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15 THE SUPERIOR COURT OF CALIFORNIA
16 COUNTY OF NAPA

17 SODA CANYON GROUP,

18 Petitioner,

19 vs.

20 COUNTY OF NAPA; NAPA COUNTY
21 BOARD OF SUPERVISORS; and
22 DOES 1 through 10, inclusive,

23 Respondents

24 MOUNTAIN PEAK VINEYARDS, LLC;
25 ERIC YUAN; HUA YUAN; and DOES 11
26 through 20, inclusive,

27 Real Parties in Interest.

Case No.: 17CV001063

**PETITIONER'S NOTICE OF
MOTION AND MOTION TO
AUGMENT THE ADMINISTRATIVE
RECORD; MEMORANDUM OF
POINTS & AUTHORITIES**

[PART 1 of 2 : ATTACHMENTS A & B]

[CEQA Matter]

Date: January 11, 2019
Time: 8:30 am
Dept.: I

Action filed: September 20, 2017

1 TO THE HONORABLE COURT AND ALL PARTIES, PLEASE TAKE NOTICE
2 (“Notice”) that on January 11, 2019 at 8:30 AM, in Department I of the Superior Court of the
3 State of California, in and for the County of Napa Courthouse, 825 Brown Street, Napa, CA
4 94559, Petitioner Soda Canyon Group (“Petitioner” or “SCG”) will respectfully move the Court
5 for an order augmenting the administrative record of proceedings (“AR”) to include (1) two sets
6 of documents that Respondents Napa County and the Napa County Board of Supervisors
7 (collectively, “Respondent”) erroneously declined to admit into the AR, and (2) new evidence
8 pertaining to the 2017 Atlas Fire (“New Evidence”) that occurred after Respondent reached its
9 final decision to approve and permit the winery for Real Party in Interest Mountain Peak
10 Vineyards, LLC, Eric Yuan, and Hua Yuan (collectively, “MPV” or “Mountain Peak” or “Real
11 Party”). Specifically, SCG moves the Court to augment the AR with the following documents,
12 all of which are attached to this Motion to Augment the Administrative Record (“Motion”):

13 **Attachment A:** two attachments to the January 30, 2017 letter from SCG’s hydrology
14 expert entitled *Rector Reservoir Water Yield Study*, May 2013 (already included among the
15 AR documents, though not currently certified by Respondent as part of the AR, and
16 labeled as AR 10926-11006), and *Rector Creek Watershed Sanitary Study*, July 2009 (same,
labeled as AR 11007-11123);

17 **Attachment B:** a May 8, 2017 technical report of Soda Canyon Road entitled
18 *Geotechnical Road Impact Review & Reconnaissance* (same, labeled as AR 6977-6983);

19 **Attachment C:** New Evidence pertaining to the 2017 Atlas Fire including: select
20 photographs, video, maps, incident reports, and declarations from residents and property
owners on SCR. [Filed under separate cover owing to size].

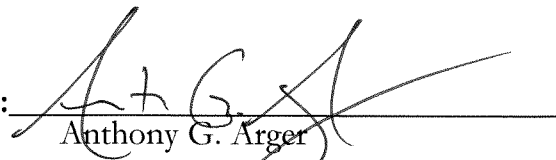
21 The Motion will be made on the grounds that: (1) the pre-decision documents, all submitted to
22 the County before permit issuance, as well as (2) the New Evidence should be included in the
23 AR, and the matter remanded for further consideration in light thereof.

24 This Motion will be based on this Notice, the accompanying Memorandum of Points
25 and Authorities, the complete records and files in this action, the declarations in support of this
26 Motion, including all supporting exhibits, the argument of the parties, and all other matters or
27 evidence that may properly come before the Court.

28

1 Dated: October 15, 2018

ROBERTSON, JOHNSON,
MILLER & WILLIAMSON

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4 By: 
Anthony G. Arger

5 Attorneys for Petitioner Soda Canyon Group
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

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§ 21167.6(e)(10)

Evidence Code

§ 210

1 **I. INTRODUCTION**

2 SCG filed action for writ of mandate pursuant to the Code of Civil Procedure §1094.5,
3 and Public Resources Code §§ 21168, 21168.5 *et seq.* – the California Environmental Quality Act
4 (“CEQA”). SCG elected to prepare the AR itself pursuant to Public Resources Code section §
5 21167.6(b)(2). However, Respondent denied SCG’s proposed inclusion of two sets of
6 documents into the AR: (1) two attachments to the “Review of Response to Public Comments”
7 by SCG’s hydrology expert Greg Kamman of Kamman Hydrology & Engineering, entitled
8 *Rector Reservoir Water Yield Study*, May 2013 and *Rector Creek Watershed Sanitary Study*, July 2009
9 (“Kamman Response Attachments”), and (2) a May 8, 2017 report from KC Engineering
10 Company entitled *Geotechnical Road Impact Review & Reconnaissance* (“KC Engineering
11 Report”). During the administrative proceedings, opponents of the Mountain Peak project
12 (“Project”), including SCG’s members (collectively, “SCG Members”), submitted written
13 requests to include the documents in the AR. These requests constitute a constructive
14 “submission” to Respondent requiring inclusion in the AR. Pub. Res. Code § 21167.6(e)(7).
15 Additionally, the documents constitute “other written materials relevant to the respondent
16 public agency’s compliance with [CEQA] or to its decision on the merits of the project” and
17 similarly require admission. Pub. Res. Code § 21167.6(e)(10).

18 In addition to these documents, SCG seeks to augment the AR with New Evidence
19 relating to the 2017 Atlas Fire. During the proceedings, a primary concern raised by SCG
20 Members was the adverse public safety implications of the Project, which could either
21 contribute to the cause of, or impede escape efforts from a major wildfire on Soda Canyon
22 Road (“SCR”). Respondent discounted and even trivialized SCG Members’ fire-related
23 concerns. Incredibly, and with tragic irony, less than three weeks after SCG filed this action,
24 one of the worst wildfires in Napa’s history erupted and devastated SCR, taking two lives, and
25 damaging or completely destroying 82% (134) of the 163 residences on SCR, including a portion
26 of MPV’s existing vineyard. This highly relevant New Evidence utterly refutes Respondent’s
27 attempts to downplay the severity of fire safety on the dead-end SCR, and requires not only
28 admission into the AR, but also a remand to Respondent for appropriate consideration thereof.

1 **II. FACTUAL BACKGROUND**

2 **A. Documents Respondent Erroneously Excluded from the AR**

3 On June 29, 2016, the County published its Notice of Planning Commission Hearing &
4 Notice of Intent to Adopt a Negative Declaration (“Negative Declaration”), which set a hearing
5 date of July 20, 2016 on the MPV matter. AR 15033-15034. The hearing began on July 20,
6 2016, was continued several times by the parties, AR 03719-20, 03734, 03909, 14070, 13771-
7 13772, 13724-13725, and eventually resumed on January 4, 2017, at the conclusion of which the
8 Planning Commission approved the Project. AR 03605-03688.

9 On December 30, 2016, just days prior to the final Planning Commission hearing, and
10 the Friday before the New Year’s holiday weekend, MPV submitted a final version of its
11 “Hydrology Response” to Mr. Kamman’s October 11, 2016 initial response to MPV’s
12 groundwater study. AR 12779-12804, 13900-13915. Due to a death in the family, Mr. Kamman
13 was unable to produce a rebuttal to MPV’s response until January 30, 2017, which was produced
14 to the County and MPV the very next day, January 31, 2017. AR 10915-1123. On January 30,
15 2017, four SCG Members appealed the Planning Commission approval to the Napa County
16 Board of Supervisors (“Board of Supervisors”). AR 10811-10814.

17 On March 27, 2017, SCG Members submitted a letter to the chair of the Board of
18 Supervisors requesting *de novo* review of the project and consideration of additional expert peer
19 reviews and reports. AR 09557-09560. Specifically, SCG Members requested the Board of
20 Supervisors to review and consider Mr. Kamman’s January 30, 2017 response letter, inclusive of
21 attachments, as well as the KC Engineering Report documenting the abysmal condition of SCR.
22 *Id.*; *see also* AR 03914-03920. On April 3, 2017, the Board of Supervisors’ chair: (1) denied SCG
23 Members’ request for *de novo* review, (2) partially granted their request to review Mr. Kamman’s
24 letter, limiting review to the letter only, *see* AR 10825-10832, and not the Kamman Response
25 Attachments, *see* AR 10834-10914, and (3) denied SCG Members’ request to review and
26 consider the KC Engineering Report. AR 08697-08698. The full board upheld the decision.

27 **B. The 2017 Atlas Fire – Crucial Evidence that Could Not Have Been Produced**
28 **Prior to the Close of the Public Hearing on the Project**

1 **1. The 2017 Atlas Fire Devastated the Entire Soda Canyon Community**

2 On Sunday, October 8, 2017, at approximately 9:52pm, the 2017 Atlas Fire began and
3 was later determined to be moving at an approximate rate of 100 yards every three seconds,
4 equivalent to 68 miles per hour (“mph”). *see* Declaration of Anthony G. Arger in support of the
5 Motion (“Arger Decl.”) at ¶¶ 12, 14, **Exs. 8, 10**. The 2017 Atlas Fire burned 22,110 acres,
6 including the entirety of lower SCR in less than one day – from late on October 8 to October 9
7 – and by October 10, the fire burned another 20,070 acres for a total of 42,181 acres burned in
8 just two days. *Id.* at ¶¶ 7, 9, 11 **Exs. 5, 7**. The fire damaged or completely destroyed 260
9 buildings on SCR or its offshoots (Feliz Ranch Road, Loma Vista Drive, Soda Springs Road,
10 Chimney Rock Road, Capps Drive, Ridge Drive, *see* AR 00617). *Id.* More specifically, the Atlas
11 Fire damaged or destroyed 82% (134) of the 163 residences on SCR, with 72% (118) of the SCR
12 residences suffering a complete loss. *Id.*

13 On the night the Atlas Fire began, numerous residents and property owners on SCR had
14 only moments to grab their family members, pets, and car keys before fleeing for their lives.
15 Declaration of Cynthia Grupp in support of the Motion (“Grupp Decl.”) at ¶¶ 7-9, 13;
16 Declaration of David Hallett in support of the Motion (“Hallett Decl.”) at ¶¶ 7-10; Declaration
17 of Linda Savoie in support of the Motion (“Savoie Decl.”) at ¶¶ 6-8; Declaration of Glenn
18 Schreuder in support of the Motion (“Schreuder Decl.”) at ¶¶ 6-8; Declaration of Shelle Wolfe
19 in support of the Motion (“Wolfe Decl.”) at ¶¶ 7-8. On lower SCR, some 15-20 individuals
20 became trapped in their vehicles behind a large downed tree as the fire was closing in on all sides
21 of them. Grupp Decl. at ¶ 10. After much effort, a truck was able to move the crown of the
22 tree out of the road just enough so that vehicles and their occupants could pass by before the
23 fire reached them. *Id.* at ¶ 12. Tragically, two individuals on lower SCR – Sally Lewis and
24 Teresa Santos – did not escape Soda Canyon and were taken by the Atlas Fire in the home of
25 Sally Lewis. Arger Decl. at ¶ 13, **Ex. 9**.

26 On upper SCR above the 5-mile mark, which includes the Project site at the 6.1-mile
27 mark, *see* AR 00001, roughly 60-70 individuals became completely trapped in Foss Valley, as
28 their only escape route down SCR was blocked by the fire. Savoie Decl. at ¶ 11; Schreuder

1 Decl. at ¶ 9. At one critical point, there was a literal traffic jam clear right at the entrance to the
2 MPV Project, composed of residents, property owners, vineyard workers, and their respective
3 vehicles including cars, SUVs and semi-trucks transporting grapes from nearby vineyards that
4 took several precious minutes to clear. Savoie Decl. at ¶¶ 8-11. In the midst of the chaos, Dr.
5 Savoie, who was among the individuals and vehicles involved in the “traffic jam,” describes it as
6 “pandemonium” and specifically recalls “being thankful that there were no tourists to add to the
7 chaos, particularly inebriated winery tourists, as that would only have made matters far worse
8 than they already were.” Savoie Decl. at ¶ 10. Unable to escape, and with no or very limited cell
9 phone service, several members of this “group” retreated further into Foss Valley up the one-
10 lane, dirt road portion of SCR to seek shelter among the vineyards. Savoie Decl. at ¶ 11; *see also*
11 AR 2880, 06864.008, 6864.086, 06864.180 (describing and depicting MPV entrance and dirt road
12 adjacent to it). However, they soon realized there was another fire coming from the north and
13 west and were directed by California Department of Forestry and Fire (“CalFire”) personnel to
14 go to Antica Winery, which was even *closer* to the force of the Atlas Fire. Savoie Decl. at ¶¶ 12-
15 18. Approximately 45 individuals trapped on upper SCR were eventually evacuated by a
16 California Department of Highway Patrol (“CHP”) helicopter in 60+ mph crosswinds that
17 proved to be one of the most harrowing events of the night, Savoie Decl. at ¶¶ 20-21; Schreuder
18 Decl. at ¶¶ 9-10, while still others had to shelter in vineyards. Wolfe Decl. at ¶ 16.

19 On October 10, 2017, Anthony Arger and his brother gained access to their family’s
20 property on upper SCR and spent the rest of the week, until October 15, 2017, with a few other
21 upper SCR neighbors assisting and providing food for fire crews. Arger Decl. at ¶¶ 18-19;
22 Schreuder Decl. at ¶ 14. As a result of their intimate knowledge of upper Soda Canyon and the
23 Foss Valley terrain, Messrs. Arger were designated “subject matter experts” and guided non-
24 local fire crews to “hot spots” throughout the week. Arger Decl. at ¶ 18. They spent countless
25 hours with fire crews from California and other western states. *Id.* at ¶ 20. During downtime,
26 the topic of Mountain Peak came up several times with fire crews, and the response was
27 consistent across the board: upper SCR is no place for the proposed event center given the
28 inherent fire danger and extreme access constraints. *Id.*; Schreuder Decl. at ¶ 14.

1 In the days and weeks after October 8, 2017, the appearance of the Soda Canyon
2 community can only be described as apocalyptic, with the remains of dead animals that were
3 burned alive littering the sides of the road, along with remnants of burned trees, cars, houses,
4 and buildings. Grupp Decl. at ¶¶ 14-16; Savoie Decl. at ¶ 23; Wolfe Decl. at ¶ 18; Hallett Decl. at
5 ¶ 19. Pictures and videos included with the New Evidence depict the devastation wreaked by the
6 Atlas Fire on SCR. Arger Decl. at ¶¶ 4-6,17, **Exs. 2-4**. Even MPV’s parcel sustained fire-
7 damage, with a portion of its vineyard burned by fire that came up from Rector Canyon and
8 down from nearby hillsides.¹ *Id.* at ¶¶ 6-8, **Exs. 4-5**; *see also* AR 2120-2122.

9 On September 25, 2018, the Board of Supervisors held a meeting to address growing
10 concerns over proposed wineries in remote areas of Napa Valley. Arger Decl. at ¶ 12, **Ex. 12**.
11 Ms. Grupp attended the meeting and asked the Supervisors what would have happened had the
12 Project been in operation and was holding an event on the night the 2017 Atlas Fire began, to
13 which Supervisor Dillon responded: “it would have been a disaster.” Grupp Decl. at ¶ 19.

14 **2. SCG Members Presented Fire Safety Evidence that Respondent**
15 **Discounted as “Generalized Fears” and “Unfounded”**

16 Prior to Respondent’s approval of the Project, SCG Members provided substantial
17 evidence of the risk of a large and devastating wildfire to the SCR area based upon historical
18 events, and the adverse impacts to the public safety that the Project will present. For example,
19 SCG member Cynthia Grupp, who trained for and served as a member of the Soda Canyon
20 Volunteer Fire Department for eleven years, testified before Respondent and provided a brief
21 explanation and history of the major wildfires on SCR that date back to the mid-1800s,
22 including fires in 1861, 1913, 1944, 1960, 1964, and 1981. AR 03480-03484, 03820-03823,
23 14190-14192. She also provided an explanation as to *why* Soda Canyon is prone to major
24 wildfires – area geography and weather conditions. AR 03480-03484, 03820-03823; *see also* AR
25 02888; 03120-03123 (CalFire Soda Canyon Monticello Pre-Attack Fire Plan, hereafter “Pre-
26 Attack Fire Plan,” describing that “two wide canyons provide the opportunity for wind to be
27 funneled, even under local wind conditions”). Notably, she highlighted that virtually all of SCR

28 ¹ There are two canyons that stem from Foss Valley on upper Soda Canyon – Soda Canyon and Rector Canyon,
both of which pose significant fire risks. *See* Arger Decl. at ¶¶ 7-8, 20, **Ex. 5**; *see also* AR 06864.182; 03120-03123.

1 is located in a “Very High Fire Hazard Severity” zone as designated by CalFire, which is the
2 worst severity designation. AR 03480-03481, 06864.118-06864.119. She then discussed and
3 recited portions of the Pre-Attack Fire Plan, which CalFire created specifically because of the
4 extremely high risk for large and devastating wildfires in the Atlas Peak/Soda Canyon areas:

5 [a]lso critical to the plan is early evacuation. Because the road will quickly become
6 congested with emergency vehicles trying to come in, and residents, visitors, vineyard
7 and winery workers, trying to get out. Soda Canyon Road [is] [o]ne way in, one way
8 out. If evacuation is necessary, it needs to be ordered early. Residents should be
9 discouraged from using their normal travel patterns, if that takes them closer to the
10 incident or fire. One way in, one way out. If the fire is between you and the one way
11 out, your only option is to shelter in place. . . .[the plan] goes on to say, quote, ‘fire
12 history, fuels, topography, and the urban interface issues indicate the potential for a
13 large and damaging fire in the Soda Canyon/Monticello area.’

14 AR 03482-03483 (emphasis added); *see also* AR 06864.134-06864.137 (Pre-Attack Fire Plan
15 quotations in presentation PowerPoint (“PPT”) slides); 03120-03123 (Pre-Attack Fire Plan).

16 As fire danger relates to the Project, Ms. Grupp explained that “[m]ost fires are caused
17 by people and/or their equipment, accidentally, carelessly, or deliberately,” and that the Project
18 will add 40,000 additional vehicles to Soda Canyon Road on an annual basis.
19 Vehicular and commercial traffic could cause a devastating wildfire. 14,575 annual
20 tourists unfamiliar with the fire danger and a careless person tosses his cigarette butt
21 out of a vehicle window, or a car or a truck overheats on a steep incline, or a chain
22 dragging under a truck causes a spark. An additional 40,000 vehicles to Soda Canyon
23 Road will impede rescue efforts in the event of a fire.

24 AR 03483. (emphasis added); *see also* AR 06864.117-06864.139 (PPT slides accompanying Ms.
25 Grupp’s testimony); 03823-03826 (testimony from resident David Hallett describing SCR fire
26 danger and that “[l]ogically, there is no way to mitigate the increased risk posed by an additional
27 47,000 annual trips to and from Mountain Peak Winery”); 02887-02889 (Anthony Arger letter
28 describing fire and safety dangers posed by MPV adding tens of thousands of annual tourists to
29 SCR²); 00017 (County acknowledging the “testimony from the chief of the Soda Canyon
30 Volunteer Fire Department and a former volunteer of the Department” who “testified that
31 approval of the Project would increase the risk of fire and significantly impact rescue efforts”);

28 ² At the time Mr. Arger’s letter was submitted, MPV proposed 18,846 visitors. MPV later reduced that number to
15,475. *See* AR 01060-01061; 12868.

1 03073-03130 (evidence of fires on SCR; reports from CalFire); 03929-03933, 03953-04140
2 (descriptions, summaries, and reports from CalFire, Napa County Sheriff and CHP regarding
3 fires, accidents and incidents on SCR); 06864.023-06864.139 (PPT slides from May 23, 2017
4 hearing summarizing public agency incident/accident statistics on SCR); 13766-13770 (resident
5 Diane Shepp describing adverse implications of MPV with regard to fire and safety on SCR).

6 Additionally, Ms. Grupp explained to the Board of Supervisors on May 23, 2017 that
7 the CalFire attack plan is based on the parameters of a normal day. . . [but] [w]hen it
8 is not a normal day, you can put the pre-attack pan back in the door. When you have
9 the heatwave . . . [a]nd when the north wind, that hot, dry wind that blows down, and
10 gusts up - - blows down the sides of mountains, and gusts up to near hurricane forces
11 in the hills, begins to blow, sucking the remaining moisture out of the fuel, leaving a
12 tinderbox. We have days like that. And maybe there are fires burning in other parts
13 of the state or county, drawing on the finite firefighting resources, and then there's a
14 spark because of the undeniable risks that currently exists on [SCR], approval of
15 Mountain Peak Winery poses a serious safety threat to all residents. AR 03482-03483.

16 Just weeks prior to the Atlas Fire, Respondent wholly discounted and even trivialized the critical
17 safety concerns pertaining to traffic, fire and emergency incidents raised by SCG Members, as
18 exemplified in its Findings of Fact and Decision on Appeal ("Findings of Fact"):

19 Fears and speculation that visitors to wineries will drive unsafely and/or impaired,
20 will be irresponsible toward fire safety, and will impede property owners' egress in the
21 event of wildland fire does not rise to the level of substantial evidence. AR 00015.

22 No credible evidence was put forward that the addition of another winery along Soda
23 Canyon Road will significantly increase the risk of fire or significantly hinder rescue
24 efforts. Neighbors' opinion that winery visitors will cause traffic congestion during a
25 fire is not supported by fact. Generalized fears and concerns about a project does
26 not constitute substantial evidence. AR 00017.

27 In the event of a fire that results in mass evacuations from this area, the road has
28 sufficient capacity and roadway width to accommodate all outgoing traffic while
29 allowing incoming fire response units. In addition, most of Foss Valley in the vicinity
30 of the Project site is now planted in vineyard, which significantly reduces the extent
31 of wildland fire than can occur in the vicinity. During the Atlas Peak Fire in 1981,
32 most of the areas that are now planted in vineyards were undeveloped wildlands,
33 which provided a combustible fuel source. AR 00017-00018.

34 Appellant's claim that fire/rescue response efforts will be impeded along Soda
35 Canyon Road if the Project is constructed are unfounded and not supported by
36 factual evidence. AR 00044.

1 Construction of the Mountain Peak Winery, especially the cave, would provide a safe
2 haven for sheltering in place in the event of wildfire conflagration and evacuation.
3 Appellant Grupp testified that sheltering in place is one of the recommendations
4 included on the “Pre-Attack Fire Plan” in the event of evacuation. The proposed
5 Project would not interfere with planning or response to wildland fire, and the
6 property and proposed winery nominally improve wildland fire response. AR 00017.

7 (Emphasis added).

8 After each of its “findings” pertaining to fire and public safety, Respondent restated
9 an identical conclusion: “substantial evidence exists in the record to support the Planning
10 Commission’s decision and considering the record as a whole, that there is no substantial
11 evidence to support a contrary conclusion or a fair argument that the Project will have a
12 significant effect on the environment.” AR 00011-00018.

13 **III. ARGUMENT**

14 **A. Certain Documents Were Erroneously Excluded by Respondent County of** 15 **Napa and Must Be Included in the AR Pursuant to CEQA § 21167.6**

16 **1. Standard of Review**

17 Public Resources Code § 21167.6 requires that the public agency certify an AR in CEQA
18 cases. Section 21167.6(e) mandates that the AR “shall include, but is not limited to” eleven
19 nonexclusive categories of documents. This list is “very expansive,” “nonexclusive,” and
20 Section 21167.6(e) “contemplates that the administrative record will include pretty much
21 everything that ever came near a proposed development or to the agency’s compliance with
22 CEQA in responding to that development.” *Citizens for Ceres v. Superior Court* (2013) 217
23 Cal.App.4th 889, 909-10 (internal quotations and citations omitted). It is the agency’s duty to
24 certify the AR under Section 21167.6(b)(2). If there is a dispute about the content of the AR, it
25 is well-established that petitioners can move to augment or supplement the AR. *See e.g. Eureka*
26 *Citizens for Responsible Government v. City of Eureka* (2007) 147 Cal.App.4th 357, 366-367 (appellate
27 court reviewing trial court’s decision on a motion to augment the AR); *Mejia v. City of Los Angeles*
28 (2005) 130 Cal.App.4th 322, 335-336 (appellate court review of trial court’s decision to augment
the AR with two documents and concluding the trial court should have granted the motion to
augment to include other documents as well); *County of Orange v. Superior Court* (2003) 113
Cal.App.4th 1, 8 (peremptory writ directed trial court to include certain documents in the AR).

1 Here, SCG submitted several documents to Respondent that were improperly excluded
2 from the AR. The broad language of Pub. Res. Code § 21167.6 requires their admission.

3 **2. Each Document Was Constructively “Submitted” to Respondent under**
4 **Pub. Res. Code §21167(e)(7) and Should Thus be Included in the AR**

5 Under Public Resources Code §21167.6(e)(7), “[a]ll written evidence or correspondence
6 submitted to, or transferred from, the respondent public agency with respect to compliance with
7 [CEQA] or with respect to the project” shall be considered part of the AR. In *Consolidated*
8 *Irrigation Dist. v. Superior Court*, the court examined the question of what constituted a
9 “submission” of documents by a member of the public to an agency for purposes of inclusion
10 in an administrative record in a CEQA proceeding and noted:

11 [T]he term ‘submitted to’ – which generally means presented or made available for
12 use or study—is concerned with the effort that must be expended by the lead
13 agency in using or studying the “written evidence” presented. . . . Consequently, we
14 think that the term should be interpreted and applied pragmatically to fairly allocate
15 the burden of handling the written evidence. Applying the term too broadly could
16 place an unacceptable burden on lead agency personnel by requiring them to
17 expend time and limited resources tracking down information that could have been
18 provided more efficiently by the commenter. Based on considerations regarding the
19 allocation of burden, we conclude that ‘written evidence’ has been ‘submitted to’ a
20 lead agency for purposes of section 21167.6, subdivision (e)(7) when the
21 commenter has made the document readily available for use or study by lead agency
22 personnel. (2012) 205 Cal.App.4th 697, 722-724. (Emphasis added).

19 Here, two sets of documents were submitted to the County, but were excluded from being
20 considered as part of the AR, including (1) the Kamman Response Attachments, and (2) the KC
21 Engineering Report. AR 08697-08698.

22 SCG Members submitted all of the evidence and correspondence to Respondent on or
23 before the May 23, 2017 Appeal Hearing before the Supervisors, and approximately three (3)
24 months before Respondent issued its August 23, 2017 Notice of Determination. The Kamman
25 Response Attachments were submitted to Respondent on January 31, 2017 and relate directly to
26 the Project’s non-compliance with CEQA. AR 10915-1123. The KC Engineering Report was
27 submitted to Respondent on May 8, 2018 and addresses the Project’s adverse impacts on SCR.
28 AR 06976-06983. Thus, there can be no question that this written evidence, all of which dealt

1 with “compliance with [CEQA] or with respect to the project” and was made “readily available
2 for use or study” by the lead agency, here the County, and thus must be considered as part of
3 the Administrative Record pursuant to Pub. Res. Code §21167.6(e)(7).

4 **3. The Documents Constitute “Other Written Materials” Requiring**
5 **Admission under Pub. Res. Code §21167.6(e)(10)**

6 Each excluded document is also relevant to the Respondent’s proceedings and thus
7 should be included in the record as “other written materials relevant to the respondent public
8 agency’s compliance with [CEQA] or to its decision on the merits of the project.” Pub. Res.
9 Code § 21167.6(e)(10). In determining whether a document is “relevant” for purposes of record
10 inclusion under Pub. Res. Code § 21167.6(e)(10), the Court need not determine the eventual
11 merits of Petitioner’s allegations, but instead, whether the document is relevant in *considering*
12 those allegations. *See e.g., Consolidated Irrigation Dist. v. Superior Court, supra*, 2012 Cal.App.4th at
13 717-718 (explaining that “other written materials” is to be “broadly construed,” and concluding
14 that audio recordings of administrative agency proceedings are “other written materials” that
15 should be included in the administrative record for relevant consideration by the court).

16 Here, there can be no question that both of the excluded sets of documents are “other
17 written materials” that are relevant to Respondent’s compliance with CEQA or its decision on
18 the merits. First, the Kamman Response Attachments relate specifically to adverse hydrology and
19 water impacts from the Project, a key topic of dispute in this matter. AR 10915-1123. Second,
20 the KC Engineering Report ties into adverse public safety impacts from the Project, which is also
21 a primary dispute in this matter. AR 06976-06983. Thus, both of these documents are plainly
22 relevant and should have been included with the AR pursuant to Pub. Res. Code § 21167.6(e)(10).

23 **B. Evidence Pertaining to the 2017 Atlas Fire is Highly Relevant and Requires**
24 **Inclusion into the AR, and a Remand to Respondent for Reconsideration**

25 **1. Standard of Review**

26 Under Code of Civil Procedure § 1094.5(e), the superior court, when considering action
27 for writ of mandate, may receive “relevant evidence that, in the exercise of reasonable diligence,
28 could not have been produced or that was improperly excluded at the hearing before
respondent.” This includes “relevant evidence of events which transpired after date of the

1 agency’s decision.” *Curtis v. Bd. of Ret.* (1986) 177 Cal.App.3d 293, 299. The Court “may admit
2 the evidence at the hearing on the writ without remanding the case,” *see* Cal. Code Civ. Proc. §
3 1094.5(e), however, the “better practice might be to remand action for agency redetermination
4 in light of new evidence, particularly if such evidence would have been crucial to administrative
5 decision.” *Curtis*, 177 Cal.App.3d at 299. In California, relevant evidence is evidence “having
6 any tendency in reason to prove or disprove any disputed fact that is of consequence to the
7 determination of the action.” Evid. Code, § 210.

8 Here, New Evidence of the historic 2017 Atlas Fire, which transpired only weeks after
9 the date of Respondent’s August 23, 2017 final decision in this matter, is highly relevant and
10 requires (1) admission into the AR and (2) a remand of the case to Respondent’s agency for
11 redetermination because such evidence would have been crucial to Respondent’s decision.

12 **2. Relevancy and Crucial Nature of the 2017 Atlas Fire New Evidence**

13 During the proceedings below, Respondent sought to place the Project in a vacuum by
14 focusing on MPV’s premises while downplaying the risk the Project poses to public safety. *See*
15 AR 00011-00018; 03450, 03453-03454. In its Findings of Fact, Respondent similarly discounted
16 and effectively ignored all of the critical safety concerns pertaining to traffic, fire, and the dead-
17 end nature of SCR raised by SCG Members. *See* AR 00011-00018. Specifically, Respondent
18 repeatedly characterized SCR Members’ concerns regarding the potential for fire and the
19 inability to escape a major fire as a result of increased winery visitors from the Project as
20 “generalized fears” for which SCG Members put forth “[n]o credible evidence.” AR 00015,
21 00017. Respondent further stated SCR “has sufficient capacity and roadway width to
22 accommodate all outgoing traffic while allowing incoming fire response units.” AR 00017-
23 00018; *see also* AR 00017 (Respondent concluding that the “proposed Project would not interfere
24 with planning or response to wildland fire, and the property and proposed winery nominally
25 improve wildland fire response”); 00044 (Respondent finding that claims “that fire/rescue
26 response efforts will be impeded along SCR if the Project is constructed are unfounded and not
27 supported by factual evidence”).

28 The New Evidence sought to be introduced y SCG to the AR includes: select

1 photographs, video, maps, incident reports from CalFire, and declarations from residents and
2 property owners on SCR, all of which relates to the Atlas Fire that began on October 8, 2017,
3 burned 51,625 acres, including the vast majority of Soda Canyon, and damaged or completely
4 destroyed 260 homes and buildings on SCR or roads accessed by it. This New Evidence
5 stemming from the Atlas Fire could not have been produced during the proceedings because it
6 did not exist, and is highly relevant because it verifies with tragic poignancy virtually all of SCG
7 Members’ previously articulated concerns with regard to fire, traffic, and public safety if the
8 Project moves forward. Moreover, the New Evidence refutes Respondents’ findings and
9 conclusions on the same topics, demonstrating the crucial nature of the New Evidence for
10 inclusion in the AR, as well as a remand to Respondent to consider same.

11 There are (or were) 163 residences on SCR and its offshoots. AR 06864.007-06864.008.
12 According to Dr. Manfree’s Damage Assessment map, based upon Napa County records, 118,
13 or 72%, of those residences were completely destroyed, and another 16 were damaged for a total
14 of 134 residences – 82% – that were damaged or completely destroyed by the Atlas Fire. Arger
15 Decl. at ¶¶ 7-9, 11 **Exs. 5,7**. This included the home of David Hallett, *see id.* ¶ 5, **Ex. 3**; Hallett
16 Decl. at ¶ 4, who testified about SCR’s severe fire danger. AR 03823-03826.

17 Importantly, the Atlas Fire is not the first, and will not be the last major fire to occur on
18 SCR/Atlas Peak. As evidenced by Ms. Grupp’s testimony, AR 03820-03823; 03480-03484, Dr.
19 Manfree’s map titled “Soda Canyon Road Regional Fires” and by the CalFire Fire History Map,
20 both contained in **Ex. 5** attached to the Arger Decl., there have been numerous major fires on
21 and around SCR dating back to the 1800s. Critically, the 3 largest fires near SCR for which
22 accurate records are kept – 1960, 1981, and 2017 – burned right through Soda Canyon where
23 the only escape route for all residents, property owners, and visitors of Soda Canyon is located.
24 *See Id.* This severe fire hazard is not going to subside. The geography of Soda CANYON, a
25 natural fire funnel, readily apparent in Dr. Manfree’s Damage Assessment map and all of
26 CalFires maps, is never going to change; the underbrush and forest will grow back, and in
27 another 20-30 years, there will be another significant load of fuel in Soda Canyon that will be
28 primed to burn. That is exactly what happened between 1960 and 1981, and again between

1 1981 and 2017, prompting CalFire to create the Pre-Attack Fire Plan specifically for SCR/Atlas
2 Peak. *See* AR 03120-03123 (Pre-Attack Fire Plan). If the Project moves forward, the potential
3 for more injury and loss of life to members of the public only increases because there will be an
4 additional 45,000 annual vehicle trips on SCR, inclusive of 14,575 winery visitors, AR 00001,
5 00018, 01060-01061, 01081, who are encouraged to drive up the dead-end road to a winery
6 located in a “Very High Fire Hazard Severity Zone,” *see* AR 06864.118-06864.119, drink wine,
7 and then drive back down the dead-end, steep, narrow, and winding SCR. These individuals
8 could cause a fire and/or impede escape and rescue efforts in the event thereof. Indeed,
9 between 2014 and 2016, SCR saw a 38% increase in the number incidents and accidents as the
10 amount of SCR traffic increased, with a total of 639 incidents/accidents occurring in those three
11 years, and 74% of those incidents (471 of 639) occurring between March and October, precisely
12 when most winery tourists visit Napa Valley, and when the bulk of the 45,000 annual vehicle
13 trips to the Project site will occur. AR 06864.031-06864.034; 03458-03461. There can simply be
14 no question that the addition of 45,000 more annual vehicles, including thousands of unfamiliar
15 tourists, will result in more incidents, accidents and fires in the already fire-prone area.

16 Every minute, and in fact every single second, was the difference between life and death
17 on the night of Sunday, October 8, 2017, as the fire was moving at a rate of 100 yards every
18 three seconds, or 68 mph. *See* Arger Decl. at ¶ 14, **Ex. 10**. As it was, a tree came down on the
19 lower portion of SCR near the intersection with Loma Vista Drive (approximately 1.5 miles up
20 SCR) blocking the entire roadway. The 10-15 cars that stacked up behind the downed tree,
21 which were filled with people, their pets, and any possessions they could grab, barely escaped
22 the fire. Grupp Decl. at ¶ 10. Those individuals were extremely fortunate that a truck and fire
23 engine with tow ropes (but no chain saws) not only happened to be on the downhill side of the
24 tree, but were also able to move the tree just enough so cars could dash around the tree and get
25 out. *Id.* at ¶ 12. When trees come down and block the roadway, which they often do on SCR,³
26 the roadway is not sufficiently wide for escape or to allow emergency vehicles to pass in the
27

28 ³Trees falling across Soda Canyon Road is a regular occurrence, with at least ten (10) such incidences occurring between January 2014 and March 2017. AR 03936, 6864.081-6864.082

1 event of an emergency as Respondent contends. AR 00017-00018. Tragically, two individuals
2 did not escape lower Soda Canyon and were taken by the fire. Arger Decl. at ¶ 13, **Ex. 9**.

3 On upper Soda Canyon, Dr. Savoie experienced a chaotic “traffic jam” literally at the
4 entrance to Mountain Peak involving approximately 30-40 residents, property owners, vineyard
5 workers, cars, SUVs, and semi-trucks loaded with grapes, and this is before the construction of
6 the Project. Savoie Decl. at ¶¶ 8-11; *see also* AR 06864.086 (image of 2016 traffic at MPV
7 entrance). If the Project moves forward, MPV will employ nineteen (19) full time, four (4)
8 part time, and four (4) seasonal employees, and be entitled to host eighty (80) visitors per day for
9 wine tasting, along with monthly and annual marketing events that allow from twelve (12) to
10 one hundred twenty-five (125) visitors. AR 00001. By MPV’s own estimates, the Project will
11 add between 45,000 additional annual vehicle trips on SCR. AR 00018, 01060-01061, 10081.

12 According to CalFire, the Atlas Fire began at 9:52pm. Arger Decl. at ¶ 12, **Ex. 8**. Had
13 this fire occurred even just a few hours earlier, perhaps at 4 or 5 p.m., which it easily could have
14 because the high winds were gusting all afternoon, when more members of the public, including
15 as many as 125 wine tasting tourists at Mountain Peak, were on-site or leaving the premises,
16 there could have been substantially more than two lives lost. Instead of 10-15 cars backed up at
17 the fallen tree, there could have been 40-50 cars and those at the back may not have escaped,
18 particularly with a fire that was moving at approximately 68 mph. *Id.* at ¶ 14, **Ex. 10**.

19 Alternatively, unfamiliar tourists who do not know the road could easily have panicked while
20 driving, rolled their car and fatally injured themselves or others. In short, had MPV’s winery
21 been in operation at the time of the Atlas Fire, “it would have been a disaster” as Supervisor
22 Dillon so aptly stated at the September 25, 2018 meeting. Grupp Decl. at ¶ 19.

23 Furthermore, Respondent’s contention that MPV’s premises and cave could “nominally
24 improve wildland fire response” is outlandish. Antica Winery has an approximately 30,000 sf
25 cave on its property and individuals trapped on upper SCR did not seek shelter inside because
26 fires remove oxygen from the air and had people sought shelter inside, they may well have
27 asphyxiated. Grupp Decl. at ¶¶ 10-11; Schreuder Decl. at ¶ 11. Moreover, the proposed
28 entrance to MPV’s cave faces and is approximately 100 yards from a tributary/draw from

1 Rector Canyon, which burned during the fire, and is in fact one of the TWO directions the fire
2 came from that burned MPV's vineyards. Arger Decl. at ¶¶ 6-8, **Exs. 4-5**; AR 02120-02122.
3 According to CalFire personnel with whom Messrs. Arger spoke during the Atlas Fire, the very
4 prospect of installing a winery event center like MPV at the end of SCR, struck them all as
5 absurd due to the obvious fire prone nature and severe access constraints of the area. Arger
6 Decl. at ¶ 20; Schreuder Decl. at ¶ 14. The absolute last thing emergency responders want or
7 need when disaster strikes, particularly a fast-moving wildfire, is more people to deal with who
8 are potentially inebriated and wholly unfamiliar with a treacherous area with poor ingress/egress.

9 The New Evidence demonstrates that the fears and concerns previously raised about fire
10 danger, the lack of escape routes, and the adverse impacts of introducing some 45,000 additional
11 annual vehicle trips on the dead-end SCR are neither “generalized” nor “unsubstantiated.” To
12 the contrary, the New Evidence stemming from the Atlas Fire legitimizes SCG Members’
13 concerns and makes clear that the introduction of some 45,000 additional vehicle trips, inclusive
14 of 14,575 visitors, *see* AR 00001; 00018; 0106-01061, 01081, on an annual basis will not only
15 increase the risk of another devastating fire in the future, but will also impede escape efforts
16 along the length of the dead-end, incident and accident prone SCR when the next big fire
17 occurs. Indeed, as shown by the Supervisors’ September 25, 2018 meeting discussing
18 “Rural/Remote Winer[ies],” *see* Arger Decl. at ¶ 16, **Ex. 12**; Grupp Decl. at ¶ 19, there can be no
19 question that the 2017 Atlas Fire has jolted the entire Napa community, and even Respondent is
20 starting to rethink the viability of large-scale commercial wineries in Napa’s most remote regions
21 like upper SCR. Inclusion of the New Evidence into the AR and directing a remand for
22 consideration of same will allow Respondent to properly consider the legitimate public safety
23 concerns involving traffic, accidents, and fire safety previously raised by SCR members.

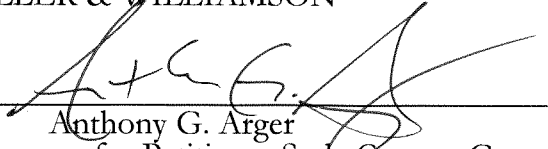
24 **IV. CONCLUSION**

25 For the foregoing reasons, Petitioner respectfully asks the court to GRANT its Motion
26 to Augment the AR with (1) the Kamman Response Attachments, (2) the KC Engineering
27 Report, and (3) the New Evidence pertaining to the 2017 Atlas Fire, and thereafter direct a
28 remand for Respondent’s reconsideration in light thereof.

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Dated: October 15, 2018

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