

**Superior Court for the State of California**

**For the County of San Bernardino**

**Department S-26, Judge David Cohn**

**Hearing Date: January 20, 2022**

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**Friends of Big Bear Valley; San Bernardino  
Valley Audubon Society, Inc., Center for  
Biological Diversity,**

**Petitioners,**


**v.**

**County of San Bernardino; Board of  
Supervisors of the County of San  
Bernardino; and Does 1-25,**

**Respondents**

**RKR Properties, Inc. and Roes 26-50,**

**Real Parties in Interest**

**FILED**  
SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SAN BERNARDINO  
SAN BERNARDINO DISTRICT  
JAN 20 2022  
BY   
JESSICA MORALES, DEPUTY

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**RULING ON PETITION FOR WRIT OF MANDATE**

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**I**

**Introduction**

Petitioners, Friends of Big Bear Valley, San Bernardino Valley Audubon Society, Inc., and Center for Biological Diversity, seek a writ of mandate ordering Respondents, the County of San Bernardino and the County Board of Supervisors, to rescind approval for Real Party in Interest, RCK Properties, Inc. ("RCK"), to build a residential housing

project known as Moon Camp (the “Project”) near the unincorporated community of Fawnskin in the San Bernardino Mountains. Petitioners bring their petition under the California Environmental Quality Act, Public Resources Code section 21000 *et seq.* (CEQA), and the Planning and Zoning Law, Government Code section 65300 *et seq.*

As explained below, the petition is granted on two narrow grounds: First, Respondents’ findings regarding mitigation measures for environmental impacts to a threatened plant species—the ashy-gray Indian paintbrush—are unsupported by substantial evidence. Second, the Environmental Impact Report fails as an informational document regarding the Project’s impacts on wildfire evacuation risks. All other grounds for the petition are denied.

## II

### Background

The Project is to be built on 62.43 acres of undeveloped land along North Shore Drive/Highway 38 on the north shore of Big Bear Lake (the “Project Site”). The Project contemplates fifty residential lots for the construction of custom-built houses, lots for open space, lake access, marina parking, and utilities. (AR 50.)<sup>1</sup> San Bernardino County is the lead agency under CEQA.

On July 10, 2020, the Final EIR, including a Mitigation Monitoring and Reporting Plan (the “2020 Final EIR”), was distributed to the public. (AR 197, 5363.) On July 28, 2020, the County Board of Supervisors conducted a public hearing, and voted to certify the Final EIR, approved Tentative Tract Map No. 16136, and to adopt Findings of Fact,

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<sup>1</sup> Citations to the Administrative Record are designated “AR” followed by a Bates number or range. Leading zeros in the Bates numbers have been omitted.

a Statement of Overriding Considerations, a Mitigation Monitoring Plan, and a General Plan Amendment. (AR 5884.)

Petitioners contend that the County's underlying findings regarding the Project are not supported by substantial evidence. The gravamen of their argument is that the analysis of biological impacts in the Final EIR is stale and does not represent the Project's current conditions or the current status of certain wildlife and plant species. Additionally, Petitioners claim the County did not adequately analyze the danger posed by pedestrians crossing Highway 38 from the Project's residential subdivision to the open space and marina on the lakefront, or the wildfire safety hazard posed by the Project.

### III

#### **Standard of Review**

CEQA requires a public agency to determine if a development project may have significant environmental impacts. (Pub. Resources Code, § 21151, subd. (a).) Under CEQA and the CEQA Guidelines,<sup>2</sup> if a project is not exempt from CEQA and may cause a significant effect on the environment, the lead agency must prepare an EIR. (Pub. Resources Code, §§ 21100, 21151, subd. (a); Guidelines, § 15064, subds. (a)(1) and (f)(1).)

CEQA and the Guidelines separately define a "significant effect on the environment." Public Resources Code section 21068 provides: "Significant effect on

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<sup>2</sup> CEQA Guidelines for California Environmental Quality Act, Title 14, Chapter 3, of the California Code of Regulations, §§ 15000-15387.

the environment' means a substantial, or potentially substantial, adverse change in the environment." Guidelines section 15382 provides:

"Significant effect on the environment" means a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance. An economic or social change by itself shall not be considered a significant effect on the environment. A social or economic change related to a physical change may be considered in determining whether the physical change is significant.

The standard for judicial review of agency decisions under CEQA is abuse of discretion. (Pub. Resources Code, §§ 21168.5, 21005, subd. (a); *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 512 ("*Friant Ranch*").) Abuse of discretion can arise in two ways—by the lead agency failing to proceed in the manner required by CEQA or by reaching factual conclusions unsupported by substantial evidence. (*Ibid.*)<sup>3</sup>

Whether the agency followed correct procedures is reviewed *de novo*, but substantive factual conclusions are entitled to greater deference. (*Friant Ranch, supra*, 6 Cal.5th at p. 512. ) In reviewing for substantial evidence, the court "'may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable.' [Citation.]" (*Ibid.*) "The decisions of the agency are given substantial deference and are presumed correct. The parties seeking mandamus bear the burden of proving otherwise, and the reviewing court must resolve reasonable

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<sup>3</sup> "[S]ubstantial evidence includes fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact" but "not argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly inaccurate or erroneous, or evidence of social or economic impacts that do not contribute to, or are not caused by, physical impacts on the environment." (Pub. Resources Code, § 21080, subd. (e); *see also* Guidelines, § 15384.) "Complaints, fears, and suspicions about a project's potential environmental impact likewise do not constitute substantial evidence." [Citations.]" (*Joshua Tree Downtown Business Alliance v. County of San Bernardino* (2016) 1 Cal.App.5th 677, 690.)

doubts in favor of the administrative findings and determination. [Citation.]” (*Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490, 1497.)

In short, there are “three ‘basic principles’ regarding the standard of review for adequacy of an EIR: ‘(1) An agency has considerable discretion to decide the manner of the discussion of potentially significant effects in an EIR. (2) However, a reviewing court must determine whether the discussion of a potentially significant effect is sufficient or insufficient, i.e., whether the EIR comports with its intended function of including “‘detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.’” [Citation.] (3) The determination whether a discussion is sufficient is not solely a matter of discerning whether there is substantial evidence to support the agency’s factual conclusions.’ [Citation.]” (*South of Market Community Action Network v. City & County of San Francisco* (2019) 33 Cal.App.5th 321, 330, quoting *Friant Ranch, supra*, 6 Cal.5th at pp. 515–516.)

“The ultimate inquiry . . . is whether the EIR includes enough detail to ‘enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.’ [Citation.]” (*Friant Ranch, supra*, 6 Cal.5th at p. 516.) “Generally, that inquiry is a mixed question of law and fact subject to de novo review, but to the extent factual questions . . . predominate, a substantial evidence standard of review will apply. [Citation.]” (*South of Market Community Action Network, supra*, 33 Cal.App.5th at pp. 330-331.) The EIR should provide decision makers with sufficient analysis for intelligent consideration of the environmental consequences of a project. (CEQA Guidelines § 15151.) Perfection is not

required, but only “adequacy, completeness, and a good faith effort at full disclosure.”  
(*South of Market Community Action Network, supra*, 33 Cal.App.5th at p. 331.)

“The overriding issue on review is thus “whether the [lead agency] reasonably and in good faith discussed [a project] in detail sufficient [to enable] the public [to] discern from the [EIR] the ‘analytic route the ... agency traveled from evidence to action.’” ([Citation]; see *Friant Ranch, supra*, 6 Cal.5th at p. 515 [‘We also affirm that in reviewing an EIR’s discussion, we do not require technical perfection or scientific certainty ... .’]) ‘Although an agency’s failure to disclose information called for by CEQA may be prejudicial “regardless of whether a different outcome would have resulted if the public agency had complied” with the law (§ 21005, subd. (a)), under CEQA “there is no presumption that error is prejudicial” (§ 21005, subd. (b)). Insubstantial or merely technical omissions are not grounds for relief. [Citation.] “A prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process.” [Citation.]” (*South of Market Community Action Network, supra*, 33 Cal.App.5th at p. 331.)<sup>4</sup>

## IV

### Petitioners’ Claims

#### ***A. The Analysis of Biological Impacts is Adequate.***

Petitioners contend the history of the Project results in an outdated and inadequate baseline description of the environmental setting, an outdated and stale

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<sup>4</sup> Petitioners’ reply brief was untimely. Nevertheless, due to the court’s continuance of the hearing to a later date, there is no prejudice.

analysis of the Project's impacts on the bald eagle population, delays in the County's response to public comments, and a Final EIR that is difficult to follow. Petitioners contend the Final EIR should have been updated to account for changes in the environment that occurred between approval and circulation of the most recent draft EIR, and then recirculated to allow for public comment based on accurate data.

The original design of the Project was drafted in 1982, and included 110 residential lots (with sixty-two lakefront lots) for the construction of individual custom homes, as well as the creation of two islands which required extensive dredging and filling of the lake. (AR 8028.) The Project Site is adjacent to the San Bernardino National Forest, and is bordered on the north, east, and west by Flicker Road, Polique Canyon Road, and Canyon Road. (AR 167.) The nearby area is primarily open space consisting of pine forest and "pebble plain" habitat, and includes various threatened and protected animal and plant species. (AR 173, 4683, 4694, 4773, 9760.) The zoning designation of the Project Site is "Rural Living" and allows for one residence per forty acres. (AR 5453.) In 1988, the design revision contemplated seventy-eight residential lots, including forty-five lakefront lots. A draft environmental impact report ("1988 Draft EIR") was prepared. (AR 8028.)

Thirteen years later, in 2001, RCK submitted a revised Project proposal to the County consisting of ninety-two residential lots—including thirty-one lakefront lots—with a minimum lot size of 7,200 square feet. Three non-residential lots and a boat marina were also included in the proposal. (AR 8029.) The initial study identified "significant and unavoidable impacts" on biological resources and other environmental impacts. (AR 167, 2026.)

In 2005, another draft EIR was completed and circulated to the public (the “2005 Draft EIR”), and public comments and responses to those comments were compiled. The 2005 Draft EIR identified “significant adverse and unavoidable impacts” to biological resources, air quality, water supply, and aesthetics. RCK then revised the tentative tract map in an attempt to avoid or reduce the impacts. Nevertheless, the 2005 Final EIR was never considered for approval at a public hearing. (AR 202.)

In 2010, RCK submitted a revision to address the environmental impacts identified in the 2005 Draft EIR. The revision reduced the number of residential lots from ninety-two to fifty, with a minimum lot size of 20,000 square feet, and included seven lots for open space, lake access, marina parking, and utilities. (AR 50.) In addition, the 2010 revision eliminated a realignment of Highway 38, eliminated all lakefront residential lots, and included the purchase of a ten-acre off-site pebble plain habitat conservation easement. (AR 202-203.) Based on the 2010 Project revision, the 2005 Draft EIR was then revised and recirculated (“2010 Revised Draft EIR”). However, it also concluded that the Project would still have “significant and unavoidable impacts to Biological Resources”—including unavoidable impacts to the bald eagle. (AR 203.)

After public comments raised concerns about the 2010 Revised Draft EIR, a Supplemental Focused Special Status Plant Species Survey was conducted in August 2010, and several additional revisions were made to the Project due to the presence of a federally-listed threatened plant species—the ashy-gray Indian paintbrush. (AR 203-204, 8034.) As a result, RCK again revised the Project, creating an open space conservation easement and moving three planned residential lots to minimize the environmental impacts to this species. The County determined that the redesign of the



subdivision and the conclusions derived from the Supplemental Focused Special Status Plant Species Survey constituted “significant new information,” and therefore required a partial recirculation of the 2010 Revised Draft EIR. Accordingly, the County prepared the 2011 Revised and Recirculated Draft EIR (“2011 Revised Draft EIR”), and circulated it for public review in late 2011 and early 2012. (AR 52, 204.)

In 2018, almost seven years after the circulation of the 2011 Revised Draft EIR, the County completed the Final EIR, which included the uncirculated 2005 Final EIR, the 2010 Revised Draft EIR, the 2011 Revised Draft EIR, the associated technical appendices, all public comments received on the draft EIRs, and the responses to those comments (“2018 Final EIR”). (AR 5455.) On October 4, 2018, the County Planning Commission conducted a public hearing on the revised Project and voted to recommend certification of the 2018 Final EIR and approval of the Project. The Planning Commission also recommended adoption of the Findings of Fact and Statement of Overriding Considerations (“SOC”), approval of Tentative Tract Map No. 16136, and adoption of a General Plan Amendment to rezone the Project Site from “Rural Living” to “Single Family Residential.” (AR 5455, 5804.) The SOC stated that the revised Project would have significant and unavoidable impacts, but that further revisions would not avoid or substantially reduce the identified impacts. (AR 5809.) Public comments to the 2018 Final EIR expressed opposition to the Project. (AR 5803-5804, 5942-6006.)

In March 2019, in response to continuing public concerns regarding the Project’s impacts on the bald eagles, RCK drafted a Long-term Management Plan. (AR 163, 9330.) Final approval of the Project by the County Board of Supervisors was scheduled for October 8, 2019. (AR 5938.) Once again, the public expressed concerns about the

Project's environmental impacts. As a result, RCK asked the County to put the Project "on hold" until RCK could respond. (AR 6861, 9440.) Ultimately, after RCK responded to the public's concerns, the County certified the 2018 Final EIR and approved the Project on July 28, 2020.

**1. Substantial evidence supports the baseline for the bald eagle.**

Petitioners contend the 2018 Final EIR is inadequate because it does not contain current information regarding the bald eagle population on and around the Project Site. As argued by Petitioners, the lack of current baseline information affects the analysis of the Project's direct, indirect, and cumulative impacts because it fails to consider a pair of eagles that began nesting and raising their chicks in 2012 less than a mile from the Project Site. Petitioners also contend the Final EIR fails to recognize that several juvenile bald eagles reside year-round at Big Bear Lake and, contrary to the analysis in the 2011 Revised Draft EIR, do not leave the area during the summer months. (AR 4357, 4376-4378.) Petitioners argue that although the information regarding the bald eagle may have been sufficient at the time of the 2011 Revised Draft EIR, it was no longer adequate by the time the County approved the Project fifteen years after environmental review began.

The determination of the baseline "sets the criterion by which the agency determines whether the proposed project has a substantial adverse effect on the environment. [Citation.]" (*John R. Lawson Rock & Oil, Inc. v. State Air Resources Board* (2018) 20 Cal.App.5th 77, 103-104.) The CEQA Guidelines state, and courts have held, that an EIR must describe the environmental setting for the project, and that the setting comprises "the physical environmental conditions in the vicinity of the project" as viewed

from “a local and regional perspective.”<sup>5</sup> (Guidelines, § 15125, subd. (a); see also, *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 448.) The Guidelines also state that the environmental baseline conditions are determined at the time the notice of preparation is published or, if there is no notice of preparation, at the time the environmental review commences. (Guidelines, § 15125, subd. (a).)

Although the physical conditions at the commencement of the environmental review “normally” constitute the proper baseline in determining whether an impact is significant, the use of the word “normally” in Guidelines section 15125, subdivision (a), “necessarily contemplates that physical conditions *at other points in time* may constitute the appropriate baseline or environmental setting.’ [Citation.]” (*Cherry Valley Pass Acres & Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316, 336.) Accordingly, agencies have considerable flexibility in determining the baseline for an EIR’s environmental impact analysis. As explained by the Supreme Court in *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310, 327-328:

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<sup>5</sup> The CEQA Guidelines, section 15125, subdivision (a), provide:

An EIR must include a description of the physical environmental conditions in the vicinity of the project. This environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant. . . .

(1) Generally, the lead agency should describe physical environmental conditions as they exist at the time the notice of preparation is published . . . from both a local and regional perspective. Where existing conditions change or fluctuate over time, and where necessary to provide the most accurate picture practically possible of the project’s impacts, a lead agency may define existing conditions by referencing historic conditions, or conditions expected when the project becomes operational, or both, that are supported by substantial evidence. In addition, a lead agency may also use baselines consisting of both existing conditions and projected future conditions that are supported by reliable projections based on substantial evidence in the record.

“[T]he date for establishing baseline cannot be a rigid one. Environmental conditions may vary from year to year and in some cases it is necessary to consider conditions over a range of time periods.” [Citation.] ... Neither CEQA nor the CEQA Guidelines mandates a uniform, inflexible rule for determination of the existing conditions baseline. Rather, an agency enjoys the discretion to decide . . . exactly how the existing physical conditions without the project can most realistically be measured . . . . [Citation.]

The Guidelines do not specifically address whether the baseline must be adjusted if environmental conditions change while the EIR is being prepared. (1 Kostka & Zischke, *Practice Under the California Environmental Quality Act* (2d ed Cal. CEB), § 12.20.) However, since physical environmental conditions may change during the period of environmental review, then a lead agency has the discretion to adjust the existing conditions baseline to reflect changes in the environment that occurred during the EIR preparation process, in accordance with Guidelines section 15125, subdivision (a)(1). (1 Kostka & Zischke, *supra*, § 12.20; *Cherry Valley Pass, supra*, 190 Cal.App.4th at p. 337.)

Contrary to Petitioners' claims, the 2018 Final EIR used a proper baseline and did not improperly rely on outdated information. The 2018 Final EIR notes that the Notice of Preparation was issued by the County in February 2002 and the original Draft EIR was circulated for public review in March 2004. (AR 741, 2027.) Bald eagle surveys were conducted in 2002 and 2007, as well as a bald eagle count in 2009, before the release of the 2010 and 2011 Draft EIRs. (AR 3072, 3094.) Although neither the 2002 nor 2007 surveys found nesting bald eagles on the Project Site, the surveys did find that the Project Site “is extensively used by bald eagles” for perching and roosting. (AR 3094, 4338.) In addition, the 2007 survey found two bald eagle nests “with potentially two pair of bald eagles” near the Project Site. (AR 3094, 3463, 4339.) Although the

proposed mitigation measures are designed to reduce these impacts on the bald eagle population, the 2011 Draft EIR concluded:

Based on the County of San Bernardino criteria for determining impacts to bald eagles, any removal of perch trees or human activity resulting in light and/or noise impacts are considered a significant impact under CEQA. This threshold is so restrictive that there is no reasonable configuration to the 2011 Alternative Project that could avoid a significant impact to the bald eagle. Therefore, further project modifications would not avoid or substantially reduce the identified impacts to bald eagles. Therefore, impacts in this regard will remain significant and unavoidable. (AR 4357, 4372.)

The May 2018 Biological Database Technical Review, included as Appendix I in the 2018 Final EIR, states that additional site visits were conducted in March 2018 and April 2018 “to verify existing site conditions and the continued applicability of [all existing biological reports] to the pending CEQA document.” (AR 5129.) Prior to these visits, a 2016 site visit verified that conditions on the Project Site had not changed since the earlier reports. (AR 5129.) The 2018 technical review notes that although the bald eagle is still listed by the California Department of Fish and Wildlife (“CDFW”) as a “threatened” species under the California Endangered Species Act (“CESA”), the federal government delisted the species in 2007 due to its “significant recovery.” (AR 5129.) The technical review states that although there were no bald eagle nesting sites “within the project area,” nine perch trees were identified on the Project Site—seven adjacent to Big Bear Lake. (AR 5129.) The technical review cited to a study finding that bald eagles use artificial perch trees and native trees in a similar fashion, and therefore, the artificial perch trees could be an effective mitigation measure. (AR 5130.) “[T]he use of artificial perch trees that resemble the existing perch trees in terms of size, structure and proximity to the shoreline would compensate for the loss of native perch trees.” (AR

5130.) Accordingly, based on the 2016 and 2018 site visits, as well as the review of all reports prepared through 2016, the technical review concluded that “site conditions remain relatively unchanged and that the previous reports were still applicable....” (AR 5129.)

Although it appears neither the 2018 technical review nor the 2018 Final EIR considered the purported year-round presence of some juvenile bald eagles, the County’s decision not to update the baseline is supported by substantial evidence because there is evidence that any change in condition would not affect the significance findings. In its responses to public and agency comments in the 2018 Final EIR, the County reiterated the finding in the 2011 Revised Draft EIR that the County “considers potential impacts to any eagle perch trees, as well as human activity resulting in the addition of human activity resulting in noise, light, and glare within bald eagle habitat, to be significant and unavoidable. Accordingly, *any* development on the Project site would result in a significant unavoidable impact to the bald eagle under CEQA.” (AR 729; see also, AR 1046.) As a result, the County stated that it “does not believe that conducting updated bald eagle surveys would provide any additional information regarding Project impacts on the bald eagle.” (AR 742.)

While consideration of the recent year-round residency of some juvenile bald eagles might produce a more accurate assessment of the current baseline conditions on and around the Project Site, the difference is marginal. The purpose of an EIR “is to inform the public and its responsible officials of the environmental consequences of their decisions *before* they are made.” (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.) In some cases, conditions closer to a project’s approval

date are more relevant to a determination whether a project's impacts will be significant. (See, *Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 125-126.) In this case, however, the County had already determined that the Project's impacts on the bald eagle would be significant and unavoidable, regardless of mitigation; accordingly, the consideration of a year-round bald eagle presence does not add anything to the significance analysis. Therefore, County did not abuse its discretion in not updating the bald eagle baseline.

This ground for the petition is denied.

**2. Revision and recirculation of the EIR was not required.**

Petitioners contend that due to changes in the nature of the presence of the bald eagle population on and around the Project Site, as well as changes in the status of the Project's impacts on the bald eagles, the 2011 Revised Draft EIR should have been revised and recirculated before the 2018 Final EIR was prepared. As noted above, Petitioners contend the Final EIR failed to take into account the presence of a nesting pair of bald eagles less than one mile away from the Project Site, as well as the year-round presence of juvenile bald eagles and the decline in the number of wintering eagles. Petitioners argue these changes in the environment required a substantial revision of the Final EIR's analysis of the Project's impact on the bald eagle population and a recirculation of the document in light of the seven-year gap between the 2011 Draft EIR and certification of the Final EIR.

Before completion of a final EIR, "a lead agency may elect to prepare a new draft EIR if it determines that project changes, a change in circumstances, or new information arising after preparation of the draft EIR are so fundamental that the draft EIR should be

revised and the entire document recirculated for public review and comment.” (2 Zischke & Kostka, *supra*, § 19.24.) However, the agency is not required to make such an election. Similarly, after completion but before certification of a final EIR, a lead agency may add information to the document if changes occur to the project, or if new information becomes available. (2 Kostka & Zischke, *supra*, § 19.25.) New information may include changes in the environmental setting as well as additional data or other information. (Guidelines, § 15088.5, subd. (a).)

Under the CEQA statutes and regulations, if “significant” new information is added to an EIR—whether on the lead agency’s own instigation or in response to public or other agency comments—after notice of public review has been given, but before final certification of the EIR, the lead agency *must* issue a new notice and recirculate the EIR for review and comments. (Pub. Resources Code, § 21092.1; Guidelines § 15088.5; *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 447.) But an agency is not required to add new information to the final EIR unless it is “significant” and will trigger the recirculation requirement. (*Western Placer Citizens for an Agricultural & Rural Environment v. County of Placer* (2006) 144 Cal.App.4th 890, 899; *Chaparral Greens v. City of Chula Vista* (1996) 50 Cal.App.4th 1134 [applying recirculation standard to new information arising before EIR certification when that information was in record, but not added to the EIR].)

New information is considered “significant,” and thus requiring recirculation, if it would change an EIR “in a way that deprives the public of meaningful opportunity to comment upon a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect (including a feasible project alternative) that the



project's proponents have declined to implement." (Guidelines § 15088.5, subd. (a).) Therefore, recirculation is not required if the new information does not involve a significant new environmental impact, a substantial increase in the severity of a known environmental impact, or new mitigation measures or alternatives that were not adopted. (Guidelines, § 15088.5, subd. (a).) Recirculation is also not required "where the new information added to the EIR merely clarifies or amplifies or makes insignificant modifications to an adequate EIR." (Guidelines, § 15088.5, subd. (b); see also, *Laurel Heights Improvement Association v. Regents of University of California* (1993) 6 Cal.4th 1112, 1129-1130.)

Examples of "significant new information" requiring recirculation include disclosures showing: (1) a new significant environmental impact would result from the project or from a new proposed mitigation measure; (2) a substantial increase in the severity of an impact would result unless mitigation measures are adopted to reduce the impact to a level of insignificance; (3) a feasible project alternative or mitigation measure that is considerably different from those previously analyzed would clearly lessen the significant impacts of the project, but the project proponents decline to adopt it; or (4) the draft EIR was so fundamentally inadequate that it precluded meaningful public review and comment. (Guidelines § 15088.5, subd. (a); see also *Laurel Heights Improvement Ass'n, supra*, 6 Cal.4th at p. 1130.)

"A decision not to recirculate an EIR must be supported by substantial evidence in the administrative record." (Guidelines § 15088.5, subd. (e).) Therefore, in deciding whether the agency properly determined recirculation of the final EIR was unnecessary, the court must determine whether the record as a whole contains substantial evidence

to support the agency's conclusion that "significant new information" was not added to the document. Substantial evidence means "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (Guidelines, § 15384, subd. (a).) Under this standard, County's decision not to recirculate the 2018 Final EIR is presumed to be correct, and Petitioners bear the burden of demonstrating that the determination is not supported by substantial evidence. (*Western Placer Citizens for an Agricultural & Rural Environment v. County of Placer* (2006) 144 Cal. App. 4th 890, 903.)

Petitioners' arguments regarding recirculation of the EIR are not well taken. As a preliminary matter, any new information regarding bald eagles was not buried in the 2018 technical review. It was set forth, almost in its entirety, in the errata section of the Final EIR. (AR 1045-1047.) Generally, technical data, analysis, and similar information placed in appendices should be summarized in the body of the EIR to ensure that the information is presented in a manner that will adequately inform the public and decision makers. Although an EIR must be upheld if it "reasonably sets forth sufficient information to foster informed public participation and to enable the decision makers to consider the environmental factors necessary to make a reasoned decision," courts have made clear that "[i]nformation 'scattered here and there in EIR appendices' or a report 'buried in an appendix,' is not a substitute for 'a good faith reasoned analysis.'" [Citations.]" (*Cleveland National Forest Foundation v. San Diego Association of Governments* (2017) 3 Cal.5th 497, 516.) Contrary to Petitioners' assertions, the summary in the Final EIR of the discussion in the 2018 technical review was sufficient to

adequately inform the public and the County of any new information regarding the bald eagle population in and around the Project Site.

Regarding the purported “new” information, the Final EIR errata section reiterates the 2018 technical review’s discussion of the presence of several natural perch trees on the Project Site and that artificial perch trees “may be an effective tool as both a mitigation measure and a management strategy.” (AR 1045, 5130.) As a result, the Final EIR recommends a survey of the natural perch trees “for their overall health and expected longevity,” and the development of a plan to install replacement trees “in advance to the projected loss of a perch tree to ensure there is no loss of perching opportunities.” (AR 1045.)

The Final EIR errata section also reiterates the general discussion in the 2018 technical review regarding the expansion of bald eagle populations in recent years and habituation to human presence and activity. (AR 1045-1046, 5130.) After noting that the bald eagle population has increased despite the expansion of human recreation and development along shorelines within prime habitat, the 2018 technical review and Final EIR state that bald eagles “are now found nesting in residential areas.” (AR 1046, 5130.) Therefore, the 2018 Final EIR, in reliance on the technical review, concludes that since “the Moon Camp area is not used by nesting pairs and only supports overwintering eagles and given the proposed mitigation measure for maintaining perch trees, the presence of 50 new homes in [the] rural residential community of Fawnskin will not adversely affect foraging behavior or other roosting behavior of the bald eagles.” (AR 1046, 5130.) The presence of two pairs of nesting bald eagles at Big Bear during the spring and summer of 2007 is noted and, as a result, the Final EIR recommends

“ongoing surveys of the Project site during breeding season ... to verify the continued absence of nesting bald eagles on the Project site.” (AR 1046.)

Nevertheless, the Final EIR again states that “any construction activities in proximity to the identified perch and most trees” and “any removal of perch trees or human activity resulting in light and/or noise impacts are considered a significant impact under CEQA. This threshold is so restrictive that there is no reasonable configuration to the 2011 ... Project that could avoid a significant impact to the bald eagle. Therefore, further project modifications would not avoid or substantially reduce the identified impacts to bald eagles. Therefore, impacts in this regard will remain significant and unavoidable.” (AR 1046-1047.)

Any failure of the Final EIR to note the presence of a resident pair of eagles nesting a mile from the Project Site or year-round juvenile eagles residing on the Project Site is harmless error. The Final EIR has already concluded that even with mitigation, the Project’s impacts on the bald eagle population will be significant and unavoidable. Any information regarding additional bald eagle nesting sites or the year-round presence of a few eagles does not show a new impact or a “substantial increase in the severity” of any impact. Nor does it show that any feasible Project alternative or mitigation measure will lessen the admittedly significant and unavoidable impacts of the Project. Instead, any additional information about the presence of bald eagles in and around the Project Site merely amplifies the discussion already contained in the Final EIR. The impacts of the Project remain significant and unavoidable regardless of whether a new pair of eagles is nesting nearby or whether juveniles have taken up year-round residence. This “new” information is not significant within the meaning of Public

Resources Code section 21092.1, nor does its exclusion from the Final EIR deprive the public of the opportunity to comment on a substantial adverse impact of the Project. (See, Guidelines, § 15088.5, subd. (a).) As a result, the revision and recirculation of the EIR is unnecessary.

The petition on this ground is denied.

**3. *The Cumulative impacts analysis is adequate.***

Petitioners contend the cumulative impacts analysis in the 2018 Final EIR is inadequate because it did not include any detailed analysis of the impacts of past, present, or future projects on the bald eagle population. According to Petitioners, the Final EIR failed to analyze the cumulative impacts of a long-term maintenance and facility upgrade project proposed in 2018 by the Big Bear Municipal Water District—including an expansion of the west launch ramp and adjacent parking lot on Big Bear Lake, and the dredging and installation of a sediment basin in Grout Bay. Petitioners contend the cumulative impact of these projects must be considered because they are in close proximity to the Project Site and the bald eagle nesting sites.

Respondents generally contend that Petitioners did not exhaust their administrative remedies on this issue, and therefore, Petitioners are barred from raising their objections now. Respondents' argument is misplaced.

Public Resources Code section 21177, which codifies the exhaustion doctrine in CEQA cases, has two prongs: (1) an action may not be brought unless the alleged grounds for non-compliance with CEQA were presented to the agency orally or in writing; and (2) the petitioner must have objected to approval of the project orally or in writing. (Pub. Resources Code, § 21177, subd. (a).) Petitioners bears the burden of

demonstrating the exhaustion of administrative remedies. (*Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 536.) The determination whether the alleged grounds for a project's non-compliance with CEQA were adequately raised turns on whether the agency had the "opportunity to receive and respond to articulated factual issues and legal theories *before* its actions are subjected to judicial review.' [Citation.]" (*North Coast Rivers Alliance v. Marin Mun. Water Dist.* (2013) 216 Cal.App.4th 614, 623.) "The purposes of the [exhaustion] doctrine are not satisfied if the objections are not sufficiently specific so as to allow the Agency the opportunity to evaluate and respond to them.' [Citation.]" (*Ibid.*) The same standard applies in cases involving challenges to planning and permitting decisions; objections must be specific enough to give the agency an opportunity to respond. (*Id.* at p. 631.)

Under Public Resources Code section 21177, subdivision (b), only a person who objected to the project approval may maintain an action challenging a CEQA decision. (*California Aviation Council v. County of Amador* (1988) 200 Cal.App.3d 337.) Judicial review is limited to parties who have objected to project approval during the agency's administrative proceedings, but any party who has objected may assert any issues that were timely raised by any person or entity during the administrative proceedings. (*Preserve Poway v. City of Poway* (2016) 245 Cal.App.4th 560, 573-574; *Citizens for Clean Energy v. City of Woodland* (2014) 225 Cal.App.4th 173, 191; *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1199.)

Petitioners exhausted their administrative remedies by timely raising issues regarding the cumulative impact analysis. On July 24, 2020—a few days before the County certified the Final EIR and approved the Project—Petitioners submitted

comments to the County expressing their concerns regarding deficiencies in the report. (AR 7741.) The public notice stated that written comments had to be submitted no later than the morning of the Board of Supervisors meeting. (AR 5939.) In their comment letter, Petitioners argued that a Water District project, as well as proposed projects regarding the launch ramp and dredging of Grout Bay, constituted a “changed circumstance” that should be included in the Final EIR’s cumulative impact analysis. (AR 7741.)

Although Petitioners submitted this letter during the public comment period, the County did not provide any response. Neither the County’s responses to comments in the Final EIR nor Findings of Fact and Statement of Overriding Considerations address the issue. Petitioners’ stated challenge was specific and the County had the opportunity to respond, but failed to do so. Therefore, Petitioners exhausted their administrative remedies regarding their challenge to the cumulative impacts analysis in the Final EIR.

According to Petitioners, since the Water District, boat launch ramp expansion, and Grout Bay dredging projects are in the vicinity of the Project Site and near the bald eagle nesting site, they must be taken into consideration in analyzing the Project’s cumulative impacts. (AR 7741.) Petitioners contend that absent consideration of these nearby projects, the Final EIR’s cumulative impacts analysis is inadequate.

“A cumulative impact is one ‘created as a result of the combination of the project evaluated in the EIR together with other projects causing related impacts.’ [Citation.]” (*Golden Door Properties, LLC v. County of San Diego* (2020) 50 Cal.App.5th 467, 527.) Cumulative impact is defined as “two or more individual effects which, when considered together, are considerable or which compound or increase other environmental

impacts.” (Guidelines, § 15355.) CEQA Guidelines section 15130, subdivision (a), requires an EIR to contain a discussion and analysis of cumulative impacts if: (1) the combined impact of the project and other projects is significant, and (2) the project’s incremental effect is cumulatively considerable. (1 Zischke & Kostka, *supra*, § 13.39, citing to Guidelines, § 15130, subd. (a); *Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209, 1228; *see also*, Guidelines, § 15355, subd. (b).) A project’s incremental effect is considered cumulatively considerable if those effects are significant “when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.” (Guidelines, § 15065, subd. (a)(3).)

An agency’s decision regarding the inclusion of information in the cumulative impacts analysis is reviewed under an abuse of discretion standard. (*City of Long Beach v. Los Angeles Unified School District* (2009) 176 Cal.App.4th 889, 906.) ““The primary determination is whether it was reasonable and practical to include the projects and whether, without their inclusion, the severity and significance of the cumulative impacts were reflected adequately.” [Citation.]’ [Citation.]” (*Ibid.*) ““CEQA requires an EIR to reflect a good faith effort at full disclosure; it does not mandate perfection, nor does it require an analysis to be exhaustive.” [Citation.]’ [Citation.]” (*Id.* at p. 898.) ““Therefore, “[n]oncompliance with CEQA’s information disclosure requirements is not per se reversible; prejudice must be shown.” [Citations.]’ [Citation.]” (*Ibid.*)

Although the 2011 Revised Draft EIR did not include a discussion of cumulative impacts, the 2010 Revised Draft EIR does contain a detailed cumulative impacts analysis. (See, Appendix A.2 to Final EIR, AR 3272-3283.) The stated basis for the



cumulative analysis in the 2010 Revised Draft EIR is derived directly from the applicable Guidelines provisions. (AR 3272.) The “list-of-projects” approach was followed wherein related projects and other possible development in the area of the Project Site were identified based on whether they, together with the Project, “could have cumulative impacts on the environment.” (AR 3272.) Although the Big Bear Water District projects were not included in the list, several residential and commercial projects were identified in the vicinity of the Project “that may produce a cumulative impact on the community.” (AR 3272-3273.)

The 2010 Revised Draft EIR noted that significant and unavoidable Project-related impacts to the bald eagle had already been identified, and that the removal of some perch trees for development of the Project’s residential lots “is considered a significant and unavoidable project-specific, as well as cumulative, impact.” (AR 3276.) Ultimately, it was determined that “when considered in conjunction with the other cumulative projects, the ... [P]roject would add incrementally to the cumulative significant impact on the bald eagle. Accordingly, cumulative impacts to the bald eagle are considered significant.” (AR 3277, 3283.) The same conclusions regarding the Project’s cumulative impacts on bald eagles were reiterated in the 2011 Revised Draft EIR. (AR 4364-4365.)

Although the Cumulative Project List was updated in the errata section in the 2018 Final EIR, it did not include the Water District projects. (AR 1035-1036.) The Final EIR also determined that any loss of natural perch trees will be mitigated by the installation of artificial perch trees. (AR 1045-1047.) Nevertheless, in both the responses to comments and the substantive discussion, the 2018 Final EIR acknowledged the

Project-specific and cumulative impacts to the bald eagle are significant and unavoidable—even without considering any possible impacts of the Water District projects. (AR 418, 1046-1047.)

Petitioners have not pointed to anything in the record indicating that the Water District projects “contribute to the cumulative impacts” on the bald eagles, or that inclusion of the impacts of the Water District projects in the cumulative impacts analysis will reveal “compound or increase” impacts on the bald eagle population on and around the Project Site.<sup>6</sup> (See, Guidelines, §§ 15130(b), 15355; *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 933-934.) Petitioners have also not demonstrated that the exclusion of the Water District projects from the cumulative impacts analysis understated the severity of the cumulative impact to the bald eagles. (*Rialto Citizens, supra*, 208 Cal.App.4th at pp. 933-934.) Given the conclusion that the Project-related impacts to the bald eagle will be “significant and unavoidable” regardless of mitigation, the cumulative impact to the bald eagle is not made more or less “significant and unavoidable” if the Water District projects are included in the cumulative impact analysis.

Petitioners have limited their challenge to the impacts to the bald eagle population. The severity and significance of impacts to the bald eagle are reflected adequately in the 2018 Final EIR without the inclusion of the Water District projects.

Therefore, the petition on this ground is denied.

***B. The Draft Long-Term Management Plan does not Constitute Impermissible Deferral of Mitigation.***

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<sup>6</sup> Petitioners do not contend the cumulative impacts analysis is inadequate as to any other environmental impact.

In August 2019, a draft Long-Term Management Plan (“LTMP”) was prepared “to provide permanent protection and long-term management for American bald eagle ... and rare plant species” for the Project. (AR 164.) Petitioners contend the LTMP is inadequate because it does not contain specific details and performance standards of the proposed mitigation measures that are intended to address the Project’s impacts on the bald eagles. As argued by Petitioners, although a conservation easement and a perch tree habitat enhancement program are supposed to provide for the protection of the bald eagles on and around the Project Site, the LTMP does not propose any criteria to ensure the success of these mitigation measures. Moreover, Petitioners contend the LTMP is inconsistent with the adopted mitigation measures and the evidence provided by RCK’s expert, and the benefits of the plan are illusory.

Petitioners also contend the LTMP does not adequately set forth performance criteria for the mitigation measures intended to protect the federally-protected ashy-gray Indian paintbrush plant species. According to Petitioners, the LTMP fails to require monitoring to ensure this plant population remains viable in perpetuity, does not include any performance standards for managing the plant sites, and does not provide detailed plans for corrective actions to be taken if the LTMP fails to ensure long-term viability of the plant.

Contrary to Petitioners’ contentions, the draft LTMP and the Mitigation Monitoring and Reporting Program (“MMRP”) adequately identified specific criteria to be applied in reducing the Project’s impacts. The MMRP incorporates specific performance standards and commits the County to mitigate impacts on the bald eagle and rare plant populations. Although the LTMP is only a draft, it sufficiently describes the framework

for achieving these standards, and presumably the final iteration of this document will include the same measures. As a result, the MMRP and LTMP do not impermissibly defer formulation of mitigation measures.

““Impermissible deferral of mitigation measures occurs when an EIR puts off analysis or orders a report without either setting standards of demonstrating how the impact can be mitigated in the manner described in the EIR.” [Citation.]” (*Center for Biological Diversity v. Department of Fish & Wildlife* (234 Cal.App.4th 214, 240-241; *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 280-281.) “[W]hen, for practical reasons, mitigation measures cannot be fully formulated at the time of project approval, the lead agency may commit itself to devising them at a later time, provided the measures are required to “*satisfy specific performance criteria articulate at the time of project approval.*” [Citation.]” (*Center for Biological Diversity, supra*, 234 Cal.App.4th at p. 241.) “In sum, “it is sufficient to articulate specific performance criteria and make further [project] approvals contingent on finding a way to meet them.” [Citation.]” (*Ibid.*)

“CEQA does not define how specific the performance standards set forth in an EIR must be to defer formulating mitigation measures.” (*Center for Biological Diversity, supra*, 234 Cal.App.4th at p. 242.) Nevertheless, “[a]n EIR is inadequate if “[t]he success or failure of mitigation efforts ... may largely depend upon management plans that have not yet been formulated, and have not been subject to analysis and review within the EIR.” [Citation.]” (*Preserve Wild Santee, supra*, 210 Cal.App.4th at p. 281.)

The MMRP adopted by County provides mandatory criteria and performance standards. Mitigation Measure MM BR-1a provides that “a conservation easement shall

be placed upon the 10-acre Dixie Lee Lane property”—the Sugarloaf Pebble Plain—to “provide for the continued protection and preservation of the property through development of a Long-Term Management Plan (LTMP).” (AR 1048, 5372.) Similarly, Mitigation Measure MM BR-1b provides that a 9.0-acre conservation easement will be established on the non-residential lots to “provide for the continued protection and preservation of the American Bald Eagle and rare plant habitat through development of a Long-Term Management Plan (LTMP).” (AR 1049-1050, 5372.) Both MM BR-1a and MM BR-1b state:

The LTMP shall provide for the preservation, restoration, and enforcement of the Conservation Areas so that each area is maintained, and restored where needed, to its natural condition. The LTMP will also include documentation of baseline conditions, any needed site preparation, anticipated restoration/enhancement activities, a biological monitoring program, the creation of a set of success criteria for managing the site, anticipated maintenance activities, an annual reporting process, and a set of contingency or adaptive management measures to be implemented in case success criteria are not being met ....”

(AR 1049, 5372.)

Costs for these mitigation measures are to be identified and documented in a Property Action Report (“PAR”). (AR 1049, 5372-5373.) This information “will be used to develop a non-wasting endowment that will ensure all costs will be available to establish the site, conduct any needed restoration and enhancements, and to fund reoccurring annual cost (*sic*) needed to manage the site in perpetuity.” (AR 1049, 5372-5373.)

### **1. Mitigation for bald eagles**

Sufficient performance standards are set forth regarding mitigation of the Project’s impacts on the bald eagle population. Mitigation Measure MM BR-4 provides

specific criteria regarding the bald eagle perch trees on the Project Site. If any designated perch trees become hazardous and have to be removed, replacement of the trees "will be either (1) at a 5:1 ratio with the creation of artificial perch trees within the conservation easement area, or (2) by enhancing other trees through trimming and limbing to make suitable for perching." (AR 126, 5377.) In addition, MM BR-4 states that any development on the Project Site "must avoid impacts to trees larger than 24 inches dbh and their root structures to the maximum extent feasible," and if any non-perch trees larger than 24 inches dbh are removed, "then a replacement ratio of 2:1 shall be required and replacement trees shall be 24-inch box trees or larger." (AR 126, 5377.) Prohibitions on construction and landscaping improvements on or around the root structures or within the dripline of these perch trees are also contemplated. (AR 126, 5377.)

Mitigation Measure MM BR-5 similarly provides: "Prior to vegetation clearing, grading, or other disturbance, the Project site shall be surveyed to identify all large trees (i.e., greater than 20 inches in diameter at 4.5 feet from the ground) within 600 feet from the high water line." (AR 5377.) Identified trees that meet these criteria will be documented and tagged, and any Project development "shall avoid impacts to tagged trees and their root structures." (AR 5378.) In addition, Mitigation Measure MM BR-6 provides: "Seven days prior to the onset of construction activities, a qualified biologist shall survey within the limits of project disturbance for the presence of any active raptor nests." (AR 5378.) Found nests "shall be mapped on the construction plans," and if nesting activity is present, "the active site shall be protected until nesting activity has ended ...." (AR 5378.) Restrictions on construction activity are required during the bald

eagle nesting season, “or until nests are no longer active as determined by a qualified biologist.” (AR 5378.) These restrictions include minimum clearing limits around nesting sites and the establishment of buffer areas for access and surveys. (AR 5378.)

Encroachment into these zones “shall only be allowed if it is determined by a qualified biologist that the proposed activity shall not disturb the nest occupants,” and construction during nesting season can occur only if it is determined that the fledglings have left the nest. (AR 5378.)

The draft LTMP largely reiterates the provisions of MM BR-1a and MM BR-1b, and provides additional information regarding implementation of a long-term monitoring program. (AR 164, 185.) The LTMP contemplates creation of two conservation easements across five fenced open-space non-residential lots, including the entire lakefront. (AR 185, 188.) One easement will be conveyed to “a California Fish and Wildlife (CDFW) agency-approved land management entity” for the “implementation and monitoring of the conditions” set forth in the LTMP and other mitigation measures. (AR 164.) The second easement will be conveyed to CDFW to provide access to verify compliance with the Project’s mitigation measures and conditions of approval with regard to sensitive biological resources. (AR 164.) The Statement of Overriding Considerations adopted by County states that these conservation easements “will be managed pursuant to a Long Term Management Plan *approved by the* [CDFW-approved] *Conservation Entity* ....” (AR 160, emphasis added.)

Regarding specific plans to address the Project’s impacts to the bald eagle, the LTMP provides that a perch tree habitat enhancement program will be implemented on the conservation easement. (AR 185.) Under the program, the conservation easement

manager will identify certain trees for trimming to improve their suitability for bald eagle perching, and the manger will meet annually with a certified arborist to inspect these enhanced perch trees as well as all sixty-five perch trees identified in the database. (AR 185-186, 190.) Other perch trees may be conserved by means of building setbacks, Caltrans setbacks along the adjacent highway, or pre-construction surveys. (AR 186.) The conservation manager will also supervise the creation of new perch trees to mitigate for lost or removed trees. (AR 191.)

The LTMP also states that the bald eagles' seasonal use of the Project Site will be routinely monitored through monthly participation in the wintering bald eagle censuses. (AR 190.) This is to "ensure that the use of the property by bald eagles can be documented and correlated with bald eagle use of the Big Bear area as a whole." (AR 190.) Routine monthly monitoring of bald eagle use of perch trees will be conducted in conjunction with the census during the seasonal closure period from December to April. (AR 190.) A residents' "Neighborhood Eagle Watch" will also allow residents of Moon Camp to monitor bald eagle perching and report the information to the conservation easement manager. (AR 190.)

Petitioners contend the conservation benefit of the lakefront parcels is illusory, and note that Mitigation Measure MM BR-8 only prohibits motorized boating between December 1st and April 1st. According to Petitioners' expert, Dr. Peter Bloom, the proposed December-to-April closure of the marina and lakefront to the public is not an adequate mitigation measure because such a closure is already required, and the area will be used by the public for other activities. (AR 9850.)



Respondents' expert, Dr. Timothy Krantz, refutes this contention. Dr. Krantz agrees that although boating is already prohibited on the lake during the winter months, pedestrian foot traffic and other activities are not currently prohibited. (AR 9850.) The mitigation measures for the Project "will enforce a total closure of all human activities in the shoreline Open Space lots during winter months." (AR 9850.) Mitigation Measure MM BR-1b expressly states that the conservation easements "shall be fenced" and "shall, at minimum, restrict all use of the property that has the potential to impact Bald Eagle perch trees, [and] the quality of valuable biological habitat..." (AR 5373.) Mitigation Measure MM BR-1c further provides that except for certain limited access by Moon Camp residents between April and December, pedestrian and motor vehicle access to the conservation areas is restricted. (AR 5373.) Enforcement provisions will be included in the subdivision's CC&Rs regarding any violations. (AR 5373.) Therefore, mitigation for the bald eagle population is not impermissibly deferred.

The petition on this ground is denied.

## ***2. Mitigation for rare plants***

Mitigation for the ashy-gray Indian paintbrush habitat is adequate. Mitigation Measures MM BR-1a and MM BR-1b state that the conservation easement shall restrict all use of the property that has the potential to impact the quality of the rare plant habitat. (AR 5372-5373.) The measure also calls for fencing and signs prohibiting entry and indicating the sensitive nature of the habitat. (AR 5372.) The LTMP contemplates the installation of fencing around portions of the conservation easement, as well as the construction of a designated trail that will be open only to Moon Camp residents and subject to seasonal restrictions. (AR 188.) The conservation easement manager is to

monitor and remedy any incidents of vehicular trespass on the habitat, and consult with botanical authorities to conduct major repairs and restoration if necessary. (AR 191.)

The LTMP also contemplates off-site mitigation through the acquisition, fencing, permanent preservation, and management of a ten-acre site known as the “Sugarloaf Pebble Plain”—the Dixie Lee Lane parcel. (AR 183.)

The petition on this ground is denied.

### ***3. Monitoring under the LTMP***

Petitioners’ contention that the LTMP does not require monitoring is unsupported. The LTMP expressly states that the conservation easement manager is to file an annual monitoring report with County and CDFW summarizing all findings regarding the monitoring reports for bald eagles and the rare plant habitats. (AR 190.) The conservation easement manager is also tasked with monthly inspections of the easements to ensure that all signs and fences are properly maintained, and to enforce the seasonal closures of the area. (AR 189.) In addition, all of the bald eagle perch trees are to be inspected annually during the May monitoring inspection and their condition is to be documented. (AR 190.)

Although the LTMP does not set forth quantitative or qualitative metrics for the achievement of these goals, the proposed management strategies are intended “to further refine and implement the mitigation measures identified in the Project Environmental Impact Report (EIR).” (AR 164.) The MMRP provides specific actions, performance standards, and metrics that must be taken and met to mitigate the Project’s impacts on the bald eagle and rare plant populations. These mitigation measures are reflected in the LTMP, and the methods by which the measures are to be

carried out by the conservation easement manager, and the timing of these measures, are clearly stated. Therefore, the County did not improperly defer formulation of the mitigation measures.

The petition on this ground is denied.

***C. The Dixie Lee Lane Pebble Plain does not Mitigate Impacts on the Ashy-Gray Indian Paintbrush.***

Petitioners contend the County cannot rely on the Dixie Lee Lane parcel as off-site mitigation for the Project's impacts on biological resources. The County acquired the Dixie Lee Lane parcel in the 1980s as mitigation for the Big Bear High School site and other future projects. (AR 786-787, 4563-4565.) Petitioners argue that documents from that time do not indicate that the Dixie Lee Lane parcel would be subdivided into a two-acre parcel and an eight-acre parcel, with the former serving as mitigation for the high school project and the latter being reserved as mitigation for future projects. (AR 7791.) Petitioners argue that although the Dixie Lee Lane parcel was never formally recorded with regard to the high school project, evidence in the record shows that a portion of it was set aside as mitigation for the high school project. As a result, Petitioners contend the mitigation measure is legally infeasible because the County cannot now claim that the entire ten-acre parcel will serve as partial mitigation for the Project's impacts to the ashy-grey Indian paintbrush.

Petitioners also contend that the County's conclusion that preservation of the Dixie Lee Lane parcel will partially mitigate the Project's impacts on the ashy-gray Indian paintbrush is unsupported. Citing to the Focused Special Status Plant Survey, Petitioners assert that there is no significant population of the ashy-gray Indian

paintbrush on the Dixie Lee Lane parcel. (AR 838-839.) Petitioners argue that the Final EIR fails to explain how preservation of the Dixie Lee Lane parcel will partially mitigate the impacts to the rare plant species since it does not always occur in the pebble plain habitat.

In 1981, the County prepared an EIR for the Big Bear High School project. (AR 7781.) At the time the high school project was examined, the ashy-grey Indian paintbrush was considered endangered in the Big Bear Valley, and its federal status as “threatened” or “endangered” was pending. (AR 7786.) Since it was determined that the high school project would reduce the rare plant habitat, an off-site mitigation measure was proposed to implement an exchange of non-sensitive land on the subject parcel for a dedication to a rare plant preserve. (AR 7789-7790.) The ten-acre rare plant preserve was to be recorded with the final site approval. (AR 7791, 7792.)

The 2018 Final EIR states that the “rare plant preserve” is now known as the Dixie Lee Lane pebble plain—a ten-acre privately owned property that has been fenced for 25 years—and “is one of the most discrete pebble plain occurrences existing in the Big Bear Valley.” (AR 786.) In the 2011 Revised Draft EIR, the revised Supplemental Focus Special Status Plant Species Survey stated: “The Dixie Lee Lane pebble plain was originally proposed as a mitigation bank for the partial offset of impacts of development of the Big Bear High School ....” (AR 786, 4365.) Although the high school EIR did not discuss the configuration of the rare plant preserve in any detail, the Final EIR and LTMP for the current Project asserts that at that time, the County intended to set aside two acres of the ten-acre parcel as mitigation for impacts to pebble plain resources and to use the remaining eight acres “for mitigation of other projects with

pebble plain-related impacts.” (AR 183, 786-787, 4563.) The Final EIR and LTMP also note that although the parcel was surveyed, the conveyance of the land was never formally recorded. (AR 183, 787, 4563.)

In response to comments in the 2018 Final EIR, the County contradicts itself regarding the status of the Dixie Lee Lane parcel. First, the County states that the 2011 Revised Draft EIR did *not* indicate that the Dixie Lee Lane parcel was already partial mitigation for impacts related to the high school. (AR 786.) Then, in the same response, the County claims the revised Supplemental Focus Special Status Plant Species Survey included in the 2011 Revised Draft EIR *did* state that the Dixie Lee Lane parcel had originally been proposed as a mitigation bank for the partial offset of impacts from the high school project. (AR 786.) The County then contradicts itself again. According to the County, the revised plant survey in the 2011 Revised Draft EIR stated that “although a portion of the Dixie Lee Lane property was originally proposed as mitigation of impacts from development of a high school, there is no evidence that any portion of the property was actually pledged as mitigation.” (AR 787.) The County similarly contradicts itself in response to another comment, first asserting that the “Dixie Lee Lane property has not been previously pledged as mitigation for another development project in the Big Bear area . . . ,” but then asserting that the “Dixie Lee Lane parcel was previously proposed for mitigation, but that proposal was not completed.” (AR 848.) The County then asserts that the parcel “is still available for mitigation purposes.” (AR 848.)

The confusion extends to the issue of whether the Dixie Lee Lane parcel actually serves as adequate off-site mitigation for the ashy-grey Indian paintbrush. One of the primary objectives of the revised special status plant species survey contained in the

2011 Revised Draft EIR was to obtain a more definitive assessment of the ashy-grey Indian paintbrush—a species that “occurs mostly in association with pebble plains habitat,” but on the Project Site, occurs in the pine forest habitat. (AR 4560.) The ashy-grey Indian paintbrush is a partially parasitic species that is usually associated with the Kennedy’s buckwheat species if found on pebble plains. (AR 4560.) The survey states, however, that “this pebble plains indicator species does not occur on site,” but rather other buckwheat or mugwort species are present. (AR 4560.) After examining the various residential and conservation easement lots on the Project Site, the survey found approximately 5,500 ashy-grey Indian paintbrush plants. (AR 4562, 4565; *see also*, 4354.) The survey then estimated that almost 5,000 of the plants—approximately 88 percent—will be protected within the on-site conservation easements. (AR 4562, 4565.)

The Dixie Lee Lane parcel was then examined. (AR 4563-4565.) After describing the Dixie Lee Lane property as a “discrete pebble plain situated in a pinyon-juniper/ Jeffrey pine woodland,” the survey notes that the parcel is “a textbook example” of the unique habitat with occurrences of the ashy-grey Indian paintbrush, and that it was being proposed as part of the “rare plant mitigation program” for the Project. (AR 4564.) But the survey then states that the ashy-grey Indian paintbrush “was infrequent on the [Dixie Lee Lane] pebble plain, with only 21 plants tallied,” and that there was a high incidence of mortality of the associated buckwheat species. (AR 4565.)

Nevertheless, , the 2011 Revised Draft EIR directly contradicts the survey and states that the Dixie Lee Lane parcel contains “very high densities of the two indicator species,” that “multiple occurrences” of the plant were observed on the parcel, and the parcel “serves as suitable habitat for the Ashy-Gray Indian Paintbrush.” (AR 4353,

4355m 4371.) Therefore, the EIR found that “permanent preservation of the ten-acre Dixie Lee property will provide further mitigation for impacts to the Ashy-Gray Indian Paintbrush species,” and with a total of 15.38 acres of habitat set aside, the on-site mitigation of the Project’s impacts on the plant species will be “at more than a 7:1 ratio” and the total mitigation will be “on an approximately 10:1 basis.” (AR 4354-4355.)

The survey also states that previous surveys misidentified the presence of 0.69 acres “pebble plain” on one of the non-residential lots. (AR 4566; *see also*, 4352-4353.) After noting the lack of indicator plant species on the lot, the survey concluded “there is technically no pebble plain on the property that requires mitigation.” (AR 4566.) The 2011 Revised Draft EIR reiterates this conclusion, and states that since “no true pebble plain habitat exists onsite, disturbance of the area previously characterized as pebble plain and included within the boundaries of Lot A, does not result in a significant impact.” (AR 4372.)

The errata section of the 2018 Final EIR notes that a 2016 update of the plant survey was conducted. (AR 1039.) The update letter confirmed the findings of the 2010 survey. (AR 5147.) As a result, the Final EIR concludes that the Project “will impact approximately 2.87 acres of the 7.71 acres of [ashy-grey Indian paintbrush] habitat,” and that with the 4.84 acres of conservation easement, there will be “an on-site mitigation ratio of 1.68:1.” (AR 1040, 1043.) The Final EIR also cites to the 2018 plant survey and incorrectly asserts that the survey found “multiple occurrences” of the ashy-grey Indian paintbrush on the Dixie Lee Lane parcel. (AR 1043.) As a result, the Final EIR concludes that the ten-acre Dixie Lee Lane property “will provide further mitigation for impacts to the Ashy-Gray Indian Paintbrush species,” and with the inclusion of the

parcel, the Project's impacts on the species will be mitigated "on an approximately 5:1 basis." (AR 1040, 1043-1044.)

In response to public comments in the Final EIR, the County admits the 2010 supplemental sensitive plant survey "did not identify significant occurrences of ashy-grey Indian paintbrush on the Dixie Lee Lane mitigation parcel." (AR 843.) The County also states that prior biological surveys had mischaracterized a portion of the Project Site as "true pebble plain," and thus the Dixie Lee Lane parcel "is not technically mitigation for any impacts to pebble plain habitat." (AR 848.) The County goes on to assert that "the project will not have a significant impact on pebble plain habitat; hence, no mitigation is required." (AR 848-849.) Nevertheless, the County stated that the Dixie Lee Lane parcel "does comprise suitable habitat for the ashy-grey Indian paintbrush," and it would adequately mitigate short-term and long-term impacts to the plant species as well as impacts to the pebble plain habitat. (AR 843, 849, 850-851.) In response to another comment, the County agrees that permanent preservation of the Dixie Lee Lane parcel "would not, in and of itself, adequately mitigate for the Project's impacts to the ashy-grey Indian paintbrush." (AR 1011.) But in response to another comment, the County states that the Project "will establish the first of its kind rare plant preserve dedicated to ashy-grey Indian paintbrush ... and the preservation of pebble plain ... will add to the incremental value of such a preserve." (AR 787.)

Respondents ignore these contradictions regarding the status of the Dixie Lee Lane parcel as mitigation for other projects, and whether its preservation will mitigate the Project's impacts on the ashy-grey Indian paintbrush and its pebble plain habitat. Instead, Respondents label Petitioners' arguments regarding the Dixie Lee Lane parcel



as “speculation” and “unsubstantiated theories.” (Joint Opp. Brief, 21:28-22:5.)

However, the inconsistent statements in the record regarding the presence of ashy-grey Indian paintbrush on the Dixie Lee Lane parcel, whether the Project’s impacts to pebble plain habitat needs to be mitigated, and whether any portion of the Dixie Lee Lane parcel was used to mitigate the impacts of the high school project undermines the EIR’s analysis of the mitigation measures needed to reduce the Project’s impacts on both the plant species and its associated habitat.

Courts generally defer to an agency’s analysis of the effectiveness of proposed mitigation measures where substantial evidence supports the agency’s conclusions. (*Sacramento Old City Association v. City Council* (1991) 229 Cal.App.3d 1011, 1027.) Under the CEQA Guidelines, when comments object to the EIR’s analysis of a significant environmental issue, the agency’s response to those comments must be detailed and provide a reasoned, good faith analysis. (Guidelines, § 15088, subd. (c); *Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, 940.) If the responses in the final EIR are well reasoned, a court will not second-guess the agency’s conclusions. (See, e.g., *City of Long Beach v. Los Angeles Unified School District* (2009) 176 Cal.App.4th 889.)

Here, however, the many inconsistent statements regarding the Dixie Lee Lane parcel as mitigation for the ashy-grey Indian paintbrush and the pebble plain habitat render the EIR as inadequate. Not only is there a question as to whether the entire ten-acre parcel is still available as an off-site mitigation measure, but also the County’s actual conclusions on this issue are clouded by the contradictory statements. Although analysis in an EIR need not be perfect, the court cannot determine the County’s analytic

path or conclusions with any certainty, and thus, cannot determine whether the County's conclusions are supported by substantial evidence. Therefore, the court finds that substantial evidence does not support the County's finding that the Dixie Lee Lane parcel will serve as adequate mitigation for the Project's impacts on the ashy-grey Indian paintbrush or the pebble plain habitat.

The petition on this ground is granted.

***D. Analysis of Pedestrian Safety Hazards is Adequate.***

Petitioners contend the Final EIR is inadequate because it failed to analyze the safety impacts associated with the lack of pedestrian access across Highway 38 from the Project Site to the marina. Petitioners note that the 2005 EIR raised the issue of pedestrian safety issues, and stated that relocation of Highway 38 would be subject to compliance with Caltrans conditions and standards, including pedestrian crossing requirements. (AR 1136, 1194.) In addition, Petitioners contend that before the County approved the Project, public comments raised the issue again, asserting that the EIR should analyze whether the signage proposed under the conditions of approval would adequately mitigate the safety hazard.

First, it must be determined if Respondents have a duty to investigate whether the presence of the marina across Highway 38 presented potential impacts to pedestrian safety. (See, e.g., *City of Maywood v. Los Angeles Unified School District* (2012) 208 Cal.App.4th 362.) Petitioners, however, have not cited to any legal authority demonstrating an analysis of pedestrian safety hazards is required under CEQA. (See, e.g., *Magan v. County of Kings* (2002) 105 Cal.App.4th 468, 477, fn. 4.) Petitioners also

have not alleged that any purported pedestrian safety issue is a violation of the Planning and Zoning Law.

Nevertheless, the County did not ignore pedestrian safety. Originally, the design of the Project included relocating approximately one-half mile of Highway 38. (AR 1194.) The 2005 EIR stated that the proposed highway construction “would be subject to compliance with various development criteria and Caltrans standards relative to setbacks, prohibited direct access, the provision of left turn lanes ..., shoulder width requirements, and pedestrian crossing requirements.” (AR 1194.) In addition, the EIR stated that the proposed realignment would be subject to County and Caltrans standards and regulations, and with the subsequent amendment to the transportation and circulation maps, “the Project would be considered compatible and consistent with the General Plan.” (AR 1194.)

The 2010 Revised Draft EIR states that “Project implementation could increase hazards to vehicles, pedestrians and bicyclists due to increased traffic and the addition of eight new intersections on SR-38.” (AR 2912.) The proposed mitigations included restriction of parking along the shoulder of the highway, construction of turn pockets, installation of stop signs at all intersections, and limitation of landscaping to increase visibility at those intersections. (AR 2912.) It is not known if the intersection improvements included pedestrian crossings.

Relocation of Highway 38, however, is no longer part of the Project’s design. (AR 3311.) Petitioners also admit that state law and Caltrans regulations provide only that they *may* require marked or unmarked pedestrian crossings to ensure motor vehicles yield to pedestrian traffic—not that crossings are mandatory. Nevertheless, Petitioners

contend the requirements associated with the relocation of Highway 38 regarding a pedestrian crossing are still applicable. In support, Petitioners only cite to a reference in the 2010 Revised Draft EIR to the County's Circulation and Infrastructure Policy CI 6.1, which generally requires "safe and efficient pedestrian and bicycle facilities in residential ... developments to facilitate access to public and private facilities and to reduce vehicular trips." (AR 3347.) But this policy is set forth in the Air Quality Analysis Report of the 2010 EIR—not the traffic and circulation section of the report.

Moreover, Petitioners ignore that with the elimination of the Highway 38 relocation, the 2010 Revised Draft EIR states that the Project does not contemplate any direct access to the highway from individual residential lots. (AR 2969.) In addition, since residential lots south of Highway 38 were deleted from the Project, Moon Camp residents' access to the Project Site north of the highway was reduced to two streets, and private parking and access to the marina would be provided through one of the non-residential lots. (AR 2969.)

On July 9, 2018, Caltrans sent a letter regarding its review of the Focused Traffic Impact Assessment for the Project. (AR 5155-5157.) Under a section entitled "Community Planning," Caltrans recommended that the Site Plan be updated to show pedestrian access from the Project Site to the marina, and referred the County to the "Highway Design Manual 100, Topic 105" for more information regarding pedestrian facilities.<sup>7</sup> (AR 5156, 9106.) The section of the manual pertaining to "Pedestrian Crossings" states that pursuant to the California Vehicle Code, such crossings "are

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<sup>7</sup> Caltrans previously reviewed the Traffic Impact Analysis for the 2010 Revised Draft EIR. In its May 2010 letter, Caltrans did not make any recommendations regarding a pedestrian crossing for the Project, even though the relocation of Highway 38 was still a part of the Project at that time. (AR 231-232.)

provided across highways as marked and unmarked crosswalks, thereby requiring vehicles to yield to pedestrians.” (AR 9111.) But installation of pedestrian facilities on a highway is not required.

On August 15, 2018, RCK’s traffic consultants provided another Focused Traffic Impact Assessment for the Project. (AR 5161-5279.) It contained information regarding pedestrian studies conducted at various times of day at intersections near the Project Site. (AR 5204, 5236, 5268.) Each study showed little to no pedestrian activity. Concurrently, RCK’s traffic consultants responded to the Caltrans recommendation. Although the Caltrans recommendation did not characterize the nature of the recommended pedestrian crossing, RCK’s consultants noted that “there is no uncontrolled pedestrian crossing on SR-38 for several miles east and west of the project site.” (AR 5152.) As a result, the consultants asserted that “providing an uncontrolled pedestrian crossing would be inconsistent with the current conditions and driver expectation and has not been recommended.” (AR 5152.)

The County, in turn, adopted this response in its staff reports (AR 5453) and the Final EIR (AR 240). The October 4, 2018 Planning Commission staff report states that the County would institute a new condition of approval for the Project to “ensure that an acceptable crossing of SR-38 is provided.” (AR 5453.) Accordingly, the Conditions of Approval state that prior to recordation of the final map for the Project, “[h]omeowner information provided by the HOA shall discourage pedestrian crossing of SR 38, and signage warning of cross traffic shall be placed at the entry/exit gate, to discourage unsafe crossing of the state highway.” (AR 5482, 5680.)

Petitioners have not demonstrated inadequacy in the EIR, either through omission of a required discussion or a lack of adequate analysis. Petitioners have not demonstrated that any alleged CEQA violation constituted a prejudicial abuse of discretion. (See, *Association of Irrigated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1392.)

Therefore, the petition on this ground is denied.

***E. Analysis of Wildfire Safety Hazard is Inadequate.***

Petitioners contend the EIR is deficient because it does not adequately discuss the wildfire risks and emergency evacuation conditions in and around the Project. According to Petitioners, the County failed to consider that fire insurance in Big Bear Valley has become difficult, if not impossible, to obtain. Petitioners assert that the Final EIR ignores results of the County's independent review of emergency road capacity and the ability of residents to evacuate the area in case of wildfire. Petitioners argue that the Project will exacerbate wildfire risk in the area.

Under CEQA Guidelines, an EIR is required to "evaluate any potentially significant direct, indirect, or cumulative environmental impacts of locating development in areas susceptible to hazardous conditions (e.g., floodplains, coastlines, wildfire risk areas), including both short-term and long-term conditions, as identified in authoritative hazard maps, risk assessments or in land use plans, addressing such hazards areas." (Guidelines, § 15126.2, subd. (a).)

The 2010 Revised Draft EIR acknowledges: "Wildfire is the primary safety issue in the mountain area," and "[a]ny residential ... land use could be impacted by a wildfire in the areas." (AR 3160.) The Project Site is located in a high fire hazard area and

included San Bernardino County Fire Safety Area 1 ("FS1"). (AR 3192, 3195.)

Therefore, the Project is subject to compliance with various requirements in the County's Development Code, including setbacks and emergency access. (AR 3192, 3195.) The EIR notes that a private research group, Insurance Service Organization, has given the community of Fawnskin a fire danger rating of 9, with 1 representing the lowest threat and 10 representing the highest threat. (AR 3192.)

Regarding emergency evacuation, the 2010 Revised Draft EIR acknowledges that development of the Project will increase the demand for fire protection in the area because it will increase the local population by approximately 116 persons. (AR 3196.) Highway 38 serves as the evacuation route for the Fawnskin area, and residents can evacuate the community either by going directly west towards San Bernardino and Interstate 210, or by going east towards Big Bear City and Lucerne Valley. (AR 3197.) In the event of an evacuation, the County's Emergency Operations Plan is activated and residents of the area will be instructed on the appropriate actions to take. (AR 3197-3198.) Although the County has not released the Emergency Operations Plan for security reasons, the EIR states that the County does have an emergency evacuation plan that will be implemented in the event of an emergency. (AR 3198.) This plan has been used successfully in past wildfire emergencies, and the 2010 Revised Draft EIR concludes that the addition of the Project "will not have a significant impact on the evacuation of Big Bear Valley." (AR 3198.) In addition, the Project contemplates that emergency access to the development will occur through the two main driveways, and an additional fire gate will be provided on the east end of the Project Site. (AR 3240.)

Various residents submitted comments objecting to the Project on the grounds that it would exacerbate the already-high fire risk in the area and that evacuation routes were inadequate. (See, e.g., AR 6152, 6163, 6174, 6179-6186, 7446-7454.) But Petitioners do not cite to any expert traffic impact analysis regarding the Project's impacts on emergency evacuation routes. In addition, although Petitioners refer to conclusions purportedly reached in the Mountain Region Emergency Road Capacity Study, they do not provide a copy of the document nor is one included in the record.

In opposition, Respondents reiterate the information included in the 2010 Revised Draft EIR regarding evacuation routes. Respondents challenge Petitioners' reliance on the Mountain Region Emergency Road Capacity Study—a report that Respondents contend was prepared more than 10 years ago. (Opp. Brief, 30:14-15.) But Respondents do not cite to any underlying data, reports, or studies regarding emergency evacuation plans or routes that support the conclusions reached in the 2010 Revised Draft EIR. The County's designation of Highway 38 as an evacuation route is not entitled to a presumption that the roadway is adequate.

In the context of routine traffic and circulation, the 2010 Revised Draft EIR evaluated the potential deficiencies of the roadways and intersections in and around the Project Site, and the discussion based on the discontinued "level of service" (LOS) metric is revealing. (AR 2911.) It was found that implementation of the Project would contribute to the utilization of the intersections during certain peak hours—intersections that already experience significant congestion based on LOS.<sup>8</sup> (AR 2911, 3226-3227,

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<sup>8</sup> Traffic congestion based on level of service ("LOS") is no longer considered a significant impact on the environment under CEQA. (Guidelines, § 15064.3, subd. (a); *Citizens for Positive Growth & Preservation v. City of Sacramento* (2019) 43 Cal.App.5th 609, 626.) But LOS may still be relevant to analyses of other potential environmental impacts such as air quality or, as here, wildfire evacuation.



3238-3239.) As a result, it was determined the Project's impact on traffic in the area will be "potentially significant" without mitigation. (AR 3240.) However, the EIR inexplicably did not find these same deficiencies to be a significant impact in the context of a wildfire requiring emergency evacuation.

Although Petitioners have only cited to unsubstantiated opinions regarding the Project's exacerbation of wildfire hazards, Respondents have not pointed to substantial evidence in the record supporting a finding that the identified evacuation routes are adequate to safely and efficiently evacuate the residents and guests of the development. The EIR's discussion of wildfire hazards ignores conclusions set forth in the analysis of traffic and transportation impacts. The draft EIRs and 2018 Final EIR do not address whether the contemplated mitigation measures addressing transportation impacts will also accommodate vehicle traffic in the event of an emergency evacuation. Nor is there any discussion regarding the actual capacity of Highway 38 or the connecting roadways to accommodate evacuation from the area. As a result, the EIR fails as an informational document.

Therefore, the petition on this ground is granted.

## V

### Conclusion

As explained above, the petition is granted on the following limited grounds:


1. Substantial evidence does not support the County's finding that the Dixie Lee Lane Pebble Plain parcel adequately mitigates the Project's impacts on the ashy-grey Indian paintbrush or pebble plain habitat.

2. The EIR fails as an information document regarding the Project's impacts on wildfire evacuation risks.

All other grounds for the petition are denied.

Counsel for petitioner is ordered to prepare a proposed writ and judgment.

Dated: January 20, 2022

A handwritten signature in cursive script that reads "David Cohn". The signature is written in black ink and is positioned above a horizontal line.

David Cohn  
Judge of the Superior Court