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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

PROTECT OUR HOMES AND HILLS et al.,

Plaintiffs and Appellants,

v.

COUNTY OF ORANGE et al.,

Defendants and Respondents;

YORBA LINDA ESTATES, LLC,

Real Party in Interest and Respondent.

G054185

(Super. Ct. No. 30-2015-00797300)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William D. Claster, Judge. Affirmed in part, reversed in part, and remanded with directions.

Kevin K. Johnson, Kevin K. Johnson and Jeanne L. MacKinnon for Plaintiffs and Appellants.

Leon J. Page, County Counsel, Nicole M. Walsh and Julia C. Woo, Deputies County Counsel for Defendants and Respondents.

Latham & Watkins, Christopher W. Garrett and Taiga Takahashi for Real Party in Interest and Respondent.

* * *

This case concerns a 340-home residential project (Project) in the hills adjacent to a state park and the City of Yorba Linda. The County of Orange (County) reviewed the Project pursuant to the California Environmental Quality Act, Public Resources Code section 21000 et seq. (CEQA). The environmental impact report concluded most potential impacts could be mitigated to a less than significant level.

Protect Our Homes and Hills and others (collectively, Protect) appeal from a partial denial of their petition for writ of mandate. They claim the County violated CEQA by failing to recognize the entire state park, failing to properly analyze and/or mitigate certain impacts, including those related to biological resources, fire hazards, and water supply, and failing to recirculate the final document prior to certifying it.

We conclude some of these arguments have merit. As we will explain, the final environmental impact report did not contain the accurate and stable description of the project's environmental setting required by CEQA, nor did it adequately mitigate fire hazard impacts or properly analyze water supply availability.

Therefore, we will reverse, in part, and remand with directions.

FACTUAL AND PROCEDURAL BACKGROUND

The 469-acre Project site consists of substantially undeveloped land situated in an unincorporated area of Orange County that has long been contemplated for development. Chino Hills State Park (CHSP) is located immediately adjacent to the north and east of the site, and the City of Yorba Linda sits to the south and west. Two future residential developments are anticipated to be built in the immediate vicinity—Cielo Vista, with 112 single family homes, and Bridal Hills, with 38 single family homes.

The Project consists of a "large-lot, low-density" gated community, to be known as Esperanza Hills, with a maximum of 340 single family homes and a variety of open space amenities, such as parks and trails. The community's pedestrian, bicycle and equestrian trails will link to existing trails and open space areas, including CHSP. Development will occur in two phases over a period of several years.

Given its setting in a very high fire hazard zone, the Project incorporates certain features intended to help minimize associated risks. The houses will integrate California Building Code fire protection components, landscaped areas will be limited to an approved list of fire safe plant species, and special fuel management practices will be imposed. In addition, two water reservoirs will be built onsite and roughly 85 acres of fuel modification zones will be strategically located around the Project.

After receiving an application for the Project, the County released an initial study and published a notice indicating it would be preparing an EIR. A public scoping meeting was held to gather public input on issues to be addressed in the EIR. Among the primary issues raised by the public from the outset were concerns about aesthetics, biological resources, fire hazards, emergency evacuation, accessibility and traffic.

The draft EIR (DEIR) was circulated for public review and comment in accordance with CEQA and the CEQA Guidelines.[1] Appended to the DEIR were numerous technical studies, including an air quality and greenhouse gas emission impact analysis, a biological technical report, a geotechnical report, a fire protection and emergency evacuation plan, noise and traffic impact reports and preliminary water and sewer reports. The DEIR indicated nearly all of the Project's potential impacts would be reduced to less than significant levels after implementation of mitigation. The two impacts identified as being significant and unavoidable even after mitigation were greenhouse gas emissions and long-term operational noise caused by increased traffic.

[1] All references to the "CEQA Guidelines" are to the state regulations which implement the provisions of CEQA. (Cal. Code Regs., tit. 14, § 15000 et seq.).

Thousands of comments concerning the Project and the DEIR flowed in from members of the public, federal and state agencies, and other government entities. The County drafted individual responses to comments, as well as topical responses for certain subject matter concerns raised by many people. It also made revisions to some information within the DEIR. Because it believed the responses and changes simply clarified, amplified, elaborated on, and made minor modifications to the DEIR, the County concluded recirculation for further public review and comment was not required.

Despite pleas from the public to further evaluate certain impacts and recirculate the FEIR pursuant to CEQA in light of alleged significant new information included in it, the County moved the Project forward. The County board of supervisors adopted a statement of overriding considerations concerning the significant unavoidable impacts, certified the final environmental impact report (FIER), adopted a mitigation monitoring and reporting program, and granted the associated Project approvals.

Protect filed a petition for writ of mandate against the County and the City of Yorba Linda, naming the developer, Yorba Linda Estates LLC, as a real party in interest, and challenging certification of the FEIR and the associated land use approvals based on purported violations of CEQA and state planning and zoning laws. With respect to CEQA, the petition alleged: the Project description, environmental setting and baseline were inaccurate and led to incomplete analyses of potential impacts; the County impermissibly piecemealed the Project; cumulative impacts were not adequately analyzed; the FEIR failed to fully analyze aesthetic impacts, including views from CHSP; the FEIR incorrectly determined the Project was consistent with various land use planning documents; the FEIR failed to adequately analyze impacts, and/or deferred mitigation, related to air quality, biological resources, geology and soils, wildland fire hazards, greenhouse gas emissions, recreation, traffic, noise, and water supply availability; the FEIR did not analyze a reasonable range of alternatives; and the County

erroneously failed to recirculate the FEIR prior to certification. Prior to the hearing on the petition, Protect voluntarily dismissed the City from the action.

After extensive briefing by all parties and a hearing, the trial court found merit in one of Protect's arguments and rejected the others. Specifically, it concluded the FEIR's greenhouse gas analysis was flawed because it failed to consider all feasible mitigation measures and the FEIR impermissibly deferred mitigation concerning greenhouse gas impacts. These determinations were among those detailed in a lengthy statement of decision.

The trial court entered judgment and issued a corresponding preemptory writ of mandate, with both ordering the County to take certain steps concerning the FEIR and the Project approvals. Those steps included: (1) vacating certification of the FEIR, as well as adoption of the mitigation and monitoring program and statement of overriding considerations; (2) vacating all Project approvals based on those documents; (3) revising the FEIR in accordance with CEQA, the CEQA Guidelines, the statement of decision, the judgment, and the writ, so as to cure the deficiencies identified by the court; and (4) "[r]econsider[ing], in light of the revised EIR, whether to recirculate and certify the [document] and issue any [p]roject-related approvals[.]" The court also ordered the County to not issue grading permits or allow any physical alteration of the Project site until it revised the EIR to bring it into compliance with CEQA.

Protect filed a timely notice of appeal challenging limited portions of the partial denial of its petition. The County did not appeal the partial grant of the petition, and instead decided to comply with the limited writ.[2]

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[2] We requested supplemental briefing from the parties regarding: (a) the status of enforcement of the judgment and writ, including, any subsequent County actions concerning the EIR, the challenged Project approvals and the Project; and (b) the impact of any such actions on this appeal, including whether they render it moot. The parties indicated the County vacated certification of the FEIR, vacated the Project approvals, revised the FEIR greenhouse gas analysis and mitigation, certified a revised FEIR, and granted new Project approvals. We take judicial notice of the existence of two new

On appeal, Protect urges de novo review of all but one of its contentions, which include claims the County violated CEQA by: (1) failing to provide an adequate and accurate baseline environmental setting by omitting a significant amount of CHSP from acreage counts and maps; (2) failing to sufficiently analyze and mitigate potential fire hazard impacts; (3) failing to adequately analyze and mitigate impacts to two special status plant species; and (4) omitting analysis of the Project's total construction stage and operational water demand. It also claims the County's decision to not recirculate the FEIR prior to certification is not supported by substantial evidence.

Although the County responds to the substance of Protect's contentions, it prefaces nearly every response with a claim that Protect has waved the argument either by failing to raise it during the administrative proceedings or in the trial court, or by failing to sufficiently lay out the record evidence favorable to the County. Additionally, it ends each response by asserting a lack of prejudice as to any error we may find.

Because we find no merit in the County's waiver assertions,[3] we will address all of Protect's contentions, providing more detailed factual information relevant to each, and the issue of prejudice.

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lawsuits now pending concerning those subsequent actions by the County. (Evid. Code, §§ 452, subd. (d), 459.)

As for the effect on this appeal, both parties take the position the County's above-described actions to not render this appeal moot or otherwise impact it. Without deciding the mootness issue, we exercise our discretion to consider the appeal even if it could technically be deemed moot. (*Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1278, fn. 6 (*Defend the Bay*) ["[T]he court has inherent power to retain a matter that presents important issues of continuing interest, even though technically moot"].)

[3] At oral argument, the County and Yorba Linda Estates LLC asserted we should decline to consider certain arguments made by Protect in its reply brief because they were allegedly not included in its opening brief. Our review of the briefs indicates otherwise.

DISCUSSION

A. Overview of CEQA Process

"CEQA is a comprehensive scheme designed to provide long-term protection to the environment. [Citation.]" (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 112.) It applies to "discretionary projects proposed to be carried out or approved by public agencies." (Pub. Resources Code, § 21080, subd. (a).) "In enacting CEQA, the Legislature declared its intention that all public agencies responsible for regulating activities affecting the environment give prime consideration to preventing environmental damage when carrying out their duties. [Citations.] CEQA is to be interpreted 'to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.' [Citation.]" (*Mountain Lion Foundation*, at p. 112.)

An EIR, which has been described as "the 'heart of CEQA'" (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564), "is required for any project . . . a public agency proposes to carry out or approve that may have a significant effect on the environment. [Citations.] An EIR must describe the proposed project and its environmental setting, state the objectives sought to be achieved, identify and analyze the significant effects on the environment, state how those impacts can be mitigated or avoided, and identify and analyze alternatives to the project, among other requirements. [Citations.]" (*Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455, 465-466, fn. omitted (*Ballona*).)

Once a draft EIR is prepared, the public must be notified, and the draft and all documents it references must be made available for public review and comment. (Pub. Resources Code, §§ 21091, subd. (a), 21092; CEQA Guidelines, § 15087.) The public agency acting as the lead agency then prepares a final EIR, which must include comments received from the public and from other agencies concerning the draft EIR,

responses to those comments, and any revisions to the draft EIR. (CEQA Guidelines, §§ 15088, 15132; *Ballona, supra*, 201 Cal.App.4th at p. 466.)

B. Standard of Review

"In reviewing a petition challenging the legality of a lead agency's actions under CEQA, our role is the same as the trial court's. We review the agency's actions, not the trial court's decision, and our inquiry extends 'only to whether there was a prejudicial abuse of discretion' on the part of the agency." (*Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 923.)

"'[A]n agency may abuse its discretion under CEQA either by failing to proceed in the manner CEQA provides or by reaching factual conclusions unsupported by substantial evidence. [Citation.] Judicial review of these two types of error differs significantly: While we determine de novo whether the agency has employed the correct procedures, "scrupulously enforc[ing] all legislatively mandated CEQA requirements" [citation], we accord greater deference to the agency's substantive factual conclusions. In reviewing for substantial evidence, the reviewing court "may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable," for, on factual questions, our task "is not to weigh conflicting evidence and determine who has the better argument." [Citation.]' [Citation.]" (*Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, 935 (*Banning Ranch*).)

In evaluating an EIR for CEQA compliance, then, a reviewing court must adjust its scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of improper procedure or a dispute over the facts. (*Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1236.) For example, "[w]hether an EIR has omitted essential information is a procedural question subject to de novo review." (*Banning Ranch*, *supra*, 2 Cal.5th at p. 935.)

C. Project Description and Environmental Setting

Protect asserts the FEIR failed "to provide an adequate and accurate . . . baseline [and] environmental setting by omitting over 2,300 acres of adjacent CHSP lands" from acreage counts and depicting inaccurate CHSP boundary maps. It contends that error resulted in the County failing to analyze or mitigate the Project's "impacts on all adjacent CHSP lands[,]" particularly with respect to aesthetics, biological resources and fire hazards. The County does not deny the DEIR understated the acreage of CHSP, but argues the FEIR was legally sufficient because the acreage amounts were corrected and it accurately referred to CHSP throughout as being located to the "north and east" of the Project site. We disagree with the County and find merit in Protect's claims.

"The fundamental goal of an EIR is to inform decision makers and the public of any significant adverse effects a project is likely to have on the physical environment. [Citations.] To make such an assessment, an EIR must delineate environmental conditions prevailing absent the project, defining a baseline against which predicted effects can be described and quantified. [Citation.]" (*Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 447.) This generally includes providing "'a description of the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced, from both a local and regional perspective." (*Id*. at p. 448; see CEQA Guidelines, § 15125, subd. (a).)

"Without accurate and complete information pertaining to the setting of the project and surrounding uses, it cannot be found that the FEIR adequately investigated and discussed the environmental impacts of the development project." (*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 729

(*San Joaquin Raptor*).) Thus, "[i]f the description of the environmental setting of the project site and surrounding area is inaccurate, incomplete or misleading, the EIR does not comply with CEQA." (*Cadiz Land Co. v. Rail Cycle* (2000) 83 Cal.App.4th 74, 87 (*Cadiz*).)

Here, the DEIR identifies the Project site as being "bordered by Chino Hills State Park on the north and east"—a description carried forward from the initial study and notice of preparation for the Project. The same "north" and "east" descriptors are used throughout other chapters of the DEIR. Occasionally, the DEIR uses the inverse description, identifying the Project site as being located to the south and west of CHSP.

Although these directional descriptors are generally accurate in describing the location of the Project site relative to CHSP, commenters reviewing the DEIR noticed the document included inaccurate acreage data and inaccurate maps of CHSP. Specifically, the DEIR understated the acreage of CHSP by roughly 2,300 acres. And, the inaccurate maps showed CHSP lying north and east of only the northern portion of the Project site, whereas CHSP actually borders the entire northern and eastern boundaries of the Project. The State Department of Parks and Recreation, the agency responsible for managing CHSP, noted the "incorrect boundary and vital statistics[,]" provided the correct park acreage and map, and requested the County "revise all map boundaries and discussions regarding [CHSP]."

In response to the public's comments, the County made a global revision to the acreage of CHSP, modifying it from the inaccurate 11,770 acres included in the DEIR to the accurate 14,100 acres. But, no similar broad revision was made to the maps. Rather, only two of the maps were modified to update CHSP's boundaries. The large majority of the maps in the FEIR, including the "[p]roject [v]icinity [m]ap," remained unchanged and still inaccurately depicted the area of CHSP lying to the east of the Project site.

The County attempts to downplay any error remaining in the FEIR by asserting "CEQA only requires 'the main features of something rather than details or particulars.'" Such a statement is too simplistic. While CEQA does not require exhaustive detail on every aspect of the area surrounding a project, it does demand enough detail to allow analysis of a project's potential impacts. (CEQA Guidelines, § 15125.) In this vein, the CEQA Guidelines state, "Knowledge of the regional setting *is critical* to the assessment of environmental impacts." (CEQA Guidelines, § 15125, subd. (c), italics added.)

Failing to identify a significant portion of CHSP as being located immediately to the east of the southern half of the Project site makes it impossible to analyze, for example, the full scope of the Project's potential indirect impacts on CHSP's biological resources. While it may turn out that potential impacts related to the omitted area of CHSP are no different than those revealed in the FEIR, the investigation, analysis, disclosure and mitigation steps are vital. (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564 [primary purpose of CEQA is to inform government decision makers and public about significant environmental effects of proposed project before a decision is made to approve or deny it].) Without them, CEQA's informational and environmental protection purposes are thwarted. (*San Joaquin Raptor, supra*, 27 Cal.App.4th at p. 729; *Cadiz, supra*, 83 Cal.App.4th at p. 87; *Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal.App.4th 1109, 1122.)

Equally unavailing is the County's claim that the uncorrected maps were "historical" ones located in portions of the FEIR where the analysis was completely unrelated to CHSP and any potential impacts thereto. Although some of these maps were historical depictions of CHSP used in documents predating CHSP's acquisition of certain land from, for example, the City of Yorba Linda (e.g. 1999 CHSP General Plan Map), others appear to have been developed for the FEIR itself. This includes the inaccurate

Project "vicinity map," which was not only included in the FEIR, but was also the only map included in the public notices of availability for both the DEIR and the FEIR.

Further, the physical location of the erroneous maps in the FEIR is of no import. A stable and accurate description of the surrounding area is no less crucial than a stable and accurate description of the Project. (See *City of Irvine v. County of Orange* (2015) 238 Cal.App.4th 526, 542, fn. 8 ["[A] stable and accurate description of a project is the 'sine qua non' of an EIR"].) Having a couple accurate depictions of CHSP's boundaries relative to the Project among a sea of inaccurate ones does nothing to clarify matters, it confounds them. If CHSP was, indeed, irrelevant to particular analyses, as County contends, then the appropriate approach would have been to focus the related maps on the matters being discussed and leave off any reference to CHSP.

The County's lack of prejudice argument is unpersuasive. "Without accurate and complete information pertaining to the setting of the project and surrounding uses, it cannot be found that the FEIR adequately investigated and discussed the environmental impacts of the . . . project." (*San Joaquin Raptor, supra,* 27 Cal.App.4th at p. 729.) Notably, nothing in the record indicates impacts on the full area of CHSP were, in fact, analyzed, nor is there any indication the inaccurate depictions were mere clerical errors. The County has never claimed as much. Instead, the County's responses to comments included in the FEIR incorrectly stated that "[t]he [DEIR's] depiction of the Project site in relation to the boundary of [CHSP] is accurate[,]" and summarily claimed the DIER's analysis "will not change based on [CHSP] boundaries or total acreage."

Under these circumstances, we must conclude the FEIR's inaccurate and unstable information concerning the Project's environmental setting "'"preclude[d] informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process."' [Citation.]" (*Banning Ranch Conservancy, supra,* 2 Cal.5th at p. 942.)

D. Fire Hazards

Protect claims the FEIR failed to sufficiently analyze potential fire hazard impacts of the Project because it did not discuss certain items which Protect believes are critical to the analysis. It also contends the County improperly deferred mitigation for the fire hazard related impacts that were discussed in the FEIR. Though Protect couches the first as an informational deficiency, the argument is actually a challenge to the scope of the FEIR's analysis, to which we apply a substantial evidence standard of review. (*Santa Monica Baykeeper v. City of Malibu* (2011) 193 Cal.App.4th 1538, 1546.)

In accordance with the CEQA Guidelines, the DEIR evaluated whether the Project would "[e]xpose people or structures to a significant risk of loss, injury or death involving wildland fires, including where wildlands are adjacent to urbanized areas or where residences are intermixed with wildlands." Recognizing the Project site is located in a "Very High Fire Hazard Severity Zone," the DEIR began by explaining the site's topography, vegetation, climate, and fire history. Included were detailed characteristics of the most recent of three fires to reach the site—the 2008 Freeway Complex Fire—which burned the entire site in approximately 40 minutes, along with roughly 30,000 additional acres adjacent to the site.

To provide a more comprehensive picture of potential fire risks and develop appropriate site-specific fire protection measures and evacuation procedures, a County consultant prepared a fire protection and emergency evacuation plan. The risk assessment included therein used a geographic-based fire behavior modeling system to assess the wildfire risk of the undeveloped Project site and that of the site post-development. The fire model took into account various characteristics of the site, the surrounding areas and the proposed Project, including elevation, slope, vegetation, weather, historic fire behavior and construction materials.

Based on the fire modeling, the risk assessment concluded: (1) "the undeveloped Project Site is considered vulnerable to wildfire starting in, burning into, or spotting into the site fuels[;]" and (2) fire risk on-site and in the vicinity would be

"significantly lower" once the Project is built. The latter conclusion was based on the Project's fire protection design features, as well as required and recommended Project-specific fire protection and emergency evacuation measures. Among the Project features highlighted in the assessment were: fuel modification zones and breaks, designed in consultation with the Orange County Fire Authority (OCFA); ignition resistant structures, compliant with the 2010 California Building and Fire Codes; and access and road infrastructure, consistent with Orange County Fire Code requirements. The suggested emergency planning and evacuation protocols included: preparation of a community evacuation plan, to be reviewed and accepted by OCFA; ongoing community education and preparedness training; early evacuations; and contingency onsite relocation.

During the DEIR circulation period, the County received multiple comments concerning fire hazards and emergency evacuation plans. As part of its response to the evacuation issues, the County had a consultant prepare a supplement to the fire protection and emergency evacuation plan. The supplement, which was appended to the FEIR, analyzed the amount of time it would take to evacuate the entire Project under various scenarios, assuming simultaneous evacuation of existing homes in the vicinity of the Project and two anticipated future developments. It concluded that, at best, full evacuation would take approximately 45 minutes, and, at worst, it would take up to 2.5 hours. The County determined these evacuation times could be effectively achieved given the Project's fire protection design features and the existence of a community evacuation plan prepared by the Orange County Sheriff's Department (OCSD) after the 2008 Freeway Complex Fire.

Protect criticizes the County's analysis, asserting it should have included, but failed to include, data and analysis concerning: (1) how much the spread rate of a fire would be reduced by having the Project on the site versus leaving the site in its natural condition; (2) whether there would be adequate evacuation time if a fire originated closer to the Project site than in the 2008 fire; (3) how residents will be notified of the need for

offsite evacuation or onsite relocation; and (4) where residents will take shelter if onsite relocation is deemed advisable in a given situation.

Aside from the fact that some of these items were, in fact, discussed in the FEIR, CEQA does not require a lead agency to discuss and evaluate every theoretical scenario, nor does it require an exhaustive impact assessment. (CEQA Guidelines, § 15151; *Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1397 (*Irritated Residents*).) What it does require is analysis of a sufficient degree, supported by substantial evidence, to provide decisionmakers with the information needed to make an intelligent decision concerning a project's environmental impacts. (CEQA Guidelines, § 15151; *Irritated Residents*, at p. 1398; *Dry Creek Citizens Coalition v. County of Tulare* (1999) 70 Cal.App.4th 20, 26.) The FEIR's fire hazard analysis did just that.

Separate from the sufficiency of the fire hazards analysis, Protect attacks the fire evacuation related mitigation imposed by the County. It argues the County improperly deferred mitigation because it merely required future preparation of an evacuation plan without setting forth any specific standards for the plan to meet. We agree.

Although mitigation measures generally must be defined in advance, there are limited circumstances in which formulation of mitigation may be deferred until a later time. (Pub. Resources Code, § 21100, subd. (b)(3); CEQA Guidelines, § 15126.4, subd. (a)(1)(B); *Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1027 (*SOCA*).) Specifically, deferred development of mitigation is permitted if, in addition to demonstrating some need for deferral, the lead agency (1) commits itself to mitigation; (2) lists in the EIR the possible mitigation options; and (3) establishes "specific performance criteria" the mitigation must meet. (*SOCA*, *supra*, 229 Cal.App.3d at pp. 1027-1029.)

To address the Project's potentially significant wildfire impacts, the County included a mitigation measure requiring development of a community evacuation plan (CEP)—a document the FEIR refers to as "the backbone of hazard relocation/evacuation planning for the Esperanza Hills community." Mitigation Measure Haz-6 (MMH6) mandates the CEP be submitted to, and reviewed by, OCFA and OCSD, and approved by OCFA prior to issuance of any certificate of use and occupancy. As for the CEP's contents, the measure provides: "The CEP will incorporate the information on community plans from the Orange County Office of Emergency Services and the San Diego Office of Emergency Services. The Esperanza Hills [Fire Protection and Emergency Evacuation Plan] shall be the basis of the CEP. . . ." It also states the CEP "shall" include certain types of provisions, including ones relating to pre-fire planning and preparation, post-fire recovery actions, prevention (maintenance of fuels around buildings, gutter and roof clearance, vent protection), emergency contact numbers, an annual evacuation training schedule, annual review and update requirements, wildfire emergency evacuation plan details, and on-site partial relocation versus off-site evacuation.

The problem with MMH6 is there are no performance standards to guide OCFA's approval process. For example, while "emergency evacuation plan details" must be included in the CEP, nothing in the measure guides the minimum standards for those details, nor is there mention of any statutes or regulations that do so. The fire protection plan appended to the FEIR, which is to form "the basis of" the CEP, does not fill the gap. Though titled a "plan," it is truly just an analysis that provides recommendations for minimizing impacts. The FEIR relied on those recommendations in concluding fire hazard impacts would be less than significant, but there is no requirement each of them actually be included in the CEP.

Under these circumstances, deferred mitigation is improper. (*Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 94 [list of

potential methods of mitigation for later selection without "specific and mandatory performance standards" is improper deferral]; *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 794 [requiring report without established standards is impermissible mitigation]; *Defend the Bay, supra*, 119 Cal.App.4th at p. 1275 [requiring biological report and compliance with any recommendations in it is impermissible deferral of mitigation].) Therefore, the fire hazard mitigation measures must be revised to eliminate the improper deferral.

E. Biological Resources

It is undisputed the Project site contains certain special status plant species and mitigation is necessary to reduce impacts on those species to less than significant levels. Protect contends the FEIR failed to adequately analyze and mitigate impacts to two of the species—the Braunton's milk-vetch and the intermediate mariposa lily. The County defends the FEIR's analysis, arguing it is supported by substantial evidence, and asserts the challenged mitigation measures are valid. We agree with the County.

To assist in understanding the Project's biological resource impacts, a County consultant prepared a biological study which analyzed the Project site and an "off-site impact area," consisting of approximately 35 acres located to the east and south of the site where off-site access improvements will be constructed. Because the grading and construction for the Project will impact all of the Braunton's milk-vetch and the intermediate mariposa lily plants, the study found a need for mitigation.

To mitigate the impact to the intermediate mariposa lily, the DEIR included MM Bio-2 (MMB2), which provides: "Prior to issuance of grading permits, a Special Status Planting and Monitoring Plan shall be prepared by a qualified biologist in consultation with the CDFW and the USFWS for approval by the Manager of Planning, OC Development Services. The plan shall provide for planting at the appropriate time of the year for success of 326 greenhouse-propagated individuals of intermediate mariposa lily in the Study Area within an undisturbed area of coastal sage scrub of same habitat

quality with respect to soil type and its characteristics. The plan shall include a maintenance program for weed removal, supplemental watering, fencing, and other forms of site protection. This mitigation plan will be considered successful if at least 80% of 326 flowering individuals, or 261 flowering individuals, are observed five years after planting. If success criteria are not met after five years, remedial measures shall include greenhouse propagation and planting of additional individuals on the Project Site." The DEIR contained an identical mitigation measure, MM Bio-3 (MMB3), for the Braunton's milk-vetch, with the 80% success rate being 320 individuals.

In response to comments expressing concern about suitable soil for replanting of the two species on the Project site, the County modified MMB2 and MMB3 to require that the replanting occur in an undisturbed location with suitable soil, slope, exposure and other characteristics to make the replanting viable. It also included in the FEIR a Habitat Mitigation and Monitoring Plan (HMMP), and revised the mitigation measures to mandate preparation of a restoration plan consistent with the HMMP prior to issuance of a grading permit. Although the FEIR indicated a restoration plan "[had] been prepared and [had] identified suitable locations for [re]planting" of the Braunton's milk-vetch and the intermediate mariposa lily, the plan was not made available to the public.

Protect contends the FEIR's analysis is inadequate because it fails to demonstrate mitigation for the Braunton's milk-vetch and the intermediate mariposa lily is feasible. It claims the County should have identified where the onsite planting would occur and demonstrated the soils in those areas would, in fact, be suitable.

"Evaluation of project alternatives and mitigation measures is '[t]he core of an EIR.'" (*Banning Ranch, supra*, 2 Cal.5th at p. 937.) Even so, "[d]ecisions as to the feasibility of . . . mitigation measures are subject to a rule of reason." (*Ibid*.) With respect to location, a comparison of the soil map and a map of the Project's footprint in the FEIR confirms there will be undisturbed areas made up of the soil types which Protect states are suitable for the two species at issue. Identification of a specific

proposed mitigation site is not required. (*California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 626 (*CNPS*).)

As for long term viability, the County's biological consultant explained it recently succeeded in relocating Braunton's milk-vetch plants on a project site in the Los Angeles area, and it was in the process of working closely with others to increase survival rates of propagated and translocated intermediate mariposa lily plants. In addition, the mitigation imposed requires preparation of a plan by a qualified biologist and consultation with two resource agencies. It also includes a standard for deeming mitigation successful, and provides for additional planting if initial attempts do not meet that standard within five years.

The record evidence is substantial and supports the County's conclusion MMB2 and MMB3 are feasible.

Protect emphasizes that certain comments on the DEIR mentioned historic difficulties with translocating the two species, and that the California Department of Fish and Wildlife indicated its disagreement with the FEIR's less than significant impact conclusion. But, "[p]ointing to evidence of a disagreement with other agencies is not enough to carry the burden of showing a lack of substantial evidence to support the [County's] finding." (*CNPS*, *supra*, 172 Cal.App.4th at p. 626; see *Irritated Residents, supra*, 107 Cal.App.4th at p. 1398 [differing opinions concerning whether mitigation measure would be effective does not invalidate EIR's analysis].)

Equally lacking merit is Protect's related argument that mitigation for the Braunton's milk-vetch and the intermediate mariposa lily has been impermissibly deferred. While MMB2 and MMB3 do call for the future preparation of a "Special Status Planting and Monitoring Plan," the measures also detail what the plan should include (e.g., number of plants, location criteria, required maintenance). Further, both provide a success threshold of "at least 80%" within five years. This type of deferred mitigation is

allowed. (*Save Panoche Valley v. San Benito County* (2013) 217 Cal.App.4th 503, 525-526.)

F. Water Demand and Supply

Protect's next challenge is to the FEIR's water supply analysis, which it claims does not satisfy CEQA's informational mandate because it fails to calculate the Project's construction stage water demand and total post-construction water demand. The County asserts the analysis is supported by substantial evidence because the Project's water demand was projected in three other documents and those documents concluded the Yorba Linda Water District (YLWD) will have sufficient supply to serve the Project, as well as its other customers. We conclude the FEIR's analysis is inadequate.

Consistent with the CEQA Guidelines, the DEIR posed the question of whether the Project would "[r]equire new or expanded entitlements to have sufficient water supplies available to serve the [P]roject[.]" To determine what, if any, new water facilities would be needed, a County consultant prepared a preliminary water report. The report assumed a density of approximately one dwelling unit per acre and used an average day water demand of 1,070 gallons per day per dwelling unit. Based on these numbers, and an assumed development of 340 residential lots, it estimated "total" average daily demand would be 0.36 million gallons per day. The report made no mention of construction phase water demand or projected water demand for the Project's common areas, including its many parks, once the Project is built.

The DEIR then relied on three separate YLWD documents to conclude YLWD would have sufficient supply to serve the Project: the 2005 YLWD Domestic Water System Master Plan (2005 WSMP), the 2010 YLWD Urban Water Management Plan (2010 UWMP), and the 2013 YLWD Northeast Area Planning Study (2013 NEAPS). Specifically, the DEIR stated: "[A]dequacy of water supply has been confirmed in the Yorba Linda Urban Water Management Plan, which stated that water is available to serve YLWD up to year 2035." In addition, with respect to cumulative impacts, it stated: "The NEAPS report was based on the addition of 340 residences in the

Proposed Project, 112 residences in the proposed Cielo Vista project, and 42 residences in the proposed Friend project for a total of 494 residences. . . . [T]he YLWD Water Master Plan and the 2013 NEAPS have considered the extent of the total development proposed and indicated that adequate water supply exists to serve the Proposed Projects." That was the extent of the DEIR's analysis of water demand and supply.

When the public inquired about the availability of sufficient quantities of water, the County spent more effort explaining why it was not statutorily obligated to prepare a formal water supply assessment than it did explaining how it determined there would be enough water. Indeed, the County failed to provide any explanation of its latter conclusion. Instead, the FEIR merely reiterated the conclusion itself: "Adequacy of water supply was confirmed in the Yorba Linda Water District Urban Water Management Plan, which states that water is available to serve YLWD up to year 2035 (DEIR page 5-63)."

Conclusions are not the reasoned explanation CEQA requires. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 404.) The body of the EIR is devoid of the analytical pathway traveled to reach the adequate water supply conclusion. (See *North Coast Rivers Alliance v. Marin Municipal Water Dist. Bd. of Directors* (2013) 216 Cal.App.4th 614, 639-640 (*North Coast*) [""[A]n 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 analytic[al] route the agency traveled from evidence to action'"].)

The FEIR's reliance on analyses and purported conclusions reached in hundreds of pages of documents appended to it does not solve the problem. "The data in an EIR must not only be sufficient in quantity, it must be presented in a manner calculated to adequately inform the public and decision makers, who may not be previously familiar with the details of the project. '[I]nformation "scattered here and there in EIR appendices" or a report "buried in an appendix," is not a substitute for "a

good faith reasoned analysis.'"'" (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 442 (*Vineyard*).)

Even setting aside the location of the documents relied upon, the FEIR's attempted analysis is lacking. In order to answer the question of whether there will be sufficient water supplies for the Project, one need first explain the Project's estimated water demand. Yet, the only demand calculated in the FEIR and its appendices is that of each "dwelling unit" or "lot." There is no explanation of the anticipated water demand associated with the community's landscaped common areas, roughly 85 acres of fuel modification zones and habitation mitigation areas. This includes, for example, roughly 13 acres of active and passive parks "dramatic fountain geysers and [a] boulder-lined babbling brook[,]" and fruit tree groves. Also absent is any discussion of water demand associated with the projected two years of grading for the Project and three to seven years of construction.

The County points to statements made by a YLWD representative at a County planning commission meeting, arguing they provide ample support for the FEIR's water supply conclusion. But, the statements made at the meeting provide no more of an explanation than the text of the FEIR. They simply mention the 2013 NEAPS and the 2005 WSMP, and the conclusions reached therein.

"The preparation and circulation of an EIR is more than a set of technical hurdles for agencies and developers to overcome. The EIR's function is to ensure that government officials who decide to build or approve a project do so with a full understanding of the environmental consequences and, equally important, that the public is assured those consequences have been taken into account." (*Vineyard*, *supra*, 40 Cal.4th at p. 449.) Ultimately, "[t]he question is . . . not whether the project's significant environmental effects *can* be clearly explained, but whether they *were*." (*Id*. at p. 443.) Here, with respect to water demand and supply, they were not.

G. Recirculation

Protect's final argument concerns circulation of the EIR. It claims the County needed to recirculate the document prior to certification because "significant new information" concerning CHSP, open space and fire hazards was added to it after close of the public review and comment period on the DEIR. We review the County's decision not to recirculate for substantial evidence, giving substantial deference to the County. (CEQA Guidelines, § 15088.5, subd. (e); *North Coast, supra*, 216 Cal.App.4th at p. 655.) Using this standard, we find no error.

Once a draft EIR has been circulated for public review, CEQA generally does not require an additional period of public circulation before the lead agency may certify the final EIR. The limited exception is when the agency adds "significant new information" to an EIR after close of the draft EIR comment period. (Pub. Resources Code, § 21092.1; CEQA Guidelines, § 15088.5, subd. (a); *Laurel Heights Improvement Assn. v. Regents of the University of California* (1993) 6 Cal.4th 1112, 1124 (*Laurel Heights II*).) In such circumstances, the EIR must be recirculated for additional public review and comment prior to certification. (Pub. Resources Code, § 21092.1; CEQA Guidelines, § 15088.5, subd. (a).)

In this context, "information" may include not only changes in the project or environmental setting, but also additional data or other added information. (CEQA Guidelines, § 15088.5, subd. (a).) To be considered "significant," the new information added to an EIR must change it "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." (CEQA Guidelines, § 15088.5, subd. (a).) Examples include information showing: "(1) [a] new significant environmental impact would result from the project or from a new mitigation measure proposed to be implemented[;] [¶] (2) [a] substantial increase in the severity of an

environmental impact would result unless mitigation measures are adopted that reduce the impact to a level of insignificance[;] [¶] (3) [a] feasible project alternative or mitigation measure considerably different from others previously analyzed would clearly lessen the significant environmental impacts of the project, but the project's proponents decline to adopt it[; or] [¶] (4) [t]he draft EIR was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded." (*Ibid*.) If the new information "merely clarifies or amplifies or makes insignificant modifications in an adequate EIR[,]" recirculation is not required. (*Ibid*.)

The first "new information" Protect claims triggered the recirculation requirement is the "belated and limited inclusion of accurate [CHSP] acreage figures and exhibits." We do not reach this issue, however, in light of our conclusion that the FEIR must be revised due to the inaccurate, incomplete and misleading description of the environmental setting of the Project site and surrounding area (i.e. CHSP). We leave it to the County to exercise its discretion concerning recirculation as it deems appropriate based on the further revisions it makes to the FEIR and the legal standards governing recirculation. (*Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1112.)

Next, Protect focuses on the supplement to the fire protection and emergency evacuation plan, which concluded that full emergency evacuation of the Project site would take between 45 minutes and 2.5 hours. But, Protect does no more than reiterate its meritless objections to the sufficiency of the FEIR's fire hazard analysis. It fails to articulate why the added information would trigger the need for recirculation. (*North Coast, supra*, 216 Cal.App.4th at p. 655 [petitioner bears burden of showing lack of substantial evidence as to agency's decision to not recirculate].)

Lastly, Protect argues recirculation was required because the FEIR revealed the amount of open space acreage that will exist after construction is complete will be significantly lower than what was indicated in the DEIR. From a factual standpoint,

contrary to the County's assertions, the Project documents were inconsistent in describing the amount of "open space."[4] Part of the inconsistency was a much lower figure for "natural open space" acreage (e.g., hills, canyons, ridgelines, other undisturbed areas) in the FEIR—85 to 90 acres—than in the initial study, the DEIR notice of availability and the DEIR itself—129 to 150 acres.

Where Protect falls short is in demonstrating a lack of substantial evidence to support the County's determination recirculation was not necessary. The DEIR described the Project site's total acreage, the acreage of each of the two planning areas within the site, the number of lots to be developed within each planning area, the amount of park and landscaped slope acreage, the acreage of the proposed fuel modification areas, and the aggregate length of onsite trails. It also included two conceptual site plans which depicted those features. And, as for the biological resources study, the topic about which Protect expresses concern, the study evaluated the potential direct and indirect impacts associated with the entire 469-acre Project site and a 35-acre offsite area where access and utility uses are expected. The public was provided an opportunity to comment on the identified impacts and the proposed mitigation.

Contrary to Protect's accusations, no "new, unaddressed impacts" were revealed in the County's responses to comments. Rather, the County clarified the open space terminology used in the DEIR and FEIR, explained why open space areas are evaluated differently in its various sections, and reiterated the types of biological impacts expected in each of the open space classifications (e.g., ungraded natural open space, vegetation management areas, parks).

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[4] Toward the beginning of the environmental review process, the initial study and the DEIR notice of availability stated the Project "will retain approximately 230.8 acres of undisturbed/natural open space." The DEIR then simultaneously described the Project as having "[a] maximum of 230 acres of open space" and "in excess of 230 acres of open space area." And finally, while the FEIR retained those statements from the DEIR, the County's response to comments indicated there would be "over 300 acres of open space."

The practical reality is a "final EIR will almost always contain information not included" in the circulating draft. (*Laurel Heights II, supra*, 6 Cal.4th at p. 1124.) As our Supreme Court has cautioned, however, recirculation is "an exception, rather than the general rule." (*Id*. at p. 1132.) Protect has not demonstrated this is one of those exceptional situations where the County's decision is not supported by substantial evidence. (*North Coast, supra*, 216 Cal.App.4th at p. 655.)

H. Prejudice and Remedy

"'[F]ailure to disclose information called for by CEQA may be prejudicial "regardless of whether a different outcome would have resulted if the public agency had complied" with the law [citation].' [Citation.] On the other hand, 'there is no presumption that error is prejudicial.' [Citation.] 'Insubstantial or merely technical omissions are not grounds for relief. [Citation.] "A prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process."' [Citations.]" (*Banning Ranch Conservancy*, *supra*, 2 Cal.5th at p. 942.) In other words, to be considered prejudicial the omission "must substantially impair the EIR's informational function." (*Ibid*.)

Here, the County's failures were "neither insubstantial nor merely technical." (*Banning Ranch Conservancy, supra*, 2 Cal.5th at p. 942.) Failure to accurately and consistently depict CHSP precluded an adequate investigation and discussion of the environmental impacts, and deprived the public of a full understanding of the potential issues. The same is true of the cursory and conclusory water demand and supply analysis. And, improperly deferring fire hazard mitigation violates CEQA's mandate that agencies adopt available feasible mitigation measures to avoid or reduce a project's impacts to less than significant levels, or indicate no such mitigation exists. (Pub. Resources Code, §§ 21002, 21100.) Accordingly, remand for further proceedings is required. (*Banning Ranch Conservancy*, *supra*, 2 Cal.5th at p. 942.)

DISPOSITION

The judgment is affirmed, in part, and reversed, in part, and the matter is remanded for further proceedings. On remand, the trial court shall modify the judgment to indicate the petition for writ of mandate is also granted with respect to the issues of environmental setting (CHSP), fire hazard mitigation, and water demand and supply. In addition, the modified judgment shall order the issuance of an additional peremptory writ of mandate, consistent with Public Resources Code section 21168.9. The writ shall direct County of Orange and Board of Supervisors of the County of Orange to (1) revise the EIR for the Project, in accordance with CEQA and the CEQA Guidelines, to correct the deficiencies identified in this opinion concerning the Project's environmental setting, fire hazard mitigation, and water demand and supply analysis; and (2) take such further action, or refrain from taking certain action, as the court deems proper in accordance with Public Resources Code section 21168.9. Nothing in this opinion shall affect the peremptory writ of mandate issued by the trial court on August 24, 2016.

THOMPSON, J.

WE CONCUR:

O'LEARY, P. J.

MOORE, J.