Pacificans for a Scenic Coast, and in favor of Respondent California Department of Transportation and Real Parties in Interest City of Pacifica and San Mateo County Transportation Authority.

Respondents and Real Parties may recover their costs of suit from Petitioner by timely filing memoranda of costs, to which Petitioner may file a timely motion to strike or tax costs.

APPROVED AS TO FORM:

DATED: July 27, 2017

By: */s/ Brian Gaffney*
BRIAN GAFFNEY
Attorney for Petitioner
PACIFICANS FOR A SCENIC COAST

DATED: _____

By: _____
KEVIN D. SIEGEL
Attorney for Real Party in Interest
CITY OF PACIFICA

DATED: _____

By: _____
ADAM W. HOFMANN
Attorney for Real Party in Interest
SAN MATEO COUNTY
TRANSPORTATION AUTHORITY

DATED: July 27, 2017

By: _____
DEREK S. VAN HOFTEN
Attorney for Respondent
CALIFORNIA DEPARTMENT OF
TRANSPORTATION

IT IS SO ORDERED.

Dated: _____

_____
HON. MARIE S. WEINER
Judge of the Superior Court

Pacificans for a Scenic Coast, and in favor of Respondent California Department of Transportation and Real Parties in Interest City of Pacifica and San Mateo County Transportation Authority.

Respondents and Real Parties may recover their costs of suit from Petitioner by timely filing memoranda of costs, to which Petitioner may file a timely motion to strike or tax costs.

APPROVED AS TO FORM:

DATED: _____

By: _____
BRIAN GAFFNEY
Attorney for Petitioner
PACIFICANS FOR A SCENIC COAST

DATED: 7/27/17

By: _____
KEVIN D. SIEGEL
Attorney for Real Party in Interest
CITY OF PACIFICA

DATED: _____

By: _____
ADAM W. HOFMANN
Attorney for Real Party in Interest
SAN MATEO COUNTY
TRANSPORTATION AUTHORITY

DATED: _____

By: _____
DEREK S. VAN HOFTEN
Attorney for Respondent
CALIFORNIA DEPARTMENT OF
TRANSPORTATION

IT IS SO ORDERED.

Dated: _____

_____
HON. MARIE S. WEINER
Judge of the Superior Court

Pacificans for a Scenic Coast, and in favor of Respondent California Department of Transportation and Real Parties in Interest City of Pacifica and San Mateo County Transportation Authority.

Respondents and Real Parties may recover their costs of suit from Petitioner by timely filing memoranda of costs, to which Petitioner may file a timely motion to strike or tax costs.

APPROVED AS TO FORM:

DATED: _____ By: _____
BRIAN GAFFNEY
Attorney for Petitioner
PACIFICANS FOR A SCENIC COAST

DATED: 7/27/17 By: _____
KEVIN D. SIEGEL
Attorney for Real Party in Interest
CITY OF PACIFICA

DATED: 7/27/17 By: _____
ADAM W. HOFMANN
Attorney for Real Party in Interest
SAN MATEO COUNTY
TRANSPORTATION AUTHORITY

DATED: _____ By: _____
DEREK S. VAN HOFTEN
Attorney for Respondent
CALIFORNIA DEPARTMENT OF
TRANSPORTATION

IT IS SO ORDERED AND ADJUDGED. RESPONDENTS SHALL FILE AND SERVE NOTICE OF ENTRY OF JUDGMENT.

Dated: 8/14/17

HON. MARIE S. WEINER
Judge of the Superior Court

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

COMPLEX CIVIL LITIGATION

PACIFICANS FOR A SCENIC COAST, an unincorporated association,

Petitioner and Plaintiff,

vs.

CALIFORNIA DEPARTMENT OF TRANSPORTATION, and DOES 1-10,

Respondents and Defendants,

_____/

SAN MATEO COUNTY TRANSPORTATION AUTHORITY, CITY OF PACIFICA, and DOES 11-50,

Real Parties in Interest and Defendants.

_____/

Civil No. 523973
CEQA

Assigned for All Purposes to
Hon. Marie S. Weiner, Dept. 2

FINAL STATEMENT OF DECISION

Trial/Hearing was held on the Petition for Writ of Mandate in Department 2 before the Honorable Marie S. Weiner. Celeste Langille, Esq. and Brian Gaffney, Esq. appeared on behalf of Petitioner Pacificans for a Scenic Coast, Derek van Hoften, Esq. and Stacy Lau, Esq. appeared on behalf of Respondent California Department of

EXHIBIT A

Transportation ("Caltrans"); Kevin Siegel, Esq. of Burke Williams & Sorensen LLP appeared on behalf of Real Party in Interest City of Pacifica; Adam Hofmann, Esq. of Hanson Bridgett LLP appeared on behalf of Real Party in Interest San Mateo County Transportation Authority ("SMCTA"), (Caltrans, the City and the SMCTA, together, "Respondents").

Although not mandated by Code of Civil Procedure Sections 632 and 634, the Court finds it appropriate to, nonetheless, issue a Statement of Decision in this complex CEQA case, especially as it is highly likely that it will be the subject of a request for appellate review regardless of who prevails. See, Consolidated Irrigation District v. City of Selma (2012) 304 Cal.App.4th 187, 196, fn. 5.

Upon due consideration of the briefs filed in this action, the administrative record lodged in this case pursuant to Public Resources Code section 21167.6, the oral argument of counsel for the parties, and the Petitioner's Objections to the Proposed Statement of Decision,

IT IS HEREBY DECIDED, ORDERED AND ADJUDGED, as the Final Statement of Decision, as follows:

The Petition for Writ of Mandate alleging violation of CEQA, Public Resources Code Section 21000 *et seq.*. as a "first cause of action" in the First Amended Complaint and Petition is DENIED. The operative pleading is the First Amended Complaint and Petition and it was previously stipulated that the matter would proceed on the Petition only, and not by Complaint.

Respondents and Real Parties in Interest shall prepare, circulate, and submit a proposed Judgment.

THE COURT FINDS, as its Final Statement of Decision, as follows:

I. NATURE OF THE PROJECT

In conjunction with the SMCTA and the City of Pacifica, Caltrans proposed and approved the State Route 1 / Calera Parkway / Highway 1 Widening Project ("Project") to provide operational improvements and decrease congestion on a 1.3-mile stretch of roadway on State Route 1 ("SR 1") within the City of Pacifica. AR 3, 7-10, 441 . The Project would widen SR 1 from four lanes to six lanes from approximately 1,500 feet south of Fassler Avenue to approximately 2,300 feet north of Reina Del Mar Avenue, provide a barrier-protected, landscaped median between San Marlo Way and Reina Del Mar Avenue, make various improvements to the lane configurations of the two intersections within the Project area, and upgrade an existing bicycle / pedestrian path adjacent to SR 1. AR 7, 443, 548. The Project was developed over the course of more than a decade to address congestion and peak period travel delays along a 1.3-mile segment of SR 1 in the City of Pacifica. SR 1, within the Project limits, currently consists of two lanes in each direction, separated by a concrete median barrier, except at two signalized intersection locations at Fassler Avenue/Rockaway Beach Avenue and Reina Del Mar Avenue. AR 10. Existing inside shoulders vary from 2' to 4' wide, while outside shoulders vary from 4' to 8' wide. AR 10. Congestion along this segment of SR 1 results in traffic queues extending up to two miles at peak travel times, and is expected to increase both in magnitude and duration if no improvements are made. AR 11, 441.

The Project would provide operational improvements to SR 1 and address congestion by widening SR 1, primarily on the west side of the roadway, to add one lane in each direction and standard 10-foot outside shoulders throughout the Project limits. AR 443. The Project also proposes: various improvements to the lane configurations at

the Fassler Avenue / Rockaway Beach Avenue and Reina Del Mar intersections with SR 1; upgrades to an existing bicycle / pedestrian path adjacent to the westerly edge of the highway; construction of a new sidewalk along the east side of Harvey Way; construction of storm water treatment facilities; crosswalk upgrades to meet current Americans with Disabilities Act standards; and conversion of Old County Road and San Marlo Way to one-way streets, among other things. AR 13-16.

The Project was initiated by the City of Pacifica and SMCTA, which have participated in and supported the planning and design of the Project through its development. AR 7-8, 4665-4936. The Project improvements fulfill a stated goal of the San Mateo County voter-approved Measure A, which is a half-cent sales tax measure approved in 1988 and reauthorized in 2004, to fund transportation projects throughout the County; Measure A specifically identifies improvements along Highway 1 in Pacifica as an essential priority. AR 7-8. The SMCTA, which was created to fund and administer the sales tax generated under Measure A, is the Project proponent. AR 7, 445. Caltrans is the lead agency for the Project under the California Environmental Quality Act ("CEQA") and National Environmental Policy Act ("NEPA"). AR 445, 7101. The City of Pacifica, as a Project sponsor, completed a Project Study Report for the Project, which Caltrans approved in July 1999. AR 531, 4200-83. In February 2007, the SMCTA approved funds to begin the Project Approval / Environmental Document phase of the Project. AR 8. The Project has been included in both the Metropolitan Transportation Commission's current Regional Transportation Plan for the San Francisco Bay Area, which was adopted on April 22, 2009, and in the Transportation Improvement Program for the San Francisco Bay Area, which was adopted in 2011. AR 531.

From the beginning of formal Project scoping in 2004 to final Project approval in 2013, the Project Development Team – consisting of representatives from Caltrans, SMCTA, the City of Pacifica, and technical and environmental consultants – met regularly internally, with various local, regional, state, and federal agencies, and with the public, to develop the Project. AR 4665-5114. During development of the Project, several other alternative solutions and designs, many of which were proposed by the public – including widening SR 1 for shorter segments, installation of roundabouts at intersections, signal timing improvements, and increased or modified transit service – were considered and evaluated, but were eventually determined to be infeasible or found not to meet the purpose and/or need of the Project. AR 568-602.

A Notice of Preparation for the Draft Environmental Impact Report ("DEIR") for the Project was circulated to local, regional, state, and federal agencies from February 12, 2010, through March 17, 2010. AR 1039, 6652-56. On August 8, 2011, Caltrans completed the DEIR for the Project, and made it available for public review and comment for two and a half months. AR 1044; Pub. Res. Code § 21091(a). The DEIR evaluated, among other things, the potential environmental impacts of a No Build Alternative, Narrow Median Build Alternative, and Landscaped Median Build Alternative. AR 543-45. A public hearing was held on September 22, 2011. AR 869-937, 1044-45, 5041. On August 1, 2013, Caltrans certified the Final Environmental Impact Report / Environmental Assessment ("FEIR/EA" or "FEIR") for the Project. AR 138, 433-2566. Like the DEIR/EA, the FEIR/EA is a joint document which considered the significance of impacts on the environment separately under CEQA and NEPA. AR 152, 445; see also Cal. Code Regs., tit. 14, § 15170 ("Guidelines"). On August 2, 2013,

Caltrans signed the Project Report approving the Project, and filed a Notice of Determination with the State Clearinghouse on August 8, 2013. AR 1, 3.

Petitioner filed its Complaint for Injunctive Relief and Petition for Writ of Mandate on September 6, 2013. Petitioner filed a First Amended Complaint for Injunctive Relief and Petition for Writ of Mandate on March 27, 2014 ("Petition"). Without leave of court, Petitioner filed a Second Amended Complaint for Injunctive Relief and Petition for Writ of Mandate on April 23, 2014, which was subsequently stricken by stipulation of the parties and Court order on May 14, 2014. On April 24, 2014, the parties stipulated that the Petition is for a writ of mandate and for injunctive relief with one cause of action for violation of CEQA, which does not state a separate independent cause of action for declaratory relief, and that Petitioner only sought relief based on the administrative record, the briefs, and oral arguments at the hearing on the merits.

Petitioner filed its Opening Brief on May 22, 2014 ("POB"). On June 30, 2014, Caltrans filed its Opposition Brief ("Opp. Br."), in which SMCTA joined, and the City of Pacifica filed its opposition brief and joinder to Caltrans' Opposition Brief ("City Br."). Petitioner filed its Reply Brief on July 25, 2014 ("Reply"). At the hearings on the merits on August 22 and 29, 2014, Caltrans and the Real Parties in Interest objected to the numerous new arguments raised for the first time in Petitioner's 47-page reply brief, and moved the Court to strike them.

On November 17, 2014, this Court issued Trial Order #1, which found that Petitioner's Reply Brief improperly contained "far more extensive factual discussion of the record than the Opening Brief," and new arguments and authorities not triggered by the opposing briefs. Trial Order #1, Nov. 17, 2014. The Court granted leave to Caltrans

and Real Parties to file a Supplemental Brief, which they filed on December 15, 2014 ("Supp.Br.").

On March 10, 2015, the Court issued its "Ruling on Submitted Matter," which stated that "the Petition for Writ of Mandate alleging violation of CEQA... is denied, and adjudicated in favor of defendants." The Ruling ordered Caltrans and Real Parties to submit a Proposed Statement of Decision reflecting the Court's denial of the Petition. Caltrans submitted a Proposed Statement of Decision on April 9, 2015, and later a Proposed Judgment on May 8, 2015.

On December 14, 2015, Petitioner filed a "Second Notice of New Authority regarding Center for Biological Diversity v. California Department of Fish and Wildlife (2015) 62 Cal.4th 204 ("Newhall Ranch")," claiming relevance to arguments "pending" before this Court ("NNA"). On December 17, 2015, the Court issued Trial Order #2 ordering supplemental briefing. Petitioner filed its Supplemental Brief on January 8, 2016 ("P.Supp.Br."). Caltrans and Real Parties filed their Second Supplemental Brief on January 22, 2016. ("2nd Supp.Br.") Petitioners filed a Third Notice of New Authority dated February 26, 2016. A revised Proposed Statement of Decision was submitted by CalTrans in October 2016. The proposal was considered by this Court and revised in its issued Proposed Statement of Decision.

II. STANDARD OF REVIEW

Petitioner failed to address and set forth the standard of review in its Opening Brief. In a CEQA lawsuit, "[i]n reviewing an agency's decision to certify an EIR, [the Court] presumes the correctness of the decision. The project opponents thus bear the burden of proving that the EIR is legally inadequate." State Water Res. Control Bd. Cases (2006) 136 Cal.App.4th 674, 723; Save our Peninsula Committee v. Monterey

County Board of Supervisors (2001) 87 Cal.App.4th 99, 117. To establish a CEQA violation, Petitioner must show a prejudicial abuse of discretion in that either (1) the agency failed to proceed in a manner required by law, or (2) its determinations are not supported by substantial evidence. Pub. Res. Code §§ 21168, 21168.5; Code Civ. Proc. § 1094.5(b); In re Bay-Delta (2008) 43 Cal.4th 1143, 1161; State Water, 136 Cal.App.4th at p. 723.

"Substantial evidence" is defined 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." CEQA Guidelines[1], 14 CCR §15384(a). This "substantial evidence" standard applies to conclusions, findings and determinations, as well as to the scope of analysis of a topic, the methodology used, and the reliability or accuracy of the data. San Joaquin Raptor Rescue Center v. County of Merced (2007) 149 Cal.App.4th 645, 654. In applying this standard, courts must resolve any reasonable doubts and conflicts in evidence in favor of the agency, and uphold an EIR if there is any substantial evidence in the record to support the agency's decision. Dry Creek Citizens Coalition v. County of Tulare (1999) 70 Cal.App.4th 20, 26. As a result, an agency's approval of an EIR may not be set aside simply because an opposite conclusion would have been more reasonable. Laurel Heights Improvement Assn. v. Regents of University of California (1988) 47 Cal.3d 376, 393. Moreover, CEQA does not mandate perfection or exhaustive analyses; instead, it merely requires an EIR to reflect a good faith effort at full disclosure. CEQA Guidelines §§ 15003(i),

[1] CEQA Guidelines are regulations adopted to implement CEQA, and are codified at California Code of Regulations, title 14, chapter 3, sections 15000 *et seq.*

15151; Concerned Citizens of South Central Los Angeles v. Los Angeles Unified School District (1994) 24 Cal.App.4th 826, 836.

As the Court of Appeal discussed in Defend the Bay v. City of Irvine (2004) 119 Cal.App.4th 1261, 1265:

> "An EIR is an informational document which provides detailed information to the public and to responsible officials about significant environmental effects of a proposed project. [Citations.] It must contain substantial evidence on those effects and a reasonable range of alternatives, but the decision whether or not to approve a project is up to the agency. [Citations.]" [Citation.] Review is confined to whether an EIR is sufficient as an informational document. "The court must uphold an EIR if there is any substantial evidence in the record to support the agency's decision that the EIR is adequate and complies with CEQA. [Citation.] CEQA requires an EIR to reflect a good faith effort at full disclosure; it does not mandate perfection, nor does it require an analysis to be exhaustive." [Citation.]

The one "challenging an EIR for insufficient evidence **must lay out the evidence favorable to the other side and show why it is lacking. Failure to do so is fatal**. A reviewing court will not independently review the record to make up for [the] failure to carry [this] burden." Id., at p. 1266, emphasis added.

In its Reply Brief, Petitioner asserts that the de novo "abuse of discretion" standard applies here: "When the informational requirements of CEQA are not complied with, an agency has failed to proceed in a manner required by law and has therefore abused its discretion." Reply at pp. 2-3. Petitioner asserts that the "substantial evidence"

"abuse of discretion" standard does not apply here: "The existence of substantial evidence supporting the agency's ultimate decision on a disputed issue is not relevant when one is assessing a violation of the information disclosure provisions of CEQA." Reply at 3:27-30, citing CBE v. City of Richmond (2010) 184 Cal.App.4th 70, 82. Petitioner argues that its objections concern "omissions" and thus are not subject to the substantial evidence rule.

Which is the applicable standard and when, were discussed by the First Appellate District recently in Citizens for a Sustainable Treasure Island v. City and County of San Francisco (2014) 227 Cal.App.4th 1036:

> We review an agency's determination and decision for abuse of discretion. An agency abuses its discretion when it fails to proceed in a manner required by law, or when its determination or decision is not supported by substantial evidence. [Citations.] **Judicial review of these two types of error differs significantly**: While we determine de novo whether the agency has employed the correct procedures, scrupulously enforcing all legislatively mandated CEQA requirements, we accord greater deference to the agency's substantive factual conclusions. [Citation.]

Treasure Island, at p. 1045, bold added. The Court must consider the nature and extent of a CEQA challenge to the "sufficiency of the information provided to the public and the decision makers" in the EIR, in order to determine the correct standard of review. Id., at p. 1046.

> Because the "fundamental purpose of an EIR is 'to provide public agencies and the public in general with detailed information about the

effect which a proposed project is likely to have on the environment," absence of information in an EIR may be a failure to proceed in a manner required by law. [Citations.] But, failing to include information "normally will rise to the level of a failure to proceed in the manner required by law only if the analysis in the EIR is clearly inadequate or unsupported. [Citation.]" [Citation.]

CEQA requires an EIR to reflect a good faith effort at full disclosure; it does not mandate perfection, nor does it require an analysis to be exhaustive. [Citation.] . . . "[T]he determination of EIR adequacy is essentially pragmatic." [Citation.] . . . Hence, an EIR must be upheld if it "reasonably sets forth sufficient information to foster informed public participation and to enable the decision makers to consider the environmental factors necessary to make a reasoned decision." [Citation.]

Consequently, the "absence of information in an EIR does not per se constitute a prejudicial abuse of discretion. [Citation.] Instead , 'a prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decision-making and informed public participation, thereby thwarting the statutory goals of the EIR process." [Citations.]

Under this standard, . . . a challenger . . . asserting inadequacies in an EIR must show the omitted information "is both required by CEQA and necessary to informed discussion." [Citations.]

Treasure Island, at pp. 1046-1047.

This standard was also discussed by the Sixth Appellate District in California Native Plant Society v. City of Santa Cruz (2009) 177 Cal.App.4th 957, 986-987, which summarized as follows:

> To sum up, the omission of required information constitutes a failure to proceed in the manner required by law where it precludes informed decision-making by the agency or informed participation by the public. [Citation.] We review such procedural violations de novo. [Citation.] By contrast, we review an agency's substantive factual or policy determinations for substantial evidence. [Citations.]

III. PETITIONER FAILED TO SHOW EXHAUSTION OF ADMINISTRATIVE REMEDIES AS TO SEVERAL ISSUES

Several of Petitioner's claims are barred by the failure to exhaust administrative remedies. The doctrine of exhaustion of administrative remedies precludes judicial review of legal and factual issues that were not first presented to the administrative agency. Coalition for Student Action v. City of Fullerton (1984) 153 Cal.App.3d 1194, 1197. The doctrine is "founded on the theory that the administrative tribunal is created by law to adjudicate the issue sought to be presented to the court, and the issue is within its special jurisdiction." Tahoe Vista Concerned Citizens v. County of Placer (2000) 81 Cal.App.4th 577, 589. Under CEQA, no action may be brought unless the alleged grounds for noncompliance, both factual and legal, were presented to the agency during the public comment period. Pub. Res. Code § 21177(a).

Section 21177(a) specifically provides:

> An action or proceeding shall not be brought pursuant to Section 21167 unless the alleged grounds for noncompliance with this division were presented to the public agency orally or in writing by any person during the public comment period provided by this division or prior to the close of the public hearing on the project before the issuance of the notice of determination.

"This exhaustion of administrative remedies requirement is **jurisdictional**. [Citations.]" Sierra Club v. City of Orange (2008) 163 Cal.App.4th 523, 535.

In fact, the exact issue must have been presented to the agency, with enough specificity for the agency to have the opportunity to evaluate and respond. Id.

> "To advance the exhaustion doctrine's purpose 'the exact issue must have been presented to the administrative agency. . . .' [Citation.] . . . '[G]eneralized environmental comments at public hearings,' 'relatively . . . bland and general references to environmental matters' [citation], or 'isolated and unelaborated comments' [citation] will not suffice. The same is true for 'general objections to project approval' [Citations.] 'The objections must be sufficiently specific so that the agency has the opportunity to evaluate and respond to them.' [Citations.]"

Sierra Club, at pp. 535-536. Allowing judicial review of these issues without affording the agency an opportunity to consider specific objections would enable litigants to "narrow, obscure, or even omit their arguments" before the final agency decision. Tahoe Vista Concerned Citizens, 81 Cal.App.4th at p. 594.

Petitioner argues that a generic objection that the project will cause harmful environmental impacts in the community is sufficient, citing to Save Our Residential

Environment v. City of West Hollywood (1997) 9 Cal.App,4th 1745, 1750. That particular decision regarding standing and adequacy for exhaustion has been *rejected* by subsequent appellate panels as lacking in any factual analysis and providing "little assistance" to courts facing CEQA challenges. California Native Plant Society v. City of Rancho Cordova,172 Cal.App.4th at p. 618.[2]

Petitioner bears the burden of identifying evidence in the record to document that specific issues were raised below and exhausted. Evans v. City of San Jose (2005) 128 Cal.App.4th 1123, 1136 ("A challenger who has participated in the administrative process must also show that the issues raised in the judicial proceeding were raised at the administrative level. [Citation.]".).

Petitioner now raises multiple issues regarding alleged deficiencies in the EIR, but which issues were never presented *by anyone* to Caltrans below and/or Petitioner has failed to meet its burden of demonstrating that the specific issues were each presented to Caltrans prior to Final EIR, and which issues are therefore barred from judicial review:

(1) Lack of analysis of traffic impacts of converting Old County Road into a cul-de-sac, or of converting street segments (Old County Road and San Marlo Way) to one-way only streets to ensure safe ingress and egress to SR 1;

(2) Inconsistency with the Pacifica Tree Heritage Ordinance in regard to identification of specific details of location, number, and size of trees to be removed;

---

[2] The Third Appellate District went on to distinguish the SORE holding: "Without that detail, *SORE* at best stands for the proposition that complaints a project will be deleterious to the surrounding community may be sufficient to exhaust administrative remedies on the EIR's *failure to adequately examine alternative sites*. But the Society fails to explain how that proposition has any bearing here." California Native Plant, at p. 618, emphasis added.

(3) Failure to determine environmental significance of construction air quality without applying mitigations;

(4) Failure to determine environmental significance of construction noise without applying mitigations;

(5) Failure to determine environmental significance of construction water quality without applying mitigations;

(6) Failure to apply the stated criteria for determination of visual impacts of project, specifically the perspectives of the viewer;

(7) Inconsistency with the City's General Plan Conservation and Circulation Elements regarding creation of one-way streets or regarding Rockaway Beach;

(8) Lack of factual support and lack of adequate analysis of Green House Gas Emissions;

(9) Insufficient analysis of indirect and temporary impacts upon the red-legged frogs;

(10) Insufficient analysis of impacts upon the white tailed kite (bird); and

(11) Failure "to explain in meaningful detail the reason and facts supporting the rejection of a feasible alternative, the earlier proposed 'Narrow Median' alternative."[3] (POB at 26.)

---

[3] Although Petitioner claims that the California Coastal Commission raised this issue below, the Administrative Record shows that Petitioner selectively mixed the "apples and oranges" of the CCC's comment – which did not raise this particular issue. Indeed the CCC acknowledged the adequacy of the rejection of the Narrow Median alternative. (AR 1095-1096.) CCC's concern was lack of detailed analysis of the rejection of "various alternatives that were considered but rejected without further study"

The Court finds that Petitioner failed to meet its burden of affirmatively demonstrating that administrative remedies were exhausted on each of these issues, and judicial review is thus precluded.

Respondent and Real Party in Interest explicitly raised the issue of failure to exhaust administrative remedies in their Statement of Issues. The issue was also raised in their trial Briefs and supplemental briefs. (E.g., Pacific's Brief at pp. 4 and 8; CalTrans' Brief at p. 9.) Yet, the issue was basically ignored by Petitioner in its briefs, simply giving lip-service to the issue by mentioning the law that requires it. Despite an Opening Brief of 30 pages and a Reply Brief of 47 pages, Petitioner failed to give substantive discussion or provide citations to the record where these issues were affirmatively and specifically raised during the administrative proceedings. That Petitioner has now decided to try to do so in its *Objections* to the Proposed Statement of Decision is procedurally inappropriate and comes far too late.

IV. PETITIONER IS REQUIRED TO PROPERLY DEVELOP AND SUPPORT ITS ARGUMENTS, INCLUDING DISCUSSION OF ALL EVIDENCE THAT *SUPPORTS* THE UNDERLYING DECISION

Where Petitioner fails to develop certain arguments or support them with reasoned discussion or citations to authority, the issue is deemed waived. Badie v. Bank of America (1998) 67 Cal.App.4th 779, 784-785. They must be raised and supported in the opening brief, not just the reply brief. Uphold Our Heritage v. Town of Woodside

---

(AR 1095), *unlike the Narrow Median* alternative as to which the EIR "provides an analysis".

The Court also notes that contrary to Petitioner's argument in its Reply Brief, the Narrow Median alternative *was specifically referenced in the Draft EIR.* (AR 208.)

(2007) 147 Cal.App.4th 587, 595, fn. 4; Citizens for a Megaplex-Free Alameda v. City of Alameda (2007) 149 Cal.App.4th 91, 112 fn. 12 ("we will discuss only the arguments actually briefed"). In certain instances, Petitioner alleges that the EIR omitted certain information, or that analysis or conclusions were improper, but without Petitioner explaining how or why. These will be identified below.

As to other issues, Petitioner failed to meet its burden under the standard of review to set forth *all* evidence on that issue – including the evidence which *supports* the underlying decisions by Caltrans. As held by the First Appellate District in Citizens for a Megaplex-Free Alameda, it is the Petitioner's "burden to demonstrate that there is not sufficient evidence in the record to justify the [Respondent's] Action. [Citation.] To do so, [the CEQA challenger] must set forth in its brief all the material evidence on the point, not merely its own evidence. [Citation.] The failure to do so is deemed a concession that the evidence supports the findings. [Citation.]" Id., at pp. 112-113. This is because it is the burden of the Petitioner to affirmatively demonstrate that there was not sufficient evidentiary support for the underlying findings and decision. Id., at p. 113. It is *not* up to this Court to do an independent review of the records to make up for any such failure of Petitioner to carry its *prima facie* burden. Id.

So, for example, in its Opening Brief, Petitioner argued that "the EIR fails to adequately analyze an alternative to replace the light signal at the Reina Del Mar Avenue intersection". (POB at p. 26:22-24.) Yet this "alternative to replace the light signal" is not even mentioned in the Reply Brief, and is considered an abandoned issue by this Court.

As another example – and setting aside for the moment the failure to Petitioner to demonstrate in its Opening or Reply Briefs that administrative remedies were first

"exhausted" on this issue; and the fact that there is no such allegation in its First Amended Petition – Petitioner argued that there was insufficient analysis of the impact upon the white-tailed kite bird. For this proposition, Petitioner devoted *half a sentence and one footnote* in its Opening Brief, *half a sentence and one footnote* in the Reply Brief. There was no substantive discussion or details by Petitioner of the facts and analysis that *was* conducted regard the white-tailed kite. Indeed, Petitioner does not even address the evidence "that only one pair of white tailed kites could be disturbed by the project." (AR1132.) Petitioner also ignores the discussion and analysis in Sections 2.19.3 and 2.19.4 of the EIR as well as that the conclusions were based upon "a technical *Natural Environmental Study (NES)* that was completed for the project in December 2009 and an Addendum to the NES that was completed in December 2010". (AR 1132.)

It was up to Petitioner to put together all of the evidence on each and all of the issues – not the Court. Nor it is the obligation of this Court to address those points for which Petitioner failed to make such a presentation in the Briefs. Petitioner had/has the burden of showing all of the information on each issue, and showing that it was not enough for a decision-maker to adequately make a decision here. Petitioner repeatedly failed do so – and the Court has given multiple simple examples.

V. THE PROJECT DESCRIPTION IS ADEQUATE

Petitioner asserts that the Project description is inadequate and consequently violates CEQA as a matter of law. The Court finds that the Project description is adequate.

Petitioner relies upon two reported decisions holding that a project description was inadequate under CEQA, specifically County of Inyo v. City of Los Angeles (1977)

71 Cal.App.3d 185, and San Joaquin Raptor Rescue Center v. County of Merced, 149 Cal.App.4th 645. In both of those cases, the Court of Appeal found that the government agency had falsely portrayed their project, mischaracterizing its nature, purpose, and scope, which deceptions were designed to avoid CEQA and public scrutiny.

In County of Inyo, the project was described as an increase in extraction of groundwater as reserves for any "unanticipated" water needs in the local area of Owens Valley, when the real purpose, nature and intent of the project was to divert and export increased amounts of water into the aqueduct system to Los Angeles. The project description and the EIR was characterized by the Court of Appeal, in its decision, as "a curtailed or distorted project description", "an egregious misinterpretation" of the law, "departure point for a serious misinterpretation", and based upon "fallacious" assumptions. Id., at pp. 192-195. Harsh words.

In San Joaquin Raptor, 149 Cal.App.4th 645, the project was described as the expansion of a mining operation to additional acreage in order to extend the life of the mine, "but is not proposed to substantially increase daily or annual production" (id., at p. 650), when in fact the project was actually to provide significantly increased production including the discretion to mine 24/7. The Court of Appeal agreed with the opponents' characterization the project and its EIR as "misleading", :unstable", and "fundamentally inadequate". Id., at pp. 655-656.

There is no such fraud demonstrated here. The Project is clearly a major expansion and reconstruction of a highway plagued with terrible traffic jams on a regular basis, in order to create a better flow of traffic, augment the ability to view the coastal shoreline, increase the median between the opposing lanes of traffic, and update pedestrian and bicycle crossing and pathways.

The Project description "should not supply extensive detail beyond that needed for evaluation and review of the environmental impact," and should include "the precise location and boundaries of the proposed project," and "a general description of the project's technical, economic, and environmental characteristics...." Dry Creek Citizens Coalition, 70 Cal.App.4th 20; Guidelines § 15124.

In regard to Project description, the EIR here meets the basis standards under CEQA, as discussed in San Joaquin Raptor, in that (a) it discloses the "activity" for which approval is sought, (b) the entirety of the Project is described, not just some smaller portion thereof, (c) the objectives of the Project are revealed, and (d) there is a "**general description** of the project's technical, economic, and environmental characteristics, considering the principal engineering proposals if any and supporting public service facilities." Id., at pp. 654-655.

It is *Petitioner* who seeks to take "some smaller portion thereof" as being the basis of a lack of Project description as a whole.

First, Petitioner claimed the Project description failed to disclose the width of intersections at Fassler Avenue and at Reina del Mar. But there is no specific requirement that an EIR include every single minute detail about a project, but rather only a general description of the project's technical, economic, and environmental characteristics. Guidelines § 15124. In any case, the EIR included detailed maps showing the precise location and boundaries of the proposed Project, which included cross-sections and measurements showing the proposed width of the highway for each build alternative. AR 545, 547. Figure 1.5 shows both the existing and proposed roadway widths and profiles for the highway, including measurements for lanes, median and shoulders for the landscaped median alternative. AR 547. The EIR's description of

the build alternatives also explains that the highway will be widened from approximately 64 feet to a maximum of approximately 132 feet. AR 549. Figure 1.5 also includes the location of existing wetlands, proposed roadway improvements, concrete barriers, sidewalk and bike paths, retaining walls, cut and fill lines, bridge structures, landscape median, existing Caltrans right-of-way, City right-of-way, and proposed Caltrans right-of-way. AR 547.

Petitioner contended that lack of information regarding intersection width precluded the public from intelligently commenting on traffic and public safety impacts and that the EIR failed to analyze impacts from highway crossing time. Yet the EIR did analyze potential traffic and public safety impacts and impacts to pedestrian facilities, and concluded they would be less than significant. AR 504, 628-43, 801. Substantial evidence supports those conclusions – including the fact that signal timing would be adjusted in accordance with Caltrans guidelines and policy to account for the increased pedestrian cross time – and Petitioner did not address or challenge that evidence. AR 4443-4552, 9130, 9251-58. Moreover, Petitioner failed to show how the alleged error or omission was so material that it precluded informed decision-making or public participation. California Native Plant Society, 177 Cal.App.4th at pp. 986-987.

Second, Petitioner claimed the EIR inconsistently stated the increase in width of Project alternatives, but base that claim on inaccurate citations to the EIR. The EIR explains that the amount of new pavement required to construct the Project would vary from 20 to 50 feet on the west edge of the existing pavement; nothing in that statement is inconsistent, as Petitioner alleges, with the separate statement in the EIR that SR 1 would be widened from approximately 64 feet to a maximum of 132 feet. AR 443, 549. Petitioner also claimed Figures 1.4 and 1.5 vary from the 132-foot measurement, but the

measurements in those figures for the lanes, shoulders and landscape median add up to 132 feet (6 lanes at 12 feet each (72 feet), 4 shoulders at 10 feet each (40 feet), and a landscape median at 20 feet). AR 547 (Figure 1.5 also depicts the measurements for the 10-foot planter and 6-foot sidewalk).

Third, Petitioner claimed the Project description is inadequate because Figures 1.4 and 1.5 were labeled "preliminary assessments." As the EIR explained, though, the initial plans set forth in the environmental document are necessarily labeled "preliminary" because the Project had not been finalized, approved and fully designed at that stage. AR 1411, 1455. Nothing about the preliminary nature of figures 1.4 and 1.5 alters the fact that the maps depict the "precise location and boundaries" of the Project. Guidelines § 15124; see also, Dry Creek, 70 Cal.App.4th at p. 28 (general description of a project element can be provided earlier in the process than a detailed engineering plan and is more amenable to modification to reflect environmental concerns).

Fourth, Petitioner claimed that Project characteristics are "not stable," citing to three isolated pieces of information they claimed were added to the Final EIR regarding vertical separation, retaining walls, and excavation. For this argument, Petitioner devotes *half a sentence* in the Opening Brief and one and a half pages in the Reply Brief. The general argument is that the *measurements*, particularly maximums, are allegedly inconsistent. There is no showing that such arguments were raised below. The argument is scattered and fails to demonstrate that the Project description is utterly inadequate under CEQA. This is the same information Petitioner claimed necessitated recirculation of the EIR. This information did not constitute a shift in the Project description or render it unstable, but rather shows that enhancements were considered and adopted for the Final

EIR – these changes are what Petitioner claims elsewhere should require recirculation of the EIR, which is a separate issue than Project description.

The Final EIR noted that the vertical separation between north and south lanes is a possible design enhancement feature that would improve coastal views, a fact that does not undercut the Project description in any way. AR 567. Information regarding retaining walls was included in the Draft EIR, and there was no "shift" in the Project description. AR 151, 175, 210-12, 244-45, 280-88, 289-90, 302, 339, 342, 359-60, 1114 (detailing in a response to comment where in the DEIR retaining walls were discussed and depicted). Information regarding excavation necessary to construct the Project was discussed at length throughout the Draft EIR in connection with numerous environmental resources. AR 162, 165-66, 170, 191, 281, 295, 297, 305, 309, 318, 371, 373, 383.

VI. THE EIR'S ENVIRONMENTAL SETTING IS ADEQUATE

Petitioner asserts that the EIR does not adequately describe the environmental setting for utilities, biological or cultural resources. An EIR must include a description of the physical environmental conditions in the vicinity of the project which constitute the baseline physical conditions for measuring environmental impacts. Guidelines §15125(a). The description of the environmental setting "shall be no longer than is necessary to an understanding of the significant effects of the proposed project and its alternatives." Id.; see also, North Coast Rivers Alliance v. Marin Municipal Water District (2013) 216 Cal.App.4th 614, 644. "[T[he question is whether the EIR contains a sufficient description of the baseline environment to make further analysis possible". County of Amador v. El Dorado County Water Agency (1999) 76 Cal.App.4th 931, 954.

A. Utilities Baseline is Adequate

Petitioner claimed the EIR's environmental setting for utilities is insufficient, but failed to identify any way in which the described setting, or the allegedly omitted information, precludes understanding of significant effects of the Project, or hampers the possibility of further analysis. For instance, Petitioner cited a comment letter from the North Coast County Water District which identified various utilities in the Project area. The EIR expressly noted that numerous utility lines, such as gas, electric, water, communications, sanitary sewer, and stormwater drains, are located within or cross under SR 1 in the Project area, and within the local streets near SR 1 in the Project vicinity. AR 627. The EIR further acknowledged and explained that existing utility lines would have to be relocated to construct the Project. AR 627. Most notably, the EIR stated that while "some utility lines would be relocated under either Build Alternative," the relocation "would not result in the disruption of utility services." AR 627, 1108. Nothing in the Water District's comment letter, or Petitioner's citation to it, explains how the environmental setting in the EIR is inadequate. AR 1108; POB at 6:1-20. Nor is there any explanation of how the description of the environmental setting precludes understanding of significant effects of the Project. North Coast Rivers Alliance, 216 Cal.App.4th 614.

Petitioner asserts that the EIR excluded the existing storm drain system. POB at 6:13-14. Yet storm drains are addressed at great length throughout the EIR, primarily in the Hydrology and Floodplain sections, which stated explicitly that "the project would increase storm drain capacities so that local ponding associated with the one percent probability storm event would not differ significantly from ponding under the existing c

> This increase could, however, result in local ponding due to increases in local runoff to individual storm drain systems beyond their current conveyance capacity... During the final design phase, storm drain facilities would be improved as needed to meet hydraulic design standards. The final design would ensure that storm and floodwaters would not encroach on the traveled way. The project would upgrade highway storm drain systems to accommodate the increase in impervious area such the storm drain systems would avoid problematic flooding during a four percent (25-year) design storm per the criteria in the Highway Design Manual.

AR 695. Further, the environmental setting does note the existence of electrical lines. AR 627.

Petitioner argues that the acknowledgment of utility lines, drains, etc. does not constitute a sufficient "baseline" in the first place. "Neither CEQA nor eht eCEQA Guidelines mandates a uniform, inflexible rule for determination of the existing conditions baseline. Rather, an agency enjoys the discretion to decide, in the first instance, exactly how the existing physical conditions without the project can most realistically be measured . . ." Communities for a Better Environment v. South Coast Air Quality Management District (2010) 48 Cal.4th 310, 328.

At its core, Petitioner would require that Caltrans specifically plot and identify every electrical pole, electrical line, water pipe, storm drain, etc. in the 1.3 mile stretch of highway, and specifically identify which lines, poles, pipes, etc. must be moved and where as part of the Project. The parties have not provided any legal authority on this specific point, and the Court's own legal research fails to disclose any case or regulation

or statute that requires such details and specifics for purposes of baseline adequacy. This Project is about expanding a highway, not about setting up a new utility system.

Under the circumstances, the Court finds that the utilities baseline is adequate.

B. **The Biological Baseline is Adequate**

The Court finds that the descriptions of the biological environment for a baseline of physical conditions to determine environmental impacts, and that there is extensive information and evidence presented and analyzed to enable decision-making.

Petitioner claims that the biological study area for the Project ("BSA") is improperly limited to the Project footprint, and that it violates CEQA by excluding allegedly adjacent wetlands. But the BSA was not limited to the Project footprint, and nearby wetlands were considered and evaluated to determine whether the Project could impact them, and whether they warranted inclusion in the BSA. AR 739-47, 2931-3141.

The BSA is depicted in detail on the map in Figure 2.5, and extends from 1,700 feet south of Fassler Avenue to 2,300 feet north of Reina Del Mar Avenue. AR 741, 1117. Although Petitioner references portions of the EIR for its argument of inadequacy, Petitioner basically ignores the fact that a very lengthy and extensive *Natural Environment Study* was conducted and incorporated as an exhibit to the EIR. Not only was a Natural Environment Study ordered by Caltrans, conducted by independent ecological consultants – entitled *State Route 1/Calera Parkway Improvement Project Pacifica, San Mateo County, California, Preliminary Delineation of Wetlands and Other Waters/Delineation of Coastal Zone Wetlands within California Coastal Commission Jurisdiction* – starting at AR 2627, but prior wetlands delineation work had been done in the area by a different consultant in conjunction with an adjacent quarry property back in

2002, and prior field studies of property in the area of the Project had been conducted in 2004, 2005, 2006, 2007,. 2008, and 2010. (AR 1118.) The EIR also contains multiple maps identifying delineated wetlands in the Project area and adjacent property. (E.g., AR 72, 5649.)

Petitioner does not identify wetlands that were forgotten or left out of the baseline, but rather seems to be arguing that field tests and analysis should have been done on all private properties along the Project -- but outside of the Project area and outside of the construction staging areas – to see if there were additional areas that should be (but have not been) delineated as wetlands.

Consistent with CEQA law, the EIR *does* identify wetlands in the vicinity. Petitioner fails to identify any that were left out. Petitioner presents no legal authority for its proposition that Caltrans must try to find some more in order to set the baseline.

Petitioner relies upon San Joaquin Raptor, 27 Cal.App.4th 713. In that case, the environmental setting was inadequate because it "completely fail[ed] to mention and consider a nearby wetland wildlife preserve," and "understated the significance of the river located immediately next to the site, so that it was "impossible for the [FEIR] to accurately assess the impacts the project will have." Id., at p. 725. As a result, that EIR "was so incomplete and misleading" that it "precluded serious inquiry into or consideration of wetland areas adjacent to the site or whether the site contained wetland areas." Id., at pp. 723, 725. Here, though, the EIR here did study, consider and evaluate all wetlands in the area in establishing the BSA, and there is no evidence that any wetlands were omitted that should have been included.

Petitioner's other arguments regarding the inadequacy of the BSA fail for similar reasons. Petitioner claimed the EIR does not identify the location and extent of adjacent

habitat, and leaves the BSA "ill-defined." POB at 7:9-19. But Petitioner ignored the maps and studies cited above, which identified the BSA and its boundaries with particularity, as well as the explanations of how the BSA was defined and determined. AR 741, 2999.

Petitioner claimed the EIR's conclusion that hydrology of aquatic habitats outside the BSA would not be altered by the Project is improper because the EIR allegedly did not consider areas outside the BSA. POB 7:25-8:8:3. But the EIR did consider areas outside the BSA when it determined what the BSA boundaries would be in the first place, as described above, and considered them again when determining that they would not be altered. AR 765, 804.

Petitioner also claimed the EIR does not disclose "how much of the wetland / aquatic habitat is inside the BSA and how much is outside," but ignored the maps in the EIR and NES that indicate the acreage of aquatic habitat, both seasonal and perennial. AR 741.

The Court finds that the biological baseline is adequate.

C. The Cultural Resources Baseline is Adequate

Petitioner claims that the cultural resources environmental setting is incomplete, specifically regarding Native American remains and artifacts. However, the cultural resources baseline in the EIR satisfies the requirements set forth above, because it includes a description of the physical environmental conditions in the vicinity of the Project which constituted the baseline physical conditions for measuring environmental impacts, and it enabled the decision-makers and the public to understand significant

effects of the proposed project and its alternatives. Petitioner did not demonstrate to the contrary.

The EIR explains that there are two recorded archeological sites – CA-SMa-162 and CA-SMa-268 – within or adjacent to the Project's Area of Potential Effects (APE). AR 684-90, 802. Petitioner asserts that it is not clear if portions of the recorded sites are outside of the area affected. Actually, the EIR acknowledges that the sites are located within or adjacent to the APE, and the Archeological Survey Report plainly depicts the location of those sites on maps relative to the APE. AR 684, 3326 (map of archeological sites within the area of archeological effects).

Petitioner also claimed the EIR is inadequate because it did not include certain information from the ASR regarding prior discoveries of Native American artifacts. But not every piece of information from underlying technical reports and studies must be included in an EIR. Petitioner cites to Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova (2007) 40 Cal.4th 412, 442, for the proposition that data in an EIR "must not only be sufficient in quantity, it must be presented in a manner calculated to adequately inform the public." But Petitioner fails to explain how the data in the EIR is insufficient to adequately inform the public, or how the conclusions in the EIR are not supported by substantial evidence. In Vineyard Area Citizens, the Supreme Court found that EIR's analysis of water supply inadequate as it failed to include any evidence of competing water users, and rejected arguments that relied entirely on data not found in the EIR to support the determination that sufficient water would be available for the project. Id., 40 Cal.4th at p. 442. Here, by contrast, Petitioner simply pointed to information in the ASR that was not re-stated verbatim in the EIR, but did not explain in any way why it needed to be included in the EIR.

The EIR did explain that Site 268 was discovered during highway construction in the early 1960s, and was described as "nearly destroyed" at the time of its original inspection. AR 685. The EIR also explained that, following records search, literature review, a field reconnaissance survey, and a supplemental coring program to determine whether cultural resources associated with Site 268 are present within the area most likely to be affected by the Project, no indications of buried archeological resources were found that could be affected by the Project. AR 684-85. That conclusion is supported by substantial evidence, which Petitioner did not challenge here.

Petitioner also claims the environmental setting is inadequate because it doesn't explain what constitutes the "areas directly adjacent" or where indirect effects could occur. Petitioner then cites Bakersfield Citizens for Local Control v. City of Bakersfield (2004) 124 Cal.App.4th 1184, 1216 for the proposition that the area affected by the project cannot be so narrowly defined that it necessarily eliminates a portion of the affected environmental setting. In that case, though, the Court of Appeal was discussing the requirement in Guidelines Section 15130 that requires an agency to define the geographic scope of the area affected by a cumulative effect, and to give a reasonable explanation for the geographic limitation used. Id., at p. 1216. These authorities are inapposite, as Petitioner did not challenge a cumulative impacts analysis here.

Petitioner claims the EIR does not explain what constitutes "areas directly adjacent to," or "where indirect effects could occur," but the entire section of the EIR on cultural resources discusses precisely those things. POB at 10:12-19; AR 684-90. In addition, the ASR includes maps showing precisely where the APE is, and where both recorded sites are located. AR 741, 743, 745, 3326, 1459 (RTC explaining that archaeology APE encompasses all areas that potentially would be directly and physically

impacted by the project). As the EIR explains, the APE is defined as the area in which indirect effects may occur. AR 684.

Lastly, Petitioner noted that a member of the Ohlone Indian Tribe commented that he wanted to know the location of human remains, the implication being that the comment renders the environmental setting inadequate, although Petitioner did not explain how. The cited comment took place in the context of outreach to different Native American individuals and groups soliciting information regarding Native American sites within or adjacent to the Project. AR 3342. The commenter wanted to know who had the remains that had been discovered in the 1960s, and ultimately was "satisfied with the information provided." AR 3344. Nothing about the comment pertains in any way to the adequacy of the environmental setting in the EIR.

VII. PETITIONER HAS FAILED TO DEMONSTRATE THAT SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE SIGNIFICANT IMPACTS ANALYSIS

As the First Appellate District held in North Coast, 216 Cal.App.4th at pp. 639-640:

> "An EIR need not include all information available on a subject . . . all that is required is sufficient information and analysis to enable the public to discern the analytical route the agency traveled from evidence to action." [Citation.] "A project opponent or reviewing court can always imagine some additional study or analysis that might provide helpful information. It is not for them to design the EIR. That further study . . . might be helpful does not make it necessary." [Citation.} "Although

others might well assess the significance of a risk . . . differently, it is error for the court to substitute its judgment for that of the Agency." [Citation.].

A. Construction and Permanent Traffic and Pedestrian Impacts

1. Construction Temporary Impacts and Project Final Impacts on Vehicle Traffic

Petitioner argued that the EIR does not contain any analysis of traffic-related aspects of construction, and that the reference to a Transportation Management Plan is an improper deferral. (POB at 12.) Petitioner argues that the analysis does not consider traffic impacts related specifically to excavation or heavy equipment access to and from construction staging areas. (POB at 12.) This is not a fair characterization of the EIR.

The analysis must begin and does begin with the traffic "baseline" analysis and the analysis of anticipated future traffic if the Project is not "built" – which traffic analysis is *not* contested by Petitioner.

Petitioner fails to acknowledge that, as discussed in Section 2.6.2 of the EIR, a technical "Traffic Operations Analysis Report" was prepared for this Project in July 2008 and updated in April 2011 – which was sufficiently lengthy that it was summarized in the EIR and made available in full at designated locations if the reader wanted more information. (AR 628.) The physical bounds of the study are discussed in Section 2.6.2 and depicted in Figure 2.1. (AR 628, 633.)

Traffic impacts are measured using a "level of service (LOS) concept, whereby traffic is evaluated in the context of capacity. (AR 630.) These levels of LOS range from A to F, which A being "insignificant" delays, B meaning "minimal" delays, C being "acceptable delays", and D meaning "tolerable delays". (AR 630.) The City of Pacific adopted a standard of requiring LOS D or better for signalizing intersections. An LOS of

E means "significant delays. Volume approaching capacity. Vehicles may wait through several signal cycles and long vehicle queues from upstream." (AR 630.) And finally, LOS F means "excessive delays. Represents conditions at capacity, with extremely long delays. Queues may block upstream intersections." (AR 630.) The study also looked at and measured vehicle queue lengths and travel times in addition to LOS. (AR 631.)

What the study found is that traffic is terrible at peak hours – which is why the Project is being proposed. The present conditions are that traffic LOS in the Project area is E or F. With the Project, the analysis is that traffic will improve to an LOS of C or D. (AR 631.) If no Project is approved, the analysis found that traffic will further degrade in the future to F. (AR 636.)

In regard to travel times and length of vehicle lines, at present they basically stretch the entire length of the SR1 Project area, i.e., it is a continuous traffic back-up for between one and two miles during peak hours. (AR 635.) With the Project, the analysis is that traffic will improve exponentially, such that morning peak hour traffic queue lines will be only 16% of present average length and only 38% of present maximum queues – or conversely, traffic lines will be six times better than present average line length and 2.5 times better than present maximum. (AR 635.) Even better, with the Project, afternoon peak hour traffic queue lines will be only 4% of present average length and only 23% of present maximum queues -- or conversely, traffic lines will be 23 times better than present average line length and 4 times better than present maximum. (AR 635.) The analysis also revealed that if no Project is approved, that traffic queues and travel time will further degrade in the future. (AR 636-637.)

As set forth in Table S-1 for "traffic and transportation", referencing Section 2.6 of the EIR, the environmental consequences of construction traffic were determined to be less than significant and not requiring mitigation. (AR 445, 451-452.)

As set forth in Table S-2 of the Final EIR for "traffic and transportation", referencing Section 2.6 and Chapter 3 of the EIR, it was determined that there would be no significant environmental impact, regardless of which design alternative was used, and that no mitigation was required. (AR 448, 504-505.)

So how can this be? Apparently because traffic is so incredibly terrible already that construction traffic impacts don't make it significantly worse from an environmental impact standpoint.

The EIR considered short-term effects of construction on traffic (AR 785), and concludes that construction would cause a "Less than Significant Impact" on traffic and transportation. AR 518-519, 804-805. This "Less than Significant Impact" determination is supported by evidence that, except for temporary lane closures at off-peak times, "the same number of traffic lanes will be maintained on SR 1 and local streets during the construction period, which is estimated to last for more than two years." (AR 785; see also 451-452.) Moreover, because construction would occur in stages, circulation and access throughout the Project area would be maintained. (AR 801.) No roadway or driveway access to businesses or residents is expected to be severed. Id.

Traffic disruptions are not being ignored by the Project proponents. Rather, they have committed to prepare a Traffic Management Plan for the details of handling traffic during each stage of construction, including public dissemination of construction-related information. (AR 785.)

The Court finds that Petitioner's arguments are inconsistent with the EIR and do not address substantial evidence within the EIR. See Defend the Bay v. City of Irvine, 119 Cal.App.4th at p. 1266.

2. Project and Construction Impacts on Pedestrians

Petitioner asserted that the analysis regarding pedestrians was not adequate because it does not take increased pedestrian crossing time into account. In support of their argument, Petitioner cite City of Maywood v. Los Angeles Unified (2012) 208 Cal.App.4th 362, where an EIR entirely failed to analyze pedestrian impacts from adding an active roadway to the middle of a school campus. That is not the situation here.

The EIR considered that pedestrians may need an additional eight seconds or so to cross two widened intersections as a result of the Project, but concluded that the benefits of the Project for pedestrians outweighed any negative effects. AR 640-642. Signal timing would be adjusted in accordance with Caltrans guidelines and policy to account for the increased crossing time. (AR 4462, 9128-30, 9251-58.)

Petitioner argues that there was no analysis of existing conditions and pedestrian impacts by the Project. The EIR *does* discuss these items, including Section 2.6.2.3 on "existing bicycle and pedestrian facilities" and the existing problems therewith – including that they are not ADA compliant. (AR 629.)

Caltrans' determination that the Project would have "No Impact" on pedestrian facilities is supported by substantial evidence. (AR 504, 801.) This includes Caltrans' analysis that the Project "would result in beneficial impacts to... pedestrian and bicycle facilities" because pedestrian sidewalks would be improved throughout the Project reach and the existing two-way Class I bicycle/pedestrian path adjacent to the westerly edge of the highway north of Reina Del Mar Avenue would be upgraded as part of the Project.

AR 801. Additionally, crosswalks would be upgraded to meet current Americans with Disabilities Act standards; sidewalk bulb-outs would be constructed to provide better bus stop access and improved sight distance; and the path north of Reina Del Mar Avenue would be widened and separated from the highway by a fence. (AR 551-552, 1485.)

Petitioner argued Caltrans failed to respond to the National Park Service's comment regarding safe pedestrian access. Respondents pointed to a record citation reflecting that they did respond to this comment. This response explicitly discusses pedestrian safety and provides specific details regarding Project upgrades to pedestrian facilities. (AR 1078.) "Moreover, 'pointing to evidence of a disagreement with other agencies is not enough to carry the burden of showing a lack of substantial evidence to support an agency's CEQA findings.' [Citation.]" North Coast, 216 Cal.App.4th at p. 643.

B. Visual Impacts Analysis

Petitioner alleges that the EIR fails to disclose if visual changes will be adverse or significant. The EIR does reach the conclusion that the Project would have a "Less than Significant Impact" on visual and aesthetic character. This determination is supported by substantial evidence, including that: (1) impacts would not constitute a substantial adverse effect on a scenic vista; (2) impacts would not substantially damage scenic resources, including, but not limited to trees; (3) the loss of vegetation would not substantially degrade the existing visual character or quality of the area; and (4) the Project would not introduce a new source of substantial light or glare into the area. (AR 505, 801, 1122-1123, 4577-4598, 4629-4659.) Petitioner argues that the EIR should have disclosed the number, location, and size of trees to be cut as part of its analysis on visual

impacts. But the question is not which competing methodology should be used, but whether substantial evidence supports Caltrans' determination. See Federation of Hillside and Canyon Associates, 83 Cal.App.4th at p. 1259. Here, the Visual Impacts Analysis depicts and discusses the visual impacts resulting from tree removal in various locations, and this constitutes substantial evidence; there is no requirement under CEQA that specific tree numbers or sizes be provided for individual trees as part of this analysis.

On reply, Petitioner conceded that Respondents made a significance finding regarding visual impacts, but now asserts that there is no substantial evidence supporting the EIR's conclusion that visual impacts would be "Less than Significant." Specifically, Petitioner argued the EIR omits consideration of scenic vistas. However, the EIR includes discussions regarding views, and appended Visual Impacts Analysis. (AR 644-83, 4553.) Petitioner then argued that visual character would be degraded. In support of this argument, they cited to a portion of the EIR regarding potential cumulative visual impacts. But the EIR concludes that the Project would not contribute to substantial cumulative visual impacts. (AR 794-95.) Oakland Heritage Alliance, 195 Cal.App.4th at p. 899 ("less than significant impact does not necessarily mean no impact at all").

Petitioner has failed to carry it burden of demonstration that the finding that the Project will not result in significant environmental impacts, i.e., would be "Less than Significant," is not supported by substantial evidence.

VIII. PETITIONER FAILS TO SHOW LACK OF ADEQUATE MITIGATION

A. As There Are No Significant Operational Noise Impacts, No Mitigation is Requires Under CEQA

For this Project, a Noise Study Report was prepared in October 2009 and updated in June 2010. (AR 727.) There was also consideration of Caltrans' Traffic Noise

Analysis Protocol. (AR 803.) The consideration is the fact that if traffic goes faster, it tends to be noisier.

Petitioner asserts that claimed the EIR violates CEQA because no mitigation is discussed for noise that exceeds the Noise Abatement Criteria. The EIR explains that the requirements for noise analysis and consideration of noise abatement and mitigation differ between the federal NEPA and the state CEQA. (AR 727.) CEQA requires a baseline versus build analysis to assess whether a proposed project will have a noise impact; if a proposed project is determined to have a significant noise impact under CEQA, mitigation measures must be incorporated into the project unless they are not feasible. (AR 727.) Under NEPA, however, for highway transportation projects with Federal Highway Administration involvement, such as this one, the Federal-Aid Highway Act of 1970 and its implementing regulations govern the analysis and abatement of traffic noise impacts. (AR 727; 23 C.F.R. § 772.) The regulations contain noise abatement criteria that are used to determine when a noise impact would occur. (AR 727-28.) Petitioner did not challenge the NEPA determinations in this lawsuit.

A review of the EIR's discussion of the federal standards and analysis belies Petitioner's position. Under the federal standard, a project is considered to have a "noise impact" if it would increase noise by 12 dba or more; *or* would approach or exceed NAC levels. (AR 728.) The present condition of the Project site is that there is no soundwalls and the decibel levels from the noise of traffic is presently 60 to 77 DBA. (AR 730.) The Noise Study Report determined that the Project would leave noise levels either unchanged or only increased by 1 or 2 decibels – which under the federal criteria is deemed "not substantial". (AR 730.) On the other hand, at four locations the noise level would "approach" or be above NAC levels – because those locations are *already*

approaching or exceeding NAC levels *without* the Project. (AR 729.) Because it would trigger a "noise impact" under the second criteria, the federal analysis considered whether a soundwall noise abatement would be "feasible". Under this criteria, a mitigation is considered "feasible" if it would reduce noise by 5 DBA or more. (AR 729.) Although it was possible that a soundwall would reduce decibels, the Noise Study Report considered soundwalls but held that they were not feasible under a cost-benefit analysis. (AR 735.)

For CEQA purposes, as the EIR explained, Caltrans' Traffic Noise Analysis Protocol provides that a traffic noise impact may be considered significant under CEQA if the project is expected to result in a substantial increase in traffic noise, defined as an increase of 12 dBA Leq(h) above existing conditions. (AR 511, 803, AR 4115-16 (Noise Study Report).) Operating under that standard, the EIR determined that "traffic noise impacts of the proposed project are considered less than significant under CEQA" because the Project will result in a maximum increase of only two dBA Leq(h), which would be an imperceptible increase well below the threshold. (AR 803; see also AR 511 (Table S-2, Summary of CEQA impacts).) This is consistent with the findings under the federal analysis.

Accordingly, no mitigation was required here, because CEQA does not require mitigation for insignificant impacts. Pub. Res. Code §§ 21100(b)(3), 21002.1(a); Guidelines § 15126.4(a)(3); San Franciscans for Reasonable Growth v. City & County of San Francisco (1989) Cal.App.3d 1502, 1517.

B. The EIR Did Not Improperty Analyse or Defer Mitigation for Garter Snakes

The First Appellate District in North Coast, held as follows regarding mitigation and its deferral:

> "'It is improper to defer the formulation of mitigation measures until after project approval; instead, the determination of whether a project will have significant environmental impacts, and the formulation of measures to mitigate those impacts, must occur before the project is approved.' [Citations.] However, when a public agency has evaluated the potentially significant impacts of a project and has identified measures that will mitigate those impacts, the agency does not have to commit to any particular mitigating measure in the EIR, as long as it commits to mitigating the significant impacts of the project. Moreover, . . . the details of exactly how mitigation will be achieved under the identified measures can be deferred ending completion of a future study. [Citations.] As explained in Sacramento Old City Assn., "for the 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 measurs 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 on its commitment as evidence that significant impacts will in fact be mitigated." [Citations.]

North Coast, at p. 629.

As held above, Petitioner failed to demonstrate exhaustion of administrative remedies in regard to its arguments as to the birds and red-legged frogs. Petitioner also raises issues as to the San Francisco garter snake, which is addressed here.

Petitioner claimed the EIR does not address that the San Francisco Garter Snake is a "fully protected species" under California Fish & Game Code. That a creature within the project is a "threatened species" has "no bearing on the impact of the project" upon it or its habitat – rather the requirement is that the environmental impact, if any, be discussed in the EIR. Chaparral Greens v. City of Chula Vista (1996) 50 Cal.App.4th 1134, 1149. Here, the EIR *does* discuss the San Francisco garter snake at great length. (AR 771-782.)

Petitioner cite a comment from a biological consultant that the Project "simply cannot take any individuals of the species or they can be prosecuted." POB at 23:24-24:1. But the comment was simply providing notice that the Project cannot take individuals outside of the consultation process. (AR 9272.) As it is, Caltrans did consult with U.S. Fish and Wildlife Service, and obtained a Biological Opinion and Incidental Take Statement. (AR 981-1026.)

In regard to the garter snake, it is acknowledged and addressed in Section 2.20.3.2 of the EIR, entitled *San Francisco Garter Snake*. (AR 771-782.) Initially, the EIR found that the present of a San Francisco garter snake in the Project area is "unlikely." prior spotting in the past have been "rare," and the potential likelihood of the garter snake appearing in the Project area is "extremely low." (AR 771-772.) Because there is at least a possibility of it appearing, the EIR proceeds with discussion, analysis, and mitigation for any theoretical impact upon the garter snake. The EIR found that the Project "would

not result in direct permanent or temporary effects to aquatic, riparian, or wetland habitats used by San Francisco garter snakes. Construction of the proposed project would disturb ruderal grassland and non-native woodland habitats that **could** be used for dispersal by garter snakes." (AR 772.) Accordingly, "there could be loss of individual snakes during construction." (AR 772.)

At present, the construction of the roadways already bars the garter snakes from travel in that direction, so the Project does not interfere with any existing travel (because there isn't any). (AR 772.) The Project would actually add even more barriers to movement and increase the protection of the garter snakes from being killed by trying to cross the highway. (AR 772.)

Mitigation measures as to the garter snake are also set forth in Section 2.20.4.2. (AR 778-779.) Even in the "rare" and "unlikely" situation that a garter snake might appear in the Project area, the EIR provides for mitigation measures during construction and thereafter. These include educating the workers on what the garter snakes look like, having the workers cover up any holes and trenches at the end of each day to keep from creatures getting entrapped, having a qualified biologist serve as a Biological Monitor and inspect the work site each morning to look for garter snakes, establishing a protocol if a garter snake is found by the Biological Monitor, and commitment to reestablish any habitat impaired. (AR 775, 777-779.)

If this isn't enough, the EIR sets forth an "alternative contingency plan for compensatory habitat mitigation" "in the unforeseeable event that the proposed mitigation concept cannot be implemented for habitat impacts". (AR 777, 779.) If such alternative mitigation is triggered, two acceptable methods are set forth, and a

commitment to develop a Habitat Mitigation and Monitoring Plan to manage the habitat property created.

Caltrans has committed to a plan of mitigation, has evaluated and analyzed alternatives within the plan, and has specified performance criteria. Sometimes it is not practical to finalize the details of a plan to mitigate an impact at the time the EIR is prepared; in those circumstances, deferral of the *specifics* of mitigation is nonetheless permissible where the lead agency "commits itself to mitigation and lists the alternatives to be considered, analyzed and possibly incorporated in the mitigation plan." Defend the Bay v. City of Irvine, 119 Cal.App.4th at p. 1275, citing Sacramento Old City Assn. v. City Council (1991) 229 Cal.App.3d 1011, 1028-30.

The facts at issue here are distinct from the authorities relied upon by Petitioner. In Communities for a Better Environment v. City of Richmond (2010) 184 Cal.App.4th 70, the EIR had improperly deferred *formulation* of mitigation measures for emissions impacts because it had merely proposed a generalized goal, and set out a "handful of cursorily described" measures for future consideration that "might serve" to mitigate the emissions. Id., at p. 93. No effort was made to calculate reductions in emissions, and the perfunctory list of possible measures was "nonexclusive, undefined, untested and of unknown efficacy." Id. Similarly, in San Joaquin Raptor Rescue Center, 149 Cal.App.4th 645, the vague mitigation measure at issue – a management plan to be prepared by a qualified biologist "to maintain the integrity and mosaic of the vernal pool habitat" – was deficient because it merely included "a generalized goal of maintaining the integrity of the vernal pool habitats... leaving the public in the dark about what land management steps will be taken or what specific criteria or performance standard will be

met." Id., at pp. 669-70. As described above, the EIR at issue here did not improperly defer formulation of mitigation.

Petitioner argues that Center for Biological Diversity v. California Department of Fish and Wildlife (2015) 62 Cal.4th 204 ("Newhall Ranch")," is relevant to the EIR's mitigation for impacts to the garter snake. While Newhall Ranch considered an EIR that relied on mitigation that authorized the take of a fully protected species, the EIR here expressly relied on mitigation that would not take the garter snake.

In Newhall Ranch, the Supreme Court found the EIR violated Fish and Game Code Section 5515's prohibition on taking or possessing fully protected fish in mitigation of project impacts. Newhall Ranch, 62 Cal.4th pp. at 232-33. The mitigation measure at issue provided for "collection and relocation of" the protected species, activities which fall squarely within the definition of "take" in Fish and Game Code Section 86. Id. The Supreme Court explained that "such actions may not be specified as project mitigation measures in an EIR or other CEQA document." Id.

Here, by contrast, the EIR expressly relied on a mitigation measure that ensures that such prohibited actions will not occur. For instance, mitigation measure MM T&E-2.7 provides that if any species are identified on site, the approved on-site biologist "will allow the individual snake to leave on its own accord." (AR 779.) In other words, instead of "collecting and relocating" protected species, as the mitigation measure in Newhall Ranch called for, the mitigation measure here calls for exactly the opposite – that the species not be captured or relocated, and that it be allowed to leave on its own.

That mitigation measure, and others, are echoed throughout the EIR and the record. For instance, the summary table of impacts and mitigation measures explains that "if any snakes are found on-site during construction, the snake will be allowed to leave

on its own accord." (AR 493.) Moreover, this mitigation measure was expressly made a condition of the Biological Opinion for this Project. (AR 1009.) In fact, the Biological Opinion, which was included in the EIR as Appendix J, also expressly discloses that the garter snake is a fully protected species and requires Caltrans to "comply with all applicable CDFG regulations pertaining to mitigation for species designated as fully protected and/or listed by the State."

Petitioner has failed to demonstrate a violation of CEQA for alleged lack of mitigation of impacts upon the San Francisco garter snake – as the record shows the opposite.

C. The EIR Contains Enforceable Monitoring or Reporting Mitigation Measures

Petitioner claims there is no Mitigation Monitoring or Reporting Plan ("MMRP"), in the EIR, and that this is fatal under CEQA. That there is not a portion explicitly entitled MMRP is not a violation of CEQA, and no law so requires. What CEQA requires is that the agency "adopt a program for monitoring or reporting" to ensure that the mitigation measures are implemented. Guidelines §15097(a). This case be set forth in the EIR itself or incorporated by reference. PR Code §21081.6(b); Vineyard, 40 Cal.4th at p. 444. "The public agency may choose whether its program will monitor mitigation, report on mitigation, or both." Guidelines §15097(c).

Petitioner presents only a broad-brush attack on the EIR, without any specific discussion or analysis of how the EIR fails to contain a program for follow-up on mitigation for those items for which a significant environmental impact was found.

Caltrans adopted a program to ensure that mitigation measures to reduce significant effects will be implemented, as reflected in Appendix I to the Final EIR, and further memorialized in the Project Report that constitutes the Project approval, the Findings adopted pursuant to Public Resources Code section 21081, and the Notice of Determination filed with the State Clearinghouse. (AR 957-78, 1, 3-139.)

CEQA requires that a lead agency ensure that mitigation measures to reduce significant environmental effects be fully enforceable through permit conditions, agreements or other measures, but does not require any specific format or procedure for doing so. Pub. Res. Code § 21081.6; see, e.g., Leonoff v. Monterey County Bd. of Supervisors (1990) 222 Cal.App.3d 1337, 1356 (compliance with monitoring requirements pursuant to other environmental laws and permits is sufficient); Kostka at p. 858. Ultimately, as long as the agency takes steps to ensure compliance during project implementation and that the mitigation measures are fully enforceable, the format does not matter. See, e.g., Kostka at p. 858 (variety of formats can suffice, such as including monitoring steps in findings).

Appendix I provides a detailed description of mitigation measures for the Project, including monitoring and reporting steps that will be taken to ensure implementation and compliance, as well as identifying the party responsible for implementation. (AR 957-78.) An example of such monitoring is the prior discussion in this Decision regarding the San Francisco garter snake. These steps, and others outlined in Appendix I, fit squarely within the definition of "monitoring" under the Guidelines: "Monitoring is generally an ongoing or periodic process of project oversight." Guidelines § 15097(c), AR 973-76. Further, although there is no requirement for such monitoring or reporting for measures implemented for effects which are not significant, Appendix I discusses them at great

length nonetheless. Pub. Res. Code § 21081.6(a)(1); see, e.g., AR 961-64 (cultural resources), 965-66 (paleontological resources), 968 (hazardous materials), 976 (invasive species), 976-78 (construction impacts).

Petitioner claimed that Caltrans "failed to make mitigation measures enforceable in the Final Project Report or elsewhere," and that "there is no condition of approval adopted for this mitigation measure." POB at 25:8-14. But the Project Report, which constituted the Project approval, identified mitigation measures for biological impacts, and ensured that they will be implemented. (AR 53-55.) The EIR also stated that these mitigation measures "are included in the Project." (AR 773.) By also identifying these measures in the Project approval itself, they are conditions of approval, which is sufficient to demonstrate that they are enforceable. Gray v. County of Madera (2008) 167 Cal.App.4th 1099, 1116; Kostka, at p. 709. The Findings also stated that "changes or alterations have been required in, or incorporated into, the project, which avoid or substantially lessen the significant environmental effect as identified in the EIR," and described the mitigation measures that "have been adopted." (AR 140-41, 144.)

Accordingly, Petitioner's argument that the Project approvals do not include any enforceable programs for monitoring or reporting of mitigation measures for various impacts such as hazardous materials, invasive species and construction impacts, is not supported by the record.

IX. PETITIONER FAILED TO SHOW THAT RECIRCULATION IS REQUIRED

Petitioner claims that new information was added to the Final Environmental Impact Report such that recirculate (and the opportunity for further comment and review)

is required prior to final certification. Petitioner raised three grounds for recirculation: (1) the addition of a new section on paleontological impacts in the Final EIR based upon a Paleontological Identification Report by a Caltrains geologist; (2) the decision by Caltrans not to adopt "Soundwall 2" as noise mitigation; and (3) that the EIR itself is inadequate. The third basis was not addressed in the Reply Brief and thus is deemed abandoned.

A. Standards for Recirculation

If significant new information is added to an EIR after notice of public review has been given, but before final certification of the EIR, the lead agency must issue a new notice and recirculate the EIR, or the relevant portions thereof, for comments and consultation. Pub. Res. Code § 21092.1; Guidelines § 15088.5; Vineyard Area Citizens for Resp. Growth v. City of Rancho Cordova (2007) 40 Cal.4th 412, 447

The standard of review and the showing required for recirculation were recently addressed by the First Appellate District in North Coast Rivers Alliance v. Marin Municipal Water District Board of Directors (2013) 216 Cal.App.4th 614, 654-656:

> "The essential purpose of the EIR is to inform the public and its responsible officials of the environmental consequences of their decisions before they are made." [Citations.] "Once a draft EIR has been circulated for public review, CEQA does not require any additional public review of the document before the lead agency may certify the EIR except in circumstances requiring recirculation. A lead agency must recirculate an EIR when 'significant new information' is added to an EIR after the draft EIR has been circulated for public review. [Citations.] New 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.'" [Citations.]

North Coast, at p. 654. "[R]ecirculation is 'an exception, rather than the general rule.'" Id., at p. 655. It must be shown that significant new information has been added to the EIR, after circulation of the Draft EIR. A showing of "significant new information" includes the following:

". . . [A] disclosure that (1) a new significant environmental impact would result from the project or a new mitigation measure; (2) a substantial increase in the severity of an environmental impact would result unless mitigation measures are adopted; (3) a feasible alternative or mitigation measure considerably different from others previously analyzed would clearly lessen the project's significant impacts but the project's proponents decline to adopt it; or (4) the draft EIR 'was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded.' [Citations.]"

North Coast, at pp. 654-655, quoting from Laurel Heights Improvement Assn., 6 Cal.4th at p. 1132; see also, Guidelines § 15088.5(a).

Agency decisions regarding whether to recirculate are upheld if supported by substantial evidence, and reasonable doubts are resolved in favor of the agency's decision. Laurel Heights Improvement Assn., 6 Cal.4th at p. 1135; Vineyard Area Citizens, 40 Cal.4th at p. 447; Guidelines § 15088.5(e).

"Recirculation is not required where the new information added to the EIR merely clarifies or amplifies or makes insignificant modifications in an adequate EIR." [Citation.] An agency's decision not to recirculate the draft environmental impact report is entitled to substantial deference; the petition bears the burden of proof to show no substantial evidence supports the agency's decision. [Citations.]

North Coast, at p. 655.

B. Paleontology Information Does Not Require Recirculation

Petitioner asserts that the Final EIR disclosed a significant new impact because the Paleontological Identification Report, prepared after the public comment period, determined that planned ground-disturbing activities within the Project footprint "could potentially impact paleontological resources." (AR 706.) The Final EIR added two mitigation measures, those measures were not necessary to reduce the impact to less than significant. AR 706-07. Rather, it reflected an effort to honor the bones of Native Americans by acknowledging a process to allow preservation of artifacts and remains if they are discovered upon excavation during the Project.

As the EIR explained, while the Project area "is considered to have a high potential of paleontological sensitivity," and "may potentially impact paleontological resources," that impact is not expected to be significant because, for instance, microfossils are very abundant and found in numerous areas in the Bay Area. AR 706. In addition, no paleontological resources will be affected in the middle portion of the Project, which is the location where the geological deposits are the most sensitive, because the widening will be constructed on new embankment to prevent encroachment

into environmentally sensitive areas and because excavation in this area would be into existing, man-made embankments. AR 706. That conclusion is supported by substantial evidence in the Paleontology Report itself. AR 4179-99. Petitioner did not challenge any of this evidence, nor cite to any evidence to the contrary, but rather argued that the Paleontology Report concluded the *impacts* would be significant. The fact is that the EIR did *not* made a conclusion of significant environmental impacts, and recirculation was not required.

C. **Rejection of a Proposed Noise "Mitigation" by Construction of "Soundwall 2" Does Not Require Recirculation**

Petitioner argues that "feasible noise mitigation" that would reduce Project noise impacts was considered but not adopted in the Final EIR. Petitioner fails to identify any CEQA violation or cite to any applicable CEQA provision, apparently because there is no requirement under CEQA that any mitigation measure be adopted for noise impacts because such impacts were determined to be less than significant. AR 803; see also AR 511 (Table S-2, Summary of CEQA impacts). CEQA requires that an EIR describe feasible mitigation measures that can minimize the project's significant environmental impacts. Guidelines §§ 15121(a), 15126.4(a). But an EIR is not required to include or discuss mitigation measures for insignificant impacts. Pub. Res. Code § 21100(b)(3); San Franciscans for Reasonable Growth v. City and County of San Francisco (1989) 209 Cal.App.3d 1502, 1517.

Further, as stated above, Petitioner failed to demonstrate exhaustion of administrative remedies in regard to the issue of any construction noise.

DATED: July 14, 2017

HON. MARIE S. WEINER
JUDGE OF THE SUPERIOR COURT