

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

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

BESS BAIR; TRISHA LEE LOTUS; BRUCE EDWARDS; JEFFREY HEDIN; LOREEN ELIASON; ENVIRONMENTAL PROTECTION INFORMATION CENTER, a non-profit corporation; CENTER FOR BIOLOGICAL DIVERSITY, a non-profit corporation; and CALIFORNIANS FOR ALTERNATIVES TO TOXICS, a non-profit corporation,

Plaintiffs,

v.

CALIFORNIA STATE DEPARTMENT OF TRANSPORTATION, and CINDY McKIM, in her official capacity as Director of the State of California Department of Transportation,

Defendants.

No. C 10-04360 WHA

**ORDER ON
CROSS-MOTIONS FOR
SUMMARY JUDGMENT,
MOTION TO STRIKE, AND
MOTION FOR SANCTIONS**

INTRODUCTION

In this NEPA action, the parties bring cross-motions for summary judgment. Plaintiffs also move to strike defendants’ opposition to plaintiffs’ motion for summary judgment, or in the alternative, the declarations of defendants’ witnesses filed in support of defendants’ motion, and move for sanctions. This order follows full briefing and oral argument, as well as a visit to the site in question by Magistrate Judge Nandor Vadas and representatives of both parties, and supplemental briefing. For the reasons set forth below, plaintiffs’ motion is

1 **GRANTED IN PART**, and the matter is **REMANDED** for the purpose of preparing a revised
2 environmental assessment on a corrected record.

3
4 **STATEMENT**

5 This environmental-impact litigation arises out of a proposal to widen Highway 101
6 through Richardson Grove State Park. The park is home to ancient redwoods 300 feet tall and
7 thousands of years old, and the park shelters an abundance of wildlife, including the marbled
8 murrelet and spotted owl (AR 123, 303-09).

9 Highway 101 threads through the park for about one mile (AR 11). The existing
10 roadway through the park, originally constructed around 1915, is a narrow, two-lane highway
11 (AR 18). Some huge redwood trees, including redwoods up to 16 feet in diameter, come right up
12 to the road, narrowing the two-lane highway to a mere 22 feet (*ibid.*). Due to its narrow and
13 winding curves, this section of the highway poses safety hazards for large trucks (AR 19).
14 Specifically, trucks authorized by the Surface Transportation Assistance Act, 23 U.S.C. 101, are
15 often longer and carry more volume than standard trucks (AR 20-21). Most of these longer
16 vehicles are prohibited from using this section of Highway 101 because of “off-tracking” (AR
17 19, 21). A truck off-tracks when its back tires do not follow its front tires around a curve, but
18 rather take the shorter route (AR 19). Narrow lanes and tight curves lead to off-tracking (*ibid.*).
19 Off-tracking may cause unintended consequences, such as collisions of the trucks with trees
20 or signs, or encroachment into the opposing lane of traffic (*ibid.*). There are a few legislative
21 exceptions, however, including a temporary exception for livestock haulers, which allow some
22 STAA trucks access through the park (AR 18).

23 Defendants California Department of Transportation and Cindy Kim, the director of
24 Caltrans (collectively “Caltrans”), initiated the Richardson Grove Operational Improvement
25 Project to widen the road to meet highway requirements in order to allow all STAA trucks
26 passage through the park. The stated purpose of allowing larger trucks through-access on
27 Highway 101 is to lower the cost of transportation for goods imported into and exported from
28 Humboldt County (AR 19-25). Currently, for instance, STAA trucks going from Oakland to

1 Eureka must take a 446-mile detour via I-5 through Oregon and back south on Route 101
2 (AR 22). Local businesses and residents pay 10-15 percent more for goods due to poorer
3 truck access (AR 22). The proposed project comprises three segments of work: (i) realigning
4 the roadway by two to six feet on average along a half mile stretch; (ii) replacing culverts in five
5 locations and building a 200-foot retaining wall 10-13 feet below the road; and (iii) paving the
6 existing highway (JS ¶ 9; AR 35-36). The present controversy arises because widening the road
7 involves excavation activities that impact old-growth redwoods. Caltrans defines old-growth
8 redwoods as those with a diameter of 30 inches or greater (AR 18).

9 Caltrans issued a notice of preparation for an environmental assessment in May 2008
10 (JS ¶ 18). Caltrans then released a draft EA in December 2008 (JS ¶ 19). In its draft EA,
11 Caltrans determined that the project would result in the removal of 87 trees, and that 40 trees
12 would be subject to cut-and-fill techniques (JS ¶ 13; AR 124). Cut-and-fill techniques involve
13 “cutting” the soil around the roots of trees and filling it with sturdy, compact material suitable
14 for highway foundation (AR 127). The use of these techniques, however, is a main point of
15 contention because cutting and filling pose risks to the structural root systems of the trees (*ibid.*).
16 After issuing its draft EA — pursuant to NEPA — and its Section 4(f) analysis — pursuant to
17 the Department of Transportation Act of 1966, 49 U.S.C. 303 — Caltrans opened the draft EA
18 to public comment, and received nearly 800 hundred letters and emails, some in support of and
19 some in opposition to the project (AR 359). In response, Caltrans changed its proposal. In May
20 2010, Caltrans issued a final EA, which documented relocating a proposed retaining wall;
21 added a chart identifying trees whose roots would be affected by the cut and fill of soil; more
22 than doubled the estimate of trees whose root structures might be adversely impacted; and cited
23 the names of two arborists who claimed no significant impact would occur (JS ¶ 13-15, 21;
24 AR 35-26, 127-32). Despite requests for further opportunity for public comment, Caltrans
25 approved the final EA, which adopted a “finding of no significant impact” (AR 7670-71,
26 7696-97; JS ¶ 21), the legal effect of which was to avoid having to prepare an environmental
27 impact statement.
28

1 The final EA identifies that the project will fell 54 trees (AR 124). According to the
2 final EA, only six of them are redwoods of four to 19 inches in diameter, two of which are
3 located inside the park and none of which are old-growth (AR 124, 126). The final EA identifies
4 two small redwoods of six to seven inches in diameter within the park that will be removed
5 (AR 124). The final EA also identifies 68 redwoods with diameters of 30 inches or greater that
6 will be impacted by cut and fill techniques (JS ¶ 15). The project calls for cut-and-fill activities
7 within the structural root zones of these 68 trees, with excavation at depths of approximately
8 two feet and maximum fill depths of three and a half feet (AR 60). The excavation will involve
9 cutting the roots of old-growth redwoods, including roots within the structural root zones of
10 the redwoods (AR 126-27, 394-95), but not roots two inches or larger in diameter (AR 1124).
11 To lessen the impact to old-growth redwoods, the project identifies mitigation precautions.
12 For example, excavation near old-growth redwoods would be done by hand or with an air spade.
13 An air spade uses air compression to clear away dirt rather than cutting roots while digging away
14 at soil. Roots that are less than two inches would be cut and watered so they would not dry out.
15 Brown logs would be braced against tree trunks to minimize the effect of fill on the trees
16 (AR 132-34).

17 Plaintiffs are individual supporters and non-profit environmental groups who claim this
18 project will jeopardize the health of the trees and wildlife. These groups and individuals bring
19 this action on behalf of their members who have an interest in California's wildlife and natural
20 wonders (Compl. ¶¶ 24-26).

21 * * *

22 This action was filed in September 2010, challenging the finding of no significant impact
23 and use of an EA rather than an EIS. The complaint alleges that Caltrans violated the National
24 Environmental Protection Act, the Department of Transportation Act, the Wild and Scenic
25 Rivers Act, and the Administrative Procedure Act. Plaintiffs previously sought injunctive relief
26 to halt all activity on the project while the parties litigated the merits. A preliminary injunction
27 was granted in July 2011 (Dkt. No. 84).
28

1 The administrative record was lodged in July 2011 (Dkt. No. 85). It contains over ten
2 thousand pages. After the administrative record was lodged, the parties requested additional
3 time to file their respective motions for summary judgment (Dkt. No. 100). The parties'
4 stipulation provided plaintiffs until December 5, 2011, to file their initial motion (*ibid.*). The
5 parties engaged in two unsuccessful settlement conferences in August 2011 and October 2011,
6 and in December 2011, the parties' filed their respective cross-motions for summary judgment.
7 Plaintiffs also filed a motion to strike and a motion for sanctions. The motions were not fully
8 briefed until January 2012.

9 A hearing on the parties' cross-motions was held on February 23, 2012. During oral
10 argument, it became apparent that one of plaintiffs' primary challenges was Caltrans' reliance on
11 a series of maps that had served as the basis for its analysis of the proposed project. These maps
12 had been provided to the public for review and comment, and counsel for Caltrans stated at the
13 hearing that the maps embodied a tree-by-tree analysis of the project's proposed impact on
14 old-growth redwoods. Plaintiffs' counsel argued, however, that the maps had omitted altogether
15 old-growth redwoods very close to the proposed project, and that at least one of the old-growth
16 redwoods shown on the maps was much wider than depicted. Specifically, plaintiffs' counsel
17 identified one tree in the EA, assigned number 17 by plaintiffs, reported by the map to have a
18 diameter of 84 inches, which plaintiffs' contended actually was 103 inches in diameter.

19 Following the hearing, Magistrate Judge Nandor Vadas, whose chambers were close by, was
20 good enough to conduct a site visit with representatives of both parties in order to measure
21 six trees: five trees of plaintiffs' choice, in addition to the tree alleged by plaintiffs to have a
22 103-inch diameter (Dkt. No. 118). This was to address plaintiffs' contention that the Caltrans'
23 maps did not contain all relevant data, and that extra-record evidence was therefore necessary.

24 *See Public Power Council v. Johnson*, 674 F.2d 791, 794 (9th Cir. 1982) (citing *Asarco, Inc. v.*
25 *U. S. E. P. A.*, 616 F.2d 1153, 1160 (9th Cir. 1980) (reviewing court should go outside
26 administrative record to consider evidence relevant to the substantive merits of the agency action
27 "for the limited purposes of ascertaining whether the agency considered all the relevant factors
28 or fully explicated its course of conduct or grounds for decision")). The reference order asked

1 Judge Vadas to respond to three narrow questions, and plaintiffs' tree selections were limited
2 to trees that plaintiffs' expert, Dr. Joe R. McBride, had already identified in his declaration,
3 submitted in support of plaintiffs' motion (Dkt. No. 66).

4 After the site visit, Judge Vadas issued a report and recommendation and a supplemental
5 report and recommendation (Dkt. Nos. 137, 144). The report and recommendation contained the
6 measurements of each of the trees selected by plaintiffs, as well as findings concerning whether
7 each tree is contained on the Caltrans' maps, and if so, where. The supplemental report
8 and recommendation contained findings concerning "tiny numerals" that are located on
9 the maps adjacent to the trees depicted on the maps, and what those numerals purportedly
10 refer to. Judge Vadas also answered the three questions contained in the reference order.

11 *First*, Judge Vadas found that tree number 17, which the EA stated had a diameter of 84 inches,
12 is actually 104 inches in diameter. *Second*, Judge Vadas found that the fifth tree measured,
13 assigned number 92, which was measured at 48.8 inches, was omitted altogether from the
14 Caltrans maps. *Third*, Judge Vadas found that of the trees measured, the only tree the parties
15 agreed was omitted from the Caltrans maps was tree number 92, but that the parties disputed the
16 location of the fourth and sixth trees that were measured, tree numbers 81 and 10, respectively.
17 *Fourth*, Judge Vadas found that the "tiny numerals" on the Caltrans maps that are adjacent to the
18 particular trees depicted on the maps represent Caltrans' measurements of the diameters of the
19 trees next to which the numerals appear.

20 Both parties were provided with the opportunity to file objections to the report and
21 recommendation, as well as supplemental briefing regarding the impact of the site visit findings
22 on the cross-motions for summary judgment. Plaintiffs and Caltrans filed objections to the
23 report and recommendation (Dkt. Nos. 139, 142). Plaintiffs also filed objections to the
24 supplemental report and recommendation (Dkt. No. 145). Having reviewed both reports, as well
25 as the parties' objections to the reports, the reports are adopted and the parties objections are

26 **OVERRULED.**

27

28

ANALYSIS

1
2 NEPA has no specific judicial review provision. NEPA actions are, instead, reviewable
3 under the APA. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882–83 (1990). The APA limits
4 the scope of judicial review of agency actions. Under the APA, a reviewing court shall set aside
5 agency action, findings, or conclusions found to be “arbitrary, capricious, an abuse of discretion,
6 or otherwise not in accordance with law” or “without observance of procedure required by law.”
7 5 U.S.C. 706(2). In its review of an agency decision, a court must be “highly deferential” to the
8 agency; its review must be “narrow,” and it “must consider whether the decision was based on
9 a consideration of the relevant factors and whether there has been a clear error of judgment.”
10 *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989); *Friends of the Earth v. Hintz*,
11 800 F.2d 822, 831 (9th Cir. 1980).

12 The reviewing court’s role is not to pass judgment on the merits of the material.
13 *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).
14 The reviewing court’s only role is to review the EA to ensure that the agency gave the “required
15 hard look” at the environmental consequences of its decisions. *Kettle Range Conservation*
16 *Group v. U.S. Forest Serv.*, 147 F.3d 1155, 1157 (9th Cir. 1998). The reviewing court should
17 not “flyspeck” the agency’s decision to hold it insufficient based on “inconsequential, technical
18 deficiencies.” *Friends of the Southeast’s Future v. Morrison*, 153 F.3d 1059, 1063 (9th Cir.
19 1998) (quoting *Swanson v. U.S. Forest Serv.*, 87 F.3d 339, 343 (9th Cir. 1996)). But the
20 reviewing court must conduct a “searching and careful” inquiry into the facts. *Marsh*, 490 U.S.
21 at 378.

1. CLAIM FOR FAILURE TO PREPARE AN EIS (NEPA AND APA).

22 NEPA requires that an EIS is prepared for all “major Federal actions significantly
23 affecting the quality of the human environment.” 42 U.S.C. § 4332(C). Not every project
24 necessitates an EIS. Where an EIS is not categorically required, the agency must prepare an EA
25 to determine whether or not the environmental impact is significant enough to warrant an EIS.
26 40 C.F.R. §§ 1501.3, 1508.9; *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000). If the
27 proposed project will significantly affect the environment, an EIS must be prepared, while if the
28

1 project will have only an insignificant effect, the agency can declare a “finding of no significant
2 impact,” and proceed with the project. 40 C.F.R. §§ 1501.3, 1501.4.

3 NEPA establishes procedural mechanisms to compel agencies to seriously weigh the
4 potential environmental consequences of a proposed action. Our court of appeals has termed this
5 crucial evaluation a “hard look.” *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1066
6 (9th Cir. 2002). Once the agency does the required hard look, it is free to choose to proceed
7 with action that will have an adverse impact on the environment, at least insofar as NEPA is
8 concerned, the idea being that if we are going to destroy the environment, we should do so with
9 out eyes wide open and not by accident.

10 An EA is arbitrary and capricious if it “entirely fail[s] to consider an important aspect
11 of the problem, or offer[s] an explanation that runs counter to the evidence before the agency or
12 is so implausible that it could not be ascribed to a difference in view or the product of agency
13 expertise.” *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (quotation marks and
14 citations omitted), *overruled on other grounds by Am. Trucking Ass’ns, Inc. v. City of L.A.*,
15 559 F.3d 1046, 1052 (9th Cir. 2009). Although courts defer to agency expertise on questions of
16 methodology, they do not ignore an agency’s failure to address factors pertinent to an informed
17 decision. *Bear Lake Watch, Inc. v. Fed. Energy Regulatory Comm’n*, 324 F.3d 1071, 1076–77
18 (9th Cir. 2003).

19 Here, there are a number of discrepancies and omissions that raise serious questions
20 about whether Caltrans truly took a “hard look” at the effects of the project and made an
21 informed decision. It is to these discrepancies and omissions that this order now turns.

22 *First*, the EA miscalculates the diameter of at least one old-growth redwood tree. The
23 EA reports that the diameter of one impacted old-growth redwood (assigned number 17 by
24 plaintiffs, and located on sheet number eight of Caltrans’ maps), is 84 inches. Yet plaintiffs’
25 redwood expert, Dr. Joe R. McBride, measured the diameter to be 103 inches (McBride Decl.
26 ¶ 26), and the joint measurement of this tree during the site visit revealed that the diameter of
27 this tree is actually 104 inches. Thus, irrespective of whether this tree is contained in the current
28

1 EA's Tables 9 and 10, the analysis of the project's impacts in relation to this tree, and hence the
2 grove as a whole, are based off of false data.

3 *Second*, the EA omitted altogether at least one close-by old-growth redwood tree from
4 its maps and analysis. Tree number 92, as assigned by plaintiffs, was measured during the site
5 visit to have a diameter of 48.8 inches, classifying it under Caltrans' invoked definition as an
6 old-growth redwood. Yet this 48.8-inch tree appears no where on the Caltrans' maps or in
7 Tables 8-10 of the final EA. This tree is 14.6 feet (175.2 inches) from the existing pavement.

8 Caltrans' algorithm for determining the location of a redwood's structural root zone is
9 three times its diameter (AR 60). And, Caltrans' algorithm for determining the location of a
10 redwood's health root zone is five times its diameter (AR 2555). So, in order to fully
11 understand the potential damage to the structural and health root zones of a redwood and the
12 whole grove, all the trees in the construction area must be identified and their diameters must be
13 measured correctly. This was not done.

14 Behind the potential impact of these data inaccuracies on the structural and health root
15 zones of the trees hides another problem: the potential impact of cutting "woody" roots. In the
16 draft EA, serious concerns were raised about the impact of cutting "woody" roots of old-growth
17 redwoods because severing these roots can significantly disturb the vigor of the trees.

18 Caltrans responded by stating that it did not intend to cut any roots larger than two inches
19 (AR 384-85, 1124). Importantly, however, Caltrans ultimately admitted in response to public
20 comments that the project may result in cutting roots larger than two inches because it was not
21 possible to determine exactly where roots may be encountered (AR 395). This uncertainty is
22 now exacerbated by the errors in the maps.

23 These discrepancies are not, as Caltrans contends, merely differences in methodology
24 for which deference is owed. Rather, the errors in the data are "so implausible that [they] could
25 not be ascribed to a difference in view or the product of agency expertise." *Lands Council*, 537
26 F.3d at 987. They are examples raising serious questions about whether Caltrans truly took a
27 "hard look" at the effects of the project. Although perhaps the failure of data or analysis on a
28 single tree might not demonstrate findings that are "highly uncertain," the accumulation of data

1 errors certainly raises “substantial questions” about the possible significance of the project’s
2 impact on the environment. This shows that Caltrans’ fact finding was arbitrary and capricious,
3 and that a more developed record is necessary. *See, e.g., Van Abbema v. Fornell*, 807 F.2d 633,
4 639 (7th Cir. 1986); *Wildlands v. U.S. Forest Serv.*, 791 F. Supp. 2d 979, 992 (D. Or. 2011);
5 *Anglers of the Au Sable v. U.S. Forest Serv.*, 565 F. Supp. 2d 812, 830-831 (E.D. Mich. 2008).

6 Caltrans is correct that NEPA does not demand any specific environmental outcome.
7 The requirement of an EIS is procedural, but the mandatory in-depth analysis forces agencies to
8 truly consider the impact of their plans. The import of this order is that Caltrans will do just that.
9 Once done, then the agency can, as far as NEPA is concerned, put the trees at risk. If we are
10 going to endanger these ancients, we should do so based on reasonably accurate maps and data.

11 “When there is a need to supplement the record to explain agency action, the preferred
12 procedure is to remand to the agency for its amplification.” *Johnson*, 674 F.2d at 794.

13 The errors in the maps frustrate effective judicial review of the agency’s actions, and additional
14 explanations of the reasons for the agency’s decision is in therefore in order. *Ibid.*; *see also*
15 *O’Reilly v. U.S. Army Corps of Eng’rs*, 477 F.3d 225, 238-39 (5th Cir. 2007) (“If the court finds
16 that a project may have a significant impact, the court should order the agency to prepare an EIS.
17 If the court finds, on the other hand, that the EA is inadequate in a manner that precludes making
18 the determination whether the project may have a significant impact, the court should remand the
19 case to the agency to correct the deficiencies in its analysis.”) (citations omitted). Thus, a
20 revised EA that corrects the data inaccuracies identified above and assesses the impacts of the
21 project through the lens of a corrected analysis is necessary, even if this reevaluation ultimately
22 reveals that the EA/FONSI remains valid. Alternatively, Caltrans may proceed directly to
23 conducting an EIS. In its revised EA (or EIS), Caltrans should give serious consideration to the
24 other significant arguments made by plaintiffs in their motion. On remand, Caltrans is
25 **ORDERED** to prepare accurate maps, and a qualified engineer shall sign and date the
26 revised maps (unlike the unsigned maps in the existing record). The agency’s analysis shall
27 number each ancient redwood, clearly identify it in the map, identify its root zone, and set forth
28

1 the environmental issues to each one. The written analysis and the maps should be readable
2 together without doubt as to which tree is which.

3 **2. EXTRA-RECORD EVIDENCE & MOTION TO STRIKE**

4 Both parties challenge the factual record. Caltrans contends that plaintiffs' arguments
5 are based "almost exclusively" on the opinions expressed in the McBride declaration, which is
6 extra-record evidence that should not be considered (Def. Opp. 9). Likewise, plaintiffs move to
7 strike Caltrans' opposition to plaintiffs' motion for summary judgment and Caltrans' entire
8 motion for summary judgment, or in the alternative, to strike the declarations of witnesses
9 Stephen Sillett and Dennis Yniguez, and any references to those declarations, contending that
10 Caltrans disobeyed a court order issued May 3, 2011, which prohibits Caltrans from using any
11 witness to supply evidence on a motion as a result of Caltrans' failure to comply with Rule 26's
12 initial disclosure requirements (Dkt. No. 26). Alternatively, plaintiffs seek to strike the
13 declarations as extra-record evidence.

14 Our court of appeals allows a reviewing court to consider extra-record materials in
15 an APA case under four exceptions: (1) when it needs to determine whether the agency has
16 considered all relevant factors and has explained its decision; (2) when the agency has relied
17 upon documents or materials not included in the record; (3) when it is necessary to explain
18 technical terms or complex matters; and (4) when a plaintiff makes a showing of agency bad
19 faith. *Southwest Center for Biological Diversity v. U.S. Forest Service*, 100 F.3d 1443, 1450
20 (9th Cir. 1996). For extra-record material to be considered, a showing must first be made that the
21 record is inadequate. *Animal Defense Council v. Hodel*, 840 F.2d 1432, 1437 (9th Cir. 1988)
22 ("The [plaintiff] makes no showing that the district court needed to go outside the administrative
23 record to determine whether the [agency] ignored information").

24 Each of the challenged declarations contain post-hoc examinations of the administrative
25 record and are, in that respect, improper. *Sierra Club v. Bosworth*, 510 F.3d 1016, 1026 (9th Cir.
26 Cal. 2007) ("Post-hoc examination of data to support a pre-determined conclusion is not
27 permissible"); *Southwest Ctr. for Biological Diversity*, 100 F.3d at 1450 (striking letter
28 submitted by Forest Service not contained in administrative record as "post-decision

1 information”). Nevertheless, portions of each declaration provide facts relevant to determine
2 whether Caltrans considered all relevant factors in its final EA, and will be considered
3 exclusively for this purpose. Caltrans’ objections to the McBride declaration are therefore
4 **OVERRULED**, and plaintiffs’ motion to strike is **DENIED**.

5 3. MOTION FOR SANCTIONS

6 Plaintiffs move for sanctions in the amount of \$5,700 based on Caltrans’ disregard for
7 the May 3 order (Pl. Br. 9). Plaintiffs argue that Rule 37(b)(2) is the source of the court’s
8 sanctioning authority. Not so. Rule 37(b)(2) requires a violation of a discovery order to trigger
9 the ability to sanction; it expressly states that a court may sanction a party if it “fails to obey an
10 order to provide or permit discovery.” *See Unigard Sec. Ins. Co. v. Lakewood Eng’g & Mfg.*
11 *Co.*, 982 F.2d 363, 368 (9th Cir. 1992) (“Rule 37(b)(2)’s requirement that there be some form of
12 court order that has been disobeyed has not been read out of existence; Rule 37(b)(2) has never
13 been read to authorize sanctions for more general discovery abuse.”). Here, even assuming that
14 Caltrans violated the May 3 order, that order is not the sort recognized under Rule 37(b)(2)’s
15 sanctioning provision. Nevertheless, plaintiffs are correct in spirit: A party cannot disobey
16 a court order with impunity. Civil contempt sanctions are available against a party that has
17 disobeyed “a specific and definite court order by failure to take all reasonable steps within the
18 party’s power to comply.” *In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 10 F.3d
19 693, 695 (9th Cir. 1993). A party seeking a finding of civil contempt against an opposing party
20 must demonstrate “(1) that [the opposing party] violated the court order, (2) beyond substantial
21 compliance, (3) not based on a good faith and reasonable interpretation of the order, (4) by clear
22 and convincing evidence.” *Ibid.* Even assuming Caltrans violated the May 3 order, plaintiffs
23 have failed to establish by clear and convincing evidence that this violation was not based on a
24 good faith and reasonable interpretation of the order. Plaintiffs’ motion for sanctions is therefore
25 **DENIED**.


26 CONCLUSION

27 Based on review of the administrative record and as per the foregoing analysis, this
28 action is **REMANDED** to prepare a revised EA and record in accordance with the instructions

1 above. Other than this, both motions for summary judgment are **DENIED** without prejudice to a
2 new round of litigation once the next administrative action is taken.

3
4 **IT IS SO ORDERED.**

5
6 Dated: April 4, 2012.

7 
8 _____
9 WILLIAM ALSUP
10 UNITED STATES DISTRICT JUDGE
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28