MERCED ALLIANCE FOR RESPONSIBLE GROWTH et al., Plaintiffs and Appellants, v. CITY OF MERCED et al., Defendants and Respondents; WAL-MART STORES EAST, L.P. et al., Real Parties in Interest and Respondents.

F062602

COURT OF APPEAL OF CALIFORNIA, FIFTH APPELLATE DISTRICT

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**PRIOR HISTORY:** [*1]
APPEAL from a judgment of the Superior Court of Merced County. Super. Ct. No. CV000593. William E. Burby, Jr., Judge.

**CORE TERMS:** challenger, mitigation measures, threshold, emission, environmental, storm, traffic, air, air quality, project site, guideline, trip, ozone, site, pond, proposed project, cumulative, detention, recirculation, intersection, baseline, runoff, no-project, retail, existing conditions, significant impacts, new information, lead agency, annexation, environmental impacts

**COUNSEL:** Lippe Gaffney Wagner, Thomas N. Lippe and Keith G. Wagner for Plaintiffs and Appellants.

Rutan & Tucker, M. Katherine Jenson, John A. Ramirez, and Peter J. Howell; Gregory G. Diaz, City Attorney, Jeanne E. Schechter, Deputy City Attorney, for Defendants and Respondents.

Sheppard Mullin Richter & Hampton, Arthur J. Friedman, for Real Parties in Interest and Respondents.

**JUDGES:** Wiseman, Acting P.J.; Levy, J., Franson, J. concurred.

**OPINION BY:** Wiseman, Acting P.J.

**OPINION**

This case concerns the City of Merced's (city) approval of a proposal to build a regional distribution center in the southeast part of the city. Three Merced residents and an organization called Merced Alliance for Responsible Growth (Alliance) petitioned the superior court for an order setting aside the city's approval, alleging violation of the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.) [1] (CEQA). The court denied the petition.

**FOOTNOTES**

[1] Subsequent statutory references are to the Public Resources Code unless indicated otherwise.

In this appeal, the three individual plaintiffs and Alliance raise several challenges [*2] to the environmental impact report (EIR) prepared for the proposed project. They contend that the EIR failed to consider a true no-project alternative and failed to adequately assess the project's impacts on air quality, hydrology and water quality, traffic, urban decay, visual impacts, and greenhouse gases and global climate change. We disagree and conclude that the EIR's discussion of a no-project alternative and assessments of the project's impact on various environmental resources were adequate.

In addition, the challengers argue that the EIR should have been recirculated for public review and comment because the city added significant new information to the final EIR. The challengers also argue that recirculation was required because the city added significant new information to the administrative record after the release of the final EIR. The city responds that the new information it added to the record was not significant; further, the information was offered in response to Alliance's comment letters, which were submitted after the public comment period had closed and which the city characterizes as a "last-minute 'document dump.'" We conclude that the information the city added [*3] to the administrative record in response to Alliance's comments did not trigger the recirculation requirement because it did not show that the draft EIR was fundamentally and basically inadequate and conclusory in nature. As a result, we conclude there was an opportunity for meaningful public review. We affirm the superior court's judgment.

***FACTUAL AND PROCEDURAL HISTORIES***

Real parties in interest Wal-Mart Stores East, L.P., Wal-Mart Stores East, Inc., and Wal-Mart Stores, Inc. (collectively Wal-Mart), proposed developing a 1.1-million-square-foot regional distribution center and associated facilities on a 230-acre site in southeast Merced. The proposed development would store and distribute nongrocery goods to Wal-Mart retail stores throughout the region and would consist of a warehouse, distribution center, and support facilities, which would include offices, a cafeteria, an aerosol garage, a truck gate, a truck maintenance garage, a truck fueling station, a fire pump house, and parking lots. It would operate 24 hours per day and would employ approximately 1,200 employees.

The project site is bounded on the north by Childs Avenue, on the east by Tower Road, and on the south by Gerard [*4] Avenue. Campus Parkway is approximately 975 feet west of the

project site. Kibby Road, which runs north-south, ends at Childs Avenue at the north end of the site. At the time the project was proposed, the city's general plan included a right-of-way between Childs Avenue and Gerard Avenue for the extension of Kibby Road. The project site is located about three miles southeast of downtown Merced and approximately 1.3 miles northeast of State Route 99. The site is owned by Wal-Mart. The previous owner was Lyons Investments, a California limited partnership.

The city's general plan designates the site for industrial use, and the zoning map designates the site as part of a heavy industrial district. The zoning designation permits a wide range of industrial operations, such as steel foundries, poultry slaughter houses, meat packing, and salvage and wreckage operations. Historically, however, the site has only been used for agriculture and most recently has been used to grow almonds and alfalfa. The site contains no structures or improvements except for two water wells.

The project site is bounded by agricultural fields and a few rural residences to the east and south. The land east of Tower [*5] Road is designated for agriculture by the city's general plan, while the land to the north, west, and south is designated industrial. To the west are an orchard and a Merced Irrigation District (MID) canal. Undeveloped open lands and industrial lands are located to the north. Land near the project site has been put to industrial use by Wellmade, Central Valley Almond Growers, and McLane Pacific, and Wal-Mart used to operate a smaller distribution facility just north of the project site.

On January 30, 2006, Wal-Mart submitted a project application to Merced's planning manager. It consisted of a site plan application, abandonment application (to abandon the Kibby Road right-of-way), and planning department development application. The city then hired an environmental consulting firm, EDAW, Inc. (EDAW), to prepare the project's EIR. The city issued a notice of preparation of a draft EIR on July 7, 2006, and held a public environmental scoping session on July 27, 2006.

On February 25, 2009, the city released a draft EIR to the public. The draft EIR described many potentially significant environmental impacts that could result from the construction and operation of the project. The draft [*6] EIR concluded that most of the significant impacts identified could be reduced to less-than-significant levels by mitigation measures, which were also described. With respect to agricultural resources, greenhouse gases, noise, and the visual character of the site, however, the draft EIR determined that the project's impacts would be significant and unavoidable.

The release of the draft EIR commenced a period for public review and comment. CEQA requires a period of at least 45 days for public review and comment, and the city determined that a 60-day review period was appropriate for the proposed project. Alliance objected to approval of the project by a letter dated April 27, 2009. Alliance wrote that the draft EIR did not comply with CEQA because it failed to include a true no-project alternative and was "informationally deficient" in its discussions of hydrology and water quality, traffic, land use and urban decay, visual impacts, and air quality. The public comment period for the draft EIR ended on April 27, 2009.

On July 30, 2009, the city released the final EIR. It contained responses to over 300 written comments from 243 different individuals and organizations, including the April [*7] 27, 2009, letter from Alliance. Also included were revisions and corrections to the draft EIR made in response to both public comments and staff observations and corrections. The final EIR stated that these changes were insignificant, did not alter the conclusions, and did not constitute substantial new information.

The planning commission held public hearings on Wal-Mart's proposed project on August 19 and 24, 2009. On August 24 the commission voted seven-to-zero to recommend that the city council certify the EIR and approve the project, with the exception of the recommendation to approve the site plan review application, for which the vote was six-to-one. [2] Alliance submitted an administrative appeal of the planning commission's actions to the city council.

**FOOTNOTES**

[2] One planning commissioner indicated that Wal-Mart's proposal was a good project for the community, but he proposed adding a requirement that Wal-Mart enhance the appearance of the site through landscaping. He voted against the recommendation to approve the site plan review application because he wanted an additional commitment from Wal-Mart regarding landscaping and the overall appearance of the project.

The city council held public [*8] hearings on the project on September 21, 23, 26, and 28, 2009. Alliance submitted three additional comment letters to the city, asserting that the final EIR did not comply with CEQA for several reasons. A letter dated September 18, 2009, discussed air quality; a letter dated September 21, 2009, concerned water, traffic, land use and urban decay, and visual impacts; and a letter dated September 23, 2009, discussed greenhouse gases and new mitigation measures added to the final EIR. Alliance's three letters and attached exhibits amounted to more than 2,300 pages. City staff and EDAW employees reviewed Alliance's comment letters and prepared responses with supporting documentation. On September 28, 2009, the chief deputy city attorney and the planning manager submitted to the city council a response to Alliance's letters, consisting of four letters from EDAW and its traffic consultant, two substantive memoranda prepared by city staff, and supporting documentation. The city's response consisted of more than 4,000 pages. The city's cover memorandum for the documents stated that Alliance's comments did not raise new substantive issues, all of the issues had been addressed adequately in the [*9] draft and final EIR's, and no changes to the final EIR were required.

After the close of the final public hearing on the project, the city council approved the project by adopting three resolutions: (1) Resolution No. 2009-67, certifying the final EIR, making findings of fact, adopting the statement of overriding considerations, approving mitigation, and directing staff to file a notice of determination; (2) Resolution No. 2009-69, amending the city general

plan circulation element, approving the site plan review application, and approving a developer agreement for the project; and (3) Resolution No. 2009-70, ordering vacation and abandonment of the right-of-way for Kibby Road. The city council denied Alliance's administrative appeal. On September 29, 2009, the city filed its notice of determination.

Alliance and three individuals filed a writ petition in the superior court on October 28, 2009, seeking to set aside the city's approval of the project. The court denied the petition in a 64-page decision filed on March 14, 2011.

## ***DISCUSSION***

Before a public agency can approve a project that "may have a significant effect on the environment," CEQA requires the agency to prepare, or hire someone [*10] to prepare, an EIR and certify its completion. (§ 21100.) In CEQA parlance, the public agency responsible for carrying out or approving a project is called the "lead agency." (§ 21067.) "Significant effect on the environment" is defined as "a substantial, or potentially substantial, adverse change in the environment." (§ 21068; see also § 21060.5 [defining "environment"]; *California Farm Bureau Federation v. California Wildlife Conservation Bd.* (2006) 143 Cal.App.4th 173, 185.) In this case, the parties do not dispute that the city was required to prepare an EIR for Wal-Mart's proposed distribution center.

The EIR must contain a detailed statement of all significant effects on the environment of the proposed project; any significant effect on the environment that cannot be avoided or would be irreversible if the project is implemented; mitigation measures proposed to minimize significant effects; alternatives to the proposed project; and the growth-inducing impact of the proposed project. (§ 21100, subd. (b).) "The EIR has often been called the heart of CEQA. [Citation.] It is an informational document whose purpose is to inform the public and decision makers of the environmental consequences [*11] of agency decisions before they are made. [Citation.]" (*Woodward Park Homeowners Assn., Inc. v. City of Fresno* (2007) 150 Cal.App.4th 683, 706 (*Woodward Park*), citing *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392, fn. 5 (*Laurel Heights I*).)

In this appeal, the challengers contend that the city failed to meet the requirements of CEQA in preparing the EIR. In particular, they contend that, (1) the EIR's no-project analysis was inadequate; (2) the EIR was inadequate in its assessments of the project's impact on six environmental resource areas: air quality, hydrology and water quality, traffic, land use and urban decay, visual impacts, and climate change/greenhouse gases; and (3) the city failed to recirculate the EIR for additional public review and comment after significant new information was added to the final EIR and additional significant new information was added to the administrative record.

### I. Standards of review

If a CEQA petition challenges agency action that is quasi-adjudicatory in character, the trial court's role is only to determine whether the action is supported by substantial evidence in the record. (§ 21168 et seq.). [*12] If the agency action is quasi-legislative in character, the trial

court reviews the action for abuse of discretion. The agency abuses its discretion if it does not proceed in the manner required by law or if the decision is not supported by substantial evidence. (§ 21168.5.) "Substantial evidence" is defined in the Guidelines for Implementation of the California Environmental Quality Act (Cal. Code Regs., tit. 14, § 15000 et seq., hereafter Guidelines) as "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." (Guidelines, § 15384, subd. (a).) The formulations in sections 21168 and 21168.5 embody essentially the same standard of review. Both require the trial court to determine whether the agency acted in a manner contrary to law and whether its determinations were supported by substantial evidence. Neither permits the court to make its own factual findings. (*Laurel Heights I, supra*, 47 Cal.3d at p. 392, fn. 5; *Burbank-Glendale-Pasadena Airport Authority v. Hensler* (1991) 233 Cal.App.3d 577, 589-590.)

"The substantial evidence standard is applied to conclusions, [*13] findings and determinations. It also applies to challenges to the scope of an EIR's analysis of a topic, the methodology used for studying an impact and the reliability or accuracy of the data upon which the EIR relied because these types of challenges involve factual questions. [Citation.]" (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1198 (*Bakersfield Citizens*).) "Where a claim is predominantly one of improper procedure rather than a dispute over the facts, however, we review the agency's action de novo, '"scrupulously enforce[ing] all legislatively mandated CEQA requirements[.]" [Citation].'" (*Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884, 898 (*Oakland Heritage*).)

"When assessing the legal sufficiency of an EIR, the reviewing court focuses on adequacy, completeness and a good faith effort at full disclosure. [Citation.] 'The EIR must contain facts and analysis, not just the bare conclusions of the agency.' [Citation.] 'An EIR must include detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.' [Citation.] [*14] Analysis of environmental effects need not be exhaustive, but will be judged in light of what was reasonably feasible. When experts in a subject area dispute the conclusions reached by other experts whose studies were used in drafting the EIR, the EIR need only summarize the main points of disagreement and explain the agency's reasons for accepting one set of judgments instead of another. [Citation.]" (*Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1390-1391 (*Irritated Residents*).)

"A public agency's decision to certify the EIR is presumed correct, and the challenger has the burden of proving the EIR is legally inadequate." (*Santa Monica Baykeeper v. City of Malibu* (2011) 193 Cal.App.4th 1538, 1546.) The Court of Appeal reviews the trial court's decision de novo, applying the same standards to the agency's action as the trial court applies. (*Id.* at pp. 1546-1548.)

**II. No-project alternative**

Every EIR must describe and consider possible alternatives to the project that would achieve most of the basic objectives of the project but would avoid or substantially lessen the substantial environmental effects of the project. (Guidelines, § 15126.6, subd. (a).) [*15] The purpose of

discussing alternatives is "to provide decision makers and the public with a reasonable picture of the range of feasible choices with lesser environmental impacts." (*Woodward Park, supra*, 150 Cal.App.4th at p. 697.) As part of this analysis, the EIR must evaluate a no-project alternative "to allow decisionmakers to compare the impacts of approving the proposed project with the impacts of not approving the proposed project." (Guidelines, § 15126.6, subd. (e)(1).) The no-project analysis must "discuss the existing conditions at the time the notice of preparation is published, ... as well as what would be reasonably expected to occur in the foreseeable future if the project were not approved, based on current plans and consistent with available infrastructure and community services." (*Id.*, subd. (e)(2).)

Where, as in this case, the project is "a development project on identifiable property, the 'no project' alternative is the circumstance under which the project does not proceed." (Guidelines, § 15126.6, subd. (e)(3)(B).) The Guidelines explain:
"[T]he discussion [of the no-project alternative] would compare the environmental effects of the property remaining in its existing [*16] state against environmental effects which would occur if the project is approved. If disapproval of the project under consideration would result in predictable actions by others, such as the proposal of some other project, this 'no project' consequence should be discussed. In certain instances, the no project alternative means 'no build' wherein the existing environmental setting is maintained. However, where failure to proceed with the project will not result in preservation of existing environmental conditions, the analysis should identify the practical result of the project's non-approval and not create and analyze a set of artificial assumptions that would be required to preserve the existing physical environment." (Guidelines, § 15126.6, subd. (e)(3)(B).)

In this case, the EIR discussed six alternatives to the proposed project—no project; a redesigned site plan; a reduced site plan and operations; and three alternatives involving different sites, each of which was vacant land located either within the city or within the unincorporated county.

In considering the no-project alternative, the draft EIR assumed that if Wal-Mart's development proposal did not proceed, the project site [*17] would be put to another industrial use. The draft EIR explained the grounds for its assumption:
"This [no-project] alternative assumes that the site would not be developed with the proposed project. However, given the following factors, it is assumed that some type of industrial or warehouse development would occur at the project site in the near term:

"• the project site is within Merced's city limits;

"• the project site is designated for industrial use in the City General Plan and zoning ordinance;

"• the project site is sufficiently large to accommodate industrial or warehouse projects;

"• the project site is relatively close, and has convenient access, to major arterial roadways and State Route ... 99; and

"• the project site is relatively close to, and could readily connect to, major public infrastructure,

such as water, wastewater, and storm drainage systems.

"In other words, if the Wal-Mart Distribution Center application were to be withdrawn or denied, it is unlikely that the project site would remain indefinitely vacant, given the factors listed above. Therefore, it is appropriate for the No Project alternative to assume some level of development, instead of assuming that the site [*18] would remain undeveloped. (If the site were to remain vacant, then the existing environmental setting would remain the same. The existing setting is described in Chapter 4 of this EIR, as part of the discussion of each resource area.)

" ... It is conceivable that another company would view the site as ideally suited for a regional distribution center similar to what is proposed by Wal-Mart."

Not surprisingly—since it was assumed that a similar 1.1-million-square-foot development for warehouse or industrial use would be built at the project site—the draft EIR determined that the no-project alternative would not lessen environmental impacts. The impacts of the no-project alternative on agriculture, biological and cultural resources, hydrology and water quality, land use, noise, and other environmental resources were all found to be "similar" to the environmental impacts that would result from the project. The draft EIR determined that the emissions of greenhouse gases might cause greater environmental impact under the no-project alternative than if the project were built. It reasoned that if Wal-Mart does not add a distribution center in the Central Valley, its existing retail stores would [*19] continue to be served by distribution centers located farther away. This would mean longer tractor-trailer trips between distribution centers and retail stores, potentially leading to higher levels of emissions of greenhouse gases from truck travel than would result if the project were completed.

In its comment letter submitted during the public comment period, Alliance objected to the draft EIR's no-project analysis, writing that the assumption that anyone would propose a nearly exact replica of the Wal-Mart project is merely speculative, not predictable. Alliance asserted that a more predictable consequence of disapproval of the project would be that no other developer would propose a similar project and the site would continue to be used for agriculture. Further, Alliance argued that, even if the future approval of a very similar proposal for the project site is predictable, this would not obviate the requirement that the EIR discuss "the property remaining in its existing state ...." (Guidelines, § 15126.6, subd. (e)(3)(B).)

The final EIR contained "Master Responses" to issues raised in the public comments, as well as individual responses to each written comment that the city received. [*20] The individual response to Alliance's concerns about the no-project alternative referred readers to "Master Response 12: Alternatives." Master Response 12, stated:
"In defining the No Project Alternative, the DEIR [draft EIR] concluded that there were several factors that make the project site highly attractive for development. As such, the potential for it to remain in an undeveloped state is highly unlikely and unrealistic. Based on these factors, the DEIR reasonably concludes that the project site would not remain undeveloped if the project were withdrawn or rejected but would instead likely be developed into a project of similar size and scope to the proposed project. The discussion of the No Project Alternative also takes into

consideration the existing conditions, as is required, by incorporating by reference the DEIR's earlier discussion of existing conditions."

The response also stated that the draft EIR appropriately used the undeveloped site as the environmental baseline against which the potential impacts of the proposed project were compared.

In this appeal, the challengers contend that the city did not satisfy the requirements of CEQA because the EIR should have considered [*21] the project site in its existing state as the no-project alternative. They argue that the EIR stated only that it was "unlikely" that the project site would remain indefinitely vacant, but the Guidelines require the consideration of the "predictable actions by others," not potential actions of others that are merely likely. (Guidelines, § 15126.6, subd. (e)(3)(B).)

As the challengers note, the project site has been designated and zoned for industrial use for decades, yet the site has been used for agriculture up until now. In addition, approval of the project required an amendment to the city's general plan in order to abandon a right-of-way for Kibby Road between Gerard Avenue and Childs Avenue. For these reasons, the challengers posit that it was unreasonable for the EIR to determine that a similar proposal would be "predictable." The challengers further argue that there is no substantial evidence to support the conclusion in Master Response 12 that the continuation of the project site in its existing agricultural use would be an "artificial" assumption.

Respondents disagree. They rely on our decision in *Woodward Park, supra*, 150 Cal.App.4th 683, and argue that the EIR in this case [*22] does not suffer from the defects we found in the *Woodward Park* EIR. Since respondents' position requires distinguishing the present facts from those of *Woodward Park*, we begin our discussion with a review of that case.

An EIR must contain a description of the physical environmental conditions in the area of the proposed project, and this environmental setting normally is the "baseline" physical condition by which the lead agency determines whether impacts are significant. (Guidelines, § 15125, subd. (a); see *Woodward Park, supra*, 150 Cal.App.4th at p. 706.) In *Woodward Park*, the proposed project was a commercial development and the project site was vacant land. (*Woodward Park, supra*, at p. 690.)

The EIR in *Woodward Park* did not contain an explicit statement of the baseline used in analyzing the project's environmental impacts. (*Woodward Park, supra*, 150 Cal.App.4th at p. 693.) In many instances, the EIR evaluated the environmental impacts of the proposed project comparing it, not with the existing state of the project site (a vacant lot), but with a hypothetical development, which was assumed to be the maximum buildable development allowed under existing zoning and plan designations. [*23] (*Id.* at p. 707.) For example, in discussing air pollution, the EIR compared the project's impacts only with those of a large-scale office and retail development. (*Id.* at p. 693.) "The upshot of all this [was] that the EIR never presented a clear or a complete description of the project's impacts compared with the effects of leaving the land in its existing state. Readers who have been told that the air pollution impact is slight and

that the traffic generated will be less than the given benchmark should not have to stop and puzzle it out that these conclusions are based on a comparison with a large office park that is not, in fact, there. Those who did puzzle it out were still left wondering whether the impacts would be slight or major in relation to vacant land." (*Id.* at pp. 708-709.) We concluded that the EIR in that case was "legally inadequate as an informational document because it failed to analyze consistently and coherently the impacts of the project relative to leaving the land in its existing physical condition." (*Id.* at p. 710.)

The EIR's no-project alternative analysis in *Woodward Park* was similarly flawed. The EIR's discussion of a no-project alternative assumed that the [*24] vacant lot would be developed consistent with current planning and zoning designations. As a result, the "discussion compare[d] the proposed project's impacts only with those of maximum office construction under existing zoning, not with the existing physical situation." (*Woodward Park, supra*, 150 Cal.App.4th at p. 697.) We explained:
"In circumstances like these, the no-project alternative should discuss both the existing physical conditions and likely future conditions under the existing zoning and plan designations, and the city argues that this is just what happened. In reality, the EIR's no-project discussion mentioned the property's vacant status briefly and then focused all its analysis on the maximum allowable project under existing designations. If the EIR's impact analyses had been based on the correct *baseline*—existing physical conditions—we might conclude that the city acted within its discretion in minimizing the examination of existing physical conditions in the *no-project* discussion, since a comparison of the project with existing physical conditions would already be in the document.... [In this case, however], the EIR did not use existing physical conditions as the baseline. [*25] This being so, we conclude that the no-project discussion was inadequate as a matter of law because it considered buildout under existing designations almost to the exclusion of existing physical conditions." (*Woodward Park, supra*, 150 Cal.App.4th at p. 714.)

We observed that the agency in *Woodward Park* chose to push the envelope in both its analysis of environmental impacts against the baseline and its consideration of the no-project alternative. We concluded, "Although a no-project discussion heavily dominated by consideration of buildout under existing designations might have been proper in an EIR where the baseline was existing physical conditions, that was not the baseline used here. The Guidelines on the no-project alternative do require attention to existing physical conditions 'as well as' to hypothetical future developments under existing plans. (Guidelines, § 15126.6, subd. (e)(2).) Due to the fact this attention was not adequately paid *anywhere* in the EIR, we cannot say the no-project discussion was legally adequate." (*Woodward Park, supra*, 150 Cal.App.4th at p. 716.)

Returning to the present case, we see that the EIR identified the baseline condition as the environmental [*26] setting as of July 7, 2006 (the date of the notice of preparation of the EIR). The EIR included a detailed discussion of the existing state of the project site, which was described as 230 acres of agricultural land that was most recently used to grow almonds and alfalfa. Chapter 4 of the EIR, titled "Environmental Setting, Thresholds of Significance, Environmental Impacts, and Mitigation Measures," considered many environmental resources and the potential impacts the construction and operation of the project would have on each. For example, in the section discussing agricultural resources, the EIR described the project site's soil

resources and recognized that converting prime farmland such as the project site to nonagricultural use would be a significant adverse impact.

Implicitly, the assessment of the project's impact on agricultural resources compared the project with the project site in its existing physical state as agricultural fields. Respondents assert that the EIR's impact analyses all properly discussed the project's potential impacts compared with existing physical conditions. The challengers do not dispute this assertion, with one exception. The challengers claim that the [*27] EIR used an improper hypothetical future baseline in its traffic analysis. In no other respect do the challengers object to the environmental baseline used in this case.

Consequently, this case is distinguishable from *Woodward Park, supra*, 150 Cal.App.4th 683. Unlike *Woodward Park*, the EIR for Wal-Mart's proposed project used the correct baseline—the existing physical conditions of the project site. In the no-project alternative discussion, however, there was no separate analysis of the project's impacts compared with the existing physical condition of the project site. Instead, in a parenthetical statement, the EIR referred readers to a different chapter, which addressed the potential impacts of the project compared to the current state of the project site.

We are confronted with circumstances that we described but did not encounter in *Woodward*—an EIR with an appropriate baseline but a minimal examination of the existing physical conditions in the no-project discussion. We said then that, in such circumstances, "we might conclude that the city acted within its discretion in minimizing the examination of the existing physical conditions in the *no-project* discussion, since a comparison [*28] of the project with existing physical conditions would already be in the document." (*Woodward Park, supra*, 150 Cal.App.4th at p. 714.)

As we have mentioned, the Guidelines on the no-project alternative require a discussion of *both* "the existing conditions" *and* "what would be reasonably expected to occur in the foreseeable future if the project were not approved ...." (Guidelines, § 15126.6, subd. (e)(2).) In many instances, of course, the existing conditions and what would reasonably be expected in the foreseeable future will be the same. Here, although the section of the EIR on the no-project alternative did not itself include a description of the existing conditions, the document did contain a discussion of the existing conditions of the project site, the general environmental setting, and the impacts of the project compared with the baseline of the existing conditions. Further, readers could find that discussion easily because the section on the no-project alternative referred to the description of existing conditions in chapter 4 of the EIR. Under these circumstances, we conclude that the EIR sufficiently discussed the impacts of the project compared with existing physical conditions [*29] as required by section 15126.6, subdivision (e)(2), of the Guidelines. Given this conclusion, we reject the challengers' argument that the EIR's no-project-alternative discussion was inadequate. Contrary to the challengers' claim, the EIR did contain analyses of the impacts of the project compared with the existing physical state of the project site.

Finally, we reject the challengers' contention that there was no substantial evidence to support the determination that, if the Wal-Mart proposal did not go forward, the project site would likely

be developed for another industrial or warehouse use in the near future. The EIR explained the reasons for the determination: Among other things, the site is zoned for industrial use, it has convenient access to State Route 99, and it can readily connect to public infrastructure. The challengers disagree that future industrial development of the project site is predictable, but they fail to show that the determination was not supported by substantial evidence. In any event, the challengers' concern with the no-project-alternative discussion is not that it *included* this particular alternative in the EIR, but rather that it allegedly *lacked* a discussion [*30] of the impacts of the project compared with the existing state of the project site. As we have explained, the EIR did include such a discussion.

**III. Air quality**

The project site is located in Merced County within the San Joaquin Valley Air Basin (SJVAB). Air quality in Merced County is regulated by the Environmental Protection Agency (EPA), the California Air Resources Board (ARB), and the San Joaquin Valley Air Pollution Control District (SJVAPCD or air district).

As explained in the EIR, the EPA's air quality mandates are drawn primarily from the federal Clean Air Act (42 U.S.C. § 7401 et seq.). The EPA has established national ambient air quality standards (NAAQS) for certain air pollutants, which are commonly referred to as criteria air pollutants. The ARB, which is responsible for implementing the analogous state statutory scheme, the California Clean Air Act (Health & Saf. Code, § 39000 et seq.) (CCAA), has established state ambient air quality standards (CAAQS). The EIR reported that the state standards are generally more stringent than the NAAQS. Under the CCAA, local air quality districts such as the SJVAPCD are required to "adopt and enforce rules and regulations to achieve [*31] and maintain the state and federal ambient air quality standards in all areas affected by emission sources under their jurisdiction ...." (Health & Saf. Code, § 40001, subd. (a).)

Criteria air pollutants include ozone and respirable particulate matter. Ozone is the primary component of smog. Ambient levels of ozone above 0.12 parts per million are linked to symptomatic responses, including throat dryness, chest tightness, headache, and nausea. Ground level ozone also damages forests, agricultural crops, and some human-made materials, such as rubber, paint, and plastics. The EIR stated that the ozone problem in the San Joaquin Valley is among the most severe in the state.

Ozone is formed through chemical reactions between precursor emissions of reactive organic gases (ROGs) and nitrogen oxides (NOx) in the presence of sunlight. For this reason, ROGs and NOx are referred to as ozone precursors.

Respirable particulate matter with an aerodynamic diameter of 10 micrometers or less is called PM10. Examples of PM10 include soot and smoke from mobile or stationary sources and natural windblown dust. The EIR stated that adverse health effects associated with PM10 include breathing and respiratory [*32] symptoms, aggravation of existing respiratory and cardiovascular diseases, alterations to the immune system, carcinogenesis, and premature death.

Criteria air pollutants are measured at several monitoring stations in the SJVAB. The EPA and the ARB use this monitoring data to determine whether an area meets their air quality standards. The three basic categories are attainment (of air quality standards), nonattainment, and unclassified. According to the EIR, the most current state and federal attainment designations for Merced County are nonattainment for ozone (state and federal standards), nonattainment for PM10 under California standards, and attainment for PM10 under federal standards.

The SJVAPCD prepares and submits air quality attainment plans and is also required to submit rate-of-progress milestone evaluations. The EIR described the air district's air quality attainment plans and evaluation reports as "present[ing] comprehensive strategies to reduce ROG, NOx, and PM10 emissions from stationary, area, mobile, and indirect sources."

In section 4.2, "Air Quality," the EIR described the existing air quality conditions in the area surrounding the project site and analyzed the potential [*33] air quality impacts likely to result from the construction and operation of the proposed project. The EIR stated that the methods of analysis used complied with the recommendations of the SJVAPCD. It discussed criteria air pollutants, including ozone and PM10, and pollutants referred to as toxic air contaminants (TAC's). A TAC was defined as an air pollutant that may cause or contribute to an increase in mortality or serious illness or that may pose a hazard to human health. The EIR noted that particulate matter from diesel-fueled engines, referred to as diesel PM, is one of the most important TAC's. The ARB estimated the diesel PM health risk in the year 2000 to be 390 excess cancer cases per million people in the SJVAB.

In this appeal, the challengers object to the EIR's discussion of ozone precursors, TAC's/diesel PM, and PM10. They argue that: (1) the EIR's use of thresholds of significance established by the SJVAPCD violated CEQA; (2) the EIR's discussion of cumulative impacts was flawed; (3) the city was required to recirculate the EIR for another round of public review and comment because (a) the final EIR contained significant new information, and (b) the city added documents [*34] to the administrative record to defend the final EIR, and those documents also were significant new information; and (4) there was no substantial evidence to support the final EIR's conclusions. We address each of these arguments.

**A. Thresholds of significance**

A threshold of significance is "an identifiable quantitative, qualitative or performance level of a particular environmental effect, non-compliance with which means the effect will normally be determined to be significant by the agency and compliance with which means the effect normally will be determined to be less than significant." (Guidelines, § 15064.7, subd. (a).) CEQA regulations encourage public agencies to develop and publish thresholds of significance. (Guidelines, § 15064.7, subd. (a); *Communities For A Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 317, fn. 2.) Courts have recognized that the "'use of [*35] existing environmental standards in determining the significance of a project's environmental impacts is an effective means of promoting consistency in significance determinations and integrating CEQA environmental review activities with other environmental program planning and regulation.'" (*Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 111; see also *County Sanitation Dist. No. 2 v.*

*County of Kern* (2005) 127 Cal.App.4th 1544, 1588; *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1107 (*Amador Waterways*).)

In this case, the draft EIR stated that its thresholds of significance were based on Appendix G of the Guidelines (Appendix G) and the SJVAPCD's Guide for Assessing and Mitigating Air Quality Impacts (SJVAPC, Mobile Source/CEQA Section, Planning Commission, Jan. 10, 2002 rev. (GAMAQI)). Appendix G provides sample questions and is intended to be used by a lead agency in conducting an initial study to determine whether a project may have a significant effect on the environment. (Guidelines, § 15063, subds. (a) & (f); *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48, 94, fn. 24 [*36] (*Madera Oversight*).) The initial study is then used by the lead agency in deciding whether to prepare an EIR. (Guidelines, § 15063, subd. (c).) Section III of Appendix G addresses air quality and states that significance criteria established by the applicable local air district "may be relied upon" in answering the sample questions.

The GAMAQI states that it "is intended for use by Lead Agencies and consultants preparing CEQA air quality documents." (GAMAQI, p. 5.) The GAMAQI establishes thresholds of significance for various pollutants, separately considering short-term emissions resulting from project construction, long-term emissions from ongoing project operations, and cumulative impacts. (GAMAQI, p. 23.)

The draft EIR determined that short-term, construction-related emission of ozone precursors would exceed the SJVAPCD's threshold of significance of 10 tons per year (TPY), and construction-related PM10 emissions could violate or substantially contribute to the violation of an air quality standard. Therefore, the draft EIR concluded that construction of the project would result in significant impacts. Similarly, the draft EIR found that emissions of ozone precursors and PM10 related [*37] to the long-term operation of the project would result in significant impacts. Construction- and operation-related emissions of TAC's, however, were found not to exceed applicable thresholds. As a result, the draft EIR determined that this impact would be less than significant.

The draft EIR described various proposed mitigation measures to mitigate the effects of the project on air quality. For example, with respect to short-term, construction-related activities, Mitigation Measure 4.2-1c would require Wal-Mart to enter into an emission-reduction agreement with the SJVAPCD to reduce net construction-related emissions of ozone precursors to less than the threshold of significance. Mitigation Measure 4.2-1b provided various steps to reduce diesel equipment exhaust during construction; for example, construction would be required to stop on "Spare the Air" days, and heavy-duty construction equipment would be located as far as possible from sensitive receptors. Additional mitigation measures addressed construction-related dust. The draft EIR stated that these measures would reduce this impact of PM10 to a less-than-significant level.

With respect to long-term, operation-related activities, [*38] Mitigation Measure 4.2-2e would require Wal-Mart to enter into another emission-reduction agreement with the SJVAPCD to reduce net ozone precursors to less than the threshold of significance. The draft EIR identified additional mitigation measures and concluded that their implementation would result in a less-

than-significant impact.

In its April 27, 2009, comment letter, Alliance asserted that, among other things, the draft EIR's air quality impacts section was informationally deficient in its discussion of impacts from emissions of ozone precursors and diesel PM. In particular, Alliance criticized the draft EIR's use of thresholds of significance set by the air district. With respect to ozone precursors emissions, Alliance wrote:
"The DEIR borrows this TOS [threshold of significance] from the San Joaquin Valley Air Pollution Control District ('air district'). The DEIR's use of the air district's TOS is erroneous as a matter of law because the DEIR applies the TOS uncritically, without any factual explanation as to why the 10 TPY standard represents an appropriate TOS for judging the significance of project-level ozone pollution impacts."
Likewise, with respect to diesel PM, Alliance [*39] observed that the draft EIR borrowed the threshold of significance from the SJVAPCD and argued this was "erroneous as a matter of law for the same reasons discussed above regarding ozone precursors ...."

In the final EIR, the city responded to Alliance's comment on the thresholds of significance used:
"The commenter suggests that the DEIR erroneously and 'uncritically' applies the SJVAPCD's thresholds of significance for ROG and NOx in determining the significance of project-level impacts. As stated in Appendix G of the State CEQA Guidelines, the significance criteria established by the applicable air quality management or air pollution control district may be relied upon to determine the level of significance of a project's impact. SJVAPCD has recommended a threshold of 10 TPY for a project's operational ROG and NOx emissions in its [GAMAQI]. The GAMAQI also includes a discussion of the basis for ozone precursor thresholds. While the commenter may disagree with the agency responsible for managing the air basin, the comment offers no evidence to suggest that, contrary to the SJVAPCD's thresholds of significance, the project's contributions should be considered significant. Because the [*40] project's mitigated operational emissions fall below SJVAPCD's significance thresholds, SJVAPCD considers that the project's ROG and NOx emissions would be less than significant."

With respect to emissions of TAC's, the city observed that Alliance did not explain why the threshold used was inappropriate, nor did it "offer ideas about what threshold of significance should be used in the analysis." The final EIR stated the draft explained that the thresholds of significance were recommended by the air district's GAMAQI, and "[t]his same threshold level is used by most other air districts in California for evaluating cancer risk."

Further, Master Response 13 of the final EIR described the air district's role in regulating pollutants in the SJVAB. The response explained that the SJVAPCD's significance thresholds "are designed to limit emissions from new development to a level that would be consistent with attainment planning efforts .... Projects that would exceed these emissions thresholds would not be considered compliant with the SJVAPCD air quality planning efforts, and would be considered to result in a substantial contribution to a violation of AAQS and/or expose members of the public [*41] to concentrations of pollutants from which adverse health effects could result."

After the release of the final EIR, Alliance submitted another letter to the city, expanding on its criticism of the EIR's use of significance thresholds borrowed from the SJVAPCD. In a letter dated September 18, 2009, Alliance argued that the SJVAPCD's significance thresholds were inappropriate for use in the EIR because the air district established those standards to implement entirely different statutes—the federal and state clean air statutes. Alliance also wrote, "uncritically borrowing the Air District's [thresholds of significance] results in a failure to disclose the existence of an actual significant effect of subjecting people to increased ozone pollution now and for the foreseeable future."

The city submitted a response to Alliance's comments in the form of a letter from J. Austin Kerr, an air quality and climate change specialist with EDAW. Kerr responded that the city used the SJVAPCD's thresholds of significance because they were recommended by the air district itself. Contrary to Alliance's argument that the air district's thresholds were inappropriate for use in an EIR, Kerr pointed out that [*42] the thresholds "were specifically designed by the District to be used in CEQA analysis ...." As we mentioned earlier, the GAMAQI itself states that it is intended for use by lead agencies and consultants preparing CEQA air quality documents. Kerr also wrote that the SJVAPCD relied on the Guidelines and Appendix G in setting its thresholds of significance, and the GAMAQI states that its thresholds are "'based on scientific and factual data ....'" [3]

**FOOTNOTES**

[3] The GAMAQI states: "While CEQA Guidelines state that an ironclad definition of a significant effect is not possible because the significance of an effect may vary with the setting, the SJVAPCD has determined that the setting, as referred to in CEQA, can be defined for air quality. Under California state law, the SJVAB is defined as a distinct geographic area with a critical air pollution problem for which ambient air quality standards have been promulgated to protect public health. As such, the SJVAPCD resolves that significance thresholds established herein are based on scientific and factual data. Therefore, the SJVAPCD recommends that these thresholds be used by Lead Agencies in making a determination of significance. However, it is still [*43] recognized that the final determination of whether or not a project has a significant effect is ultimately within the purview of the Lead Agency pursuant to CEQA Guidelines." (GAMAQI, p. 22, fns. omitted.)

In this appeal, the challengers again contend that the EIR's reliance on thresholds of significance established by the SJVAPCD violates CEQA. The contention applies to the EIR's analyses of ozone precursors, diesel PM, and PM10. They raise five arguments.

Preliminarily, we observe that Alliance raised only two of these arguments in its comment letter submitted during the public comment period. These are the arguments that the city used the air district's thresholds of significance "uncritically" and "without any factual explanation," the first and third arguments in the challengers' appellate brief. We disapprove of the challengers' failure to present all of their arguments in a timely manner. In any event, we conclude that the challengers' contention lacks merit.

The challengers' first argument is that the city may not "uncritically, summarily" conclude that emissions below the SJVAPCD's thresholds are less than significant, citing *Amador Waterways, supra*, 116 Cal.App.4th 1099. In [*44] that case, the court recognized that applicable thresholds of significance are relevant, but not determinative, in assessing a project's environmental impacts during the EIR process. The court explained, "[I]n preparing the EIR, the agency must determine whether any of the *possible* significant environmental impacts of the project will, in fact, be significant. In this determination, thresholds of significance can ... play a role.... [H]owever, the fact that a particular environmental effect meets a particular threshold cannot be used as an automatic determinant that the effect is or is not significant.... [A] threshold of significance cannot be applied in a way that would foreclose the consideration of other substantial evidence tending to show the environmental effect to which the threshold relates might be significant. [Citation.]" (*Id.* at p. 1109.)

In this case, the challengers offer no evidence that the city used the significance thresholds established by the SJVAPCD in a manner that "foreclose[d] the consideration of other substantial evidence tending to show the environmental effect to which the threshold relates might be significant." (*Amador Waterways, supra*, 116 Cal.App.4th at p. 1109.) [*45] In its letter submitted during the public comment period, Alliance objected to the significance thresholds used in the draft EIR, but, as the city pointed out in its response, Alliance offered no evidence showing that the applicable thresholds were incorrect or inadequate. After the final EIR was released, Alliance raised the same objection and further argued that the air district's thresholds of significance were inappropriate for use in an EIR. The city responded that the SJVAPCD specifically designed the thresholds for use in CEQA analysis. Nothing in the city's responses demonstrates that the city refused to consider other substantial evidence that emissions below the air district's significance thresholds would result in a significant environmental effect.

The challenger's second argument is that the city's uncritical application of the SJVAPCD's significance thresholds represents a failure to exercise independent judgment in preparing the EIR. (See Guidelines, § 15084, subd. (e) ["draft EIR ... must reflect the independent judgment of the lead agency"].) We are not persuaded. Nothing in the record indicates that the city failed to use its independent judgment.

The cases cited by [*46] the challengers are inapposite. *Friends of La Vina v. County of Los Angeles* (1991) 232 Cal.App.3d 1446, 1455-1456, disapproved on another point by *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 570, footnote 2, 576, footnote 6 (*Western States Petroleum*), held that the exercise of independent judgment does not require a lead agency to draft the EIR; it is sufficient for the agency to participate actively and significantly in the EIR's preparation, even if a hired consultant writes the document. *California*

*Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 979, recognized that an agency must use its independent judgment in considering an EIR prepared by a consultant. Neither of these cases supports the proposition that using thresholds of significance set by the applicable local air district demonstrates a failure to exercise independent judgment.

Third, the challengers claim that the city did not offer a sufficient factual explanation regarding why the thresholds of significance used were appropriate. We disagree. The draft EIR explained that the thresholds were set by the SJVAPCD, the local air quality district responsible for adopting and [*47] enforcing rules to achieve state and federal ambient air quality standards. The city also pointed out that the SJVAPCD specifically intended their significance thresholds to be used in CEQA air quality documents, such as the air quality section of the EIR prepared in this case.

Fourth, the challengers assert that compliance with another agency's regulatory standards cannot be used under CEQA as a basis for determining that a project's effects would not be significant. For example, our Supreme Court has held that the fact the Department of Pesticide Regulation had registered various herbicides did not relieve the Department of Forestry and Fire Protection (CDF) of its obligation to assess the potential impacts of the use of such herbicides in particular timber harvesting plans. (*Ebbetts Pass Forest Watch v. California Dept. of Forestry & Fire Protection* (2008) 43 Cal.4th 936, 956 (*Ebbetts Pass*).) The court observed, "In registering a pesticide for use in California, the Department of Pesticide Regulation does not necessarily fully assess its use in every application, such as silviculture, where it may bear potential for particular environmental effects, nor does it guarantee that the [*48] pesticide's use will never have significant environmental effects." (*Ibid.*) The court held that the CDF was incorrect "in concluding that any use of an herbicide in compliance with Department of Pesticide Regulation label restrictions necessarily 'would not have a significant effect on the environment.' [Citations.]" (*Id.* at p. 957.) Similarly, courts have recognized that a project's conformity with the general plan for the area would not insulate that project from the EIR requirement. (*Oro Fino Gold Mining Corp. v. County of El Dorado* (1990) 225 Cal.App.3d 872, 881-882; *City of Antioch v. City Council* (1986) 187 Cal.App.3d 1325, 1332.)

In the present case, however, the city did not rely on a regulatory standard unrelated to CEQA. To the contrary, the air district specifically established the thresholds of significance for CEQA purposes. (See GAMAQI, pp. 5, 23.) We observe that a "threshold of significance" is defined in the CEQA regulations as a standard or set of criteria for a particular environmental effect, "compliance with which means the effect normally will be determined to be less than significant" and, further, public agencies are encouraged to develop and publish such thresholds. [*49] (Guidelines, § 15064.7, subd. (a).) This is not a case where a regulatory agency approved some action without necessarily considering potential significant environmental effects. (Cf. *Ebbetts Pass, supra*, 43 Cal.4th at p. 957.) For this reason, we reject the challengers' fourth argument.

The challengers' fifth argument is that the city may not rely on Appendix G of the Guidelines as authorization to use the thresholds of significance established by the SJVAPCD. We fail to see how the absence of express authorization in Appendix G supports the challengers' contention that the city's use of the SJVAPCD's significance thresholds in this case was a violation of CEQA.

While Appendix G does not expressly permit the use of local air district significance thresholds in EIRs, it does not prohibit this use either.

Appendix G is a sample form of questions intended for use in determining whether a project may cause significant environmental effects. Used in conjunction with Appendix H, these forms meet the requirements for the lead agency's initial study of a project. (Guidelines, § 15063, subd. (f).) In the section on air quality, Appendix G states, "Where available, the significance criteria established [*50] by the applicable air quality management or air pollution control district may be relied upon" in addressing the sample questions. (Appendix G, § III.) Thus, it is understood that local air pollution control districts such as the SJVAPCD would establish thresholds of significance, and the Guidelines expressly permit lead agencies to use these thresholds in deciding whether to prepare an EIR.

Since Appendix G is intended for use in the initial decision whether to prepare an EIR, it does not address how to prepare the EIR once an agency has decided that an EIR is required. We know, however, that thresholds of significance are also useful in the preparation of EIR's. (See *Amador Waterways, supra*, 116 Cal.App.4th at p. 1109.) EIR's often rely on thresholds of significance established by the applicable local air district in determining whether a project will cause a significant impact on air quality. (E.g., *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 667-668 [final EIR's air quality section stated emissions levels were below SJVAPCD thresholds of significance and concluded impact was less than significant]; *Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 875 [*51] [draft EIR concluded that project would have significant impact on air quality where emissions exceeded thresholds set by Mojave Desert Air Quality Management District].) Nothing in Appendix G prevents the use of local air districts' significance thresholds in this manner. Consequently, the challengers' fifth argument is without merit.

We reject the challengers' claim that the city violated CEQA by using the thresholds of significance established by the SJVAPCD in its discussion of the project's potential impacts on air quality.

**B. Cumulative impacts**

An EIR must discuss the cumulative impacts of a project when the project's incremental effect is cumulatively considerable. (Guidelines, § 15130, subd. (a).) "'Cumulatively considerable' means that the incremental effects of an individual project are significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects." (Guidelines, § 15065, subd. (a)(3).) In this case, the draft EIR addressed cumulative impacts in chapter 6, titled "Cumulative and Growth-Inducing Impacts." In section 6.1.2, the draft EIR discussed the project's potential cumulative impacts [*52] on air quality, concluding that, with mitigation, the project would not contribute to cumulative degradation of air quality in the region from either construction-related or operational emissions.

Discussing potential cumulative impacts on ozone and ozone precursors, the draft EIR used a threshold of significance of 10 TPY, the same threshold used in determining short-term, construction-related impacts and long-term, operation-related impacts (together, these impacts

are also referred to as project-level impacts). The draft EIR reported that ozone is a region-wide problem, caused by the accumulation of emissions from different sources. Measured individually, most sources of ozone precursor emissions would not have an impact on ozone, but together they cause severe ozone problems. The draft EIR then stated, "For the evaluation of cumulative ozone impacts[,] SJVAPCD recommends that lead agencies use the project-level significance standards to determine whether a project's construction or operational emissions of ROG and NOx would not have a cumulatively considerable contribution to a significant cumulative impact (SJVAPCD 2002)." In other words, the air district's thresholds of significance [*53] for determining project-level impacts and cumulative impacts are one and the same.

The draft EIR stated that PM10, like ozone, was a cumulative, regional problem, as particulates in the atmosphere "build to unhealthful levels over time." PM10 also may cause more localized problems "if for example, several unrelated grading or earth moving projects are underway simultaneously at nearby sites." The draft EIR stated, "For cumulative analysis, SJVAPCD recommends that lead agencies examine the potential PM10 exposure to sensitive receptors near the project site from earth disturbing activities from the proposed project and any construction of nearby projects that may occur at the same time. For the sake of this analysis, it is not anticipated that other earth movement activities associated with other nearby projects would occur at the same time as grading and earth movement for the proposed project. Furthermore, the project-level impact would be less than significant with mitigation with respect to PM10 emissions. As a result, PM10 emissions from proposed project would not be cumulatively considerable."

The draft EIR also determined that the potential cumulative impact from the project's [*54] TAC emissions (presumably including diesel PM) would be less than significant. The draft EIR stated that a health risk assessment had determined that the maximum increase in cancer risk at a nearby sensitive receptor would be 7.3 in one million, and the maximum increase in the noncarcinogenic hazard index would be .0086. The draft EIR stated that noncancer health risks were measured in terms of a hazard index, which was the calculated exposure of each contaminant below which there would be no impact on human health. These impacts were below the air district's thresholds of significance of 10 in one million for increased cancer risk and a hazard index measure of one. The health risk assessment also took into account future residential and school development, which could result in exposure to additional residents, students, and school employees. The draft EIR concluded, "Based on an analysis of potential sources of toxic air emissions in the area, the project's contribution to health risk at existing and potential future (cumulative) nearby sensitive receptors is not cumulatively considerable and therefore the impact is *less than significant.*"

In its April 27, 2009, comment letter, Alliance [*55] objected to the draft EIR's cumulative-impact analysis. Alliance argued that the use of the SJVAPCD's thresholds of significance was legally erroneous because the city used the air district's thresholds uncritically and without any factual explanation. Alliance further wrote, "[T]he DEIR's assessment of cumulative ozone impacts is inconsistent with CEQA's definition of cumulative impacts because it assumes that if its incremental impacts are not significant[,] its cumulative impacts are not either. But it is well settled that even incremental minor changes can be cumulatively significant." Alliance argued that the draft EIR's cumulative-impacts analysis for diesel PM was erroneous for the same reasons.

In the final EIR, the city responded to Alliance's comments. The city pointed out that in the GAMAQI, the SJVAPCD recommended using its project-level thresholds of significance for cumulative-impacts analysis. (See GAMAQI, p. 53.) The response explained, "In effect, the project threshold is the cumulative threshold. Given that these impacts are inherently cumulative (a single project would not, by itself, generate emissions that would cause the air basin to reach non-attainment), the [*56] interchangeable use of the cumulative/project threshold is logical. The project's air quality [cumulative-impact] analysis is consistent with SJVAPCD's guidance."

In a letter submitted after the release of the final EIR, Alliance again asserted that the EIR's analysis of cumulative impacts for ozone precursors and diesel PM was erroneous as a matter of law. Alliance disputed the final EIR's statement that the air district recommended using project-level significance standards for evaluating cumulative impacts.

In response to Alliance, Kerr explained, "Air basin-wide air quality planning to improve region-wide ozone levels is inherently a cumulative issue." He wrote, "By recommending that 10 TPY be used as the thresholds of significance for ozone precursors in the GAMAQI, SJVAPCD has determined that individual projects that do not generate more than 10 TPY of NOx or ROG do not ... [¶] [1] conflict with or obstruct implementation of the applicable air quality plan, [¶] [2] violate any air quality standard or contribute substantially to an existing or projected air quality violation, ... [¶] [or 3] result in a cumulatively considerable net increase of any criteria pollutant for which the [*57] project region is nonattainment under an applicable NAAQS or CAAQS ...."

The challengers continue to object to the EIR's cumulative-impacts analysis. They contend that (1) the city erroneously used the air district's thresholds of significance for ozone precursors and diesel PM to analyze cumulative impacts, and (2) the EIR failed to apply the correct definition of cumulative impacts.

The challengers' first contention essentially is that the city has misread the GAMAQI, and the SJVAPCD does not recommend using its thresholds of significance for cumulative-impacts analysis. We do not find the challengers' argument persuasive. In section 4, titled "Thresholds of Significance," the GAMAQI states that the basis for its thresholds of significance includes, among other things, whether the effect of a project "result[s] in a cumulatively considerable net increase of any criteria pollutant for which the project is non-attainment under applicable federal or state ambient air quality standards (including releasing emissions which exceed quantitative thresholds for ozone precursors) ...." (GAMAQI, p. 21.)

The GAMAQI explains, "Ozone ... is the product of a photochemical reaction that may occur many [*58] miles away from the source of emissions. Although atmospheric ozone models exist, they are only sensitive enough to register changes caused by the largest projects. What is more important for determining ozone impacts is a project's contribution to existing violations of the ozone standard in the [San Joaquin Valley]. By comparing a project's ozone precursor emissions with emission levels considered important under state law, this impact can be evaluated." (GAMAQI, pp. 21-22.)

Section 5 of the GAMAQI is titled "Assessing Air Quality Impacts." In subsection 5.9,

"Evaluating Cumulative Air Quality Impacts," the GAMAQI states, "All but the largest individual sources emit ROG and NOx in amounts too small to have a measurable effect on ambient ozone concentrations by themselves. However, when all sources throughout the region are combined, they result in severe ozone problems. Lead Agencies should use the quantification methods described in Section 4 to determine if ROG or NOx emissions exceed SJVAPCD thresholds." (GAMAQI, p. 53.) Section 4 provides thresholds of significance of 10 TPY for each of the pollutants ROG and NOx. (GAMAQI, p. 26.)

From these passages of the GAMAQI, it is clear [*59] that the air district took cumulative effects into account in setting its thresholds of significance for ozone precursors because it views ozone as an inherently cumulative problem and, consequently, recommends that lead agencies use its threshold for both project-level and cumulative-impacts analyses. We reject the challengers' argument that the EIR improperly used the SJVAPCD's thresholds of significance in analyzing cumulative impacts.

The challengers' second contention essentially is that the additional impacts the project will have on the SJVAB's existing extremely degraded condition *must* be recognized as cumulatively significant. The challengers do not dispute the EIR's quantitative determinations (e.g., after mitigation, the project would add less than 10 TPY of ozone precursors to the atmosphere and the impact of TAC's would be a maximum increase in cancer risk of 7.3 in one million). They simply disagree with the EIR's conclusion that these effects do not amount to a cumulatively considerable impact. [4] The premise of the challengers' argument—that any additional emissions of pollutants in the SJVAB must be cumulatively considerable—is not correct. It is not the law that "*any* [*60] additional effect in a nonattainment area for that effect *necessarily* creates a significant cumulative impact ...." (*Communities for a Better Environment v. California Resources Agency, supra*, 103 Cal.App.4th at p. 120.) Applying the substantial evidence standard, we cannot say that the city lacked enough relevant information and reasonable inferences to make a fair argument in support of its conclusions. (Guidelines, § 15384, subd. (a); *Bakersfield Citizens, supra*, 124 Cal.App.4th at p. 1198 [substantial evidence standard applies to EIR's conclusions, findings, and determinations, along with methodology used for studying impact].) It is not enough for the challengers to advocate that their position is also supported by evidence or is more reasonable. (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.) For these reasons, we reject the challengers' argument that the EIR failed to apply the correct definition of cumulative impacts.

**FOOTNOTES**

[4] To the extent the challengers' argument is that there was no substantial evidence to support the EIR's use of the air district's thresholds of significance for cumulative-impacts analysis, we reject the argument. The EIR explained [*61] the air district's reasoning for setting the same quantitative thresholds for project-level and cumulative-impacts analyses.

**C. Significant new information**

The final EIR incorporated changes to the discussion of PM10 emissions in response to the air district's comments on the draft EIR. The challengers argue that these changes to the EIR were significant new information, and as a result, the city was required to give notice and circulate the EIR again for additional public review and comment. In addition, they claim that the city's submission of memoranda, letters, and supporting documentation offered in response to Alliance's post-comment-period letters also mandated recirculation. The challengers' arguments are without merit.

When a lead agency prepares an EIR, the agency must provide notice of that fact and a period of time during which the public can review the draft EIR and submit comments. (§ 21092; *Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1123 (*Laurel Heights II*).) The agency must evaluate the public comments it receives and prepare a written response. (Guidelines, § 15088, subd. (a).) "The response to comments may take the [*62] form of a revision to the draft EIR or may be a separate section in the final EIR." (*Id.*, subd. (d).) Given the requirement of providing written responses to public comments, "the final EIR will almost always contain information not included in the draft EIR." (*Laurel Heights II, supra*, at p. 1124.)

CEQA also requires notice and recirculation for public review and comment of an EIR when "significant new information is added" to the EIR after the public comment period has closed but before certification. (§ 21092.1.) The Guidelines explain that "[n]ew information added to an EIR is not 'significant' unless the EIR is changed in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect (including a feasible project alternative) that the project's proponents have declined to implement." (Guidelines, § 15088.5, subd. (a).) The purpose of the recirculation requirement is to advance "the goal of meaningful public participation in the CEQA review process" without at the same time causing "endless rounds of revision and recirculation of EIR's." (*Laurel Heights II, supra*, 6 Cal.4th at p. 1132.)

Examples [*63] of new information requiring recirculation include disclosures that:
"(1) A new significant environmental impact would result from the project or from a new mitigation measure proposed to be implemented.

"(2) A substantial increase in the severity of an environmental impact would result unless mitigation measures are adopted that reduce the impact to a level of insignificance.

"(3) A feasible project alternative or mitigation measure considerably different from others previously analyzed would clearly lessen the significant environmental impacts of the project, but the project's proponents decline to adopt it.

"(4) The draft EIR was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded." (Guidelines, § 15088.5, subd. (a); see also *Laurel Heights II, supra*, 6 Cal.4th at p. 1130.)

On the other hand, when new information merely clarifies or amplifies an adequate EIR, recirculation is not required. (*Laurel Heights II, supra*, 6 Cal.4th at pp. 1129-1130.) A lead agency's determination that revisions to an EIR do not constitute significant new information is reviewed for substantial evidence. (*Id.* at p. 1133.)

In *Laurel Heights [*64] II*, the final EIR added new information that had not appeared in the draft EIR, including "three new noise studies, two new studies relating to potential toxic discharges, a clarification that one loading dock, rather than three, will be used for shipping and receiving, the recognition that 'night lighting glare' could result from the use of the laboratories in the evening and early morning, and an expanded analysis of [a project] alternative ...." (*Laurel Heights II, supra*, 6 Cal.4th at p. 1122.) The court concluded that these additions did not require the lead agency to recirculate the final EIR for further public comment. (*Id.* at p. 1136.)

**1. New information in the final EIR**

In this case, the draft EIR identified the project's estimated emissions based on computer-generated modeling. The modeling showed that unmitigated construction-related emissions of PM10 would total 17.9 TPY, and unmitigated operation-related emissions would total 32.9 TPY. The draft EIR stated that the SJVAPCD did not set quantitative thresholds for construction- or operation-related emissions of PM10. The draft EIR went on to conclude that both short-term, construction-related and long-term, operation-related [*65] emissions of PM10 from the project would be significant impacts, determining that emissions "could violate or contribute substantially to an existing or projected air quality violation, and/or expose sensitive receptors to substantial pollutant concentrations, especially considering the nonattainment status of Merced County." The draft EIR then described various mitigation measures that would reduce emissions to a less-than-significant level.

The SJVAPCD reviewed the draft EIR and submitted comments and suggestions during the comment period. Regarding PM10 emissions, the SJVAPCD wrote:
"The Draft EIR correctly states that the District has not adopted a threshold of significance for PM10 and concludes that PM10 emissions would have a significant impact on air quality. Although the District's Governing Board has not adopted a threshold of significance for PM10, the District recommends that lead agencies use an applied threshold of 15 tons per year (TPY). The District recommends that mitigation of PM10 emissions below the 15 TPY applied threshold be included into the Emissions Reduction Agreement."

The final EIR incorporated the air district's suggestions. The 15 TPY threshold was added [*66] to the impact analysis for PM10. Mitigation Measure 4.2.-2e, which provided for an emission-reduction agreement between Wal-Mart and the SJVAPCD, added that the parties would reduce net PM10 emissions to less than 15 TPY. The new quantitative threshold did not alter the determination from the draft EIR that, without mitigation, the project would result in significant impacts. Nor did the new quantitative threshold change the conclusion that mitigation measures would reduce such emissions to a less-than-significant level. The final EIR stated that

the changes from the draft EIR "do not alter the conclusions of the Draft EIR and do not constitute 'substantial' new information as defined under [Guidelines,] Section 15088.5 ...."

The changes to the final EIR did not disclose either a new impact or an increase in the severity of an impact. The estimate of the project's unmitigated emissions of PM10 was the same in the draft EIR and final EIR. Nor did the changes to the final EIR disclose a feasible project alternative or mitigation measure. The mitigation measures and the conclusion that these measures would reduce emissions to an insignificant level were the same in the draft EIR and final [*67] EIR. The new threshold of significance did not alter the analysis in any way. Since the draft EIR discussed PM10 emissions and mitigation measures, the public had a meaningful opportunity to comment on the project's potential adverse environmental effect in this regard. We conclude, therefore, that substantial evidence supported the city's determination that the addition of a quantitative threshold of significance for PM10 did not require recirculation of the EIR.

**2. Late-submitted information**

The challengers also claim that the city's "Reliance on its Late-submitted Information to Defend the EIR's Assessment of Air Quality Impacts from Ozone Precursor Emissions [and TAC/diesel PM and PM10 emissions] Demonstrates the 'Significance' of this New Information," which, in turn, requires recirculation for public review and comment. [5] The "Late-submitted Information" refers to the documents the city submitted in response to Alliance's post-comment-period letters—four letters from EDAW, two memoranda written by staff, and supporting documents. In response, the city asserts that Alliance's post-comment-period letters and supporting documents were a "proverbial, last-minute 'document dump,'" and, [*68] further, the city was under no obligation to prepare a response. (Guidelines, § 10588, subd. (a).) [6]

**FOOTNOTES**

[5] The respondents contend that the challengers are procedurally barred from raising a recirculation claim based on the documents the city submitted on September 28, 2009, because they failed to plead the facts of the claim in a timely manner. The challengers did allege a recirculation claim in their original pleadings, although the claim was based on new information in the final EIR, not information in documents submitted after the final EIR was released. The record indicates that the superior court later granted the challengers leave to amend the pleadings. The challengers then amended their petition to allege that the city's additions to the administrative record submitted on September 28, 2009, also required recirculation. "[P]roper amendments to an original complaint 'relate back' to the date of the filing of the original complaint, despite the amendments being made after the statute of

limitations had expired." (*Garrison v. Board of Directors* (1995) 36 Cal.App.4th 1670, 1678.) Here, the recirculation claim at issue relates back to the date of the challengers' original filing; as [*69] a result, the respondents' contention fails.

[6] The Guideline provides: "The lead agency *shall* respond to comments received during the noticed comment period and any extensions and *may* respond to late comments." (Italics omitted.) The city, nonetheless, did prepare a response, heeding the court's warning in *Bakersfield Citizens, supra*, 124 Cal.App.4th at page 1201. In that case, the court recognized that, after the public comment period has closed, new environmental objections may be made at a public hearing on project approval, and "[i]f the decisionmaking body elects to certify the EIR without considering comments made at this public hearing, it does so at its own risk." (*Ibid.*)

In the cover memorandum to the responsive documents, the city stated, "Information contained in these responses does not constitute substantial new information, as defined pursuant [to] the CEQA Guidelines Section 15088.5, as there is no new significant environmental impact identified, no substantial increase in the severity of an environmental impact would result unless mitigation measures are imposed that would reduce the impact to a level of [in]significance, and no other feasible project alternatives or mitigation [*70] measures are being proposed that would clearly lessen the project's environmental impacts."

The challengers' preliminary argument is that the standard of review for this claim should be de novo, not substantial evidence, because their claim is primarily procedural. (See *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435 ["[w]hile we determine de novo whether the agency has employed the correct procedures, ... we accord greater deference to the agency's substantive factual conclusions"].) As we have seen, however, *Laurel Heights II* held that substantial evidence review applies to an agency's determination that recirculation is not required because the new information in the final EIR is not significant. (*Laurel Heights II, supra*, 6 Cal.4th at p. 1135.)

The challengers argue that *Laurel Heights II* is distinguishable because, in that case, the new information was added to the final EIR, while in this case, the new information was submitted after the final EIR had been released and was only added to the administrative record on the day the project was approved. This argument raises another issue: If the new information was not added to [*71] the final EIR, then what is the basis for the challengers' claim that recirculation was required? Section 21092.1 requires recirculation "[w]hen significant new information is *added to an environmental impact report* after notice has been given," not when such information is added to the administrative record. (Italics added.) The challengers expressly rely

on section 21092.1 and *Laurel Heights II* for their recirculation argument and do not offer other authority for requiring recirculation.

Since the documents that were added to the administrative record in this case were not added to the final EIR, there appears to be no basis for the challengers' recirculation claim. The parties, however, assume that the recirculation requirement does apply, implicitly treating the new information as if it had been added to the final EIR for purposes of section 21092.1. While the respondents argue that the city's decision not to recirculate the EIR is subject to review for substantial evidence, they do not question the challengers' premise that the recirculation requirement of section 20192.1 applies to documents added to an administrative record after a final EIR is released. For the sake of argument, [*72] we also will treat the documents that the city added to the administrative record as if they had been added to the final EIR for purposes of section 210921.1. As a consequence, the holding of *Laurel Heights II* applies and we review the city's decision not to recirculate the EIR for substantial evidence. In other words, either section 21092.1 and *Laurel Heights II* apply to this case and review is for substantial evidence, or they do not apply and there is no basis for the recirculation claim. The challengers' position—that section 21092.1 applies, but we should review the claim de novo—is without merit.

The challengers focus on the letter from the air quality and climate change specialist Kerr and supporting documents that address thresholds of significance. In response to Alliance's post-comment-period letters, Kerr defended the EIR's reliance on the air district's thresholds of significance, writing that the SJVAPCD has "a strong regulatory track record of assisting in the reduction of air pollution ...." He commented that, between 1990 and 2005, emissions of NOx decreased by more than 28 percent and emissions of ROG decreased by more than 37 percent. In addition, the air district [*73] achieved compliance with NAAQS for PM10 three years ahead of schedule.

The challengers argue that the draft EIR stated only the bare conclusion that the thresholds of significance from the GAMAQI were applicable, and it was only the Kerr letter and supporting documents that provided evidence that the air district's thresholds of significance were appropriate. This argument is not persuasive. The following facts were stated in the draft EIR and are not in dispute: (1) the SJVAPCD is the local air pollution agency responsible for regulating air quality in Merced County; (2) the SJVAPCD's recommended thresholds of significance for ozone precursors and TAC's are identified in the GAMAQI; and (3) the draft EIR used those thresholds in determining the project's impacts. This was sufficient substantial evidence that the SJVAPCD's thresholds were applicable in this case.

The challengers simply disagree with the SJVAPCD over what the thresholds of significance should be. The additional information in Kerr's letter and supporting documents did not change the EIR's analysis and did not disclose a new significant impact, an increase in the severity of an impact, a feasible project alternative, or [*74] a mitigation measure. The public had a meaningful opportunity to comment on the thresholds of significance used in the EIR, and Alliance took advantage of that opportunity. By explaining that the air district has been successful in establishing rules and regulations to achieve air quality standards, Kerr's letter and supporting documents served merely to amplify—at Alliance's request—the information in the draft EIR.

Further, the premise of the challengers' argument appears to be that, since the city was able to produce additional information to support its position after the final EIR was released, the draft EIR must have been inadequate. An EIR's analysis, however, need not be exhaustive. (*Irritated Residents, supra*, 107 Cal.App.4th at p. 1390.) The fact that additional information supporting the EIR existed, which the city provided to respond to Alliance's concerns, does not mean the draft EIR was lacking. For these reasons, the challengers' argument fails.

**D. Substantial evidence**

Finally, the challengers contend there is no substantial evidence supporting the city's conclusions regarding the project's air quality impacts from emissions of ozone precursors, TAC's/diesel PM, and PM10. [*75] This contention is without merit.

The challengers argue that the addition of 10 TPY of ozone precursors *required* a finding of significant impact. The challengers do not claim the record lacks substantial evidence to support the EIR's determination that, after mitigation, less than 10 TPY of ozone precursor emissions would result from the project for either construction- or operation-related effects. They only disagree with the city's conclusion that this would not be a significant impact. However, "[c]ourts are 'not to determine whether the EIR's ultimate conclusions are correct but only whether they are supported by substantial evidence in the record and whether the EIR is sufficient as an information document.' [Citation.]" (*Bakersfield Citizens, supra*, 124 Cal.App.4th at p. 1197; see also *Laurel Heights I, supra*, 47 Cal.3d at p. 392 ["'The court does not pass upon the correctness of the EIR's environmental conclusions, but only upon its sufficiency as an informative document'"].)

With respect to the EIR's discussion of TAC's and PM10, the challengers repeat their objection to the use of the air district's thresholds of significance for cumulative-impacts analysis. They also repeat [*76] their argument that adding diesel PM to the area's degraded environment should be considered significant. We reject these arguments for the reasons we have already stated.

In short, while the challengers vigorously disagree with the EIR's conclusions regarding air quality impacts, they have not shown that the EIR's air quality section was inadequate as an information document or that the city failed to comply with CEQA. (See *Irritated Residents, supra*, 107 Cal.App.4th at p. 1398 ["Appellants disagree with the analysis and conclusions reached in the FEIR. Yet, this does not render the FEIR legally insufficient"].)

**IV. Hydrology and water quality**

In section 4.6, titled "Hydrology and Water Quality," the EIR described the conditions of ground and surface waters in the area around the project site and analyzed the project's potential impacts to these water resources. The EIR relied on information from previously prepared plans and studies, including the Merced Vision 2015 General Plan, the City of Merced Storm Drain Master Plan, a preliminary study on the project titled "Preliminary Site Drainage Analysis," and additional water supply assessment and geotechnical reports.

The EIR identified [*77] several potentially significant impacts from the project, including short-term degradation of water quality from project-related activities (Impact 4.6-1); long-term degradation of surface water quality from project-related contaminants (Impact 4.6-2); and onsite and offsite flooding hazards from increased storm water runoff (Impact 4.6-3). The EIR described mitigation measures that would reduce the project's impacts on water resources to a less-than-significant level. Mitigation Measure 4.6-2, for example, provided for the development and implementation of a water quality maintenance and monitoring plan, which included a system for removing pollutants from storm water before allowing runoff to leave the project site.

On appeal, the challengers contend that the hydrology and water-quality section of the EIR was inadequate in addressing the project's potential impacts in three areas: (1) groundwater—in particular, a public water well; (2) runoff water quality; and (3) storm drainage and flood risk.

**A. Water Well 10-R2**

The city relies on groundwater for its primary domestic water source. In describing the project site, the draft EIR stated that the site contained a municipal water well, [*78] which was designated City of Merced Water Well 10-R2, and an irrigation well. The draft EIR stated that the irrigation well would be decommissioned in accordance with the California Water Code and the city's standard designs for well destruction. Section 4.6 made no further mention of Water Well 10-R2.

In section 4.10, "Public Health And Hazards," the draft EIR discussed the use, storage, and disposal of hazardous materials (including gasoline, diesel, and oil) that would result from the project. In this section, the draft EIR stated, "On an ongoing basis the project would have one 6,000-gallon new oil tank, one 2,500-gallon waste oil tank, two 20,000-gallon diesel USTs [underground storage tanks], and two aboveground 500-gallon diesel storage tanks ...."

The draft EIR described the state scheme for regulating hazardous materials. The Secretary for Environmental Protection has established a unified hazardous waste and hazardous materials management regulatory program (unified program). The unified program coordinates administrative requirements, permits, and enforcement activities for several environmental programs, including the underground storage tank (UST) program, hazardous materials [*79] release response plans and inventories, and the Aboveground Petroleum Storage Act program. The Merced County Division of Environmental Health (MCDEH) is the local agency responsible for enforcement of the unified program. In addition, the Central Valley Regional Water Quality Control Board, which has jurisdiction over the project site, is responsible for the quality of groundwater and surface waters.

The draft EIR identified thresholds of significance related to the use of hazardous materials. Among other things, it would be considered a significant impact if the project were to "create a significant hazard to the public or the environment through reasonably foreseeable upset and accident conditions involving the release of hazardous materials into the environment or through the routine transport, use, or disposal of hazardous materials ...."

The draft EIR identified as a potential impact from the project "Creat[ing] a Significant Hazard to the General Public through the Routine Use of Hazardous Materials [D]uring Operation of the Project." (Impact 4.10-3.) The draft EIR concluded, however, that "[c]ompliance with federal, state, and local hazardous materials regulations, which would [*80] be monitored by the state and/or local jurisdictions, would reduce impacts associated with the use, transport, and storage of hazardous materials during operation of the project" to a less-than-significant level. The specific possibility of contamination of Water Well 10-R2 was not discussed.

Alliance raised the issue of potential risk to Water Well 10-R2 in its letter submitted during the comment period. Alliance asked hydrologist Dennis Jackson to review the draft EIR. He wrote a letter that identified areas of concern, including "[c]oncern about water quality because of the fuel storage ...." Jackson wrote that there was no description of what measures would be taken to contain and clean up fuel spills and that the draft EIR contained "no substantive discussion of the underground storage tanks and the risk they pose to the City of Merced water well 10-R2 which is located on the southern edge of the project." He acknowledged that underground tank installations are regulated by the statute, but "there is the potential for underground tank failure, especially since the soils are corrosive." Jackson continued, "The characteristics of well 10-R were not discussed in the DEIR. In general, [*81] the City wells are supposed to tap a deep aquifer and not the surface water, but there is always a possibility that contaminated surface water could find its way into the well. Assessing the risk to the water quality in well 10-R requires knowing the characteristics of well 10-R and the characteristics of the subsurface materials around well 10-R are important."

The final EIR responded to Jackson's comments regarding potential impacts on well water by directing readers to "Master Response 8: Runoff Water Quality." The appropriate response to Jackson's concerns, however, appears to be "Master Response 9: Groundwater Quality," which addresses "comments [that] identify issues related to the potential for leakage from underground storage tanks."

In Master Response 9, the final EIR stated that the planned aboveground and underground storage tanks would be under the authority of the MCDEH and reiterated that compliance with hazardous materials laws and regulations would reduce impacts associated with the storage of hazardous materials. The final EIR stated that the project proponents would comply with the Health and Safety Code and state regulations, "which include[] an Underground Storage [*82] Tank Monitoring and Spill Response Plan." As specified in the regulations, the proposed UST's would include a primary containment system that would meet regulatory requirements, a secondary containment system in the event of a leak or unauthorized release, and a leak-monitoring program. Master Response 9 continued:

"The methodologies and technologies for UST installation, operation, and maintenance are continually improving, and the best available technologies would be implemented for the proposed project. Although the potential for UST failure exists, attempts to predict likelihood of UST failure after compliance with applicable regulatory requirements as described in the FEIR would be speculative. Furthermore, the final geotechnical report that will be prepared for the project will address any issues related to corrosive soils and will provide recommendations to ensure that the UST's would not be adversely affected by these types of soil conditions."

The response also stated that, contrary to the description in the draft EIR, Water Well 10-R2 was on a separate parcel and not part of the project site. The response stated that the MCDEH conducts onsite inspections of the well to oversee [*83] operations and compliance.

Alliance submitted another comment letter after the comment period closed. Alliance wrote that there was no description of the water well, its distance from the proposed tanks, or the characteristics of the land that might increase the risk of tank failure or well contamination.

An environmental planner from EDAW, Mike Parker, wrote a response dated September 28, 2009. He explained, for the first time, that the fuel storage and dispensing facilities would be in excess of 1,200 feet from the well site property boundary. Parker wrote that the EPA sets the minimum distance between domestic water wells and fuel storage tanks at 100 feet, and California well standards recommend a distance ranging from 50 to 150 feet. He described the state regulations in more detail. "For example, in Title 23, Division 3, Chapter 16, Section 2631, extensive regulations are established for the types of fuel tanks that would be used here. (Copy of regulation attached.) Under these regulations, for example, the storage tanks will be double-walled fiberglass tanks which will include leak detection, fuel level monitoring and test well sensors. In addition to the required items they will [*84] also have a sealed turbine enclosure, dry interstitial monitoring, containment collar sensor, digital sensing probes and overfill spill container. The piping will be double-walled flexible pipe." Finally, he wrote, "The City Engineer has reviewed the requirements for the fuel storage tanks and the geotechnical information currently available regarding the area. His opinion is that the measures imposed are more than sufficient to protect the City's water supply ...."

The challengers argue: (1) the EIR failed to describe the affected environmental setting and unlawfully deferred impact analysis and development of mitigation measures; (2) the EIR improperly relied on future compliance with regulatory standards as a substitute for assessing potential impacts; and (3) the city's reliance on late-submitted information to defend the EIR's determination regarding risk to the water well demonstrates "significance" and requires notice and recirculation of the EIR. These arguments are without merit.

The challengers' first argument is that the draft EIR failed as a matter of law to describe adequately the environmental setting because the city has deferred conducting its impacts analysis until it [*85] receives a final geotechnical report. This argument is premised on the challengers' characterization of statements in the final EIR; they claim that, in its response to public comments, the city indicated that it "will wait for the preparation of a final geotechnical report before assessing the risk posed by ... soil characteristics." [7] We are not convinced.

**FOOTNOTES**

[7] Regarding soil characteristics, the challengers claim that the draft EIR did not include evaluation of (1) two old stream channels that are now filled with soil that is less dense and

more permeable than the surrounding land; (2) the fact that the soil on the site has a high shrink-swell potential; and (3) corrosive soil conditions.

To support their position, the challengers cite the final EIR's master response to comments regarding proposed detention basins and drainage. In this response, the final EIR explained that proposed storm water detention and conveyance facilities were not yet designed to construction-level detail, but preliminary designs at the conceptual phase met stated specifications. The response referred to a "final geotechnical report," which would be prepared before finalizing the construction-level project design. [*86] Specifically, the final EIR stated that berms would be designed "pursuant to the final geotechnical report for the project," and the report "will include evaluation of the filled-in stream channel areas, which are less dense and more permeable to water than surrounding land and soil and have high shrink-swell potential." We do not read this response as a statement by the city that it intended to wait for the final geotechnical report before conducting an impact analysis. To the contrary, the storm drains and storm water detention facilities were proposed as part of a mitigation measure designed to address a potentially significant impact identified in the draft EIR. Obviously, the city did conduct an impact analysis.

It is likely that the challengers' cite to the administrative record in their appeal brief is inaccurate; they may have intended to cite Master Response 9 of the final EIR, which discussed potential leakage from the storage tanks. This response stated that attempting to predict the likelihood of tank failure would be speculative, and "the final geotechnical report that will be prepared for the project will address any issues related to corrosive soils and will provide recommendations [*87] to ensure that the UST's would not be adversely affected by these types of soil conditions." Again, we do not read this response to mean that the city was waiting for the final geotechnical report before considering potential significant impacts related to Water Well 10-R2. Rather, the city addressed the concern raised in Jackson's letter but concluded that the likelihood of underground storage tank failure would be speculative and, therefore, not a significant impact. Given our reading of the final EIR, we reject the challengers' first argument.

The challengers' second argument is that the EIR improperly relied on future compliance with regulatory standards to substitute for the city's obligation to assess the potential impacts to municipal water supplies. We disagree. As we have explained, the city considered the risk of storage tank failure and potential harm to the well and concluded that this possibility would not amount to a significant impact. In reaching its conclusion, the city properly took into account the project's compliance with federal, state, and local laws that regulate the construction and use of storage tanks.

In *Tracy First v. City of Tracy* (2009) 177 Cal.App.4th 912, 934, [*88] cited by the respondents, the challenger argued that it was improper for an EIR to rely on state building standards in determining whether an energy impact would be significant. (*Id.* at p. 933.) The court rejected this argument, recognizing that the state building standards at issue promoted the same goal as CEQA, namely, reducing wasteful, inefficient, and unnecessary consumption of energy. (*Tracy First, supra*, at pp. 933-934.) Similarly, in this case, the laws and regulations governing the storage of hazardous materials are intended to protect the environment and public health just as

CEQA is intended to prevent environmental damage. (See, e.g., Health & Saf. Code, § 25280, subd. (b) [Legislature's intent is "to establish orderly procedures that will ensure that newly constructed underground storage tanks meet appropriate standards ... so that the health, property, and resources of the people of the state will be protected"]; § 21000, subd. (g) [Legislature's intent is that agencies regulate activities "so that major consideration is given to preventing environmental damage"].) Under these circumstances, it was proper for the city to rely on compliance with federal, state, and local [*89] laws in determining potential impacts related to the project's storage tanks. (See *Oakland Heritage, supra*, 195 Cal.App.4th at p. 904 [compliance with building code and other regulatory provisions, together with geotechnical investigation, provided substantial evidence that mitigation measures would reduce potential seismic impacts to insignificant level; "We will not interfere either with the [lead agency's] findings or with its policy decision to rely on the relevant codes and ordinances"].)

Finally, the challengers argue that the city relied on late-submitted information to defend its determination, thereby triggering the requirement to recirculate the EIR. They point to Parker's letter and two attachments submitted after the comment period closed. Parker's letter is described above; the two attachments are the State Water Resources Control Board's underground storage tank regulations (Cal. Code Regs., tit. 23, § 2610 et seq.) and an EPA publication titled "Drinking Water From Household Wells." The challengers do not identify any particular pieces of new information in the documents cited, nor do they explain how the documents could "deprive[] the public of a meaningful opportunity [*90] to comment upon a *substantial* adverse environmental effect ...." (*Laurel Heights II, supra*, 6 Cal.4th at p. 1129.) The only new information we discerned from Parker's letter was that the water well was located over 1,200 feet from the project's proposed fuel storage facilities. While the city should have included this information in the final EIR in response to Jackson's first letter, this fact did not disclose a new significant impact, increase the severity of an impact, or identify a feasible project alternative or mitigation measure. It merely clarified or amplified the analysis in the draft EIR. (See *id.* at pp. 1129-1130.) As a result, notice and recirculation of the EIR was not required.

We have considered the challengers' three arguments, and they have failed to demonstrate the EIR was inadequate in assessing the project's potential impacts to Water Well 10-R2.

**B. Storm water runoff quality**

The draft EIR identified Impact 4.6-2 as the potential long-term degradation of surface water quality from project-related contaminants. The draft EIR stated that the increase in impervious surfaces within the city had resulted in higher rates of runoff during rainy periods, which can be a source [*91] of surface water pollution. Erosion of disturbed areas, deposition of atmospheric particles from cars or industrial sources, corrosion or decay of building materials, and spills of toxic material on surfaces that receive rainfall all contribute to urban runoff pollution. The draft EIR concluded, "New urban industrial and commercial development can generate urban runoff from parking areas as well as any areas of hazardous materials storage exposed to rainfall. Therefore, this impact is considered *potentially significant.*"

To address this impact, Mitigation Measure 4.6-2 provided for the development and implementation of a best management practices (BMP) and water quality maintenance and

monitoring plan. The draft EIR provided that "[d]esign standards for water quality treatment are being formulated that would meet or exceed City of Merced Storm Drain Master Plan and Standard Design requirements." When completed, the design standards would incorporate the adopted City of Merced Storm Drain Master Plan and Design guidance and include the following elements: (1) excavated 60-foot right-of-way open channels that would convey runoff through areas where the estimated peak flow rates from a [*92] watershed exceed the capacity of a 66-foot storm drain; (2) underground storm drain pipelines; (3) storm water detention facilities consisting of two storm water detention basins "designed to accommodate runoff generated during a 50-year 24-hour storm event under General Plan buildout conditions, with the rate of outflow being limited to the discharge generated by the watershed during a 2-year storm event under existing conditions"; and (4) pump stations that would augment the gravity flow draining of the detention basins.

Runoff would be collected into detention ponds to control the volume of runoff leaving the site. The measure also provided that "[t]he quality of runoff would be controlled by sedimentation ponds, biological treatment of the water by vegetation, infiltration of the water into the ground and a skimmer plate to skim floatable objects from the water surface." The draft EIR concluded that implementation of Mitigation Measure 4.6-2 would reduce impacts to a less-than-significant level.

Continuing the discussion of Mitigation Measure 4.6-2, under the heading "Design Criteria and Methodology," the draft EIR stated:
"To design a treatment system that meets or exceeds the City [*93] and MID guidelines and standards for [storm water] quantity and quality that must be met or exceeded, the site was analyzed to determine the peak discharge rates for the predeveloped and developed conditions under various storm event scenarios (Carter-Burgess 2007). The City requires the detention ponds to be designed (1) to store water deposited on site by the so-called 50-year storm and (2) to control the allowable discharge from developed conditions so as not to exceed the 2-year predeveloped discharge (City of Merced 2002). The City also has a requirement that the ponds be dry in 48 hours, if the maximum discharge rate will allow it. The MID requires that the allowable discharge from developed conditions not exceed the 10-year storm. However, the MID requested that the maximum allowable discharge be 2,200 gpm (gallons per minute), which is less than both the 10-year storm and the 2-year predeveloped discharge rates. The MID maximum allowable rate of 2,200 gpm, lower than the City's discharge rate of 8,960 gpm, was agreed on by the City and MID (Carter-Burgess 2007).

"The 24-hour rainfall values were selected from NMFS Atlas 14, Volume I by the National Oceanic and Atmosphere Administration. [*94] Time of concentration values were computed based on the methods in the Soil Conservation Service Technical Report Manual SCS TR-55, widely used for calculating [storm water] runoff in small urban watersheds (USDA 1986). The detention ponds were size[d] based on volume required to hold the [storm water] runoff from a 100-year storm event. The computer program Interconnected Pond Routing by Streamline Technologies, Inc., a FEMA approved [storm water] modeling system, was utilized to rout[e] the various storms through the detention ponds and the pump station. The 2-year, 10-year, 25-year, 50-year and 100-year 24-Hour Storms were used in the analysis to size the [storm water]

conveyances such that they would handle the water volumes of all of those [storm water] volumes."

Under the heading, "Pre- and Postdevelopment Conditions," the draft EIR described how storm water runoff currently pools in a low-lying corner of the project site and eventually spills over to a roadside ditch north of Gerard Avenue. The development would create approximately 110 acres of impervious surface area on the 235-acre site. To offset the increase in runoff caused by this additional impervious area, a series of [*95] detention ponds would be constructed to store storm water runoff and to control the quantity and quality of the runoff. The runoff would be discharged from the detention ponds into a connection to an existing MID irrigation canal.

The draft EIR explained that the runoff would be released in compliance with the requirements and directives of the MID:
"Using the maximum discharge rate of 2,200 gpm as required by the MID, the ponds could not be drained within 48 hours for the 10-year storm, as required by the City. Therefore the City would agree to allow longer drawdown duration time for the system. The drawdown durations for the 10-year, 25-year, 50-year and 100-year would be approximately 72 hours, 88 hours, 95 hours and 108 hours, respectively. These drawdown times assume that once the pumps start pumping they would operate continuously; however, the pumps would be controlled by MID. If MID determined that downstream conditions warranted the discharge from the proposed project site be discontinued, then MID would have the ability to shut the pumps down to discontinue the discharge. This would then increase the duration [storm water] would remain in the ponds and the additional volume [*96] that could infiltrate into the soil. The 10-year, 24-Hour storm runoff volume for the entire 235 acre site for predeveloped conditions is 10.7 af [acre-feet] and for developed conditions is 26.2 af."

The draft EIR stated that permanent BMP's, which are described in detail in the Storm Drain Master Plan, have been shown to be effective in reducing contaminant levels in urban runoff.

On appeal, the challengers object to Mitigation Measure 4.6-2, asserting that it amounts to an unlawful deferral of mitigation measures. We disagree.

Generally, "[f]ormulation of mitigation measures should not be deferred until some future time." (Guidelines, § 15126.4, subd. (a)(1)(B).) For example, an agency may not simply require a project applicant to obtain a report and then comply with any recommendations that may be made in the report. (*Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 793 (*Endangered Habitats*).)

On the other hand, "'[d]eferral of the specifics of mitigation is permissible where the local entity commits itself to mitigation and lists the alternatives to be considered, analyzed and possibly incorporated in the mitigation plan. [Citation.]'" (*Endangered Habitats, supra*, 131 Cal.App.4th at p. 793; [*97] see also Guidelines, § 15126.4, subd. (a)(1)(B).) In *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 95 (*City of Richmond*), cited by the challengers, the court recognized that the formulation of specific mitigation measures may be

deferred in cases where "the lead agency: (1) undertook a complete analysis of the significance of the environmental impact, (2) proposed potential mitigation measures early in the planning process, and (3) articulated specific performance criteria that would ensure that adequate mitigation measures were eventually implemented."

Mitigation Measure 4.6-2 is acceptable under this standard. (See, e.g., *Endangered Habitats, supra*, 131 Cal.App.4th at pp. 795-796 [no improper deferral of mitigation where EIR required project proponent to develop BMP to address storm water runoff; "[D]eferral is permissible because the EIR commits to it and lists standards to be incorporated in the mitigation plan"].) The EIR analyzed the project's impact on runoff quantity and quality, mitigation measures were proposed, and specific performance criteria were identified. In addition, the final EIR added the following statement to the mitigation [*98] measure to ensure compliance: "Prior to issuance of grading permits, the City Engineer shall ensure that the design standards incorporate the adopted City of Merced [Storm Drain Master Plan] and Design guidance (City of Merced 2002)."

We are not persuaded by the challengers' claim to the contrary. They assert that the EIR improperly deferred mitigation because: "(1) the DEIR lacks adequate information from which to accurately quantify or understand the scope and extent of the Project's potential adverse effects on downstream water quality ... [;] (2) there is no indication that finalizing the '[d]esign standards for water quality treatment' is 'feasible but impractical' at this time; [3] the DEIR 'articulate[s] specific performance criteria,' but then admits that the Project will not meet them; and [4] the DEIR does not explicitly 'make further approvals contingent on finding a way to meet [the design standards].'" (Fn. omitted.)

With respect to the challengers' first assertion, the challengers do not explain what information was lacking. The draft EIR described and quantified the increase in storm water runoff that would be caused by the project and also described the potential for [*99] contamination of runoff water from various sources. The challengers have failed to show the EIR was inadequate in this respect.

The challengers' next assertion is that there has been no showing that a finalized storm water treatment system design would be feasible but impractical. (See *Endangered Habitats, supra*, 131 Cal.App.4th at p. 793 ["If mitigation is feasible but impractical at the time of a general plan or zoning amendment, it is sufficient to articulate specific performance criteria and make further approvals contingent on finding a way to meet them"].) In other words, the challengers expect the project proponent to provide construction-level detail of the proposed mitigation measure.

Courts have recognized, however, that, "'for kinds of impacts for which mitigation is known to be feasible, but where practical considerations prohibit devising such measures early in the planning process ..., the agency can commit itself to eventually devising measures that will satisfy specific performance criteria articulated at the time of project approval. Where future action to carry a project forward is contingent on devising means to satisfy such criteria, the agency should be able to rely [*100] on its commitment as evidence that significant impacts will in fact be mitigated.'" (*Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1028-1029; see also *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1395 [not improper deferral where project proponent agreed to protect downstream properties "'by constructing

adequate drainage facilities including enlarging existing facilities and/or by securing a drainage easement'"].) The mitigation measure in this case meets this standard. The EIR contains the elements of the mitigation measure as well as the specific performance criteria. The city will be able to ensure that impacts will be mitigated because future grading permits will be conditioned on the project proponent meeting certain requirements. We reject the challengers' second assertion.

The challengers' third assertion is that the draft EIR admitted that the mitigation measure would not meet the specific performance criteria. This assertion is based on the statement in the draft EIR that the City "has a requirement that the ponds be dry in 48 hours, if the maximum discharge rate will allow it," followed by the statement that the MID has requested a maximum [*101] allowable discharge rate that will not allow the ponds to be drained within 48 hours for a 10-year storm. From this, the challengers claim that the draft EIR demonstrates that the project will not meet the City of Merced Storm Drain Master Plan and Standard Design requirements. The respondents counter that the challengers have mischaracterized the EIR and the city's Storm Drain Master Plan. As stated in the draft EIR, the city's requirement that ponds be drained within 48 hours is qualified by the phrase "*if* the maximum discharge rate will allow it." (Italics added.) We read the language of the draft EIR to mean that the city's 48-hour drainage requirement would not apply in this case because the maximum discharge rate, as set by the MID, will not allow it.

The respondents point out that even Alliance appears to have believed that the city does not impose an absolute requirement that ponds be drained within 48 hours regardless of the applicable discharge rate. In Jackson's first comment letter (submitted during the public comment period), he wrote, "The City of Merced would *prefer* to see the ponds drain in 48 hours." (Italics added.) This indicates that Jackson understood that the 48-hour [*102] drainage time was a city preference, and not a requirement, because the MID's maximum discharge rate in this case would not allow drainage within 48 hours. We reject the challengers' third assertion. In addition, the respondents explain that, although the EIR used the word "requirement," the Storm Drain Master Plan does not, in fact, have such a requirement. The challengers do not dispute this point.

Fourth, the challengers' state that the draft EIR did not make further approval contingent on finding a way to meet design standards. This is irrelevant since the final EIR provided that future grading permits were contingent on compliance with the Storm Drain Master Plan and Design guidance.

In sum, Mitigation Measure 4.2-6 does not impermissibly defer mitigation.

**C. Storm drainage and flood risks**

Mitigation Measure 4.6-2 provides for "Storm Detention Facilities," described as follows: "The two [storm water] detention basins, one draining the north portion of the proposed project site and the other draining the south portion, have been designed to accommodate runoff generated during a 50-year 24-hour storm event under General Plan buildout conditions, with the rate of outflow being limited [*103] to the discharge generated by the watershed during a 2-year storm event under existing conditions. Detention basins have been conceptually designed with a

maximum depth of 5 feet below ground surface due to the relatively shallow depth to groundwater in some of the areas surrounding the proposed Project. One foot of freeboard from the 50-year 24-hour storm to the top of the basin has also been included in the conceptual design."

Under the heading "Design Criteria and Methodology," the draft EIR stated that the city requires detention ponds to be designed to store water deposited onsite by a 50-year storm, but the proposed detention ponds were sized to accommodate storm water from a 100-year storm event. The draft EIR explained that "a series of detention ponds would be constructed around the perimeter of the site area to store [storm water] runoff" and then pumped to MID's Fairfield Canal or, alternatively, Farmdale Lateral. Preliminary plan drawings showed the detention ponds and two alternative locations for the pump station.

In Alliance's letter submitted during the public comment period, Jackson commented on the storm detention and drainage system. He wrote that the draft EIR did [*104] not present the technical details of the hydrologic calculations used, so it was difficult to assess if realistic estimates of storm runoff volumes were used. Jackson stated that there was no narrative that explained how the storm water detention system would operate, no statement of the elevation differences between the storm water inlets and the discharge points at the bottom of the detention ponds, and no discussion of water velocities expected in the detention ponds under different conditions. He indicated, "The DEIR does not provide enough information regarding the design and construction of the detention basins to evaluate whether the ponds are adequately sized ... and what impacts would occur if the pond berm failed." In addition, Jackson commented that the draft EIR was inconsistent, stating that the facilities could accommodate a 50-year event in one place while claiming that a 100-year event could be handled in another, and describing a system of two detention ponds but including drawings that showed six ponds linked together by pipes. He wrote that the draft EIR did not consider whether floodwater moving around outside the detention ponds had the potential to erode the berms [*105] of the ponds, did not discuss potential offsite impacts if the excavation of the detention ponds intersected with filled-in stream channels, and did not discuss potential offsite impacts to either of the MID canals.

In the individual response to Jackson's comments, the final EIR referred the commenter to Master Response 7. The individual response also stated:
"As a general note, the level of detail requested in the letter by Mr. Jackson attached to the comment letter is not necessary to evaluate and understand the scope of the project's environmental impacts. The discussion following Section 15146 'Degree of Specificity' indicates that '[t]he analysis must be specific enough to permit informed decision[] making and public participation. The need for thorough discussion and analysis is not to be construed unreasonably, however, to serve as an easy way of defeating projects. What is required is the production of information sufficient to understand the environmental impacts of the proposed project and to permit a reasonable choice of alternatives so far as environmental aspects are concerned.' The Draft EIR includes the necessary level of detail to inform the decision makers and the general [*106] public of the environmental impacts resulting from the proposed project and to reasonably compare those impacts against those resulting from a list of feasible alternatives.

Including additional level of detail suggested by the author of the letter attached to the comment would not provide any additional clarity to the analysis and would not alter any conclusions."

Master Response 7 stated that calculations had not been finalized for the storm water detention and conveyance facilities "[b]ecause plans for the proposed project are not yet designed to construction-level detail ...." The response explained that the preliminary designs were conservative. Even though the city only required that detention ponds be designed to store water from a 50-year storm, "the basins and conveyance facilities are sized larger than necessary" and will "handle [a] 100-year storm event ...."

The response stated, "[t]he berms would be designed and compacted pursuant to the final geotechnical report for the project," and "[t]he final geotechnical report will include evaluation of the filled-in stream channel areas, which are less dense and more permeable to water than surrounding land and soil and have high [*107] shrink-swell potential." In addition, the senior city engineer and another city engineer reviewed and found acceptable the preliminary plans for the storm water detention facilities on the condition that the project proponent enter an agreement with the MID on the proposed project's storm water discharge points and drainage improvement details. The agreement would require, among other things, that the project proponent enter a "Storm Drainage Agreement" and pay all applicable fees to MID, and further, "[s]torm water discharges meeting MID requirements during the construction phase shall be agreed upon beforehand such that water quality is protected within the Doane Lateral [Canal] and any downstream connected facilities or creeks." This condition was added to Mitigation Measure 4.6-2 in the final EIR.

Alliance submitted a comment letter after the comment period closed, which repeated many of Jackson's previous comments. In addition, Jackson reviewed the final EIR and his comments were attached as exhibit 37 to Alliance's letter. Jackson wrote that the calculations of water volume for a 100-year storm event may be inaccurate and cannot be checked, and the design specifications for the [*108] detention ponds system are not sufficiently detailed to allow an evaluation of the risk of berm failure. He wrote that the hydrology and water quality section of the EIR should include, among other things, water velocities in the detention ponds and the elevations of the pond bottoms and storm water inlets.

Parker responded to Alliance's comments in his September 28, 2009, letter. Regarding asserted inconsistencies in the descriptions of the detentions ponds, he explained, "Detention basin capacity is for [a] 100-year storm. The ponds ... consist of a series of six detention basins. The ponds are interconnected. How one designates the number of ponds is a matter of interpretation. Because there are only two different elevations of the pond bottoms, some persons might view the system as including only two ponds. However, because there are intermediate earthen barriers interspaced in the ponds, they have been described as six detention ponds in the DEIR. There is only one discharge point and there are connector pipes through each barrier to allow water to move throughout the system ...." Addressing Jackson's concern of potential berm failure, Parker explained that the detention ponds [*109] would all be excavated ponds. There would be no risk of berm collapse because "[t]here is not an earthen berm around any of the ponds to increase the capacity." In other words, the stored storm water would always be below or at

ground level.

Parker also wrote that the Federal Emergency Management Agency (FEMA) flood maps show that floodwaters around the project site would move at a very slow rate and that the city engineer's opinion was that the configuration and elevation of the basins would not cause storm flows from a 100-year storm to accelerate or cause increased erosion on adjoining property. Addressing Jackson's concern about possible impacts on MID canals, he noted that there would be no increased flood hazard because the proposed project would limit peak discharges to below pre-project levels. Finally, Parker explained, "Technical studies addressing the level of detail requested ... would be completed during the detailed design and construction phase of the proposed project completed in support of the EIR. As a result of information in the EIR, [the city] would establish requirements or conditions on project design, construction, or operation in order to protect or enhance [*110] the environment (CEQA Statutes Section 15149[b])."

The challengers contend that the EIR failed to lawfully assess the project's flood and drainage impacts. They argue that: (1) the EIR failed to describe the project and affected environmental setting; (2) the final EIR provided inadequate responses to comments by Alliance; (3) the city unlawfully deferred development of mitigation measures; (4) the city's reliance on late-submitted information to defend the EIR's analysis requires recirculation; and (5) no substantial evidence supported the EIR's conclusions. We are not convinced.

We reject the challengers' first argument. The EIR described the project and the environmental setting, discussing the terrain, the climate, flood hazards, and water resources in the vicinity of the project site. The challengers' claim is not so much that the EIR failed to describe the environmental setting as that it failed to describe Mitigation Measure 4.6-2 with the level of technical and design detail they requested. This brings us to their second argument—that the final EIR provided inadequate responses to comments.

"An agency must evaluate and respond to timely comments on the draft EIR that raise significant [*111] environmental issues. [Citations.] Responses must describe the disposition of the issues raised in the comments. [Citations.] If the agency rejects a recommendation or objection concerning a significant environmental issue, the response must explain the reasons why." (*Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455, 475 (*Ballona Wetlands*).)

In *Twain Harte Homeowners Assn. v. County of Tuolumne* (1982) 138 Cal.App.3d 664, 678-687 (*Twain Harte Homeowners* ), we discussed the scope of a lead agency's discretion in responding to public comments. The case involved approval of a county general plan; members of the public submitted comments on a variety of matters, and the lawsuit claimed the county's responses, included in the final EIR, were inadequate. We disagreed, saying:
"The determination of the sufficiency of County's responses to comments upon the draft EIR turns upon the detail required in such responses.... The sufficiency of the EIR is to be viewed in light of what is reasonably feasible. Courts should look for adequacy and completeness in an EIR, not perfection. [Citation.] 'While the decision makers must take account of environmental objections [citations], [*112] satisfactory answers to these objections may be provided by reference to the EIR itself [citation].' [Citation.].... [¶] In the instant case it does appear that the

County responded fully and adequately to comments in numerous instances and that they addressed in great detail many of the issues raised by appellant. The responses as a whole evince good faith and a reasoned analysis, despite the fact that the responses are not exhaustive or thorough in some specific respects. They adequately serve the disclosure purpose which is central to the EIR process." (*Twain Harte Homeowners, supra*, 138 Cal.App.3d at p. 686.)

The response in this case satisfies the standards embodied in this discussion. The city responded to comments from Alliance (including Jackson's comments) by referring to Master Response 7. (See *Twain Harte Homeowners, supra*, 138 Cal.App.3d at pp. 681-684 [response referred readers to responses to other comments; agency response adequate where commenter's concern is addressed in response to another comment].) Master Response 7 addressed the perceived inconsistency in the draft EIR's reference to 50- and 100-year storms. The response explained that, while the city requires only [*113] that the detention ponds be designed with sufficient capacity to withstand a 50-year storm, the detention ponds were conservatively designed to accommodate storm water from a 100-year event. The response also addressed concerns about berm failure.

The challengers assert that the final EIR "brushe[d] off" Jackson's questions and concerns because it stated that the level of detail requested was not necessary to evaluate the project's environmental impacts. We see the city's point, however. "When responding to comments, lead agencies need only respond to significant environmental issues and do not need to provide all information requested by reviewers, as long as a good faith effort at full disclosure is made in the EIR." (Guidelines, § 15204, subd. (a).) Here, Jackson's comments did not raise a potential new significant environmental impact but rather questioned the design and construction of a proposed mitigation measure. It was not unreasonable for the city to respond that (1) the mitigation measure was not yet designed to construction-level detail, and (2) the level of detail requested was not necessary to understand the environmental consequences of the project. (See *Dry Creek Citizens Coalition v. County of Tulare* (1999) 70 Cal.App.4th 20, 34-36 [*114] (*Dry Creek*) [EIR's description of conceptual design of mitigation measure was sufficient where subsequent final designs would be required to meet certain conditions].)

The challengers' third argument is that the city unlawfully deferred development of mitigation measures to address storm water runoff impacts. We have already concluded that Mitigation Measure 4.6-2 is permissible as a measure to mitigate the project's potential significant impact on runoff water quality. Likewise, it is permissible to address potential flood and storm drainage impacts because it sets specific performance criteria that ensure adequate mitigation measures will be implemented. (*City of Richmond, supra*, 184 Cal.App.4th at p. 95.) For example, the allowable discharge rate from the developed project is required to stay below the two-year predeveloped discharge rate.

Fourth, we reject the challengers' claim that the city's late-submitted information responding to Alliance's comments triggered the recirculation requirement. Parker's letter and supporting documents did not disclose a new significant impact, increase the severity of an impact, identify a feasible project alternative or mitigation measure, or "deprive[] [*115] the public of a meaningful opportunity to comment upon a *substantial* adverse environmental effect"; they

merely clarified the discussion in the draft EIR. (*Laurel Heights II, supra*, 6 Cal.4th at pp. 1129-1130.)

Finally, the challengers argue that no substantial evidence supports the EIR's conclusions regarding flooding and storm water runoff quality. They claim "that the EIR is informationally defective because it never disclosed, analyzed or mitigated the environmental impacts that might occur from the construction of the undescribed drainage facilities, or diverting flood waters from the site ...." This argument lacks merit. A party making a substantial evidence challenge must marshal all the evidence material to the lead agency's finding and then show that that evidence could not reasonably support the finding. (*California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 626.) The challengers have not done this. To the extent their argument is that the EIR did not take into consideration the construction of the storm detention and conveyance facilities in analyzing the project's construction-related environmental impacts, they offer no evidence in the record [*116] to support this position. Without evidence to the contrary, we assume the EIR's discussions of construction-related impacts included consideration of the construction of the storm drainage facilities.

As for the alleged failure to analyze "diverting flood waters from the site," the EIR did analyze this issue, acknowledging that the project would cause an increase in runoff. The EIR determined that this impact could be mitigated by the storm detention and conveyance facility, which would discharge runoff at a rate lower than the discharge generated in a two-year storm event under predevelopment conditions and would therefore cause no increase in flood hazard.

**V. Traffic**

Section 4.11 of the EIR, "Traffic and Transportation," discussed the project's potential traffic impacts. The discussion was based primarily on a traffic-impact study conducted by DKS Associates, which also was included in the EIR as Appendix E. The EIR identified thresholds of significance for traffic impacts, including:
• causing an increase in traffic congestion that results in an intersection or roadway segment with a level of service (LOS) [8] of E or worse;

• increasing traffic volume by more than five percent for an [*117] intersection or segment that is already operating at LOS E or F;

• conflicting with adopted policies, plans, or programs supporting alternative transportation.

The EIR concluded that the project would not have a significant impact on traffic congestion as measured by LOS.

**FOOTNOTES**

[8] "Level of service" is a way of describing relative traffic congestion on a roadway segment or

intersection. LOS is stated as a letter grade ranging from A through F, with A being the best. (*Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal.App.4th 807, 820, fn. 5.) Based on the city's general plan, an acceptable operating LOS is defined as D or better.

The challengers contend that: (1) the EIR used an unlawful future baseline that understated the project's true impact on existing traffic; (2) the EIR underestimated the number of trips generated by the project; (3) the final EIR improperly revised a mitigation measure; and (4) the city's late-submitted information on traffic impacts triggered the requirement that the EIR be recirculated. We address each of these issues.

**A. Near-term future baseline**

The DKS traffic study evaluated 16 intersections and eight roadway and freeway segments near the project site. The [*118] study analyzed the traffic conditions of these intersections and roadway segments during peak weekday a.m. and p.m. hours for the following scenarios: existing condition, 2010 background condition, 2010 background with project condition, 2030 cumulative no-project condition, and 2030 cumulative with project condition.

The EIR stated that the scenarios were selected to be consistent with other traffic studies prepared for the city, and they are typical of comprehensive traffic analysis. The EIR described the 2010 background condition as a "near-term future baseline condition," and the project's potential traffic impacts were measured against this condition. The EIR explained that the 2010 background condition was used as the baseline because it "provides an accurate comparison rather than a comparison to the Existing Conditions, since the Background Scenario includes other known approved development that will be built and occupied prior to the proposed project."

The estimated number of daily vehicle trips the project would generate was determined based on the number of employees anticipated to work onsite, plus anticipated heavy truck operations. These project-generated trips were added [*119] to the 2010 background condition for the 2010 background with project condition. For roadway segments, all segments were determined to operate at an acceptable LOS during morning and evening peak hours under all three scenarios (the existing condition, the 2010 background condition, and the 2010 background with project condition).

For intersections, under the existing condition scenario, all intersections were found to operate at an acceptable LOS during the a.m. and p.m. peak hours. Under the 2010 background condition, most intersections were found to operate at an acceptable level, but five location/time/direction measurements [9] were determined to operate at an unacceptable LOS. The 2010 background with project condition did not cause any additional intersection measurements to operate at an unacceptable level and did not contribute more than five percent volume to any of the five intersection measurements already operating at LOS E or F under the 2010 background condition. As a result, the EIR concluded that the impact of the project on intersection LOS

would be less than significant.

**FOOTNOTES**

[9] For intersections, LOS is measured as average delay in seconds per vehicle passing through the intersection; [*120] the longer the delay, the worse the LOS. The delay times are estimated at each intersection (location) during the morning and evening peak hours (time), and, for intersections without signals, the approach and direction of vehicles entering the intersection (direction) is also taken into account.

The challengers argue that the EIR used an unlawful hypothetical future baseline that understated the project's impacts on existing traffic. They cite *Madera Oversight, supra*, 199 Cal.App.4th at pages 89-90, which held that the baseline used in an EIR must reflect existing conditions, and "lead agencies do not have the discretion to adopt a baseline that uses conditions predicted to occur on a date subsequent to the certification of the EIR ...." The respondents distinguish the facts of *Madera Oversight*, pointing out that the EIR in that case lacked clarity regarding what conditions were used as the baseline in analyzing traffic impacts, and the future traffic scenario discussed was for the year 2025—more than 20 years after the EIR was certified. (*Id.* at pp. 59, 95.)

In contrast, the respondents argue, the near-term future baseline used in this case was not speculative or based on anticipated [*121] conditions far into the future. Instead, the 2010 background condition was based on conditions expected from existing, approved projects, including residential units, restaurants, gas stations, retail centers, and a motel/hotel—along with estimated numbers of vehicle trips related to each project.

The respondents rely on *Pfeiffer v. City of Sunnyvale City Council* (2011) 200 Cal.App.4th 1552 (*Pfeiffer*). In *Pfeiffer*, the EIR's traffic analysis evaluated existing conditions, background conditions, project conditions, and cumulative conditions. Like the EIR in the present case, the background conditions in *Pfeiffer* included "'traffic from approved but not yet constructed developments in the area.'" (*Id.* at p. 1571.) Like the challengers in the present case, the appellants argued that "the EIR improperly used hypothetical 'background conditions' instead of existing conditions as the traffic baseline." (*Id.* at p. 1569.) The *Pfeiffer* court rejected the appellants' argument, concluding that there was substantial evidence that the traffic conditions could change from existing conditions, based on "the construction of already-approved developments." In addition, the court noted that the EIR included [*122] existing conditions in its analysis of traffic impacts. (*Id.* at p. 1572.)

We agree with the respondents that the facts of this case are more similar to the facts of *Pfeiffer* than the facts of *Madera Oversight.* To the extent *Pfeiffer* and *Madera Oversight* are in conflict, however, we need not resolve the matter in this case. The challengers' argument is that the EIR

omitted a correct analysis of the project's traffic impact, which would have examined the project's impact in relation to a baseline of existing traffic conditions. In other words, they argue that the EIR was not sufficient as an informative document. Assuming, for the sake of argument, that the 2010 background condition was an incorrect baseline in this case, we conclude that there was no prejudice.

"Noncompliance with CEQA's information disclosure requirements is not per se reversible; prejudice must be shown." (*Irritated Residents, supra*, 107 Cal.App.4th at p. 1391.) "Failure to comply with the information disclosure requirements constitutes a prejudicial abuse of discretion when the omission of relevant information has precluded informed decisionmaking and informed public participation, regardless whether a different outcome [*123] would have resulted if the public agency had complied with the disclosure requirements." (*Bakersfield Citizens, supra*, 124 Cal.App.4th at p. 1198.) An omission is prejudicial "if the decision makers or the public is deprived of information necessary to make a meaningful assessment of the environmental impacts." (*Ballona Wetlands, supra*, 201 Cal.App.4th at p. 468.) In this case, the EIR contained information that allowed readers to compare the additional traffic caused by the project to the existing traffic conditions. Consequently, the decision makers and the public were provided sufficient information to assess the project's traffic impacts.

As we have mentioned, the EIR determined that all roadway and freeway segments would operate at an acceptable LOS under all three scenarios, the existing condition, the 2010 background condition, and the 2010 background with project condition. Since the 2010 background condition assumed an *increase* in traffic compared to the existing condition, and the 2010 background condition plus project-generated trips resulted in an acceptable LOS, readers of the EIR would have sufficient information to see that the existing condition plus project-generated [*124] trips also would result in an acceptable LOS.

For intersections, the EIR provided a map of intersection traffic volume for the existing condition, Exhibit 4.11-1, and another map showing the intersection traffic volume of the estimated trips generated by the project alone, Exhibit 4.11-2 found on page 4.11-24 of the draft EIR. (We provide the page number because the draft EIR labels two different maps "Exhibit 4.11-2.") It is true that the EIR did not provide a third map showing the intersection traffic volume of the existing condition plus project-generated trips. Instead, the EIR provided maps of the intersection volumes of the 2010 background condition and of the 2010 background with project condition. Nor did the EIR provide a table of intersection LOS grades for the scenario existing condition plus project-generated trips.

Even so, comparing the map of existing intersection traffic volume to the map showing the intersection traffic volume of project-generated trips, readers could understand the impact of the project in relation to the existing condition. For example, Exhibit 4.11-1 shows that, under the existing condition, an average of 53 westbound vehicles pass through intersection [*125] 15 during the peak weekday morning hour. Exhibit 4.11-2 shows that estimated project-generated trips would contribute on average another 72 vehicles. Thus, readers had sufficient information to see that the project would more than double the volume of westbound vehicles at Mission Avenue and State Route 99 during the peak weekday morning hour. Indeed, Exhibit 4.11-2 by itself illustrates the change (i.e., increase) in intersection traffic volume that would result from

the project, regardless of the baseline condition against which it is evaluated. Since the EIR also included the existing traffic conditions, the decision makers and the public had the "information necessary to make a meaningful assessment of the environmental impacts" with respect to traffic. (*Ballona Wetlands, supra*, 201 Cal.App.4th at p. 468.)

The challengers also argue that the EIR's use of the 2010 background condition as the baseline may have served to understate or hide the project's effect, misleading readers about the project's "true" impact on traffic. The record, however, shows that this did not happen. Using the 2010 background condition as the baseline, the EIR concluded that the project would not have a significant [*126] impact on intersection traffic. After the final EIR was released and in response to a post-comment-period letter from Alliance, DKS conducted an intersection analysis using the scenario existing condition plus project generated trips. The results showed that all intersections would continue to operate at an acceptable LOS and therefore the project had no significant impact. In other words, whether the baseline is the existing condition or the 2010 background condition, the project would not have a significant impact on intersection traffic. Thus, even if the EIR used an incorrect baseline, it did not provide an incorrect or misleading impact finding. The challengers' concern that the 2010 background condition masked a significant impact to intersection traffic is unfounded.

In addition, the challengers claim that the final EIR did not adequately respond to Alliance's comments. Alliance asked traffic engineer Dan Smith to review the draft EIR. He wrote that the DKS traffic study was inadequate because it lacked analysis of an "'Existing + Project'" traffic scenario. The final EIR responded to Smith's concern, explaining that the traffic analysis was prepared using standard industry methodologies, [*127] adhered to the city's guidelines, and was consistent with the methodology used by the EIR consultant to prepare many other traffic impact studies in jurisdictions throughout California. This was in addition to the explanation stated in the draft EIR—that the 2010 background condition was a more accurate comparison because it included developments that would be built and occupied by the time the proposed project began.

We observe that the final EIR was released and certified before *Madera Oversight, supra*, 199 Cal.App.4th 48, was filed. As a result, the city did not have the benefit of the *Madera Oversight* decision when it prepared the final EIR. [10] Further, other courts have since approved the use of a future baseline for traffic impact analysis, and the issue is currently pending before our Supreme Court in *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2012) 205 Cal.App.4th 552, review granted August 8, 2012, S202828. (See also *Pfeiffer, supra*, 200 Cal.App.4th at p. 1573.) For this reason, we conclude that the final EIR's response was made in good faith and was adequate under the circumstances. (*Twain Hart Homeowners, supra*, 138 Cal.App.3d at p. 686.)

**FOOTNOTES**

[10] The [*128] court in *Madera Oversight* relied on *Sunnyvale West Neighborhood Assn. v. City of Sunnyvale City Council* (2010) 190 Cal.App.4th 1351, 1380. (*Madera Oversight, supra*, 199 Cal.App.4th at p. 89.) The *Sunnyvale* decision also came out after the final EIR was released

and certified in this case.

Finally, the challengers argue that, even if a future baseline were appropriate, the EIR in this case artificially inflated its selected baseline. In his comment letter (submitted by Alliance during the public comment period), Smith wrote that the 2010 background condition assumed that 1,853 residential housing units would be constructed and occupied in the project vicinity and would be generating traffic in excess of 16,500 new vehicle trips. "The problem with this," he asserted, "is that, in today's economic climate, very few of those units are likely to be completed, sold and occupied by Year 2010." The final EIR responded, "Known approved projects were included in the 2010 Background Condition, and the traffic analysis was based on the information and appropriate assumptions at the time of the analysis. While economic conditions are cyclical and will change over time, traffic impact studies follow [*129] this procedure in order to provide a common methodology ...."

Essentially, the challengers' argument is that there was no substantial evidence to support the 2010 background condition used in the traffic analysis. This argument fails. The EIR included a list of approved projects, including the number of planned residential units. This list was used to estimate the "new trips expected to be generated by the approved projects within the study area." The EIR explained the methodology used: "The trip generation for the approved projects in the study area was determined based on the standard trip rates published in the Institute of Transportation Engineers (ITE), Trip Generation, 7th Edition, 2003 for weekday conditions ...." This was substantial evidence to support the 2010 background condition. By contrast, the challengers do not point to any evidence in the record showing that any of the approved projects were not built or were built but remained vacant. Nor do they challenge the ITE trip rates used for estimating the additional traffic generated by the approved projects.

**B. Estimate of project-generated trips**

The challengers claim that the EIR underestimated the number of trips the project [*130] would generate, thereby understating the project's traffic impacts.

The DKS traffic study estimated the number of project-generated trips "based on a week-long trip generation survey conducted at the Wal-Mart distribution center in Apple Valley, San Bernardino County, in August 2006. It was assumed the number of trips generated by the project is proportional to the total number of employees."

In his comment letter, Smith wrote that sales of consumer shopping goods in some months are vastly higher than in August, and the peak month of the year for shopping centers is as much as 39 percent higher than in August. He reasoned that movement in and out of Wal-Mart distribution centers likely would be higher by about the same proportion. "Hence," Smith argued, "the trip generation estimates, particularly the estimates of truck traffic, do not represent a peak or 'design level' or necessarily even an average trip generation for the Project."

The final EIR responded to Smith's concern:

"The trip generation forecast that was used in the traffic analysis was based on a survey of a similar facility in Apple Valley, California, and was conducted in a manner and during a [time frame] that was considered [*131] representative of average conditions and appropriate for analysis. The number of trips from the trip generation survey at the Apple Valley site included all trip purposes (e.g., trucks, automobiles, deliveries, staff, and other trips associated with the facility). The surveys reflect the shift patterns of workers, the arrivals and departures during the morning and afternoon peak hours, and the average vehicle occupancy.... The survey data was peer reviewed by an independent consultant and considered appropriate for use in the DEIR. [¶] It is industry standard practice that traffic analyses and trip generation surveys are based on average typical conditions, and not peak conditions. For example, shopping malls are not surveyed at Christmas for their trip generation and parking characteristics as this represents the peak and not typical condition. Using peak conditions would overstate the potential impacts and their frequency of occurrence."

The challengers assert that the EIR understated the project's traffic impacts by using "the lowest possible time period of the year." They offer no evidence to support this assertion. Their consultant wrote only that August was not the peak month [*132] for retail sales; he did not claim that August is the least busy month of the year for retail distribution centers. The EIR stated that the time period used was "representative of average conditions." To the extent they claim that traffic studies *must* use a project's peak period of operation to estimate project-generated trips, and CEQA bars the alternative method of using an average or representative period of operation, the challengers offer no authority for this position. This appears to be no more than a disagreement between experts over methodology. (*Laurel Heights I, supra*, 47 Cal.3d at p. 409 [disagreement among experts does not make EIR inadequate].)

**C. Projected truck routes**

The challengers object to the methodology used in the traffic study to predict the routes of project-generated truck traffic. The EIR explained that trip distribution was estimated "based on regional distribution of residences in Merced County and around the study area," and "[b]ased on prevailing traffic patterns, roadway capacity, and consultation with the City of Merced and Wal-Mart Stores, Inc., [State Route] 99, [State Route] 140 and [State Route] 152 were designated as the major routes that would service [*133] the proposed project site."

The challengers argue that truck routes should have been estimated based on the locations of the project's source of goods and the regional retail stores that will take delivery from the project. Smith raised this issue in his comment letter. In a master response on trucks and transportation, the final EIR explained that the truck routes were carefully reviewed by city staff, and, in addition, "a comprehensive peer review of the traffic analysis was commissioned by the City of Merced and conducted by an independent consultant." The response stated, "The truck routing is based on the most logical routes to access [State Route] 99, [State Route] 140 and the regional roadway network. Truck routes are typically the shortest routes between a site and the regional roadway network, and that is the case here as well." Further, the response pointed out that, in a comment letter from the Merced County Department of Public Works, the director of specialty programs wrote that the county had reviewed the draft EIR and was "in agreement with the

assumptions and the methodology of the traffic study ...."

Since the challengers' argument is a disagreement with the methodology [*134] used, it is reviewed for substantial evidence. (*Bakersfield Citizens, supra*, 124 Cal.App.4th at p. 1198.) The challengers, however, have not shown that there is no evidence reasonably supporting the methodology used; they simply believe there was a better methodology that should have been used. Consequently, their argument fails. (*Laurel Heights I, supra*, 47 Cal.3d at p. 409 [disagreement among experts does not make an EIR inadequate; "the issue is not whether the studies are irrefutable or whether they could have been better"].)

The challengers' claim that the city did not respond to Smith's comment on truck routes also fails. The city explained that the methodologies used in the traffic analysis had been peer reviewed and approved by the county department of public works, and the predicted truck routes were the shortest routes between the site and the regional roadway network. The final EIR's master response was responsive to Smith's comment and was adequate.

**D. Modification of a mitigation measure**

The draft EIR included a mitigation measure that required Wal-Mart to implement an employee trip-reduction plan and meet a certain milestone. In response to comments from Wal-Mart, the final [*135] EIR modified the mitigation measure. The challengers claim that the modification was improper. This claim is without merit.

Mitigation Measure 4.2-2b in the draft EIR provided, "The applicant shall develop and implement an employee trip reduction program that minimizes the percentage of employee commute trips in single occupancy vehicles. At a minimum, the program shall ensure that at least 25% of employee commute trips occur by some other transportation mode than a single occupancy vehicle."

During the public comment period, Wal-Mart submitted comments on the draft EIR. Wal-Mart explained that it already had a rideshare program and it would tailor the program specifically to this facility. Wal-Mart wrote that it could not guarantee a 25 percent reduction in single occupancy vehicle trips by employees, however, because it "simply cannot mandate how employees travel to work."

In response to Wal-Mart's comment, the final EIR stated that Wal-Mart was correct and the mitigation measure would be revised: "Pursuant to California Health and Safety Code Section 40717.9, no city, air district, ... or congestion management agency can require an employer to implement an employee trip reduction program. [*136] However, the City can *require* feasible mitigation measures, including design features and program incentives ... that strive to reduce the total number of employee commute trips. The text of Mitigation Measure 4.2-2b has been altered so that a performance standard (i.e., a 25% reduction in [single occupancy vehicle] employee commute trips) is no longer required."

The final EIR modified Mitigation Measure 4.2-2b to provide that "[t]he applicant shall implement design features and develop program incentives that discourage employees from

commuting in single occupant vehicles ... in order to reduce associated mobile-source emissions."

The challengers argue that the city's interpretation of Health and Safety Code section 40717.9 is wrong. The statute provides:
"(a) Notwithstanding Section 40454, 40457, 40717, 40717.1, or 40717.5, or any other provision of law, a district, congestion management agency, as defined in subdivision (b) of Section 65088.1 of the Government Code, or any other public agency shall not require an employer to implement an employee trip reduction program unless the program is expressly required by federal law and the elimination of the program will result in the imposition [*137] of federal sanctions, including, but not limited to, the loss of federal funds for transportation purposes.

"(b) Nothing in this section shall preclude a public agency from regulating indirect sources in any manner that is not specifically prohibited by this section, where otherwise authorized by law." (Health & Saf. Code, § 40717.9.)

The challengers argue that this statute applies to local air districts but not cities and counties. They ignore the fact that the statute applies to "any other public agency," not just local air districts. The challengers also argue that the statute is only intended to prevent local air districts from adopting regulations of general application to existing businesses; it is not intended to prevent individual cities and counties from imposing requirements on individual employers. The language of the statute does support their interpretation. Health and Safety Code section 40717.9, subdivision (a), states, "any other public agency shall not require an employer to implement an employee trip reduction program unless the program is expressly required by federal law ...." The final EIR reasonably interpreted the statute to mean that Merced, a lead agency, could [*138] not require Wal-Mart, an employer, to implement such a program. (See Remy et. al., Guide to CEQA (2006 ed.) p. 542 [Health & Saf. Code, § 40717.9 "eliminates employee trip reduction programs as one of the types of mitigation that cities and counties can impose under CEQA for impacts on air quality and transportation facilities"].)

In any event, the challengers have not shown that the city's modification of the mitigation measure is a violation of CEQA. The purpose of Mitigation Measure 4.2-2b (both the original version in the draft EIR and the modified version in the final EIR) is to reduce NOx and PM10 emissions by reducing the number of vehicle trips by employees. To the extent the challengers' claim is that the final EIR lacked sufficient mitigation measures, they offer no evidence to support this claim. (See *Laurel Heights I, supra*, 47 Cal.3d at pp. 407-413 [rejecting appellants' contention that EIR did not provide sufficient mitigation measures where substantial evidence supported agency's conclusion that measures mitigated impacts]; *California Native Plant Society v. City of Rancho Cordova, supra*, 172 Cal.App.4th at p. 626 [challenger must show that evidence could not reasonably [*139] support agency's finding].) The respondents point out that the final EIR concluded that implementation of another mitigation measure—an emission-reduction agreement with the SJVAPCD—would reduce NOx and PM10 emissions to less-than-significant levels.

Finally, the challengers claim that modifying Mitigation Measure 4.2-2b was a significant

change and the city was required to recirculate the EIR. Like their other recirculation claims, this one fails because the change to the mitigation measure did not disclose a new significant impact, increase the severity of an impact, identify a feasible project alternative or mitigation measure, or "deprive[] the public of a meaningful opportunity to comment upon a *substantial* adverse environmental effect ...." (*Laurel Heights II, supra*, 6 Cal.4th at p. 1129.)

**E. Late-submitted information**

Smith wrote a second comment letter criticizing the traffic analysis in the final EIR. DKS prepared a response that explained in detail why the methodologies used in its traffic study were sound. In addition, to allay Smith's concern, DKS conducted an analysis of the study intersections using the baseline Smith suggested—the existing condition plus project-generated [*140] trips. This analysis showed that "there would be no new findings compared to the DEIR traffic analysis." All intersections would operate at an acceptable LOS under the scenario existing condition plus project-generated trips.

The challengers argue that, because the respondents cited DKS's analysis to defend the EIR before the superior court, this must have been significant new information that required recirculation. Once again, their recirculation argument fails. The DKS response letter and new analysis did not disclose a new significant impact, increase the severity of an impact, identify a feasible project alternative or mitigation measure, or "deprive[] the public of a meaningful opportunity to comment upon a *substantial* adverse environmental effect ...." (*Laurel Heights II, supra*, 6 Cal.4th at p. 1129.) The letter and analysis were prepared especially to respond to Alliance's concerns, not to change any aspect of the project, mitigation measures, or findings and conclusions in the EIR. Our conclusion applies to the use of a traffic study conducted in the month of August as well.

**VI. Urban decay**

The challengers believe that the project will lead to the development of many more Wal-Mart [*141] retail stores in the region, and therefore the EIR was required to assess the potential urban decay that could be caused by these new stores. We agree with the respondents that the city was not required to engage in such a speculative analysis.

In a section titled, "Environmental Issues Not Addressed," the draft EIR briefly mentioned issues that would not be examined—for example, landslides, tsunamis, and urban decay. The draft EIR explained the reasons the city and EDAW believed that the possibility that the project could lead to the development of additional Wal-Mart stores, which in turn could cause urban decay in the vicinity of those stores, was too speculative to analyze further:
"The potential for urban decay is a topic that is sometimes included in environmental impact reports, particularly for large retail projects. In a situation such as the subject project, there could be concern over the potential impact a large retail supplier could have on existing businesses in the community if it were to improve the functioning of existing retail outlets or facilitate the development of new retail establishments. Bigbox, or warehouse, retail facilities are sometimes suspected of having [*142] a negative financial impact on existing, smaller retail establishments. An analysis of potential for urban decay does not, however, address direct impacts on the

financial health of these existing retail competitors. Rather, it would assess the potential impact of businesses leaving the community, because of an inability to financially compete, resulting in vacant buildings. In other words, the financial impact on local business is not an environmental issue that can be addressed in an environmental impact report. However, if enough local retail businesses were forced to close as a result of a new project, this could lead to vacant buildings. Vacant buildings can have a variety of environmental impacts on a community and would be considered a form of urban decay which is an environmental impact.

"As noted in Chapter 3, 'Project Description,' the proposed project is not a retail facility; rather, it is a regional warehouse that would supply retail facilities within a large radius of the project site. As described by the project proponent, this project is designed primarily to fill an existing gap in Wal-Mart's distribution system that supplies its retail facilities, and would make existing [*143] distribution activities more efficient. However, it is possible that the project could support the operation of new Wal-Mart retail stores. Depending on where any new retail facilities are built, it is possible that such construction could contribute to urban decay in a nearby community.

"The City of Merced has determined that the proposed project does not have the potential to create urban decay in existing developed areas beyond the project site. This determination is based on the fact that the proposed project would not be a retail outlet for goods and would not supply groceries to Wal-Mart retail outlets. The distribution center would not compete for a client base that could result in adverse affects to other businesses in the region. Similarly, it is too speculative to attempt to analyze whether or not the proposed distribution center would cause urban decay anywhere beyond Merced. Therefore, an analysis of the potential environmental impacts associated with urban decay is not included in the EIR. EDAW and the City believe that the factual situations for such analysis, such as if and where new Wal-Mart stores would go in, and whether those facilities would possibly foster urban [*144] decay, are unknown and unknowable, and thus the potential impact is too speculative to analyze in this EIR."

Addressing growth-inducing impacts of the project, the draft EIR stated, "[T]he proposed project would not include a resident population and would not be a retail outlet for goods and services. Any growth-inducing effect the proposed regional distribution center may have relative to new Wal-Mart retail stores in the area or beyond is difficult to accurately determine. The proposed project can be viewed as a means to simply improve the service to existing retail outlets, given the fact that proximity to a distribution warehouse in and of itself and in the absence of consumer demand is not likely to warrant construction of a new retail facility."

During the public comment period, Alliance wrote that the draft EIR failed to assess the impacts of potential new Wal-Mart stores "by studiously not providing any information about Wal-Mart's plans to expand retail operations in this region." Alliance described the draft EIR as "evasive" on this issue. Economist Philip King reviewed the draft EIR for Alliance and wrote that Wal-Mart had already announced plans to build new stores in a number [*145] of locations that could be serviced by the project, such as Tracy, Clovis, and Sonora.

The final EIR responded to Alliance's comment, "[T]he Draft EIR does disclose the possibility

for the project increasing viability of retail stores due [to] the increased shipping accessibility, but also that it is impossible to analyze such impacts, such as urban decay, without gross speculation."

CEQA does not treat economic and social effects of a project as significant impacts on the environment. (Guidelines, § 15131.)
"[E]conomic and social changes may not be regarded, in themselves, as a significant change in the environment but may be considered if they are associated with a physical change. (Guidelines, § 15064, subd. (e).).... [¶] A physical change in the environment caused by economic and social factors attributable to a project would be an indirect physical change in the environment. (Guidelines, § 15064, subd. (d)(2).) An indirect physical change may be considered only if it is reasonably likely to occur. (Guidelines, § 15064, subd. (d)(3).) A change which is speculative or unlikely to occur is not reasonably foreseeable. (*Ibid.*)" (*Friends of Davis v. City of Davis* (2000) 83 Cal.App.4th 1004, 1019-1020.)

The [*146] respondents argue that a discussion of urban decay effects that may be caused by future Wal-Mart stores would be speculative, not reasonably foreseeable. They rely on *Del Mar Terrace Conservancy, Inc. v. City Council* (1992) 10 Cal.App.4th 712 (*Del Mar Terrace*), disapproved on another point by *Western States Petroleum, supra*, 9 Cal.4th at pages 570, footnote 2 and 576, footnote 6, and *National Parks & Conservation Assn. v. County of Riverside* (1996) 42 Cal.App.4th 1505 (*National Parks*).

In *Del Mar Terrace*, the court held that the EIR for a highway segment project was not required to discuss the impacts of a possible connection to another highway segment, which was not yet at the project stage. (*Del Mar Terrace, supra*, 10 Cal.App.4th at pp. 738-739.) In so doing, the court observed that "an EIR need not contain discussion of specific future action 'that is merely contemplated or a gleam in a planner's eye.'" (*Id.* at p. 738 [quoting *Laurel Heights I, supra*, 47 Cal.3d at p. 398].)

In *National Parks*, the court held that the EIR for a landfill project was not required to analyze the impacts of possible future material recover facilities (MRF's), which would process trash to be dumped in the [*147] landfill. (*National Parks, supra*, 42 Cal.App.4th at pp. 1509, 1518-1520.) The court explained that environmental assessments are not required "where an EIR cannot currently provide meaningful information about speculative future projects." (*Id.* at p. 1520.) The court also observed, "Moreover, the landfill project makes no commitment to build MRF's as future facilities; these processing facilities will be built separately." (*Ibid.*)

We find these cases persuasive. In this case, the proposed distribution center does not commit Wal-Mart to build future retail stores, and the challengers do not point to any planned Wal-Mart stores that are dependent on the project. The city reasonably determined that it could not provide meaningful information about speculative future Wal-Mart stores and potential urban decay effects that could result from such stores. (See *Del Mar Terrace, supra*, 10 Cal.App.4th at p. 739 ["More detailed analysis of such potential future activity would have been unduly speculative"].)

The challengers claim that the city's response to Alliance's comments was not made in good

faith. They argue that the city should have required Wal-Mart to provide them with its expansion plans. [*148] They rely on section 21160, which provides that, when an applicant applies for a permit, "the public agency may require that person to submit data and information which may be necessary to enable the public agency to determine whether the proposed project may have a significant effect on the environment." Section 21160 did not compel the city to request expansion plans from Wal-Mart in this case. Such expansion plans would represent only "'a gleam in [Wal-Mart's] eye,'" not meaningful information about where and when future Wal-Mart stores actually will be built and operated. (*Del Mar Terrace, supra*, 10 Cal.App.4th at p. 738.) Consequently, the city could reasonably conclude that such information was not necessary to determine the environmental impacts of the project. The draft EIR disclosed that the project could support the operation of new Wal-Mart stores, and it was possible that, if new stores were built, they could contribute to urban decay in nearby communities. The EIR was not required to speculate further.

The challengers also argue that late-submitted information from the city required recirculation of the EIR. The information they refer to is Parker's letter, which explained [*149] in more detail why the city concluded that examining the effect the project would have on the development of future Wal-Mart stores would be speculative. For example, he wrote:
"A number of factors incentivize general merchandise retailers to locate in any given area. Of primary importance is locating stores in sizeable population centers with available discretionary income. Within these markets, retailers generally pursue sites with high auto traffic and visibility. Limited consideration is given to logistical support as logistic centers generally follow location decisions, rather than lead. In other words, logistic centers have not traditionally been the driving force behind expansion but have followed expansion of retail locations which are made by perceived market opportunities within a given geography. Moreover, distribution centers alone do not generate revenue for retailers but depend on store sales to justify their operation.

"Further, and not over-riding the previous statement, the extent to which a distribution center may induce additional stores is speculative. As mentioned, many market factors drive location decisions of retailers. The potential gain in logistic efficiencies [*150] neither decides nor precludes the establishment of future Wal-Mart retail stores in California. If sufficient market demand for additional Wal-Mart stores exists in California, then Wal-Mart and most other national retailers will attempt to build additional stores to fulfill that demand. There are approximately seven Wal-Mart distribution centers in California. The addition of one new distribution center is not necessarily the tipping point for future Wal-Mart expansion, nor would the rejection of the distribution center's application necessarily stall future Wal-Mart expansion in California."

This response did not disclose a new significant impact, increase the severity of an impact, identify a feasible project alternative or mitigation measure, or "deprive[] the public of a meaningful opportunity to comment upon a *substantial* adverse environmental effect ...." (*Laurel Heights II, supra*, 6 Cal.4th at p. 1129.) Parker's letter merely expanded upon an already adequate explanation in the draft EIR.

In addition, the challengers point to a letter submitted to the city by Wal-Mart's litigation attorneys which questioned King's credibility and neutrality; they argue that they did not have [*151] an opportunity to respond to the attack on their expert's credibility. Even so, the letter contained no significant new information that would trigger the requirement to recirculate the EIR.

Finally, the challengers attempt to make a substantial evidence argument by asserting that the city and EDAW are feigning ignorance of Wal-Mart's "plans to use the Project as a springboard for regional growth plans ...." This assertion, however, does not show that it was unreasonable for the city to determine that it would be speculative to attempt to assess urban-decay impacts of potential future Wal-Mart stores in unknown locations. Consequently, this argument fails.

**VII. Visual impacts**

Section 4.13 of the EIR discussed aesthetic and visual impacts. The proposed distribution center would operate 24 hours per day and would be continuously illuminated. The EIR described the preliminary lighting specifications:
"According to the project description, site lighting would consist of metal halide lamps atop 45-foot high poles. The lighting would be designed so that light would not shine beyond the property line, except at road intersections. The primary target of illumination would be horizontal ground [*152] surfaces, including pathways, driveways, and parking lots. However, vertical wall surfaces could also be illuminated. An average illumination level of 0.5 footcandle is anticipated. (One footcandle is the amount of light caused by a single candle a distance of 1 foot from a flat surface). The lighting plan has not been designed based on a uniformity ratio. That is, the level of illumination is not proposed to be consistent throughout the project site. Accordingly, areas with high activity would likely be more highly illuminated than low activity areas."

The project site currently contains no sources of illumination, and the sources of illumination in the immediate surrounding area are limited in number intensity. Finding that the "project would result in a very noticeable increase in illumination on and from the site that would be readily visible from all of the public streets abutting the site and [from] vantage points beyond," the EIR identified Impact 4.13-3 as the potential for creating substantial light or glare that would affect nighttime views.

The EIR noted that Wal-Mart had not provided a detailed lighting plan showing the locations and design of the project's outdoor light [*153] fixtures. The EIR determined that there was potential for nighttime "light spillage" to impact vehicles traveling on adjacent roads and on adjoining properties. "Light spillage," the EIR explained, "is illumination that travels beyond the surface it is intended to illuminate." The EIR concluded that the potential for light spillage was a potentially significant impact.

Mitigation Measure 4.13-3 would require Wal-Mart to prepare a lighting plan for review and approval by the city. The plan would identify design, placement, orientation, and illumination level of all light fixtures. The measure also provided, "The lighting plan shall specify that no

illumination source (including light bulb and reflector) shall be visible beyond the property line. The exception to this performance standard is at driveway intersections with public streets." With implementation of this mitigation measure, the EIR concluded that the impact to nighttime views would be less than significant.

In assessing cumulative impacts, the EIR considered the nighttime light from the project in combination with other projects. The EIR determined, "The cumulative change of agricultural and open space views in the project [*154] region to urban land uses and the associated increase in nighttime light and glare and subsequent skyglow from past and planned future projects is a cumulatively considerable incremental contribution, and the project's cumulative impact would be **significant.**" It concluded that mitigation measures would not reduce the cumulative impact to a less-than-significant level.

Alliance had consultant Harry Benke review the visual impacts analysis of the draft EIR. He wrote that the project description did not appear to provide sufficient information to conduct an adequate visual analysis. Benke acknowledged that the type (metal halide lamps), height (45 feet), and average lighting level of the lights were provided, but he believed important details were omitted, such as the type of poles, the extent of shielding for the lights, the number and location of the lights, the color of the structures (color has a bearing on reflectivity), the type of paving and fencing, and the landscaping design.

The final EIR responded to Benke's comments: "The project description for the proposed project was prepared consistent with the requirements of CEQA ....As stated in Section 15124 of the CEQA Guidelines, 'the [*155] description of the project shall contain the following information but *should not supply extensive detail beyond that needed for evaluation and review of the environmental impact.*' ... In accordance with CEQA, the project description includes a description of site lighting, buildings and structures, roadways and parking, fencing, and landscaping at a level that is detailed enough for an adequate evaluation and review of visual resources impacts." The response stated that mitigation was recommended in the draft EIR, and "Mr. Benke does not provide any specific disagreements with the analysis provided in the DEIR, and does not offer any evidence that demonstrates how project-related visual resources impacts would remain significant after implementation of mitigation measures 4.13-2 and 4.13-3." The response further noted that detailed information concerning fencing, location of the lights, and color of the structures is not necessary to adequately evaluate the impacts and would not alter the conclusions, and "[t]he commenter does not offer any evidence that demonstrates how project visual resources impacts would remain significant after implementation of mitigation measure 4.13-3; therefore, [*156] no further response can be provided."

On appeal, the challengers contend that the EIR failed to describe the project's visual elements in sufficient detail and failed to disclose the severity of the project's cumulative nighttime illumination and sky glow impacts. They also argue that the response to Benke's comments was inadequate.

An EIR must contain "[a] general description of the project's technical, economic, and environmental characteristics," "but should not supply extensive detail beyond that needed for evaluation and review of the environmental impact." (Guidelines, § 15124.) The challengers rely

on *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818 for the proposition that an EIR cannot avoid describing how severe an impact will be by simply concluding that the impact may be significant. In *Santiago*, the EIR concluded that increased demand upon water available from the local water district would be an unavoidable adverse impact of the project. (*Id.* at p. 828.) Under those circumstances, the court held that the EIR's bare conclusion was insufficient; "What is needed is some information about how adverse the adverse impact will be." (*Id.* at p. 831.) *Santiago* [*157] is distinguishable. In this case, the EIR concluded that the potential impacts from lighting could be mitigated to an insignificant level. Additional detail about the unmitigated lighting conditions would not be necessary to understand the environmental impacts of the project with mitigation.

The respondents cite *Dry Creek, supra*, 70 Cal.App.4th 20, which addresses the level of detail required in an EIR's project description. In that case, the appellants argued that the conceptual description of certain mitigation measures (a bypass channel and water flow diversion structures) was inadequate. (*Id.* at pp. 25, 27.) The court distinguished *Santiago*, which the court described as "omit[ing] an integral component of a proposed project from the project description." (*Dry Creek, supra*, at p. 27.) The EIR in *Dry Creek*, in contrast, included the mitigation measures in the project description, but the appellants claimed that "only precise engineering designs [would] provide the necessary detail to analyze the environmental consequences of the entire project under CEQA." (*Ibid.*) The court rejected the appellants' claim, concluding, "CEQA does not mandate the detail appellants urge this court to [*158] require." (*Id.* at p. 36.) In addition, the court observed, the appellants failed to explain how more detailed engineered drawings would give the public and decision makers a more complete understanding of the environmental consequences of the project. (*Ibid.*)

Similarly, in the present case, precise details of the project's lighting plans were not necessary to evaluate the project's impacts, and we reject the challengers' claim that the EIR failed to describe the project's visual elements sufficiently. We also agree with the respondents that the EIR's discussion of the project's cumulative contribution to nighttime light was adequate. (See *Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 716-717 [EIR for residential development project sufficient under CEQA where agency determined generally that change in land use from open space to "'a more urban quality'" was cumulatively adverse impact on visual resources].) Finally, since the project description in the draft EIR was sufficient, the final EIR's response to Benke's comments—explaining that the project description was detailed enough for evaluation of visual resources impacts—was also adequate.

**VIII. Greenhouse [*159] gas emissions**

The challengers also object to the EIR's discussion of greenhouse gases (GHG's) and global climate change. The EIR stated, "Emissions of [GHG's] contributing to global climate change are attributable in large part to human activities associated with the industrial/manufacturing, utility, transportation, residential, and agricultural sectors ...." Prominent GHG's include carbon dioxide (CO2), methane, and ozone. Unlike criteria air pollutants and TAC's, which are pollutants of regional and local concern, GHG's are global pollutants. The EIR stated, "The quantity of [GHG's] that it takes to ultimately result in climate change is not precisely known; suffice to say, the quantity is enormous, and no single project alone would be expected to measurably

contribute to a noticeable incremental change in the global average temperature, or to global, local, or micro climate. From the standpoint of CEQA, GHG impacts to global climate change are inherently cumulative."

The EIR reported that Assembly Bill No. 32 (AB No. 32), enacted in 2006, "establishes regulatory, reporting, and market mechanisms to achieve quantifiable reductions in GHG emissions and a cap on statewide GHG emissions" [*160] and requires that statewide GHG emission be reduced to 1990 levels by 2020. (See Health & Saf. Code, § 38500 et seq.) AB No. 32 directs the ARB to develop regulations to reduce GHG emissions from stationary sources. The EIR explained, "AB [No.] 32 does not explicitly apply to emissions from land development, though emissions associated with land development projects are closely connected to the utilities, transportation, and commercial end-use sectors." According to the EIR, no local air district in California, including the SJVAPCD, has identified thresholds of significance for GHG's. The EIR stated, however, that a global climate change impact would be considered significant if the project "conflict[s] with or obstruct[s] state or local policies or ordinances established for the purpose of reducing greenhouse gas emissions" or "result[s] in a considerable net increase in greenhouse gases." The EIR explained, "the net change in total levels of [GHG's] generated by a project or activity is the best metric for determining whether the proposed project would contribute to global warming."

Estimates of construction-related GHG emission were calculated using SJVAPCD-recommended parameters [*161] for composition of the construction equipment fleet, ground disturbance acreage, worker trips, and material haul trips. Operation-related emissions were estimated based on vehicle trip information from the DKS traffic study, information about electricity and natural gas consumption at a Wal-Mart distribution center in Porterville, and the SJVAPCD's recommended assumptions. The EIR provided tables of short-term estimated project-generated emissions of CO2 from construction, including asphalt, building construction, and architectural coatings, and long-term estimated emissions from operation, including natural gas use, employee commute trips, truck trips, on-site truck activity, and electricity consumption. The tables showed that construction of the project would generate over 5,000 tons of CO2 during a 12-month construction period, and operation of the project would generate annual emissions of approximately 12,595 tons of CO2.

The EIR determined that construction- and operation-related activities would result in a considerable net increase in emissions of CO2 and other GHG's, and this increase would conflict with the state's AB No. 32 goals. As a result, the EIR concluded that the impact [*162] would be significant.

The EIR noted that mitigation measures proposed to reduce emissions of ozone-precursors and particulate matter would have the added benefit of reducing emissions of CO2. Additional measures were proposed to reduce GHG emissions, such as installing solar panels or other types of alternative energy sources and retaining an existing almond orchard between the proposed truck gate and Campus Parkway. In addition, Wal-Mart would be required to inventory all emissions of GHG's associated with operation of the project according to the most recently established methodologies of the California Climate Action Registry or ARB.

The EIR stated that the results of the proposed mitigation measures could not be fully quantified, and there is no established methodology for verifying GHG reductions from emission-reduction agreements. Further, even with mitigation, the net increase in GHG emissions could still be considered substantial. For these reasons, the EIR concluded that the project's impact on GHG's and global climate change would be significant and unavoidable.

On appeal, the challengers contend that the EIR's treatment of GHG's was inadequate because the EIR failed to account [*163] for all major sources of GHG emissions, failed to quantify the project's GHG emissions after mitigation, and failed to specify standards or protocols for ensuring implementation of the mitigation measures. The challengers also raise recirculation and substantial evidence claims. We are not persuaded by the challengers' contentions.

The challengers argue that the EIR failed to consider (1) GHG's embedded in construction materials and goods distributed through the center and (2) GHG's caused by mitigation measures. The respondents counter that CEQA does not require analysis of these tangential sources.

A new guideline on GHG emissions, which became operative on March 18, 2010, provides, "A lead agency should make a good-faith effort, based to the extent possible on scientific and factual data, to describe, calculate or estimate the amount of greenhouse gas emissions *resulting from* a project." (Guidelines, § 15064.4, subd. (a), italics added.) The respondents point out that the phrase "resulting from" replaced the phrase "associated with," which had been used in a preliminary draft of the guideline. The director of the Governor's Office of Planning and Research (OPR) has explained that [*164] the change was made "to conform to existing CEQA law that requires analysis only of impacts caused by the project" and "to avoid an implication that a 'life-cycle' analysis is required." Although the respondents do not explain the meaning of "life-cycle" analysis in their brief, we assume this refers to the manufacture, transportation, and later disposal of the construction materials and goods. Similarly, the challengers have not explained the term "embedded," which we assume is intended to refer to GHG emissions attributable to the production and transport of the materials. (See *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 172 (*Save the Plastic Bag*) [discussing the '"life cycle"' of paper and plastic bags].)

The respondents argue that the life-cycle impacts of a product would more logically be addressed in the environmental analysis accompanying the permitting of the industry or act that creates the product. This argument appears to have merit. (Cf. *Save the Plastic Bag, supra*, 52 Cal.4th at p. 174 [noting "the city could hardly be expected to trace the provenance of all paper bags that might be purchased by [city] establishments, in order to evaluate [*165] the particular impacts resulting from their manufacture"].) Further, this is a dispute over the methodology used for studying an impact. Since the city has offered a reasoned explanation for its methodology, we decline to interfere. (Guidelines, § 15064.4, subd. (a) [lead agency has discretion to select methodology it considers most appropriate in analyzing GHG impacts].)

We agree with the respondents on the issue of impact analysis of mitigation measures. The challengers argue that the mitigation measures that were proposed to address air quality may have the effect of increasing GHG emissions and, therefore, the EIR was required to discuss the GHG impacts of these mitigation measures. The EIR, however, already concluded that the

project would have a significant and unavoidable impact on GHG emissions. No further analysis of the mitigation measures' impact on GHG emissions was necessary because the mitigation measures would not cause an *additional* significant effect. (Guidelines, § 15126.4, subd. (a)(1)(D) [effect of mitigation measure must be discussed if "measure would cause one or more significant effects in addition to those that would be caused by the project as proposed"].)

We [*166] also reject the challengers' argument that the EIR was inadequate because it failed to quantify GHG emissions after mitigation. The respondents point out that CEQA does not require agencies to quantify the magnitude of emissions after mitigation. Moreover, the draft EIR stated, "at the time of writing this EIR these reductions [from mitigation measures] cannot be fully quantified," and, in response to Alliance's comments on the issue, the final EIR further explained that "there is no method available to accurately estimate how much fuel would be saved by each measure in order to translate into a quantifiable GHG emission reduction." Although the challengers' consultant asserts there are methodologies for quantifying the reduction of GHG emissions, the existence of a disagreement between experts as to whether mitigation of GHG's can be quantified with any accuracy does not make the EIR inadequate. (*Laurel Heights I, supra*, 47 Cal.3d at p. 409.)

We also reject the challengers' claim that the EIR was inadequate for failing to specify standards for quantifying and validating offsets. As the respondents explain, the emission-reduction agreements proposed as mitigation measures are fully [*167] enforceable as all offset fees would be paid prior to issuance of a building permit. Further, to the extent the challengers demand a quantified measure of GHG emissions reduction specifically, the city explained that it was not possible to do so with any accuracy.

The challengers argue that recirculation was required because, in response to one of Alliance's post-comment-period letters, the city submitted a response that included reference to the OPR director's letter discussing life-cycle analysis. This claim fails for the same reason the challengers' other recirculation claims have failed: Reference to this letter (and a copy of the letter itself) did not disclose a new significant impact, increase the severity of an impact, identify a feasible project alternative or mitigation measure, or "deprive[] the public of a meaningful opportunity to comment upon a *substantial* adverse environmental effect ...." (*Laurel Heights II, supra*, 6 Cal.4th at p. 1129.)

Finally, we reject the challengers' substantial evidence claim, which repeats their claim that the EIR was required to consider GHG's embedded in construction materials and goods. This claim fails for the reasons we have already explained.

**IX. [*168] Addition to the final EIR**

Chapter 3 of the draft EIR, "Project Description," gave an overview of the project, described the site location, listed necessary entitlements, and identified the city and Wal-Mart's objectives for the project. Under the heading, "Project Background," the draft EIR described the location of the project site, included maps of the site and surrounding area showing county zoning designations, and stated that the EIR relied on the city general plan EIR, which was adopted in 1997. The city revised this section of chapter 3 by adding the following paragraph to the final EIR:

"In addition, a portion of the project site was included as part of the Lyon's Annexation to the City of Merced, which was approved by LAFCO on January 28, 1999, and a Certificate of Completion was recorded on June 11, 1999. The Expanded Initial Study/Mitigated Negative Declaration [MND] prepared for the annexation includes several mitigation measures, which apply to any development approved within the annexation area. If approved, the proposed project would be required to comply with these mitigation measures. It should be noted that, because many of the mitigation measures required in the Merced [*169] Wal-Mart Distribution Center are more current and more effective than the Lyon's Annexation mitigation, the City may consider, on a case-by-case basis, whether implementation of individual mitigation measures included in the Merced Wal-Mart Distribution Center EIR would meet the mitigation requirements for similar individual mitigation measures required under the Lyon's Annexation project. A copy of the Mitigation Monitoring Plan adopted for the Lyon's Annexation Project is available from the City upon request."

The challengers argue that (1) this addition shows that the draft EIR's project description was incomplete and inaccurate and therefore recirculation was required; (2) the city failed to comply with *Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342 (*Napa Citizens*); (3) the city "violated CEQA's procedures because there is no indication in the record that the applicant will actually be required to comply with any Lyons Annexation mitigation measures that may be applicable to the Project"; (4) the city relied on late-submitted information to defend its action, thereby triggering the requirement to recirculate the EIR; and (5) there [*170] is no substantial evidence to support the city's position regarding the Lyon's Annexation. We address each of these arguments.

First, the challengers interpret the new paragraph to mean that the city intends to incorporate some, but delete other, mitigation measures from the Lyon's Annexation MND. From this premise, they argue that the final EIR demonstrates that the draft EIR's project description was incomplete and inaccurate. We disagree with their interpretation of the added language. The new paragraph provided, "If approved, the proposed project would be required to comply with these [i.e., the Lyon's Annexation] mitigation measures." A reasonable reading of the new paragraph is that the city does not intend to delete any mitigation measures from the Lyon's Annexation MND, but some of the Wal-Mart project's proposed mitigation measures will satisfy the requirements of the earlier mitigation measures.

Further, before the challengers initiated this lawsuit, the city explained that the challengers' reading of the new paragraph was incorrect. In a letter dated September 23, 2009 (55 days after the final EIR was released), Alliance objected to the added language to the final EIR based [*171] on its understanding that some of the Lyon's Annexation mitigation measures would be deleted. Two days later, in a memorandum dated September 25, 2009, the city responded to Alliance's concern. The memorandum pointed out that added language included the proviso, "the proposed project would be required to comply with these mitigation measures." The memorandum continued:
"The language added to the FEIR went on to explain that where a more specific, a more up-to-date, or a more stringent mitigation measure had been developed to address a particular impact of the Wal-Mart Distribution Center, that more specific, more up-to-date, or more stringent measure

would be applied. (FEIR, Volume II, p. 4-2.) This was necessary since the Lyons Annexation measures are now a decade old and were developed without an application for a specific development project. As technology has improved, regulations have changed and many of the proposed mitigation measures for the distribution center contain greater detail and are more stringent than the language utilized in the Lyons Annexation measures. The City Attorney's office prepared the language added to FEIR. It was not the intent of that language to suggest [*172] that any of the Lyons Annexation mitigation measures would be eliminated *unless* they were subsumed by a new measure in the Wal-Mart Distribution Center EIR."

Given the city's explanation, the challengers have no basis for continuing to misinterpret the new paragraph in the final EIR. In rejecting the challengers' argument, the superior court wrote, "[T]he Petitioners are asking this Court to conclude that the City plans to violate its 1998 obligations arising from the annexation of [a] portion of the Project Site. The City has not disregarded the [mitigation] measure[s]. [¶] This Court agrees with the City there has not been a violation of CEQA's procedures." We agree with the superior court and reject the premise of the challengers' first argument. Moreover, the challengers' argument does not show that the project description was incomplete or inaccurate.

Second, the rule of *Napa Citizens, supra*, 91 Cal.App.4th 342, does not apply to this case. In *Napa Citizens*, the court held that an agency may delete a previously adopted mitigation measure, but it must state a legitimate reason for doing so, supported by substantial evidence. (*Id.* at p. 359.) In this case, the city has not deleted [*173] any previously adopted mitigation measures.

Third, the mitigation measures from the Lyon's Annexation MND are still in force. In response to a comment letter from a group called San Joaquin Et Al that questioned how the project would "interface" with the Lyon's Annexation MND, the final EIR explained, "mitigation measures adopted as part of the Lyons Annexation will apply to the proposed project" and noted that "[t]he Mitigation Monitoring Plan ... for the Lyon's Annexation Project is a publicly available document." A "lead agency remains responsible for ensuring that implementation of the mitigation measures occurs in accordance with the program" until the mitigation measures have been completed. (Guidelines, § 15097, subd. (a).) Thus, the city continues to be responsible for ensuring the implementation of the Lyon's Annexation mitigation measures. For this reason, we reject the challengers' claim that "there is no indication in the record that the applicant will actually be required to comply with" the Lyon's Annexation mitigation measures.

Fourth, the challengers' recirculation claim—based on the assertion that the September 25, 2009, memorandum was significant new information—is [*174] without merit. The memorandum did not disclose a new significant impact, increase the severity of an impact, identify a feasible project alternative or mitigation measure, or "deprive[] the public of a meaningful opportunity to comment upon a *substantial* adverse environmental effect ...." (*Laurel Heights II, supra*, 6 Cal.4th at p. 1129.)

Fifth, the challengers' substantial evidence claim is based on a faulty assumption. [11] They argue that the city failed to explain (1) what Lyon's Annexation mitigation measures would be

eliminated; (2) which new measures in the project EIR would replace the eliminated Lyon's Annexation mitigation measures; and (3) whether such undisclosed new measures are actually equivalent to the undisclosed Lyon's Annexation mitigation measures that will be eliminated. This argument is unpersuasive because it is premised on the assumption that some of the Lyon's Annexation mitigation measures will be eliminated. The city has explained that no mitigation measures from the Lyon's Annexation MND will be eliminated, but some of those mitigation measures will be satisfied by newer mitigation measures proposed for the Wal-Mart project. The challengers apparently do not [*175] believe the city when it states that the Wal-Mart project will comply with the Lyon's Annexation mitigation measures, but their doubts about the city's intentions do not demonstrate an absence of substantial evidence.

## FOOTNOTES

[11] In addition, we observe that it is not clear from their brief what determination or conclusion in the EIR the challengers claim is not supported by substantial evidence. The heading for this argument reads, "Even If the [City] Could Rely on Its Late-Submitted Information, It Does Not Constitute Substantial Evidence Supporting Its Conclusion Regarding the Lyon's Annexation Project Urban Decay Impacts." The body of the brief, however, does not mention urban-decay impacts. We assume that the determination challenged is the city's position that the Wal-Mart project does not eliminate any of the mitigation measures from the Lyon's Annexation MND.

## ***DISPOSITION***

The judgment is affirmed. Respondents are awarded costs on appeal.

Wiseman, Acting P.J.

WE CONCUR:

Levy, J.

Franson, J.

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