

1 JOHN J. SANSONE, County Counsel
County of San Diego
2 By C. ELLEN PILSECKER, Senior Deputy (SBN 154241)
CARRA L. RHAMY, Senior Deputy (SBN 163269)
3 1600 Pacific Highway, Room 355
San Diego, California 92101
4 Telephone: (619) 531-4873
Facsimile: (619) 531-6005
5

*EXEMPT FROM FILING FEES
GOV'T CODE § 6103*

6 Attorneys for Respondent the County of San Diego
7

8 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **IN AND FOR THE COUNTY OF SAN DIEGO**

10
11 THE CALIFORNIA CHAPARRAL
INSTITUTE, a California corporation,

12 Petitioner,

13 v.

14 COUNTY OF SAN DIEGO, a California
government entity,

15 Respondent.
16

) Case No. 37-2009-00091583-CU-TT-CTL
Action Filed: June 10, 2009

) **RESPONDENT'S OPPOSITION BRIEF**

) Date: January 15, 2010
) Time: 10:00 a.m.
) Dept: C-71
) ICJ: Honorable Ronald S. Prager

TOPICAL INDEX

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

TABLE OF AUTHORITIES ii

INTRODUCTION.....1

STATEMENT OF RELEVANT FACTS1

 Background1

 The Grant Project2

 The Vegetation Management Report3

ARGUMENT4

I. THE GRANT PROJECT WAS A COMPLETE PROJECT FOR THE
PURPOSES OF CEQA AND THE COUNTY DID NOT ENGAGE
IN “PIECEMEALING”4

 A. The Board Of Supervisors’ Approval Was For The One Grant
Project And Not The Wholesale “Clearing Of Land” As Argued
By Petitioner5

 B. The Vegetation Management Report Is Not A Project Subject
To CEQA6

II. SUBSTANTIAL EVIDENCE IN THE RECORD SUPPORTS THE
EMERGENCY EXEMPTION FOR THE GRANT PROJECT8

 A. Fire Is An “Occurrence” Under The Emergency Exemption9

 B. Substantial Evidence Supports The Imminent Threat of Fire Danger.....9

 C. Petitioner’s Arguments Lack Merit11

III. PETITIONER IS PRECLUDED FROM ASSERTING PAST ACTIONS
WHICH ARE BEYOND THE STATUTE OF LIMITATIONS12

IV. THE REMOVAL OF DEAD, DYING AND DISEASED TREES IS EXEMPT
FROM THE ENVIRONMENTAL REVIEW REQUIREMENTS OF THE
FOREST PRACTICE ACT WHICH IS AN ALTERNATIVE TO CEQA13

CONCLUSION13

1 **TABLE OF AUTHORITIES**

2 **Page**

3 **CASES**

4

5 Calbeach Advocates v. City of Solana Beach, 103 Cal. App. 4th 529 (2002)8, 9, 11

6 Castaic Lake Water Agency v. City of Santa Clarita, 41 Cal. App. 4th 1257 (1995)8

7 Friends of Sierra Railroad v. Tuolumne Park & Recreation,

8 147 Cal. App. 4th 643 (2007)5

9 Fullerton Joint Union High School Dist. v. State Bd. of Education,

10 32 Cal.3d 779 (1982)5

11 Riverwatch v. Olivenhain Municipal Water Dist., 170 Cal. App. 4th 1186 (2009)7

12 Save Tara v. City of West Hollywood, 45 Cal.4th 116 (2008).....5, 7

13 Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora,

14 155 Cal. App. 4th 1214 (2007)4

15 Western Municipal Water District v. Superior Court, 187 Cal. App. 3d 1104 (1986).....11

16 Western States Petroleum Assn. v. Superior Court, 9 Cal.4th 559 (1995).....11

17

18 **STATUTES**

19 California Code of Regulations, Title 14

20 Section 896.....13

21 Section 1038.....13

22 Section 1038(b).....13

23 Section 15000 *et seq.*4

24 Section § 15112(c)12

25 Section §15352.....5

26 Section § 15378(a)4, 6

27 Section § 15384(a)8, 11

28 Section § 15384(b)8

1 **TABLE OF AUTHORITIES (Cont'd)**

2 **Page**

3 **STATUTES**

4 **Public Resources Code**

5 Section 4581 *et seq.*13

6 Section 21060.38, 9

7 Section 21080(a)4

8 Section 21080(b)(4)8

9 Section 21080.513

10 Section 21168.58

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **INTRODUCTION**

2 Every year San Diego County experiences wildfires. Some years the fires have been of
3 devastating proportions. These fires have required the evacuation of hundreds of people and
4 resulted in the destruction of human life, livestock and animals, in addition to the destruction of
5 hundreds of structures. The most recent devastating fire was in 2007 which burned hundreds of
6 acres. In 2009, Respondent County of San Diego ("County") applied for and obtained a grant
7 from the federal government to be able remove dead dying and diseased trees in certain areas
8 determined to be most vulnerable to future wildfires. Time is of the essence in implementing
9 this project before the onset of additional fires. Petitioner The California Chaparral Institute
10 ("Petitioner") seeks to stop this program by mischaracterizing it as a wide scale deforestation
11 and clearing project that should be subject to CEQA review and require an Environmental
12 Impact Report ("EIR"). However, the project is limited in scope to removing dead, dying and
13 diseased trees and partial vegetation near structures and evacuation corridors in high priority
14 areas and qualifies under the emergency exemption from further CEQA review.

15 **STATEMENT OF RELEVANT FACTS**

16 **Background**

17 Every year San Diego County experiences wildfires. In the last decade, these wildfires
18 have burned a total of over 868,888 acres. (AR 141).¹ The most devastating fires occurred in
19 2003 and 2007 - each burning in excess of 300,000 acres. These fires have resulted in loss of
20 human life, livestock and animals in addition to destroying hundreds of structures and forced the
21 evacuation of hundreds of people. (AR 29, 138, 141). The fires are driven by the hot, dry Santa
22 Ana winds. (AR 30). In addition, the San Diego region has suffered years of drought which, in
23 addition to creating dry conditions, has provided the opportunity for a massive bark beetle
24 infestation. This infestation has resulted in high mortality rate for trees. It is these dead, dying
25 and diseased trees which have fueled the wildfires. (AR 3, 131).

26 ///

27
28 ¹ References are to pages of the Administrative Record ("AR") on file with the court in
this matter.

1 In an effort to reduce the potential for losses due to fire, the County of San Diego created
2 a Fire Safety and Fuels Reduction (“FSFR”) program. The County worked with other
3 governmental agencies in identifying the areas of highest priority for potential fire danger.
4 (AR 3, 30). The FSFR program has worked to remove dead, dying and diseased trees from the
5 high priority areas. (AR 3). The removal of dead, dying and diseased trees in the high priority
6 areas of Palomar Mountain, Lost Valley and greater Julian directly contributed to the success of
7 protecting the structures and limiting property losses in the Palomar Mountain communities
8 during the 2007 wildfires. (AR 51, 63).

9 On March 7, 2003, the State of California declared an emergency in the County of
10 San Diego because of imminent fire danger due to the extraordinary number of dead, dying and
11 diseased trees resulting from prolonged drought, overstocked forests and infestation by bark
12 beetles and other decay organisms. (AR 143).

13 On May 9, 2007 and May 9, 2008, the Governor issued Executive Orders which referred
14 to the continuing emergency situation of imminent fire danger due to the extraordinary number
15 of dead, dying and diseased trees in the State resulting from prolonged drought, overstocked
16 forests and bark beetle infestations. (AR 147-149, 150-151).

17 **The Grant Project**

18 In early 2009, The County applied to the U.S. Department of Agriculture Forest Service
19 for a grant for Federal Assistance for Cooperative Fire Protection. The purpose of the grant was
20 to seek funds to support the effort to reduce hazardous fuels by removing dead, dying and
21 diseased trees in areas identified as high priority for potential fire. (AR 3-8).

22 The project at issue involved the acceptance, by the County Board of Supervisors, of a
23 7 million dollar grant from the federal government to be used to remove dead, dying and
24 diseased trees within 500 feet of evacuation corridors and habitable structures and strategic
25 vegetation treatments within 100 feet of habitable structures and 30 feet of evacuation roads.
26 (AR 4, 132,137).

27 ///

28 ///

1 On May 13, 2009, the Board voted to accept the grant and authorize the Department of
2 Planning and Land Use to conduct all negotiations and execute all documents necessary to
3 implement the grant. (AR 130-132). In addition, the Board found that the proposed Grant
4 Project was exempt from further CEQA review under the emergency exemption. (AR137).
5 The reasons for the exemption were detailed in the Notice of Exemption Form which was filed
6 as required. (AR 130).

7 **The Vegetation Management Report**

8 In order to reduce the risk of life and structure loss, as well as address adverse impacts on
9 the ecosystem after wildfires, the County researched a multiple solutions approach to address
10 wildfires which included the concept of vegetation management. As a result, the County issued
11 a report entitled the Vegetation Management Report (“Report”). (AR 20-115). The purpose of
12 the Report was to collect information and discuss options for future action related to the control
13 and prevention of wildfires. (AR 28). In developing the Report, County staff held workshops
14 and invited representatives from various private organizations and government agencies to
15 participate. A representative from Petitioner was included in the workshops. (AR 114).

16 The Report contains information concerning past efforts regarding vegetation
17 management by the County, state and federal agencies on their respective lands, as well as
18 future proposals by federal and state agencies regarding their lands. (AR 56-59). The Report
19 identifies six major fire paths in the San Diego area. Three of those paths were burned in
20 previous fires as predicted, but three remain. (AR 82). In addition, the Report contains
21 information describing high priority areas where fires are most likely to occur. (AR 30, 51-55).
22 The Report identifies the various techniques that are possible to be used as strategic fuels
23 treatments. (AR 40-42).

24 The Report was designed to serve as a guidance document concerning vegetation
25 management in San Diego County. The Report does not authorize any vegetation management
26 activities to occur. (AR 26).

27 ///

28 ///

1 The Report was presented and received at the Board of Supervisors' meeting on
2 March 25, 2009. The only action taken by the Board of Supervisors ("Board") regarding the
3 report was to (1) receive the report, and (2) direct staff to conduct appropriate CEQA review for
4 any new proposed projects which will implement actions identified in the Vegetation
5 Management Report. (Minute Order No. 2, County of San Diego Board of Supervisors
6 March 25, 2009 ("Minute Order March 25, 2009") – attached to Petitioner's Opening Brief and
7 attached to County of San Diego's Request for Judicial Notice). The Report did not authorize
8 the County to take any action other than to accept the Report. (AR 26). The Report only
9 provides information regarding potential possibilities for dealing with vegetation. (AR 26-27).

10 ARGUMENT

11 I

12 **THE GRANT PROJECT WAS A COMPLETE PROJECT FOR PURPOSES OF CEQA** 13 **AND THE COUNTY DID NOT ENGAGE IN "PIECEMEALING"**

14 CEQA requires public agencies to undertake environmental review of proposed projects
15 that require their discretionary approval. Pub. Res. Code § 21080(a); *Tuolumne County Citizens*
16 *for Responsible Growth, Inc. v. City of Sonora*, 155 Cal. App. 4th 1214, 1222 (2007). Whether
17 actions comprise a project for CEQA purposes is a legal question. *Id.* at 1224. The CEQA
18 Guidelines (Cal. Code Regs. tit. 14, § 15000 *et seq.*)² define a "project" as the "whole of an
19 action, which has the potential for resulting in either a direct physical change in the
20 environment, or a reasonably foreseeable indirect physical change in the environment"
21 Guidelines § 15378(a).

22 There is only one project at issue in this case; the acceptance and authorization to
23 implement the 7 million dollar grant from the federal government. ("Grant Project"). (AR 130).
24 The grant is to be used for the removal of dead, dying and diseased trees within 500 feet of
25 evacuation corridors and habitable structures and it is limited to areas identified as high priority
26 for risk of fire. (AR 132-133). The removal of trees would be conducted with oversight of a
27 registered forester and in compliance of the California Forest Practice Rules. (AR 132). The
28

² Hereinafter referred to as "Guidelines."

1 grant would also be used for some selective thinning of vegetation around habitable structures
2 and evacuation roads. (AR 133). This is explained in the record in support of the project.
3 (AR 1-7, 130-133). This is the only “project” that was approved by the Board on May 13, 2009.
4 (AR 175).

5 **A. The Board Of Supervisors’ Approval Was For The One Grant Project And**
6 **Not The Wholesale “Clearing Of Land” As Argued By Petitioner.**

7 Under CEQA, “approval” of a project means the decision by a public agency which
8 “commits the agency to a definite course of action in regard to a project intended to be carried
9 out...” Guidelines § 15352. *Save Tara v. City of West Hollywood*, 45 Cal.4th 116, 129 (2008)
10 (“*Save Tara*”). A significant component of the analysis whether an action constitutes an
11 approval of a project is the question of whether other options are being foreclosed. See *Friends*
12 *of Sierra Railroad v. Tuolumne Park & Recreation*, 147 Cal. App. 4th 643, 654 (2007). If an
13 action forecloses other alternative projects (including a “no project” alternative), or eliminates
14 mitigation measures it is considered a project subject to CEQA review. *Id.*; *Fullerton Joint*
15 *Union High School Dist. v. State Bd. of Education*, 32 Cal.3d 779, 797 (1982) (delaying CEQA
16 review inappropriate where, as a practical matter, the “alternative of continuing the status quo”
17 was precluded).

18 In the case at hand, the Board approved acceptance and implementation of the 7 million
19 dollar grant designated for the removal of dead, dying and diseased trees in designated high
20 priority areas around structures and evacuation corridors. (AR 174-175). Petitioner incorrectly
21 asserts that the project approved was “to clear trees, brush and other vegetation from 304.85
22 square miles of San Diego’s rural backcountry.” (Petitioner’s Opening Brief (“POB”) 8:6-8).
23 However, there is no evidence to support this assertion. The Grant Project is nothing of the sort
24 as explained in the Grant Request and subsequent approval documents. (AR 2-5; 174-175).
25 The Grant Project is only for the specified purposes described in the limited areas.

26 ///

27 ///

28 ///

1 **B. The Vegetation Management Report Is Not A Project Subject To CEQA.**

2 The Vegetation Management Report (“Report”) is just that - *a report* and is not a project
3 under CEQA. It does not fit the definition of “project” because it was not an activity that would
4 or could cause a physical change in the environment. Guidelines § 15378(a).

5 Further, by accepting the Report, the Board did not “approve” a project. There is nothing
6 to show that the Board committed to any “definite course of action.” Specifically, the Board
7 only committed to “receiving the report” and then to direct staff to conduct appropriate CEQA
8 review for any new proposed projects which would implement actions identified in the Report.
9 (“Minute Order March 25, 2009”).

10 The Report is a collection of information with options for future action. And,
11 specifically, the Report states “[a]ction on this report does not authorize any vegetation
12 management activities to occur.” (AR 26).

13 The Report summarizes what are considered the priority areas for fire management,
14 provides a list of fuel management tools, provides an overview of vegetation management
15 requirements, examines past and future projects - both by the County and other government
16 agencies, and provides recommendations to improve development and implementation of
17 vegetation management. (AR 28). The Report contains information showing the major paths for
18 fires which have burned, or will burn, in the County. (AR 82).

19 The Report concludes by indicating that the next steps will be to develop a plan and
20 make decisions on how to treat vegetation in the priority areas. The Report does not commit to
21 any particular method or project to treat the areas. (AR 66). The Report provides estimates of
22 potential costs of management but does not commit to any specific action. (AR 66).

23 Again, Petitioner’s argument that the “whole of the project” is to “clear trees, brush and
24 other vegetation from 304.85 square miles of San Diego County’s rural backcountry over the
25 next five years” is mistaken and unsupported. (POB 8:6-8). Petitioner cites to various pages of
26 the Report in support of its argument. However, the evidence Petitioner cites does not support
27 its argument.

28 ///

1 Petitioner's citation to case authority is similarly misplaced. Petitioner quotes
2 extensively from the case of *Save Tara v. City of West Hollywood* 45 Cal.4th 116, 129 (2008) to
3 support its position that the County has engaged in prohibited "piecemealing;" the breaking of a
4 large project into smaller projects to avoid CEQA review. (POB 8:27-9:15).

5 However, the reasoning in *Save Tara*, as quoted by petitioner, actually supports the
6 County's position. In *Save Tara*, the Court stated:

7 [C]ourts should ... look at all the surrounding circumstances to determine
8 whether, as a practical matter, the agency has committed itself to the project as a
9 whole or to any particular features, so as to effectively preclude any alternatives or
10 mitigation measures that CEQA would otherwise require to be considered,
including the alternative of not going forward with the project.

11 *Save Tara*, 45 Cal.4th at 139.

12 In *Save Tara*, because the Court found a development agreement committed the city to a
13 specific development project, CEQA review was required. *Id.* at 122, 128-29. See also
14 *Riverwatch v. Olivenhain Municipal Water Dist.*, 170 Cal. App. 4th 1186 (2009) (CEQA review
15 required when Water District approved agreement requiring definite action, including
16 construction of designated improvements). However, in the case at hand, the County has only
17 committed to implementing the Grant Project. (AR 174-175). The County has not made any
18 other commitment. The County has not committed to all the vegetation management actions
19 identified in the Report, nor is it precluded from any alternatives for future action. The record
20 does not support Petitioner's characterization that respondent has "committed itself to a definite
21 course of action to ... the clearing of trees, brush and vegetation from 304. 85 miles of
22 backcountry." (POB 9:20-23).

23 Petitioner continually advocates that the County has approved a project, or part of a
24 project, to "clear vegetation." (POB 10:16). However, this is a characterization which is not
25 supported by the evidence. Moreover, the Grant Project is clearly described and is limited to
26 removal of dead, dying and diseased trees, and vegetation thinning, only near structures and
27 evacuation corridors in specific areas identified as those with the highest potential for the next
28 major wildfire. (AR 130-133, 175).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

II

**SUBSTANTIAL EVIDENCE IN THE RECORD SUPPORTS THE
EMERGENCY EXEMPTION FOR THE GRANT PROJECT**

The standard of review in order to set aside the decision of the Board in accepting the grant is whether or not there was a prejudicial abuse of discretion. Pub. Res. Code § 21168.5. An abuse of discretion can only be established if the Board had not proceeded in a manner required by law or if their decision was not supported by substantial evidence. *Id. See Castaic Lake Water Agency v. City of Santa Clarita*, 41 Cal. App. 4th 1257, 1264 (1995). Substantial evidence means enough relevant information, and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached. *Id.* at 1264-1265; Guidelines § 15384(a). Substantial evidence “shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.” Guidelines § 15384(b).

The Board’s decision to exempt the project from further CEQA review under the emergency exemption is supported by substantial evidence. Public Resource Code section 21080 subdivision (b)(4) provides an exemption from CEQA for “specific actions necessary to prevent or mitigate and emergency.” An emergency is defined as:

A sudden, unexpected occurrence, involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to, life, health, property, or essential public services. “emergency” includes such occurrences as fire...”

Pub. Res. Code § 21060.3.

The exemption applies even if the occurrence is not unexpected, if the project’s purpose is to prevent an occurrence that is likely to happen in the future. *Calbeach Advocates v. City of Solana Beach*, 103 Cal. App. 4th 529, 537 (2002) (“*Calbeach*”)

In *Calbeach*, the leading case concerning the emergency exemption, the Court of Appeal found that the emergency exemption applied to building a seawall to protect a sandstone bluff from potentially collapsing in the future. The court found that substantial evidence supported that there was an immediate need to prevent the bluff from potential collapse which would have

1 caused destruction to homes and other structures which were on top of the bluff. *Calbeach*,
2 103 Cal. App. 4th at 538. The evidence supporting the exemption included expert opinion
3 testimony that the bluff was likely to collapse with the upcoming winter storms. Therefore,
4 immediate action was required to secure the bluff. *Id.*

5 In the case at hand, there is substantial evidence to support that the removal of the dead
6 dying and diseased trees from areas near structures and evacuation corridors is needed to prevent
7 the potential devastation from the imminent threat of wildfire which is likely to occur.

8 **A. Fire Is An “Occurrence” Under The Emergency Exemption.**

9 Public Resource Code section 21060.3 defines an emergency to include “such
10 occurrences as fire.” A forest fire is an occurrence. *Calbeach* 103 Cal. App. 4th at 537.

11 Petitioner argues that the history of wildfires in San Diego County does not present
12 substantial evidence of an “occurrence” of wildfire because there were “only minor wildfires” in
13 the years between the catastrophic fires of 2003 and 2007. (POB 14:19-21). First of all,
14 petitioner offers no support for its characterization of what it considers “minor.” The least
15 amount of acreage burned in a documented year was over 5,500 acres. (AR 141). Moreover,
16 fire is an occurrence under the law, there is no size specification. Pub. Res. Code § 21060.3;
17 *Calbeach* 103 Cal. App. 4th at 537.

18 In *Calbeach*, the court did not indicate that the exemption would or would not apply
19 based upon a minimum number of homes which were at risk or number of persons who could be
20 hurt by the collapse of the sand bluff. This is essentially what Petitioner is arguing in this case
21 and it should be disregarded.

22 **B. Substantial Evidence Supports The Imminent Threat of Fire Danger.**

23 The evidence in the record shows that wildfires occur every year in San Diego County.
24 The record specifically documents those fires which burned *at least 100 acres* from 2000 to
25 2007. Those fires alone burned a total of 868,000 acres. (AR 141). The largest fires occurred
26 in 2003 and 2007, but there have been significant fires in the other years. The evidence
27 demonstrates that fires have burned through part of the areas designated as high priority and
28 have followed the paths as predicted. (AR 82, 155). In the past five years, five fires have

1 followed predictable paths. (AR 30). The remaining paths are in imminent danger of wildfire.
2 (AR 82). The evidence shows that when fires occur, they have caused destruction to life,
3 structures and the environment. (AR 29).

4 The record also contains evidence that California declared a state of emergency in 2003
5 for the County of San Diego because of imminent fire danger due to extraordinary number of
6 dead, dying and diseased trees resulting from prolonged drought, overstocked forests and
7 infestation by bark beetles and other decay organisms. (AR 143). On May 9, 2007 the
8 Governor issued an Executive Order which referred to the “*emergency situation of imminent fire*
9 *danger*” due to the extraordinary number of dead, dying and diseased trees. (AR 147 (emphasis
10 added)). Then again on May 9, 2008 the Governor issued another Executive Order which
11 referred to the 2007 wildfires which “destroyed lives, property, businesses and the environment
12 and resulted in the largest deployment of firefighting resources and the highest number of
13 evacuations in state history.” (AR 150-151). This Order also referred to the “*imminent threat of*
14 *catastrophic fires*” due to the amount of dead, dying and diseased trees from the bark beetle
15 infestation. (AR 150 (emphasis added)).

16 The basis for the exemption is as stated in the Notice of Exemption filed by the County.
17 It states:

18 The County of San Diego continues to be threatened by very high fire risk as
19 evidenced by these recent major fires and required evacuations. Removal of these
20 dead, dying and diseased trees and vegetation treatments along evacuation
21 corridors is required in order to minimize the loss of life and property in the next
22 wildfire event and is necessary to prevent or mitigate a wildfire emergency. The
23 removal of dead, dying and diseased trees and vegetation thinning activities will
24 occur within the Wildland Urban Interface areas and the Fire Hazard Severity
25 Zones of San Diego County where the risks of imminent fires are most severe.
26 (AR 138).

27 The Notice of Exemption refers to a map which shows the areas designated as high
28 priority by the Forest Areas Safety Task Force where imminent threat of fire is most severe.
(AR 155). The evidence identifies the paths taken by fires in the County. Of those paths, three
remain after the most recent fires. (AR 82). The Grant Project is only to be applied to the areas
designated as high priority for fires. (AR 154-155, 175).

1 **C. Petitioner’s Arguments Lack Merit.**

2 Petitioner argues that because there is no expert testimony describing the imminent
3 danger, as there was in *Calbeach*, that the exemption in this case should not have been granted.
4 (POB 12:1-3). However, expert testimony is not mandatory; the court must examine all the
5 evidence in the entire record and draw reasonable inferences. Guidelines § 15384(a); *Calbeach*,
6 103 Cal. App. 4th at 536. As explained above, the record contains substantial evidence to
7 support the elements of the exemption. There is even evidence in the record from an individual
8 with experience, Anne Fege, who is not employed by the County but who did provide an
9 opinion which supports that the majority of the project would qualify under the emergency
10 exemption. (AR 123-124).

11 Petitioner’s reference to the case of *Western Municipal Water District v. Superior Court*
12 187 Cal App. 3d 1104, (1986) (“*Western*”) (disapproved on other grounds in *Western States*
13 *Petroleum Assn. v. Superior Court*, 9 Cal. 4th 559 (1995), does not undermine the applicability
14 of the exemption in this case. In *Western*, a water district was concerned that, because of the
15 high water table, a major earthquake would cause water to saturate the ground and undermine
16 overlying structures – a process known as liquefaction. The water district applied the
17 emergency exemption to build two dewater wells to prevent liquefaction. *Id.* at 1107. The
18 Court of Appeal found there was insufficient evidence in the record to support that there was an
19 imminent threat of a major earthquake occurring which would justify the emergency exemption.
20 *Id.* at 1114. The only evidence of imminence was that there was between a 2 and 5 percent per
21 year, or about 50 percent in the next 20 to 30 years, chance that a major earthquake would occur
22 in the area which might cause liquefaction. *Id.* at 1114. This was insufficient to justify the
23 exemption. In the case at hand, the evidence shows that wildfires are a yearly occurrence in
24 San Diego County and, because of drought, Santa Ana winds, and insect infestations, have the
25 high potential to cause devastation. (AR 2, 3, 29, 141).

26 Petitioner quotes a great deal from *Western* and emphasizes the language that a “large-
27 scale project, like extensive deforestation” which “might ultimately mitigate the harms [of a]
28 disaster” would not qualify for the emergency exemption. (POB 13:12-14). However, this

1 language is inapplicable in the case at hand because the Grant Project is not extensive
2 deforestation; it is the limited removal of dead, dying or diseased trees around structures and
3 evacuation corridors in high priority areas. (AR 130-133, 174-175). In addition, the record
4 supports that the removal of the specified trees is directly related to the prevention of
5 devastation to life and property associated with wildfire, as occurred in 2007. (AR 51, 63).

6 Petitioner asserts that “respondent had adequate time in May to complete the requisite
7 CEQA paperwork before the late-September through early-October period of high fire season.”
8 (POB 13:27). Petitioner offers no evidentiary support for this assertion. In addition, there is
9 more time involved in the environmental review process than just the completion of paperwork.
10 Petitioner certainly would be a participant in the process which could take months or years.
11 Unfortunately, wildfires do not wait for the CEQA process. They occur on some basis each and
12 every year.

13 III

14 **PETITIONER IS PRECLUDED FROM ASSERTING PAST ACTIONS** 15 **WHICH ARE BEYOND THE STATUTE OF LIMITATIONS**

16 Petitioner argues that Respondent has spent seven years to plan this project.
17 (POB 16:22). However, Petitioner’s argument is not supported by evidence. Petitioner’s
18 Statement of Facts alludes to prior authorizations and actions of the County in 2002 through
19 2004. (POB 3:10-24). However, the statute of limitations for challenging an action under
20 CEQA is at the most 180 days from approval or decision. Guidelines § 15112(c). Petitioner is
21 beyond the time to challenge any of those alleged prior actions. Furthermore, there is
22 insufficient evidence in the record for the Court to make any determinations regarding any past
23 actions. Therefore, Petitioner’s arguments regarding past actions should be disregarded.

24 ///

25 ///

26 ///

27 ///

28 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IV

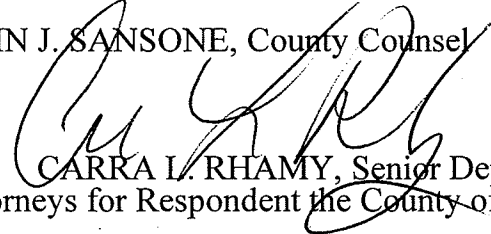
**THE REMOVAL OF DEAD, DYING AND DISEASED TREES IS
EXEMPT FROM THE ENVIRONMENTAL REVIEW REQUIREMENTS OF THE
FOREST PRACTICE ACT WHICH IS AN ALTERNATIVE TO CEQA**

The Forest Practices Act generally requires submission of a timber harvesting plan (“THP”) with the California Department of Forestry and Fire Protection prior to any timber operation. Pub. Res. Code § 4581 *et seq.* The THP process substitutes for the EIR process under CEQA because the timber harvesting regulatory program has been certified pursuant to Public Resources Code section 21080.5. Cal. Code Regs. tit. 14 § 896. Importantly, there are exemptions for certain types of timber operations from the THP process. Cal. Code Regs., tit. 14 § 1038. One of the exemptions is specifically for the harvesting of dead, dying or diseased trees. Cal Code Regs., tit 14 § 1038(b). The Grant Project, to the extent it involves the removal of dead, dying and diseased trees, is exempt from even the environmental requirements of the Forest Practice Act and therefore, CEQA review would not apply.

CONCLUSION

The project approved by the Board was to accept and implement a grant from the federal government to remove dead, dying and diseased trees, and thin vegetation, around structures and evacuation corridors in the areas designated as high priority for wildfires in San Diego County. There is substantial evidence in the record to support that this project is exempt from further CEQA review under the emergency exemption in order to prevent or mitigate the imminent danger to life and property caused by wildfire. Based upon the foregoing, the County requests this Court to deny Petitioner’s writ of mandate.

DATED: 12/9/09

JOHN J. SANSONE, County Counsel
By 
CARRA L. RHAMY, Senior Deputy
Attorneys for Respondent the County of San Diego