legally  
10 effective. These operations, both those that commenced before the Napa Regulations took effect in 1991  
11 and those permitted before the BPA becomes legally effective, will not be subject to the Napa Regulations’  
12 requirement that the landowner obtain County approval of an Erosion Control Plan.<sup>2</sup> However, these pre-  
13 existing operations will be subject to the BPA. (See discussion of Questions 6 and 7, *infra*.) Therefore, the  
14 BPA imposes a new regulatory requirement that is not included in the Napa regulations.

15 Moreover, even if the Napa regulations are part of the regulatory baseline, the SED must assess their  
16 effect on channel incision as part of adequately describing the environmental setting and assessing  
17 cumulative impacts. An accurate description of the environmental setting is crucial to a complete  
18 understanding by both the decision maker and the public of how the project will change and impact existing  
19 <sup>3</sup>conditions and resources. (*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27  
20 Cal.App.4th 713, 723 (*San Joaquin Raptor*)). CEQA also requires an assessment of the cumulative impacts  
21 of the BPA, which requires adding “the incremental impact of the project ... to other closely related past,  
22 present, and reasonably foreseeable probable future projects.” (Guidelines § 15355.) “Cumulatively  
23 considerable” means that the incremental effects of an individual project are significant when viewed in  
24 connection with the effects of past projects, the effects of other current projects, and the effects of probable  
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26 <sup>2</sup>Except that in certain situations where the landowner proposes to “replant” the vineyard, the County may  
27 require approval of a new Erosion Control Plan. (Napa County Code §§ 18.108.070.C and 18.108.090.)

28 <sup>3</sup>When an EIR’s description of the environmental setting is inadequate, it also renders the EIR’s  
29 identification of environmental impacts legally inadequate and precludes a determination that substantial  
30 evidence supports any findings that the environmental impacts have been mitigated to insignificance. (*San  
Joaquin Raptor, supra*, at p. 729.)

1 future projects. (Guidelines § 15064(h)(1).) Thus, the SED must assess the effects of the Napa regulations  
2 even if they are part of the environmental baseline because, in that event, these effects are “the effects of past  
3 projects, the effects of other current projects, and the effects of probable future projects.” (*Kings County*  
4 *Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712, 718.)

5           **(2) The Board's anticipated Waste Discharge group policy on vineyard waivers.**

6           As in *Stanislaus Natural Heritage*, the fact that the BPA is a “program” does not excuse the Board  
7 from CEQA’s normal requirements, including assessing the environmental effects of the “whole of the  
8 project” and “reasonably foreseeable future activities” associated with the Project that may change its scope  
9 or impacts. The BPA requires that landowners submit a Report of Waste Discharge (RoWD) permit  
10 application or a notice of “enrollment” to obtain a waiver of this requirement. (AR 19, Table 4.1 “Actions.”)  
11 The “threshold” requirements that will trigger the RoWD permit application requirement remains  
12 unspecified. (See AR 1659 and discussion of Questions 6 and 7, *infra*.) Also, the conditions that landowners  
13 must meet to qualify for a waiver from the RoWD permit application requirement remain unspecified. (POB  
14 28-31; Petitioner’s Reply Trial Brief, (PRB) 17-19.) Because these future regulatory provisions will  
15 determine to whom the BPA will apply, they are part of the project and must be described and assessed now,  
16 not later. At a minimum, they are “reasonably foreseeable future activities” associated with the Project that  
17 may change its scope or impacts.

18 **3. Question No. 3: Subparts a, b, and c:** No. See sections 2.a and 2,b *supra*.

19 **4. Question No. 4.** Petitioner’s counsel was misinformed, and therefore misspoke, at the April 12,  
20 2012 hearing in this matter when he told the court that the Napa County Conservation Regulations were  
21 adopted by voter initiative and therefore did not undergo CEQA review. Subsequent investigation reveals  
22 that in 1991 Napa County adopted the Conservation Regulations by Ordinance (No. 991) and that  
23 environmental review was by “Negative Declaration.” (Declaration of Thomas N. Lippe Re Plaintiff’s  
24 Supplemental Brief (Lippe Decl.), ¶ 2, Exh 1.) The County’s Initial Study/Negative Declaration discusses  
25 channel incision in its description of the environmental setting, but does not assess any possibility that  
26 compliance with the new Napa regulations may cause or contribute to channel incision impacts. (Lippe  
27 Decl.), ¶ 3, Exh 2.)

28 **5. Question No. 5.** The Staff Report discusses channel incision in its description of the environmental  
29 setting at AR 83, 1602, 1606, 1630-1634, 1637, 1662, 1664, 1722 and 1780. The discussion at AR 1606,  
30 1630-1633 describes the fact that channel incision is caused by various types of land uses for the purpose

1 of establishing a load allocation for different land use categories for channel incision caused sedimentation.  
2 At AR 664 the staff report discusses the need for new or replanted vineyards to analyze the potential for  
3 increased storm runoff to cause channel incision. (See also PRB 5-7.) None of these portions of the Staff  
4 Report assess the extent to which the BPA, by establishing a performance standard for controlling  
5 “excessive” amounts of surface erosion or by identifying compliance with the Napa regulations as  
6 “effective” in controlling excessive surface erosion, may cause or contribute to channel incision impacts.

7 In fact, the Board flatly refused to analyze the channel incision impacts of surface erosion control  
8 measures adopted to meet the TMDL’s limits. (AR 629-632.) In its October 1, 2010 response to comments,  
9 Board stated that “[t]o the extent that there may be impacts from the adoption of the TMDL, those impacts  
10 would result from the construction and/or operation of reasonably foreseeable methods of compliance with  
11 the TMDL” Still, however, the Board has not disclosed and analyzed what the “reasonably foreseeable  
12 methods of compliance” are (the Board still disclaims responsibility for any impacts arising from surface  
13 erosion control measures adopted in compliance with the Napa regulations) or what those impacts may be.  
14 (AR 1744.) Instead, the Board concluded, without explanation or citation to any particular portion of the  
15 SED, that the “potential impacts from reasonably foreseeable methods of compliance were analyzed by the  
16 SF Bay Water Board to the extent possible in this plan-level analysis.” (AR 1744.) The Board merely  
17 pointed to the whole of its environmental document and said that the analysis is in there, somewhere. (AR  
18 1745 [the “Board appropriately analyzed reasonably foreseeable methods of compliance in the substitute  
19 environmental documentation (see staff report at beginning at Page 93)”].”

20 **6. Questions Nos. 6 and 7.** With respect to its applicability and the “Actions” required of landowners  
21 as set forth in Table 4.1, with one exception, the BPA does not appear to distinguish between new and  
22 existing vineyards or between owners who plan to alter their vineyards versus those who do not. The  
23 exception is that the BPA’s standard to “effectively attenuate significant increases in storm runoff” (AR 19),  
24 rather than existing significant storm runoff from vineyards. Thus, the runoff standard applies to vineyard  
25 owners who alter their property but not others.

26 Also, the BPA does not clearly establish the criteria that will determine which landowners are subject  
27 to the BPA. (See (AR 1659 [“[The Board] expect[s] to define a minimum threshold, in terms of potential  
28 sediment delivery to channels caused by human activities from a given parcel that would trigger the  
29 requirement to prepare and implement a sediment control plan”].)

30 The BPA generally states that vineyard owners must continue to comply with the WDRs or waiver

1 conditions and report on their compliance therewith. The details of compliance and reporting will be  
2 “specified in applicable WDRs or waiver of WDRs” (AR 19); therefore, the BPA does not specify whether,  
3 or how often, a landowner must report on its compliance or “renew” its WDR or waiver.

4 The BPA does not require landowners to monitor the effectiveness of erosion control measures, only  
5 to report on implementation. (AR 27-28; AR 1659.)

6 **7. Question No. 8.** Yes, but only as necessary to mitigate the impacts of implementing new erosion  
7 control measures in compliance with the TMDL. (AR 8 at ¶ 16.) Otherwise, the BPA identifies channel  
8 incision as a separate sediment source category (along with “roads, grazing, vineyards, urban stormwater  
9 [and] runoff”). (AR 1662.) However, according to the Staff Report, the BPA does not “propose a regulatory  
10 permitting program to require channel restoration to resolve adverse ecological and water quality impacts  
11 of channel incision....” (AR 1669), opting instead to “rely upon voluntary participation by landowners in  
12 reach based stewardships that will work with public agencies to implement projects that jointly reduce  
13 sediment discharges and enhance [salmonid habitat].” (AR 1722 (emphasis added); see also AR 1780.)

14 **8. Question No. 9.** The BPA does not require the Board to actively monitor whether the specific  
15 “goals” of the BPA are being met.<sup>4</sup> It states that “in-channel effectiveness monitoring should be conducted  
16 by other agencies;” that “the Water Board will conduct in-channel effectiveness monitoring as part of the  
17 Surface Water Ambient Monitoring Program” (i.e., a different program); and that “At a minimum, repeat  
18 surveys will be conducted once every five years.” (AR 1820-1821, emphasis added.) The Water Board will  
19 also conduct “upslope effectiveness” monitoring to evaluate sediment delivery to channels from land use  
20 activities and natural processes. (AR 27.)

21 According to the Staff Report, the Board does have authority to modify the BPA in response to new  
22 information. (AR 1779 [“Approximately every five years, the San Francisco Bay Water Board has  
23 committed to evaluate monitoring results and assess progress made towards attaining targets and load  
24 allocations. New and relevant information from monitoring, special studies and the scientific literature will  
25 be taken into account as it becomes available. The San Francisco Bay Water Board may revise the TMDL  
26 and implementation plan and schedule as necessary through its adaptive implementation process.”])

27  
28  
29 <sup>4</sup>The goals are to: conserve the steelhead trout population; establish a self-sustaining Chinook salmon  
30 population; enhance the overall health of the native fish community; and enhance the aesthetic and  
recreational values of the river and its tributaries. (AR 10.)

1 DATED: April 25, 2012

LIPPE GAFFNEY WAGNER LLP

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*Tom Lippe*

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Thomas N. Lippe  
Attorneys for Petitioner

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1 **PROOF OF SERVICE**

2 I am a citizen of the United States, employed in the City and County of San Francisco, California.  
3 My business address is 329 Bryant St., Suite 3D, San Francisco, CA 94107. I am over the age of 18 years  
4 and not a party to the above entitled action. On April 25, 2012, I served the following document:

5 • **PETITIONER’S SUPPLEMENTAL TRIAL BRIEF**

6 on the parties designated on the attached service list by placing said document into a sealed envelope  
7 addressed to the parties designated on the attached service list; and

8 **MANNER OF SERVICE**

9 (check all that apply)

10  By First Class Mail In the ordinary course of business, I caused each such envelope to  
11 be placed in the custody of the United States Postal Service, with  
12 first-class postage thereon fully prepaid in a sealed envelope.

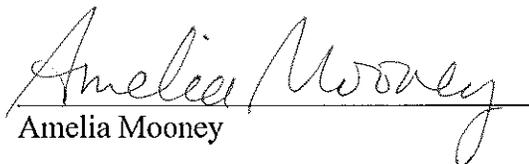
13  By Personal Service I personally delivered each such envelope to the office of each such  
14 addressee on the date written below.

15  By Electronic Mail I caused such document to be served via electronic equipment  
16 transmission (email) on the parties in this action listed on the  
17 attached service list as “served by email” by transmitting a true  
18 copy to the email addresses listed on the attached service list. The  
transmission was reported as complete and without error on April  
25, 2012 before 12:00 noon.

19  By Facsimile I caused such document to be served via facsimile electronic  
20 equipment transmission (fax) on the parties in this action by  
21 transmitting a true copy to the following fax numbers listed under  
each addressee below.

22  By Personal Delivery by Courier I caused each such envelope to be delivered to an authorized  
23 courier or driver, in an envelope or package addressed to the  
24 addressee below.

25 I declare under penalty of perjury under the laws of the State of California that the foregoing is true  
26 and correct. Executed on April 25, 2012, in the City and County of San Francisco, California.

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29 Amelia Mooney  
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