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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

COUNTY OF MONO and SIERRA CLUB,

Petitioners

v.

CITY OF LOS ANGELES, LOS ANGELES DEPARTMENT OF WATER AND POWER; LOS ANGELES DEPARTMENT OF WATER AND POWER BOARD OF COMMISSIONERS; and DOES 1 through 20;

Respondents

CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE; and DOES 21 through 40

Real Parties in Interest.

Case No. RG18923377

Assigned for all purposes to:
Judge Evelio Grillo, Dept. 15

RESPONDENTS CITY OF LOS ANGELES, CITY OF LOS ANGELES DEPARTMENT OF WATER AND POWER, AND LOS ANGELES DEPARTMENT OF WATER AND POWER BOARD OF COMMISSIONERS' OPPOSITION TO PETITION FOR WRIT OF MANDATE

Reservation No.: R-2201506
Hearing on the Merits: January 21, 2021
Time: 1:30PM
Dept. 15
Judge: Hon. Evelio Grillo

Action Filed: August 15, 2018
Trial Date: January 21, 2021

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I. INTRODUCTION

Petitioners County of Mono ("County") and Sierra Club's (collectively "Petitioners") First Amended Verified Petition for Writ of Mandate ("Petition") fails because the action Petitioners challenge is an implementing action for a previously approved project (the "2010 Leases"), not a new or changed project. Under the California Environmental Quality Act ("CEQA") additional CEQA review is not required every time an agency performs an implementing action for a previously approved project. Here, the "project" for CEQA purposes is the previously approved 2010 Leases, and Petitioners' attempt to create a new "project" to fabricate a CEQA claim is not supported by the law, the plain language of the 2010 Leases or the undisputed facts in the administrative record.

The 2010 Leases[1] are part of Respondent Los Angeles Department of Water and Power's ("LADWP") long history of water management activities in the County. LADWP has operated a water collection, storage, and distribution system ("Water System") in Mono and Inyo Counties for over 100 years. This Water System provides water for millions of residents of the City of Los Angeles ("City"), who are LADWP's customers. For at least the last 70 years, a component of that Water System has involved LADWP leasing certain LADWP-owned lands in Mono County to ranchers for cattle operations ("Lease Lands"). Pursuant to these lease agreements, LADWP has provided water to the lessees, who use the water to irrigate forage crops for the cattle.

In the leases, LADWP has always expressly reserved full discretion over the amount and timing of the water spreading. Historically, LADWP has determined the amount of water it will spread each year based on a myriad of factors including, but not limited to: the amount of precipitation; rate and amount of runoff from the snowpack; the amount of capacity in LADWP's water storage and water transfer facilities; water necessary for environmental mitigation; environmental concerns such as turbidity, flow rates, temperature, and amount of water necessary for protected species; water necessary for LADWP's energy production facilities; and water

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[1] As is explained in more detail below, the term of the 2010 Leases ended on December 31, 2013. Pursuant to the provisions of the 2010 Leases, however, the 2010 Leases have remained in effect through the Leases' holdover provision.

demand for City residents.

In 2010, LADWP approved the most recent lease agreements with ten third-party ranchers (the "Ranchers"), the 2010 Leases, pursuant to a categorical exemption under CEQA. The 2010 Leases, as with LADWP's historic leases, provide LADWP with discretion to determine the amount of irrigation water provided to the Ranchers from 0 acre-feet per acre ("AF/acre") up to 5 AF/acre. LADWP has, in fact, made annual determinations of the amount of water available to the Ranchers between 0 AF/acre to over 5 AF/acre ("Water Allotment"). In 2018, pursuant to the terms of the 2010 Leases and LADWP's historic practices, LADWP allocated irrigation water to the Ranchers ("2018 Water Allocation"). Petitioners objected to the 2018 Water Allocation and, when LADWP would not capitulate to the County's demands for more water for the Ranchers, the County filed this lawsuit alleging that the 2018 Water Allocation required CEQA review.

Under CEQA, however, once an agency has approved a project, subsequent actions taken by an agency in furtherance of that previously-approved project are not separate projects requiring CEQA review. Here, LADWP's annual Water Allotments, including the 2018 Water Allotment, are made in furtherance of the 2010 Leases and, therefore, are not subject to CEQA. Thus, Petitioners' claim must fail.

Moreover, the Petition suffers from three jurisdictional defects, each of which serve to bar Petitioners' lawsuit. First, the Petition is barred by the statute of limitations. The longest statute of limitations available under CEQA is 180 days. LADWP's approval of the project at issue in this case, the 2010 Leases, is beyond challenge, as Petitioners admit. Even assuming for the sake of argument that LADWP changed its historic practices as Petitioners allege, however, that change occurred in 2015 and 2016 when LADWP provided the Ranchers with less water than would have been expected under Petitioners' characterization of LADWP's historic practices. The County was aware of the water allocations in 2015 and 2016 and complained regarding the amount of water LADWP allocated to the Ranchers in each of these years. The County did not file a lawsuit within the limitations period, however, and Petitioners' claims are therefore barred.

Second, Petitioners seek to modify or cancel the 2010 Leases between LADWP and the Ranchers, but have not named the Ranchers to the lawsuit. This failure is problematic because the

outcome of the litigation could materially impact the Ranchers' interests by changing the rights and duties of the parties to the 2010 Leases. Because the statute of limitations for naming the Ranchers to the case has long since run, the Ranchers' absence requires dismissal of this case.

Third, Petitioners failed to exhaust their administrative remedies. Petitioners claim that communications made by the City of Los Angeles' ("City") Mayor and one member of LADWP's Board of Commissioners ("Board") prove LADWP's alleged decision to deviate from its historic practices in 2018. As discussed in detail herein, however, Petitioners blatantly mischaracterize these communications in their attempt to fabricate a new CEQA project in order to avoid the indisputable fact that the 2010 Leases are the project at issue in this case. In any event, Petitioners had an available remedy. Petitioners could have brought their concerns before the full Board or the City Council for review of this alleged decision, but did not. As such, Petitioners' claims are jurisdictionally barred by their failure to exhaust these available administrative remedies.

Even moving beyond these fundamental jurisdictional defects, the indisputable facts contained in the administrative record show that Petitioners have failed to prove their allegations that the 2018 Water Allotment was a new or changed "project" for CEQA purposes, rather than an implementing action for the 2010 Leases. Petitioners' single claim that the 2018 Water Allotment constitutes a new or changed project is based on a wholly inaccurate representation of LADWP's historic practices regarding the annual Water Allotments. According to Petitioners, LADWP purportedly provides 5 AF/acre of water to the Ranchers in a "normal" water year,[2] and provides proportionate amounts of water to the Ranchers in other years based on how much the annual precipitation deviates from normal ("5 AF/acre Theory" or "Theory").[3] Petitioners' concocted 5 AF/acre Theory is not based in fact. The evidence in the record does not show that the Ranchers

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[2] LADWP's snowpack runoff water year runs from April 1 until March 31 of the following calendar year. Runoff is the amount of water coming out of the Eastern Sierra into LADWP water system.

[3] Thus, under Petitioners' 5 AF/acre Theory, the data should show that in a "normal" or 100% of average water year, LADWP would provide the Ranchers with 5 AF/acre, while in a water year with 80% of normal runoff, LADWP would provide 4 AF/acre, and in a water year with 120% of normal runoff, LADWP would provide 6 AF/acre. As will be shown herein, the data in the administrative record does not support this Theory.

are guaranteed any amount of water, nor that LADWP has any set formula for the water it provides to the Lease Lands, nor that there is any formulaic regularity in the amount of water LADWP actually provides to the Ranchers. Rather, the evidence shows that, since LADWP's approval of the 2010 Leases, LADWP has made annual Water Allotments that have varied between 0 AF/acre and above 5 AF/acre. Even if the Court were to look at LADWP's pre-2010 practices, the range of LADWP's annual Water Allotments are the same. Because Petitioners' premise is flawed, they cannot meet their burden of proof to show that LADWP violated CEQA by providing less water to the Ranchers in 2018 than would have been expected under Petitioners' Theory without first conducting CEQA review.

Next, to the extent Petitioners are using CEQA to enforce the terms of the 2010 Leases, which are private contracts between LADWP and the Ranchers, Petitioners have no standing to challenge LADWP's performance of those contracts. Even if they could establish standing, their claims seek to force obligations on LADWP that are not within the four corners of the agreements since the plain language of the 2010 Leases does not require LADWP to provide any specific amount of water to the Ranchers, as Petitioners contend.

Finally, Petitioners' claims are moot for two reasons. First, Petitioners challenge only a single Water Allocation, 2018, which has long since passed. LADWP cannot go back in time and change how much water it delivered to the Ranchers two years ago. Second, to the extent Petitioners claim an ongoing change to LADWP's operations, which is not supported by the facts, the remedy that Petitioners seek – LADWP's CEQA review of potential new lease terms and the effects on irrigation activities – is already under way. Thus, there is no effective relief that Petitioners can gain through this lawsuit and the case should be dismissed as moot.

For all of these reasons, the Court should deny the Petition.

II. STATEMENT OF FACTS

A. Historic Operations

The City began acquiring land and water rights in Mono and Inyo Counties in the early part of the 20th Century. (*County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 799 ("*Yorty*").) The water rights the City obtained are known as "Pre-1914" water rights and are treated differently

under the law than water rights obtained after 1914. (Water Code, § 1706.)

In 1941, the City completed what is known as the "Mono Basin Project." This project was designed to gather the natural runoff in the Mono Basin area and to direct it by gravity flow and pumping operations through the Mono Lake watershed into the Owens River system through the Tinemaha Reservoir to the Haiwee Reservoir. (*Yorty, supra,* 32 Cal.App.3d at 799.) That project was a complex of sources, tributaries, conduits, tunnels and storage areas extending 349 miles from Lee Vining to the City. (*Id.*; see also AR 169339, 169368-169369, 169500, 169505 [1972-era schematics of water system in Round Valley, Tinnemaha to Haiwee, Mono Basin, and Long Valley areas.])

It is unclear from the record when, exactly, LADWP began leasing lands to ranchers and providing irrigation water for the lessees, but the earliest documentation is that it began in the 1928-1929 timeframe. A LADWP handbook, dated February 17, 1928, contains an organization chart including a position in charge of "Distribution of Irrigation Water" as well as procedures for handling the applications for ranch leases. (AR 17063, 170605, 170619-170620.) Similarly, the record contains an index titled "1929 Water Supply" that includes the names of LADWP tenants as well as the requested amount of acre-feet for each lease. (AR 170594-170596.)

LADWP's management of irrigation water for its lessees began at least as far back as 1929 as well. (See AR 170541 [3/2/1929 letter requesting water for lessees for irrigation]; AR 170538 [3/5/29 memo stating it should be LADWP policy not to supply irrigation water before April 1]; AR 170533 [letter from LADWP assistant engineer recommending that LADWP "curtail" the "acreage of land for irrigation" under existing leases]; AR 170536 [recording lease credits "allowed on account of restrictions on irrigated area under the lease"]; AR 170525-170526 [7/2/1929 memo with maximum allotments to certain lessees and noting that "such allotments are to be decreased whenever possible"].)

The first copy of a ranch lease in the record, though located in Inyo County, is dated October 1, 1934. (AR 170487-170490.) This lease reserves to LADWP "[A]ll water, including surface, underground and percolating waters, water rights, [and] riparian rights," the right for LADWP "to flood, inundate or overflow" the property "at any time and in such manner as it may

see fit," and that "[n]o water, water rights or water privileges whatsoever are included in this lease." (*Id.*) Subsequent historical leases in both Mono and Inyo Counties include the same or similar language, with the first Mono County leases appearing in the record in 1951. (AR 170106-170111, 170116-170121; see also AR 170464-66 [1937 lease]; AR 170454-170456 [1938 lease]; AR 170435-170437 [1939 lease]; AR 170408-170410, 170414-170416 [1940 leases]; AR 170395-170397 [1941 lease]; AR 170342-170344, 170351-170353, 170365-170367 [1942 leases]; AR 170322-170324 [1943 lease]; AR 170309-170311 [1944 lease]; AR 170248-170253 [1947 lease]; AR 170231-170237 [1948 lease]; AR 170151-170156, 170163-170168, 170171-170175 [1950 leases]; AR 170040-170045, 170052-170056 [1954 lease] AR 170022-170028, 170031-170036 [1955 leases]; AR 169979-169983, 169990-169995, 170001-170006 [1956 leases]; AR 169951-57, 169961-169968 [1959 leases].) The lease language changed somewhat in 1960, though maintaining LADWP's full discretion over water use (the decision of LADWP "shall be conclusive in all matters relating to the flooding, inundation, overflowing, conservation and measurement of water upon said premises") and providing that, in the event that "the operations of the Department shall be such that at any time hereunder any of said land shall be rendered unsuitable for its designated use" then the Board would make a "dry finding" and reduce the rents. (AR 169936-169942; see also AR 169926-169933 [1960 lease]; 169853-169889, 169893-169900 [1961 leases]; AR 169771-169819 [1962 leases]; AR 169710-169758 [1963 leases]; AR 169673-169705 [1964 leases]; AR 169645-169653 [1966 lease].)

During these first decades of the ranch lease program, LADWP would, on occasion, use its discretion to reduce the amount of water provided to the lessees. (See AR 170189-170190 [LADWP form to lessees stating that "[i]f water becomes available for spreading on leases during the 1950 season, I would like to have the following areas considered for a season's irrigation" and recognizing that "if some unforeseen condition should make it necessary to withdraw the water before the season ends, adjustments in rental will be made accordingly"]; AR 170184 [7/12/50 memo recommending mutual cancellation of a lease due to two years of no irrigation water being provided]; AR 170123-170128 [April 1951 letters regarding LADWP's decision that due to "sub-normal condition ... there will be no water available for use on the Department's Inyo-Mono

ranch properties during 1951"]; AR 169975; [4/12/57 internal memorandum states that "[t]here is sufficient water in storage at present time which, together with anticipated runoff, will permit reasonable spreading" but that "[i]f we do not allow irrigation, we may easily conclude the season with a record of having denied our tenants irrigation water and being forced to spread water for lack of a place to impound it"]; AR 169945-169947 [11/19/1959 memoranda regarding "dry findings" due to lack of irrigation water for lessees]; AR 169901-169913 [1960 dry findings]; AR 169839-169852 [1961 dry findings]; AR 169668 [3/22/65 letter to lessees regarding irrigation amounts for the year]; AR 168946-168954 [April 1976 letters to lessees regarding 50% reduction in irrigation allotment]; AR 168956 [internal memorandum regarding restricted irrigation program for 1976].) LADWP continued periodic changes in the amount of irrigation water provided to the lessees up to, and through the adoption of the 2010 Ranch Leases. (AR 86772-86773 [showing LADWP provided between 0.0 AF/acre and 8.1 AF/acre in the water years 1992-1993 through 2017-2018].)

B. The 2010 Leases

On February 2, 2010, the LADWP Board approved Resolution No. 010 217, for the Execution of 60 Ranch Leases Located in Inyo and Mono Counties. (AR 168432—168432-2198.)[4] The Board Approval Letter provides that "[i]n April 2009, 60 ranch leases were mailed to existing tenants. All of the 60 ranch leases have been signed and returned to LADWP, now before your Board, for approval." (AR 168432-005.) "The new ranch leases will be entered into with the same individuals or entities that possessed the leasehold rights under the previous ranch leases." (*Ibid.*) The 2010 Leases included the Ranchers, who lease lands in the Long Valley and Little

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[4] LADWP's Board is vested with the authority to enter into leases for lands under the control of LADWP on behalf of the City. Thus, there was no need for City Council approval of the Leases and Board Resolution No, 10-2017 constitutes the final approval for the Leases. Resolution 10-2017 includes the "environmental determination" that the Leases "are categorically exempt under Article III, Class 1, Paragraph (14)" of the City's CEQA Guidelines. This provision of the City's CEQA Guidelines incorporates and provides more detail for "Class 1" categorical exemptions under State CEQA Guidelines section 15301, and specifically exempts the "[i]ssuance, renewal or amendment of any lease, license or permit to use an existing structure or facility involving negligible or no expansion of use." (AR 168521, 168529.)

Round Valley areas of Mono County. (AR 86978-86979 [map showing Mono County lease areas]; AR 168432-409—168432-444, 168432-844—168432-879, 168432-1316—168432-1465, 168432-1613—168432-1648, 168432-1685—168432-1720, 168432-1982—168432-2017.) The term for all of the leases was "1/1/09 – 12/31/13." (AR 168432-1398.)[5] With respect to CEQA, the Board Approval Letter explains that: "Ranch leases are categorically exempt under Article III, Class 1, Paragraph (14) of the City of Los Angeles Guidelines for the Implementation of the California Environmental Quality Act of 1970." (AR-168432-8.)

The 2010 Leases continue LADWP's reservation of water rights and LADWP's sole discretion over the water supply for the Leases. (AR 168432-1401—168432-1402, 168432-1404.) Section 7 of the 2010 Leases discusses water supply for the Lease Lands generally. (AR 168432-1401—168432-1402.) Under Section 7.1 of the Leases, the lessee understands and agrees that the lease is "subject to the "paramount rights" of LADWP "with respect to all water and water rights as set forth" in Section 1, subsection 1.2 of the Reserved Rights. (AR 168432-1401.) This reservation of rights provides that:

> "There is excepted from this lease and reserved to the Lessor all water and water rights, whether surface, subsurface, or of any other kind; and all water and water rights appurtenant or in anywise incident to the lands or premises leased herein, or used thereon or in connection therewith, together with the right to develop, take, transport, control, regulate, and use all such water and water rights."

(AR 168432-1404.) Section 7.1 continues that the availability of water is "by reason of [] contract only, and not by virtue of any public utility duty imposed upon" LADWP. (AR 168432-1401.) Furthermore, the availability of water "is conditioned upon the quantity in supply at any given time." (*Ibid.*) Under the 2010 Leases, it is LADWP's intent, subject to LADWP's "paramount responsibility to furnish water for the City of Los Angeles, to manage its water supplies to the fullest extent it deems practical ... in order to provide water for leased land herein classified for irrigation." (AR 168432-1401—168432-1402.) However, "[t]he amount and availability of water, if any, shall at all times be determined solely by" LADWP. (AR 168432-1402.)

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[5] As indicated in the Opening Brief, the terms of the various leases relevant to this case are identical. (Opening Brief ("OB"), p. 11, fn. 3.) For simplicity, LADWP will also cite to only RLM-469 (Lacy Livestock) located at AR 168432-1394—168432-1429.

Section 7.2 of the 2010 Leases requires the Ranchers "to maintain sufficient flows downstream of creek diversions to sustain existing aquatic resources" and allows LADWP to "decrease or cease irrigation as each creek approaches minimum in-stream flows as determined by" LADWP. (AR 168432-1402.) While LADWP will coordinate with the Ranchers to minimize impacts to the Ranchers' operations, in "all cases of conflict between" the Ranchers operations and LADWP's objectives, LADWP's objectives "shall prevail." (*Id.*)

The final portion of Section 7, Section 7.3, states the Ranchers' acknowledgement and agreement that "any supply of water" to the Lease Lands "is subject to the paramount right of [LADWP] at any time to discontinue the same in whole or in part and to take or hold or distribute such water for the use of" the City and its inhabitants." (*Id.*)

The provision of irrigation water is discussed in Section 8. (AR 168432-1403.) Subject to the conditions in Section 7, "water supplies to all lands classified for irrigation ... will be delivered in an amount not to exceed five (5) acre-feet per acre per irrigation season." (*Ibid.*) Section 8 further states, however, that "[t]he water supply for a specific lease is highly dependent upon water availability and weather conditions; due to this, delivery of irrigation water may be reduced in dry years." (*Ibid.*)

Finally, Section 3.2.4 allows LADWP to lower the rent due under the lease if "[b]ased on the availability of water" LADWP makes a "'dry finding.'" (AR168432-1398.)

LADWP has supplied water to the Ranchers under the terms of the Leases in annual amounts varying from 0.0 AF/acre to 5.4 AF/acre since 2010. (AR 86772-86773.)

Upon the expiration of the Leases on December 31, 2013, the leases went into "holdover" status. Pursuant to Section 18 of the Leases:

> If Lessee shall hold over after expiration or other termination of this lease, whether with the apparent consent or without the consent of Lessor, such shall not constitute a renewal or extension of this lease, nor a month-to-month tenancy but only a tenancy at will with liability for reasonable rent, and in all other respects on the same terms and conditions as are herein provided. The term reasonable rent as used in this section shall be no less than 1/12th of the total yearly rents, taxes, and assessments provided for elsewhere in this lease, per month, and said reasonable rent during the holdover period shall be paid, in advance, on the first day of each month.

(AR 168432-1420.) Since 2013, all of the Ranchers have continued to lease the Lease Lands in

holdover status.

C. The Proposed New Leases, Mono County Demands, and the City/LADWP's Responses

In March 2018, LADWP began the process of the consideration of new leases by providing the Ranchers with drafts of proposed new leases. (AR 95002-95052.) LADWP's communication to the Ranchers noted that the proffered lease was a "proposed" lease, that LADWP would hold a meeting with the Ranchers in March 2018, and that the Ranchers would "have the opportunity to comment and ask questions regarding the proposed changes to the lease." (AR 95004.) The proposed leases eliminated use of water for "irrigation," which the proposed lease defined as "the purposeful application of water to increase forage production." (AR 095015.) Further communications with the Ranchers on April 12, 2018 indicated that LADWP was

> "performing an Environmental evaluation of the proposed Mono County ranch leases. Until this evaluation is completed and the new leases are in effect, the current leases are in holdover.
>
> Based on LADWP's operational needs water will be spread on the leased property. Currently LADWP Operations staff is evaluating the results of the latest snow surveys and anticipated runoff throughout the Eastern Sierra, and will determine what amount of water will be available for spreading on your lease."

(AR 126-135.)

A week later, on April 19, 2018, the County's Board of Supervisors ("BOS") wrote a letter to the City's Mayor Garcetti asking for his "help" with the proposed new leases. (AR 91068-91076.) However, before discussing the reasons the County thought that the proposed leases were a bad idea (AR 91069-91072), the County demanded the Mayor's assurance, by May 1, 2018, that LADWP would continue to provide irrigation water to the Ranchers in the 2018-2019 water year. (AR 91068-91069.) The County sent the April 19, 2018 letter to a number of federal, state, and local elected officials, agencies, and associations. (AR 91072-73.)

Shortly thereafter, on April 23, 2018, County Supervisor John Peters contacted LADWP Board President Levine to discuss the proposed ranch leases. (AR 90097.) Mr. Levine agreed to discuss the issue with Mr. Peters, but indicated that "[t]here is no emergency, inasmuch as DWP will be doing things as usual while the environmental study is under way, which will take a

number of months to complete, so we have some time." (AR 90095.)

Mayor Garcetti responded to the April 19, 2018 BOS letter by a letter dated May 1, 2018. (AR 124-125.) It is this letter that Petitioners cite as the first evidence that LADWP adopted a new or changed project in May of 2018. (OB, pp. 14, 33-34.) Because the bulk of the BOS's letter concerned the proposed new leases, Mayor Garcetti discussed the rationale behind the proposed new leases and informed the BOS that "[o]ver the next six months, LADWP will analyze the potential environmental impacts of reducing water on leased ranch land in Mono County and will discuss the findings with you and the ranchers before any new lease language is proposed." (AR 125.) Mayor Garcetti then addressed the County's concerns regarding the 2018 Water Allotment by stating that "[i]n the interim, I have directed staff to inform you this week of the amount of water available for operational spreading to the lessees this year based on snowpack and anticipated runoff. Staff has indicated that the amount of water provided will likely be similar to 2016, which was also based on snowpack conditions. This determination will be made under the flexibility that the existing expired leases afford." (*Id.*) Mayor Garcetti concluded by suggesting that the BOS engage in further discussions regarding the proposed leases with then-LADWP Board President Levine. (*Id.*) That same day, LADWP sent the Ranchers an email indicating that

> "LADWP has evaluated the snowpack and anticipated runoff from the Eastern Sierra and has determined that a total of 4,200 Acre-Feet (AF) of water will be provided for irrigation to the Long Valley Ranch Leases this runoff year. This is consistent with the level of irrigation water that was provided two years ago in a similar year when the runoff was 82% of normal. This year the runoff is predicted at 78% of normal.
>
> Each of the lessees in Long Valley will receive the same amount of water per acre of land being irrigated."

(AR 90196.)

Two days later, on May 3, 2018, the County's Administrative Officer responded to Mayor Garcetti's letter by arguing that LADWP could not provide water in 2018 in similar amounts to what LADWP provided in 2016 because the 2016 Water Allotment did not comply with the 5 AF/acre Theory and that, under this Theory, the Ranchers should get 3.9 AF/acre in 2018. (AR 90057-59.) The letter continued:

> "Additionally, LADWP's plan to eliminate irrigation and stock water from Mono County ranch leases appears to be part of a larger plan by the City to completely discontinue water deliveries to the Eastern Sierra. Your May 1 letter explains that the City is reevaluating its current water uses, 'including the water historically provided to eastern Sierra ranches.' Under the circumstances, we take this to mean that the City plans to increase exports of Eastern Sierra water by reducing or completely discontinuing deliveries to Mono County ranches and habitat."

(AR 90058.)

The County also forwarded this letter to a host of federal and state elected leaders and resource agencies. (AR 90055.) On May 17, the Secretary of the California Natural Resources Agency, John Laird wrote to Mayor Garcetti, taking up Mono County's cause. (AR 87171-87172.) Secretary Laird parroted the County's talking points both regarding the proposed new leases and the County's assertion that the 2018 Water Allotment would result in impacts on the environment. (*Id.*) State Assemblymember Bigelow and State Senator Berryhill followed with a joint letter on May 31, 2018, also baselessly arguing that LADWP must abide by the County's 5 AF/acre theory (AR 87079-87082 ["Our understanding is that for well more than half a century the water allocation to these leases has been based on annual snowpack levels and anticipated runoff. LADWP's calculation of the appropriate 2018 allocation to Mono County ranches should be calculated no differently"].) Petitioner Sierra Club also submitted a letter on June 5, 2018 "deeply concerned by LADWP's recent attempt to stop irrigation on their grazing allotments in Mono County" and claiming, again without reference or evidence, that the "usual irrigation allotment" is "five acre-feet/acre/year." (AR 86490-91.)

From July 6 through July 9, 2018, President Levine sent a number of letters to the individuals and organizations that had expressed concern regarding both the proposed new leases and the 2018 Water Allotment. (AR 82-101.) Regarding LADWP's intentions for existing operations, Mr. Levine wrote:

> "It is important to note, LADWP is not de-watering Mono County. LADWP will continue to provide water to protect the environment in Inyo and Mono counties. The free water LADWP has provided to commercial ranchers is separate and unrelated to the water LADWP provides to serve the region's environment.
>
> ...
>
> Decades ago, LADWP began offering free water to the commercial ranchers to flood irrigate the grazing lands when the department had more water than it could accommodate in the Los Angeles Aqueduct. At LADWP's sole discretion, free water has since been

> offered to the commercial ranchers on an ad hoc basis when supplies were available, but it was never a guarantee tied to their leases. The amounts have differed each year based on hydrological conditions and LADWP operational needs."
>
> ...
>
> "LADWP notified the ranchers on May 1, 2018, shortly after this year's final runoff was calculated, that they would receive 4,200 acre-feet for this irrigation year, approximately the same number of acre-feet per acre of water provided in 2016 from similar runoff conditions. Lessees are provided this information at this time every year."

(AR 82, 83.)

Regarding the proposed leases, Mr. Levine wrote

> "Prior to approving new leases that exclude the provision of free irrigation water for commercial ranchers, LADWP will carefully evaluate any potential environmental impacts and will complete a full Environmental Impact Report that will solicit stakeholder input, like yours. LADWP will fully evaluate any impacts to the Sage Grouse habitat and ensure that those impacts are fully mitigated."

(AR 83). The remainder of the letter explains the policy reasons behind LADWP's consideration of the proposed new leases.

On August 7, 2018, the BOS sent letters to both Mayor Garcetti and Mr. Levine. (AR 72254-72257, 72249-72251.) The BOS reiterated the County's position that the 2018 Water Allotment's reduction "should correspond proportionally to the snowpack and anticipated runoff of a given year or cycle." (AR 72249; see also 72250, 72256.) The BOS also indicated that compromise negotiations had not been successful because LADWP had refused to accept the County's proposal of "a reduced amount between 3.9 and 3.0 AF/acre." (AR 72256.)

D. LADWP Releases Notice of Preparation for an Environmental Impact Report To Study the Proposed Leases

On August 15, 2018, LADWP issued the Notice of Preparation ("NOP") advising the public of its intention to prepare an EIR pursuant to CEQA for the proposed lease project. (AR 40-43.) The NOP solicits input from the public, organizations and government agencies on the scope and content of the information to be analyzed in the EIR. (AR 40.) The EIR for the proposed new leases is still ongoing.

That same day, Mono County filed this lawsuit. Petitioner Sierra Club joined as a Petitioner in the First Amended Petition filed on October 5, 2018.

III. STANDARD OF REVIEW

In determining whether a lead agency (here, LADWP) has complied with CEQA, the courts apply an "abuse of discretion" standard that is highly deferential to the agency's analysis and decision-making. (Pub. Resources Code, § 21168.5; *Western States Petroleum Ass'n v. Super. Ct.* (1995) 9 Cal.4th 559, 572-574; *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.* (1993) 6 Cal.4th 1112, 1132-33 ["*Laurel Heights II*"].) The starting point is that LADWP's decision is "presumed correct" (*San Franciscans Upholding the Downtown Plan v. City & County of San Francisco* (2002) 102 Cal.App.4th 656, 674), and Petitioners bear the heavy burden to establish an abuse of discretion. They can only do this by demonstrating that LADWP "has not proceeded in a manner required by law or [that] the determination or decision is not supported by substantial evidence." (*Ebbetts Pass Forest Watch v. Dep't of Forestry & Fire Protection* (2008) 43 Cal.4th 936, 944.) This deferential standard is reflective of CEQA's goal of aiding decision-makers and the public in reviewing projects, not supporting opponents in delaying approvals or unnecessarily interfering with the public process. (*Laurel Heights II, supra*, at 1132-33.)

Petitioners argue that the "determination of whether a proposed activity is a project is a matter of law," citing *Union of Medical Marijuana Patients, Inc. v. City of San Diego* (2019) 7 Cal.5th 1171, 1198 ("*Union*"). (OB, p. 24.) However, Petitioners misconstrue the question before the Court. The issue in *Union* was whether a city's adoption of a zoning ordinance which authorized establishment of medical marijuana dispensaries and regulated their location and operation was a "project" that could require CEQA review. Thus, it dealt with the determination of a "project" in the first instance. Here, in contrast, the issue is whether LADWP's 2018 allocation was within the scope of the previously approved project, the 2010 Leases, which LADWP approved pursuant to a CEQA exemption. Once a project is approved, actions encompassed within and taken to implement that original approval are not separate project approvals under CEQA. (*City of Chula Vista v. County of San Diego* (1994) 23 Cal.App.4th 1713, 1720-1721; *Van de Kamps Coalition v. Bd. of Trustees of Los Angeles Community College Dst.* (2012) 206 Cal.App.4th 1036, 1045-1051.) The Court can make this determination as a matter of law. (*Ibid.*) Moreover, LADWP made a determination that the 2018 water allocation was within

the scope of the 2010 Ranch Leases. This is a factual determination that is subject to the substantial evidence test. (See, e.g., *Friends of College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 937, 952-953 (applying substantial evidence standard to issue of whether initial environmental document remains relevant despite changed plans or circumstances).)

IV. ARGUMENT

A. The 2018 Water Allotment Was Not a Project Subject to CEQA[6]

Here, the "project" for CEQA purposes is the previously approved 2010 Leases. LADWP was not required to conduct CEQA review of the 2018 Water Allotment because that decision was an implementing action for a previously approved project, the 2010 Leases, not a separate project subject to CEQA. The 2010 Leases provide LADWP with discretion to allot the Ranchers with between 0 AF/acre and 5 AF/acre of water per year and LADWP has historically exercised its discretion under the Leases in exactly this manner, providing amounts of water to the Ranchers varying from 0 AF/acre up to, and in some cases beyond the 5 AF/acre per year. The 2018 Water Allotment was no different and does not, as a matter of law, represent a change in the 2010 Lease Project. Because the 2018 Water Allotment was well within both the terms of the leases and LADWP's historic practices, it does not represent a new or changed project, but rather the continuation of an existing project.

CEQA applies to "discretionary projects proposed to be carried out or approved by public agencies." (Pub. Resources Code, § 21080, subd. (a).) "Project" means

> "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is any of

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[6] LADWP raised similar arguments on demurrer to the Petition. Petitioners appear to argue that the Court's Order Overruling the Demurrer ("Order") has the effect of issue preclusion regarding the legal arguments LADWP made. (OB, pp. 18-19.) This is incorrect. A "ruling on a demurrer determines a legal issue on the basis of *assumed facts*, i.e., all those material, issuable facts properly pleaded in the complaint, *regardless of whether they ultimately prove to be true*." (*Kiseskey v. Carpenters' Tr. for So. California* (1983) 144 Cal.App.3d 222, 228 (emphasis added).) In this case, the Court declined to take judicial notice of the Leases and did not have access to the administrative record for purposes of the demurrer. As will be established herein, on the basis of the facts in the record, Petitioners have failed to show that the 2018 Water Allotment was a new or changed project subject to CEQA.

the following:

> (a) An activity directly undertaken by any public agency.
>
> (b) An activity undertaken by a person which is supported, in whole or in part, through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies.
>
> (c) An activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies."

(Pub. Resources Code, § 21065.)

A "project" means the "whole of an action." (CEQA Guidelines, § 15378, subd. (a).) The term "project" refers "to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies. The term 'project' does not mean each separate governmental approval." (CEQA Guidelines, § 15378, subd. (c); *City of Irvine v. County of Orange* (2013) 221 Cal.App.4th 846, 855.) "Approval" means the discretionary decision by a public agency which commits the agency to a definite course of action in regard to a project intended to be carried out by any person. (CEQA Guidelines, § 15352, subd. (a).)

Once a project is approved, actions taken to implement that original approval are not separate project approvals under CEQA. (*City of Chula Vista, supra*, 23 Cal.App.4th at 1720–21; *Van de Kamps Coalition, supra*, 206 Cal.App.4th at 1045-1051.) "If every action had to be considered an 'approval,' each and every step that [an agency] took toward implementing an approved project would necessarily constitute another 'approval on' the project, thereby endlessly reopening the [] long-final consideration of the project's environmental impacts. Yet CEQA Guidelines section 15162 explicitly provides that '[i]nformation appearing after an approval does not require reopening of that approval." (*Willow Glen Trestle Conservancy v. City of San Jose* (2020) 49 Cal.App.5th 127, 133 ("*Willow Glen*") (emphasis omitted).) This rule is consistent with well-established CEQA principles:

> It is true that a project, by definition, includes '[a]ctivities involving the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies.' [Citation.] But it is equally true that a project 'means the whole of an action, which has a potential for resulting in a physical change in the environment....' [Citation.] It refers to the underlying activity which may be subject to approval by one or more governmental agencies; it does not refer to each of the several approvals sequentially issued by different agencies. 'The term "project" does not mean each separate governmental approval.' [Citations.]"

(*Van de Kamps Coalition, supra*, 206 Cal.App.4th at 1045 (citation omitted).)

City of Chula Vista, Van de Kamps Coalition, and *Willow Glen* are directly on point. In *City of Chula Vista*, the city filed a petition for writ of mandate seeking environmental review of a lease agreement between the county and the operator of a hazardous waste facility in the city. In 1989, the county's board of supervisors approved and authorized its contracting director to enter into negotiations with the operator and, subject to successful negotiations and the determination of a fair price, awarded a five-year service contract. (23 Cal.App.4th at 1716–1717.) At the same time, the county determined that its approval was categorically exempt from CEQA. (*Id.* at 1717.) In January 1992, the county and the operator executed a lease agreement, and the city filed its petition six months later. (*Ibid.*) The trial court sustained demurrers to the petition without leave to amend and the appellate court affirmed, holding that the 180–day limitations period applied to bar the action, "because the facts alleged in the City's petition, as read in conjunction with judicially noticeable facts, clearly show that the 'project' (i.e., the agreement) was approved by the County on November 28, 1989, and the actual agreement executed on January 29, 1992, was not substantially different from the original 'project.'" (*Id.* at 1720.)

Notably, the court also rejected the city's argument that the "project" approved by the county was materially different than the actual executed agreement, including arguments that there was an increase in acreage of the facility, storage tanks, roll-off containers, and types of hazardous waste. The court rejected these assertions as being "in direct contradiction of the express language of the actual agreement." (*Id.* at 1721.)

The court in *Van de Kamps Coalition* also upheld a demurrer to a petition alleging that a college district failed to comply with CEQA in connection with leasing of a campus site. The court held that "[t]he decisions made in 2010 that appellant challenged ... were actions toward the implementation of a 2009 project approval." (206 Cal.App.4th at 1039.) In that case, the district had adopted resolutions which authorized a five-year lease of its property and held that no additional environmental review was necessary. (*Id.* at 1040-1041.) The district subsequently took further actions implementing the resolutions, including approving expenditures to redesign the building for the proposed new tenants and acquire neighboring property. (*Id.* at 1041.)

The court expressly held that "[t]he limitations period starts running on the date the project is approved by the public agency *and is not retriggered on each subsequent date that the public agency takes some action toward implementing the project.* [Citations.]" (*Id.* at 1045 (emphasis added).) It explained that a "project" refers to the activity that is being approved, which may include multiple discretionary approvals by governmental agencies, and does not mean each separate governmental approval. (*Id.* at 1045-46.) "This definition ensures that the action reviewed under CEQA is not the approval itself but the development or other activities that will result from the approval. [Citation.]" (*Id.* at 1046.)

The recent *Willow Glen* case stands for the same principles. There, in 2014, the City of San Jose adopted a mitigated negative declaration and approved a project that included the demolition of a railroad trestle. (49 Cal.App.5th at 129.) The petitioner alleged that San Jose violated CEQA in 2018 by failing to provide supplemental environmental review of the project before the City sought and obtained a new Streambed Alteration Agreement ("SAA") from the California Department of Fish and Wildlife after the San Jose's prior SAA for the project expired. (*Ibid.*) The court held that petitioner's

> "claim cannot withstand scrutiny because it attempts to equate *any action in connection with a project* with an '*approval* on' or an '*approval* for' the project. (Italics added.) If every action had to be considered an 'approval,' each and every step that the City took toward *implementing* an approved project would necessarily constitute another 'approval on' the project, thereby endlessly reopening the City's long-final consideration of the project's environmental impacts. Yet CEQA Guidelines section 15162 explicitly provides that '[i]nformation appearing after an approval does not require reopening of that approval.' 'Once a project has been subject to environmental review and received approval, section 21166 and CEQA Guidelines section 15162 *limit* the circumstances under which a subsequent or supplemental EIR must be prepared. These limitations are designed to balance CEQA's central purpose of promoting consideration of the environmental consequences of public decisions with *interests in finality and efficiency.*' [Citation.] 'In this context, "the interests of finality are favored over the policy of encouraging public comment." [Citation.]' [Citation.] The City's post-approval actions implementing the project did not constitute an 'approval' within the meaning of CEQA Guidelines section 15162(c)."

(49 Cal.App.5th at 132-133 (emphasis original).)

In ruling on LADWP's demurrer, this Court cited to *Communities for a Better Environment v, South Coast Air Quality Management District* (2010) 48 Cal.4th 310 ("*CBE*") for the proposition that a "contractually permitted proposed change" may require CEQA review

"because it is a substantial change from an established environmental baseline." (Order, p. 8.) However, the facts available in the record show that *CBE* is inapplicable because the 2018 Water Allotment was within the scope of LADWP's approval of the 2010 Leases and was not a change to either the 2010 Leases or LADWP's historic practices. As such, the 2018 Allotment was an action in furtherance of a previously approved project and not a separate project requiring additional CEQA review.

1. The Project Approval Is The Board's Approval of the 2010 Leases

(a) The Terms of the 2010 Leases Provide LADWP With Complete and Substantial Discretion To Determine Annual Water Allotments

The "project" under which LADWP made the 2018 Water Allocation was LADWP's Board approval of the Leases in 2010. (AR 16843—168432-2198.) The Board found that the 2010 Leases were exempt from CEQA under the existing facilities exemption because the lands, parties, and operating conditions under the leases remained the same as under the prior leases. (AR 168432-005, 168432-008.)

The 2010 Leases are clear that LADWP has complete discretion regarding the amount of irrigation water to provide the Lease Lands and that the leases provide no guarantee or even expectation of the amount of water supply. As set forth above, the allocation "not to exceed' 5 AF/acre per year of irrigation water pursuant to Section 8 of the leases is subject to the reservations of rights and the discretion of LADWP set forth in Section 7. (AR 168432-1401—168432-1403.)

It is clear from the plain language of these terms that the 2010 Leases do not guarantee that LADWP will supply any specific amount of irrigation water to the Ranchers, that the leases reserve all rights to water and water supply to LADWP, and that whatever water LADWP provides to the Ranchers is subject to LADWP's discretion.

(b) LADWP Has Historically Exercised Its Discretion To Provide Allotments Between 0 AF/acre and Above 5 AF/acre

Under the terms of the Leases, LADWP has made annual determinations regarding the amount of water to provide to the Ranchers for irrigation of the Lease Lands for decades and these

determinations have ranged from a low of 0 AF/acre to a high of 8.1 AF/acre. (AR 86772-86773.) The 2018 Water Allotment of 0.7 AF/acre was within this range of historical practices and most closely resembles the 2016 Water Allotment, which also provided 0.7 AF/acre. (*Id.*)

2. There Was No Change to LADWP's Historic Practices

Petitioners argue, contrarily, that the 2018 Water Allotment was a "change" to LADWP's "historic land management practices" by "curtailing and/or eliminating water deliveries" to the Ranchers in order to "augment exports" to the City, or, alternatively, constitutes a new "augmented water export program." (OB, p. 8.) These arguments are unsupported by the facts.

Petitioners' claim relies on three sets of allegations: (1) the 5 AF/acre Theory, which Petitioners claim requires LADWP to provide an amount of water proportionate to the amount of runoff; (2) communications made by Mayor Garcetti and LADWP Board President Levine regarding the 2018 Water Allotment and LADWP's intention to conduct CEQA review of new proposed leases allegedly show a decision to approve a new or changed project; and (3) studies performed by LADWP in 2010 regarding the impacts of climate change on LADWP's water supply and operations allegedly provided the impetus for LADWP's approval of a new or changed project in 2018. Under CEQA, "Courts presume that the agency's decisions are correct, and the challenger bears the burden of proving the contrary." (*San Diego Citizenry Group v. County of San Diego* (2013) 219 Cal.App.4th 1, 11.) Petitioners have failed to meet their burden. None of Petitioners' allegations are factually correct, nor do they show a change to LADWP's historic practices. Moreover, Petitioners have provided no evidence whatsoever that LADWP increased or augmented exports from Mono County in 2018. As such, Petitioners' claims fail for lack of evidentiary support.

(a) Petitioners' 5 AF/acre Theory Is Wrong

To prove Petitioners' allegation that the 2018 Water Allotment represented a change from LADWP's historic practices, Petitioners first need to establish what the historic practices actually were before showing that the 2018 Water Allotment deviated from those practices.

The foundation for Petitioners' claims is their "5 AF/acre Theory," but that theory is not supported by the facts. Petitioners describe the 5 AF/acre Theory as follows. On May 3, 2018,

the County wrote a letter to Mayor Garcetti requesting "that LADWP continue its practice of providing up to 5 AF/acre, offset based on snowpack and anticipated runoff (78% of anticipated runoff for 2018)." (OB, pp 16-17 [citing AR 121].) The May 3 letter further explains "[w]e understand the need to vary deliveries based on annual snowpack and anticipated runoff and recognize that for many years LADWP did deliver amounts proportional to anticipated runoff. ... This year LADWP has estimated anticipated runoff to be 78 percent of normal. Accordingly, we ask that ... the ranchers receive 3.9 AF per acre."[7] (AR 121; OB, p. 16. fn 6.) "Thus, the County requested that LADWP adhere to the historic practice of delivering to Mono County ranchers an amount of water proportional to the anticipated supply." (OB., p. 17.) Because the 2018 Water Allotment was less than what the 5 AF/acre Theory would have predicted, Petitioners claim the allotment is "entirely inconsistent with historic practices based upon water availability, yet [is] entirely consistent with LADWP's new project to increase exports from the Eastern Sierra to the City." (OB, p. 33.) As such, Petitioners conclude, "LADWP implemented water reductions in May 2018 that deviate from more than 70 years of historic practice." (*Id.*)

Contrary to Petitioners' unsupported assertions, LADWP does not have any policy, practice, or legal requirement to provide water in amounts proportionate to the available water supply. In fact, the evidence in the record clearly shows that the 5 AF/acre Theory is wrong, and that since the 2010 Lease approvals LADWP has *never* provided the amount of water that would be expected under Petitioners' Theory. (AR 86772-86773.) In fact, even if the Court were to look at LADWP's pre-2010 practices, the data shows that LADWP's practices do not comport to Petitioner's Theory. (*Id.* [Chart prepared by LADWP staff showing actual irrigation amounts for Mono County lease lands from the 1992-1993 water year through the 2017-2018 water year].) A replication of this record data is included herein as Exhibit A, along with two additional columns showing what the AF/acre should have been if the 5 AF/acre Theory were correct and the deviation of the actual irrigation numbers from the hypothetical numbers under the Theory.

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[7] Under the 5 AF/acre Theory, 3.9 AF/acre would be the "expected" amount in a year where runoff is 78% of normal. (5 AF/acre x 0.78 = 3.9 AF/acre)

(i) The evidence shows that LADWP has never provided water in accordance with the 5 AF/acre Theory.

These charts show several critical facts defeating Petitioners' 5 AF/acre Theory and Petitioners' allegations that 2018 represented a change to LADWP's historic practices. First, there is not a *single water year* since the 2010 Lease approvals, or prior to that approval, where LADWP supplied the amount of water that would be expected under the 5 AF/acre Theory. If LADWP's historic practice actually was to provide irrigation water in an amount proportionate to water supply, the data should show that LADWP provided water according to the Theory in at least most water years. Instead, the data shows that the Theory has no basis in reality and is not an accurate description of LADWP's historic practices.

Second, the deviations from the 5 AF/acre Theory range from -2400% to +17%, showing that the actual water supplied varied greatly from Petitioners' Theory.[8] The extent and variety of these deviations also show that LADWP's historic practices cannot be easily reduced to a simple mathematical formula. This is unsurprising because, as LADWP has alleged all along, the annual determination of how much water LADWP makes available for irrigation of the Lease Lands is dependent on a myriad of factors such as the amount of runoff, the rate of runoff, the amount of water stored in LADWP's water system, the water LADWP has committed to environmental mitigation in Mono and Inyo Counties, the water necessary for protecting fish habitat, repairs and maintenance to water system facilities, demand from LADWP customers, and many other factors. (See e.g. AR 4237, 71740-71744, 82941-82942, 84194, 84381-84384, 85500, 86242-86252, 86462-86464, 86707, AR 87896-87905, 87906-87928, 90228-90240, 137772.)

Third, the actual amount of water LADWP provided over this time period varied from 0.0 AF/acre to 8.1 AF/acre, with the 2016-2017 water year being the most similar to the 2018 Water Allotment (2016-2017 providing 0.7 AF/acre with 82% of normal runoff and 2018-2019 providing 0.7 AF/acre with 78% of normal runoff). Thus, the evidence shows both that Petitioners' 5

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[8] The negative percentage deviations represent years where LADWP supplied less water than would be expected under the 5 AF/acre Theory and the positive percentage deviations represent years where LADWP provided more water than would be expected under the 5 AF/acre Theory.

AF/acre Theory is not an accurate representation of LADWP's historic practices and that the 2018 Water Allotment was completely in line with LADWP's historic practices.

(ii) Petitioners' citations do not support the 5 AF/acre Theory.

In the face of the facts regarding LADWP's historic practices, Petitioners attempt to cobble together support for their arguments from limited citations to the record. These attempts are unavailing. Initially, Petitioners cite to the leases themselves, which, as Petitioners admit, provide for up to 5 AF/acre, but do not include any commitment by LADWP to provide water in any specific amount. (OB., p. 11 [citing AR 168432.1403].)[9] Therefore, the Leases do not support Petitioners' arguments.

Next, Petitioners cite to the County's own letter for the proposition that LADWP has provided an "average of approximately 25,000-30,000 acre feet (AF) of water to these lands for more than 70 years." (OB, p. 11 [citing AR 14, 67].) They then contradict this assertion by citing to another County letter stating that the average is 26,000 AF. (OB., p. 16 [citing AR 62].) Finally, to confuse the matter further, Petitioners cite to an email from LADWP Senior Assistant General Manager for Water Richard Harasick, in which Mr. Harasick is responding to Mono County Deputy County Counsel Canger's assertion of LADWP's historic practices. (OB., p. 16 [citing AR 82942].) What Mr. Harasick states in this communication is that:

> "It is important to clarify the 'historic allocation' of 5 acre-ft/acre you refer to, which calculates to an amount of 32,000 acre-ft of irrigation water based on 6,400 acres. What that number is in actuality is the 'not to exceed' amount of water to be supplied in the lease. The contractual water supply is dependent on water availability, weather, and is always subject to LADWP's operational needs. As such, the leases have never historically received an irrigation water supply of 5 acre ft/acre. Rather, the average from 1992 to present has been 22,000 acre-feet, and the average over the last 25 years has been 26,000 acre-ft.
>
> So when you propose 3.9 acre-ft/acre, which calculates to 24,960 acre-ft, it's not 78% of the 'historic allocation'. You've merely asked for an amount that's within the long term averages."

(AR 82942-43.)

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[9] Petitioners also cite to the Resource Management Guidelines attached to the Leases. These are obligations on the Ranchers to not allow their cattle to overgraze the vegetation on the lease lands, not evidence supporting a guaranteed supply of water to the lease lands. (See AR 194-201 [utilization analysis to monitor cattle grazing impacts].)

Thus, while the actual "long term average" is a matter of some debate, it is ultimately meaningless for Petitioners' case. For example, if LADWP provided 1 AF/acre, 4 AF/acre, and 10 AF/acre in three successive years, the average would be 5 AF/acre. That does not mean that the provision of 1 AF/acre was not a part of LADWP's historic practice. Nor does it mean that if LADWP supplied 2 AF/acre in the fourth year of the hypothetical, that that action would constitute a change to historic practices. Likewise, here, the fact that the 2018 Water Allotment was below the long-term average is not evidence that 2018 represented a change to LADWP's historic averages, it is simply another data point that is used to calculate the long-term average. Though, as Exhibit A shows, every water year is different, the 2018 Water Allotment most closely resembles the 2016 Water Allotment, with 0.7 AF/acre supplied in 2016 in an 82% of normal water year and 0.7 AF/acre supplied in 2018 in a 78% of normal water year. As such, Petitioners' reliance on long-term averages does not support their arguments.

Petitioners provide no other citations to the record showing that the 5 AF/acre Theory accurately describes LADWP historic practices.[10] Moreover, because the 2018 Water Allotment was in line with LADWP's actual historic practices, it cannot constitute a change to a project requiring CEQA review.

(b) LADWP and City Communications Do Not Evidence a Project or a Change to a Project

Next, Petitioners cite to communications from Mayor Garcetti and Board President Levine as purported evidence that LADWP approved a new project or changed an existing project in May 2018. (OB, pp. 30-33.) However, these letters fail to demonstrate any such approval.

Petitioners are intentionally conflating two separate actions—the release of the draft proposed new leases and the 2018 Water Allotment—and are doing so based on their own previous demands that the two issues be dealt with simultaneously. The record shows that

[10] Petitioners do inexplicably cite to AR 91608. (OB, p. 15.) AR 91608 is a single page from a 289-page spreadsheet containing flow rates of water through several of LADWP's monitoring stations. It is unclear why Petitioners cite to this document, but this spreadsheet does not support the 5 AF/acre Theory.

LADWP always treated the proposed new leases and the 2018 Water Allotment as two separate issues and LADWP's communications clearly indicated that LADWP would continue to provide water to the Ranchers under the 2010 Leases while LADWP studied the new leases.

LADWP released the draft proposed leases to the Ranchers in March 2018. (AR 95002-95052.) The County's BOS responded with a letter to Mayor Garcetti dated April 12, 2018 that demanded that the Mayor immediately provide the County with assurances regarding the 2018 Water Allotment before launching into the County's criticisms of the proposed leases. All subsequent communications from the Mayor and LADWP therefore addressed both issues. because that was what the County had demanded. However, the Mayor's communications make clear that the proposal for the new leases would be studied under CEQA while the 2018 Water Allotment would be provided in accordance with the existing leases and LADWP's past practices. Thus, when Mayor Garcetti speaks to the need to "reevaluate our current water use, including the water historically provided to the eastern Sierra ranches," he is discussing the proposed new leases and the evaluation LADWP is undertaking of those proposed leases under CEQA. (AR 125; see OB, p. 14 [citing same].) On the other hand, when Mayor Garcetti addresses the 2018 Water Allotment and states that he has:

> "directed staff to inform you this week of the amount of water available for operational spreading to the lessees this year based on snowpack and anticipated runoff. Staff has indicated that the amount of water provided will likely be similar to 2016, which was also based on snowpack conditions. This determination will be made under the flexibility that the existing expired leases afford,"

he is discussing, as a separate action, the 2018 Water Allotment. (AR 125.)

Similarly, when Mr. Levine states the need to "re-evaluate how our precious and limited water resources are managed" and explains the numerous reasons giving rise to that need for re-evaluation, he is discussing the rationale for the proposed new leases and the CEQA process that LADWP is conducting for that proposal. (AR 82-85.) When Mr. Levine is addressing the 2018 Water Allotment, however, he states "LADWP notified the ranchers on May 1, 2018, shortly after this year's final runoff was calculated, that they would receive 4,200 acre-feet for this irrigation year, approximately the same number of acre-feet per acre of water provided in 2016 from similar

runoff conditions. Lessees are provided this information at this time every year." (AR 83.)[11]

It is the height of gamesmanship for the County to first demand that LADWP address the proposed new leases and the 2018 Water Allotment in the same communication, then use the fact that LADWP did as the County asked as purported evidence that LADWP approved a new or changed project. The full text of these communications does not show LADWP prematurely embarking on a new policy for its water management prior to the completion of CEQA review. Rather, these communications show an agency engaged with stakeholders in discussion of future policy proposals while at the same time committing to maintain its past practices in the interim. As such, Petitioners' efforts to portray these communications as evidence that LADWP approved a new or changed project fall flat.

(c) There Were No "Material Changes" to the 2010 Leases

Next, Petitioners baselessly allege two other changes to LADWP's management of the Leases. (OB, pp. 34-37.) Petitioners do not explain these assertions or support them with any citations to the record. As such, the Court should reject them as evidence that LADWP approved a changed project in 2018.

First, Petitioners claim that LADWP changed its management of the Leases by "directly spread[ing] the water itself instead of allowing ranchers to spread the water." (OB, p. 34.) The Opening Brief provides no citation to the record that this actually occurred. Nor do Petitioners explain how changing the manner of water spreading on the Lease Lands would constitute a change to a project with the potential for significant environmental impacts. It should not matter, from a CEQA perspective, who is doing the actual delivery of the water, but, in any event, as Petitioners have failed to explain this argument, it is waived.

Similarly, Petitioners claim that "LADWP changed the way it determined 'the amount and availability of water' under section 7.1 of the approved leases and changed its definition of

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[11] Petitioners also claim that Mr. Levine's statement that the water provided to the ranchers is separate and unrelated to the water provided for environmental interests is a "demonstrable untruth," but then Petitioners go on to demonstrate the truth of the statement by separately noting the water LADWP provided to the Ranchers in 2018 and the water LADWP provided for the Sage Grouse. (OB, pp. 15, 17.)

'surplus water' under Section 220(3) of the City Charter, which is incorporated into, and governs, Section 7.3 of the approved leases." (OB, p. 34.) Again, Petitioners provide no evidence to show that LADWP ever made such decisions. The only record citation offered is to portions of the lease terms, which do not show any change to LADWP's historic practices or that LADWP changed the way it was interpreting these terms in 2018. (*Id.* [citing AR 168432-0596 – 168432-0598.) As such, there is no evidence that any such changes occurred, nor that such changes could constitute a "project" under CEQA.

(d) LADWP's 2010 Climate Change Studies Do Not Show LADWP Approved a Change to the 2010 Leases in 2018

Petitioners also allege that certain climate change impact studies conducted by LADWP ("Studies") are the impetus for the alleged change in LADWP's water management practices. (OB, pp. 14-15, 37-39.) This is nonsensical. The majority of the Studies were completed in *2010*, the same year as the current leases were approved, and *eight years* before the 2018 Water Allotment, with the remainder of the studies completed in 2011. Even aside from the fact that Petitioners' claim that eight-year old studies somehow convinced LADWP to change its historic practices in 2018 is unexplained, and strains credulity, Petitioners utterly fail to link the Studies in any way with any LADWP approval in 2018.

What Petitioners do present is a summary of the Studies' findings that climate change will and is having an impact on LADWP's water supply – a point that is not in dispute – and pure conjecture as to how these Studies "demonstrate LADWP's intent to augment exports from Mono County." (OB, p. 37.) According to Petitioners, because one of the Studies recommended that LADWP might mitigate the impacts of climate change by increasing the capacity of the Long Valley Reservoir –an action that is neither proposed nor before this Court – that LADWP "could" find the extra water for filling this hypothetically-expanded reservoir by "reducing delivery of water for cattle grazing purposes in Long Valley." (OB, p. 38.) Petitioners' abstract line of thinking continues that this measure "could be considered" by LADWP because another statement in the same report "makes clear by omission" that reducing water for cattle grazing "is not precluded." (*Id.*, pp. 38-39.)

What any of this has to do with the 2018 Water Allotment, Petitioners never make clear. Petitioners do not provide any citation or argument showing that the Studies were considered by LADWP in 2018 or that LADWP sought to implement the recommendations of these Studies in 2018. (OB, pp. 37-39.) As such, there is nothing about the Studies that shows, or even implies, that LADWP approved a new or changed project in 2018.

(e) Petitioners Cite No Evidence of Increased Water Export in 2018

Despite claiming that LADWP initiated a project of increased water exports from Mono County in 2018. Petitioners do not provide a single citation to the record showing that LADWP actually increased water exports from Mono County in 2018. (OB, p. 15 [claiming the Petition challenges the replacement of water deliveries to Mono County with "augmented deliveries" to the City, but citing only to AR 100, Mr. Levine's July 6, 2018 communication which provides no evidence of such augmented exports]; *id.*, pp. 31-32 [same].)

If Petitioners are to claim that LADWP approved an "augmented water export program," the very least they must show is that LADWP actually augmented its water exports. However, as with Petitioners' other assertions, the facts in the record simply do not show that any such approval occurred.

3. The Fact that the 2010 Leases Are In Holdover Status Does Not Change the Result

In this Court's Order on the demurrer, even though the Court did not take judicial notice of the 2010 Leases, the Court observed that because the 2010 Leases expired at the end of 2013, they could have no effect on the 2018 Water Allotment. (Order, p. 6.) As set forth in more detail in section II.B, supra, the evidence in the record shows that since the expiration of the leases in 2013, the Ranchers have operated in "holdover" status. Pursuant to the requirements of holdover status, LADWP and the Ranchers operate under all of the requirements of the 2010 Leases, except that the term of the lease is at-will instead of for a set period of time. (AR 168432-1420.) Thus, the provisions of the 2010 Leases regarding water supply to the Ranchers, as described above, were applicable to the 2018 Water Allotment and, indeed, continued to be applicable to LADWP's water allotments in 2019 and 2020. Therefore, the holdover status of the current leases does not

change the analysis that the 2018 Water Allotment was an implementing action of the 2010 Leases and not a separate project subject to CEQA.

4. LADWP Provided Water for Sage Grouse Habitat In Consultation With Resource Agencies in 2018

Petitioners raise the issue of water for the Bi-State Sage Grouse only in the context of the alleged impacts that would result from Petitioners' claim that the 2018 Water Allotment would have significant environmental impacts, not as a separate alleged violation of CEQA. (OB, pp. 12-13, 17-18, 41.) Nevertheless, it is important to note that the water LADWP supplies for Sage Grouse Habitat is separate and distinct from the irrigation water supplied to support foraging vegetation for the Ranchers' cattle operations, though such water does incidentally benefit the Rancher' cattle operations. (OB, p. 17.) In addition, in 2018, LADWP fully supplied the necessary water to support the Sage Grouse in consultation with the resources agencies. (AR 71740-71744, 82941-82945, 84194, 84381-84384, 85500, 86242-86252, 86462-86464, 86707.) Thus, even if Petitioners' allegation that the 2018 Water Allotment was a change to historic practices vis a vis the irrigation water for the Ranchers, which it was not, impacts to the Sage Grouse would not have resulted from this alleged decision.

B. Petitioners' Claims Are Barred and the Case Should Be Dismissed

In addition to Petitioners' inability to show any new or changed project requiring CEQA review, Petitioners' claims are barred by a number of legal defects.

1. Petitioners' Claims Are Barred By the Statute of Limitations

Petitioners' claims are barred by CEQA's short statute of limitations. "Among the purposes of statutes of limitations are to prevent stale claims, give stability to transactions, protect settled expectations, promote diligence, encourage the prompt enforcement of substantive law, and reduce the volume of litigation. [Citations.]" (*Stockton Citizens for Sensible Planning v. City of Stockton* (2010) 48 Cal.4th 481, 499.) "To ensure finality and predictability in public land use planning decisions, statutes of limitations governing challenges to such decisions are typically short. [Citations.]" (*Ibid.*) "Courts have often noted the Legislature's clear determination that ' "the public interest is not served unless CEQA challenges are promptly filed and diligently

prosecuted." ' [Citations.]" (*Id.* at 500.)

The longest statute of limitations applicable to any CEQA action provides that any such action "shall be commenced within 180 days from the date of the public agency's decision to carry out or approve the project, or, if a project is undertaken without a formal decision by the [] agency, within 180 days from the date of commencement of the project." (Pub. Res. Code, § 21167, subd. (a).) In certain circumstances, courts have held that the project does not "commence" until a petitioner knew or should have known that a modified project had begun. (*Concerned Citizens of Costa Mesa, Inc. v. 32'd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 933.)

Any challenge to the 2010 Lease approval is barred by the 180-day statute of limitations, which Petitioners concede. (OB, p. 18, 36-37.) However, even accepting Petitioners' theory that a substantial deviation from the 5 AF/Acre Theory would constitute a new or changed project requiring CEQA review, Petitioners' claims are still barred. In 2015, LADWP provided the Ranchers with no water (0 AF/acre) for irrigation. On May 19, 2015, the County BOS wrote a letter to LADWP stating that the County was "highly distressed to learn that" the Ranchers "have been cut off from any irrigation water this season." (AR 225.) The BOS expressed that they "understand" the Ranchers "receive a seasonal water allotment for irrigation of up to 5 acre-feet (AF) of water per acre," and that the elimination of water would result in significant economic and environmental impacts, including impacts to the Bi-State Sage Grouse. (*Id.*) The BOS concluded by demanding the "[i]mmediate provision of 2-3 AF of irrigation water" for the Ranchers[12] and a "commitment" from LADWP to communicate with the BOS "prior to significant water management changes affecting lands in Mono County now and into the future." (AR 226.)

In 2016 LADWP provided the Ranchers with an identical amount of water to the 2018 Water Allotment (0.7 AF/acre) in a nearly identical water year (82% of normal runoff in 2016 and 78% of normal runoff in 2018). (AR 86772-86773; Exhibit A.) Again, the BOS wrote a letter to LADWP, dated April 19, 2016, noting the BOS's "distress" at learning that the Ranchers would

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[12] See Exhibit A. The 5 AF/acre Theory predicts that the Ranchers "should" have received 2.4 AF/acre in 2015.

receive "reduced" water allotments. (AR 206.) The BOS reiterated the alleged economic and environmental impacts of the "reduced" water from the 2015 letter and argued that the "reductions must consider all impacts to the environment and affected parties for which LADWP is responsible, not just those resulting from court orders and past California Environmental Quality Act (CEQA) documents. These responsibilities include both agricultural lessees and habitat health for sensitive species such as the Bi-State [] Sage Grouse." (*Id.*)

Thus, Petitioners knew about these water allotments and sent LADWP letters in both 2015 and 2016 complaining that LADWP was reducing the water provided to the Ranchers in a way that was a modification to LADWP's past practices, and claiming that the water allotments would result in the same environmental impacts Petitioners now allege would occur because of the 2018 Allotment. (AR 206-207, 225-226.) Therefore, Petitioners had actual knowledge of the alleged change from LADWP's historic practices, at the latest, by April 19, 2016, but chose not to file a claim. The latest Petitioners could have challenged LADWP's modification of its historic practices, then, was October 16, 2016, 180 days after the BOS's April 19, 2016 letter. Petitioners' complaint was not filed until nearly two years later, on August 15, 2018, and therefore is barred by the statute of limitations.

2. Petitioners Failed To Name Indispensable Parties

Petitioners also failed to name the Ranchers, who are indispensable parties to this case. Generally, Code of Civil Procedure section 389 governs indispensable parties. A party is an indispensable party to the action if: (1) without it, complete relief cannot be accorded between the present parties, or (2) if it claims an interest in the action and without it, disposition of the action would impair its ability to protect that interest or leave a present party at a substantial risk of incurring multiple or inconsistent obligations as a result of that interest. (Code Civ. Proc., § 389, subd. (a).) Failure to join the real party in interest before the statute of limitations has run may be a ground for dismissal of the case under section 389 subd. (b) for failure to join an indispensable party. (*See Sierra Club, Inc. v. California Coastal Com.* (1979) 95 Cal.App.3d 495, 502; *see also Save Our Bay, Inc. v. San Diego Unified Port Dist.* (1996) 42 Cal.App.4th 686, 693 [failure to join indispensable party within CEQA 30-day statute of limitations necessitated dismissal]; *Beresford*

Neighborhood Assn. v. City of San Mateo (1989) 207 Cal.App.3d 1180, 1189 [failure to name developer to case challenging zoning approvals for a project warranted dismissal].) In these instances, the Court must determine, under section 389 subd. (b), "in equity and good conscience" whether the action should proceed with the present parties or if the suit should be dismissed, "the absent person being thus regarded as indispensable." The Court should consider four factors: (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) the extent to which any prejudice can be lessened or avoided; (3) whether the judgment rendered in absence would be adequate; and, (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder. (Code Civ. Proc., § 389, subd. (b).)

Under CEQA, Public Resources Code section 21167.6.5 subd. (a) additionally governs whether an entity is an indispensable party in a CEQA case. (*Quantification Settlement Agreement Cases* (2011) 201 Cal.App.4th 758, 855 [decided under former Public Resources Code section 21167.6.5].) In *Quantification Settlement Agreement Cases*, the court held that, if a court determines that a recipient of an approval has not been named as a real party in interest and cannot be joined in the lawsuit, it then determines whether the unnamed party is indispensable by applying the factors in Code of Civil Procedure section 389(b). The failure to join a party found to be indispensable requires dismissal. (201 Cal.App.4th at 848. *See* Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2018) § 23.16, p. 23-23.)

In addition, for claims, as here, involving a dispute regarding a contract "'Ordinarily where the rights involved in litigation arise upon a contract, courts refuse to adjudicate the rights of some of the parties to the contract if the others are not before it.'" (*Deltakeeper v. Oakdale Irrigation Dist.* (2001) 94 Cal.App.4th 1092, 1106.)

Here, the statute of limitations has run and Petitioners cannot amend their Petition to add the Ranchers, who are indispensable parties to this case. The Petition seeks to adjudicate the rights and responsibilities of LADWP and the Ranchers under the 2010 Lease Agreements, but an adjudication of those rights and responsibilities where only one of the parties to the contract is in the case would be prejudicial to both of the contractual parties. The Ranchers do not have the opportunity to defend their interests in the 2010 Leases and LADWP could be prejudiced by being

burdened with additional duties under the 2010 Leases that those agreements did not contemplate. This is especially critical here because the Leases have expired and are in "holdover" status. To the extent adjudication of this action results in terms that the Ranchers do not agree with, either the Ranchers or LADWP could refuse to continue under the holdover status, depriving the other party of the benefits conferred under the 2010 Leases. (AR 168432-1420.) Similarly, if Petitioners are successful in obtaining an order from this Court that LADWP must continue supplying water for ranching operations, a necessary corollary of this order would be that the Ranchers would be required to continue leasing the property and paying rent despite the fact that the Ranchers are currently free to vacate the property at will. This prejudice cannot be minimized because Petitioners do not adequately represent the interests of either LADWP or the Ranchers. Finally, Petitioners do have an adequate remedy for their concerns regarding the proposed new leases, both at an administrative level during the CEQA process, and in the ability to challenge any approval of the proposed new leases in court.

Similarly, under CEQA's mandatory joinder provisions, the Ranchers are clearly the recipients of LADWP's approvals of both the 2010 Leases and the annual Water Allotments, and, therefore, should have been joined. Moreover, to the extent this Court orders LADWP to conduct CEQA review of the Water Allotments, that review includes the potential application of mitigation measures and consideration of alternatives. The Ranchers would have no say in the changes to their leases that might result from court-mandated CEQA review of annual Water Allotments.

Thus, Petitioners were required to name the Ranchers as parties but did not. The statute of limitations has run, preventing Petitioners from amending their claims to add the Ranchers now. That failure warrants dismissal of the action.

3. Petitioners Cannot Specifically Enforce the Terms of the Leases Through the Guise of a CEQA Action

(a) Mandamus is Not An Appropriate Remedy For Enforcing the 2010 Leases

Though framed as claims under CEQA, what the Petition actually attempts to accomplish is to change the terms of the 2010 Leases to add new duties that LADWP must perform and an order requiring LADWP to specifically perform those alleged duties.

"As a general proposition, mandamus is not an appropriate remedy for enforcing a contractual obligation against a public entity." (*Shaw v. Regents of Univ. of California* (1997) 58 Cal.App.4th 44, 52; see also *300 DeHaro Street Investors v. Department of Housing & Community Development* (2008) 161 Cal.App.4th 1240, 1243-48, 1254 [holding claims for breach of a regulatory contract with agency properly pled as contract claims rather than mandamus].) Thus, where a claim is framed in mandamus, but is really a dispute over an agency's contractual obligations, the reviewing court should apply contract principles in resolving the parties' dispute over the terms of the contract. (*Shaw, supra*, 58 Cal.App.4th at 52.)

The Petition alleges that, under the terms of the 2010 Leases, LADWP is required to provide "up to 5 acre feet of water per acre (AF/acre) per year" to the Ranchers "to enable them to conduct cattle grazing operations and to create wetland and meadow habitat" and that LADWP has complied with these terms, with the exception of 2015 when through mutual "agreement with the lessees, no water was provided." (Petition, ¶¶ 14, 15.) However, according to Petitioners, the 2018 Water Allotment was not within the scope of LADWP's previous performance under the 2010 Leases and, thus, the County demanded that LADWP specifically perform under the terms of the contract. (*Id.*, ¶¶ 28 -29, 52-53.) LADWP refused, thus leading to this lawsuit. (*Id.* at ¶ 30.) Petitioners seek an order from this Court that LADWP specifically perform annual Water Allotments under the terms of the 2010 Leases as Petitioners interpret those terms. (*Id.* at pp. 13-14.) Therefore, Petitioners' claims that LADWP breached the 2010 Leases in 2018 and seek an order requiring LADWP to specifically perform the terms of the 2010 Leases should be considered under the principles of contract law, not CEQA. As set forth below, under those principles, the Court should reject the Petition.

(b) Petitioners Have No Standing To Challenge LADWP's Specific Performance of the 2010 Leases

Petitioners cannot enforce the terms of the 2010 Leases because they are not parties to those agreements, nor are they intended third-party beneficiaries to those agreements. As such, Petitioners have no standing to obtain specific performance of the 2010 Leases.

The general rule is that "someone who is not a party to the contract has no standing to

enforce it." (*Jones v. Aetna Cas. & Sur. Co.* (1994) 26 Cal.App.4th 1717, 1722.) However, California law does allow that a "contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." (Civil Code, § 1559.) "The test for determining whether a contract was made for the benefit of a third person is whether an intent to benefit a third person appears from the terms of the contract. [Citation.] If the terms of the contract necessarily require the promisor to confer a benefit on a third person, then the contract, and hence the parties thereto, contemplate a benefit to the third person. The parties are presumed to intend the consequences of a performance of the contract." (*Johnson v. Holmes Tuttle Lincoln–Merc.* (1958) 160 Cal.App.2d 290, 297.) "Under the intent test, 'it is not enough that the third party would incidentally have benefited from performance.' [Citation.] 'The circumstance that a literal contract interpretation would result in a benefit to the third party is not enough to entitle that party to demand enforcement. The contracting parties must have intended to confer a benefit on the third party.' [Citation.]" (*Spinks v. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004, 1022.) "The effect of the section is to exclude enforcement by persons who are only incidentally or remotely benefited." (*Lucas v. Hamm* (1961) 56 Cal.2d 583, 590.)

That Petitioners are not parties to the 2010 Leases is not in dispute. Thus, the only means through which Petitioners could enforce the terms of the 2010 Leases would be as third-party beneficiaries. Petitioners' Opening Brief makes no effort to show that either LADWP or the Ranchers intended the 2010 Leases to benefit Petitioners. Moreover, the plain language of the 2010 Leases show no intent to benefit Petitioners as third-party beneficiaries. (AR 168432-1394 – 168432-1429.) Finally, Petitioners have pointed to no evidence that the actions of LADWP and the Ranchers in performing under the 2010 Leases show an intent to benefit Petitioners, nor does any such evidence exist. Thus, Petitioners have no rights to enforce the terms of the 2010 Leases and their claims for enforcement of the 2010 Leases should be dismissed.

(c) The 2010 Leases Do Not Support Petitioners' Interpretation of LADWP's Duties Under the Leases

Even if Petitioners could seek to enforce the terms of contracts to which they were not parties, the plain language of the 2010 Leases do not support Petitioners' interpretation of

LADWP's duties regarding the annual Water Allocations.

"The basic goal of contract interpretation is to give effect to the parties' mutual intent at the time of contracting. [Citations.] When a contract is reduced to writing, the parties' intention is determined from the writing alone, if possible. (Civ.Code, § 1639.) 'The words of a contract are to be understood in their ordinary and popular sense.' (Civ.Code, § 1644; see also *Lloyd's Underwriters v. Craig & Rush, Inc.* (1994) 26 Cal.App.4th 1194, 1197–1198, 32 Cal.Rptr.2d 144 ['We interpret the intent and scope of the agreement by focusing on the usual and ordinary meaning of the language used and the circumstances under which the agreement was made'].)" (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 955.) "[A] third-party beneficiary may not obtain a greater recovery than that which would have been available to the promisee." (*Souza v. Westlands Water Dist.* (2006) 135 Cal.App.4th 879, 894; *Marina Tenants Assn. v. Deauville Marina Dev. Co.* (1986) 181 Cal.App.3d 122, 126 ["Tenants cannot state a cause of action as third-party beneficiaries, because even if they succeed in proving they are intended beneficiaries of the lease agreement ..., they cannot assert rights greater than those of the promisee ... under that contract"].) Furthermore, the intended beneficiary "bears the burden of proving that the promise he seeks to enforce was actually made to him personally or to a class of which he is a member." (*Neverkovec v. Fredericks* (1999) 74 Cal.App.4th 337, 348–49.)

Nevertheless, Petitioners request an order from this Court requiring LADWP to continue to supply water to the Ranchers "in an amount consistent with its historic water supply practices." (Petition, p. 13.) The requirement that LADWP supply a specific amount of water, or even any water, to the Ranchers, is not a term of the 2010 Leases and, in fact, contradicts the plain language of the leases as set forth above. Therefore, even if Petitioners had standing to enforce the 2010 Leases, their claim must fail because it seeks to "obtain a greater recovery than that which would have been available to the promisee." (*Souza, supra,* 135 Cal.App.4th at 894.)

4. Petitioners Failed To Exhaust Their Administrative Remedies

Next, Petitioners failed to exhaust their administrative remedies, which should also result in dismissal of their claims. "Under the doctrine of administrative exhaustion, the long-standing

general rule is this: 'where an adequate administrative remedy is provided by statute, resort to that forum is a "jurisdictional" prerequisite to judicial consideration of the claim.'" (*McAllister v. County of Monterey* (2007) 147 Cal.App.4th 253, 274.) "Put another way: 'In the context of administrative proceedings, a controversy is not ripe for adjudication until the administrative process is completed and the agency makes a final decision that results in a direct and immediate impact on the parties.'" (*Ibid.*) "Even where the administrative remedy may not resolve all issues or provide the precise relief requested by a plaintiff, the exhaustion doctrine is still viewed with favor 'because it facilitates the development of a complete record that draws on administrative expertise and promotes judicial efficiency.'" (*Sierra Club v. San Joaquin Local Agency Formation Commission* (1999) 21 Cal.4th 489, 501.)

"The doctrine 'is not a matter of judicial discretion, but is a fundamental rule of procedure ... binding upon all courts.' [Citation.] Until an available 'administrative procedure has been invoked and completed, there is nothing that the ... court may review; it cannot interfere in the intermediate stages of the proceeding.' [Citation.] For that reason, 'the failure to exhaust administrative remedies prevents appellant from seeking relief through administrative mandamus ..., which provides judicial review of *final* administrative proceedings.' [Citation.]" (*McAllister, supra,* 147 Cal.App. 4th at 275 (emphasis original).)

Assuming for the sake of argument that LADWP did approve a change to its historic practices in 2018, Petitioners had two separate bodies to which to appeal that alleged decision. First, LADWP's Board of Commissioners is charged with the management and development of the City's water assets (Los Angeles City Charter, §§ 672.(a), 675, 677.) To the extent any informal decision was made to change LADWP's management of its water assets, Petitioners should have brought that decision to the attention of LADWP's Board, which is vested with the authority over the management of those water assets. Second, the LADWP Board is an appointed body. Under CEQA, "Guideline 15090, subdivision (b) ... requires local governments to have an appeals procedure," to a body of elected decisionmakers. (*Vedanta Soc. of S. California v. California Quartet, Ltd.* (2000) 84 Cal.App.4th 517, 526.) Thus, Petitioners could have appealed any decision by the unelected Board to the City Council. (Request for Judicial Notice, Exs. 1-3

[showing appeals to City Council from other City departments].) Petitioners did not attempt to appeal or raise the issues presented in the Petition to either LADWP's Board or to the City Council. As such, Petitioners failed to exhaust their administrative remedies and their claims are barred.

5. Petitioners' Claims Are Moot

Petitioners' claims should also be dismissed because no effective relief can be granted and, thus, the claims are moot. A CEQA case "should be dismissed as moot when the occurrence of events renders it impossible" for the court to grant "any effective relief." (*Cucamongans United for Reasonable Expansion v. City of Rancho Cucamonga* (2000) 82 Cal.App.4th 473, 479.) In *Santa Monica Baykeeper v. City of Malibu* (2011) 193 Cal.App.4th 1538, 1550, the court held that claims regarding construction phase impacts of a project were moot since construction had ended, and the entire project was complete and open to the public. Under these circumstances, the court found that there was no way the court could provide "effective relief regarding construction impacts." (*Ibid.*) Similarly, in *North Coast Rivers Alliance v. Westlands Water District* (2014) 227 Cal.App.4th 832, 849, and *County Sanitation District No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1628, the courts refused to consider CEQA challenges to contracts that had already expired, finding that the claims were moot. Finally, in *Parkford Owners for a Better Cmty. v. County of Placer* (2020) 54 Cal.App.5th 714, 721-725, the court found a CEQA challenge to a storage project was moot because the storage project had already been completed.

Like these cases, no effective relief can be granted here. Petitioners' claims challenge the 2018 Water Allotment, which was the water provided during the 2018-2019 water year. The Court cannot grant effective relief because the Court cannot mandate that LADWP reach into the past and provide a different amount of water to the Ranchers in 2018, nor could LADWP comply with such a mandate. Moreover, to the extent that Petitioners' claims challenge the proposed new leases and the proposal to remove irrigation water as a term of those leases, LADWP is already undertaking CEQA analysis for those proposals and, thus, there is no justiciable controversy here. (AR 40-43; see *Ass'n of Irritated Residents v. Dep't of Conservation* (2017) 11 Cal.App.5th 1202, 1223-1224.) Therefore, Petitioners' claims should be dismissed as moot.

6. Petitioners' Requested Remedies Cannot Be Granted

Finally, Petitioners' request for a mandatory injunction requiring LADWP to continue supplying the Ranchers with irrigation water "in an amount consistent with its historic water supply practices over the past seventy years and continue supplying such water until Respondents have prepared, circulated and considered a legally adequate environmental document under CEQA" cannot be enforced as a matter of CEQA, water law, and landlord-tenant law. (Petition, pp. 13-14.)

First, under CEQA, "the trial court may not direct the agency to exercise its discretion in a particular way and may only include the mandates necessary to achieve compliance with CEQA. (§ 21168.9, subds.(b) & (c).)" (*Pres. Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 287.) Mandamus may not be used to "force the exercise of discretion in a particular manner or to reach a particular result." (*Carrancho v. California Air Res. Bd.* (2003) 111 Cal.App.4th 1255, 1268.) The Court "'may not substitute its judgment for that of the agency.'" (*Klajic v. Castaic Lake Water Agency* (2001) 90 Cal.App.4th 987, 995.)

Second, the water rights through which LADWP supplies the Ranchers with irrigation water are Pre-1914 appropriative rights. Pursuant to Water Code section 1706, these Pre-1914 rights confer upon LADWP the right to "change the point of diversion, place of use, or purpose of use" of its water "if others are not injured by such change." "Under this provision, a person can change the place where appropriated water is used as long as that change does not adversely affect the rights of others to the water involved." (*Barnes v. Hussa* (2006) 136 Cal.App. 4th 1358, 1365.) There is no allegation of injury to any downstream user and, even if LADWP were to reduce irrigation, the water remains in the stream or river and would not affect downstream users.

Third, a tenant has no right to remain in possession of property after a lease has expired and is subject to an action for unlawful detainer. (Code of Civ. Proc., 1161; *Nork v. Pac. Coast Med. Enterprises, Inc.* (1977) 73 Cal.App.3d 410, 413 [the "purpose of the unlawful detainer statutes is to provide the landlord with a summary, expeditious way of getting back his property when a tenant fails to pay the rent or refuses to vacate the premises at the end of his tenancy"].)

The 2010 Leases have, by their own terms, expired and the Rancher holdover status is at-

will. There is no law, and Petitioners have cited none, requiring LADWP to continually allow the Ranchers to maintain their cattle operations on the Lease Lands in holdover status indefinitely while LADWP conducts CEQA review for new leases it may never adopt. Nor, as set forth above, can the Court mandate that the Ranchers continue their ranching operations. Allowing the Ranchers to remain in holdover status requires both LADWP and the Ranchers to consent to the continued holdover status every year. (AR 168432-1420.) Moreover, such mandate would dictate to LADWP how to exercise its Pre-1914 water rights in violation of LADWP's rights established in Water Code section 1706.

Therefore, Petitioners' requested remedy would force LADWP to exercise its discretion in a particular way contrary to the provisions of CEQA, force LADWP to exercise its water rights in a particular manner in violation of Water Code section 1706, and require both LADWP and the Ranchers to maintain a landlord-tenant relationship indefinitely, in violation of both LADWP and the Ranchers' rights to contract on mutually agreeable terms. Thus, Petitioners' requested relief cannot be granted.

C. Even Were the Court to Consider the 2018 Water Allotment to be a Separate "Project" for CEQA Purposes, It Would Be Exempt From CEQA Review

Finally, even if the Court were to consider the 2018 Water Allotment to be a "project" subject to CEQA, Petitioners' claim would still fail. Even if the 2018 Water Allotment was a separate "project" for CEQA purposes, it would be exempt from CEQA review under either or both of the Ongoing Project exemption (CEQA Guidelines, § 15261) and the Existing Facilities exemption (CEQA Guidelines, § 15301). An agency may rely on an exemption even if the agency did not file a Notice of Exemption. (*Tomlinson v. County of Alameda* (2012) 54 Cal.4th 281, 290 ["The absence of a notice of determination does not render improper the agency's approval of the proposed project based on an exemption finding. It only extends the time within which to initiate a lawsuit challenging the public agency's decision"].) Where, like here, a project is exempt, "CEQA [does] not apply as a matter of law." (*Del Cerro Mobile Estates v. City of Placentia* (2011) 197 Cal.App.4th 173, 184; *Mountain Lion Foundation v. Fish & Game Comm.* (1997) 16 Cal.4th 105, 124.) And, agencies are not required to make an exemption determination at any particular point

in the project-approval process. (*Del Cerro, supra,* 197 Cal.App.4th at 173 [even where the lead agency prepared an EIR and an exemption was raised for the first time as a defense in litigation, court granted demurrer because the project was exempt from CEQA].) "When faced with a challenge to an agency's exemption determination, the court considers whether the agency proceeded in the manner required by law and whether its determination is supported by substantial evidence." (*San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist.* (2006) 139 Cal.App.4th 1356, 1381.)

1. The 2018 Water Allotment Was Part of An Ongoing Project and Not Subject to CEQA

As Petitioners concede, LADWP has been managing the Lease Lands in the County for over 70 years, well before CEQA's enactment. (OB, pp. 10-11.) Each year, as a part of the ongoing management of these Lease Lands, LADWP determines the annual Water Allotment that will be available to the Ranchers. Thus, the Ongoing Project Exemption applies to exempt the 2018 Water Allotment from CEQA.

The Ongoing Project exemption exempts projects from CEQA review as follows: "(a) If a project being carried out by a public agency was approved prior to November 23, 1970, the project shall be exempt from CEQA unless either of the following conditions exists: [¶] (1) A substantial portion of public funds allocated for the project have not been spent, and it is still feasible to modify the project to mitigate potentially adverse environmental effects, or to choose feasible alternatives to the project, including the alternative of 'no project' or halting the project.... (2) A public agency proposes to modify the project in such a way that the project might have a new significant effect on the environment."

Nacimiento Regional Water Management Advisory Commission v. Monterey County Water Resources Agency (1993) 15 Cal.App.4th 200 ("*Nacimiento*") is on point. There a government agency built a dam and reservoir prior to the enactment of CEQA. The agency's application to build the project had provided for operation of a reservoir, including the storing and periodic release of water in varying amounts and for different uses. The petitioner in that case challenged the agency's 1991 decision to release large amounts of water that year to benefit various interests

downstream. The court held that "[w]hether an activity requires environmental review depends upon whether it expands or enlarges project facilities or whether it merely monitors and adjusts the operation of existing facilities to meet fluctuating conditions." (*Nacimiento, supra*, 15 Cal.App.4th at 205.) If an activity is a "normal, intrinsic part of the ongoing operation" of the project, then no further CEQA review is required. (*Ibid.*)

Similarly, in *North Coast Rivers* , petitioners challenged several water districts' decision to enter into two-year, interim renewal contracts with the United States Bureau of Reclamation relating to the Bureau's ongoing provision of water to the districts. The court held that the ongoing project exemption "includes the situation where a public agency carries out an action today that is an inherent part of an ongoing project approved before CEQA took effect. [Citation.] The key issue in analyzing the exemption is whether the challenged action is 'a normal, intrinsic part of the ongoing operation' of a project approved prior to CEQA, rather than an expansion or modification thereof." (227 Cal.App.4th at 857.) This analysis involves a "comparison of the nature of the original pre-CEQA project and the current activity challenged by petitioners." (*Id.* at 858.) Because there was no substantial change in either the pre-CEQA facilities used to deliver the water or in the rights granted by the pre-CEQA contracts, the court held that the new contracts were "*within the scope and parameters* of the approved pre-CEQA original project" as such, the contracts "were within the scope of, and incidental to, the ongoing original project" and exempt from CEQA. (*Id.* at 865 (emphasis original).)

Here, the 2018 Water Allotment was within the scope and parameters of LADWP's management of the Lease Lands. Under the terms of the Leases, LADWP has made annual determinations regarding the amount of water to provide to the Ranchers for irrigation of the Lease Lands for decades and these determinations have ranged from 0 AF/acre to above 5 AF/acre. (AR 86772-86773.) The 2018 Water Allotment was no different. In 2018, again pursuant to the terms of the Leases, LADWP allocated water to the ranchers for irrigation, and made a determination of the amount of that water in accordance with the Leases and in conformity with LADWP's past practices. (AR 90196.)

Petitioners rely on a series of cases arising out of LADWP's water management in the

County of Inyo to show that the Ongoing Project Exemption does not apply to the 2018 Water Allotment. (OB, pp. 26-30.)[13] Petitioners' reliance on the *County of Inyo Cases* is misplaced.

Yorty involved LADWP's management of its Water System and the application of the Ongoing Project Exemption. Critically, however, though the court did find that City's groundwater extraction program was a separate CEQA project than the City's construction of a second aqueduct, the court determined that both projects pre-dated CEQA and, thus, were potentially exempt from CEQA review by the Ongoing Project Exemption. (*Id.* at 805-806.) The *Yorty* court reviewed the Ongoing Project Exemption and held that a project that pre-dated CEQA would be exempt from CEQA review unless either: 1) a substantial portion of public funds allocated for the project have not been spent and it is still possible to modify the project to mitigate impacts or to approve an alternative to the project; or 2) the agency proposes a modification to the project such that the project might have new significant impacts on the environment. (*Id.*) The court then found that both exceptions to the exemption applied to the groundwater extraction program because only "half of the moneys appropriated for well drilling and pumping have been expended, and of this sum a substantial amount has been spent since the effective date of CEQA" and that, after CEQA's adoption, the groundwater extraction program "has involved a continued 'modification' in the constantly increased intensity and scope of actual and projected groundwater withdrawals." (*Id.* at 806-807.) Thus the court required the preparation of an EIR for the modified groundwater extraction program.

Here, the first part of the *Yorty* court's inquiry, whether the leases are a part of the LADWP's management of the Water System or a separate CEQA project, is irrelevant. LADWP's management of the Lease Lands predates CEQA. In addition, neither exception to the Ongoing Project Exemption applies. First, there is no evidence in the record, and Petitioners have not cited to any, showing that there is significant public funds remaining to be spent for the leases, so the first exception to the exemption does not apply. Second, unlike the continually increasing

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[13] *Yorty, supra,* 32 Cal.App.3d 795; *County of Inyo v. City of Los Angeles* (1976) 61 Cal.App.3d 91; *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185; and *County of Inyo v. City of Los Angeles* (1981) 124 Cal.App.3d 1 (collectively the "*County of Inyo Cases*").

amount of groundwater pumping in *Yorty*, here the evidence shows that the 2018 Water Allocation was in line with LADWP's past practices regarding the Water Allocations. (AR 86772-86773, Exhibit A.) The 2018 Water Allotment was no different than Water Allotments made in previous years, most closely resembling the 2016 Water Allotment. (*Id.*) Therefore, the 2018 Water Allotment is exempt from CEQA review under the Ongoing Project Exemption.

2. The 2018 Water Allotment Is Exempt From CEQA Under the Existing Facilities Exemption

Similarly, the 2018 Water Allotment falls under the Existing Facilities Exemption. That exemption exempts from CEQA review "the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, [or] mechanical equipment ..., involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination.... The key consideration is whether the project involves negligible or no expansion of an existing use. (Guidelines, § 15301.)" (*North Coast Rivers,* 227 Cal.App.5th at 851, 867.) As an example, the Guideline lists in subdivision (b) "[e]xisting facilities of both investor and publicly-owned utilities used to provide electric power ... or other public utility services[.]" (CEQA Guidelines, § 15301.)

The *North Coast Rivers* decision, *supra*, additionally found that the water contracts at issue in that case would also be exempt under the categorical exemption for existing facilities. Again, the court found that because the contracts would use existing facilities to deliver the water, and the amount of water was to be delivered pursuant to contracts "the terms of which were expressly continued without change" the approval of those contracts fell within the existing facilities exemption. (227 Cal.App.4th at 868; see also *World Business Academy v. California State Lands Commission* (2018) 24 Cal.App.5th 476 (lease replacement for nuclear power plant intake and discharge structure was exempt under existing facilities exemption); *Citizens for East Shore Parks v. State Lands Commission* (2011) 202 Cal.App.4th 549 (appropriate baseline for renewal of marine terminal was current operations of terminal); *Bloom v. McGurk* (1994) 26 Cal.App.4th 1307, 1315 (finding permit renewal for medical waste facility was exempt from CEQA and stating "[w]e presume that thousands of permits are renewed each year for the ongoing operation of

regulated facilities, and we discern no legislative or regulatory directive to make each such renewal an occasion to examine past CEQA compliance").)

Again, there is no change in the facilities used to deliver water, nor in the terms of the Leases. Instead, the 2018 Water Allotment was made pursuant to the terms of existing Leases, and using existing facilities to deliver the water. Moreover, neither the significant impact due to unusual circumstances exception nor the cumulative project exception to exemptions should apply. There is no change to the Leases, and therefore no change in the environment that would trigger either of these exceptions under *North Coast Rivers* and the cases cited therein.

Petitioners' Opening Brief only superficially addresses the application of categorical exemptions such as the Existing Facilities Exemption to the 2018 Water Allotment by stating that no exemption can apply because of Petitioners' allegation that the 2018 Water Allotment constitutes a decision to modify LADWP's historic practices to increase water exports to the City. (OB., p. 40.) Again, this allegation has no basis in fact because the 2018 Water Allotment was directly in line with LADWP's historic practices. (AR 86772-86773, Exhibit A.) Thus, the 2018 Water Allotment was exempt from CEQA review under the Existing Facilities Exemption as well.

V. CONCLUSION

For all of the reasons stated herein, the Court should deny the Petition in its entirety.

DATED: November 23, 2020

MEYERS, NAVE, RIBACK, SILVER & WILSON

By: _____

AMRIT S. KULKARNI
JULIA L. BOND
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Attorneys for Respondents CITY OF LOS ANGELES, CITY OF LOS ANGELES DEPARTMENT OF WATER AND POWER, and LOS ANGELES DEPARTMENT OF WATER AND POWER BOARD OF COMMISSIONERS

Exhibit A

Runoff Year	Eastern Sierra Runoff % of Normal	Total Irrigation Provided to Ranchers (AF)	Irrigation Acres	AF/Acre	Expected AF/Acre under 5 AF/Acre Theory	Deviation From 5 AF/Acre Theory
2017-18	202	30,181	6,091	5.0	10.1	-102%
2016-17	82	4,424	6,091	0.7	4.1	-485%
2015-16	48	0	6,091	0	2.4	-2400%
2014-15	53	9,296	6,091	1.5	2.65	-76%
2013-14	55	14,426	6,091	2.4	2.75	-14%
2012-13	58	13,424	6,091	2.2	2.9	-32%
2011-12	142	33,136	6,091	5.4	7.1	-31%
2010-11	104	26,334	6,091	4.3	5.2	-21%
2009-10	79	26,229	6,091	4.3	3.95	+8%
2008-09	75	18,665	6,091	3.1	3.75	-21%
2007-08	61	16,616	6,091	2.7	3.05	-13%
2006-07	148	29,870	6,091	4.9	7.4	-51%
2005-06	138	31,381	6,091	5.2	6.9	-33%
2004-05	78	28,816	6,091	4.7	3.9	+17%
2003-04	83	27,265	6,091	4.5	4.15	+8%
2002-03	68	21,341	6,091	3.5	3.4	+3%
2001-02	84	21,077	6,091	3.5	4.2	-20%
2000-01	85	30,464	6,091	5.0	4.25	+15%
1999-00	90	29,841	6,091	4.9	4.5	+8%
1998-99	151	29,156	6,091	4.8	7.55	-57%
1997-98	126	33,838	6,091	5.6	6.3	-12.5%
1996-97	137	29,282	6,091	4.8	6.85	-43%
1995-96	156	49,492	6,091	8.1	7.8	+4%
1994-95	68	20,160	6,091	3.3	3.4	-3%
1993-94	108	35,589	6,091	5.8	5.4	+7%
1992-93	62	9,750	6,091	1.6	3.1	-94%

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PROOF OF SERVICE

County of Mono v. City of Los Angeles, et al.
Case No. RG18923377

STATE OF CALIFORNIA, COUNTY OF ALAMEDA

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Alameda, State of California. My business address is 1999 Harrison Street, 9th Floor, Oakland, CA 94612.

On November 23, 2020, I served true copies of the following document(s) described as **RESPONDENTS CITY OF LOS ANGELES, CITY OF LOS ANGELES DEPARTMENT OF WATER AND POWER, AND LOS ANGELES DEPARTMENT OF WATER AND POWER BOARD OF COMMISSIONERS' OPPOSITION TO PETITION FOR WRIT OF MANDATE** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from e-mail address mbender@meyersnave.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

BY OVERNIGHT DELIVERY: I enclosed said document(s) in an envelope or package provided by the overnight service carrier and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight service carrier or delivered such document(s) to a courier or driver authorized by the overnight service carrier to receive documents.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 23, 2020, at Oakland, California.

Melissa Bender

SERVICE LIST
County of Mono v. City of Los Angeles, et al.
Case No. RG18923377

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Attorneys for Respondents CITY OF LOS ANGELES, CITY OF LOS ANGELES DEPARTMENT OF WATER AND POWER, and LOS ANGELES DEPARTMENT OF WATER AND POWER BOARD OF COMMISSIONERS

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

COUNTY OF MONO and SIERRA CLUB,

Petitioners

v.

CITY OF LOS ANGELES, LOS ANGELES DEPARTMENT OF WATER AND POWER; LOS ANGELES DEPARTMENT OF WATER AND POWER BOARD OF COMMISSIONERS; and DOES 1 through 20;

Respondents

CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE; and DOES 21 through 40

Real Parties in Interest.

Case No. RG18923377

Assigned for all purposes to:
Judge Evelio Grillo, Dept. 15

REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF MANDATE

Reservation No.: R-2201506
Hearing on the Merits: January 21, 2021
Time: 1:30PM
Dept. 15
Judge: Hon. Evelio Grillo

Action Filed: August 15, 2018
Trial Date: January 21, 2021

NOTICE AND REQUEST FOR JUDICIAL NOTICE

TO THE COURT AND COUNSEL FOR ALL PARTIES:

PLEASE TAKE NOTICE that pursuant to Rules of Court, Rules 3.1113(l), 3.1103(a)(2), and 3.1306(c) and Evidence Code sections 452 and 453, Respondents CITY OF LOS ANGELES, LOS ANGELES DEPARTMENT OF WATER AND POWER; and LOS ANGELES DEPARTMENT OF WATER AND POWER BOARD OF COMMISSIONERS (collectively, "Respondents") hereby move the Court for an order taking judicial notice of the following documents:

1. Attached hereto as Exhibit 1 is a true and correct copy of the following document from the administrative files of the City of Los Angeles ("City"):

July 30, 2020 Staff Report from Council File 19-1263 related to an appeal of the certification of the Final Supplemental Environmental Impact Report for Berths 97-109 (China Shipping) Container Terminal Project (APP NO 150224- 504;SCH NO. 2003061153) by the City's Board of Harbor Commissioners. Exhibits to the Staff Report have been excluded as not relevant to the purposes of this Request for Judicial Notice. The document is in the files of the City and can be accessed on the City's website at https://cityclerk.lacity.org/lacityclerkconnect/index.cfm?fa=ccfi.viewrecord&cfnumber=19-1263

2. Attached hereto as Exhibit 2 is a true and correct copy of the following document from the administrative files of the City of Los Angeles ("City"):

December 4, 2019 Appeal Letter from the South Coast Regional Air Quality Management District from Council File 19-1263. Exhibits to the Appeal letter have been excluded as not relevant to the purposes of this Request for Judicial Notice. The document is in the files of the City and can be accessed on the City's website at https://cityclerk.lacity.org/lacityclerkconnect/index.cfm?fa=ccfi.viewrecord&cfnumber=19-1263

3. Attached hereto as Exhibit 3 is a true and correct copy of the following document from the administrative files of the City of Los Angeles ("City"):

October 18, 2019 Appeal Letter from the National Resources Defense Council, et al. from Council File 19-1263. Exhibits to the Appeal letter have been excluded as not relevant to the

purposes of this Request for Judicial Notice. The document is in the files of the City and can be accessed on the City's website at https://cityclerk.lacity.org/lacityclerkconnect/index.cfm?fa=ccfi.viewrecord&cfnumber=19-1263

I. LEGAL ARGUMENT

A. The Documents Are Properly Subject to Judicial Notice

The Court may take notice of the official acts of the "legislative enactments issued by or under ... any public entity in the United States" as well as of the "[o]fficial acts of the legislative, executive, and judicial departments ... of any state of the United States." (Evidence Code, § 452, subd. (b) and (c); *see e.g. Shapiro v. Board of Directors* (2005) 134 Cal.App.4th 170, 174, fn 2.) "Evidence Code section 452, subdivision (b) permits judicial notice of legislative enactments of 'any public entity in the United States.'" (*Jordan v. Los Angeles County* (1968) 267 Cal.App.2d 794, 798.) The City of Los Angeles ("City") is one such public entity and its official acts are subject to judicial notice. (Gov. Code, § 811.2.)

The Court may also take notice of the contents of the administrative files of a public entity. (*See Assoc. Builders & Contractors, Inc. v. San Francisco Airports Comm'n* (1999) 21 Cal.4th 352, 374, fn. 4 [taking judicial notice of administrative agency records].) "The records and files of an administrative board are properly the subject of judicial notice. [Citations.]" (*Hogen v. Valley Hosp.* (1983) 147 Cal.App.3d 119, 125.) Based on this authority, LADWP requests that judicial notice be taken of the documents from the City identified above. The documents are the proper subject for judicial notice under Evidence Code sections 452(b), (c) and 453, which provide that courts may take judicial notice of a public agency's regulations, legislative enactments, and official documents. (*Clark v. Patterson* (1977) 68 Cal.App.3d 329, 334, fn. 5.) Thus, the documents are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. (Evid. Code, § 452 subd. (h).) Accordingly, LADWP respectfully requests the Court to take judicial notice of the documents of the City, as specified above.

B. The Documents Are Relevant to the Case

The documents are also relevant to the present matter and would be helpful to the Court in deciding Petitioners' First Amended Petition for Writ of Mandate ("Petition"). Petitioners have alleged that they were not required to exhaust their administrative remedies because there were no available administrative remedies. However, the documents show that appeals of decisions made by the City's Departments can and are made to the City Council by other interested parties including other government agencies and public interest groups. Petitioners did not attempt to bring the issues raised in the Petition before the City Council and, thus, did not exhaust their administrative remedies. Judicial notice of items is proper where such items are "necessary, helpful, or relevant" to the present matter. (*Jordache Enter., Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 748, fn. 6.) Additionally, the court may reject allegations by a plaintiff that are contrary to facts that the court may judicially notice. (*City of Chula Vista v. County of San Diego* (1994) 23 Cal.App.4th 1713, 1719.) Accordingly, the documents are relevant to the present litigation and are properly subject to judicial notice.

II. CONCLUSION

For the reasons stated above, LADWP respectfully requests that this Court take judicial notice of the City documents.

DATED: November 23, 2020

MEYERS, NAVE, RIBACK, SILVER & WILSON

By: _____

AMRIT S. KULKARNI
JULIA L. BOND
EDWARD GRUTZMACHER
Attorneys for Respondents CITY OF LOS ANGELES, CITY OF LOS ANGELES DEPARTMENT OF WATER AND POWER, and LOS ANGELES DEPARTMENT OF WATER AND POWER BOARD OF COMMISSIONERS

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EXHIBIT 1

THE PORT
OF LOS ANGELES 425 S. Palos Verdes Street Post Office Box 151 San Pedro, CA 90733-0151 TEL/TDD 310 SEA-PORT www.portoflosangeles.org

July 30, 2020

Honorable Members of the
City Council of the
City of Los Angeles

CD No. 15

Attention: Mr. John White, City Clerk's Office

SUBJECT: Council File 19-1263

Transmitted herewith are all supporting documents related to an appeal of the certification of the Final Supplemental Environmental Impact Report for Berths 97-109 (China Shipping) Container Terminal Project (APP NO 150224-504;SCH NO. 2003061153). The Board of Harbor Commissioners certified the Final Supplemental Environmental Impact Report for Berths 97-109 China Shipping Container Terminal at its Special Meeting on October 8, 2019.

Respectfully Submitted,

AMBER M. KLESGES
Commission Secretary

Enclosures –

1. POLA Berths 97-109 (China Shipping) Container Terminal Project Appeal Response Cover Letter dated July 27, 2020 with Attachment: Ron Widdows Supplemental Expert Opinion dated May 11, 2020
2. Summary Staff Report dated June 2, 2020
3. Supplement to Summary Staff Report dated June 2, 2020
4. Appeal Responses Report dated May 11, 2020 with Attachments 1 - 6
   - Attachment 1 – September 2019 China Shipping Container Terminal Project Final Supplemental EIR, Chapter 2, Response to Comments
   - Attachment 2 – October 8, 2019 Memo from Chris Cannon to Port of Los Angeles Board of Harbor Commissioners re Response to NRDC's Letter on Final Supplemental Environmental Impact Report for Berths 97-109 [China Shipping] Container Terminal Project
   - Attachment 3 – October 8, 2019 Memo from Chris Cannon to Port of Los Angeles Board of Harbor Commissioners re Response to South Coast Air Quality Management District Letter on Final Supplemental Environmental Impact Report for Berths 97-109 [China Shipping] Container Terminal Project
   - Attachment 4 – December 19, 2019 Memo from Chris Cannon re Equipment Replacement Schedules for Revised Project Mitigation Measures in the China Shipping Supplemental EIR
   - Attachment 5 – December 19, 2019 Table re Cost Scenarios for Expenditure on Mitigation Requiring Infrastructure for Electrified Equipment
   - Attachment 6 – December 20, 2019 Ron Widdows Expert Opinion

cc: Trade, Travel & Tourism Committee
Councilman Buscaino
Councilman Bonin
Councilman Krekorian
Heleen Ramirez, Mayor's Office
Erick Martell, Harbor Representative
Janice Chang Yu, CAO
Dennis Gleason, CD15
Matthew Shade, CLA

CITY OF LOS ANGELES
INTER-DEPARTMENTAL MEMORANDUM

DATE: June 2, 2020

TO: Honorable City Council
c/o City Clerk Room 395

FROM: EUGENE D. SEROKA
Executive Director, Harbor Department

SUBJECT: CALIFORNIA ENVIRONMENTAL QUALITY ACT ("CEQA") APPEAL AND CERTIFICATION OF FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT REPORT FOR BERTHS 97-109 (CHINA SHIPPING) CONTAINER TERMINAL PROJECT (APP NO. 150224-504; SCH NO. 2003061153)

SUMMARY:

The Board of Harbor Commissioners (BOHC) certified a Final Supplemental Environmental Impact Report (Final SEIR) for, and approved, the "Revised Project" for the Berths 97-109 China Shipping Container Terminal, which modifies 10 mitigation measures (MMs) and one lease measure (LM) that were previously identified in the joint Environmental Impact Statement/Environmental Impact Report for the China Shipping Container Terminal Project that was approved by the BOHC in 2008 (2008 EIS/EIR). The Revised Project also includes operational changes associated with the terminal's cargo throughput projections that have since been revised in light of new information.

The BOHC decision to certify the Final SEIR and approve the Revised Project has been appealed to the Los Angeles City Council (Council), pursuant to the California Environmental Quality Act (CEQA), Public Resources Code Sections 21000 et seq. Staff requests that the Council deny the appeal and uphold the BOHC decision to certify the Final SEIR and approve the Revised Project.

In this action, the Council will need to independently review and consider the Final SEIR and, if deemed adequate under CEQA, certify the Final SEIR, adopt specific Findings of Fact (FOF) and a Statement of Overriding Considerations (SOC) as modified in the Errata regarding the significant environmental impacts of the Revised Project and MMs to reduce or avoid such impacts, and adopt a Supplemental Mitigation Monitoring and Reporting Program (Supplemental MMRP). Two traffic mitigation measures are the financial responsibility of the City of Los Angeles Harbor Department (Harbor Department). Staff proposes that the other MMs and LMs be the financial responsibility of the tenant, as outlined in the Supplemental MMRP.

RECOMMENDATION:

It is recommended that the Council:

1. Certify that the Final SEIR for the Berths 97-109 China Shipping Container Terminal Project (a) has been completed in compliance with the California Environmental Quality Act (CEQA) (Public Resources Code §21000 et seq.), with the State CEQA Guidelines (14 Cal. Code Regs. §15000 et. seq.), and the City of Los Angeles CEQA Guidelines; (b) was presented to the Council for review and the Council considered the information contained in the Final SEIR prior to approving the Revised Project; and (c) reflects the independent judgment and analysis of the Council, and that all required procedures have been completed;

2. Find that, in accordance with the information contained in the Final SEIR, the Revised Project will have significant environmental effects on air quality and meteorology, greenhouse gas emissions and climate change, and ground transportation as defined by Public Resources Code Sections 21068 and 21082.2, and the State CEQA Guidelines, Sections 15064, 15064.4, 15064.5, and 15382;

3. Find that, in accordance with the provisions of State CEQA Guidelines Section 15091 (a)(1), changes or alterations have been required in, or incorporated into, the Revised Project, which substantially lessens or avoids one or more of the significant adverse environmental impacts identified in the Final SEIR;

4. Find that, in accordance with the provisions of State CEQA Guidelines Section 15091 (a)(3), specific economic, legal, social, technological, or other considerations, make infeasible certain mitigation measures such that some environmental impacts remain significant and unavoidable;

5. Find that, all information added to the Final SEIR after public notice of the availability of the Recirculated Draft Supplemental Environmental Impact Report (Recirculated Draft SEIR) for public review but before certification, merely clarifies, amplifies, or makes insignificant modifications in an adequate Environmental Impact Report and recirculation is not necessary;

6. Find that, in accordance with Public Resources Code Section 21081(b) and State CEQA Guidelines Section 15093, the benefits of the Revised Project outweigh the significant and unavoidable environmental impacts;

7. Adopt the FOF and SOC as modified in the Errata (contained in BOHC Resolution No. 19-9548);

8. Adopt the Supplemental MMRP as required by Public Resources Code, Section 21081.6. The Supplemental MMRP is designed to ensure compliance with the mitigation measures and lease measures adopted to avoid or lessen significant effects on the environment, and identifies the responsibilities of the Harbor Department, as lead agency, to monitor and verify project compliance with those mitigation measures and lease measures;

9. Affirm the BOHC's certification of the Final SEIR and project approval;

10. Deny the appeals submitted by the Appellants on the grounds set forth in the Port of Los Angeles communication dated June 2, 2020;

11. Approve the Revised Project identified in the Final SEIR including all feasible MMs and LMs with consideration of the FOF and SOC, and the Supplemental MMRP; and

12. Direct the Harbor Department Cargo and Industrial Real Estate Division to incorporate by reference the Final SEIR, MMs, LMs, and Supplemental MMRP into any and all lease agreements or assignments encompassed in the approved Revised Project.

BACKGROUND:

In September 2015, the Harbor Department released a Notice of Preparation informing the public that a Supplemental Environmental Impact Report (SEIR) was being prepared for the Berths 97-109 China Shipping Container Terminal. In June 2017, a Draft SEIR was released for public review and comment. Based on public comments, the document was revised, and a Recirculated Draft SEIR was issued in September 2018 for public review and comment. In September 2019, the Final SEIR was completed to address all comments received on the Recirculated Draft SEIR and identify changes made to the document. On October 8, 2019, the BOHC certified the Final SEIR, adopted the Findings of Fact (FOF), Statement of Overriding Considerations (SOC), final Supplemental Mitigation Monitoring and Reporting Program (Supplemental MMRP), and Errata, and approved the "Revised Project" for the Berths 97-109 China Shipping Container Terminal. The Revised Project consists of modifying 10 (ten) of the 52 mitigation measures and 1 (one) lease measure originally approved in the 2008 Environmental Impact Statement/Environmental Impact Report (2008 EIS/EIR) for that terminal, which have not been fully implemented due to their infeasibility. A more detailed description of the Revised Project and the SEIR process and timeline is included in the Executive Director's Report to the BOHC approved as Resolution No. 19-9548.

DISCUSSION:

Background/Context - On December 18, 2008, the BOHC certified the 2008 EIS/EIR that analyzed the construction and operation of the China Shipping Container Terminal, which occupies approximately 142 acres and has been operational since 2005 with the last phase of construction completed in 2013. The 2008 EIS/EIR was prepared as a result of a lawsuit settled in 2004 through an Amended Stipulated Judgment (ASJ) in which the Harbor Department committed to preparing a new, project-specific EIR for development of the terminal (i.e., the 2008 EIS/EIR) and agreed to several mitigation measures and the establishment of a $50 million community impact fund.

In certifying the 2008 EIS/EIR, the BOHC adopted an MMRP that imposed 52 mitigation and lease measures, including additional measures beyond those required in the ASJ, to reduce significant construction and operational impacts of the approved China Shipping Container Terminal Project in the areas of aesthetics, air quality, biology, cultural resources, geology, ground water, noise, public services, and transportation. Most of the measures, including all the measures associated with construction and all of the ASJ requirements, have been implemented. Accordingly, those measures and the ASJ requirements are not considered in this Final SEIR.

Of the 52 measures adopted in the 2008 EIS/EIR, 10 MMs and one LM have not been fully implemented for various reasons. A re-evaluation of those measures, based on feasibility, availability of alternative technologies, and the actual need, has indicated that some measures are

unnecessary, others have been superseded by advances in technology, and still others need to be modified to ensure their feasibility. The Final SEIR analyzes certain changes to those measures and discloses the impacts of those potential changes as they would affect the physical environment and operations at the China Shipping Container Terminal. The Final SEIR also examines whether there are any additional feasible mitigation measures that could be adopted to address such impacts. These changes are collectively referred to as the "Revised Project" in the Final SEIR, which is discussed in more detail below.

Description of the Revised Project - The Revised Project evaluated in the Final SEIR proposes to modify or eliminate 10 MMs and one LM from the 2008 EIS/EIR. Specifically, the Revised Project proposes to modify six MMs, and to eliminate four MMs and one LM as follows:

Measures from 2008 EIS/EIR Modified under the Revised Project

- MM AQ-9 Alternative Maritime Power
- MM AQ-10 Vessel Speed Reduction Program
- MM AQ-15 Yard Tractors at Berth 97-106 Terminal
- MM AQ-17 Yard Equipment at Berth 97-106 Terminal
- MM TRANS-2 Alameda and Anaheim Streets
- MM TRANS-3 John S. Gibson Boulevard and I-110 NB Ramps

Measures from 2008 EIS/EIR Eliminated under the Revised Project

- MM AQ-16 Yard Equipment at Berth 121-131 Rail Yard
- MM AQ-20 LNG Trucks
- LM AQ-23 Throughput Tracking
- MM TRANS-4 Fries Avenue and Harry Bridges Boulevard
- MM TRANS-6 Navy Way and Seaside Avenue

In addition, the SEIR for the Revised Project also adds one new MM and four new LMs as follows:

New Measures Added under the Revised Project

MM GHG-1: LED Lighting

- LM AQ-1: Cleanest Available Cargo Handling Equipment
- LM AQ-2: Priority Access for Drayage
- LM AQ-3: Demonstration of Zero Emissions Equipment

- LM GHG-1: GHG Credit Fund

Transmittal 1 (contained in BOHC Resolution No. 19-9548) includes a comparison of each measure listed above, both as originally approved in the 2008 EIS/EIR and as proposed for modification or elimination under the Revised Project. All other measures (41 out of 52) approved in the 2008 EIS/EIR remain in effect, and are not affected by the Revised Project.

ENVIRONMENTAL ASSESSMENT:

CEQA Lead Agency Responsibilities - The Harbor Department is the CEQA lead agency for the Revised Project. As such, the BOHC was responsible for reviewing and considering the Final SEIR and, at its discretion, certifying that the Final SEIR has been completed in accordance with CEQA, the State CEQA Guidelines, and the Los Angeles City CEQA Guidelines. In doing so, the BOHC found that the information contained in the Final SEIR reflects the independent judgment and analysis of the Harbor Department. Certification of the Final SEIR must precede approval of the Revised Project. Accordingly, the BOHC first independently reviewed and certified the Final SEIR as adequate under CEQA; adopted the specific FOF and SOC as modified in the Errata regarding the significant environmental impacts of the Revised Project and MMs to reduce or avoid such impacts and adopted a Supplemental MMRP. As described in the "Recommendation," above, the Harbor Department recommends that the Council, exercising its independent review, repeat these steps in denying the appeal and upholding the decisions of the BOHC.

The Harbor Department typically implements MMs and other environmental obligations by including them in leases with its tenants. As a subsequent discretionary action, the BOHC will use this Final SEIR when deciding whether and how to implement the Revised Project, which may include entering into a new lease with a tenant or amending the current lease for operations at Berths 97-109 accordingly.

Purpose of the SEIR - A supplemental EIR, as its name implies, supplements an EIR that has already been certified for a project, to address project changes, changed circumstances, or new information that was not known, and could not have been known with the exercise of reasonable diligence at the time the prior document was certified. The purpose of a supplemental EIR is to provide the additional information necessary to make the previously certified EIR adequate for the project as revised. A supplemental EIR does not "re-open" a previously certified EIR or reanalyze the environmental impacts of a project as a whole; the analysis is limited to whether the project changes result in new or substantially more severe significant impacts.

Scope and Content of the SEIR - The Final SEIR incorporates and supplements the 2008 EIS/EIR where mitigation measures and lease measures have been modified or information updated, and where discussion of these changes is necessary to provide sufficient analysis of impacts. Resource areas addressed in the scope of the Final SEIR are limited to Air Quality, Greenhouse Gases and Climate Change, and Transportation. The scope of the Final SEIR was also established based on the Initial Study prepared pursuant to CEQA, comments received during the Notice of Preparation (NOP) review process, and comments received on the Draft SEIR and Recirculated Draft SEIR.

In addition, the Final SEIR, in evaluating the impacts of operation of the terminal under the Revised Project, assumes and analyzes the impacts of an incremental increase in the Terminal's

throughput in future years, compared to the assumptions in the 2008 EIS/EIR. These revised throughput assumptions arise from circumstances surrounding operation of the terminal, which have changed as a result of updated cargo and activity projections. The 2008 EIS/EIR assumed that at full capacity, the China Shipping Container Terminal would handle throughput of approximately 1,551,000 TEUs (twenty-foot equivalent units, a measure of containerized cargo capacity) per year, which is roughly equivalent to 838,380 standard shipping containers per year. Those numbers were based on cargo forecasting performed in 2005. Based on an updated forecast of terminal cargo demand and capacity performed for the Final SEIR, the Harbor Department has estimated that, as presently configured, the terminal's maximum capacity is 1,698,504 TEUs per year and throughput activity at that level will be reached by 2030 under current demand projections. This new estimate of maximum terminal throughput activity is approximately ten percent greater than the estimate used in the 2008 EIS/EIR.

The Final SEIR incorporates modifications and corrections made to the Recirculated Draft SEIR, contains responses to all public comments made on the Recirculated Draft SEIR, and contains records of the public process as further detailed below.

Environmental Documentation Process and Public Involvement - The Revised Project was subject to the required environmental documentation process that included public disclosure as required by CEQA. The procedural steps of the Final SEIR process are described below.

1. Notice of Preparation (NOP). In accordance with the Los Angeles City CEQA Guidelines, Article VI, Section 1.5 and the State CEQA Guidelines, Section 15082, responsible agencies, participating City agencies, and other concerned parties were consulted through an NOP released on September 18, 2015, and public scoping meeting held on October 7, 2015, in the BOHC Room. Two commenters provided oral comments during the scoping meeting and a total of 17 written comment letters were received from various agencies and the public during the comment period, which closed on October 19, 2015.

   Copies of the NOP were available for review online at www.portoflosangeles.org, at the Harbor Department Environmental Management Division office, and at the Los Angeles San Pedro Branch and Wilmington Branch Libraries.

2. Draft SEIR. On June 16, 2017, the Draft SEIR was released for a 45-day public review and comment period that was extended by request from commenters for an additional 60 days through September 29, 2017. A public hearing on the Draft SEIR was held on July 18, 2017, in the BOHC room. A total of 34 written and oral comments were received from agencies, organizations, and individuals.

   Public notices of the availability of the Draft SEIR was published in six newspapers: Los Angeles Times, Torrance Daily Breeze, Long Beach Press Telegram, Random Lengths, Metropolitan News Enterprise and HOY. Copies of the Draft SEIR were available for review online at www.portoflosangeles.org, at the Harbor Department Environmental Management Division office, and at the Los Angeles San Pedro Branch and Wilmington Branch Libraries.

Based on a number of issues raised in public comments, the Harbor Department decided to revise and recirculate the Draft SEIR. Significant new information was added, as summarized in the next section below, which required a complete recirculation of the entire Draft SEIR.

3. Recirculated Draft SEIR. On September 28, 2018, the Recirculated Draft SEIR was released for a 45-day public review and comment period that ended on November 16, 2018. A public hearing on the Recirculated Draft SEIR was held on October 25, 2018 in the BOHC room. The same public noticing described above was provided. Reviewers were advised that since the entire document was recirculated, new comments must be submitted on the Recirculated Draft SEIR. Although comments received on the prior Draft SEIR are part of the administrative record, they would not require a written response by the Harbor Department in the Final SEIR. A total of 10 written and oral comments were received from agencies, organizations, and individuals. The significant new information added to the Recirculated Draft SEIR included the following:

CEQA Baseline - The Draft SEIR used 2014 (the year before the NOP was issued) as the CEQA baseline. Several comments disagreed with that baseline, alleging that use of a 2014 baseline ignored the period between 2008, when the original China Shipping Container Terminal Project was approved, and 2014 during which some mitigation measures were not fully implemented in a timely manner, and that the appropriate baseline would be the year 2000-2001 as used in the 2008 EIS/EIR. The Harbor Department determined that the appropriate baseline is 2008 (the year of certification of the EIS/EIR for the China Shipping Container Terminal Project) since that approach captures the period in question but avoids revisiting the period between 2000 and 2008, which preceded the certification of the 2008 EIS/EIR that this Final SEIR supplements.

Project Description of the Revised Project - The project description of the Revised Project in the Draft SEIR was revised to include the "Partial Implementation Period" (i.e., the time period after project approval occurred under the 2008 EIS/EIR, during which mitigation measures were in place but not all were being implemented in a timely manner). Three additional study years - 2012, 2014, and 2018 - were added to the analysis, 2012 as the first year when most of the mitigation measures in the 2008 EIS/EIR were to have been in effect, 2014 to coincide with the baseline in the Draft SEIR, and 2018 as the last year before the proposed revised measures in the Revised Project could take effect.

Feasible Mitigation Measures - The mitigation measures that comprise the Revised Project were modified from those analyzed in the Draft SEIR. In most cases, compliance dates have been adjusted to be based on the effective date of a new lease amendment between the Harbor Department and the tenant, rather than fixed calendar dates. In addition, several air quality and greenhouse gas mitigation measures and lease measures have been revised to take into account public comments and the adoption of the 2017 San Pedro Bay Clean Air Action Plan (CAAP).

Transportation Analysis - The analysis of the Revised Project's potential impacts on traffic was modified to include several additional intersections and freeway segments requested by the California Transportation Department in a comment letter on the Draft SEIR.

4. Responses to Comments on Recirculated Draft SEIR. As required by Public Resources Code Section 21092.5, all responsible and trustee public agencies that commented on environmental issues in the Recirculated Draft SEIR were provided with proposed written responses to those

comments 10 days prior to submittal of the Final SEIR to the BOHC for certification. In addition, written responses were provided in the Final SEIR for all public comments received on the Recirculated Draft SEIR, including those that incorporated or resubmitted their prior comments on the Draft SEIR.

5. Final SEIR. In accordance with the Los Angeles City CEQA Guidelines, Article I, and the State CEQA Guidelines, Section 15088, comments received on the Recirculated Draft SEIR were evaluated and significant environmental issues raised therein were responded to in the Final SEIR. In addition, modifications to mitigation measures and lease measures were made based on public comments on the Recirculated Draft SEIR. The comment letters and responses to comments, along with minor modifications and corrections to the Recirculated Draft SEIR were presented in the Final SEIR. The Final SEIR was completed in September 2019.

6. Appeals. Following certification of the Final SEIR by the BOHC, appeals were submitted to Council by the Natural Resources Defense Council, the South Coast Air Quality Management District, the California Air Resources Board and the Attorney General of the State of California. Full and summarized responses to the appeal issues are included in other documents filed with Council as part of this Item.

Findings and Conclusions – The Final SEIR, FOF and SOC, transmitted herewith, identify major findings and conclusions regarding the areas of environmental concern, feasible mitigation measures, and significant unavoidable impacts. The discussion below summarizes the proposed FOF for the Council's consideration.

1. Areas of Environmental Concern. Through the public environmental review process, the following areas of environmental concern were identified. These potential impacts and others were assessed and discussed in detail in the Final SEIR. The Final SEIR concludes that unavoidable significant impacts would occur if the Revised Project is implemented in the following resource areas: Air Quality and Meteorology, Greenhouse Gas Emissions and Climate Change, and Ground Transportation. In addition, cumulatively significant and unavoidable impacts would also occur in these same resource areas. All available feasible mitigation measures have been incorporated into the Revised Project to reduce significant impacts. However, even with the incorporation of all feasible mitigation measures, impacts on these environmental resources would remain significant and unavoidable.

2. Proposed Mitigation and Lease Measures. In accordance with the provisions of the Los Angeles City CEQA Guidelines, Article I, the State CEQA Guidelines Section 15091, and the information contained in the SEIR, changes or alterations have been required in, or incorporated into the Revised Project which substantially lessen or avoid significant adverse environmental impacts identified in the SEIR. Further, certain mitigation measures and lease measures were modified/strengthened based on public comments received on the Recirculated Draft SEIR. All MMs and LMs can be found in the Supplemental MMRP and would be incorporated as appropriate in real estate entitlements for the proposed Revised Project.

3. Overriding Considerations. Pursuant to Public Resources Code Section 21081(b), no public agency shall approve or carry out a project for which an EIR has been certified which identifies one or more significant environmental effects unless the agency makes the specific findings

discussed above with respect to each significant impact and finds that specific overriding economic, legal, social, technological, or other benefits of the project outweigh the significant effects. The SOC must identify the substantial adverse environmental impacts that cannot be mitigated or avoided; make recommendations that the project or alternatives, if applicable, be approved as proposed; and the reasons why, if in the opinion of the decision-making body, the project warrants approval despite such consequences or recommendations.

The FOF and SOC that were approved by the BOHC and are recommended by the Harbor Department are transmitted for Council consideration and adoption. The Harbor Department, in recommending the proposed Revised Project for approval, has identified specific environmental, economic, legal, social, technological and other project benefits. In summary, the Revised Project provides the following benefits:

- **Fulfills Harbor Department's legal mandates and objectives.** The Revised Project would fulfill the Harbor Department's legal mandate under the Port of Los Angeles (Port) Tidelands Trust (Los Angeles City Charter, Article VI, Sec. 601; California Tidelands Trust Act of 1911) to promote and develop commerce, navigation and fisheries, and other uses of statewide interest and benefit including industrial and transportation uses and the California Coastal Act (PRC Division 20, Section 30700, et seq.), which identifies the Port and its facilities as a primary economic/coastal resource of the state and an essential element of the national maritime industry and obligates the Harbor Department to accommodate the demands of foreign and domestic waterborne commerce and other traditional water-dependent and related facilities in order to preclude the necessity for developing new ports elsewhere in the state. Further, the California Coastal Act provides that the Harbor Department should give highest priority to the use of existing land space within harbors for Port purposes, including, but not limited to, navigational facilities, shipping industries and necessary support and access facilities. The Revised Project would also meet the Harbor Department's strategic green growth objectives by maximizing the efficiency and the capacity of facilities while applying mitigation measures that adhere to and/or exceed the San Pedro Bay CAAP requirements and raise environmental standards.

- **Implements the San Pedro Bay CAAP.** The Revised Project incorporates many environmental features consistent with the CAAP, and additional mitigation measures and lease measures have been identified through the CEQA findings of the SEIR that meet CAAP requirements and objectives.

- **Implements feasible mitigation measures on the existing China Shipping Container Terminal Project, to replace mitigation measures identified in the 2008 EIS/EIR that have not been fully implemented.** The Revised Project would eliminate some existing mitigation measures that have proved to be infeasible or unnecessary, institute new mitigation measures, and modify other existing measures to enhance their effectiveness. In proposing these changes, the Revised Project would advance the original project objectives of the China Shipping Container Terminal Project to implement pollution control measures consistent with the CAAP, and to maximize the efficiency and capacity of the terminal while, at the same time, raising environmental standards through the application of all feasible mitigation measures. If the existing mitigation measures determined to be infeasible or unnecessary are not revised as proposed by the Revised Project, these project objectives

would be not be advanced as originally intended. Further, environmental impacts identified in the 2008 EIR/EIS would not be addressed despite the availability of new or modified feasible mitigation, as identified in the SEIR. The proposed changes to existing mitigation measures that constitute the Revised Project would enable the China Shipping Container Terminal Project to better meet the original project objectives and address impacts identified in the 2008 EIR/EIS.

- **Allows for continued operation of the China Shipping Container Terminal under feasible mitigation measures, providing economic benefits to the Port and the community.** The Revised Project will allow for the continued operation of the terminal, generating revenues to the Port over the life of the Revised Project. The Terminal is responsible for 17% of the Port's 9.7 million Twenty-Foot Equivalent Units that were processed in Fiscal Year-ending June 30, 2019, providing jobs and funding for environmental improvements. These funds are included in the Harbor Revenue fund for the purposes of operating, maintaining and improving the Port in accordance with the Tidelands Trust. Revenues from operation of the China Shipping Container Terminal also provide for environmental improvements, including incentive programs associated with the CAAP for reduction of truck emissions and advancing clean technology, and support the construction of necessary infrastructure for waterfront commercial and recreational improvements in Wilmington and San Pedro. If the Terminal cannot continue to operate, it could result in more than 800 jobs being displaced and delay implementation of environmental protection measures.

In summary, the Revised Project would allow the Harbor Department to meet its legal mandates to accommodate growing international commerce and would permit the Harbor Department to continue to comply with the CAAP and other measures designed to reduce overall emissions over time. The BOHC found that the benefits of the proposed Revised Project described above outweigh the significant and unavoidable environmental effects and are therefore considered acceptable, and the Harbor Department recommends that the Council, exercising its independent review, also so find, in denying the appeal and upholding the decisions of the BOHC

4. Areas of Controversy on Recirculated Draft SEIR. It is important for the Council to be informed as to the areas of controversy associated with the Final SEIR. The areas of controversy have been identified through oral and written comments received on the proposed Revised Project as part of the environmental review process. The discussion below provides a general summary of the areas that staff believes remain controversial. Specific details on issues raised by commenters and the responses to those comments are included in the Final SEIR.

Commenters on the SEIR have requested:

- Disclosure and follow-up on past non-compliance with previously approved mitigation measures; imposition of fines and penalties for non-compliance; and development of a comprehensive program to monitor and enforce compliance of all approved mitigations and new technologies, including through the formation of an oversight committee. Refer to pages 2-23, 2-52, 2-53, and 2-65 where these issues have been addressed in the Final SEIR.

- More aggressive actions and phase-in schedules to accelerate use of zero-emission vehicles and equipment that are alleged to be currently and/or expected to be commercially available during the life of the Revised Project (the current permit term which ends in 2045). Refer to pages 2-7 and 2-37 where these issues have been addressed in the Final SEIR.

- Maintaining the 2008 mitigation requirements, in particular requirements for 100% compliance with standards for use of alternative maritime power, 100% compliance with the Vessel Speed Reduction Program; and mandatory use of LNG-fueled drayage trucks. Refer to pages 2-34 through 2-36 where these issues have been addressed in the Final SEIR.

- Conversion of the China Shipping Terminal to employ all zero-emissions cargo-handling technology. Refer to page 2-19 where this issue has been addressed in the Final SEIR.

- A mitigation fee fund to support off-Port community improvement projects. Refer to pages 2-60 and 2-93 where these issues have been addressed in the Final SEIR.

- Implementation of various terminal efficiency measures, for example: Reduced rates for zero-emission trucks through a fast-track system; incentives for faster turn times; mandatory increased use of on-dock rail; and various measures aimed at reducing emissions from oceangoing vessels. Refer to pages 2-22, 2-39 through 2-40, 2-62, 2-93, and 2-95 where these issues have been addressed in the Final SEIR.

- Explanation of how the tenant's lease will be amended to incorporate adopted mitigation measures, and what will happen if the tenant does not agree to a lease amendment and the Port is not able to legally enforce adopted mitigation. Refer to page 2-29 where this issue has been addressed in the Final SEIR.

5. SEIR Certification and Revised Project Approval. In light of these findings and conclusions, staff recommends certification of the Final SEIR as having been prepared in accordance with CEQA and its implementing guidelines, and further recommends approval of the Revised Project and adoption of all feasible mitigation measures and lease measures.

6. Implementation of Mitigation. When making the CEQA findings required by Public Resources Code Section 21081 (a), a public agency shall adopt a reporting or monitoring program in accordance with Public Resources Code Section 21081.6 for changes to the proposed project which it has adopted or made a condition of project approval in order to mitigate or avoid significant effects on the environment. A Supplemental MMRP is transmitted for Council consideration and adoption.

7. Record of Proceedings. When making CEQA findings required by Public Resources Code Section 21081(a), a public agency shall specify the location and custodian of the documents or other material which constitute the record of proceedings upon which its decision is based. These records are in the care of the Director of Environmental Management, City of Los Angeles Harbor Department, 222 W. 6th Street, San Pedro, California 90731.

8. Notice of Determination. If and when the SEIR is certified and the Revised Project is approved, in accordance with Los Angeles City CEQA Guidelines, Article I, and the State CEQA Guidelines Section 15094, a Notice of Determination will be filed with the Los Angeles County and City

Clerks' Offices, and submitted to the State of California Governor's Office of Planning and Research, State Clearinghouse after approval of the Revised Project. Public Resources Code Section 21167(c) provides that any action or proceeding alleging that an EIR does not comply with the provisions of CEQA shall be commenced within 30 days after filing the NOD.

Therefore, the staff of the Harbor Department requests that the Council certify the Final Supplemental Environmental Impact Report and approve the Revised Project.

EXHIBIT 2

South Coast
Air Quality Management District
21865 Copley Drive, Diamond Bar, CA 91765-4178
(909) 396-2000 • www.aqmd.gov

SENT VIA E-MAIL, USPS, AND ONLINE:
Clerk.CPS@lacity.org
CityClerk@lacity.org
https://cityclerk.lacity.org/publiccomment/
City of Los Angeles City Council
Office of the City Clerk
200 N. Spring Street
City Hall - Room 360
Los Angeles, CA 90012

December 4, 2019

RE: CEQA Appeal from the Board of Harbor Commissioners' Decision to Approve the Final Supplemental Environmental Impact Report (SEIR) for the Berths 97-109 (China Shipping) Container Terminal Project (SCH No.: 2003061153)

Dear Members of the City Council,

Pursuant to the California Public Resources Code Section 21151(c), South Coast Air Quality Management District (South Coast AQMD) staff appeals the Board of Harbor Commissioners' (Board) decision on October 8, 2019 to certify the Final Supplemental Environmental Impact Report (SEIR) for the Berths 97-109 (China Shipping) Container Terminal project (project) prior to approving the project[1,2,3]. South Coast AQMD staff asks that the City Council overrule the Board's October 8, 2019 decision and reject the certification of the Final SEIR and approval of the project[4]. This CEQA appeal is made on the following procedural and CEQA grounds.

Procedural Grounds for Appeal

The CEQA appeal is made pursuant to California Public Resources Code Section 21151(c), which provides that:

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[1] Los Angeles Board of Harbor Commissioners. October 8, 2019. Board Resolution No.: 19-9548. *1st Special Meeting Minutes: Item 2 Resolution No. 19-9548 – Final Supplemental Environmental Impact Report for the Berths 97-109 (China Shipping) Container Terminal Project (App No. 150224-504; SCH No. 2003061153)*. Accessed at: https://docs.google.com/gview?url=https%3A%2F%2Fportofla.granicus.com%2FDocumentViewer.php%3Ffile%3Dportofla_abc320b5b73d2ac3087b95c04bbd0246.pdf%26view%3D1&embedded=true.

[2] Los Angeles Harbor Department (LAHD). October 2019. *Findings of Fact and Statement of Overriding Considerations. Berths 97-109 (China Shipping) Container Terminal Project Supplemental Environmental Impact Report (SCH No. 2003061153, App No. 150224-504)*. Accessed at: https://kentico.portoflosangeles.org/getmedia/4dd3fc68-3998-4474-a545-5d01db919887/CS_Final_FSOC_FSEIR.

[3] LAHD. October 2019. *Final Supplemental Mitigation Monitoring and Reporting Program. Berths 97-109 [China Shipping] Container Terminal Project Supplemental Environmental Impact Report (SCH No. 2003061153, App No. 150224-504)*. Accessed at: https://kentico.portoflosangeles.org/getmedia/f04712f8-6f4f-4488-87a1-924bf2e6cddc/CS_Final_MMRP_FSEIR.

[4] Los Angeles Board of Harbor Commissioners. October 8, 2019. Board Resolution No.: 19-9548.

> "If a nonelected decision-making body of a local lead agency certifies an environmental impact report, approves a negative declaration or mitigated negative declaration, or determines that a project is not subject to this division, that certification, approval, or determination may be appealed to the agency's elected decision-making body, if any."

The Board is a nonelected decision-making body of the City. The Board consists of commissioners appointed by the Mayor of Los Angeles[5]. The City Council is an elected decision-making body of the City that consists of 15 members elected by districts[6]. On October 8, 2019, the Board certified the Final SEIR and approved the project. Therefore, the Board's certification and approval may be appealed to the City Council.

Where an agency allows administrative appeals upon the adequacy of an environmental document, an appeal shall be handled according to the procedures of that agency (CEQA Guidelines Section 15185(a)). The City does not provide a procedure for filing CEQA appeals of environmental determinations made by the Board under Cal. Pub. Resources Code 21151(c). The only procedure for filing CEQA appeals is set forth in the Los Angeles Municipal Code Section 197.01. Effective September 24, 2019, Section 197.01 establishes a procedure for filing CEQA appeals of environmental determinations made by a nonelected decision-making body and specifies that the appeals must be filed within 10 days following the filing of a Notice of Determination (NOD)[7]. However, Section 197.01 does not apply to the CEQA appeals of the environmental determinations made by the Board. The ordinance provides that it does not apply to departments established by Charter Section 600, which includes the Harbor Department (LAHD). Therefore, the CEQA appeal of the Board's environmental determination to certify the Final SEIR and approve the project is not subject to the procedural requirements under the Los Angeles Municipal Code Section 197.01.

The CEQA appeal is made pursuant to CEQA Guidelines Section 15090(b), which provides that:

> "When an EIR is certified by a non-elected decision-making body within a local lead agency, that certification may be appealed to the local lead agency's elected decision-making body, if one exists. [...] Each local lead agency shall provide for such appeals."

Since the LAHD is governed by the Board, but is subordinate to the City Council, CEQA requires that an appeal to the City Council be available. Therefore, we file this appeal under the requirements of CEQA itself, which does not specify a time limit for filing an appeal.

The CEQA Guidelines specify a time limit for filing court challenges under Section 15094(g), which provides that:

> "The filing of the notice of determination [...] start[s] a 30-day statute of limitation on court challenges to the approval under CEQA." (See also CEQA Guidelines Section 15112).

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[5] The Port of Los Angeles. Accessed at: https://www.portoflosangeles.org/about.

[6] City of Los Angeles. Elected Official Offices. Accessed at: https://www.lacity.org/your-government/elected-official-offices.

[7] Ordinance No. 186254. Effective September 24, 2019. Accessed at: http://clkrep.lacity.org/onlinedocs/2014/14-0090-S1_ORD_186254_09-24-2019.pdf.

The CEQA appeal of the Board's environmental determination and approval of the project is an administrative appeal to the City Council. It is not a court challenge. Therefore, the CEQA time limit for filing court challenges does not apply to this appeal.

Moreover, the CEQA decision is not yet final so the time for filing a court challenge has not yet begun to run. The Natural Resources Defense Council (NRDC) has already filed an appeal to the City Council. The CEQA decision will become final only after the City Council, an elected decision-making body, hears the appeal and makes a decision on the appeal. Since the City has not provided a CEQA appeal process for decisions of the Board, the present appeal is not barred by any applicable time limit. Nor is there any prejudice to the City in setting this appeal for hearing due to the timing of filing this appeal, since the City has not yet set the NRDC appeal for hearing.

CEQA Grounds for Appeal

The CEQA appeal is made on the following CEQA grounds, as well as the grounds in the South Coast AQMD staff's comment letters on the Draft SEIR[8], the Recirculated Draft SEIR[9], and the Final SEIR[10], each of which is attached for your reference in Exhibits A, B, and C, respectively.

The Final SEIR is inadequate and fails to comply with the requirements of CEQA and the CEQA Guidelines because the Final SEIR does not implement all feasible mitigation measures, including the air quality mitigation measures required by the 2008 Environmental Impact Report (EIR) and does not propose new mitigation measures to reduce the more severe significant adverse air quality and health risk impacts resulting from the revised project. Under CEQA, a mitigation measure must be required in, or incorporated into, the project (CEQA Guidelines Sections 15091(a) and (d)). Mitigation measures must also be fully enforceable through permit conditions, agreements, or other measures (CEQA Guidelines Section 15126.4(a)(2)). As a landlord for the China Shipping terminal and the Lead Agency for the project, the LAHD has the responsibility of mitigating the project's significant adverse air quality and health risk impacts (CEQA Guidelines Section 15041). Based on the 2008 EIR, the project's emissions exceeded the CEQA significance thresholds for NOx, CO, VOC, PM10, and PM2.5 and mitigation measures were adopted by the Board to reduce those significant impacts. However, the LAHD failed to implement those mitigation measures and the project has been allowed to operate without meeting its commitments to reducing the air quality impacts. The Final SEIR removes key feasible mitigation measures that were previously adopted and required under CEQA to reduce the project's significant adverse air quality and health risk impacts without adequate substitute measures or additional measures. Furthermore, the revised project is seeking to increase its cargo throughput, adding more emissions to an already significant impact. For NOx, the emissions from the project in 2008 exceeded the significance threshold up to 135 times[11] and this will increase in the Final SEIR to 159 times[12]. Instead of adding to or

[8] South Coast AQMD. September 29, 2017. Accessed at: http://www.aqmd.gov/docs/default-source/ceqa/comment-letters/2017/dseir-chinashipping-092917.pdf.

[9] South Coast AQMD. November 30, 2018. Accessed at: http://www.aqmd.gov/docs/default-source/ceqa/comment-letters/2018/LAC181002-11.pdf.

[10] South Coast AQMD. October 4, 2019. Accessed at: http://www.aqmd.gov/docs/default-source/ceqa/comment-letters/2019/october/LAC190905-02.pdf.

[11] Recirculated Draft EIR. 2008. Page 3.3-88.

[12] Draft Recirculated SEIR. 2018. Page 3.1-4.

strengthening the existing air quality mitigation measures that were required under CEQA in the 2008 EIR, the Final SEIR removes and weakens the required mitigation measures that the LAHD was responsible for implementing, affecting an area heavily impacted by air pollution, which also happens to be an AB 617 community. Therefore, the Final SEIR does not meet the requirements of CEQA for implementing all feasible mitigation measures (CEQA Guidelines Sections 15091(a) and (d), and 15126.4(a)(1)).

The Final SEIR is also inadequate and fails to comply with the requirements of CEQA and the CEQA Guidelines because it violates CEQA's requirement for enforceable mitigation measures. The LAHD relies on the tenant to meet its legal obligation to mitigate significant air quality impacts under CEQA. However, the lease amendment process appears to be the only legal and viable mechanism for the LAHD to enforce the Board-adopted mitigation measures in the Final SEIR. When the Board considered certification of the Final SEIR and approval of the project on October 8, 2019, the lease amendment was not part of the Final SEIR or the project. There was no assurance to the public that the tenant will enter into a binding and enforceable agreement with LAHD to implement the Final SEIR, nor whether the LAHD has the authority to render the identified mitigation measures enforceable. Based on the tenant's October 7, 2019 letter to the LAHD that was distributed to the public at the October 8, 2019 Board meeting[13], it is anticipated that the tenant will not agree to amend the lease agreement to implement the required mitigation measures due to the operational, commercial and financial feasibility concerns[14]. Because the Final SEIR was certified before there was an enforceable commitment by the tenant to mitigate significant air quality impacts, the Final SEIR does not meet the requirements of CEQA for enforceable mitigation measures (CEQA Guidelines Sections 15091(a) and (d) and 15126.4(a)(2)).

The LAHD's response to South Coast AQMD staff's comments on the Final SEIR, dated October 4, 2019, was conclusory and non-responsive. CEQA requires that issues raised in comments should be addressed in detail giving reasons why specific comments and suggestions are not accepted. There should be good faith, reasoned analysis in the response. When the Lead Agency makes the finding that the additional recommended mitigation measures are not feasible, the Lead Agency should describe the specific reasons for rejecting them (CEQA Guidelines Section 15091(c)) and those reasons must be supported by substantial evidence in the record (CEQA Guidelines Sections 15091(a) and (b)). In South Coast AQMD staff's comment letter on the Final SEIR, South Coast AQMD staff recommended that the LAHD establish a mitigation fee program that would be separate from and in addition to the greenhouse gas credit fund to implement the required mitigation measures to reduce the project's criteria pollutants emissions if the tenant does not agree to amend the lease agreement to incorporate the Board-adopted mitigation measures for implementation[15]. However, in the LAHD's response letter that was distributed to the public at the October 8, 2019 Board meeting, the LAHD failed to provide an explanation, supported by substantial evidence in the record, as to why the mitigation fee program was not feasible or adopted in the findings[16]. When the LAHD does not have other mechanisms to obligate the tenant to agree

[13] Cosco Shipping (North America) Inc. October 7, 2019. A letter to the City of Los Angeles Harbor Department (Mr. Chris Cannon). Distributed at the Los Angeles Board of Harbor Commissioners Special Meeting on October 8, 2019.
[14] *Ibid.*
[15] South Coast AQMD. October 4, 2019. Page 3. Accessed at: http://www.aqmd.gov/docs/default-source/ceqa/comment-letters/2019/october/LAC190905-02.pdf.
[16] LAHD. October 8, 2019. *Response to South Coast Air Quality Management District Letter on Final Supplemental Environmental Impact Report for Berths 107-109 [China Shipping] Container Terminal Project (SCH No.*

to lease amendments, the mitigation fee program is an equally effective or superior mechanism to implement the required mitigation measures. Since there was no finding on the mitigation fee program, the Board did not review or consider it prior to certifying the Final SEIR and approving the project, and the Final SEIR has not been completed in compliance with CEQA (CEQA Guidelines Sections 15090 and 15091).

In conclusion, the Final SEIR is inadequate in reducing the significant and more severe air quality impacts and does not meet the requirements of CEQA (CEQA Guidelines Sections 15002(a)(3), 15003(f), 15041, 15090, 15091(a) and (d), 15126.4(a)(1) and (a)(2), and 15185(a)). South Coast AQMD staff asks that the City Council overrule and reject the Board's October 8, 2019 certification of the Final SEIR and approval of the project. South Coast AQMD staff also asks that the City Council direct the Board to establish a mitigation fee program that is separate from and in addition to the greenhouse gas credit fund to reduce the project's emissions from criteria pollutants such as NOX, PM10, and PM2.5. The mitigation fee program can be used to incentivize and accelerate turnover of trucks and cargo handling equipment to be zero emissions and that program should be made available to all tenants at Port of Los Angeles, including China Shipping.

We appreciate your consideration of this appeal. We look forward to a full hearing before the City Council. Please feel free to call me at (909) 396-3176 if you have questions or wish to discuss our comments.

Sincerely,

Jillian Wong

Jillian Wong, Ph.D.
Planning and Rules Manager
Planning, Rule Development & Area Sources

Enclosures:
Exhibit A: South Coast AQMD staff comments on the Draft SEIR, dated September 29, 2017
Exhibit B: South Coast AQMD staff comments on the Recirculated Draft SEIR, dated November 30, 2018
Exhibit C: South Coast AQMD staff comments on the Final SEIR, dated October 4, 2019

2003061153). A letter from the LAHD (Mr. Chris Cannon) to Port of Los Angeles Board of Harbor Commissioners. Distributed at the Los Angeles Board of Harbor Commissioners Special Meeting on October 8, 2019.

EXHIBIT 3


San Pedro Peninsula Homeowners United, Inc.

SAN PEDRO PENNISULA
HOMEOWNERS' COALITION

Via Email, U.S. Mail and Hand Delivery

Members of the Los Angeles City Council
c/o City Clerk
Los Angeles City Council
200 N. Spring Street
City Hall - Room 360
Los Angeles, CA 90012
Email: CityClerk@lacity.org

October 18, 2019

Re: Appeal from the Board of Harbor Commissioners' Decision to Approve the Final Supplemental Environmental Impact Report for the Berths 97-109 (China Shipping) Container Terminal Project (SCH No. 2003061153)

Dear Members of the City Council:

Pursuant to California Public Resources Code Section 21151(c), the Natural Resources Defense Council (NRDC), San Pedro and Peninsula Homeowners' Coalition, San Pedro Peninsula Homeowners United, Inc., Coalition for Clean Air, Urban and Environmental Policy Institute, Occidental College, Long Beach Alliance for Children with Asthma, and East Yard Communities for Environmental Justice hereby appeal the October 8, 2019 decision of the Board of Harbor Commissioners to certify the China Shipping Final Supplemental Environmental Impact Report (the "2019 Supplemental EIR") and approve the Revised Project described in that document. A copy of the Board's resolution incorporating its approval is attached hereto as Exhibit A.

We ask that the City Council overrule and reject the Board's October 8, 2019 certification of the 2019 Supplemental EIR and approval of the Revised Project. Furthermore, as explained below, the Port has repeatedly and consistently violated a court-approved settlement agreement with

NRDC, Coalition for Clean Air, San Pedro Peninsula Homeowners Coalition, and San Pedro Peninsula Homeowners United, Inc. (collectively, "Petitioners") regarding operations at the China Shipping terminal. We therefore ask the City Council to direct the Board to negotiate a new agreement with Petitioners that avoids litigation and keeps the terminal open; provides Petitioners the remedies afforded to them based on the Port's breach of the settlement agreement (including compensatory air pollution mitigation to make up for the excess emissions caused by the breach); and commits the Port to all feasible mitigation as required by CEQA and necessary to achieve the Mayor's zero emission goals.

Factual Background

In 2001, NRDC, Coalition for Clean Air, San Pedro Peninsula Homeowners Coalition, and San Pedro Peninsula Homeowners United, Inc. filed suit against the Port of Los Angeles and City of Los Angeles. Petitioners alleged that the Port violated the California Environmental Quality Act (CEQA) when it approved construction of a new container terminal to be operated by China Shipping.

In 2002, the Court of Appeal ruled in Petitioners' favor on the CEQA suit and enjoined construction of the terminal. Shortly thereafter, Petitioners and the Port entered into a landmark settlement agreement (approved by the court), which created a $50 million mitigation fund and included many specific requirements for alternative fuel equipment at the terminal. A copy of the 2004 Amended Stipulated Judgment (ASJ) is attached hereto as Exhibit B. Notably, the ASJ stated that the Port would require, starting in 2005, that 70% of ship calls by China Shipping, would utilize "alternative maritime power" (AMP) while at berth. AMP is electric plug-in shoreside power, which drastically reduces diesel emissions while container ships are docked at the terminal. The Port also agreed to prepare a new Environmental Impact Report under CEQA, in which it would consider additional feasible mitigation measures.

In 2008, the Port certified the new EIR required by the ASJ (the "2008 EIR"), which, among other things, increased the required AMP percentage to 100% by 2011. However, shortly after making these commitments, top Port officials secretly began rolling back the pollution-cutting measures they had agreed to in the ASJ and 2008 EIR. Unbeknownst to Petitioners, just a few months after approval of the 2008 EIR, the executive director of the Port assured China Shipping that it would face no consequences for violating the AMP requirement—in direct violation of a court-approved settlement agreement and CEQA. The Port continued issuing unlawful waivers of the requirement until state regulators began requiring high levels of AMP in 2014.

As a result, China Shipping's compliance with the AMP requirement fell far below the required levels. The China Shipping terminal continues to violate the 2008 EIR's AMP requirement, which currently calls for 100% AMP. The Port also failed to enforce many other mitigation measures—including a speed limit for ships and a number of low- or zero-emission requirements for short-haul trucks and cargo handling equipment—all of which would have significantly reduced emissions from the terminal.

When this all came to light in 2015 as the result of news media inquiries, Mayor Garcetti

personally intervened and asked Petitioners to try to work with the Port collaboratively. Accordingly, the parties entered into a tolling agreement, and the Port initiated yet another EIR to address its malfeasance.

The Port released the Final Supplemental EIR for the project in September 2019, after repeatedly promising to release it earlier. Worse, its main goal was justifying rollbacks of the pollution control measures adopted by the 2008 EIR, even though the availability of clean technologies has improved significantly over the past decade. And the document disclaims any responsibility to address the significant excess emissions caused by the Port's past violations of the 2008 EIR mitigation measures and settlement agreement.

Grounds For Appeal

The appeal is made on the following grounds, as well as the grounds in our three comment letters and the South Coast Air Quality Management District's comment letters, each of which is attached for your reference[1]:

CEQA is a comprehensive statute designed to protect the environment and safeguard informed self-government. *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.*, 47 Cal. 3d 376, 392 (1988). It accomplishes these objectives in two ways. First, CEQA requires agencies to inform decisionmakers and the public about a project's potential significant environmental effects. Cal. Code Regs., tit. 14 (CEQA Guidelines) § 15002(a)(1). The EIR is the "heart" of this requirement. *No Oil, Inc. v. City of Los Angeles*, 13 Cal. 3d 68, 84 (1974). Second, CEQA requires agencies to adopt alternatives or mitigation measures to avoid or reduce significant environmental damage whenever feasible. CEQA Guidelines § 15002(a)(2), (3). Mitigation measures for significant impacts must be "fully enforceable." Cal. Pub. Resources Code § 21081.6(b).

Failure To Properly Analyze and Disclose Impacts

In the 2019 Supplemental EIR, the Port failed to disclose two critical pieces of information: 1) the past excess emissions that were caused by its failure to comply with the 2008 EIR mitigation measures and 2) the future excess emissions that will be caused by the Revised Project as compared to what is required under the approved project.

As detailed in our comment letters, the 2019 Supplemental EIR uses the wrong baseline for its analyses. The Port uses a baseline of 2008 actual conditions, but that baseline undercounts emissions because many mitigation measures were scheduled to be phased in after 2008—in other words, the approved project should have become cleaner over time, had the Port implemented all mitigation measures.

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[1] Our September 27, 2017, November 16, 2018, and October 3, 2019 comment letters are attached as Exhibits C, D, and E, respectively. The Port has copies of all attachments to those letters. The comment letters of the South Coast Air Quality Management District are attached as Exhibits F, G, and H.

By refusing to compare the past actual emissions to what emissions would have been under the approved project (with all mitigation implemented), the Port vastly undercounts the past excess pollution from its violation of the 2008 EIR. Likewise, by refusing to compare the future emissions of the Revised Project to what emissions would have been under the approved project (with all mitigation implemented), the Port vastly undercounts the future excess emissions from the Revised Project.

In addition, the Port's analysis of future excess emissions is deficient because, throughout the 2019 Supplemental EIR, the Port assumes that the mitigation measures for the Revised Project will be implemented starting in 2019, after amendment of the lease with China Shipping. Yet the Port fully admits that it is impossible to know when—or whether—it will sign a new lease with China Shipping. In fact, the record is replete with evidence that China Shipping will not agree to a lease amendment. China Shipping steadfastly refused to amend the lease in 2008 to incorporate the previous mitigation measures. The Port has provided no evidence whatsoever that China Shipping will agree to modify its lease this time around. Under CEQA, mitigation measures for significant impacts must be "fully enforceable." Cal. Pub. Resources Code § 21081.6(b). Here, these mitigation measures are not.

Nonetheless, in its analysis, the Port inexplicably takes full credit for these emission reductions that may never happen, and that certainly will not happen starting in 2019. This has the effect of drastically understating the true pollution impacts of the Revised Project. The Port must either disclose the pollution impacts of the Revised Project assuming no lease amendment or it must ensure that its mitigation measures are enforceable, which it has not done.

Failure To Show That 2008 Mitigation Measures Are Infeasible And To Include Additional Feasible Mitigation Measures

Before it got caught cheating in 2015, the Port never claimed that any of the 2008 EIR mitigation measures were infeasible. In fact, all of those mitigation measures are feasible today and have been since 2008. And now, a decade later, there are additional mitigation measures that are also feasible, yet the Port fails to adopt them.

The Port has failed to show that seven air quality mitigation measures it previously adopted in the 2008 EIR—and now intends to alter or abandon—are actually infeasible. While an agency may delete or modify a mitigation measure adopted in an initial EIR, it cannot do so "without a showing that it is infeasible." *Napa Citizens for Honest Gov't v. Napa Cty. Bd. of Supervisors*, 91 Cal. App. 4th 342, 359 (2001). Additionally, the Port has failed to adopt new mitigation measures—such as zero-emissions trucks and cargo handling equipment—that have become feasible since 2008.

The Port argues that many of the mitigation measures are too expensive. However, for the most part, the Port does not even attempt to put a dollar figure to the cost of implementing the measures, or compare that to the profits that either the Port or China Shipping are making. CEQA requires much more: The fact that a mitigation measure is expensive or that it may make the project less profitable is not enough to show that the measure is infeasible. What CEQA

requires is "evidence that the additional costs or lost profitability are sufficiently severe as to render it impractical to proceed with the project." *See Citizens of Goleta Valley v. Bd. of Supervisors*, 197 Cal. App. 3d 1167, 1181 (1988).

The Port claims that the 2008 EIR's requirement for liquified natural gas (LNG) trucks is infeasible and also rejects newer zero-emissions trucks that have become available since 2008. In short, the Port contends that China Shipping cannot require cleaner trucks to haul cargo through the terminal because those truckers are third-party contractors and China Shipping has no control over them. But the Port admits that China Shipping has the ability to control the access of trucks by implementing a priority access system for zero and near-zero emission trucks; if it can do that, then it can also restrict the entry of diesel trucks to the terminal entirely. The Port also argues that it is not feasible to require cleaner trucks at only one of its terminals, and that cleaning up trucks requires a port-wide solution. But it fails to explain why it cannot then implement a port-wide solution. Indeed, the Port's own Clean Air Action Plan envisions a transition to zero-emission equipment Port-wide by 2035.[2]

The Port also plans to eliminate a throughput tracking measure intended to reduce emissions associated with unanticipated increases in cargo. The Port claims that the measure is unnecessary, because the 2019 Supplemental EIR supposedly takes into account the maximum capacity of the terminal's cargo volume. But that argument makes no sense in light of the Port's acknowledgement that actual throughput exceeded its previous projections in the 2008 EIR. The Port fails to demonstrate that the throughput tracking measure is either infeasible or unnecessary.

Finally, when a project is approved despite having impacts that cannot be mitigated below the threshold of significance, CEQA requires the agency to adopt a mitigation monitoring and enforcement program. And while the Port does that, it merely copies and pastes the same program that proved ineffective in monitoring and enforcing the 2008 mitigation measures. At the very least, the mitigation monitoring and enforcement program should establish a requirement to publicly disclose the implementation status of all mitigation measures. Further, a third party should be selected to oversee the monitoring and reporting process. In addition, a permanent and independent oversight committee, fully funded to audit the implementation of all mitigation measures throughout the Port, should be created.

Use Of A Statement Of Overriding Considerations Is Unconscionable

Climate change and air pollution are among the greatest environmental perils Los Angeles faces. The China Shipping terminal is next door to thousands of San Pedro and Wilmington residents, the closest of whom live only 500 feet from the project site. That area already had the highest concentration of diesel truck pollution in the Los Angeles basin, and residents there suffer from some of the highest cancer risks in the South Coast from breathing polluted air.

[2] Moreover, in 2013, the Board of Harbor Commissioners approved an EIR in the SCIG matter that included a requirement that only LNG-fueled trucks could access the SCIG site.

Climate change will only exacerbate this air pollution and its effects on vulnerable populations. Furthermore, climate change-induced rising sea levels could make the Port of Los Angeles unusable. State policy, recently reaffirmed by Governor Newsom's Executive Order N-19-19[3], requires dramatic reductions in GHGs. Mayor Garcetti has stated that Port equipment and drayage will be zero emission by 2030 and 2035[4], respectively, which requires starting the transition from diesel now. Yet the EIR approved by the Port accepts GHG increases and diesel fleets over many years. The approval also accepts increases in criteria pollutants and cancer risk.

The use of a statement of overriding considerations is ultimately a policy decision that a project's negative environmental effects than cannot be mitigated are worth it. Here, they are not worth it to the Port community, the State, or to the Port itself. It is simply unconscionable for the City Council to allow that decision to stand. The short- and long-term effects of exposure to high levels of ambient air pollution on children, and adults, in adjacent communities is a major concern based on a large body of research documenting associations between exposure to pollution from traffic-related sources and respiratory illness – particularly asthma.

Financial Consequences To The Port

The Port is putting at risk millions of dollars by its violations of CEQA and the ASJ. That agreement, in Article XI, provides for a $30 per twenty-foot equivalent unit (TEU) fee for each TEU in excess of 328,000 at Berth 100, to be placed in an escrow account once a legal action (including arbitration) is commenced in this matter. Using the TEU figures provided by Gene Seroka at the October 8, 2019 Board of Harbor Commissioners hearing, the escrowed fees may be tens of millions per year, every year that litigation continues. If Petitioners prevail, those funds would be required to be spent for additional mitigation measures and not for general Port operations. The ASJ also provides for other sources of Port funding for mitigation that may reach into the millions of dollars. The City Council should keep this in mind when ruling on this appeal.

Conclusion

In conclusion, we ask that the City Council overrule and reject the Board's October 8, 2019 certification of the 2019 Supplemental EIR and approval of the Revised Project. We also ask the City Council to direct the Board to negotiate a new agreement with Petitioners that avoids litigation and keeps the terminal open; provides Petitioners the remedies afforded to them based on the Port's breach of the settlement agreement (including compensatory air pollution mitigation to make up for the excess emissions caused by the breach); and commits the Port to all feasible mitigation as required by CEQA and necessary to achieve the Mayor's zero emission goals.

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[3] https://www.gov.ca.gov/wp-content/uploads/2019/09/9.20.19-Climate-EO-N-19-19.pdf

[4] https://www.lamayor.org/mayor-garcetti-celebrates-clean-air-day-unveils-new-zero-emission-equipment-port-los-angeles

We appreciate your consideration of this appeal. Please contact Melissa Lin Perrella or David Pettit at (310) 434-2300 with any questions. We look forward to a full hearing before the City Council.

Sincerely,

Melissa Lin Perrella
Natural Resources Defense Council

David Pettit
Natural Resources Defense Council

Jaclyn H. Prange
Natural Resources Defense Council

Gonzalo E. Rodriguez
Natural Resources Defense Council

Taylor Thomas
East Yard Communities for Environmental Justice

Jessica Tovar
Urban and Environmental Policy Institute, Occidental College

Sylvia Betancourt
Long Beach Alliance for Children with Asthma

Enclosures:

- Exhibit A: Resolution Certifying China Shipping Final SEIR; Findings of Fact and Statement of Overriding Considerations
- Exhibit B: Amended Stipulated Judgment
- Exhibit C: NRDC Comments to Draft Supplemental EIR
- Exhibit D: NRDC Comments to Recirculated Draft Supplemental EIR
- Exhibit E: NRDC Comments to Final Supplemental EIR
- Exhibit F: SCAQMD Comments to Draft Supplemental EIR
- Exhibit G: SCAQMD Comments to Recirculated Draft Supplemental EIR
- Exhibit H: SCAQMD Comments to Final Supplemental EIR

PROOF OF SERVICE

County of Mono v. City of Los Angeles, et al.
Case No. RG18923377

STATE OF CALIFORNIA, COUNTY OF ALAMEDA

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Alameda, State of California. My business address is 555 12th Street, Suite 1500, Oakland, CA 94607.

On November 23, 2020, I served true copies of the following document(s) described as **REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF MANDATE** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from e-mail address mbender@meyersnave.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

BY OVERNIGHT DELIVERY: I enclosed said document(s) in an envelope or package provided by the overnight service carrier and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight service carrier or delivered such document(s) to a courier or driver authorized by the overnight service carrier to receive documents.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 23, 2020, at Oakland, California.

Melissa Bender

SERVICE LIST
County of Mono v. City of Los Angeles, et al.
Case No. RG18923377

Stacey Simon, County Counsel Jason Canger, Deputy County Counsel COUNTY OF MONO P.O. Box 2415 Mammoth Lakes, CA 93546 Tel: (760) 924-1700 Fax: (760) 924-1701 E-mail: ssimon@mono.ca.gov jcanger@mono.ca.gov	Attorneys for Petitioner **COUNTY OF MONO**
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Laurens Silver, Esq. CALIFORNIA ENVIRONMENTAL LAW PROJECT P.O. Box 667 Mill Valley, CA 94942 Tel: (415) 515-5688 Fax: (510) 237-6598 E-mail: larrysilver@earthlink.net	Attorneys for Petitioner **SIERRA CLUB**
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LOS ANGELES DEPARTMENT OF WATER AND POWER

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