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10 **SUPERIOR COURT OF CALIFORNIA**
11 **COUNTY OF SAN DIEGO, CENTRAL DIVISION**

12 THE CALIFORNIA CHAPARRAL INSTITUTE,) Case No. 37-2009-00091583-CU-TT-CTL
13 Petitioner,) **PETITIONER'S REPLY BRIEF**
14 v.) Hearing: January 15, 2010
15 COUNTY OF SAN DIEGO,) Time: 10:00 a.m.
16 Respondent.) Dept.: SD-71
17) Date Action Filed: June 10, 2009
18) **INDEPENDENT CALENDAR JUDGE:**
19) Hon. Ronald S. Prager

20 DATED: January 8, 2010

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THE CALIFORNIA CHAPARRAL INSTITUTE

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1 **I. SUMMARY OF REPLY BRIEF**

2 The Court should issue a writ of mandate which sets aside the May 13, 2009, Minute Order of
3 respondent COUNTY OF SAN DIEGO's Board of Supervisors (AR 174-175)¹, orders respondent to
4 prepare an EIR on its whole project to clear trees, brush and vegetation from 304.85 square miles of San
5 Diego County's rural backcountry, and orders respondent to suspend all project activities except for
6 funding applications until it has shown it has fully complied with CEQA, for three reasons:

7 *One*, respondent has failed to meet its burden of proof that substantial evidence exists in the
8 record to establish each element of the emergency exemption of Cal. Code Regs., Title 14, § 15269(c).²

9 *Two*, undisputed facts establish as a matter of law that respondent's whole project is to clear
10 304.85 square miles of San Diego County's rural backcountry -- an area the size of New York City.³

11 *Three*, the fundamental reasons why CEQA was enacted will not be furthered by allowing
12 respondent to segment its project and declare each segment exempt. Such an adjudication would "in the
13 name of 'emergency' . . . create a hole in CEQA of fathomless depth and spectacular breadth."

14 **II. RESPONDENT HAS NOT MET ITS BURDEN OF PROOF**
15 **TO ESTABLISH EACH ELEMENT OF THE EMERGENCY EXEMPTION**

16 **A. Respondent Has Not Met It's Burden**

17 An agency bears the burden to demonstrate with substantial evidence that its action fell within
18 the exemption. (*California Unions for Reliable Energy v. Mojave Desert Air Quality Management*
19 *District* (2009) 178 Cal.App.4th 1225, 1239, 1245; *Great Oaks Water Co. v. Santa Clara Valley Water*
20 *Dist.* (2009) 170 Cal. App. 4th 956, 968.) Substantial evidence must exist in the record of every element
21 of the emergency exemption. (*Calbeach Advocates v. City of Solana Beach* (2002) 103 Cal.App.4th 529,
22 540-541 (*Calbeach Advocates*); *Western Municipal Water District v. Superior Court* (1986) 187
23 Cal.App.3d 1104, 1113 (*Western*).

24 In this case, respondent fails to meet its burden that substantial evidence exists to establish five
25 elements of the emergency exemption: (1) a short term project; (2) an occurrence not a condition; (3) a
26 high probability of the occurrence in the short term; (4) time constraints so that the agency cannot
27 complete the CEQA paperwork; and (5) the *Western* interpretation of the emergency exemption.

28 _____
¹ A cite to a document in the Administrative Record is referred to as AR [Page #]

² A cite to Cal. Code Regs., Title 14, §§ 15000, et seq. is referred to as "CEQA Guidelines."

³ Petitioner requests that the Court take judicial notice under Evidence Code § 452(h) of the fact that the City of New York has "a land area of 305 square miles" by resorting to the source "http://en.wikipedia.org/wiki/New_York_City."

1 And, in this case, respondent fails to meet its burden to establish the alternative, the Governor
2 issuing an emergency proclamation exempting a project from CEQA under the emergency exemption.

3 **B. No Substantial Evidence of a Short-Term Project**

4 One element of the emergency exemption is a short-term project. Cal. Code Regs., Title 14,
5 § 15269(c) provides:

6 "The following emergency projects are exempt from the requirements of CEQA.

7 . . . (c) Specific actions necessary to prevent or mitigate an emergency. *This does not*
8 *include long-term projects undertaken for the purpose of preventing or mitigating a*
9 *situation that has a low probability of occurrence in the short-term.*" (Italics added.)

10 In this case, it is undisputed that respondent's project is a long-term project, to be conducted
11 "over multiple years" "through Fiscal Year 2012-2013." (AR 116, 127-128.)

12 Respondent's Brief fails to respond at all to California Chaparral's argument that the emergency
13 exemption does not apply because respondent's project is a long-term project. (Respondent's Opposition
14 Brief (ROB) at pp. 1-13.) Respondent admits by omission that substantial evidence does not exist in the
15 record to establish this first element of the emergency exemption.

16 **C. No Substantial Evidence of an Occurrence of Fire**

17 A second element of the emergency exemption is an "occurrence" such as "a fire raging out of
18 control" and not a "condition." Public Resources Code 21060.3⁴ defines "emergency":

19 "'Emergency' means a sudden, unexpected *occurrence*, involving a clear and imminent
20 danger, demanding immediate action to prevent or mitigate loss of, or damage to, life,
21 health, property, or essential public services. *"Emergency" includes such occurrences as*
22 *fire . . .*" (Italics added.)

23 "(T)he definition limits an emergency to an '*occurrence*,' not a condition . . . For example, if a . . . fire is
24 raging out of control and human life is threatened as a result of delaying a project decision, application
25 of the emergency exemption would be proper." (*Western, supra*, 187 Cal.App.3d at p. 1111; italics in
26 original.)

27 In this case, there is no evidence in the record of any fire in San Diego County exceeding 100
28 acres in size during 2008 and 2009 -- the two year period before respondent filed its brief. (AR 140-
141.) Indeed, respondent admits "the most recent devastating fire was in 2007 . . ." (ROB 1:5.)
Substantial evidence does not establish this second element of the emergency exemption.

⁴ All statutory references are to the Public Resources Code.

1 **D. No Substantial Evidence of Imminent Danger Because of A**
2 **High Probability of the Occurrence of Fire In The Short Term**

3 A third element of the emergency exemption is "imminent danger" because of a "situation" that
4 has a high "probability of occurrence in the short term." (§ 21060.3; CEQA Guidelines § 15269(c).)

5 First, there are no "facts" in the record to establish imminent danger. There is no evidence of any
6 fire in San Diego County exceeding 100 acres in size during 2008 and 2009. (AR 140-141.)

7 Second, there is no "expert opinion supported by facts" in the record. No expert opines fire is
8 "imminent" and has a high "probability of occurrence in the short term." (AR 1 - 185.)

9 Third, there is no "reasonable assumptions predicated upon facts" in the record for two reasons:

10 *One*, the last decade of the history of wildfires in San Diego County does not establish
11 "reasonable assumptions predicated upon facts" to establish the element of imminent danger. The true
12 facts are that there were only minor fires from 2000 through 2002 and 2004 through 2006; the major fire
13 of October 2003 had been over for five years and seven months when respondent invoked the
14 emergency exemption; the major fire of October 2007 had been over for one year and seven months; and
15 there were no fires exceeding 100 acres during 2008 and 2009. (AR 140-141.) What can at best be
16 reasonably assumed from these "facts" is that the occurrence of wildfire is highly unpredictable.

17 *Two*, the Governors' proclamation and minute orders also do not establish facts from which there
18 is a reasonable assumption of the element of "imminent danger." (AR 144-145, 147-149, 151-153.)
19 California Chaparral can find no statute, regulation or opinion which provides or holds a Governor's
20 proclamation or minute order of emergency which *does not exempt a project from CEQA* constitutes
21 substantial evidence. Further, the proclamation and minute orders do not state facts from which an
22 imminent fire can be reasonably assumed. (*Id.*) And they do not contain expert opinion. (*Id.*)

23 Finally, respondent's argument substantial evidence exists in the record is nothing more than
24 argument without merit for two reasons:

25 Respondent first responds by characterizing that the holding of *Calbeach Advocates* is that the
26 emergency exemption "applies . . . if the project's purpose is to prevent an occurrence that is *likely to*
27 *happen in the future*" citing to 103 Cal.App.4th at p. 537. (ROB 8:22-24; italics added.) Respondent
28 mischaracterizes *Calbeach Advocates*. There is no broad language in the opinion about "likely to

1 happen in the future." (*Id.*) Rather, the Court expressly held in *Calbeach Advocates* that the emergency
2 exemption applied because experts opined a coastal bluff could collapse "within a few weeks":

3 "CalBeach also contends substantial evidence does not support the finding that the notch
4 that developed in the bluff required immediate action. CalBeach bases its contention on
5 the length of time between the bluff fracture in February 2000 and the application for an
6 emergency permit in December 2000. As discussed in Skelly's November 16 letter, the
7 clean sands in the middle of the bluff and the fissure in the Torrey sandstone eroded quite
8 rapidly, such that the notching in the sandstone increased by at least a foot since January.
9 It was this rapid erosion that resulted in an emergency by November 16, when that letter
10 was written. Further, Skelly stated the bluff condition had become an emergency; the
11 bluff could collapse "within a few weeks," requiring "immediate action." Crampton
12 stated, "If this remaining section of coastline is not stabilized, this coastal bluff will also
collapse, placing the bluff-top residences in *immediate* peril." (Italics added.) The
13 professional opinion of these two engineers, both of whom have substantial experience in
14 coastal stabilization projects and coastal erosion, provides substantial evidence that the
15 condition of the bluff required immediate action." (*Calbeach Advocates, supra*, 103
16 Cal.App.4th at p. 538; italics in original.)

17 Respondent second claims there is an "imminent threat of fire danger" because the "record
18 specifically documents those fires which burned *at least 100 acres* from 2000 to 2007." (ROB 9:24-25;
19 italics in original.) More than two years after the October 2007 fire, with no fires during 2008 and 2009,
20 respondent argues wildfires are always raging out of control for purposes of CEQA review.

21 Arguments without facts, without expert opinion, and unreasonable assumptions, do not create
22 substantial evidence which establishes this third element of the emergency exemption.

23 **E. No Substantial Evidence of Time Constraints So That Respondent**
24 **Cannot Complete The Requisite CEQA Paperwork**

25 A fourth element of the emergency exemption is that "a project arises for which the lead agency
26 simply *cannot* complete the requisite paperwork within the time constraints of CEQA." (*Western, supra*,
27 187 Cal.App.3d at p. 1111; italics in original.)

28 In this case, Respondent's Brief admits respondent has had *more than seven years* to complete
the requisite paperwork. Respondent's Brief represents in the "Statement of Relevant Facts":

"... The County worked with other governmental agencies in identifying the areas of
of highest priorities for potential fire danger. (AR 3, 30.)" (ROB 2:2-4.)

However AR 3 admits this "work" started more than seven years ago, in September 2002:

"... *Since September 2002*, the County of San Diego has worked with the Forest Area
Safety Taskforce (FAST), a coalition of 81 local, State and federal agencies and
community organizations and private citizens, chaired by the County of San Diego."
(AR 3; italics added.)

1 Respondents Brief then represents in the "Statement of Relevant Facts":

2 "In an effort to reduce the potential for losses do to fire, the County of San Diego created
3 a Fire Safety and Fuels Reduction ('FSFR') program. . . ." (ROB 2:1-2.)

4 However, respondent created that FSFR program *five and one-half years ago* during June 2004. The
5 "Agenda Item Information Sheet" to the Board of Supervisors states:

6 "**PREVIOUS RELEVANT BOARD ACTIONS:**

7 . . . *June 16, 2004* (4), established the San Diego County Fire Safety and Fuels Reduction
8 Program to "maximize federal grants and provide comprehensive fuels treatment in all
9 high-risk areas." (AR 121; italics added.)

9 Respondents Brief then represents in the "Statement of Relevant Facts":

10 ". . . The removal of dead, dying and diseased trees in the high priority areas of Palomar
11 Mountain, Lost Valley and greater Julian directly contributed to the success of
12 protecting the structures and limiting losses in the Palomar Mountain communities during
13 the 2007 wildfires. (AR 51, 63.)" (ROB 2:5-8.)

13 However, AR 51 admits respondent did this work "from 2004 to 2006":

14 ". . . The Dead, Dying and Diseased Tree program removed dead trees within 200 feet of
15 of structures and roads *from 2004 to 2006* on Palomar Mountain." (AR 51; italics added.)

16 Respondent does not then dispute the accuracy of the facts summarized in Petitioner's Opening
17 Brief that after 2006, respondent did everything but CEQA paperwork: respondent applied for Federal
18 grants of \$487,767,500 (AR 66); had its task force identify and rank nine high fire risk areas (AR 25);
19 directed staff to develop a "comprehensive program" to remove trees, brush and vegetation (AR 28);
20 held workshops on the comprehensive program (AR 34-39); held a Board of Supervisors hearing on the
21 final "Vegetation Management Report" which summarized "what is planned in the next five years" (AR
22 26, 49-55); adopted an order which received the Report and directed "staff to conduct appropriate
23 California Environmental Quality review for any new proposed projects which will implement actions
24 identified in the Vegetation Management Report" (copy attached to POB); approved the subproject (AR
25 66, 132-133); and declared the subproject exempt from CEQA (AR 174-175).

25 Substantial evidence does not establish this fourth element of the emergency exemption.

26 **F. No Substantial Evidence To Establish The Western Interpretation**

27 In *Western, supra*, 187 Cal.App.3d at p. 1104, the Court of Appeal gave the following binding
28 interpretation of the emergency exemption:

1 "The "emergency" exception of section 21080, subdivision (b)(4) is obviously extremely
2 narrow. "Emergency" as defined by section 21060.3 is explicit and detailed. We
3 particularly note that the definition limits an emergency to an "*occurrence*," not a
4 condition, and that the occurrence must involve a "*clear and imminent danger*,
5 *demanding immediate action*."

6 As one commentator has noted: "At least in principle, the emergency exemptions are
7 appropriate, common sense provisions. The theory behind these exemptions is that **if a
8 project arises for which the lead agency simply cannot complete the requisite
9 paperwork within the time constraints of CEQA, then pursuing the project without
10 complying with the EIR requirement is justifiable. For example, if . . . a fire is
11 raging out of control and human life is threatened as a result of delaying a project
12 decision, application of the emergency exemption would be proper.**" (Comment, *The
13 Application of Emergency Exemptions Under CEQA: Loopholes in Need of Amendment?*
14 (1984) 15 Pacific L.J. 1089, 1105, fn. omitted.)

15 Although (real party) urges that 'CEQA, including its environmental impact report
16 requirements, shall not apply to specific actions necessary to prevent or mitigate
17 earthquakes or other soil or geological movements,' this interpretation is unsupported by
18 the text of the exemption. Such a construction completely ignores the limiting ideas
19 of "sudden," "unexpected," "clear," "imminent" and "demanding immediate action"
20 expressly included by the Legislature and would be in derogation of the canon that a
21 construction should give meaning to each word of the statute. (See *Pacific Legal
22 Foundation v. Unemployment Ins. Appeals Bd.* (1981) 29 Cal.3d 101, 114 [172 Cal.Rptr.
23 194, 624 P.2d 244].) **Moreover, in the name of "emergency" it would create a hole in
24 CEQA of fathomless depth and spectacular breadth. Indeed, it is difficult to imagine
25 a large-scale public works project, such as an extensive deforestation project . . . ,
26 which could not qualify for emergency exemption from an EIR on the grounds that
27 it might ultimately mitigate the harms attendant on a major natural disaster.** The
28 result could hardly be intended by the careful drafting of the Legislature, and is
unmistakably opposed to the policy of construing CEQA to afford the maximum possible
protection of the environment. (See *Friends of Mammoth, supra*, 8 Cal.3d at p. 259.)"
(*Western, supra*, 187 Cal.App.3d at pp. 1111-1112; italics in original; bold added.)

No substantial evidence exists in the record to establish the elements of this binding
interpretation: an occurrence such as a fire raging out of control; sudden; unexpected; clear; imminent;
demanding immediate action; threat to human life as a result of delaying a project decision; and time
constraints which prevent an agency from completing the requisite CEQA paperwork.

G. No Emergency Proclamation Exempting The Project From CEQA Alternative

California's governors do have the power to and do exempt projects from the requirements of
CEQA based on the emergency exemption. California Chaparral has requested that this Court take

1 judicial notice of Governor Schwarzenegger's February 27, 2009, "Proclamation" of a "State of
2 Emergency - Water Shortage" which suspended the requirements of CEQA regarding drought attack
3 actions based on the emergency exemption.

4 Governor Gray Davis' March 7, 2003, Emergency Proclamation, and Governor Arnold
5 Schwarzenegger's May 9, 2007, and May 9, 2008, Executive Orders, do not exempt deforestation
6 projects from the requirements of CEQA. (AR 144-145, 147-149, 151-153.)

7 Respondent's Opposition Brief does not respond at all to California Chaparral's argument.
8 Substantial evidence does not establish the emergency proclamation or order from the Governor
9 exempting the project from CEQA alternative.

10 **III. RESPONDENT VIOLATED CEQA**
11 **WHEN IT SUBDIVIDED THE WHOLE PROJECT**

12 This Court should adjudicate as a matter of law that respondent's whole project is to clear trees,
13 brush and vegetation from 304.85 square miles of San Diego County's rural backcountry:

14 **A. What Constitutes Respondent's Project Is An Issue of Law**

15 Whether an activity is the project is an issue of law that can be decided on undisputed facts in the
16 record. (*Sunset Sky Ranch Pilots Assn. v. County of Sacramento* (2009) __ Cal.4th __, 2009 Cal. LEXIS
17 13169 (December 28, 2009); *Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41
18 Cal.4th 372, 382.)

19 In this case, respondent does not dispute the accuracy of any of the facts summarized in
20 California Chaparral's Opening Brief which establish respondent's whole project is to remove trees,
21 vegetation and brush from 304.85 square miles of San Diego County's rural backcountry. (ROB 1-13.)
22 This Court can and should adjudicate as an issue of law that this constitutes respondent's whole project.

23 **B. The Court Must Consider All Surrounding Circumstances**

24 In *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116 (*Save Tara*), the Supreme Court
25 disapproved those opinions which applied a deferential test to an agency's decision as to what constitutes
26 a project (*Id.* at p. 131, fn. 10)⁵ and held the court must "independently" determine what constitutes a
27 project (*Id.* at p. 131). The Court then restated the rule enunciated in *Laurel Heights Improvement Assn.*
28 *v. Regents of University of California* (1988) 47 Cal.3d 376, that "an EIR must be performed before

⁵ *City of Vernon v. Board of Harbor Comrs.* (1998) 63 Cal.App.4th 677, 690; *Stand Tall on Principles v. Shasta Union High Sch. Dist.* (1991) 235 Cal.App.3d 772, 780; *Mount Sutro Defense Committee v. Regents of the University of California* (1978) 77 Cal.App.3d 20, 40.

1 a project is approved":

2 ". . . (W)e summed up the issue and attempted to state a rule, as follows: 'We agree that
3 environmental resources and the public fisc may be ill served if the environmental review
4 is too early. On the other hand, *the later the environmental review process begins, the
5 more bureaucratic and financial momentum there is behind a proposed project, thus
6 providing a strong incentive to ignore environmental concerns that could be dealt with
7 more easily at an early stage of the project.* . . . For that reason, "EIRs should be prepared
8 as early in the planning process as possible to enable environmental considerations to
9 influence project, program or design."' (*Id.* at p. 395.) We also observed that *at a
10 minimum an EIR must be performed before a project is approved*, for '[i]f postapproval
11 environmental review were allowed, EIR's would likely become nothing more than *post
12 hoc* rationalizations to support action already taken.' (*Laurel Heights I*, at p. 394.)"
13 (*Save Tara, supra*, 45 Cal.4th at p. 130; italics added.)

14 Finally, the Supreme Court in *Save Tara* held that in independently deciding what constitutes a
15 project, the "*courts should look . . . to the surrounding circumstances* to determine whether, as a
16 practical matter, the agency has committed itself to the project as a whole or to any particular features . .
17 ." (*Save Tara, supra*, 45 Cal.4th at p. 139; italics added.)

18 In this case, respondent argues this Court cannot consider, in determining what constitutes the
19 project, respondent's actions preceding 180 days before the Board of Supervisors adopted the emergency
20 exemption. (ROB 12:16-23.) Respondent makes this argument despite the fact that it extensively
21 discusses its own conduct from 2002 through 2009 in its "Statement of Relevant Facts." (ROB 1:16-
22 4:9.) Respondent's argument directly contradicts the holding of *Save Tara* that the "courts should look .
23 . . to the surrounding circumstances." To adopt respondent's argument would constitute reversible error.

24 Respondent's conduct from 2002 through 2009 establishes that this is the exact situation
25 described in *Laurel Heights I*, that there is such "bureaucratic and financial momentum" behind
26 respondent's whole project that respondent has "a strong incentive to ignore environmental concerns."

27 **C. Respondent's Vegetation Management Report Is Direct Evidence**
28 **That Respondent Has Committed Itself To The Whole Project**

The Executive Summary of respondent's Vegetation Management Report states:

Purpose of the Report

. . . * Provide a list of vegetation management projects sorted by FAST target area and
lead agency --- what has been completed in the past five years and *what is planned in the
next five years . . .*" (AR 26; italics added.)

1 California Chaparral's Opening Brief quoted this statement as direct evidence of respondent's
2 commitment to the whole project to clear 304.85 square miles of San Diego County's rural backcountry.
3 (AOB 4:10-17.) Respondent's Opposition Brief does not respond to, and therefore omits by silence, that
4 this is indeed direct evidence of respondent's commitment to the whole project. (ROB 1-13.)

5 **D. There Are Reasonable Inferences Respondent Intends To Segment The**
6 **Whole Project By Federal Grant And Declare Each Segment Exempt**

7 It is undisputed that on March 25, 2009, respondent's Board of Supervisors adopted an order
8 which received the Vegetation Management Report and ordered staff to conduct CEQA review:

9 "Direct staff to conduct appropriate California Environmental Quality review for *any*
10 *new proposed projects* which will implement actions identified in the Vegetation
11 Management Report."⁶ (Italics added.)

12 And it is undisputed that on March 18, 2009 -- seven days *before* the order -- the Deputy
13 Director of the Department of Planning and Land Use completed a Notice of Exemption form for the
14 subproject. (AR 122.)

15 One clear fact that can and should be reasonably inferred from the Board of Supervisor's use of
16 the plural word "projects" in the order is that respondent intends to segment each portion of the whole
17 project by each Federal grant received.

18 And one clear fact that can and should be reasonably inferred from the Deputy Director's prior
19 preparation of the Notice of Exemption form is that respondent intends to declare each segment exempt
20 under the emergency exemption.

21 **E. Respondents' Applications for Federal Funding Is Proof**
22 **Respondent Has Committed Itself To The Whole Project**

23 A state agency must accompany a request for funds with an EIR. Section 21102 provides:

24 "No state agency . . . shall request funds . . . other than a project involving only feasibility
25 or planning studies for possible future actions which the agency . . . has not approved . . .
26 which may have a significant effect on the environment unless such request . . . is
27 accompanied by an environmental impact report."

28 Section 21102 does not expressly apply by its terms to respondent because the County of San Diego is
not a state agency. (CEQA Guidelines § 15368.) However, there is a clear inference from section 21102
that a local agency's request for funds is direct evidence and proof of the agency's commitment to

⁶ Respondent's counsel agreed the Board of Supervisor's March 25, 2009 Minute Order No. 2 approving receipt of the
Vegetation Management Report would be added to the record. A copy is attached to California Chaparral's Opening Brief.

1 a project and obligation to prepare an EIR.

2 In this case, it is undisputed that respondent has applied for \$487,767,500 of federal funding.
3 (AR 66.) Respondent cannot reasonably argue that it will not accept the Federal funds if the
4 applications are granted. Respondent's completed funding applications are the best evidence that
5 respondent has committed itself to clear 304.85 square miles of San Diego County's rural backcountry.

6 **IV. THE FOREST PRACTICES ACT DOES NOT EXEMPT**
7 **THE PROJECT FROM CEQA**

8 Respondent's argument that the subproject is exempt from CEQA because of the Forest Practices
9 Act (Public Resources Code §§ 4511 et seq.) has no merit in statute, regulation, court opinion or fact:

10 The Forest Practices Act, and the regulations enacted thereunder including Cal. Code Regs., Title
11 14, § 896, do not apply to respondent's project because the project does not involve a "timber harvesting
12 plan." "Timber harvesting plans" are logging operations carried out by timber owners or operators.
13 (*Environmental Protection Information Center v. California Department of Forestry and Fire*
14 *Protection* (2008) 44 Cal.4th 459, 481 (*Environmental Protection Information Center*). In this case,
15 respondent's project is to remove "vegetation," not just timber, from 304.85 square miles, and is not a
16 logging operation carried out by a timber owner or operator. (AR 20-115.)

17 Even if the Forest Practices Act and the regulations applied to respondent's project, it would
18 require that the functional equivalent of a full EIR be prepared for respondent's project. (*Environmental*
19 *Protection Information Center, supra*, 44 Cal.4th at p. 481.) Cal. Code Regs., Title 14, § 896 provides:

20 "(a) The purpose of the Forest Practice Rules is to implement the provisions of the
21 Z'berg-Nejedly Forest Practice Act of 1973 *in a manner consistent with other laws,*
22 *including but not limited to, . . . the California Environmental Quality Act (CEQA) of*
23 *1970, . . . The provisions of these rules shall be followed by Registered Professional*
24 *Foresters (RPF's) in preparing Timber Harvesting Plans, and by the Director in reviewing*
such plans to achieve the policies of the Act as described in Sections 4512, 4513, 21000,
*21001, and 21002 of the Public Resources Code (PRC)*⁷, and Sections 51101, 51102 and
25 51115.1 of the Government Code.

26 It is the Board's intent that *no THP shall be approved which fails to adopt feasible*
27 *mitigation measures or alternatives from the range of measures set out or provided for in*
28 *these rules which would substantially lessen or avoid significant adverse impacts which*
the activity may have on the environment. The THP process substitutes for the EIR
process under CEQA because the timber harvesting regulatory program has been
certified pursuant to PRC Section 21080.5. In recognition of that certification and PRC

⁷ Public Resources Code §§ 21000, 21001, 21002 and 21080.5 are part of CEQA.

1 Section 4582.75, these rules are intended to provide the exclusive criteria for reviewing
2 THPs. If the Director believes that there are significant adverse environmental impacts
3 not covered in existing rules, matters should be referred to the Board as otherwise
4 specified in these rules."

5 In this case, there are no facts in the record that establish that respondent complied with the
6 Forest Practices Act and the regulations enacted thereunder including Cal. Code Regs., Title 14, § 896.
7 (AR 1 - 185.) There is no Registered Professional Forester or RPF; a RPF did not prepare a timber
8 harvesting plan; the functional equivalent of a full EIR was not prepared; feasible mitigation measures
9 were not adopted which would substantially lessen or avoid significant adverse impacts; alternatives
10 were not adopted which would substantially lessen or avoid significant adverse impacts; and there was
11 no certification of a timber harvesting plan by the State Board of Forestry under CEQA § 21080.5. (*Id.*)

12 Indeed, respondent's Board of Supervisors *admitted* CEQA applied when it invoked the CEQA
13 emergency exemption. (AR 174-175.) They *admitted* the subproject was not exempt from CEQA
14 because of the Forest Practices Act when it did not invoke that Act in approving the subproject. (*Id.*)

15 **V. THE FUNDAMENTAL PURPOSES OF CEQA**
16 **WILL NOT BE FURTHERED BY UPHOLDING THE EXEMPTION**

17 California Chaparral suggests the fundamental purposes of CEQA can be broken down into four
18 tenets: Public agencies must give consideration to environmental consequences in making decisions
19 which may affect the environment; public agencies must make these decisions based on accurate and
20 current information; transparency in government decisionmaking, that public agencies must disclose to
21 the public the information they are relying in making these decisions; and public participation, the public
22 has the right to participate in these decisions affecting their communities. (*See* §§ 21000-21003; and
23 Michael H. Remy, et al., *Guide To CEQA* (2007 Solano Press Books), pp. 1 - 6, 13-36.)

24 In this case, it is undisputed that respondent's project will cause significant environmental
25 impacts. Respondent admitted its project will cause a "clear, significant impact" when it invoked the
26 emergency exemption. (*Western, supra*, 187 Cal.App.3d at 1113.) Experts who participated in
27 respondent's workshops on the Vegetation Management Report expressed opinions about "the impact of
28 strategic fuel modifications on ecosystem services (erosion control, water quality, hydrology, slope
stability) and ecosystem persistence, structure (soil structure, species composition and potential spread
of invasive species, species age (size) structure) and function (soil development, nutrient cycling,

1 species succession)." (AR 36.) Numerous experts submitted comment letters before the Board of
2 Supervisors' March 25, 2009, hearing on that report setting forth uncontradicted expert opinion that the
3 project will cause significant environmental impacts. (AR 173.) And the comment letter of Anne S.
4 Fege, Ph.D., M.B.A., an Adjunct Professor in the Department of Biology at San Diego State University,
5 submitted before the Board of Supervisors' May 13, 2009, hearing on the subproject, requested that "the
6 Board direct County staff to . . . Comply with CEQA environmental documentation" because, among
7 other reasons, respondent's proposed "vegetation removal increases soil erosion and dramatically
8 reduces native habitats, local wildlife, and in some areas, threatened and endangered species." (AR 125.)

9 In this case, the first fundamental tenet of CEQA, consideration of environmental consequences,
10 has not been met. Respondent has given no consideration to environmental consequences.

11 The second fundamental tenet, government decisions based on accurate and current information,
12 has not been met. Respondent has had no studies prepared on environmental impacts.

13 The third fundamental tenet, transparency in government decisionmaking, has not been met.
14 Respondent has not disclosed any studies to the public on the environmental impacts.

15 Finally, the fourth fundamental tenet, public participation, has not been met. The public has not
16 been given the opportunities to participate in an EIR scoping hearing; submit comment letters on a draft
17 EIR; and attend a public hearing of the public agency on the Final EIR.

18 The fundamental reasons why CEQA was enacted will not be furthered by allowing respondent
19 to segment its project and declare each segment exempt. Such an adjudication would "in the name of
20 'emergency' . . . create a hole in CEQA of fathomless depth and spectacular breadth."

21 **VI. CONCLUSION**

22 The Court should issue the writ of mandate.

23 DATED: January 8, 2010

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26 _____
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