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MARINA COAST WATER DISTRICT

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SUPERIOR COURT FOR THE STATE OF CALIFORNIA
COUNTY OF SANTA CRUZ

MARINA COAST WATER DISTRICT, AND DOES 1-10,

Petitioner and Plaintiff,

v.

CALIFORNIA COASTAL COMMISSION, AND DOES 11-50,

Respondents and Defendants.

CALIFORNIA-AMERICAN WATER COMPANY, a California water corporation, AND DOES 51-100,

Real Party in Interest.

Case No.: CV180839

MARINA COAST WATER DISTRICT'S OPENING BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

(California Environmental Quality Act (CEQA))

[Code Civ. Proc., § 1094.5, subd. (g); Pub. Resources Code, §§ 21168 30803, subd. (a); Code Civ. Proc., § 525 et seq.]

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I. INTRODUCTION

This action challenges Respondent California Coastal Commission's ("CCC's") approval of two Coastal Development Permits ("CDPs") for Real Party in Interest California American Water Company's ("Cal-Am's") Slant Test Well Project ("slant well" or Project) under the Coastal Act (Pub. Resources Code, § 30000 et seq.) and California Environmental Quality Act ("CEQA") (Pub. Resources Code, § 21000 et seq.). [1] The Project will pump over 4,000 acre-feet ("AF") of water per year from the overdrafted Salinas Valley Groundwater Basin ("SVGB") "to gather technical data related to the potential hydrogeologic and water quality effects that would result from using similar wells at or near this site to provide water for the proposed Monterey Peninsula Water Supply Project [MPWSP]." (AR4142; 4158.) [2] As both the CCC and Cal-Am have acknowledged, the Project is a "necessary precursor" and the first phase of Cal-Am's MPWSP, which proposes multiple slant wells that would be located at the Project site, a desalination plant to be located about two miles inland, pipelines, and the other related facilities. (AR1588; 2711; 3126; 3597; 3540; 4142; 4156.) Cal-Am ultimately plans to use the slant well as a long-term production well for the MPWSP. (AR4142; 4156-57.)

Prior to the CPUC completing its environmental review for the MPWSP, Cal-Am sought to develop the Project to confirm that slant wells are feasible at Cal-Am's preferred location for the MPWSP – i.e. the Project site. To that end, Cal-Am submitted a CDP application to the City of Marina ("City") for the land-side portion of the Project within the City's jurisdiction (AR315). Cal-Am also submitted applications to the State Land Commission (SLC) to lease the water-side portion of the Project (within state tidelands) and to the CCC for a CDP for that water-side portion. (AR2712.)

The City was designated the lead agency for purposes of conducting CEQA review for the Project (AR1592) and published a Mitigated Negative Declaration (MND) in May 2014. (AR2059.) After three days of public hearings, the City ultimately determined that the MND for the Project was

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[1] / Except as otherwise noted, all further statutory references are to the Public Resources Code. Citations to "Guidelines" refer to CEQA Guidelines found at California Code of Regulations, title 14, section 15000 et seq., which are the guidelines for the application of CEQA.

[2] / Cal-Am submitted an application to the California Public Utilities Commission ("CPUC") for approval of the MPWSP in April of 2012 before seeking approval of the slant well. The CPUC submitted a Notice of Preparation for an Environmental Impact Report ("EIR") on the MPWSP in October 2012, which had not been published at the time the CCC's approval the Project. (AR315, 4142.)

inadequate under CEQA. (AR315-17.) Therefore, the City adopted written findings stating additional environmental review was required based on the Project's potential adverse environmental impacts. (*Ibid.*) Prior to reaching its determination, the City requested that Cal-Am agree to an additional condition/mitigation limiting the Project's extraction of groundwater (as opposed to seawater) from the SVGB to 500 AF per year. (AR190-92.) Cal-Am refused. As a result, the City had no choice but to deny the Project under CEQA. (*Ibid.*) The City's resolution expressly stated that it was denying Cal-Am's CDP application "without prejudice" until "appropriate CEQA review is completed." (AR316.)

Unwilling to accept the City's proposed additional mitigation to address groundwater impacts and unwilling to work with the City to prepare an EIR for the Project, Cal-Am "appealed" the City's "without prejudice" denial of the CDP application to the CCC. (AR1588.) Cal-Am argued that the CCC should grant the appeal because the Project was consistent with the City's Local Coastal Program (LCP) and public access policies of the Coastal Act. (*Ibid.*) Cal-Am's appeal did not mention, much less address, the crucial fact that the City's denial of the CPD was "without prejudice" until appropriate CEQA review was completed. (*Ibid.*) The CCC also ignored this crucial fact when it found a "substantial issue" and asserted appellate jurisdiction over the Project finding "insufficient factual and legal support for the City's denial." (AR4166.) This was prejudicial error.

This error was compounded by the CCC's subsequent, abbreviated, closed-door environmental review process for the Project, which included both Cal-Am's appeal and the CDP for the portion of Project within CCC's original jurisdiction. As explained below, in addition to improperly asserting jurisdiction and usurping the City's authority to decide whether to approve the Project, the CCC:

- Assumed the role of the lead agency under CEQA (given the City did not certify an environmental document for the Project), but failed to review all of the Project's potential environmental impacts as required by CEQA;
- Failed to comply with CEQA's mandatory public review requirements depriving the public and resources agencies adequate time to review and comment on the Project's potential significant impacts and inadequate mitigation measures/special conditions;
- Failed to provide written responses to comments on significant environmental points raised during its evaluation of the Project as required by CEQA and its own regulations;
- Improperly segmented (or "piecemealed") its environmental review of the Project by failing to assess the significant environmental impacts of the entire project—i.e., the MPWSP;
- Failed to establish thresholds of significance and provide baseline information in its CEQA-equivalent document against which to measure the Project's potential groundwater impacts;

- Improperly delegated and deferred mitigation of potential impacts to groundwater;
- Improperly changed mitigation for endangered species in a manner that could result in new impacts to biological resources without notice to the public or responsible and trustee agencies.
- Failed to fully mitigate the Project's impacts to "environmentally sensitive habitat area" ("ESHA") as required under the City's LCP
- Failed to *analyze* any feasible alternatives in its CEQA-equivalent document.
- Failed to comply with CEQA's mandatory recirculation requirements.

In sum, unlike the City's open environmental process which was interrupted by the appeal, the CCC's environmental review was the antithesis of what is required under CEQA and the Coastal Act.

As MCWD explained to the CCC, MCWD is not opposed to the Project, but to the CCC's rushed process that did not allow for meaningful public participation, adequately assess or mitigate groundwater impacts to the SVGB, or consider feasible alternatives to the location of the Project. (AR4056-58.) Based on these prejudicial errors, MCWD requests the Court grant its request for a writ of mandate.

II. STATEMENT OF FACTS

In 1995, the State Water Resources Control Board ("Water Board") adopted an Order (WR 95-10) finding that Cal-Am was unlawfully diverting about 10,730 acre-feet per year of water from the Carmel River and directing Cal-Am to diligently implement actions to terminate its unlawful diversions. (AR732.) In 2009, the Water Board adopted a cease and desist order stating that "Cal-Am has not diligently implemented actions to terminate its unlawful diversions," and requiring Cal-Am to significantly reduce its Carmel River diversions on an annual basis and terminate all illegal diversions by December 31, 2016. (AR788-94.) The cease and desist order, however, provides that Cal-Am may petition the Water Board for relief from reductions if public health and safety are threatened. (AR790.)

Cal-Am has proposed the MPWSP to replace a significant amount of the water it is currently unlawfully diverting from Carmel River. (AR4241.) In connection with Cal-Am's application for the MPWSP, Cal-Am entered into a settlement agreement with many (but not all) of stakeholders with interests in the Project. (AR1602-94.) As part of the settlement agreement, the settling parties negotiated terms for the development, construction, operation, and financing of the MPWSP. The negotiated settlement required the parties to support all aspects of the MPWSP consistent with the settlement agreement. (AR1606.) The settling parties also agreed to support construction slant wells, including the slant test well at issue, at the Project site. (AR1610; 1643.) The parties further agreed to an order of

alternatives to the proposed MPWSP's intake wells: (1) Ranney collectors at Project site; (2) slant wells at Potrero Road; (3) various slant wells or a Ranney collector intake system at Moss Landing, among several options. (AR1650.) The Staff Report does not mention any of these alternatives. (AR2742-44.)

The Project involves the construction and operation a slant well required under the settlement agreement. (AR4156-58.) The Project will be constructed in "extremely rare" coastal dune habitat identified by CCC as an "ESHA." (AR2693; 4175-76.) During the operations phase of the Project Cal-Am will continuously pump water from the well for up to 24 months at volumes up to 2,500 gallons per minute. (AR4158.) Cal-Am initially proposes to use the slant well to calculate how much water being pumped from the SVGB is groundwater, how much is sea water, and then discharge all of the pumped water into the ocean. (AR4142; 4156-57.)

Cal-Am applied with the City for a CDP for the land-side elements of the Project. (AR3542; 4275-76.) The City prepared a MND. (AR2059-2681.) After an extensive public process, the City's Planning Commission determined that the MND was inadequate under CEQA. Cal-Am appealed that decision to the City Council. (AR4.) After the hearing on the appeal, and after Cal-Am refused to adopt additional ground-water mitigation, the Council concluded: "Based upon the substantial evidence in light of the whole record before the City of Marina, the City Council in unable to find that the Project will not have significant effect on the environment." (AR316.) On the CDP, the City expressly found:

> Based upon the above conclusions regarding CEQA, the City is unable to approve the Project and therefore **denies the Project without prejudice to reconsideration as such time as the appropriate CEQA review is completed**. (AR316.)

Cal-Am subsequently appealed the City's denial of its application to the CCC. (AR1558-63.) The CCC's staff released its recommendations in a consolidated "Staff Report" on October 31, 2014. (AR2691-943.) Although MCWD and other commenters objected to the CCC's premature review of the CDP—before the City could consider the CDP on the merits—staff recommended the CCC grant the appeal and approve both the land- and water-side elements of the Project. (AR2693-94; 4070-72.)

On November 7 and 10, 2014, MCWD submitted comment letters explaining in detail that the CCC lacked jurisdiction to act on the permits and that the Staff Report did not satisfy the CCC's obligations under CEQA and the Coastal Act, and explained why the significant environmental impacts of the Project had not been addressed and that feasible alternatives had not be considered. (AR3613-37.)

Midday on November 11, 2014—both a national and state holiday—the CCC published on its website a 578-page "addendum" to its Staff Report, consisting mostly of comments on the Staff Report. It did not include MCWD's comments. (*Ibid.*) MCWD was informed its comments would be included in a later addendum. (AR3783-84.) Well into the evening, the CCC published a second addendum, substantially modifying the original Staff Report. (AR3789; 3523-3611.) The second addendum *still* did not include MCWD's comments. Nor did the addendum respond to the significant environmental issues raised in the MCWD's comment letters. (*Ibid.*) Notably, while MCWD's comments were never provided to the public or Commissioners before the hearing, CCC staff provided copies of the letters to Cal-Am and Cal-Am's response to MCWD's letters was included in the addendum. (AR3545-3568.)

The second addendum **significantly changed both the Project and the mitigation for the Project**, including but not limited to biological resources and hydrology impacts. (AR3523-3544.) The Project, for instance, was modified so as to allow construction to continue after February 28, which was identified by every consulted wildlife agency as the critical deadline before which all construction activities must cease in order to avoid adverse impacts to Western snowy plover, a bird species protected under the Federal Endangered Species Act. (AR3530; 3525; 2699; 2353-54; 4158; 4164). The mitigation was altered as well. For instance, the new mitigation allows Cal-Am to physically move listed-endangered species in violation of the Endangered Species Act. (AR3526-27.) The mitigation for groundwater impacts was also changed. (AR3531-32.) The record does not provide any information as to why these changes were made or how the changed mitigation was adequate to avoid impacts. At the November 12, 2014, hearing, CCC staff announced further changes to mitigation. (AR3997-98.)

Well into the hearing, right before the Commissioners voted to approve the CDPs, CCC staff provided the Commissioners with copies of MCWD's letters of November 7 and 10, 2014. (AR4056-57; 4086.) In as much as the letters were in excess of 100 pages combined, it was impossible for the Commissioners to read and comprehend MCWD's comments before they approved the Project.

After the close of the public hearing, the CCC approved both CDPs with limited discussion. (AR4144; 4102; 3982.) Recognizing that Cal-Am did not have a lease from the SLC, the CCC issued a conditioned approval for the water-side portion of the Project. (AR4144; 4147; 4531.)

MCWD timely filed a Petition for Writ of Mandate challenging the CCC's Project approvals.

III. STANDARD OF REVIEW

Agencies should not approve projects "if there are feasible alternatives or mitigation measures available" which would substantially lessen the project's significant environmental effects. (§ 21002.) "[T]he public agency bears the burden of affirmatively demonstrating that, notwithstanding a project's impact on the environment, the agency's approval of the proposed project followed meaningful consideration of alternatives and mitigation measures." (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 112, 134.) "To accomplish CEQA's informational purpose, an 'EIR must contain facts and analysis, not just the agency's bare conclusions.' [Citation.]" (*Citizens for Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553,568 ("*Goleta*").)

Review of an action challenging an agency's determination under CEQA is governed by Public Resources Code section 21168 in administrative mandamus proceedings (decisions "made as a result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken…") and section 21168.5 in traditional mandamus actions. (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1109.) The standard of review under both sections is "essentially the same." (*Id.* at p. 1110, fn. 4.) "In either case, the issue before the . . . court is whether the agency abused its discretion. Abuse of discretion is shown if (1) the agency has not proceeded in a manner required by law, or (2) the determination is not supported by substantial evidence." (*County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 945; see also § 21168.5.)

In evaluating an EIR for CEQA compliance, "a reviewing court must adjust its scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of improper procedure or a dispute over the facts." In a factual dispute, the agency's factual conclusions are accorded greater deference and reviewed only for substantial evidence. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.) In contrast, the agency fails to proceed in the manner prescribed by CEQA where it fails to comply with CEQA's procedural mandates or fails to include certain information mandated by CEQA in its environmental analysis. (*Id.* at p. 435 [courts must "scrupulously enforce" all legislatively mandated CEQA requirements; to do so, courts "determine de novo whether the agency has employed the correct procedures" in taking the challenged action].) "Generally speaking, an agency's failure to comply with the procedural requirements of CEQA

is prejudicial when the violation thwarts the act's goals by precluding informed decisionmaking and public participation." (*San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist.* (2006) 139 Cal.App.4th 1356, 1375.) "The existence of substantial evidence supporting the agency's ultimate decision on a disputed issue is not relevant when one is assessing a violation of the information disclosure provisions of CEQA." (*Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 82 ("*CBE*").)

The standard of review under the Coastal Act is similar to CEQA. (Pub. Resources Code, §§ 30801, 30803; *Sierra Club. v. California Coastal Com.* (1993) 19 Cal.App.4th 547, 556-557; *Bolsa Chica Land Trust v. Super. Ct.* (1999) 71 Cal.App.4th 493, 502-503.) Whether the CCC "proceeded in the manner required by law," under Coastal Act and whether it correctly interpreted the provisions of the statute is subject to independent judicial review. (*East Peninsula Education Council, Inc. v. Palos Verdes Peninsula Unified School Dist.* (1989) 210 Cal.App.3d 155, 165; *Sierra Club v. Super. Ct.* (1985) 168 Cal.App.3d 1138, 1145-1146.) The Court must evaluate "both whether substantial evidence supports the administrative agency's findings and whether the findings support the agency's decision." (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514-515 ("*Topanga*").) *Topanga* held: "[T]he agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order." (*Id.* at p. 515.) Whether findings support the challenged decisions is a question of law where the facts are undisputed. (*San Francisco v. Board of Permit Appeals* (1989) 207 Cal.App.3d 1099, 1110.)

In enforcing the Coastal Act, the Legislature expressly instructed that the Act "... be liberally construed to accomplish its purposes and objectives." (§ 30009; see also *McAllister v. California Coastal Com.* (2008) 169 Cal.App.4th 912, 928.) Similarly, the Legislature intended CEQA "to be interpreted 'to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.'" (*Mountain Lion Foundation, supra,* 16 Cal.4th at p. 112, quoting *Friends of Mammoth v. Bd. of Supervisors* (1972) 8 Cal.3d 247, 259).

IV. THE CCC'S VIOLATIONS OF THE COASTAL ACT

Under the Coastal Act, primary jurisdiction to issue CDPs within the City of Marina lies with the City pursuant to its certified LCP. Before the City could exercise that jurisdiction, however, the CCC

seized jurisdiction under the guise of an "appeal." The CCC's actions were simply ultra vires, usurping the City's authority under the Act.

A. The denial of the CDP "without prejudice" was not appealable under the Coastal Act.

It is undisputed that the CCC certified the City of Marina's LCP in 1982. (AR796.) Once an LCP has been certified, as is the case here, the CCC no longer undertakes "development review," and that becomes the sole province of the local agency:

> after a local coastal program, or any portion thereof, has been certified and all implementing actions within the area affected have become effective, the **development review ... shall no longer be exercised by the commission over any new development proposed within the area to which the certified local coastal program** ... applies and shall at that time be delegated to the local government that is implementing the local coastal program or any portion thereof.

(§ 30519, subd. (a), emphasis added; see also *City of Malibu v. California Coastal Com.* (2012) 206 Cal.App.4th 549, 563 [once the CCC certifies an LCP, "[d]evelopment review authority can no longer be exercised by the [CCC]" and is "delegated to the local government that is implementing the [LCP]," with limited rights of appeal to the CCC].)

The CCC retains only very limited appellate jurisdiction under the Coastal Act in such circumstances. (§ 30603.) As relevant here, an "appeal" taken from a denial of a project that constitutes a "major public works project"— "shall be limited to an allegation that the development conforms to the standards set forth in the certified local coastal program and the public access policies set forth in this division." (§ 30603, subds. (a)(5), (b)(2).) The implementing regulations for the Coastal Act confirm the grounds for appeal are narrow. (Cal. Code Regs., tit. 14, § 13113 ["grounds of appeal ... limited to those specified in Public Resources Code Section 30603..."].) The regulations further explain that an appeal should only be heard when it raises significant questions "as to conformity with the certified [LCP]." (*Id.*, § 13115, subd. (b).) Case law further supports a narrow view of the CCC's appellate jurisdiction:

> **After certification, the local government has discretion to choose what actions it will take to implement its LCP.** [Citation.] Thus, for example, the Coastal Act "does not dictate that a local government must build a hotel and conference center—that decision is made by the local government. It merely requires **local governments to comply with specific policies—but the decision of whether to build a hotel or whether to designate an area for a park remains with the local government."** [Citation.] Once the LCP is certified, "the Commission's role in the permit process for coastal development [is] to hear appeals ... The Commission's jurisdiction in such appeals, however, is limited.

(*Security Nat. Guar., Inc. v. California Coastal Com.* (2008) 159 Cal.App.4th 402, 421; accord *City of Malibu, supra*, 206 Cal.App.4th at p. 555.) Thus, the only grounds for appeal are that the project is, in fact, consistent with the certified LCP and the Coastal Policies, notwithstanding any findings to the contrary by the City. (§ 30603, subd. (b)(2); see *Kaczorowski v. Mendocino Cnty. Bd. of Supervisors* (2001) 88 Cal.App.4th 564, 569 [interpreting virtually identical terms in subdivision (b)(1)].)

Despite the clear words of the statute and case law, the CCC found that where a "major public works project" was at issue, any denial at all, on any ground would trigger appellate jurisdiction if an appellant alleged conformance with the LCP. In other words, according to the CCC, it has plenary authority to review any action taken on a "major public works project" by a local agency if an appellant alleges conformance with the LCP. (AR3986 ["The Coastal Act generally only allows appeals to the [CCC] of local government approvals of CDP's but in the case of major public works facilities and major energy facilities any action including a denial taken by a local government on development which constitutes a major public works facility or a major energy facility appealable to the [CCC]."].) This is simply wrong. There is nothing in the Coastal Act that authorizes the CCC to exercise plenary authority over "major public works projects" in the Coastal Zone. As with other appeals, the appeal may only be taken from a local agency's denial of a CDP on the grounds it is ostensibly inconsistent with the LCP. (§ 30603, subds. (a)(5), (b)(2).) Here, the City's made no decision on the Project's conformance with the City's LCP, pending compliance with CEQA. (AR316.) [3]

Cal-Am and the CCC suggest the City ceded jurisdiction by sending a letter indicating final agency action was taken. (AR327-328.) That letter was sent by City staff explaining the Council's actions. (*Ibid.*) Staff's letter cannot change the nature of the action taken by the City Council, who clearly never acted pursuant to their authority under the Coastal Act. (AR2686-2688.) Moreover, by regulation, staff's letter does not constitute "final agency action" supporting an appeal. The CCC's

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[3] / The CCC may argue that because its appeals are heard "de novo," it has resumed plenary land-use authority under the Coastal Act. (See § 30621.) "De novo" review is a standard of review, it allows a tribunal to reconsider the issue, and in this case receive new evidence, without deference to the lower tribunal. (See, e.g., Black's Law Dictionary (9th ed. 2009), p. 789, cl. 1 [hearing de novo: "a reviewing court's decision on a matter anew, giving now deference to a lower court's findings"], p. 112, cl. 2 [appeal de novo: "an appeal in which the appellate court uses the trial court's record without deference

regulations explain that a local government action "shall not be deemed complete" until the agency has made all the required findings regarding the project's compliance with the LCP and when all local remedies have been exhausted. (Cal. Code Regs., tit. 14, § 13570.) Here, the record unequivocally shows the City made none of the required LCP findings. Rather, as required by CEQA, the City deferred making these findings until environmental review was complete. This was not error.

CEQA imposes a duty on public-agency decisionmakers to document and consider the environmental implications of their actions. (See §§ 21000, 21001; *Friends of Mammoth, supra,* 8 Cal.3d at pp. 254-256.) This review had to occur before the City could approve the project under the LCP. CEQA "requires that, before approving a project, the lead agency 'find either that the project's significant environmental effects identified in the [final] EIR have been avoided or mitigated or that the unmitigated effects are outweighed by the project's benefits.'" (*Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1993) 6 Cal.4th 1112, 1124 ("*Laurel Heights II*"), citing §§ 21002, 21002.1 and 21081.) Thus, the City had to comply with CEQA before acting on the CDP. [4]

In sum, there simply was no final action under the Coastal Act that could trigger the CCC's jurisdiction, and therefore nothing to appeal from.

B. The CCC's "substantial issue" findings are not supported by substantial evidence and conflict with the record and CEQA.

Despite the fact that the City plainly took no final action under the Coastal Act with respect to the CDP for the Project pending compliance with CEQA, the CCC's findings on the "substantial issue" question pretend the City did. (AR4165-66.) These findings are not supported by substantial evidence. (*Topanga, supra,*11 Cal.3d at p. 515; accord *Great Oaks Water Co. v. Santa Clara Valley Water Dist.* (2009) 170 Cal.App.4th 956, 971 [findings requirement "serves to conduce the administrative body to draw *legally relevant* sub-conclusions supportive of its ultimate decision", emphasis added].)

The term "substantial issue" is not defined in the Coastal Act or its implementing regulations. As

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to the trial court's rulings."].) De novo review does not expand the scope of the appellate jurisdiction of the CCC. Such a reading would render the narrow grounds for appeal in section 30603 superfluous.

[4] / The CCC suggests that the City was somehow abusing its discretion by refusing to act expeditiously on the Project. There is absolutely no evidence of that. The City acted in accordance with its legal mandate. In any event, the CCC is not a universal arbiter of City action. If the City had been acting in such a way, the remedy would be judicial review, not appeal to the CCC.

noted in the Staff Report, the CCC has been guided by the following factors in deciding whether and appeal presents a "substantial issue":

> 1. The degree of factual and legal support for the local government's decision that the development is consistent or inconsistent with the certified LCP and with public access policies of the Coastal Act;
> 2. The extent and scope of the development as approved or denied by the local government;
> 3. The significance of the coastal resources affected by the decision;
> 4. The precedential value of the local government's decision for future interpretation of its LCP; and,
> 5. Whether the appeal raises only local issues or those of regional or statewide significance.

(AR2715; 4165.) The CCC's findings that "four of the five substantial issue factors weigh heavily in favor of a finding of substantial issue," however, conflict with both the record and the law. (AR4166.)

As to the first factor, the CCC found that there is insufficient factual and legal support for the City's denial of the proposed test well. (AR4166.) This finding cannot be sustained. As discussed above, at the conclusion of the City's hearing on the MND, the City Council concluded that it simply could not permissibly approve the CDP consistent with its obligations under the CEQA. Having found substantial evidence indicating that unaddressed significant impacts may occur, the City was compelled by law to deny the project until an EIR was prepared. CEQA mandates preparation of a full environmental impact report (EIR), rather than a MND, where substantial evidence in the record supports a "fair argument" that significant impacts may occur. (*Laurel Heights II*, *supra*, 6 Cal.4th at p. 1123.)

Nothing in the Coastal Act gives the CCC appellate jurisdiction over CEQA determinations. (See, e.g., § 30603 [describing the CCC's narrow appellate jurisdiction on "actions taken by a local government on a coastal development permit application]; *Hines v. California Coastal Com.* (2010) 186 Cal.App.4th 830, 852 [holding that the CCC lacks jurisdiction to hear an appeal from the City's determination under CEQA].) In any event, the CCC neither addressed nor disputed the City's CEQA finding. Under the header "Coastal Development Permit," the City made the following finding:

> **Based upon the above conclusions regarding CEQA, the City is unable to approve the Project and therefore denies the Project without prejudice to reconsideration as such time as the appropriate CEQA review is completed.**

(AR316.) Thus, the CDP review—and any determination of consistency with the LCP—was put on hold until CEQA was complied with. That is simply what is required by law under the facts.

As to the second and third factor, the CCC found that "while the project is not expected to impact a significant portion of the CEMEX site, it will be constructed in areas that are within primary habitat, so significant coastal resources will be affected by the proposed project." (AR4166.) This finding is inexplicable. Since the City did not approve the project, no significant coastal issues would be affected. The finding is simply contrary to fact. In fact, the evidence would appear to cut against finding a substantial issue, at this juncture in any event.

As to the fourth factor, the CCC found it was "poor precedent for the City to deny a CDP without making any findings as to why the proposed project does not conform to the City's LCP." (AR4166.) This alleged "poor precedent" was mandated by the Legislature. As addressed in detail above, CEQA requires that the environmental impacts of a project be understood before an agency acts. As the courts have noted, "[T]he ultimate decision of whether to approve a project, be that decision right or wrong, is a nullity if based upon an EIR that does not provide the decision-makers, and the public, with the information about the project that is required by CEQA." (*Riverwatch v. Olivenhain Mun. Water Dist.* (2009) 170 Cal.App.4th 1186, 1201, citing *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 829.) The decision to approve a project cannot be informed without full CEQA review. Thus, as with the first factor, the finding is in direct conflict with the law.

As to the fifth factor, the CCC found the "appeal raises significant regional concerns, as the data that will be produced by the test well are needed to assess the feasibility, location and design of a desalination facility that is intended to address regional water shortages." (AR4166.) Given the CCC determination that the slant well is a separate project and it would review the MPWSP separately, this finding should not be sustained. Moreover, this factor alone would not support the CCC's findings.

In sum, with the possible exception of the fifth factor, none of the "substantial issue" factors are supported by substantial evidence. Moreover, given the limited scope of jurisdiction in this case, the CCC's substantial issue findings do not bridge the analytical gap between the raw evidence, the "legally relevant subconclusions," and its ultimate decision to accept appellate jurisdiction. (*Topanga, supra*, 11 Cal.3d at p. 515; *Great Oaks Water Co., supra*, 170 Cal.App.4th at p. 971.) Because the CCC's findings in support of jurisdiction are unsupported by legally relevant evidence and analysis, the CCC acted ultra vires when it accepted jurisdiction.

C. The CCC found the project to be inconsistent with the LCP and on this basis ought to have denied the appeal.

Ironically, after accepting the appeal, the CCC concluded that the project was not consistent with the City's certified LCP. The Staff Report noted that "the key concern" with the CDP was the "project's unavoidable effects on [ESHA]." (AR2693.) On the project site, the rare coastal sand dunes were found to be ESHA "due to their vulnerable habitat," the "rarity" of the habitat, and its important ecosystem functions, particularly for "sensitive species," including endangered and threatened species. (AR2721.) The CCC's biological expert concluded that the habitat affected by the Project was primary habitat under the LCP and ESHA. (AR2725.) The Staff Report further notes that the LCP, and the Coastal Act, preclude development on primary habitat unless the development is "dependent on the resources." (AR2726.) Here, the report notes, the "proposed project is not a resource dependent use, so it cannot be approved consistent with the LCP's habitat protection policies." (AR2726.) As a result, the report concludes that the project "does not conform to the Habitat Protection policies in the City's LCLUP." (AR2727.) Based on this finding alone, the CCC determination out to have denied the appeal. (§ 30603, subds. (a)(5), (b)(2).) Its conclusions to the contrary are not supported by substantial evidence.

D. The CCC—without any authority —concluded that its appellate jurisdiction allowed it to override the City's LCP and approve the Project.

Given the fact that the CCC itself found that the Project was inconsistent with the LCP's land use plan, one would suppose that the CCC would have denied the appeal, which was after all "limited to an allegation that the development conforms to the standards set forth in the certified local coastal program and the public access policies set forth in this division." (§ 30603, subds. (a)(5), (b)(2).) It did not. The CCC took matters further.

The CCC found that—although "Project activities would further disturb the sensitive habitat areas in a manner not consistent with provisions of the LCP"—it could essentially override the LCP. (AR2693.) It reasoned that "because the project is a coastal-dependent industrial facility and the LCP allows such facilities in this location, consistent with Coastal Act Section 30260, the CCC may approve a permit for this project if (1) alternative locations are infeasible or more environmentally damaging; (2) denial of the permit would not be in the public interest; and, (3) the project is mitigated to the maximum extent feasible." (AR2693.)

The CCC can overturn a local agency's denial of a major public works project under the Coastal Act if it concludes that the project is conforms to (1) the standards set forth in the certified LCP; and (2) the public access policies set forth in this division. (§ 30603, subds. (a)(5), (b)(2).) Coastal Act section 30260 governs when industrial development is appropriate, and is among the factors the CCC may consider in certifying an LCP in the first instance. (See §§ 30200, 30260.) This override provision is notably not mentioned in either the LCP, nor in the "public access policies" set forth the act—the two exclusive grounds for appeal. (See AR796-897 [LCP]; §§ 30210-30214 [public access policies].) Thus, the factors set forth in section 30260 simply were not relevant on appeal at the CCC. (§ 30603, subds. (a)(5), (b)(2).) As explained in *City of Malibu*, *supra*, 206 Cal.App.4th at p. 556, "after certification of a local coastal program, issuance of coastal development permits is the purview of the local government, not the CCC. And, after certification of an LCP, the Coastal Act mandates—with the singular, narrow exception delineated in the section 30515 override provision—local control over changes to a local government's land use policies and development standards." (*Id.* at p. 556.) The CCC did not purport to act under section 30515 here, therefore, the CCC acted ultra vires and inconsistent with the Coastal Act.

V. THE CCC'S VIOLATIONS OF CEQA

The CCC's statutory and regulatory obligations require it to comply with both the Coastal Act and CEQA. (See § 21080.5; Cal. Code of Regs., tit. 14 §§ 13096, subd. (a) ["All decisions of the commission relating to permit applications shall be accompanied by written conclusions about the consistency of the application with… [CEQA]"], 13057, subd. (c).) The CCC is exempt, however, from preparing a formal EIR because Public Resources Code section 21080.5 specifies that the Secretary of Resources may certify that an agency's environmental review process satisfies the substantive mandates of CEQA and serves as the "functional equivalent" of an EIR. (See §21080.5, subd. (a); Cal. Code of Regs., tit. 14 § 15251 [CCC has a certified regulatory program].) However, the agency must meet the strict requirements of the certified regulatory program and is still required to identify all significant environmental impacts of its Project, to assess cumulative impacts, and to include feasible alternatives or feasible mitigation measures that would substantially lessen any significant adverse effects of the Project. (See § 21080.5, subd.(d)(2)(A), subd. (d)(3)(A); Cal. Code of Regs., tit. 14 § 13057.) Here, the CCC failed to comply with the basic legal mandates of CEQA and its certified regulatory program.

A. The Coastal Commission had a duty to identify, disclose, and mitigate all of the impacts of the Project.

1. The Coastal Commission is not exempt from CEQA.

CEQA contains a number of statutory exemptions, and for those activities, the Legislature has declared that CEQA simply does not apply. (§ 21080, subd. (b).) Certified regulatory programs, however, are not on the list of activities for which CEQA "does not apply." (See § 21080, subd. (b).) The Supreme Court found this to be telling. In as much as the Legislature has identified activities that are exempt from CEQA and did not include certified regulatory programs, "[w]e therefore reject" the assertion that certified regulatory programs are "'exempt" from CEQA. (*Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1230-31.) Rather, "section 21080.5 establishes a *limited exemption* from CEQA's EIR requirements for qualifying state agencies having environmental protection responsibilities." (*Mountain Lion Foundation, supra,* 16 Cal.4th at pp. 126-127, emphasis added.)

Certified regulatory programs are only exempt from very specific provisions of CEQA: "Section 21080.5 compels instead the conclusion that [certified regulatory programs are] exempt only from chapters 3 and 4 of CEQA and from section 21167 of that act." (*Sierra Club, supra,* 7 Cal.4th at pp, 1230-1231; see also *Joy Road Area Forest and Watershed Assn. v. California Dept. of Forestry & Fire Protection* (2006) 142 Cal.App.4th 656, 668 ("*Joy Road*") ["Our Supreme Court has expressly found that this exemption must be strictly construed" and certified regulatory programs are "exempt *only* from chapters 3 and 4 of CEQA and from section 21167...."].)

A number of agencies with certified regulatory programs have argued for a more expansive exemption, and the courts have refused to read the exemption expansively. For instance, when the Air Resources Board argued that it did not have to consider an environmental document before approving its project, as required by the CEQA Guidelines section 15004, subdivision (a), the court disagreed: "we conclude that the timing requirement set forth in Guidelines section 15004, subdivision (a) applies to the environmental review documents prepared by ARB in this case—that is, the staff reports and written responses to comments that ARB used in lieu of an EIR." (*POET, LLC v. California Air Resources Bd.* (2013) 218 Cal.App.4th 681, 716.)

When forestry companies argued that the regulatory scheme under the Forest Practice Act was exempt from CEQA, the court disagreed, holding that such programs are only exempt from the

requirement to prepare a full-blown EIR." (*Environmental Protection Information Center, Inc. v. Johnson* (1985) 170 Cal.App.3d 604, 620 ("*EPIC*").) The court also held that:

- "Full compliance with the letter of CEQA is essential to the maintenance of its important public purpose," even in the case of a certified regulatory program. (*Id* at p. 622.)
- "Reviewing courts 'have a duty to consider the legal sufficiency of the steps taken by [administrative] agencies [citation], and we must be satisfied that these agencies have fully complied with the procedural requirements of CEQA, since only in this way can the important public purposes of CEQA be protected from subversion." (*Id* at p. 622.)

As another court noted: "If CEQA is scrupulously followed, the public will know the basis on which its responsible officials either approve or reject environmentally significant action, and the public, being duly informed, can respond accordingly to action with which it disagrees… In pursuing an approach that 'releases a report for public consumption that hedges on important environmental considerations while deferring a more detailed analysis to [a report] that is insulated from public review' the Department pursued a path condemned as inconsistent with the purpose of CEQA …." (*Friends of the Old Trees v. Department of Forestry & Fire Protection* (1997) 52 Cal.App.4th 1383, 1402.)

In all of these cases, the courts have held that the procedural and substantive mandates of CEQA apply with equal vigor to certified regulatory programs.

2. The Coastal Commission was neither required nor entitled to limit environmental review because of its limited jurisdiction.

Nor can the CCC limit its environmental review under CEQA to the areas within its jurisdiction. Under CEQA, a project is not a "permit." A "project" is the "whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." (Guidelines, § 15378.) "'Project' is given a broad interpretation in order to maximize protection of the environment." (*Creed-21 v. City of San Diego* (2015) 234 Cal.App.4th 488, 503, citing *McQueen v. Board of Directors* (1988) 202 Cal.App.3d 1136.) Project does not "mean each separate governmental approval." (Guidelines, § 15378, subd. (c); *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 165.)

It is important to note that the CCC acted as the "lead agency" here, over MCWD's objections, and as such it had responsibility to evaluate all of the impacts of the project and to prepare an environmental study that other agencies could rely on. (*Riverwatch, supra,* 170 Cal.App.4th at p. 1201; *Planning and Conservation League v. Dept. of Water Resources* (2000) 83 Cal.App.4th 892, 904

["Public Resources Code Section 21067 provides the statutory definition of the term 'lead agency' under CEQA: 'the public agency *which has the principal responsibility for carrying out or approving* a project which may have a significant effect upon the environment.' [Citation.]"].)

Second, even if CEQA countenanced limited environmental review where the scope of an agency's discretion was limited, nothing here indicates that the CCC's limited jurisdiction circumscribed its ability to study and mitigate project impacts. In other words, nothing in the LCP suggests that curtailed or focused environmental review is justified. The LCP itself does not provide for curtailed or limited environmental considerations. The LCP reiterates that a permit ought not be granted until the full environmental impacts are understood and mitigated (AR840 [noting need for EIR and full mitigation].) In addition to these policies which emphasize that the consideration of environmental impacts generally is essential to the implementation of the LCP, the LCP states that in deciding whether a proposed project is consistent with the LCP a number of considerations are relevant, including whether the impacts of the project are mitigated to the extent feasible. (AR840 ["Included feasible mitigating measures which substantially reduce significant impacts of the project ..."].)

Third, the statute that the CCC cites as the primary justification for approving the permit mandates a full environmental review. That statute provides that, in certain circumstances, the LCP policies may be overridden but only if the following three findings can be made:

> **alternative locations are infeasible or more environmentally damaging**; (2) to do otherwise would adversely affect the public welfare; and (3) **adverse environmental effects are mitigated to the maximum extent feasible.**

(§ 30260, emphasis added.) In order to make findings under this section, the CCC obviously had to consider all the impacts of the proposed action and all potentially feasible alternative locations. To be clear, either the does not have jurisdiction override the LCP (as MCWD contents), or if it does (as the CCC contends), it had to take full responsibility to analyze and mitigate the projects impacts.

3. The Coastal Commission had to adopt a process that furthers CEQA's mandate to ensure (1) open and informed decisionmaking and (2) full disclosure and mitigation of environmental impacts.

The twin purposes of CEQA are (1) to ensure that the public and decision-makers know, understand, and meaningfully consider the environmental effects of proposed projects, and (2) to require that public agencies consider and adopt feasible mitigation measures and alternatives that would avoid

or lessen significant effects. (See §§ 21001, 21001.1, 21002, 21002.1, 21081, 21100.) As noted above, although a certified regulatory program is exempt from the requirement to prepare an EIR per se, certified regulatory programs are not exempt from CEQA and must comply with these mandates. (*Conway v. State Water Resources Control Board* (2015) 235 Cal.App.4th 671 citing *City of Arcadia v. State Water Resources Control Bd.* (2006) 135 Cal.App.4th 1392, 1422 (*Conway*) ["A certified regulatory program is subject to the broad policy goals and substantive standards of CEQA."].) Furthermore, "there must be significant documentation" of environmental review, including "a description of the proposed activity with alternatives to the activity and mitigation measures as well as written responses to significant environmental points raised during the evaluation process." (*Conway, supra*, citing § 21080.5, subds. (d)(2)(D) & (d)(3)(A); Guidelines,§ 15252, subd. (a).) This is because the substitute document "serve[s] as the functional equivalent of an EIR." (*Conway, supra*, citing *Ebbetts Pass Forest Watch v. Cal. Dept. of Forestry and Fire Protection* (2008) 43 Cal.4th 936, 943.)

In furtherance of these purposes, public agencies pursuing projects subject to CEQA must follow a familiar and well-established course of action. First, a lead agency must determine whether the environmental impacts of its project are "significant." (Guidelines, §§ 15063, 15064.) If there is substantial evidence in light of the whole record that the project will have significant effects, the agency must prepare an EIR or EIR-equivalent document. (§§ 21082.2, subd. (d), 21100, subd. (a); Guidelines, § 15064, subd. (a)(1), (f).) The EIR-equivalent must identify the Project's environmental effects, evaluate their significance, describe feasible mitigation measures to minimize those effects, and consider a range of reasonable alternatives that could avoid or substantially lessen those effects. (Guidelines, §§ 15126.2, 15126.4, 15126.) Before the agency can approve the project, it must specifically find that the project's significant effects have been mitigated or avoided. (§ 21081; Guidelines, § 15091.) If significant environmental effects remain after implementation of all feasible measures, the agency may still approve the project, but only after adopting a "statement of overriding considerations" finding that the project's benefits outweigh its environmental cost. (§ 21081, subd. (a)(3), (b); Guidelines, § 15093.) Mitigation measures must be monitored and enforced following project approval "to ensure compliance during project implementation." (§ 21081.6, subd. (a)(1); Guidelines, § 15097.)

"[T]he ultimate decision of whether to approve a project, be that decision right or wrong, is a

nullity if based upon an EIR that does not provide the decision-makers, and the public, with the information about the project that is required by CEQA." (*Riverwatch, supra,* 170 Cal.App.4th at p. 1201, citing *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 829.)

B. The CCC failed to comply with CEQA's mandatory 30-day public review period, depriving the public and resources agencies adequate time for review and comment.

The CCC's environmental review process was improperly rushed and flawed, flouting not only CEQA's public notice and participation requirements but also those set out in the Coastal Act. (See § 30006.) [5] Because public participation in the CEQA process is of paramount importance, CEQA requires a minimum 30-day public review period for EIRs. (§ 21091, subd. (a) ["The public review period for a draft [EIR] may not be less than 30 days"]; *Laurel Heights II, supra,* 6 Cal.4th at p. 1123 ["public participation is an 'essential part of the CEQA process'"].) [6] The fact that Public Resources Code section 21091 refers to EIRs rather than environmental documents prepared under a certified regulatory program "is of no consequence."(*Ultramar, Inc. v. South Coast Air Quality Management Dist.* (1993) 17 Cal.App.4th 689, 699.) This mandatory 30-day review period applies with equal vigor to certified regulatory programs. (*Id.* at pp. 699-700; *Joy Road, supra,* 142 Cal.App.4th 656.)

Here, the CCC completely ignored the 30-day notice requirement. The CCC prepared and circulated its Staff Report for the Project on October 31, 2014. (AR2691.) Had the Commission provided the required 30-day comment period, the closing date for comments would have been November 30, 2014, with a hearing scheduled sometime thereafter. Instead, the hearing was scheduled for November 12, 2014. (AR2196.) The comment period provided was a scant 12 calendar days and even more meager 6 business days, counting the day of the hearing. This does not satisfy CEQA. (§ 21091, subd. (a); *Ultramar, supra,* 17 Cal.App.4th at pp. 698-700; *Joy Road, supra,* 142 Cal.App.4th at

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[5] / Section 30006 provides: "The Legislature further finds and declares that the public has a right to fully participate in decisions affecting coastal planning, conservation, and development; that achievement of sound coastal conservation and development is dependent upon public understanding and support; and that the continuing planning and implementation of programs for coastal conservation and development should include the widest opportunity for public participation."

[6] / See also, e.g., *Sierra Club, supra,* 7 Cal.4th at p.1229 [public review "demonstrate[s] to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action"]; *Schoen v. Department of Forestry & Fire Protection* (1997) 58 Cal.App.4th 556 ["This public review provides the dual purpose of bolstering the public's confidence in the agency's decision and providing the agency with information from a variety of experts and sources"].

pp. 667-673.) Nor was 12-days reasonable given the complex issues as MCWD testified. (AR4056-58.)

The CCC argues it is exempt from the public review provisions of CEQA—despite the fact that section 21091 is not set out Chapters 3 or 4, which are the provisions in CEQA that certified regulatory programs are exempt. The CCC claims that *Ross v. California Coastal Commission* (2011) 199 Cal.App.4th 900, 932 (*Ross*), establishes that the 30-day notice requirement is inapplicable to the CCC. *Ross* is not on point. The court in *Ross* addressed the notice requirement in a **completely separate, and very different, regulatory scheme** than the one at issue here. Specifically, the court in *Ross* considered the notice period for staff recommendations under the CCC's certified regulatory program for LCPs and Long Range Development Plans. That certified regulatory program does not apply here. (See Guidelines, § 15251 [listing separate CCC regulatory programs for CDPs and LCPs].) Accordingly, *Ross* is not controlling. There is no similar timing provision here. Section 13059, which governs the circulation of Staff Reports for CDPs, states only: "Staff reports shall be distributed within a reasonable time to assure adequate notification prior to the scheduled public hearing."[7]

It is also important to note that Public Resources Code section 21091 was adopted after the CCC's regulatory program was certified. The 30-day requirement was added to CEQA after the CCC's certified regulatory program was certified in 1978. At the time, CEQA only required that EIRs be circulated for a "reasonable time," similar to the language in the CCC's regulatory program. (Cal. Stats. 1989, ch. 907, § 2.) When the Legislature amended CEQA in 1989 to add the 30-day requirement, the requirements of the Act, as amended, applied to regulatory programs because regulatory programs are not exempt from the requirements of section 21091. (See *Ultramar, supra*, 17 Cal.App.4th 689; *Joy Road, supra*, 142 Cal.App.4th 656.) Sections 13059 and 21091 can and, thus, must be reconciled. (See note 9.) The CCC simply cannot escape the fact that it was required to comply with CEQA's 30-day notice requirement. By providing only a 12-day public review period for the Staff Report, the CCC failed to proceed in the manner required by law.

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[7] / As the Supreme Court stated in *Mountain Lion Foundation, supra,* 16 Cal.4th at p. 122, if the "benefits and purposes of the CEQA process can be reconciled with the [ageny]'s duty under [its certified regulatory program]… *we are obligated to harmonize the objectives common to both statutory schemes to the fullest extent the language of the statutes fairly permits.*" (Emphasis added; see also *Strother, supra,* 173 Cal.App.4th at p. 880 [harmonizing CEQA and the Coastal Act)

C. The CCC failed to respond to any significant environmental comments raised during the evaluation of the slant well.

As the Supreme Court has explained, "[i]n order to claim the exemption from CEQA's EIR requirements, an agency must demonstrate ***strict compliance*** with its certified regulatory program." (*Mountain Lion Foundation, supra,* 16 Cal.4th at p. 132, emphasis added.) Here, the Coastal Commission's regulations expressly require that a Staff Report include "[r]esponses to significant environmental points raised during the evaluation of the proposed development *as required by [CEQA]*." (Cal. Code Regs., tit. 14, § 13057, subd. (c)(3); see *Strother v. California Coastal Com.* (2009) 173 Cal.App.4th 873, 877, 881 ("*Strother*") [noting requirement that the CCC provide written responses to significant environmental points raised during the evaluation process]; *Conway, supra,* 35 Cal.App.4th 671 [a document used as a substitute for an EIR under a regulatory program must include "written responses to significant environmental points raised during the evaluation process"].) The CCC, however, did not provide any responses to environmental points raised by MCWD or other commenters.

To fulfill the requirements of CEQA, and its own regulations, the CCC was required to provide a "reasoned response," in writing, to each of the significant environmental issues raised, and to set forth in detail the reasons why particular comments and objections were rejected. (See Guidelines, § 15088, subd (b) ["There must be good faith, reasoned analysis in response [to the comments received]. Conclusory statements unsupported by factual information will not suffice."]; § 21091, subd. (d)(2)(B) ["The written response shall describe the disposition of each significant environmental issue that is raised by commenters"]; *Gallegos v. State Bd. of Forestry* (1978) 76 Cal.App.3d 945, 953-955; *People v. County of Kern* (1974) 39 Cal.App.3d 830, 841; *EPIC, supra,* 170 Cal.App.3d 604; *Flanders Foundation v. City of Carmel-by-the-Sea* (2012) 202 Cal.App.4th 603, 616-617.)

The CCC's "responses to comments" runs a scant two-and-a-half pages in the Staff Report, and addresses none of the significant environmental points raised by commenters. (AR3535-3538.) For example, among the significant environmental points raised in comments to the CCC, commenters expressed concerns regarding hydrological and groundwater impacts, including the potential for saltwater intrusion and other impacts to the Salinas Groundwater Basin (AR3613-3614; 3625-3626; 2998; 3011-3021; 3452; 3455-3457), impacts to endangered species such as the Western Snowy Plover and ESHA (AR3632-3633; 3621-3622; 3624; 3635-3636; 3886-3887), greenhouse gas emissions and air

quality impacts (AR2795). Additionally, commenters repeatedly questioned the adequacy and effectiveness of proposed mitigation, the CCC's failure to consider feasible alternatives, and the Staff Report's failure to establish an adequate baseline from which to measure groundwater impacts. (AR3614; 3625-3623; 3633-3636; 3886-3887.) The CCC provided *no response* to these comments or any other comments on environmental issues in violation of CEQA. (*Berkeley Keep Jets Over the Bay Com. v. Board of Port Commissioners* (2001) 91 Cal.App.4th 1344, 1367 ["Where comments from responsible experts or sister agencies disclose new or conflicting data or opinions that cause concern that the agency may not have fully evaluated the project and its alternatives, these comments may not simply be ignored. *There must be good faith, reasoned analysis in response.*"].) Rather, the Staff Report only includes responses regarding the CCC's appellate jurisdiction. (AR3535-3538.)

By completely ignoring its obligation to provide written responses to comments, the CCC disregarded a critical component of the environmental review process. As the California Supreme Court explained in *Mountain Lion Foundation*, CEQA's "written response requirement ensures that [the decisionmakers] will fully consider the information necessary to render decisions that intelligently take into account the environmental consequences. [Citations.] It also promotes the policy of citizen input underlying CEQA." (16 Cal.4th at p. 133; see also *id.* at p. 123 [articulating its reasons for rejecting opposing views in written form helps sharpen the agency's understanding of the significant points raised in opposition to a project]; *EPIC, supra,* 170 Cal.App.3d at p. 628 ["the purpose of this requirement is to provide the public with a good faith, reasoned analysis why a specific comment or objection was not accepted"]; *People v. County of Kern* (1974) 39 Cal.App.3d 830, 841 [responses to comments "helps insure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug."].) By failing to provide any responses to the environmental points raised by commenters, the CCC failed to proceed in the manner required by law. (*Mountain Lion Foundation, supra*, 16 Cal.4th at p. 137 [noting that failure to proceed in accordance with law is presumptively prejudicial when mandatory procedures not followed]; *Environmental Protection Information Center v. California Dept. of Forestry and Fire Protection* (2008) 44 Cal.4th 459, 487 [failure to respond to comments must be deemed prejudicial unless the agency can prove the comments were, on their face, demonstrably repetitive of material already considered or were patently irrelevant].)

D. The CCC improperly piecemealed the Project by analyzing the impacts of the slant well separate from the larger MPWSP.

CEQA prohibits the "piecemealing" or segmenting of a project into smaller parts to avoid the early assessment of the significant environmental impacts of the entire project. (*Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 396 ("*Laurel Heights I*"); Guidelines § 15165.) Therefore, when a specific project contemplates future expansion, the lead agency is required to review all phases of the project. (*Laurel Heights I, supra,* 47 Cal.3d 376; see also *Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209, 1224, [improper piecmealing occurs when "the purpose of the reviewed project is to be the first step toward future development"]; Guidelines, § 15162 ["All phases of a project must be considered when evaluating its impact on the environment"].) This requirement reflects CEQA's broad definition of "project" as "the *whole* of an action" that may impact the environment. (Guidelines, § 15378, italics added; see *Habitat & Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277, 1297.)

Segmenting a project into smaller pieces, as the CCC did here, results in an improperly "curtailed" and "distorted" project description. (*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 730.) The "segmentation" of the "test slant well" from the overall MPWSP mislead the public, understated the impacts of the project, and resulted in unnecessarily curtailed discussion of potentially feasible alternatives to the Project. Accordingly, by using "truncated project concept" the CCC failed to proceed in a manner required by law. (*Ibid.*; see also *Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214, 1224.)

In *Laurel Heights I, supra,* 47 Cal.3d 376, the Supreme Court explained that an agency must analyze the effects of potential future development if such development is: (1) "a reasonably foreseeable consequence of the initial project," and (2) "will likely change the scope or nature of the initial project or its environmental effects." (*Id.* at p. 396.) The slant well easily meets both parts of the test.

Here, the record shows that the slant well is the initial phase of the MPWSP and that Cal-Am intends to convert the slant well into a production well for the MSWP. (AR4142; 4156; see also AR4634 [identifying the slant well as a "major component" of the MPWSP].) As a result, it cannot reasonably be disputed that the MPWSP is a reasonably foreseeable consequence of the Project. As the Mayor of Marina, a proponent of the Project, noted:

> MAYOR DELGADO: Well, that seems like a no-brainer; that, of course, it's foreseeable that if these slant test wells work out the way everyone hopes they do, then they would be turned into permanent wells and they would be supplying the desal project. (AR3177.)

In an attempt to circumvent CEQA's prohibition of piecemealing, the CCC's Staff Report and findings state that they apply only to the slant well "and do not authorize development that may be associated with long-term use of the well, including converting the well to use as a water source for the separately proposed MPWSP. Any such proposal will require additional review … and will be conducted independent of any decision arising from these Findings." (AR4156.) This position cannot be reconciled with *Laurel Heights I.* (47 Cal.3d at p.396.) Like the CCC, the respondent in *Laurel Heights I* claimed that because further approvals were required and would be evaluated in their own right, the agency could defer evaluation of the potential expansion. (*Id.* at p. 394.) The Supreme Court flatly rejected this argument, finding deferring environmental review to a later point, when "bureaucratic and financial momentum" would make it difficult to deny the expansion, violated CEQA. (*Id.* at pp. 395-96.)

The CCC's improper piecemealing of the Project here is even more apparent than the proposed expansion in *Laurel Heights I.* The CPUC is currently preparing an EIR for the full project pursuant to an application by Cal-Am. (AR4156; 3990.) Because the Project represents a significant commitment to the selection of this site for the MPWSP, and even the final design of the MPWSP, the slant well could not be segmented from the environmental review of the MPWSP under CEQA.

Moreover, as explained in the CEQA Guidelines, "[w]here an individual project is a necessary precedent for action on a larger project . . . an EIR must address itself to the scope of the larger project." (Guidelines § 15165; *Nelson v. County of Kern* (2010) 190 Cal.App.4th 252, 272.) The CCC's findings readily admit that the test well is a "necessary precursor" for the MPWSP. (AR4161.) Indeed, the record is abundantly clear that the slant well is a necessary precedent for the MPWSP. (See, e.g., AR2711 [the test well is "a necessary precursor to determining whether slant wells are feasible at this site and determining whether the MPWSP will be constructed and operated as currently proposed."]; 2706 ["Information derived from the well tests is necessary to assess the feasibility and the preferred design and location of the proposed full-scale project."]; 2743; 4634.) Because the slant well is a necessary precedent to the MPWSP, it could not be analyzed separately.

After the piecemealing problem was brought to the Cal-Am's attention, it has attempted in vain

to establish that the slant well has independent utility separate from the MPWSP that justifies its treatment as a separate project. Here, the slant well does not have independent utility apart from the MPWSP. As the City noted there "is no independent utility of the test wells that has been able to be focused to us other than the furtherance of the larger project." (See AR215.)The entire justification for the Project is to determine whether the MPWSP will be constructed and operated as proposed. (See AR2711; 2706; 4142; 215.) As explained above, the Project is necessary for the MPWSP to proceed.

Moreover, even accepting Cal-Am's flawed argument that the slant well and MPWSP have independent utility because they could be implemented separately, "the possibility that two acts could be taken independently of each other is not as important as whether they actually will be implemented independently of each other. Theoretical independence is not a good reason for segmenting the environmental analysis of the two matters." (*Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214, 1229; see also *Banning Ranch Conservancy, supra*, 211 Cal.App.4th at p. 1226, fn. 7 [If the implementation of two projects "would be sufficiently interdependent in practice, even if theoretically separable, . . . a piecemealing challenge would be well founded."].) The record here is abundantly clear that the slant well and the MPSWP are in fact parts of the same project. Treating them as separate projects is classic piecemealing.

Finally, the CCC's justification for asserting jurisdiction over and approving the Project, as well as for rejecting alternatives, are all premised on the MSWSP being approved at Cal-Am's preferred location and based on its preferred design. (See e.g., AR4200 [MPWSP as the basis for siting the Project in ESHA]; 4196 [MPWSP as the basis for rejecting alternatives]; 4166 [finding a "substantial issue"].) Cal-Am cannot have its cake and eat it too. If the slant well is indeed a separate project, as the CCC and Cal-Am allege, the CCC could not use the MPWSP as the basis for (1) asserting jurisdiction of Cal-Am's appeal; (2) siting the Project in ESHA; (3) rejecting alternatives; or (4) approving the Project despite is significant and unavoidable impacts. Either the CCC improperly piecemealed the slant well from the larger MPWSP, or the findings in the Staff Report cannot be upheld.

E. The Staff Report failed to establish an adequate baseline and thresholds of significance against which to measure impacts to hydrology and water quality.

The Project will pump water 24 hours per day for up to 2 years at a rate from about 1,000 gallons per minute (gpm) to 2,500 gpm and will remove up to 3.6 million gallons of water from the groundwater

basin. (AR2740; 4191.) Despite acknowledging potential impacts to Coastal Agriculture, the Staff Report fails to analyze or discuss the Project's potential impacts to the overdrafted Salinas Valley Groundwater Basin (SVGB). (AR2741.) With the exception of providing Cal-Am's estimate of the cone of depression from the slant well, no evaluation of the potential impacts to the SVGB is included in the Staff Report. (AR2740-2741.) The CCC seems to believe it is not required to analyze the Project's impacts to groundwater or hydrology because it is exempt under its regulatory program from certain portions of CEQA. The CCC is mistaken. As explained above, the CCC must analyze all potential environmental impacts of a project in its functional equivalent document.

1. The Staff Report failed to establish an adequate baseline against which to measure impacts to hydrology and water quality.

To fulfill CEQA's information disclosure function, the Staff Report was required to "delineate environmental conditions prevailing absent the project, defining a baseline against which predicted effects can be described and quantified." (*Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439; Guidelines, §§ 15125, 15126.2, subd. (a).) "Before the impacts of a project can be assessed and mitigation measures considered, an EIR must describe the existing environment. It is only against this baseline that any significant environmental effects can be determined. [Citations.]" (*Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 119-120.) Without an adequate description of the baseline, "analysis of impacts, mitigation measures and project alternatives becomes impossible." (*County of Amador, supra,* 76 Cal.App.4th at p. 953.) Without accurate and complete information pertaining to the setting of the project and surrounding uses, it cannot be found that the [EIR] adequately investigated and discussed the environmental impacts of the development project." (*Cadiz Land Co. v. Rail Cycle* (2000) 83 Cal.App.4th 74, 87.)

Here, the Staff Report failed to provide any meaningful baseline information regarding hydrologic conditions beyond the historic level of sea-water intrusion. (AR2740-2741.) The entire discussion of existing conditions is a brief one-paragraph "background" discussion and a couple sentences in the "project objectives" section. (AR2740; 2708.) It does not contain an adequate description of existing conditions at the project site or explain the differing conditions in the 180-ft and 400-ft aquifers. The Staff Report also fails to describe the existing salinity or water levels to evaluate the

Project's impacts. And the Staff Report includes no information regarding tidal and seasonal variations in water levels. (*Ibid.*) Based on the limited information provided in the Staff Report, it was simply impossible for the public or the Commissioners to evaluate the Project's potential impacts to the groundwater supplies and water quality. (AR2740-2741; see *Save Our Peninsula Committee, supra,* 87 Cal.App.4th at p. 125; Guidelines, §§ 15125, 15126.2.)

After MCWD commented on the lack of baseline analysis in the Staff Report (see AR3625-3626), CCC staff added the term "baseline" to the text in an addendum, but still did not provide an any discussion of baseline groundwater conditions. (AR3531-3532; 3525.) Nor did the CCC respond to MCWD's comments. Instead, the CCC modified its conditions of approval (Special Condition 11) to require Cal-Am to monitor water and salinity levels *after* the Project is constructed, and provide the Executive Director with "baseline" water and Total Dissolved Solids ("TDS") levels. (AR3531-3532; 3525 [changes to Special Condition 11].) This was inadequate under CEQA. By deferring the analysis of baseline conditions, it was impossible for the Staff Report to provide the information necessary for the decisionmakers and the public to understand the impacts of the Project. (*Save Our Peninsula Committee, supra,* 87 Cal.App.4th at p. 125; Guidelines, §§ 15125, 15126.2, subd. (a).) As explained in *Save Our Peninsula Committee,* an environmental document may not simply present data without meaningful analysis. Without an explanation of preexisting conditions, the Staff Report does not comply with CEQA. (*Id.* at p. 122 [EIR failed to comply with CEQA because it relied on "figures generated at the end of the environmental review process, rather than at the beginning, to determine a baseline].)

Furthermore, CEQA requires the identification of baseline conditions in an open process that involves interested agencies and the public *before* a project is approved. (*CBE, supra,* 184 Cal.App.4th at p. 88 [holding experts reliance on undisclosed data regarding baseline does not meet the "informational" goals of CEQA and that baseline information provided at the end of the process was too little, too late].) By failing to provide meaningful baseline data or description of existing conditions, the Staff Report is inadequate as an informational document as a matter of law. [8]

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[8] To make matters worse, the conclusory statements regarding historic sea-water intrusion are not supported by evidence in the record. The Staff Report limited groundwater references, include citations

2. The Staff Report failed to establish adequate thresholds of significance to measure the Project's impacts to hydrology and water quality.

The main purpose of an EIR is to allow agencies and the public to consider whether a project will result in any significant environmental impacts and to evaluate alternatives and mitigation measures that could reduce or avoid those impacts. (Pub. Resources Code, §§ 21002; 21002.1, subd. (a).) To serve this important function, an EIR must establish and explain the "threshold of significance" used to measure the severity of each potential impact. "A threshold of significance is an identifiable quantitative, qualitative or performance level of a particular environmental effect, non-compliance with which means the effect will normally be determined to be significant by the agency and compliance with which means the effect normally will be determined to be less than significant." (Guidelines, § 15064.7.)

Here, the Staff Report fails to describe any threshold of significance to measure the severity of impacts to groundwater. As noted above, the Staff Report improperly only discusses whether the Project would have a significant effect on coastal agriculture. (But see Guidelines, Appendix "G" [Would the project "deplete groundwater supplies or interfere substantially with groundwater recharge *such that there would be a net deficit in aquifer volume or a lowering of the local groundwater table level* …"].) There is no threshold for gauging impacts to the SVGB. Therefore, it was impossible for the CCC or the public to determine whether the Project would have a significant impact to the SVGB.

Instead, the Staff Report seems to rely on a mitigation measure proposed by Cal-Am (which was rejected by the City of Marina) to establish a threshold of significance. The Staff Report states that if a drawdown of one foot "above natural fluctuations" occurs, this "shall be considered a significant adverse effect on water supply." (AR2741.) Even if it was appropriate for the CCC to only describe a threshold of significance as part of its mitigation, there is no explanation why this particular threshold was selected and there is no evidence to support the use of this threshold. As MCWD' interim general manager, and an experienced engineer expert (AR3616-17), commented "the proposed mitigation and monitoring for the Project are completely inadequate to assure that impacts to Salinas Groundwater Basin and wells in the basin are fully mitigated." He noted that the "keystone to the mitigation is the assumption that single one-foot drawdown in monitoring wells is meaningful and relevant to assure no

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to the Monterey County Groundwater Management Plan (AR2708) and the Salinas Valley Water Project

impacts will occur. How was that one-foot drawdown determined? What baseline groundwater elevation and salinity levels did the Commission use to evaluate the proposal? The Staff Report includes no description of the existing groundwater elevations, and no analysis to support the assumption that a one-foot drawdown or increase in salinity levels has any meaning whatever from a technical standpoint." (AR3614.) The CCC did not respond to MCWD's comments. This was error. (*Berkeley Keep Jets Over the Bay Commission v. Board of Port Commissioners* (2001) 91 Cal.App.4th 1344, 1367 ["Where comments from responsible experts or sister agencies disclose new or conflicting data or opinions that cause concern that the agency may not have fully evaluated the project and its alternatives, these comments may not simply be ignored. There must be good faith, reasoned analysis in response."].)

As explained in *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1111, "the fact that a particular environmental effect meets a particular threshold cannot be used as an automatic determinant that the effect is or is not significant." The agency must explain *why* the threshold is appropriate and *why* there will be no impacts based on the threshold. (*Ibid.*).

Even if the revisions to Special Condition 11 could be considered thresholds of significance, the addendum failed to provide any analysis to support the assumption that a 1.5-foot water level drawdown or increase in TDS levels of more than 2,000 parts per million at Monitoring Well 4 provides a meaningful threshold for assessing impacts as required under CEQA. (See *Protect the Historic Amador Waterways, supra,* 116 Cal.App.4th at pp. 1110-1112; Because the Staff Report failed to provide any explanation or evidence to support the use of any thresholds, the Commissioners and the public were not able to determine whether the impacts to groundwater would in fact be significant. Therefore, the Staff Report is inadequate as an informational document.

3. The mitigation added in the last-minute addendum does not cure the baseline and thresholds of significance problems; the mitigation itself is improper under CEQA.

Instead of analyzing potential impacts to the SVGB, the Staff Report relies on mitigation proposed by Cal-Am (that was rejected by the City as inadequate) to establish the Project will not significantly impact Coastal Agriculture. (AR2741). This was error. An EIR must separately identify and analyze the significance of environmental impacts before proposing mitigation

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Environmental Impact Report (AR2740), are not included in the CCC's administrative record.

measures. (See *Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645 (*Lotus*).) Here, the Staff Report assumes Cal-Am's mitigation is part of the Project, will be voluntarily implemented, and will be effective, without first analyzing or disclosing the impacts of the Project itself. "[T]his short-cutting of CEQA requirements subverts the purposes of CEQA by omitting material necessary to informed decision-making and informed public participation. It precludes both identification of potential environmental consequences arising from the project and also thoughtful analysis of the sufficiency of measures to mitigate those consequences." (*Id.* at p. 658.)

Adding to the problem, Special Condition 11, as amended last-minute, constitutes unlawful deferral of mitigation and improper delegation by leaving it up to Cal-Am's Hydrology Working Group, subject to concurrence by the Executive Director, to determine whether impacts are significant. (AR4151; 3532; 3525.) This approach has been soundly rejected by the courts. "A study conducted after approval of a project will inevitably have a diminished influence on decisionmaking. Even if the study is subject to administrative approval, it is analogous to the sort of post hoc rationalization of agency actions that has been repeatedly condemned in decisions construing CEQA." (See *CBE*, *supra*, 184 Cal.App.4th at p. 92, see also *id.*, at p. 93 ["Fundamentally, the development of mitigation measures …is not meant to be a bilateral negotiation between a project proponent and the lead agency after project approval; but rather, an open process that also involves other interested agencies and the public."].)

In addition, the CCC was required to determine whether the Project will have a significant effect on the environment and whether mitigation will be effective before project approval; this authority cannot be delegated. (See *POET, supra,* 218 Cal.App.4th at p. 731.) By allowing the Hydrology Working Group and Executive Director to determine the Project's impacts and effectiveness of mitigation after Project approval and outside of the public forum, the CCC violated CEQA.

F. The CCC's CEQA-Equivalent Document Failed to Disclose, Analyze, or Propose Adequate Mitigation for the Project's Significant Impacts on Special-Status Species and ESHA.

The CCC's Staff Report purported to consider the impacts on special-status species and ESHA. Among other things, the Staff Report found:

- the "dune habitat" on site is an "extremely rare physical habitat type." (AR2725.)
- Cal-Am's expert argued that the habitat was "degraded" and thus unimportant. (AR2725.) The CCC's experts disagreed. (*Ibid.*)

- the "entire area in which the project would be located is primary habitat and ESHA under the LCP." (AR2726.)
- The Coastal Act also protects ESHA against significant disruption of habitat values and only allows uses "dependent on those resources" in ESHA areas. (AR2726.)
- "The proposed project is not a resource-dependent use, so it cannot be approved consistent with the LCP's habitat protection policies." (AR2726.)
- A number of plant and animal species of special concern are dependent on dune habitat, including several listed species. (AR2722.) For instance, "Monterey spineflowers and snowy plover nests have been identified within and adjacent to the proposed project area." (AR2725.)

The Staff Report purports to analyze potential impacts to ESHA and to special-status species. In addressing these impacts, the Staff Report states that the impacts will be addressed by "requiring project construction, well pack replacement, and decommissioning to occur outside of the Western snowy plover breeding and nesting season, the active season for the Smith's blue butterfly, and the blooming period of the Monterey spineflower." (AR2749.) Thus, "construction will occur outside the Western snowy plover nesting season, which runs from February 28 to October 1 each year." (AR2708.) The Staff Report repeats this assurance no less than **6 times**. (AR2699; 2701; 2708; 2713; 2722; 2766.)

Notably, this condition was based in large part on the Environmental Assessment prepared by the Monterey Bay National Marine Sanctuary, in consultation with the United States Fish and Wildlife Service. (AR357-482.) In face-to-face meetings with the Sanctuary and the Service, Cal-Am made repeated assurances that neither "construction" nor "demobilizations" would occur in the snowy plover nesting season "**under any condition**." (AR2353.) The federal concurrence in the CDP was dependent on this condition, and the Service specifically noted that the "season of work was important to our concurrence for the plover and butterfly." (AR475; 3849.) Every single biologist in this case opined that construction activities had to cease by February 28 to avoid impacts to snowy plover and other special-status species. On the date of project approval, in fact, United States Fish and Wildlife Service sent an email reiterating the importance of the construction deadline. (*Ibid.*)

Nevertheless, without any notice to the public, without consultation with the expert resource agencies or biological experts, the CCC essentially deleted this condition on the evening before the project approval. (See AR3525; 3526; 3527; 3528; 3530; 3534.) Although the Staff Report continues to cite to the federal approvals as evidence that the adopted mitigation is effective, there is absolutely no evidence in the record that the federal agencies knew of the changes in the mitigation. More importantly,

there is no substantial evidence in the record that the modified mitigation will avoid impacts to species.

Although under the City's LCP, the dune habitat on the project site constitutes "primary habitat area" and ESHA, which cannot be impacted, the Staff Report purports to authorize impacts and to mitigate impacts to ESHA by requiring habitat restoration. (AR2705, 2727.) This was not only impermissible under the City's LCP, it violates the Coastal Act. (*Bolsa Chica, supra,* 71 Cal.App.4th at pp. 506-507 [the only permissible mitigation of Project impacts to ESHA, *even if degraded,* is preservation and *complete avoidance*].)

G. The CCC Violated CEQA by Failing to Adequately Analyze a Reasonable Range of Alternatives to the Project in its CEQA-equivalent document.

In adopting CEQA, the Legislature expressly declared that "it is the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects[.]" (§ 21002.) To achieve this end, the Legislature has directed that environmental documents must contain a "detailed statement" setting forth alternatives to a proposed project. (§ 21100, subd. (b)(4).) The document must "describe a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives." (Guidelines, § 15126.6, subd. (a).) Under the CCC's certified regulatory program, its environmental analysis must include a discussion of alternatives that satisfies CEQA. The Staff Report does not.

The entire discussion of alternatives in the Staff Report is a scant two-and-a-half pages.[9] (AR2742-2744; 4194-4196.) The first page is largely a statement of legal standards for the preparation of an adequate alternatives analysis, which are subsequently ignored. (AR2742; 4194.) The remaining discussion consists primarily of a conclusory summary that no alternative methods or locations are feasible. (AR2743; 4195-4196.) This does not satisfy CEQA. (See *Laurel Heights I,*

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[9] / Notably, in its comments on the slant well to the City of Marina, the CCC recommended the City's review of the slant well "include a robust alternatives analysis to identify feasible sites where the project may result in fewer impacts – e.g., sites with less sensitive habitat, less potential for coastal erosion, etc." (AR4486.) The CCC did not even follow its own recommendation.

supra, (1988) 47 Cal.3d 376 [conclusory statements as to lack of feasible alternatives is inadequate under CEQA].) An EIR must discuss the reasons for rejecting alternatives "in sufficient detail to enable meaningful participation and criticism by the public. (*Id.* at 405.)

While the Staff Report states that, allegedly, "stakeholders" considered various factors such as habitat, coastal resources, and the availability of electrical service to eliminate unstated alternatives, the Staff Report cites to no actual evidence of this analysis and does not mention which alternatives were considered. (AR2743.) The "applicant's feeling about an alternative cannot substitute for the required facts and independent reasoning" regarding the feasibility of alternatives. (*Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4th 1336, 1356.) An agency may not simply accept the project proponent's assertions about an alternative; rather, the agency "must independently participate, review, analyze and discuss the alternatives in good faith." (*Save Round Valley*, *supra*, 157 Cal.App.4th at 1460, quoting *Kings Cnty. Farm Bureau v. City of Hanford*, 221 Cal.App.3d 692, 736 (1990). Here, the CCC abdicated its independent duty to evaluate alternatives and let the Cal-Am determine the project objectives and each alternatives' feasibility, despite the Cal-Am's failure to provide any data from which to draw rational conclusions about each alternative's feasibility.

The EIR 'is required to make an *in-depth* discussion of those alternatives identified as at least potentially feasible.' [Citation.]" (*Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4th 1336, 1354, italics added.) Moreover, "[w]hile the lead agency may ultimately determine that the potentially feasible alternatives are not actually feasible due to other considerations, the actual infeasibility of a potential alternative does not preclude the inclusion of that alternative among the reasonable range of alternatives." (*Watsonville Pilots Assn. v. City of Watsonville* (2010) 183 Cal.App.4th 1059, 1087.) Moreover, it is well settled that private agreements cannot be used to circumscribe the analysis of alternatives under CEQA, even if the agreement actually binds the private parties, which is not the case here. (See *Habitat & Watershed Caretakers, supra,* 213 Cal.App.4th at p. 1301 [rejecting the notion that the alternatives analysis could be limited because the project was supposed to implement a settlement agreement]. As the Supreme Court explained in *Laurel Heights I*, it is not sufficient for decisionmakers (or their staff) to privately discuss the feasibility of alternatives, and thus limit the scope of analysis in an environmental document. (47 Cal.3d at p. 404.)

Because the CCC improperly dismissed all alternatives in conclusory fashion, there is no analysis or discussion comparing the impacts of the alternatives to those of the Project as required by CEQA. (Guidelines, § 15162 ["the analysis must contain sufficient information about each alternative to allow meaningful evaluation, analysis, and comparison with the proposed project"]; *Friends of the Eel River*, supra, 108 Cal.App.4th at p. 873 [discussion of alternatives must provide sufficient "information to the public to enable it to understand, evaluate, and respond" to the agency's conclusions.].)

Additionally, the curtailed scope of the analysis is not supported by substantial evidence in light of Cal-Am's public declarations that other sites are potentially feasible. Cal-Am has described a site "near Potrero Road" as promising, especially because it would "avoid impacts to the Salinas Basin." (AR3627; 3588, 3592.) In its comment letter on the Staff Report, MCWD asked that the CCC consider this alternative. (AR3627; 3614.) The CCC did not respond to the comment, but in a late-night alteration to the Staff Report, it argued that the alternative would have potential impacts related to public access and "could" impact plover habitat. (AR3533; 4195.) The revisions to the Staff Report also state that it is further away from Cal-Am's preferred location for the unapproved MPWSP desalination facility, and thus might have impacts. (AR3533; 4195.) These assertions are merely conclusions; there are no facts or analysis. As such, they do not satisfy CEQA. (*Laurel Heights II*, *supra*, 6 Cal.4th at p. 1124 ["Conclusory statements unsupported by factual information will not suffice."]; see also *Habitat & Watershed Caretakers, supra,* 213 Cal.App.4th at p. 1305 ["CEQA does not permit a lead agency to omit any discussion, analysis, or even mention of *any* alternatives that feasibly might reduce the environmental impact of a project on the *unanalyzed theory* that such an alternative *might not* prove to be environmentally superior to the project. The purpose of an EIR is to provide the facts and analysis that would support such a conclusion so that the decision maker can evaluate whether it is correct."].)

Finally, the Staff Report is inadequate because it completely fails to analyze the impacts of the "no project" alternative as required under CEQA. (Guidelines, § 15126.6, subd. (e)(1).) As explained in the CEQA Guidelines, the "no project" alternative should compare the environmental effects of the property remaining in its existing state against environmental effects which would occur if the project is approved. (Guidelines, § 15126.6, subd. (e)(3)(B).) Here, the Staff Report fails to comply with this basic requirement. (AR2743-2744.) There is no discussion regarding what would be expected to occur at the

project site if the Project is not approved and the scant discussion comparing potential impacts from other potential desalination projects is conclusory. The lack of any meaningful analysis of potentially feasible alternatives renders the Staff Report inadequate as an informational document

H. The CCC's in-lieu environmental document must be re-noticed and re-circulated.

Certified regulatory programs, like the CCC's, are subject to Public Resources Code section 21092.1, which requires new public notice and recirculation for additional public comment when "significant new information" is added to an EIR after its original release for public review. (*Joy Road, supra,* 142 Cal.App.4th at pp. 667-671 ["notice and recirculation provisions of CEQA ensure that the public has notice and an opportunity to comment on the actual plan that [the agency] intends to approve"].) "Significant new information" triggering recirculation includes, for example, a disclosure showing (1) a new or substantially more severe environmental impact; (2) a new feasible project alternative or mitigation measure that is not adopted; or (3) when the draft EIR was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded. (Guidelines, § 15088.5.)

Here, the October 31 Staff Report was substantially modified in the evening of November 11, 2014, the night before the CCC approved the Project, to fundamentally alter the project description, the mitigation, the disclosure of impacts, and the disclosure of feasible alternatives. For example, the Staff Report's analysis of impacts to snowy plover was predicated on the fact that no construction-related activities would occur during the snowy plover nesting and breeding season under any condition. (AR2708; 2722.) The mitigation in the Staff Report included an express condition that Project-related construction "shall not occur between February 28 and October 1 of any year." (AR2699.) After the Staff Report was circulated, this restriction was eliminated, without public review, and without agency consultation. (AR3526-3527; 3528; 3530.) This change authorizes construction to continue after February 28, which would likely cause new undisclosed impacts. (*Ibid.*) "Special Condition 14," as amended, also authorizes Cal-Am to capture and move endangered snowy plovers in the project area without an incidental take permit, which is prohibited under the Endangered Species Act. (AR3526-3527.) These changes significantly weakened the mitigation described in the Staff Report without any discussion regarding whether the mitigation would be effective. There are no expert reports or opinions

demonstrating that the new mitigation is substantially similar and equally effective as the old mitigation. The new mitigation is of questionable efficacy and has never seen the light of public review and has not been reviewed by the wildlife agencies. (See *Gray, supra*, 167 Cal.App.4th at p. 1120 [change to mitigation measure triggered recirculation].)

The CCC also disclosed a new potentially feasible alternative site for the Project at Potrero Road, explaining that this new alternative site was "suitable for a slant well." (AR3533.) This alternative, however, was never subject to public scrutiny. In *Joy Road*, the lead agency left out a discussion of alternatives from its draft timber harvest plan (an EIR equivalent under CEQA) and then slipped a discussion into the final plan without comment from the public. (*Joy Road, supra*, 142 Cal.App.4th at 667-68.) The court ordered recirculation noting that "public review and comment regarding alternatives is a crucial component of CEQA." (*Id.*, at p. 667.)

The CCC also substantially changed the discussion of impacts to coastal agriculture, substantially changing the mitigation and adding significant new information regarding seawater intrusion near the site. (AR3531-3532; 3525.) By adding the new information and additional data in the cover of night after the Staff Report was circulated, the public and other agencies were deprived any opportunity to comment on these significant environmental issues. (Guidelines, § 15088.5, subd. (a)(4).)

The eleventh-hour changes deprived the public any opportunity to comment on the actual project approved. Therefore, the CCC was required to recirculate the Staff Report before approving the Project to comply with CEQA. (See Pub. Recourses Code, § 21092.1, Guidelines, § 15088.5; *Laurel Heights II, supra,* 6 Cal.4th at pp. 1124-1125; *Joy Road, supra,* 142 Cal.App.4th at pp. 667-671.)

VI. CONCLUSION

For the foregoing reasons, KTC respectfully requests that the Court grant the petition.

Dated: May 6, 2015

REMY MOOSE MANLEY, LLP

By: _____
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MARINA COAST WATER DISTRICT

Marina Coast Water District v. California Coastal Commission, et al.
Santa Cruz Superior Court Case No.: CISCV180839

PROOF OF SERVICE

I, Rachel Jackson, am a citizen of the United States, employed in the City and County of Sacramento. My business address is 555 Capitol Mall, Suite 800, Sacramento, California 95814. My email address is rjackson@rmmenvirolaw.com. I am over the age of 18 years and not a party to the above-entitled action.

On May 6, 2015, at approximately 4:15 p.m., I served the following:

MARINA COAST WATER DISTRICT'S OPENING BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

☑ On the parties in this action by causing a true copy thereof to be electronically delivered via the internet to the following person(s) or representative at the address(es) listed below. The parties on whom this electronic mail has been served have agreed to such form of service

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury that the foregoing is true and correct and that this Proof of Service was executed on this 6th day of May, 2015, at Sacramento, California.

Rachel Jackson

Marina Coast Water District v. California Coastal Commission, et al.
Santa Cruz Superior Court Case No.: CISCV180839

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CRUZ

Marina Coast Water District, and DOES 1-10, Petitioner, **v.** **California Coastal Commission, and DOES 11-50,** Respondents, **California-American Water Company, a California water corporation, and DOES 51-100,** Real Party in Interest.	Case No. CV180839 **CALIFORNIA COASTAL COMMISSION'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS** July 23, 2015, 9:00 a.m. Department 4 Honorable Rebecca Connolly Trial Date: None Set Action Filed: November 25, 2014

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Respondent California Coastal Commission (the Commission) hereby submits this opposition to Marina Coast Water District's (MCWD's) petition for writ of administrative mandamus in this matter. The Commission incorporates by reference the brief filed by Real Party in Interest Cal-Am, and offers the following additional arguments.

I. THE COASTAL ACT AUTHORIZED THE COMMISSION TO HEAR THE APPEAL AND APPROVE THE PERMITS.

A. The Commission had authority to hear this appeal from the denial of a CDP for a major public works project.

First, MCWD contends there were no statutory grounds for Cal-Am's appeal to the Commission from the City's coastal development permit (CDP) denial. Yet Public Resources Code section 30603(a)(5) authorizes the appeal at issue here:

> 30603. (a) After certification of its local coastal program, an action taken by a local government on a coastal development permit application may be appealed to the commission for only the following types of developments:
>
> . . .
>
> (5) Any development which constitutes a major public works project or a major energy facility.

MCWD does not dispute that in this case, the City "took action" on a CDP application for a "major public works project." (See AR 327 [City notice of final local action stating that City denied a CDP for the project]; Pub. Res. Code § 30114 [defining a "public works project" to include water production facilities subject to the jurisdiction of the California Public Utilities Commission]; Cal. Code Regs., tit. 14, § 13012(a) [public works facilities costing at least $100,000 are "major"].)

MCWD maintains, however, that the Coastal Act did not authorize the appeal to the Commission here, because the City denied the CDP application "without prejudice," and the City did not base its denial on local coastal program (LCP) conformance or nonconformance. (MCWD Memo. at p. 6.) MCWD misunderstands the Coastal Act appeal provisions.

The scope of the Commission's appellate jurisdiction is defined by the type of development acted on by the local government, not the nature or adequacy of the local government's findings. (See Pub. Res. Code § 30603(a) ["After certification of its local coastal program, an action taken

by a local government on a coastal development permit application may be appealed to the commission for only the following types of developments:"].)

The grounds for appeal have nothing to do with the local government's analysis or findings. Nor does section 30603 distinguish between local permit actions that are "with prejudice" and "without prejudice." (Neither the LCP nor the Coastal Act authorizes a denial "without prejudice." Indeed, since an applicant can always reapply for a permit, that distinction is meaningless.) Rather, as MCWD accurately states on page 9 of its memorandum, a valid appeal must allege that the project conforms to the standards of the LCP. (Pub. Res. Code § 30603(b)(2) ["The grounds for an appeal of a denial of a permit pursuant to paragraph (5) of subdivision (a) shall be limited to an allegation that the development conforms to the standards set forth in the certified local coastal program and the public access policies set forth in this division."].) That *is* the case here: the appeal to the Commission alleged that the project conformed to the standards of the LCP. (See AR 1588 ["Because the proposed Project conforms to the standards of the LCP and the public access policies in the Coastal Act, the Commission should grant this appeal and issue the CDP."].)

In fact, after adhering to this untenable talking point for a few pages, MCWD quickly lapses back into acknowledging the actual legal standard. (See MCWD Memo. at p. 14 ["The CCC can overturn a local agency's denial of a major public works project under the Coastal Act if it concludes that the project is [sic] conforms to (1) the standards set forth in the certified LCP; and (2) the public access policies set forth in this division.(§ 30603, subds. (a)(5), (b)(2).)"].) Accordingly, the appeal was proper, and the Commission appropriately heard it.

The City's interpretation of its action matched the Commission's, and the City issued a final local action notice (FLAN) following its decision. (AR 2983.) In the City's resolution itself, the resolution summarizing the City Council action simply states that the City Council disapproved the coastal permit; the reference to the denial being "without prejudice" to subsequent "reconsideration" appears in the findings. (AR 316-17.)

MCWD argues that regardless of what the City thought it was doing, under the Commission's regulations, the City's action was not "complete" until it made all the required

findings regarding the project's compliance with the LCP.[1] (MCWD Memo. at p. 10.) MCWD's argument is incorrect for two reasons. First, the City based its decision on CEQA, and so there were no "required findings" concerning LCP compliance, at least for purposes of Commission appellate review and judicial review.[2] (See, e.g., *Topanga Association For A Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 510 [agency must have analytical bridge between evidence and findings, and findings and action]; *Saad v. City of Berkeley* (1994) 24 Cal.App.4th 1206, 1215 [agency need only have one valid, sufficient ground for denying permit].) The clear intent of the regulation is to address those situations where a local government has made a decision, but is still in the process of adopting supporting findings—not situations where the local government has made a decision, given notice that its decision is final, and has made all of the findings it intends to make in connection with that final decision.

Second, while this regulation imposes requirements on local governments, it is not a jurisdictional provision. Even if "completeness" arguably affects when an approved permit takes effect (a question the Court need not reach), it should not impede appellate review by the Commission. Indeed, MCWD's reading would negate one of the main purposes of such review: to correct inadequate findings. If MCWD were correct, then when a local government made inadequate findings (either in good faith, or intentionally, to capitalize on this regulation), then the Commission could never exercise appellate review over the decision. It could exercise such review only if the local government made *adequate* findings, in which case there would probably be no need for appellate review. The jurisdiction of an appellate body cannot be limited to

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[1] The pertinent regulation states as follows:

> A local decision on an application for a development shall not be deemed complete until (1) the local decision on the application has been made and all required findings have been adopted, including specific factual findings supporting the legal conclusions that the proposed development is or is not in conformity with the certified local coastal program and, where applicable, with the public access and recreation policies of Chapter 3 of the Coastal Act, and (2) when all local rights of appeal have been exhausted as defined in Section 13573.

(Cal Code Regs., tit. 14, § 13570.)

[2] Of course, the Commission does not believe that the City's approach here was legally sound, simply that it was "complete" for purposes of review.

situations where the body whose decision is being appealed from has complied with all of its legal obligations.

MCWD also claims that the Commission could not hear the appeal because the City had not prepared an EIR, citing *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.* (1993) 6 Cal.4th 1112, 1124. (MCWD Memo. at p. 10.) This argument, however, assumes that an EIR was required before the Commission could act. Unlike *Laurel Heights*, here the Commission *can* act absent an EIR, because it has a certified regulatory program. (Cal. Code Regs., tit. 14, §§ 15250, 15251(c).)

B. Substantial evidence supported the substantial issue findings.

MCWD argues that the Commission erred in finding a "substantial issue," but does not quote the relevant statutory language from the Coastal Act. After certification of an LCP, "[t]he commission shall hear an appeal unless it determines . . . (2) . . . that no substantial issue exists with respect to the grounds on which an appeal has been filed pursuant to Section 30603." (Pub. Res. Code § 30625(b).)

Here, the ground for the appeal was that the proposed development conformed to the LCP. (AR 1588.) Given that the Commission ultimately determined that the proposed development did conform to the LCP despite inconsistency with one provision of the Land Use Plan, there was, at a minimum, a substantial issue on that point.[3] The Commission therefore did not abuse its discretion in finding a substantial issue. (See *Alberstone v. California Coastal Com*. (2008) 169 Cal.App.4th 859 [trial court reviews an administrative agency determination of whether an appeal raises a substantial issue for abuse of discretion].)

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[3] The five factors listed in MCWD's brief can be helpful in this analysis, and the Commisison found that "four of the five substantial issue factors weigh in favor of a finding of substantial issue." (AR 4165-66.) The Commission explained its reasoning behind each of the five factors in detail in the Staff Report, providing substantial evidence in support of its determination. (AR 2716.)

C. The Commission properly found that approving the project was the option most consistent with the LCP, despite being inconsistent with one primary habitat policy.

MCWD contends that the Commission erred in approving the CDPs for the project because, according to MCWD, only resource dependent development, and not industrial development, is allowed on the site, despite it being designated for coastal-dependent industrial uses. MCWD inaccurately asserts that the Commission found that the project was inconsistent with the LCP, but in fact, the Commission found that the project was inconsistent with one provision of the Land Use Plan, but consistent with the LCP when the various provisions were read together. (AR 2727.)

1. The Commission was within its discretion when it read the various LCP provisions together, and determined that they allowed this use at the project site.

On its face, the LCP supports the Commission's interpretation of the LCP, allowing the project. First, only the Commission's interpretation gives effect to the LCP's specific land use designation for this site. The LCP designates the project site as "Coastal Conservation and Development," which prioritizes development of coastal-dependent industrial uses. (AR 4197.) The LCP also states that "Coastal Conservation and Development uses shall be allowed on the west side of Dunes Drive," which includes the project site:

> Coastal Conservation and Development uses *shall be allowed* on the west side of Dunes Drive. These activities shall include, but not be limited to, marine agriculture (Mariculture); off-shore and surf-zone sand mining, and other commercial activities dependent for economic survival on proximity to the ocean, salt water or other elements only available in this particular environment. *Development in this area will be allowed* in already disturbed areas (see Sensitive Habitat section).

(AR 820, emphasis added.) Thus, the LCP mandates that such uses, which include the test well, be allowed here. MCWD's interpretation, which would not allow an industrial use on the site, is flatly incompatible with the LCP's designation of this site for industrial use.

Second, the Commission's interpretation, unlike MCWD's, gives effect to LCP language confronting exactly the issue here: harmonizing protection of primary habitat with the intent to allow industrial development on the site. The LCP balances those concerns by restricting such development to already disturbed areas:

> Because of the fragile character of the dune vegetation, new development in this area shall be restricted to already-disturbed areas. Development in areas where the natural dune remains shall not alter the basic configuration of the natural dune landform, and shall provide for site reclamation.

(AR 817.) The project would be located in a dune area "that has been extensively disturbed by mining activities." (AR 2693.) Thus, the CDP approval comports with the LCP's requirement that new coastal dependent industrial development be located in disturbed areas. Additionally, the Commission found that "Because the area of the proposed project essentially lacks dune vegetation, the primary habitat criteria linked to the presence of dune vegetation does not apply in this instance." (AR 2724, fn. 15.)

The Commission relied on these LCP provisions, and others, in finding the use allowable. (AR 4197-4202.)

Third, as a general matter, the Commission's interpretation of the LCP is entitled to judicial deference, given the Commission's special familiarity with the regulatory and legal issues. (*Hines v. California Coastal Com.* (2010) 186 Cal.App.4th 830, 849 [court gives "broad deference" and "great weight" to Commission's interpretation of LCP]; *Reddell v. California Coastal Commission* (2009) 180 Cal.App.4th 956, 965-966 [courts give deference to Commission's interpretation of the LCP appropriate to the circumstances of the agency action]; *Alberstone v. California Coastal Commission* (2008) 169 Cal.App.4th 859, 866 ["we grant broad deference to the Commission's interpretation of the LCP since it is well established that great weight must be given to the administrative construction of those charged with the enforcement and interpretation of a statute."]; § 30625, subd. (e) [Commission decisions to guide future actions of local governments].) "The Commission has the ultimate authority to ensure that coastal development conforms to the policies embodied in the state's Coastal Act." (*Charles A. Pratt Construction Co. v. California Coastal Com*, *supra*, 162 Cal.App.4th at 1075.) The Commission's interpretation here is therefore entitled to deference.

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2. The Commission could properly consider the Coastal Act in interpreting the LCP.

Furthermore, the Commission's interpretation allowing industrial development in already disturbed areas is consistent with Public Resources Code section 30260.[4] MCWD criticizes the Commission for citing section 30260 in its approval of an industrial facility in primary habitat. MCWD argues that because the City has a certified LCP, that LCP and the Coastal Act public access and recreation policies—and not the remaining provisions of the Coastal Act—provide the substantive policies with which proposed development must comply. Therefore, according to MCWD, the Commission erred by considering section 30260, which is not part of the Public Access and Recreation chapters of the Coastal Act. (MCWD Memo. at p. 14.)

This argument is specious. In considering section 30260 for additional support, the Commission tracked the LCP, which repeatedly references section 30260. The Commission findings cite section 30260 because the LCP cites that provision in its discussion of appropriate uses for the site. (See AR 843 ["The Coastal Conservation and Development designation for this area is consistent with . . . 30260 (Coastal-Dependent Industries)"]; AR 849 ["Priority for public acquisition along with the continuation of the existing land use and future Coastal Conservation and Development land use designation are consistent with Coastal Act policies: . . . 30260 (Coastal-Dependent Industries)."].)[5]

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[4] Coastal-dependent industrial facilities shall be encouraged to locate or expand within existing sites and shall be permitted reasonable long-term growth where consistent with this division. However, where new or expanded coastal-dependent industrial facilities cannot feasibly be accommodated consistent with other policies of this division, they may nonetheless be permitted in accordance with this section and Sections 30261 and 30262 if (1) alternative locations are infeasible or more environmentally damaging; (2) to do otherwise would adversely affect the public welfare; and (3) adverse environmental effects are mitigated to the maximum extent feasible.

(Pub. Res. Code § 30260.)

[5] In its preliminary injunction papers, MCWD contended that the LCP's references to section 30260 simply indicate that the City considered section 30260 in deciding how to designate each site, and so the citation is more an indication of past review than a mandate that future review should consider the standards in section 30260. (Opening Memorandum in Support of Motion for Preliminary Injunction, at p. 9.) If MCWD is correct, then by designating the site for this type of development, the LCP simply codifies a previous finding that coastal dependent industrial use at the site satisfies section 30260. If that is true, then the use is allowable,

(continued…)

Moreover, while the Commission believes that the LCP provisions are straightforward in their support for coastal dependent industrial development at this location, to the extent there was any ambiguity in the LCP policies, it is appropriate to use Coastal Act provisions to resolve such ambiguity because provisions of an LCP must be consistent with Coastal Act requirements. (*McAllister v. California Coastal Com.* (2009) 169 Cal.App.4th 921, 931.)

To the extent there was any tension between two or more LCP policies, the Commission appropriately looked to the Coastal Act to interpret the LCP. The Coastal Act allows coastal dependent industrial uses, even in sensitive habitat, when the three part test of 30260 can be satisfied. Given the absence of evidence that the project will adversely affect primary habitat, the Commission therefore properly prioritized the industrial facilities designation in the LCP over the primary habitat policies, which is consistent with how the LCP and Coastal Act prioritize those competing concerns. (AR 817, 843, 846.)

And as explained above, in finding that the project was consistent with the LCP, the Commission relied primarily on LCP provisions requiring the Commission to allow coastal dependent industrial development at the site, and cited section 30260 as additional support. Thus, any error regarding section 30260 was harmless, because the Commission had and cited LCP grounds for its decision.

3. MCWD approves of the Commission's reference to the Coastal Act as an interpretive tool when it serves MCWD's arguments.

MCWD is selective and hypocritical in its disdain for the Commission's consideration of the Coastal Act when interpreting LCP policies. On one hand, it argues that the Commission should not have considered section 30260 when harmonizing the various LCP policies discussed above. On the other hand, its entire argument here turns on the Commission's finding that the site is "primary habitat" under the LCP. (See MCWD Memo. at p. 13.) The LCP language requiring that a proposed use be "resource dependent" applies only for primary habitat, not for secondary habitat. (See AR 2720; MCWD Memo. at p. 13.)

(…continued)
consistent with the LCP, with or without explicitly referencing section 30260 in a decision approving a CDP.

Yet in determining that the project site was primary habitat, the Commission relied in large part on Coastal Act policies:

> Thus, interpreting the definition of primary habitat consistent with the Coastal Act, the Commission finds that the area in which the proposed project would be located constitutes ESHA and meets the first description of primary habitat under the LCP.
>
> This interpretation of the LCP and the definition of primary habitat is further supported by the structure of the LCP and Coastal Act habitat policies. The Coastal Act ESHA protection policies in Section 30240 state:. . .

(AR 2726.) The CEMEX site is actually mapped as secondary habitat in the LCP, and the applicant's biologist determined that is was secondary habitat adjacent to primary habitat. (AR 2724-25.)

MCWD cannot have it both ways. If, as the Commission believes, it was appropriate to reference the Coastal Act in interpreting the LCP and harmonizing its provisions, then the Commission properly found the project consistent with the LCP. If, in contrast, the Commission could not consult related Coastal Act provisions when interpreting the LCP, then MCWD cannot build its argument on the Commission's classification of the site as primary habitat, because that also cited Coastal Act provisions for support. And even if MCWD could take such inconsistent positions, as explained above, even without relying on section 30620, the Commission had other bases for finding the project consistent with the LCP when read as a whole.

The Commission did not abuse its discretion in interpreting the LCP to allow industrial use in an already disturbed area.

II. THE COMMISSION COMPLIED WITH CEQA.

The Commission has a certified regulatory program under CEQA. (Cal. Code Regs., tit. 14, §§ 15250, 15251(c).) The parties agree that the Commission is therefore exempt from Chapters 3 and 4 of CEQA (sections 21100 through 21154), and section 21167, and from the requirement to prepare an EIR. (See MCWD Memo. at p. 15.)

A. CEQA Specifies the Content of Substitute Documents, Which Is Different from Standard CEQA Documents.

The parties dispute the extent to which Commission findings must mirror an EIR or other CEQA document. MCWD contends that having a certified regulatory program does not affect

what information an agency must include in its environmental document. At its core, MCWD argues that the Commission should have prepared an EIR, but could give it a different title. In contrast, the Commission maintains that the content of its environmental documents is governed by the provision that specifically addresses the content of substitute environmental documents for certified regulatory programs, CEQA Regulation 15252:

> 15252. SUBSTITUTE DOCUMENT
>
> (a) The document used as a substitute for an EIR or Negative Declaration in a certified program shall include at least the following items:
>
> (1) A description of the proposed activity, and
>
> (2) Either:
>
> (A) Alternatives to the activity and mitigation measures to avoid or reduce any significant or potentially significant effects that the project might have on the environment, or
>
> (B) A statement that the agency's review of the project showed that the project would not have any significant or potentially significant effects on the environment and therefore no alternatives or mitigation measures are proposed to avoid or reduce any significant effects on the environment. This statement shall be supported by a checklist or other documentation to show the possible effects that the agency examined in reaching this conclusion.
> (b) The notice of the decision on the proposed activity shall be filed with the Secretary for Resources.

(Cal. Code Regs., tit. 14, § 15252.) Substitute documents contain more information than what section 15252 describes, in part because the agencies' governing statutes and regulations require it. In addition, the Secretary of Natural Resources reviews the regulatory programs prior to certification to ensure that they are consistent with CEQA's overarching policies, and the provisions required to qualify for the certification process, which includes more than what is specified in section 15252. Once certified, however, section 15252 is the CEQA provision that most directly governs what should be in a substitute environmental document in order to be compliant with CEQA.

This provision, on its face, governs the Commission's findings, and MCWD's arguments about various other alleged requirements not found in section 15252 is simply incompatible with section 15252. Other provisions of CEQA also contradict MCWD's position that if an EIR would

be necessary for a project absent a certified regulatory program, then Commission findings must contain all the same information as an EIR. Public Resources Code section 21100 lists the information that must be in an EIR. Although MCWD accuses the Commission of violating that provision (MCWD Memo. at pp. 18, 32), MCWD also admits that Chapter 3 of CEQA does not apply to the Commission. (*Id.* at p. 15; see *Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1230-31.) Section 21100 is in Chapter 3.

Thus, MCWD is arguing that all of the informational requirements for EIRs found in section 21100 and elsewhere apply to a certified regulatory program, even though (1) the Legislature enacted a provision of CEQA specifically stating what information a certified regulatory program document must contain; and (2) the Legislature explicitly stated that certified regulatory programs need not comply with the CEQA provision listing the information that EIRs must include (section 21100). MCWD's position makes no sense, and contravenes the clear legislative intent.

And as a practical matter, why would an agency go to the trouble of obtaining certification from the Secretary of Resources if the only benefit was being able to call its document something other than "EIR," and the content had to be exactly the same? The purpose of allowing certified regulatory programs was to enable agencies to create their own programs, tailored to their governing statutes, policies, and procedures, while still serving CEQA's central goals of considering the environmental effects of a proposed project.

In support of its argument that a substitute document must include all information that an EIR must include, and not just what section 15252 lists, MCWD cites a number of cases, none of which support MCWD's conclusion. *Sierra Club* says that a certified regulatory program is not "exempt" from CEQA entirely, which no one is arguing in this case. (*Sierra Club v. State Bd. Of Forestry* (1994) 7 Cal.4th 1215, 1230-31.) The *Joy Road* case held that the Department of Forestry was subject to CEQA notice and recirculation requirements. (*Joy Road Area Forest and Watershed Assn. v. California Dept. of Forestry & Fire Protection* (2006) 142 Cal.App.4th 656, 668.) *Joy Road* noted that certified regulatory programs are exempt only from Chapters 3 and 4 and section 21167 of CEQA. (*Ibid.*) While the Commission is not "exempt" from the rest of

CEQA, other provisions apply only as they specify. Thus, in the absence of an indication they were intended to apply more broadly, provisions addressing EIRs apply only to EIRs, not to MNDs or substitute documents. For example, section 21080.1 is not one of the provisions that the Commission is "exempt" from under *Joy Road,* but on its face, it does not concern certified regulatory programs, because it sets forth an obligation to determine the appropriate type of CEQA document to prepare, when certified agencies need not prepare any of the CEQA documents referenced.[6] Put differently, an agency preparing an EIR is not "exempt" from section 15252, but section 15252 imposes no additional obligations on that agency. In the same way, there are various CEQA provisions that the Commission is not "exempt" from, but that do not impose any obligations on the Commission in this matter.

MCWD also cites *POET, LLC v. California Air Resources Bd.* (2013) 218 Cal.App.4th 681, 716. *POET* held that CEQA regulation 15004 applied to a certified regulatory program. Yet section 15004 refers to "a final EIR or Negative Declaration or another document authorized by these Guidelines to be used in the place of an EIR or Negative Declaration." (Cal. Code Regs., tit. 14, § 15004(a).) This only bolsters the Commission's argument that when CEQA or its regulations intend to address substitute documents, they say so.

Similarly, another case that MCWD cites held that a certified program may rely on "abbreviated project plans instead of a full-blown EIR." (*Environmental Protection Information*

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[6] That provision reads as follows:

> (a) The lead agency shall be responsible for determining whether an environmental impact report, a negative declaration, or a mitigated negative declaration shall be required for any project which is subject to this division. That determination shall be final and conclusive on all persons, including responsible agencies, unless challenged as provided in Section 21167.
>
> (b) In the case of a project described in subdivision (c) of Section 21065, the lead agency shall, upon the request of a potential applicant, provide for consultation prior to the filing of the application regarding the range of actions, potential alternatives, mitigation measures, and any potential and significant effects on the environment of the project.

(Pub. Res. Code § 21080.1.) The Commission is not exempt from this provision, but at the same time, it is not "responsible for determining whether an environmental impact report, a negative declaration, or a mitigated negative declaration shall be required for any project."

Center, Inc. v. Johnson (1985) 170 Cal.App.3d 604, 620.) This also supports the Commission's position that the informational requirements for substitute documents are not identical to EIRs.

Finally, in support of its argument that the Commission is not entirely exempt from CEQA—a position the Commission agrees with—MCWD cites *Conway v. State Water Resources Control Board* (2015) 235 Cal.App.4th 671 and *City of Arcadia v. State Water Resources Control Bd.* (2006) 135 Cal.App.4th 1392, 1422. (See MCWD Memo. at p. 18.) Both of these cases say that certified programs are subject to CEQA's "broad policy goals and substantive standards." (*Conway, supra,* 235 Cal.App.4th at p. 680; *City of Arcadia, supra,* 135 Cal.App.4th at p. 1422.) MCWD pretends that being subject to a statute's broad policy goals, and broad substantive standards, means being subject to every phrase in the statute, whether it applies on its face or not. That is not a fair reading of the cases.

Conway specifically mentions that "there must be significant documentation." (*Conway, supra,* 235 Cal.App.4th at p. 680.) Here, there was, as evidenced by the Commission's extensive findings and administrative record.

Most importantly, both of these cases specifically track CEQA regulation 15252 when discussing what requirements apply to certified regulatory programs. (*Conway, supra,* 235 Cal.App.4th at p. 680; *City of Arcadia, supra,* 135 Cal.App.4th at p. 1422.) That is precisely the Commission's position here, and it negates MCWD's position that the information in a substitute document must be identical to what would be in an EIR. That would render section 15252 superfluous.

B. The Commission did not find any significant environmental effects from the project, and so was not required to discuss mitigation or alternatives.

While the Commission believes that its discussion of alternatives and mitigation in its findings was analytically sufficient, such a discussion would be necessary only under section 15252(a)(2)(A). Here, the Commission found no significant adverse effects, and so the

applicable provision was section 15252(a)(2)(B), which does not require an analysis of alternatives and mitigation.[7]

C. CEQA does not give a certified regulatory program jurisdiction to address environmental effects that are otherwise outside the agency's jurisdiction.

CEQA does not expand the powers or jurisdiction of an agency beyond its governing statute. (Pub. Res. Code § 21004; Cal. Code Regs., tit. 14, § 15040.) As MCWD notes, in reviewing the project, the Commission is limited to applying the policies found in the City of Marina LCP. (MCWD Memo. at pp. 8-9.) Although the LCP has no policies concerning groundwater supply or quality, the LCP does have policies concerning coastal agriculture. While CEQA does not empower the Commission to independently regulate groundwater quality and supply issues, the Commission did find that the project would not adversely affect groundwater quality and supply so as to harm coastal agriculture.

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[7] The Commission found that the project as conditioned would not interfere with public access or beach use (AR 2718), would not adversely affect coastal waters (AR 2729), including ocean water quality (AR 2730), and not otherwise cause any adverse impacts within the scope of the LCP's marine resources, water quality, and spill prevention policies. (AR 2730.)

The Commission also considered geologic hazards such as erosion, earthquake, and tsunami, and found no adverse project impacts. (AR 2732-34.)

The Commission found no adverse impacts to archaeological and cultural resources (AR 2737), and that the project was consistent with LCP policies protecting scenic and visual resources. (AR 2739.)

Specifically concerning habitat, the Commission found that the project would not adversely affect habitat (AR 2724 [noting that area of disturbance has historically been used as an access road, and has been disturbed by sand mining activities for many years]), and that the site is not currently supporting native dune vegetation (AR 2725). The only "mitigation" the Commission required was monitoring and construction best management practices to ensure unanticipated impacts did not occur and restoration for temporary impacts, if any, in areas not disturbed by CEMEX (AR 2703-2705). That is not true mitigation, since there might not have been any adverse impacts without it. The Commission stated that "The LCP also requires that all adverse effects in primary habitat are fully mitigated," and that the project could be approved consistent with the LCP. (AR 2726-27.)

Finally, the Commission found that the project would not result in diminished water supply or water quality for agricultural uses, and would have "an insignificant effect on coastal agriculture." (AR 2740.) The Commission adequately analyzed potential effects on groundwater levels and quality, and found that the project would not have an adverse impact. (See California-American Water Company's Opposition To Ag Land Trust's Opening Brief, Case No. June 5, 2015, Case No. CV180887, at pp. 7-24.) Here too, the Commission included conditions in the permit to make sure its initial analysis was correct—not to "mitigate" expected adverse impacts.

All of the above findings were supported by substantial evidence.

MCWD makes a number of other assertions about CEQA that are not correct. First, it states that as the lead agency, the Commission "had responsibility to evaluate all of the impacts of the project and to prepare an environmental study that other agencies could rely on." (MCWD Memo. at p. 16.) Yet Section 15253 of the CEQA regulations sets forth the circumstances in which another agency can rely on a certified document in lieu of preparing its own CEQA document. Section 15253(c) states that "Certified agencies are not required to adjust their activities to meet the criteria in subdivision (b)."[8] If any certified agency acting as lead were required to "evaluate all impacts of the project and to prepare an environmental study that other agencies could rely on" then this section of CEQA would be meaningless. Additionally, section 15253(b)(3) lists as a requirement for another agency to rely on the document that the analysis

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[8] Section 15253(b) reads as follows:

> (b) The conditions under which a public agency shall act as a Responsible Agency when approving a project using an environmental analysis document prepared under a certified program in the place of an EIR or Negative Declaration are as follows:
>
> (1) The certified agency is the first agency to grant a discretionary approval for the project.
>
> (2) The certified agency consults with the Responsible Agencies, but the consultation need not include the exchange of written notices.
>
> (3) The environmental analysis document identifies:
>
> (A) The significant environmental effects within the jurisdiction or special expertise of the Responsible Agency.
>
> (B) Alternatives or mitigation measures that could avoid or reduce the severity of the significant environmental effects.
>
> (4) Where written notices were not exchanged in the consultation process, the Responsible Agency was afforded the opportunity to participate in the review of the property by the certified agency in a regular manner designed to inform the certified agency of the concerns of the Responsible Agency before release of the EIR substitute for public review.
>
> (5) The certified agency established a consultation period between the certified agency and the Responsible Agency that was at least as long as the period allowed for public review of the EIR substitute document.
>
> (6) The certified agency exercised the powers of a Lead Agency by considering all the significant environmental effects of the project and making a finding under Section 15091 for each significant effect.

includes the significant environmental effects within the jurisdiction or expertise of the responsible agency. If certified agencies acting as CEQA lead agency were always required to analyze all issues subject to CEQA, then this requirement, too, would be unnecessary. The purpose of certifying a program is to allow that agency to review the project under its governing statute and regulations, without needing to review all issues that would be analyzed in an EIR. While acknowledging that certified programs are exempt from EIR requirements, MCWD is essentially arguing that they must nevertheless prepare an EIR in everything but name.

MCWD also argues that "The LCP reiterates that a permit ought not be granted until the full environmental impacts are understood and mitigated," citing page 840 of the administrative record. (MCWD Memo. at p. 17.) No such statement appears on page 840 of the administrative record. The LCP does require the Planning Commission, when considering a CDP application, to make a finding about whether the project will include "feasible mitigating measures which substantially reduce significant impacts of the project as prescribed in any applicable EIR." (AR 940.)

This provision, which is directed to the Planning Commission, does not mandate that the Commission prepare an EIR. It requires that when considering a CDP application, the Planning Commission must include feasible mitigating measures that substantially reduce significant impacts of the project "as prescribed in any applicable EIR." No EIR was required here, as MCWD concedes. This LCP provision, by its terms, has no effect when there is no EIR. Thus, there is no general LCP requirement that all environmental impacts be mitigated.

MCWD argues that Public Resources Code section 30260 mandates that all adverse environmental effects be mitigated to the maximum extent feasible. (MCWD Memo. at p. 17.) As explained above, this provision does not directly apply, as the project must be consistent with the LCP. The Commission referenced section 30260 only as part of the process of interpreting the LCP, and had sufficient LCP grounds for approving the permit even without reference to section 30260. Throughout MCWD's opening points and authorities, MCWD argues that section 30260 does not apply.

/ / /

Assuming arguendo that the project must comply with section 30260, the Commission found that environmental impacts had been mitigated to the maximum extent feasible. In fact, the Commission found that the project would not have significant adverse environmental impacts. (See p. 13 fn. 6 *ante*.) That finding is supported by substantial evidence, and MCWD does not demonstrate otherwise.

Citing six provisions of CEQA, MCWD contends that one of CEQA's two purposes is "to require that public agencies consider and adopt feasible mitigation measures and alternatives that would avoid or lessen significant effects. (MCWD Memo. at p. 17-18.) The first cited provision states that it is the policy of the state "to consider alternatives to proposed actions affecting the environment." (Pub. Res. Code § 21001(g).) Of course, here, the Commission found no significant adverse environmental impacts, but nevertheless did consider alternatives. MCWD's second provision announced that "The Legislature further finds and declares that it is the policy of the state that projects to be carried out by public agencies be subject to the same level of review and consideration under this division as that of private projects required to be approved by public agencies." (Pub. Res. Code § 21001.1) That sheds no light on this case, since no public agency is carrying out the project.

The third cited provision states a legislative finding encouraging feasible alternatives and feasible mitigation. (Pub. Res. Code § 21002.) While the Commission did consider both mitigation and alternatives in this case, section 21002 must be read alongside the nearby provision stating that CEQA does not expand the powers an agency has under its governing statute, here, the Coastal Act. (See Pub. Res. Code § 21004.) Accordingly, the Commission cannot require mitigation measures and/or alternatives to address environmental impacts not within the scope of the LCP. MCWD also cites sections 21002.1 and 21081, but those provisions apply to how EIRs should be used, and govern agency responsibilities after an EIR is certified, whereas no EIR is required here. Similarly, while MCWD also cites section 21100, not only does this provision also concern EIRs, but it is also found in Chapter 3 of CEQA, and MCWD agrees that the Commission is exempt from Chapter 3. The Commission does have some

responsibilities under CEQA, but it need not prepare an EIR, and therefore, those requirements that are specific to EIRs do not apply to the Commission.

MCWD singles out the CEQA requirement that an EIR include written responses to all significant comments. (MCWD Memo. at p. 18.) MCWD cites section 21080.5(d)(2)(D), which states as follows:

> (d) To qualify for certification pursuant to this section, a regulatory program shall require the utilization of an interdisciplinary approach that will ensure the integrated use of the natural and social sciences in decision making and that shall meet all of the following criteria:
>
> . . .
>
> (2) The rules and regulations adopted by the administering agency for the regulatory program do all of the following:
>
> . . .
>
> (D) Require that final action on the proposed activity include the written responses of the issuing authority to significant environmental points raised during the evaluation process.
>
> . . .

On its face, this is a requirement for the Secretary of Natural Resources to apply when considering whether to certify a regulatory program. Once he or she does so, the specific provisions of the program, not the CEQA analog or the certification standard in section 21080.5, governs. Here, the Coastal Act has specific provisions addressing responses to comments, and the Commission has complied with those. (See Cal. Code Regs., tit. 14, § 13057(c)(3) [Commission staff report must respond to significant comments received at that point].) And even if this provision purported to specify ongoing procedures for an agency to follow, since it conflicts with the Commission's own certified provision, the latter controls. (See *Ross v. Coastal Com.* (2011) 199 Cal.App.4th 900.) MCWD also cites CEQA regulation 15252(a), but that provision does not mention responses to comments.

MCWD then proceeds to cite a variety of other CEQA provisions that are specific to preparing EIRs or governing agency obligations once an EIR or MND is certified. (See MCWD Memo. at p. 18 [citing Guidelines §§ 15063, 15064, 15091, 15093, 15097, 15126, 15126.2, 15126.4; Pub. Res. Code §§ 21081, 21082.2(d), 21081.6, 21100(a)].) Again, the Commission is

not required to prepare an EIR before approving a permit, and so these provisions do not apply. Furthermore, Guideline 15093 does not apply, because the Commission found no significant adverse environmental impacts.

D. Application of CEQA's 30-day circulation requirement to Coastal Commission staff reports would be legally incorrect and unworkable.

MCWD contends that the Commission violated CEQA because CEQA requires a 30-day minimum review period for a staff report on a CDP appeal. (See Pub. Res. Code § 21091(a) ["The public review period for a draft environmental impact report may not be less than 30 days."].)

1. *Ross* is controlling.

There is only one published case that discusses whether CEQA's public comment period provisions apply to the Commission. (*Ross v. Coastal Com.* (2011) 199 Cal.App.4th 900, 932.) *Ross* is on point, and it establishes that the Coastal Act's timing provisions, and not section 21091(a) of CEQA, control.

MCWD attempts to distinguish *Ross* on the basis that the hearing in *Ross* concerned an LCP amendment, whereas this case involves a CDP. (MCWD Memo. at p. 20.) The final Commission staff recommendation about a LCP amendment must be circulated "within a reasonable time but in no event less than 7 calendar days prior to the scheduled public hearing." (Cal. Code Regs., tit. 14, § 13532.) For CDP proceedings, the requirement in the Commission's regulations is "within a reasonable time," and it allows the staff report to be distributed with the hearing notice, which must be distributed no later than 10 days preceding the hearing (See Cal. Code Regs., tit. 14, § 13059 ["Staff reports shall be distributed within a reasonable time to assure adequate notification prior to the scheduled public hearing. The staff report may … accompany the meeting notice required by section 13015 "].)[9] MCWD argues that even though both

[9] Although this provision is found in the Chapter of the regulations concerning permits issued by the Commission (which would apply to one of Cal-Am's two CDPs), section 13321 makes section 13059 applicable to appeals from local permit decisions as well.

regulations say "reasonable time," the inclusion of a specific seven-day minimum for LCP amendments distinguishes *Ross*.

MCWD's attempted distinction is unpersuasive. *Ross* emphasized that the Secretary of Natural Resources had reviewed section 13532 and certified it, and so that certified regulation—and not its CEQA counterpart—controlled. (199 Cal.App.4th at p. 936.) The certification had occurred decades earlier, and so it was too late to challenge the certification of section 13532. (*Ibid.*) The analysis is identical here: section 13059 dictates when a staff report must be distributed, and it supplants the 30-day CEQA period. The Secretary reviewed section 13059 and approved it. The statute of limitations has run for any challenge to either the Commission's adoption of the regulation, or the Secretary's certification of it. And MCWD does not address the specific allowance in section 13059 for distribution just ten days before the hearing.

Nothing in *Ross* indicates that its analysis turned on whether the Coastal regulation referred to a concept ("reasonable time"), a set number of days (seven), or both. Indeed, given that on its face, "a reasonable time" in section 13059 gives the Commission more flexibility than section 13532, it would be ironic if that intent to provide *greater* flexibility resulted in the Commission having *less* flexibility in determining when to distribute staff reports and set hearings. In addition, as in *Ross*, the regulation at issue specifically allows for distribution of the staff report in fewer than 30 days. (Cal. Code Regs. Tit 14, § 13015 ["Notice of regular meetings of the commission shall be … dispatched not later than 10 days preceding the meeting."].)

MCWD relies heavily on *Ultramar, Inc. v. South Coast Air Quality Management Dist.* (1993) 17 Cal.App.4th 689, 699 and *Joy Road Area Forest and Watershed Assn. v. California Dept. of Forestry & Fire Protection* (2006) 142 Cal.App.4th 656, 672-673. *Ross* distinguished *Ultramar* and *Joy Road* on the ground that both cases established only that the CEQA notice period applied *in the absence of a different time period in the agency's controlling statute or regulations:*

> Neither *Ultramar* nor *Joy Road* involves a similar grant of power and a certified regulatory program which expressly deviates from the 30–day notice time frame specified in Public Resources Code section 21091.

(*Ross, supra,* 199 Cal.App.4th at p. 937.) *Ross* buttressed its analysis by observing that under Public Resources Code section 21174, "to the extent of any inconsistency or conflict between [the Coastal Act and CEQA, the Coastal Act] shall control." (*Ibid.*) There is a conflict between (1) "not less than 30 days," and (2) "a reasonable time" with an allowance for distribution 10 days before the hearing. And at a minimum, they are inconsistent. [10] As MCWD notes, the Legislature amended CEQA to change the CEQA requirement from "reasonable time" to 30 days, so the two requirements cannot be identical.

It would be irrational to have such a disparity between the distribution period for staff reports about LCP amendments and staff reports about CDPs. Indeed, it would be quite odd if the staff report for a CDP appeal concerning a single family dwelling had to be circulated 30 days before the hearing, even though the staff report for a hearing to consider approving an LCP or major LCP amendment (which could involve a lengthy and complicated set of policies, and designate allowable development for a large number of properties) need only be circulated seven days in advance of the hearing.

Here, as in *Ross* (and unlike in *Ultramar and Joy Road*), there is a Commission regulation that "expressly deviates" from section 21091 by specifying a different period. The Commission therefore did not violate the law by circulating its staff report less than 30 days before the hearing.

2. Applying the 30-day CEQA timeline to CDP appeals would be unworkable and would undermine the goals of the Coastal Act and CEQA.

Beyond the fact that a 30-day circulation period is inconsistent with the Commission regulation dictating a different circulation period, a 30-day circulation period would be inconsistent with the overall structure of the Coastal Act, which requires that the Commission take action quickly after an appeal is filed. Public Resources Code section 30621(a) requires that

[10] MCWD may argue that there is no conflict between Public Resources Code section 21091 and Commission regulation 13059, because the Commission can comply with both. That argument is specious, and fails to distinguish *Ross*. The Commission could also comply with both a 30-day minimum notice period and a seven-day minimum notice period—by giving at least 30-days notice. The point is that two mandates, worded so differently, are different and therefore *inconsistent*, which is what *Ross* relied on in holding that the timeline in the Coastal regulation, and not the timeline in CEQA, controlled.

a hearing on any coastal development permit application or appeal be set no later than 49 days after the date it is filed with the Commission.[11] The Commission must take action within that period; it may not simply open and continue the public hearing under section 30621. (*Encinitas Country Day School, Inc., v. California Coastal Commission* (2003) 108 Cal.App.4th 575.)

The Commission meets for only a few days each month, on a schedule that is set many months in advance. If the Commission were required to circulate a staff report at least 30 days prior to the hearing, that could mean that Commission staff would have as few as five days to prepare a staff report.[12]

Failure to act within 49 days can cause the local action to become final. (See *Encinitas, supra,* 108 Cal.App.4th 575.) While such an outcome here might please MCWD, most appeals are from local *approvals* of CDPs, so the effect of importing CEQA's 30-day notice requirement would most often result in deemed approval of development, significantly undermining the purpose of the Commission's appellate jurisdiction and of CEQA. Unlike CEQA, the Commission allows comments up until the time of the hearing. (Cal. Code Regs., tit. 14, § 13060(b).) As MCWD argues, the Commission must make a reasonable effort to respond to significant comments. (See MCWD Memo. at p. 21.) Were the courts to hold that the Commission must continue its hearing if certain information or documents are not transmitted until the day of the hearing or the day before, as MCWD will undoubtedly argue, such a rule would have the pernicious result of causing automatic *approvals* of development without any meaningful environmental review by the Commission at all. MCWD's approach is not compatible with the Public Resources Code section 30621 requirement that the Commission take action within 49 days.

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[11] Short deadlines apply in other circumstances as well. Public Resources Code section 30513 requires the Commission to act on LCP implementation plan submittals within 60 days after receipt of the submittal. Section 30512 requires actions on land use plan submittals within 90 days.

[12] MCWD's position here is doubly absurd given that it also argues that a Commission staff report must essentially comply with all of the requirements for an EIR. As a result, MCWD is arguing that the Commission staff must prepare a thorough, legally valid EIR, in as few as five days (or less if it does not immediately receive the complete local record for the project).

Moreover, the Commission is required to give notice at least ten days before the meeting. (Cal. Code Regs., tit. 14, § 13063.) One would expect notice of a hearing to be given at the same time as, or in advance of, a detailed staff report for the matter. This is further evidence that there was no legislative intent to require thirty days notice for Commission staff reports.

III. CONCLUSION

The Court should deny the petition.

Dated: June 5, 2015

Respectfully Submitted,

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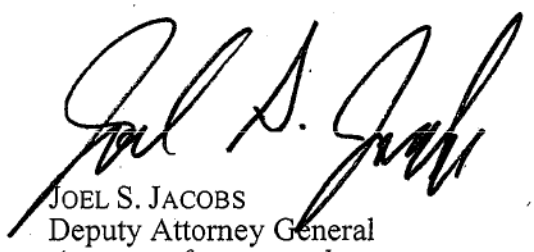

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DECLARATION OF SERVICE BY E-MAIL

Case Name: *Marina Coast Water District v. California Coastal Commission*

Case No.: **CV180839**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter.

On June 5, 2015, I served the attached **CALIFORNIA COASTAL COMMISSION'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS** by transmitting a true copy via electronic mail, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 5, 2015, at Oakland, California.

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CRUZ

MARINA COAST WATER DISTRICT, and DOES 1-10,

Petitioner and Plaintiff,

v.

CALIFORNIA COASTAL COMMISSION, and DOES 11-50,

Respondents and Defendants.

CALIFORNIA-AMERICAN WATER COMPANY, a California water corporation, and DOES 51-100,

Real Party in Interest.

CASE NO. CV180839

Assigned to: Hon. Rebecca Connolly, Dept. 4

CALIFORNIA-AMERICAN WATER COMPANY'S OPPOSITION TO MARINA COAST WATER DISTRICT'S OPENING BRIEF

Hearing Date:
Date: July 23, 2015
Time: 9:00 a.m.
Dept.: A

Action Filed: December 11, 2014

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I. INTRODUCTION

The California Coastal Commission ("Commission") fully complied with the Coastal Act and the California Environmental Quality Act ("CEQA") in approving the development and operation of California-American Water Company's ("Cal-Am") temporary test slant well project ("Project"). At bottom, this case is really about sour grapes; a "competitor" trying to block a Project it doesn't like because its own bad conduct derailed a prior water supply project proposed for the Monterey region. Marina Coast Water District ("MCWD") has no genuine environmental concern with the Project. Just a few years ago, along with Cal-Am, MCWD was proposing its own test well project to the Commission, drawing water from the Salinas Valley Groundwater Basin ("SVGB"), the *same groundwater basin* from which Cal-Am's current test well Project draws. *See* Request for Judicial Notice ("RJN"), Ex. A at 2 of 32. And now, concurrently with pursuing this action against the Commission, MCWD is seeking funding and approvals for its ***own subsurface intake wells in the exact same location as Cal-Am's test well***. In reality, MCWD fears that the data obtained from the Project will demonstrate the feasibility and *de minimis* impacts associated with Cal-Am's slant well, and support Cal-Am's development of its own future full-scale desalination facility before MCWD can move forward with a separate facility using the same technology. When viewed through this lens, MCWD's allegations about the Commission's "illegal" actions in approving the Project truly ring hollow.

Notwithstanding MCWD's true motives, its arguments that the Commission violated the Coastal Act and CEQA in its approval of this temporary test slant well Project all are without merit. MCWD attempts to cast this Project as a permanent facility that will have irreversible consequences to the groundwater basin and surrounding habitat, but the fact remains that this is a two-year Project to collect scientific data about this type of well to ensure that any future, permanent desalination projects in the region are appropriately designed and conditioned to avoid potential impacts. Moreover, Project construction is now complete and no habitat impacts will occur, and Project operations are fully conditioned so that the groundwater basin will not be adversely affected. Yet MCWD still seeks to stop this single well from operating and providing valuable data to federal, state, and local resource agencies.

The Court should be familiar with MCWD's arguments, as MCWD has repeated them nearly verbatim from its past attempts to enjoin the Project. Despite the Court rejecting many of those arguments at the hearing on MCWD's motion for stay and preliminary injunction, MCWD continues to assert them in its Opening Brief. ***Nothing has changed since the May 1 hearing. MCWD's arguments still fail.***

The Commission complied with the Coastal Act in accepting Cal-Am's appeal of the City of Marina's ("City") denial of the Project's local coastal development permit ("Local CDP"), and approving the Local CDP and the coastal development permit for those portions of the Project in the Commission's retained jurisdiction ("Commission CDP") The City took final action in denying the Local CDP, Cal-Am timely appealed that action in accordance with the requirements of the Coastal Act, and the Commission appropriately found that the appeal raised a substantial issue as to conformity with the City's Local Coastal Program ("LCP"). In approving the Local CDP and the Commission CDP at a public hearing, the Commission appropriately found that although the Project would be developed in a sensitive habitat area, because it meets certain tests required for coastal-dependent industrial facilities, the Commission had the authority under the Coastal Act and LCP to approve the Project. The Commission's actions complied with the law and are supported by substantial evidence in the record.

The Commission also complied with CEQA in approving the Project. The Commission's release of the Staff Report 13 days before the Commission's hearing was appropriate under and consistent with the Commission's CEQA certified regulatory program, and the Commission's consideration of comments submitted in advance of the hearing also complied with the rules applicable to the Commission under that program. As the Court agreed at the May 1 hearing, the Commission did not piecemeal CEQA review of the Project from Cal-Am's full-scale desalination project. Substantial evidence in the record supports the Commission's consideration and disclosure of existing groundwater conditions, as well as its establishment of appropriate standards to measure potential impacts to groundwater. Moreover, the Commission assessed and considered a reasonable range of alternatives and adequately mitigated potential impacts to biological resources. Finally, the Commission's changes to the Staff Report and proposed Special Conditions

did not require the Staff Report to be recirculated. The Commission proceeded in the manner required by law and its CEQA findings are supported by substantial evidence.

MCWD's Petition should be denied.

II. STATEMENT OF FACTS

A. Background

The water supply situation on the Monterey Peninsula is dire. AR3090-3091, 3107, 4160. Cal-Am, which provides potable water supply to approximately 100,000 customers on the Monterey Peninsula, has been vigorously working for many years to obtain alternative water sources to decrease its reliance on the Carmel River for the Monterey region's water supply. AR3888, 4143. Orders issued by the State Water Resources Control Board ("State Board") require Cal-Am to significantly reduce its Carmel River withdrawals by the end of 2016, making development of a new water supply project in the region an urgent matter. AR732-795, 3547, 2710, 4160-4161. As such, Cal-Am has proposed and the California Public Utilities Commission ("CPUC") is evaluating the Monterey Peninsula Water Supply Project ("MPWSP"), a project including a full-scale desalination facility and water supply system improvements. AR3540, 4241.

Prior to the developing the MPWSP, Cal-Am worked with MCWD to develop the Regional Desalination Project ("RDP"). AR3548. The RDP also included a proposed subsurface test well to confirm the suitability of potential seawater intake well along Monterey Bay. *Id.* However, the RDP failed after a MCWD consultant violated conflict of interest laws, and MCWD now opposes Cal-Am and the MPWSP. *Id.* To that end, MCWD conveniently fails to mention that it *fully supported* the proposed RDP subsurface test well, and joined in an application to the Coastal Commission for approval of a CDP for that test well. *See* RJN, Ex. A. As such, it is clear that MCWD's motives in this case are disingenuous: it has no genuine concern for potential environmental impacts of Cal-Am's test well Project or the actions taken by the Coastal Commission to approve the Project. MCWD simply wants to block the Project. Indeed, MCWD is currently proposing its own desalination plant *with vertical wells near the beach* at the CEMEX facility and near the Project. *See* RJN, Exs. B, C, D; AR139.

B. The Test Well Project

At issue in this case is Cal-Am's *temporary* test slant well at the disturbed CEMEX sand mining facility in the City. AR2706, 4156. The Project will be constructed, operated, and decommissioned over approximately 24 to 28 months. AR2706-2707, 4156-4157. The Project will remove primarily seawater from a sub-seafloor extension of the Dune Sand and 180-Foot Aquifers within the SVGB, which have been impacted by seawater intrusion due to past groundwater pumping. AR2708, 2740, 4158, 4191, 2098, 2166-2170. Primary components of the Project include (1) the slant test wellhead, where the water is pumped, which is located about 650 feet from the shoreline and extends downward at close to a 20 degree angle from the surface to a point over 200 feet below sea level beneath Monterey Bay; (2) monitoring wells in the Project vicinity used to measure groundwater levels and water quality during the pump tests; (3) a disposal pipeline connecting to the Monterey Regional Water Pollution Control Agency's existing ocean outfall; and (4) other associated infrastructure, including electrical supply. *Id.*

Due in part to the aquifers being seawater-intruded near the Project site, the closest active off-site wells are about 5,000 feet from the Project site. AR2740, 4191. The Project will not perforate any aquifers used or suitable for irrigation or human consumption. AR3531, 3592, 2167.

The Project will allow Cal-Am, with support from the Department of Water Resources, to gather data about the hydrogeological and water quality effects of using similar wells at or near the Project site to provide source water for potential future desalination facilities. AR2706, 4156, 1855. The data will assist resource agencies in assessing the future viability of slant wells here and around the State and inform the CPUC's consideration of the MPWSP. AR2709, 4159, 2711, 4161, 1855. The data is also required to satisfy Monterey Bay National Marine Sanctuary ("MBNMS") guidelines requiring Cal-Am to investigate the feasibility of subsurface slant wells before moving forward with the MPWSP. AR1840.

The Project is located in part within the City's LCP jurisdiction under the California Coastal Act (Pub. Res. Code § 30000, et seq.) and in part within the Commission's retained Coastal Act jurisdiction. AR2711, 4162. Development in the City's jurisdiction includes the

Project's land-based activities, and development in the Commission's jurisdiction includes the portion of the well beneath the seafloor. *Id.*

C. The Coastal Commission Properly Reviewed and Approved the Project

In March 2013, Cal-Am applied to the City and the Commission, respectively, for the Project's two CDPs. AR4249-4250. On September 4, 2014, the City denied Cal-Am's application for the Local CDP. AR315-317. On September 12, the Commission received the City's Final Local Action Notice ("FLAN"), ***which explicitly stated that the City had denied the Local CDP***. AR1597. Cal-Am timely appealed the City's decision to the Commission, AR2714, 4164, and on November 12, the Commission considered both Cal-Am's appeal and Cal-Am's CDP application to the Commission, and conditionally approved the Project over MCWD's objections. AR4146. By including Special Conditions, the Commission found that the Project "has been adequately mitigated and is determined to be consistent with CEQA." AR2748-2749, 4201-4202, 2753, 4206.

The Commission's actions were appropriate and legal under the Coastal Act and CEQA. Pertinent to the issues raised by MCWD:

- The Commission properly exerted jurisdiction over the Local CDP appeal because the City took final action on a major public works project, and the appeal properly alleged that the Project conformed with the LCP and public access policies. AR2983-2984, 1588, 4164.
- The Commission appropriately found that the Local CDP appeal raised a substantial issue, and substantial evidence in the record supported that finding. AR4146, 4155-4156.
- The Commission's release of the Staff Report 13 days before the hearing was appropriate under its certified regulatory program, which is not subject to a 30-day review period. AR2691. The Commission also complied with its certified regulatory program by including comment letters in the addenda, providing them to Commissioners at the hearing, and orally responding to comments at the hearing. AR3524-3535, 3545-3611, 4086-4089.
- The Commission adequately disclosed existing groundwater conditions. AR4158, 4191, 2098, 2166-2170, 483-566. The Commission established an appropriate standard to measure potential groundwater impacts, requiring Cal-Am to stop pumping if Monitoring

Well 4 shows a reduction in water level of 1.5 feet or an increase of 2,000 parts per million in total dissolved solids ("TDS") from pre-pump conditions. AR4151-4152.

- The Commission adequately considered and assessed a reasonable range of alternatives to the Project. AR4194-4196, 4143, 2295-2296, 2208.
- The Commission appropriately imposed Special Conditions designed to protect potential impacts to sensitive species. AR3526-3527, 4199-4202.

In sum, the Commission's actions in approving the CDPs complied with the law and are supported by substantial evidence in the record.

III. STANDARD OF REVIEW

This case challenges the Commission's approval of CDPs, which is reviewed pursuant to Code of Civil Procedure section 1094.5. Pub. Res. Code § 30801.

MCWD implies that the Court is to independently review the Coastal Commission's actions, giving no deference to the Commission. That is incorrect. In reviewing a decision by the Commission, "[t]he trial court presumes that the [Commission's] decision is supported by substantial evidence, and the [petitioner] … bears the burden of demonstrating the contrary." *Ocean Harbor House HOA v. Cal. Coastal Comm'n*, 163 Cal.App.4th 215, 227 (2008); *see also Norris v. State Personnel Bd.*, 174 Cal.App.3d 393, 396 (1985) ("All reasonable and legitimate inferences must be considered in support of the [Commission's] decision."); Pub. Res. Code § 21168. The Court's review is "quite limited" and the Commission is "given *substantial deference*." *Evans v. City of San Jose,* 128 Cal.App.4th 1123, 1145-46 (2005) (emphasis added). MCWD bears the burden of proof. *Ocean Harbor House HOA*, 163 Cal.App.4th at 227.

In reviewing an allegation that the Coastal Commission violated the Coastal Act's procedural requirements, the Court determines whether "the [Commission] proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion." *La Costa Beach Homeowners' Ass'n v. California Coastal Comm'n*, 101 Cal.App.4th 804, 814 (2002); Code Civ. Proc. § 1094.5(b). Code of Civil Procedure section 1094.5(b) provides that a prejudicial "[a]buse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or

the findings are not supported by the evidence." *McAllister v. California Coastal Comm'n*, 169 Cal.App.4th 912, 921 (2008); *La Costa Beach Homeowners' Ass'n*, 101 Cal.App.4th at 814.

The Court similarly reviews the Commission's determination that a "substantial issue" exists for an "abuse of discretion." *See Hines v. California Coastal Comm'n*, 186 Cal. App. 4th 830, 849 (2010). In reviewing the Commission's substantial issue determination, the Court "grant[s] broad deference to the Commission's interpretation of the [local coastal program] since it is well established that great weight must be given to the administrative construction of those charged with the enforcement and interpretation of a statute." *Id.* The Court "will not depart from the Commission's interpretation *unless it is clearly erroneous*." *Id.* (emphasis added).

In reviewing the Commission's findings in support of a CDP, the Court "must uphold the Commission's findings of fact if they are supported by substantial evidence,"[1] *i.e.,* the CDP cannot be overturned unless *"no reasonable person would have reached the same conclusion*" as the Commission. *Charles A. Pratt Constr. Co. v. Cal. Coastal Comm'n*, 162 Cal.App.4th 1068, 1076 (2008) (emphasis added). The Court is to "look to *the 'whole' administrative record and consider all relevant evidence*, including that evidence that may detract from the decision." *Kirkorowicz v. Cal. Coastal Comm'n,* 83 Cal.App.4th 980, 986 (2000) (emphasis added); *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.*, 47 Cal.3d 376, 407-408 (1988) ("*Laurel Heights I*") (court must "consider the evidence as a whole[,] . . . 'scrutinize the record and determine whether substantial evidence' supports the agency's decision").

The Court may not engage in an independent review of the evidence or substitute its own findings and inferences for those of the Commission. *Kirkorowicz,* 83 Cal.App.4th at 986. "Rather, it is for the Commission to weigh the preponderance of conflicting evidence, as [the court] may reverse its decision only if, based on the evidence before it, a reasonable person could

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[1] "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." CEQA Guidelines § 15384(a); *Laurel Heights I*, 47 Cal.3d at 393. Substantial evidence includes facts, reasonable assumptions based on facts, and expert opinion supported by facts. Substantial evidence ***does not*** include argument, speculation, unsubstantiated opinion or narrative, or evidence that is not credible. Pub. Res. Code §§ 21080(e), 21082.2(c); CEQA Guidelines §§ 15064(f)(5)–(6), 15384.

not have reached the conclusion reached by it." *Id.* The Court "must deny the writ if there is any substantial evidence in the record to support the findings." *Smith v. County of Los Angeles*, 211 Cal.App.3d 188, 198 (1989).

Further, MCWD is also obligated to lay out the evidence favorable to the other side and show why it is lacking. The "[f]ailure to do so is fatal" to any substantial evidence challenge and "is deemed a concession that the evidence supports the findings." *Defend the Bay v. City of Irvine,* 119 Cal.App.4th 1261, 1266 (2004); *Citizens for a Megaplex-Free Alameda v. City of Alameda,* 149 Cal.App.4th 91, 112-13 (2007). "A reviewing court will not independently review the record to make up for appellant's failure to carry his burden." *Defend the Bay,* 119 Cal.App.4th at 1266.

MCWD alleges that the Commission failed to comply with certain CEQA requirements. Noncompliance with CEQA is not *per se* reversible; actual prejudice must be shown. *Neighbors for Smart Rail v. Expo. Metro Line Constr. Auth.*, 57 Cal.4th 439, 463 (2013); Pub. Res. Code § 21005(b). "Insubstantial or merely technical omissions are not grounds for relief." *Neighbors for Smart Rail*, 57 Cal.4th at 463. "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 [environmental review] process." *Kings County Farm Bureau v. City of Hanford*, 221 Cal.App.3d 692, 712 (1990). Failing to comply with CEQA's substantive requirements is not prejudicial error if there is no basis to conclude that a properly conducted analysis "would have produced any substantially different information." *Neighbors for Smart Rail*, 57 Cal.4th at 463.

IV. ARGUMENT

A. The Commission Was Authorized to Hear Cal-Am's Appeal

At the May 1 hearing on MCWD's motion for stay and preliminary injunction, MCWD's arguments that the Commission did not have jurisdiction over the Project did not persuade the Court. [2] Tr. at 117:10-12. Nevertheless, MCWD repeats its baseless claims that the Commission

[2] The transcript of the May 1, 2015, hearing ("Tr.") was lodged with the [Proposed] Order Denying Petitioner's Motion for Stay and Preliminary Injunction on May 28, 2015.

did not have authority to approve the Local CDP. Nothing has changed: MCWD continues to misread the Coastal Act and cannot show that the Commission acted in excess of its jurisdiction.

1. The City's Denial of Cal-Am's CDP Application Was a Final Action

MCWD claims that the City's denial of the Project's CDP is not a "final" action. Brief at 9-10. This claim is contradicted by the Coastal Act's text and the record, and has no legal basis.

On September 4, 2014, the City denied the Project's local CDP and declined to approve the mitigated negative declaration ("MND") that the City prepared as the Project's CEQA document. AR315-317. On September 11, the City issued its FLAN, notifying the Commission that the City had taken a final action on the Project.[3] AR2983-2984. On September 12, the Commission received the FLAN. AR4164. The FLAN stated, in relevant part, that the "City Council adopted [a resolution] . . . *denying Coastal Development Permit CDP 2012-05*" for the Project. AR2983 (emphasis added.) The FLAN's plain text and the City's submission of it to the Commission demonstrate that the City took a final action denying the CDP. Nothing more is required.

MCWD attempts to downplay the legal import of the FLAN by repeatedly referring to the FLAN as a "letter" that "does not constitute 'final agency action' supporting an appeal." Brief at 9. In doing so, MCWD unabashedly misrepresents the purpose of a FLAN under the Coastal Act, which is a trigger for a ten-day period for an appeal to the Commission. Pub. Res. Code § 30603(c); 14 Cal. Code Regs., § 13110. Moreover, MCWD suggests that Coastal Act Regulation section 13570, which provides that actions are final when findings have been adopted and local rights of appeal have been exhausted, somehow prevented the City from issuing a FLAN. *Id.*, § 13570. MCWD declines to mention that section 13571 provides that a local government shall issue a FLAN within seven days of meeting the requirements of section 13570. *Id.*, § 13571. By preparing a FLAN, the City conceded its action was a "final agency action" under the Coastal Act.

In addition, nothing in the Marina Municipal Code ("MMC") provides for a denial of a CDP "without prejudice" to prevent an appeal to the Commission. MMC Section 17.41.090 governs the City's CDP procedures. Subsection 17.41.090.D.3 requires that "[w]ithin five days of

[3] "Within five (5) working days of the approval or denial of a coastal development permit. . . a local government shall notify the commission and any person requesting such notification in writing of the ***final local action***." 14 Cal. Code Regs., § 13331 (emphasis added).

any *final city council action* on an appeal of a coastal permit the city shall notify . . . the State Coastal Commission." RJN, Ex. E at 3; AR2973 (emphasis added). Subsection 17.41.090.F.3 states that "[a]ppeals to the Coastal Commission must follow at least one local action on the application." RJN, Ex. E at 4; AR2973. The City followed its procedures by denying Cal-Am's CDP application, then notifying the Commission in the FLAN that its denial was a final action.

Moreover, MCWD continues to rely on *City of Malibu v. California Coastal Commission*, 206 Cal.App.4th 549 (2012), even after the Court indicated at the May 1 hearing that the case is distinguishable. Brief at 8; Tr. at 34:19-22. Cal-Am agrees with the Court. *City of Malibu* involved an entirely different fact pattern from the facts at issue here. There, the Commission "approved amendments to a city's certified local coastal program at the request of state agencies, over the objections of the city, where the amendments were not requested to undertake a public works project or energy facility development, but instead changed the city's land use policies and development standards as they would apply to future plans for development within the city." *City of Malibu*, 206 Cal.App.4th at 552. In contrast, no LCP amendments are at issue here. Here, the Commission simply *interpreted* the LCP in considering Cal-Am's appeal, which courts have uniformly recognized as being within the Commission's authority. See, *e.g., Pratt*, 162 Cal.App.4th at 1078. *City of Malibu* is inapposite.

The rules are simple. Because the City denied the CDP and filed a FLAN with the Commission, the City's denial was appealable to the Commission.[4]

2. Because the Project is a Major Public Works Project, the Commission Had Jurisdiction to Hear the Appeal

The City's denial of the CDP was appealable to the Commission. Pub. Res. Code §§ 30603(a)(5), 30603(b)(2). The City denied the CDP, and Cal-Am appealed to the Commission on

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[4] MCWD contends that the Commission lacked jurisdiction to hear the appeal because the City should be afforded the opportunity to consider the Project on the merits after further CEQA review. That interpretation would lead to absurd results and conflict with Coastal Act section 30603. MCWD's interpretation would mean that a City could hold a major public works project that it opposes hostage from Commission review on appeal simply because the City claims its own CEQA review is inadequate – thwarting the very purpose of the Commission's appellate authority under the Coastal Act.

the grounds that the Project—a major public works project—conforms to the standards set forth in the certified LCP and the Coastal Act's public access policies. AR1588. No more was required.

MCWD suggests that because the City did not make findings about consistency with the City's LCP, there is no basis for appeal here.[5] That is not correct. That the City made no findings regarding LCP consistency had no impact on whether Cal-Am could appeal the City's final action denying the CDP. MCWD wrongly asserts that the "appeal may only be taken from a local agency's denial of a CDP on the grounds it is ostensibly inconsistent with the LCP." Brief at 9. But the standard applied to the appeal of a denial of a major public works project—which applies to this Project—is "an allegation that the development conforms to the standards set forth in the certified local coastal program and the public access polices" in the Coastal Act. Pub. Res. Code § 30603(b)(2). Cal-Am's stated grounds for appeal were that "the proposed Project fully conforms to the standards set forth in the City's certified [LCP] and the public access policies of the California Coastal Act." AR1588.

Moreover, the Project qualifies as a "public works project" because it is a facility for the production, transmission, and recovery of water, and as a "major public works project" because its costs exceed the minimum required to be considered as one under the Coastal Act Regulations. Pub. Res. Code § 30114(a) (defining "public works"); 14 Cal. Code Regs., § 13012(a) (defining "major public works"); AR1588, 4164. Cal-Am satisfied the applicable appeal requirements in the Coastal Act, and the Commission had jurisdiction to hear the appeal.

B. <u>Substantial Evidence Supports the Commission's "Substantial Issue" Findings</u>

MCWD now alleges that the Commission's substantial issue findings are not supported by substantial evidence. Brief at 10-12. As noted above, the Commission's determination that a "substantial issue" exists is reviewed for an "abuse of discretion." *See Hines*, 186 Cal.App.4th at 849. In reviewing the Commission's substantial issue determination, the Court "grant[s] broad deference to the Commission's interpretation of the [LCP]." *Id.* The Court "*will not depart from*

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[5] If MCWD's argument were accepted, a local jurisdiction could prevent a denied project from ever being appealed to the Commission simply by choosing not to make LCP consistency findings.

the Commission's interpretation unless it is clearly erroneous." *Id.* (emphasis added). Here, the Commission's determination that a substantial issue existed was not an "abuse of discretion."

In an appeal to the Commission where the local government has a certified LCP, the Commission first determines whether a substantial issue "exists with respect to the grounds on which an appeal has been filed pursuant to Section 30603." Pub. Res. Code § 30625(b)(2). A substantial issue presents a "significant question" as to LCP conformity. 14 Cal. Code Regs., § 13115. When interpreting whether an appeal raises a significant question as to conformity with the LCP, the Commission generally looks at five factors. AR4165; *Hines,* 186 Cal.App.4th at 849.

Here, the Commission appropriately concluded that the appeal raised a substantial issue regarding conformity with the LCP and the Coastal Act's public access policies. AR4166. The Commission weighed and considered each of the five factors that guide the Commission's substantial issue determination, and found that "four of the five substantial issue factors weigh in favor of a finding of substantial issue." AR2715-2716, 4165-4166. The Commission explained its reasoning behind each of the five factors in detail in the Staff Report. AR2716, 4166.

MCWD's allegations that the findings are not supported by substantial evidence have no merit. As to the first and fourth factors—factual and legal support for the local agency's determination of the consistency or inconsistency with the certified LCP and precedential value of the local government's decision for future interpretation of its LCP —MCWD suggests that the City could not make LCP findings because it had to deny the Project under CEQA. Brief at 11-12. That is a red herring. MCWD cites to no legal authority standing for the proposition that if an agency denies a project pursuant to CEQA, it cannot make findings regarding the proposed project's consistency with applicable land use plans. Here, the City chose to make no findings regarding the Project's consistency with the LCP and the Coastal Act's public access policies. Under the circumstances, the Commission appropriately determined that these factors weighed in favor of finding a substantial issue. AR2716, 4166. MCWD cannot show that this was erroneous.

As to the third factor—the significance of the coastal resources affected by the decision—the Commission noted that because the Project would occur within primary ESHA habitat, significant coastal resources would be affected. AR2716, 4166. MCWD argues that such a

finding is inappropriate because the City denied the Project. But reading the factor as MCWD does would mean that any denial of a major public works project by a local agency could never be appealed to the Commission because the local agency's denial would prevent the project and mean that coastal resources would never be affected by it. The Coastal Act should not be interpreted so narrowly. The entire purpose of the Coastal Act's appellate procedures for major public works projects is to ensure that parochial local interests do not prevail on projects of regional or statewide significance. *See Reddell v. California Coastal Comm'n*, 180 Cal.App.4th 956, 963 (2009) ("[A] fundamental purpose of the Coastal Act is to ensure that state policies prevail over the concerns of local government."). MCWD's interpretation would cause Coastal Act section 30603(a)(5) to have no meaning or effect, and flies in the face of established rules of statutory interpretation. *See Tuolumne Jobs & Small Business Alliance v. Superior Court*, 59 Cal.4th 1029, 1037 (2014) ("Interpretations that lead to absurd results or render words surplusage are to be avoided.").

Finally, as to the last factor—regional concerns—MCWD argues that the Commission's finding "should not be sustained," because the Commission will be reviewing the proposed MPWSP separately from the Project. Again, this argument defies logic. The Project itself implicates important regional issues, as its main purpose is to determine whether slant well technology is feasible for full-scale desalination facilities in the region. AR4158, 1855, 1588-1591. The Commission's finding was appropriate and supported by the record.

The Commission thoroughly evaluated each of its applicable factors in determining that Cal-Am's appeal raised a substantial issue, and the Commission's findings and determination are supported by the record and entitled to "broad deference." *Hines*, 186 Cal.App.4th at 849.

C. MCWD's Other Coastal Act Arguments Have No Merit

MCWD raises two other baseless Coastal Act arguments regarding the Commission's interpretation of the City's LCP. Brief at 13-14. First, MCWD argues that the Commission's findings confirm that the Project does not conform to the LCP, and so the Commission should have denied the appeal. *Id.* at 13. MCWD ignores that the Commission's review of those portions of the Project in the City's LCP jurisdiction has two separate components. As noted above, the Commission first looks at five factors to interpret whether an appeal raises a significant question as

to conformity with the LCP. AR2714-2715, 4165. The Commission does not make findings of a Project's consistency with the LCP during that process. However, once the Commission determines that a substantial issue exists, it then reviews the local CDP application *de novo*. Pub. Res. Code § 30621(a); 14 Cal. Code Regs., § 13115(b)). It is on *de novo* review where the Commission makes its own independent LCP consistency findings. *See, e.g., Pratt*, 162 Cal.App.4th at 1078-79 (making independent LCP consistency findings after determining that appeal raised a substantial issue). That the Commission may find during a project's *de novo* review that the project is inconsistent with a particular LCP policy has no bearing on its earlier findings that the appeal raised a significant question as to conformity with the LCP.

Second, MCWD argues that the Commission improperly overrode the LCP. Brief at 13-14. The Coastal Act allows the Commission to find that if a new or expanded coastal-dependent industrial facility might be inconsistent with the Coastal Act or LCP, the Commission can still approve that facility if it makes certain findings. Pub. Res. Code § 30260.[6] MCWD suggests that because certain provisions of section 30260 are not repeated verbatim in the LCP, they cannot apply, and so the Commission exceeded its jurisdiction in determining that the Project is a coastal-dependent industrial facility. That is wrong. As explained in greater detail in the Commission's brief in this action, the Staff Report is clear that section 30260 and its factors are incorporated into the City's LCP. AR2746-2749, 3534. The Commission has ultimate authority over LCP interpretation. *Pratt,* 162 Cal.App.4th at 1078. MCWD's claims are meritless.

D. <u>The Commission is Exempt From CEQA Notice and Comment Requirements</u>

MCWD continues to assert that the Commission violated CEQA's notice and comment requirements in preparing its in-lieu environmental document. But the Court of Appeal directly contradicted MCWD's position. "***[T]he Commission's certified regulatory program is exempted from the notice and comment requirements of Public Resources Code section 21091, subdivision (a).***" *Ross v. Cal. Coastal Comm'n*, 199 Cal.App.4th 900, 935 (2011) (emphasis added).

[6] "[C]oastal-dependent development . . . requires a site on, or adjacent to, the sea to be able to function at all." Pub. Res. Code § 30101. The Project is directionally drilled beneath the seafloor and is pumping seawater to gather data on slant well feasibility. It is coastal dependent.

1. CEQA's 30-Day Public Comment Period Does Not Apply

MCWD's attempt to once again distinguish *Ross*' holding that the Commission *does not need to comply with a 30-day CEQA comment period* is baseless and ignores long-standing Commission practice.[7] Under CEQA, the Secretary of the Resources Agency ("Secretary") can certify a state administrative agency's regulatory program. Pub. Res. Code § 21080.5(a). If the program meets certain standards and the Secretary certifies it, the program is exempt from CEQA's requirements for the preparation of EIRs, negative declarations, and initial studies. *Id.* §§ 21080.5(c), (d). Instead, environmental review documents prepared pursuant to the agency's own regulations are used. *Id.* § 21080.5(a). Certifying a regulatory program is a determination that the agency's program includes procedures for environmental review and public comment that are "functionally equivalent" to CEQA. *Californians for Alternatives to Toxics v. Dep't of Pesticide Reg.*, 136 Cal.App.4th 1049, 1059 (2006).

The Secretary approved the Commission's certified regulatory program on May 22, 1979. *Ross,* 199 Cal.App.4th at 931; CEQA Guidelines § 15251(c).[8] When the Commission considers a CDP application or an appeal of a local agency's action on a CDP, its staff report serves as the environmental review document. *Kaczorowski v. Mendocino County Bd. of Supervisors,* 88 Cal.App.4th 564, 569 (2001); 14 Cal. Code Regs., § 13057(c)(2). A certified program's environmental documents must be available for review and comment "for a reasonable time."

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[7] MCWD continues to rely on *Ultramar, Inc. v. South Coast Air Quality Mgmt Dist.,* 17 Cal.App.4th 689 (1993), and *Joy Road Area Forest and Watershed Ass'n v. Cal. Dep't of Forestry & Fire Protection*, 142 Cal.App.4th 656 (2006), even though *Ross* expressly analyzed and distinguished these cases. *Ross*, 199 Cal.App.4th at 936-937 ("Neither *Ultramar* nor *Joy Road* is controlling."). *Ultramar* did not involve a grant of power similar to Public Resources Code section 21174 and a certified regulatory program that expressly deviates from the 30-day notice timeframe specified in CEQA section 21091(a). *Ultramar* involved the South Coast Air Quality Management District's ("SCAQMD") certified regulatory program. The SCAQMD had adopted "implementation guidelines" that included the CEQA section 21091(a) 30-day period of review for an environmental document. The *Ultramar* court, part of the ***same Second Appellate District of the Court of Appeal*** that decided *Ross*, determined that the Secretary expected the same rules would apply to EIRs and SCAQMD's environmental documents. *Ultramar*, 17 Cal.App.4th at 699-703. Accordingly, as the Court of Appeal correctly determined in *Ross*, *Ultramar*'s reasoning is inapplicable here where the issues involve the Coastal Commission's certified regulatory program. Likewise, *Joy Road* did not involve a certified regulatory program that deviates from the 30-day notice period for EIRs. *Ross,* 199 Cal.App.4th at 937.

[8] The CEQA Guidelines are set forth at Cal. Code Regs., title 14, section 15000 *et seq.*

Pub. Res. Code § 21080.5(d)(3)(B). Staff reports for CDP applications and *de novo* hearings on appeals must be "*distributed within a reasonable time to assure adequate notification prior to the scheduled public hearing*." 14 Cal. Code Regs., § 13059 (emphasis added); *id.* § 13115(b).

In *Ross*, the Court of Appeal examined the Commission's certified program's public review and comment provisions, and held that a 13-day public review period for a staff report was reasonable.[9] *Ross,* 199 Cal.App.4th at 935-939. "By providing 13 days' notice of the filing of the staff report, the commission complied with [CEQA]." *Id.* at 936. The court stated that the Secretary is authorized to determine whether a regulatory program satisfies the "reasonable time for review and comment" requirement of CEQA section 21080.5(d)(3)(B); thus, any challenge to the Secretary's approval of the Commission's review and comment provisions should have been made within 30 days from the date of certification (i.e., in 1979). *Id.* at 938.

Here, the Commission released the Project's Staff Report for public review on October 31, 2014, 13 days prior to the Project hearing on November 12, 2014. AR2691. The Project's notice and review period was identical to the time period analyzed in *Ross* and is consistent with the Coastal Act Regulations' requirement that staff reports be distributed within a "reasonable time" before a hearing. As this requirement is part of the Commission's certified regulatory program, it may differ from CEQA's 30-day review period. *See Ross,* 199 Cal.App.4th at 937 ("Public Resources Code section 21174 provides for the primacy of the Coastal Act over [CEQA's] statutory provisions"). Specifically, Section 21174 provides: ***"To the extent of any consistency or conflict between the provisions of the California Coastal Act of 1976. . . and the provisions of [CEQA], the provisions of [the Coastal Act] shall control."*** Pub. Res. Code § 21174 (emphasis added); *Sierra Club v. Cal. Coastal Comm'n*, 35 Cal.4th 839, 859 (2005).[10] Here, as in *Ross*, the Commission acted in compliance with its certified regulatory program,

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[9] MCWD attempts to distinguish *Ross* on the basis that *Ross* concerned a LCP amendment, not a CDP. This is a distinction that makes no difference. In both instances, there is a Commission regulation that "expressly deviates" from CEQA's 30-day public notice for EIRs in Public Resources Code section 21091. Accordingly, in both instances, "the provisions of [the Coastal Act] shall control." Pub. Res. Code § 21174.

[10] In determining whether a 13 days is a "reasonable time" for review and comment, deference must be given to the Commission's interpretation of its own rules. *Ross,* 199 Cal.App.4th at 938.

which allows for a review period that differs from the 30-day review period provided in CEQA section 21091(a). *Ross,* 199 Cal.App.4th at 937. Accordingly, the Commission's 13-day review period for the Project's Staff Report complied with CEQA.

2. The Commission is Not Required to Provide Detailed Responses to Each Comment Letter Submitted After the Release of the Staff Report

Under its certified regulatory program the Commission also is not required to follow CEQA's response to comments requirements, which are applicable to public review of draft EIRs. CEQA Guidelines § 15088. By certifying the Commission's regulatory program, the Secretary determined that the Commission's notice and comment requirements are "functionally equivalent" to CEQA compliance. CEQA Guidelines § 15251(c); *Kaczorowski,* 88 Cal.App.4th at 569 (noting that the Commission's "permit appeal procedure is treated as the functional equivalent of the EIR process"). Thus, the Commission need only comply with its own regulations to comply with CEQA, which do not contain the same response to comment requirements imposed on agencies that prepare draft EIRs. [11]

Coastal Act Regulations section 13057(c)(3), which applies to the Commission's ***initial preparation of the Staff Report***, requires that Commission Staff's ***recommendation*** include "[r]esponses to significant environmental points raised during the evaluation of the proposed development." Contrary to MCWD's arguments, section 13057 ***does not*** require a comment-by-comment response to comments raised after the release of a staff report.

Here, prior to the Commission's consideration the Project had already been subject to a robust environmental review through the processing of the City's MND. AR2059-2681, AR1872-1873. MCWD participated heavily during that process, raising numerous issues that City staff addressed before the MND was presented to the City Planning Commission, and then to the City Council, for review (along with a draft resolution for approval from City staff). *See*

[11] When determining whether an agency proceeded in the manner required by law, a court may not impose procedural or substantive requirements beyond those explicitly stated in the statutes and the CEQA Guidelines. Pub. Res. Code § 21083.1; *South Orange County Wastewater Auth. v. City of Dana Point*, 196 Cal.App.4th 1604, 1617 (2011).

AR1878. Therefore, there was already a detailed administrative record and environmental analysis of the Project's potential impacts before the Commission considered the Project's CDPs.

Based on that detailed record, the Commission's Staff Report responded to environmental concerns raised during the City's administrative process, as required by Coastal Act Regulations section 13057, and attached written comments received by the Commission prior to issuance of the Staff Report, including comments from MCWD. AR2935-2943. Moreover, although not explicitly required to do so, Commission Staff *also* responded to additional environmental concerns raised by commenters in the addenda to the Staff Report prior to the Commission's November 12 hearing on the Project's CDPs. AR3535-3538.

MCWD's claim that the Commission must provide written responses to all significant comments submitted to the Commission on a project between the release of the Staff Report and the Commission's hearing on the Project ignores Coastal Act Regulations section 13060. That regulation does not impose any requirement to respond to written comments on CDP applications and staff reports. Rather, the regulation requires the Commission's Executive Director to either distribute to the Commissioners a text or summary of comment letters received prior to the close of public hearing, or summarize such comments orally at the hearing. 14 Cal. Code Regs., § 13060(a), (c). That regulation also allows written communications to be submitted to the Commission all the way up to the date of the hearing. *Id.* § 13060(b) (written communications may be made "in the hearing room on the day of the public hearing").

The Commission fully complied with section 13060. First, Commission Staff released two addenda in advance of the public hearing, which contained minor modifications and clarifications to the Staff Report (AR3524-3535), *ex parte* and other communications (e.g., AR2946-2949; 3545-3611), and responses to public comments (AR3535-3538). The addenda were issued to provide complete information to the Commission and the public *before the public hearing*. Second, at the hearing, Staff noted that the addenda only included the exhibits from MCWD's November 7, 2014, letter, and that Staff was providing that letter and a November 10 letter from Brian Lee of MCWD to the Commissioners for review over the Commission's lunch break and prior to any action on the Project. AR4063, 4086 (noting that the letter was provided

to Commissioners during the break for a complete set of correspondence).[12] At the hearing, Staff orally responded to comments and questions raised regarding Coastal Act and CEQA issues, including those made by MCWD. AR4086-4089. Commission Staff therefore met and exceeded section 13060's requirements.

MCWD's absurd argument that the Commission must respond in writing to all written comments received before the Commission can take an action would create an endless loop for all projects considered by the Commission. No language in the Coastal Act or its Regulations support MCWD's claim. The Commission fully complied with its own regulations governing comments submitted on a CDP application and staff report. Nothing more was required. In addition, MCWD also suggests that the Commission's issuance of two addenda in advance of the public hearing somehow violated Coastal Act requirements due to the length of the addenda. MCWD essentially argues that the Commission should have continued the hearing because of MCWD's last-minute document dump of over 100 pages of comment letters and attachments, which contributed substantially to the length of the addenda. Brief at 4-5. MCWD's argument would allow project opponents to hold projects hostage by waiting to submit voluminous materials mere hours before a hearing. The incentives created by MCWD's argument are contrary to public policy, and have been consistently rejected by the courts. *See, e.g., Citizens for Responsible Equitable Envtl. Dev. v. City of San Diego*, 196 Cal.App.4th 515, 528 (2011).

E. The Commission Did Not Engage in Improper Piecemealing

Although the Court disagreed with MCWD at the May 1 hearing (Tr. at 81:23 to 82:3), MCWD continues to wrongly claim that the Commission engaged in improper "piecemealing" because the Commission did not analyze the environmental effects of the entire MPWSP when analyzing this temporary test well Project. MCWD's argument overlooks years of CEQA case law confirming that two projects may properly undergo separate environmental review when the projects have independent utility and can be implemented independently. *Del Mar Terrace*

[12] Notably, Commission Staff had summarized the significant points raised by MCWD's October 30 letter in the addenda and responded to them – so the Commission was aware of the issues MCWD had presented.

Conserv., Inc. v. City Council, 10 Cal.App.4th 712, 736 (1992) (section of a proposed freeway was independent from potential later extension when the proposed segment served its own purpose by connecting two logical points); *Cmtys. for a Better Env't v. City of Richmond*, 184 Cal.App.4th 70, 99 (2010) (refinery upgrade and construction of pipeline exporting excess hydrogen from upgraded refinery were "independently justified separate projects"); *Banning Ranch Conserv. v. City of Newport Beach*, 211 Cal.App.4th 1209, 1224 (2012) (park and access road project independent of residential project that would use same access road).

Here, it was entirely appropriate under CEQA for the Project to be analyzed in a separate CEQA document from the larger MPWSP because the test well Project has independent utility. The fundamental purpose of the Project is to "gather technical data" regarding the feasibility of slant wells for desalinated water production in the area of the Monterey Bay. AR2692. The data produced is publicly available and could be used by the MPWSP or any other desalination facility proposed for the area to determine if this type of well design in this general location would provide the necessary amount of water for a desalination facility without causing "unacceptable adverse effects." *Id.* The information that will be learned from the Project will have value to the public, desalination proponents, environmental groups, and California water agencies, regardless of whether the MPWSP is ever approved or constructed. *See* AR1856.

Moreover, the MBNMS Guidelines state that desalination project proponents "should investigate the feasibility of using subsurface intakes [including slant wells] as an alternative to traditional [i.e., open ocean] intake methods." AR1840. Determining whether a slant well intake system is feasible at the CEMEX property is necessary to satisfy the MBNMS Guidelines, and is relevant for any potential desalination project that requires MBNMS approval. *Id.*

The Project also would not legally or factually compel the construction of the MPWSP. *Cf. Tuolumne County Citizens for Responsible Growth v. City of Sonora*, 155 Cal.App.4th 1214, 1231 (2007) (hardware store "cannot be completed and opened legally without the completion of [a] road realignment"). To constitute unlawful piecemealing, a future project must be "a reasonably foreseeable consequence of the initial project" and "likely change the scope or nature of the initial project and its environmental effects." *Laurel Heights I*, 47 Cal.3d at 396. As the

Court agreed at the May 1 hearing, the Project does not meet the piecemealing standard established in *Laurel Heights I*. Tr. at 83:23 to 84:2. While data produced by the Project could affect the future MPWSP's design – including the elimination of slant wells – the future development of the MPWSP or any other desalination project would not change the scope or potential environmental effects of this initial Project. As the Project has utility independent of the MPWSP, the Commission was justified in reviewing the Project separately from the MPWSP. Further, because the CPUC is currently in the process of reviewing the MPWSP's environmental impacts, there is no reason to believe that the MPWSP's review has been compromised. AR2711. As the Commission noted, "approval of this proposed test well would not authorize any additional activities that may be associated with a larger or more permanent facility." AR2692, 4142, *see also* AR4156 (Commission's findings "do not authorize . . . converting the well to use as a water source for the separately proposed MPWSP"). As such, the MPWSP or any other future desalination project would be subject to an entirely separate, independent and rigorous analysis before the Commission.

F. The Commission Adequately Disclosed Existing Hydrological Conditions and Established an Appropriate Significance Standard

1. The Staff Report and Record Evidence Provides Baseline Hydrological Information

MCWD alleges that the Commission failed to establish an adequate environmental baseline with respect to the current SVGB conditions, making an analysis of hydrologic and water quality impacts impossible. That is incorrect. The record is replete with discussion of existing hydrologic conditions in the SVGB. *See, e.g.*, AR409-413 (MBNMS Environmental Assessment); AR522-524 (Geoscience Report); AR2164-2170 (MND); AR2740 (Staff Report). Substantial evidence in the record demonstrates that the Commission disclosed existing hydrological conditions in the SVGB, which is all that is required under CEQA to establish the environmental baseline. *Cmtys. for a Better Env't.*, 48 Cal.4th at 328.

As the Commission recognized, groundwater in the Project vicinity is *already* severely contaminated by seawater intrusion, and these conditions are extremely well understood and

documented in reports to and by government agencies. The Commission's findings cite to such reports, describe the existing conditions, and note that the underlying basin is subject to seawater intrusion that extends several miles inland from the coast where the Project is located. AR2708, 4158, 4191. As such, these reports are part of the Commission's record and provide substantial evidence of baseline conditions.[13] *McMillan v. Am. Gen. Fin. Corp.*, 60 Cal.App.3d 175, 183-84 (1976) ("reference to portions of a report in administrative findings incorporates that part of said report into the findings."); *see also Sierra Club v. Cal. Coastal Comm'n,* 35 Cal.4th 839, 864 (2005); *Towards Responsibility in Planning v. City Council,* 200 Cal.App.3d 671, 683-84 (1988) ("it is difficult to take seriously an argument which posits that there is no evidence to support a finding" where the findings refer to studies and reports in the administrative record). The Commission also summarized groundwater conditions in the vicinity of the Project by describing the SVGB, past groundwater pumping quantities, the degree of seawater intrusion, groundwater storage capacity and the proximity of groundwater wells to the Project site. AR4191. For instance, the Commission noted:

- "The known area of seawater intrusion extends along about ten miles of the Bay shoreline and up to about five miles inland, with all known existing wells within two miles of this test well site having already experienced seawater intrusion." AR4158.
- "Water quality data collected from nearby areas over the past several years show that both aquifers exhibit relatively high salinity levels and that there is not an aquitard separating the two. . . . . Those data show that salinity and Total Dissolved Solids ("TDS") concentrations in nearby areas of the aquifers *already exceed levels that are suitable for agricultural crop production*." *Id.* (emphasis added).
- "Seawater intrusion has been estimated to occur at a baseline rate of about 10,000 acre-feet (equal to about three billion gallons) per year, though the Basin's groundwater management programs are attempting to significantly reduce this rate." AR4191 (footnote omitted).

The City's MND also described the severity of seawater intrusion in the aquifers from which the Project will pump. AR2098 ("the Dune Sand and 180-FTE Aquifers are heavily contaminated in the project area due to decades of seawater intrusion"); AR2166-2167 (discussing seawater intrusion due to agricultural pumping); AR2167 ("Water samples taken

[13] An agency's determination of environmental "baseline" conditions is reviewed under the deferential substantial evidence standard. *Cmtys. for a Better Env't*, 48 Cal.4th 310, 328 (2010); *see also Neighbors for Smart Rail*, 57 Cal.4th at 457.

from the exploratory borings at the CEMEX site indicate that both the Dune Sand Aquifer and the 180-FTE Aquifer contain saline (salt) water and are substantially influenced by the sea."); AR2168-2169 (historic seawater intrusion maps for 180-Foot and 400-Foot Aquifers); AR2170 (groundwater quality data collected at the CEMEX site).

Additional information about existing conditions is provided in a hydrogeologic technical memorandum prepared by Geoscience, regarding exploratory boreholes drilled at the CEMEX site (the "Borehole Memorandum"). AR483-650. The Borehole Memorandum described existing conditions in detail, including seawater intrusion, groundwater subbasins, groundwater quality and levels, and other subsurface conditions. AR522-566.

Both the MND and the Borehole Memorandum are substantive file documents cited in the Staff Report, and the Commission relied on those documents in preparing its Project analysis and recommendation. AR2789 (list of substantive file documents); *see also* AR2709, n.4, 4158, n. 5 (citing to the Borehole Memorandum and noting that it "shows TDS levels in surrounding areas of the two aquifers ranging from 16,122 to 35,600 parts per million"). The analysis and information in the MND and the Borehole Memorandum are part of the substantial evidence of the baseline conditions. *Kirkorowicz*, 83 Cal.App.4th at 986 (in reviewing Coastal Commission actions, courts "look to the 'whole' administrative record and consider all relevant evidence").

The record also describes how groundwater conditions can fluctuate over time. The Commission noted that the Project would access water that vary from 16,000 ppm TDS to 26,000 ppm TDS, and that even seawater fluctuates from about 30,000 ppm TDS to 33,000 ppm TDS. AR3532. Given this natural fluctuation, it is nearly impossible to pinpoint one precise "baseline" measurement, as MCWD demands.

MCWD unconvincingly attempts to support its baseline argument by citing to *Save Our Peninsula Committee v. Monterey County Board of Supervisors*, in which the lead agency—when presented with multiple baseline options for water usage—arbitrarily selected the formula most favorable to the project applicant. 87 Cal.App.4th 99 (2001). Here, unlike in *Save Our Peninsula Committee*, the Commission did not arbitrarily choose the most lenient of several baseline options, but provided a substantive discussion of baseline groundwater conditions that

was supported by evidence in the Commission's record. AR4158-4159, 4191, 2098, 2166-2170, 522-566, 2651-2655. Based on those baseline conditions, and as discussed in detail below, the Commission established conservative standards in Special Condition 11 to ensure that no potential impacts to groundwater supply and quality could occur. AR 4151-4152.

In sum, the record adequately describes existing baseline groundwater conditions in detail, and substantial evidence supports the Commission's determination of baseline groundwater conditions. *See Cmtys. for a Better Env't*, 48 Cal.4th at 328 (agency's determination of baseline conditions reviewed under deferential substantial evidence standard).

2. Special Condition 11 Establishes Appropriate Standards to Measure Potential Groundwater Impacts

MCWD further alleges that the Commission failed to establish an adequate threshold of significance to measure the Project's impacts to hydrology and water quality. Brief at 28. To the contrary, the measures contained in Special Condition 11 provide a reasoned performance standard for measuring the Project's potential impacts. Pursuant to Special Condition 11, Cal-Am must conduct ongoing water quality monitoring during Project operations, and, if specified monitoring wells show a reduction in water quantity of 1.5 feet above natural fluctuations or a 2,000 parts per million ("ppm") increase in TDS, Cal-Am must stop pumping.[14] AR4151.

A lead agency may exercise its own judgment in selecting a standard of significance. *Clover Valley Found. v. City of Rocklin*, 197 Cal.App.4th 200, 243 (2011) (upholding determination that aesthetic impacts were insignificant within context of existing development); *Sierra Club v. City of Orange*, 163 Cal.App.4th 523, 541 (2008) (upholding significance standards for traffic based on performance standards adopted by local jurisdictions). The lead agency has discretion to accept expert opinions on the appropriateness of the significance standard. *Mount Shasta Bioregional Ecology Ctr. v. County of Siskiyou*, 210 Cal.App.4th 184,

[14] While MCWD may complain that this standard is not explicitly labeled a "threshold," regardless of terminology, this standard provides an objective metric that allows the Commission to make a reasoned decision regarding the significance of hydrology and water quality impacts. *See North Coast Rivers Alliance v. Marin Mun. Water Dist.*, 216 Cal.App.4th 614, 624-625 (referring to both "standards" and "thresholds" of significance).

204 (2010). Significance standards may be tailored to the specific project and contrary to MCWD's implications, do not need be based on the significance questions set forth in CEQA Guidelines Appendix G. *Save Cuyama Valley v. County of Santa Barbara*, 213 Cal.App.4th 1059, 1068 (2013) (upholding project-specific standard for hydrological impacts).

Here, the Commission developed Special Condition 11's standards based on data from a technical report prepared by Geoscience, which was referenced during the Commission's proceedings and is included in the Commission's record. AR3997-3998; AR1403-1448; AR1410 (describing model results showing one foot decline in groundwater levels at a distance of approximately 2,500 to 1,800 feet from the test slant well). Commission Staff incorporated a discussion of the rationale for the standards into an addendum to the Staff Report, which was ultimately included in the Commission's findings. AR3531-3532, 4192-4193. The findings explain that the standard of 1.5 feet above natural fluctuations would account for changes in barometric pressure, tidal changes, offsite pumping, and rainfall events. AR4193.

In addition, the Commission noted that 2,000 ppm was selected as a conservative standard for TDS, because seawater has approximately 3,000 ppm natural variability from 30,000 ppm to 33,000 ppm. AR3532, n. 2, 4192, n. 34. The salinity standard for Project shut down is therefore below the natural level of fluctuation, and was appropriately selected as the threshold "for when the monitoring wells may begin to detect an adverse effect." *Id.*

Substantial evidence in the record supports the Commission's selection of the significance standards in Special Condition 11. The absence of any expert analysis in the Commission's record showing that these standards are *not* conservative and protective of the environment only supports the Commission's determination.

1. Special Condition 11 Ensures That the Project Will Not Result in Significant Groundwater Impacts; MCWD's Deferred Mitigation Claims Have No Merit

There is ample evidence in the record showing that the Project would not result in significant drawdown of local groundwater levels in the SVGB. For example, the MND stated that "[a]nalytical modeling indicates that no significant drawdown of groundwater wells would

occur as a result of the test pumping activities." AR2098; *see also* AR1423 (Geoscience findings). Nonetheless, to ensure that an early avoidance system is in place, the Commission adopted Special Condition 11, requiring Cal-Am to monitor both the quantity and quality of water in areas that may affected by operation of its test well. As described above, pursuant to Special Condition 11, if MW-4 shows a reduction in water quantity of 1.5 feet above natural fluctuations or a 2,000 ppm increase in TDS, Cal-Am must stop pumping. AR4151. This standard ensures the Project will have no significant adverse impact on area water quantity or quality. This is exactly what CEQA requires. *North Coast Rivers Alliance*, 216 Cal.App.4th at 647-49.

MCWD's accusation that the Hydrogeologic Working Group ("HWG") and the Commission's Executive Director will set a *post hoc* baseline is misplaced. Special Condition 11's performance standards for groundwater drawdown (1.5 feet) and salinity increase (2,000 ppm TDS) are already established and cannot be changed without additional discretionary action by the Commission. AR4151. If MW-4 reaches one of these pre-determined levels, the HWG and the Executive Director are tasked with determining whether the Project caused such changes. AR4151-4152. If causation is at least in part due to the Project, Cal-Am must obtain a CDP amendment before resuming pumping. *Id.* Neither the levels of drawdown or salinity increases, nor the consequences if those levels are reached, are discretionary. *Defend the Bay*, 119 Cal.App.4th at 1275-76 (upholding mitigation measure that specified objective performance criteria). Given the fact that both groundwater levels and salinity fluctuate naturally, it was wholly appropriate for the Commission to set objective performance criteria and to delegate authority to the Commission's Executive Director to work with scientific experts to determine whether the Project is violating those criteria. CEQA Guidelines § 15025(a); *Cal. Clean Energy Com. v. City of Woodland*, 225 Cal.App.4th 173, 195 (2014) ("Shifting the responsibility to carry out the mitigation in that measure is allowed under CEQA.").

MCWD continues to assert that Special Conditions 11 results in an impermissible "deferral" of mitigation. This argument still fails. Courts have long recognized that a mitigation measure is appropriate if it sets specific performance standards even if all specifics are not known at the time of approval. *Defend the Bay*, 119 Cal.App.4th at 1275-76. Exact details on meeting

the performance standards may be deferred until further study has been conducted. *North Coast Rivers Alliance*, 216 Cal.App.4th at 630-31. Special Condition 11 satisfied these requirements: the Commission committed to the specified the criteria that needed to be met in order for the Project to continue operating under the CDP. *Defend the Bay*, 119 Cal.App.4th at 1275-76 (no deferral when City committed to mitigating biological impacts in accordance with habitat conservation plan criteria); *Endangered Habitats League, Inc. v. County of Orange*, 131 Cal.App.4th 777, 794-96 (2005) (no deferral when agency "commit[ted] to mitigation and set out standards for a plan to follow."). The Commission set a standard requiring Project activities be halted upon reaching specific triggers—1.5 foot drawdown or 2,000 ppm TDS increase. As these standards are specific, the Commission could allow determination of further details to occur once Cal-Am had completed Project construction, including the development of monitoring wells to provide data necessary to implement Special Condition 11. "[T]he fact [that] the entire extent and precise detail of the mitigation that may be required is not known does not undermine the . . . conclusion that the impact can in fact be successfully mitigated." *Riverwatch v. County of San Diego*, 76 Cal.App.4th 1428, 1447 (1999); *Nat'l Parks & Conserv. Ass'n. v. County of Riverside*, 71 Cal.App.4th 1341, 1362, 1364-66 (1999). MCWD's argument that specific groundwater monitoring data at monitoring well locations is required before the monitoring wells are constructed is nonsensical. Under this absurd logic, Cal-Am could never obtain a CDP for the Project because it would need to provide data from the monitoring wells before the CDP allowing their construction could be approved.

The data needed to implement Special Condition 11 will be overseen by the HWG, a team of hydrogeologic and modeling experts representing the interests of various stakeholders of groundwater use and management in the region. *See* AR4195; AR1589, 2069-2070 (listing HWG representatives, including a CPUC member). Contrary to MCWD's allegations, enlisting the HWG's technical expertise in implementing Special Condition does not constitute an improper delegation of the Commission's authority. Brief at 30. Under CEQA, an agency may delegate reporting or monitoring responsibilities to another public agency or to a private entity that accepts the delegation. CEQA Guidelines § 15097(a). The HWG's expertise and neutrality

make it an appropriate body to analyze the data and provide it to the Commission so that the Commission may enforce the established standards in Special Condition 11. In addition, Special Condition 11 requires that all of the data the HWG will analyze be made public, and none of the HWG's determinations or recommendations will be final without oversight and approval by the Commission's Executive Director. AR3525, 4151-4152. It is well recognized that the Commission may delegate authority to implement Project conditions to the Executive Director. CEQA Guidelines § 15025; *Cal. Clean Energy Com*, 225 Cal.App.4th at 195.

G. The Commission Adequately Analyzed Project Alternatives

MCWD's arguments that the Commission failed to adequately assess Project alternatives wholly lack credibility. MCWD has conceded that the CEMEX site is the preferred alternative for a subsurface seawater intake well—because it is pursuing its own well ***at this exact same location.*** RJN, Exs. B, C, D. Also, the Commission analyzed a reasonable range of alternatives, including alternative sites, in compliance with CEQA and the Coastal Act.[15]

Under CEQA, a lead agency must consider a "reasonable range" of alternatives to a project, or to the project's location, "which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project." CEQA Guidelines § 15126.6(a); *see also id.*, § 13053.5(a). An agency need not consider "every conceivable alternative" and may determine how many is a reasonable range. *Id.*, § 15126.6(a); *Citizens of Goleta Valley v. Bd. of Supervisors*, 52 Cal.3d 553, 566 (1990). Sometimes, no feasible alternative locations exist. CEQA Guidelines § 15126.6(f)(2)(B).

The Commission analyzed a reasonable range of alternative locations for the Project—a project for which location is critical. AR2742-2743, 4194. Due to the State's and MBNMS' preferences for using subsurface intakes, where feasible, to provide water for desalination, the analysis of alternative Project locations focused on sites in the region that are potentially

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[15] MCWD implies that the alternatives analysis in the Staff Report *must* be inadequate because it is 2 ½ pages. Brief at 32. There is no page requirement for an alternatives analysis. All that is required is "sufficient information about each alternative to allow meaningful evaluation, analysis, and comparison with the proposed project." CEQA Guidelines § 15126.6(d). Contrary to the MCWD's suggestions, "[t]he discussion of alternatives need not be exhaustive. . . ." *Sierra Club v. City of Orange*, 163 Cal.App.4th 523, 548 (2008).

favorable for subsurface intakes. AR2743, 4194, 1480. The availability of such sites is limited. AR2743, 4195. Nonetheless, a group of stakeholders identified a number of potential sites between Marina and the Moss Landing Power Plant, conducted a hydrogeologic investigation to determine potential locations for a subsurface intake, AR2743, 4195, and concluded that slant wells may be feasible at two locations at the CEMEX property (where the Project site is located) and at a site eight miles north, near Moss Landing. *Id.* One location was initially considered at the northern end of the CEMEX facility, but consultation with wildlife agencies revealed that locating a test well in that area would significantly impact nesting Snowy Plover, require more excavation and shoreline protective devises, and be subject to greater erosion and coastal hazards. AR2743, 4196. Therefore, the current site at the south end of the CEMEX facility, which is within an already disturbed area, is further from the shoreline, and would avoid significant impacts to Plover through mitigation, was identified as a preferable location. *Id.*

The alternative site near Moss Landing is not a disturbed location like the CEMEX site and would require miles of additional pipeline, including through potentially sensitive ecosystems (a State park), increasing environmental impacts. AR3533, 4195. Thus, the Commission concluded that the Moss Landing site would cause greater impacts than the Project site and excluded that site from further consideration. AR4143; CEQA Guidelines § 15126.6(f)(2)(A).

The Commission also considered a fourth, "No Action" alternative. AR4196. This could result in greater adverse impacts than the Project because not completing or delaying the Project would deprive Cal-Am and the public of data on the feasibility of slant wells in the Monterey Bay, delaying future water supply projects in the region, which could have drastic economic consequences. AR2743-2744. This alternative could extend withdrawals from the Carmel River, exacerbating ongoing impacts on fish and habitat. AR2710, 4160, 2744, 4196.

In determining whether the Commission analyzed a reasonable range of alternatives, the Court should look at the entire record before the Commission establishing that alternative sites were infeasible or more environmentally damaging than the Project site. The Commission's findings are to be supported by "substantial evidence in light of the whole record." Code of Civ. Proc. § 1094.5(c); *Sierra Club v. Cal. Coastal Comm'n,* 19 Cal.App.4th 547, 557-58 (1993)

(Commission's findings upheld because "the record discloses that findings [on alternatives] in the FEIR were part of the administrative record referenced by the Commission" and "explain the rationale which led the Commission to determine there is no feasible less environmentally damaging alternative"); *Village Laguna of Laguna Beach, Inc. v. Bd. of Supervisors*, 134 Cal.App.3d 1022, 1029 (1992) (agency not required to analyze "every conceivable variation" of an alternative).

For example, the Project's Biological Assessment describes the analysis of "numerous alternative temporary slant test wells sites." AR2295. The CEMEX site was ultimately selected in consultation with the U.S. Fish and Wildlife Service and environmental consultants to minimize biological impacts. AR2296. Likewise, the MND explains that the "current project location was selected after lengthy discussion and consideration of alternative sites." AR2208. The MBNMS also considered alternative locations, which " were all determined to be less preferable than the location identified in the Proposed Action." AR399-400. As described in the MBMNS' Environmental Assessment, a substantive file document cited in the Staff Report (AR2789), the CEMEX site was identified as a potential location for Project development due to, among other things, the site's heavy disturbance and existing access. AR400.

In light of the detailed consideration of alternative sites in the record, it is telling that MCWD's brief does not identify a single potential location for an alternative site that the Commission did not consider. *See Save San Francisco Bay Ass'n v. San Francisco Bay Conservation etc. Com.*, 10 Cal.App.4th 908, 922, 929-30 (1992) ("[A]ppellants have not pointed to a single location brought to the City's attention that was disregarded" yet "[w]e are asked to presume that a feasible alternative site existed somewhere"); *Save Our Residential Env't v. City of W. Hollywood,* 9 Cal.App.4th 1745, 1754 (1992) ("surely [Petitioners] would have identified the alternative sites meriting analysis" if any existed.). MCWD's alternatives arguments fail.

H. MCWD's Biological Impacts Arguments are Moot and Lack Merit

MCWD alleges, as it has many times before in its requests to enjoin the Project, that the Commission failed to adequately mitigate potential impacts to special-status species and sensitive habitat areas. Brief at 30-32. MCWD's arguments, which focus on harm that allegedly could be

caused by Project construction, are moot because construction of the Project is complete.[16] An argument "should be dismissed as moot when the occurrence of events renders it impossible for the . . . court to grant [petitioner] any effective relief." *Cucamongans United for Reasonable Expansion v. City of Rancho Cucamonga,* 82 Cal.App.4th 473, 479 (2000). When a project's construction phase ends, claims of impacts resulting from construction are moot because no effective relief can be granted. *See, e.g., Santa Monica Baykeeper v. City of Malibu*, 193 Cal.App.4th 1538, 1549-1551 (2011). That same principle applies here.[17]

Even if the Court decides to reach the merits of MCWD's arguments, they are baseless. MCWD focuses on Special Condition 14, which consists of biological resources protection measures imposed by the Commission, arguing that substantial evidence does not demonstrate that changes made to that condition in an addendum to the Staff Report would avoid impacts to species. Brief at 31-32. MCWD is wrong. The Commission's modifications to Special Condition 14 made the Project's biological resources mitigation *more protective*.[18] For example, changes to Special Condition 14 required that monitoring begin earlier in the year (by February 1, rather than March 1), clarified standards for notification to appropriate wildlife agencies should sensitive species and/or active nests be found at the site, limited construction noise, and added measures to halt construction if necessary. AR3526-3527. The changes to Special Condition 14 make it clear that construction could be halted at *any time*, *even before February 28*, if Snowy Plover or other sensitive species were present at the Project site. *Id.* Overall, with the imposition of a number of Special Conditions, as well as the acknowledgment that Cal-Am had independently incorporated

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[16] *See* Declaration of Ian Crooks in support of Cal-Am's Opposition to MCWD's Motion for Stay and Preliminary Injunction, filed with the Court on April 20, 2015, ¶¶ 13-15. Although this is extra-record evidence, it is admissible for the sole purpose of supporting Cal-Am's mootness defense, which Cal-Am included as its eight affirmative defense in its answer to the Petition. *See San Joaquin County Local Agency Formation Comm'n v. Superior Court*, 162 Cal.App.4th 159, 169 (extra-record evidence may be admissible to prove affirmative defense).

[17] MCWD cannot show that any exceptions to the mootness doctrine apply to its biological impacts claims. There will be no recurrence of controversy between the parties, as construction is complete and Cal-Am does not propose to modify the Project. There is also no material question remaining for the court's determination. *See Santa Monica Baykeeper*, 193 Cal.App.4th at 1551.

[18] MCWD implies that the Commission's modifications to Special Condition 14 were inappropriate because no resource agencies were consulted about those changes. MCWD is wrong. Because the Project has a public purpose, consultation was not required. *See La Costa Beach Homeowners Ass'n*, 101 Cal.App.4th at 820.

additional biological mitigation measures into the Project, the Commission expressly determined that the Project's biological impacts would be fully mitigated. AR4201-4202,4215-4222.

Project construction was strictly limited to compacted and unvegetated sand dunes that have been subject to continued disturbance by sand mining operations for decades. AR2725, 4176, 2747, 4200. Because the disturbed area is located in a coastal dune complex, however, the Commission determined that the entire area should be considered an environmentally sensitive habitat area ("ESHA"), even though the Project is within a disturbed area and will not impact sensitive habitats. AR2721, 4172, 2724-2726, 4175-4177. Under the Commission's regulations and the City's LCP, any project in ESHA—regardless of whether it has impacts—can be approved only if the project is "resource dependent" *or* a coastal-dependent industrial facility. Pub. Res. Code § 30260; AR2726, 4178, 2747-2749, 4199-4202. Because the Project is a coastal-dependent industrial facility, the Commission determined that it had the authority to approve the Project within the site's disturbed footprint. *Id.* MCWD's convoluted and misleading claim that any development in ESHA would result in environmental harm is contradicted by the plain text of the Coastal Act and the LCP – which expressly allow development in ESHA in limited circumstances - and which the Commission confirmed in its findings. AR4177-4178. MCWD's argument is also inconsistent with the City's own analysis of the site, which determined it was secondary habitat, within which development may be sited when designed to prevent impacts that would significantly degrade primary habitat. AR2724, 4175. Accordingly, substantial evidence supports the Commission's findings regarding the Project's potential biological impacts.

I. The Commission Was Not Required to Recirculate the Staff Report

MCWD asserts that the Commission should re-notice and recirculate the Staff Report due to the inclusion of purported "significant new information" in the addendum to the Staff Report. MCWD is grasping at straws; the minor modifications and clarifications to the Staff Report contained in the addendum did not rise to the level of "significant new information."

The Commission is not bound by CEQA's recirculation provisions. As described above, the Commission's regulatory program is exempt from CEQA's procedural requirements. Pub. Res. Code §§ 21080.5(c), (d). Certification of a regulatory program means that the agency's

program includes procedures for environmental review and public comment that are "functionally equivalent" to CEQA. *Californians for Alternatives to Toxics*, 136 Cal.App.4th at 1059. The Commission's regulations expressly address when recirculation of a staff report is required. Coastal Act regulation section 13096 provides that, if a Commission action is "substantially different than that recommended in the staff report," staff shall "prepare a revised staff report with proposed revised findings that reflect the action of the commission." 14 Cal. Code Regs., § 13096(b). The revised staff report will then be presented at a noticed public hearing. 14 Cal. Code Regs., § 13096(c). Here, the Commission's action on the CDP was not "substantially different" than that recommended in the Staff Report, and no revised staff report was required.

Even if the Commission was required to abide by CEQA's recirculation requirements,[19] recirculation is not required unless "significant new information" is added to an environmental document after public notice of the document's availability. CEQA Guidelines § 15088.5(a). "New information added to an EIR is not 'significant'" unless the public is deprived "of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect (including a feasible project alternative) that the project proponents have declined to implement." *Id*. Recirculation is not required if the new information "merely clarifies," "amplifies" or "makes insignificant modifications." CEQA Guidelines § 15088.5(b). None of the limited information in the addenda constitutes "significant new information" requiring recirculation because the information does not identify new significant or more severe impacts or a new feasible alternative or mitigation measure that the Commission declined to implement. CEQA Guidelines § 15088.5(a).

MCWD first contends that changes made to Special Conditions in an addendum to the Staff Report to address potential biological impacts "would likely cause new undisclosed impacts," and would permit Cal-Am to capture and move snowy plovers in violation of the Endangered Species Act. Brief at 35. That is incorrect. MCWD's accusations of new undisclosed impacts are pure

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[19] MCWD relies on *Joy Road Area Forest & Watershed Ass'n* to argue that certified regulatory programs must comply with CEQA recirculation requirements. *Joy Road* involved a different agency's program that did not include recirculation provisions. 142 Cal.App.4th at 670-671.

speculation, not substantial evidence. CEQA Guidelines § 15384(a). As described above, the Commission's edits to Special Condition 14 made the Project's biological resources mitigation *more protective*. MCWD can point to no record evidence demonstrating that the Commission's changes to Special Condition 14 required recirculation under CEQA's test for recirculation.

Second, MCWD points out that the addendum included information about a potentially feasible alternative site at Potrero Road. Brief at 36; AR3533. This information does not require recirculation. Under *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.*, 6 Cal.4th 1112 (1993) ("*Laurel Heights II*") and CEQA Guidelines section 15088.5(a)(3), when new information consists of a suggested new project alternative, recirculation is required only if the alternative: (1) is feasible; (2) is considerably different from the alternatives already evaluated; (3) would clearly lessen the project's significant environmental impacts; ***and*** (4) is not adopted. *South County Citizens for Smart Growth v. County of Nevada*, 221 Cal.App.4th 316, 330 (2013). Recirculation is required only if *each* of the above tests is met. *South County Citizens*, 221 Cal.App.4th at 330. To prevail on a claim that a new alternative triggered a duty to recirculate, MCWD has the burden to prove that there is no substantial evidence in the record that might support an express or implied finding by the agency that at least one of the triggers for recirculation was not met. *South County Citizens*, 221 Cal.App.4th at 330; *see also North Coast Rivers Alliance*, 216 Cal.App.4th at 655 (new alternative did not trigger recirculation because it was infeasible and was not considerably different from alternatives already evaluated); *Sierra Club v. City of Orange*, 163 Cal.App.4th 523, 547 (2008) (new alternative added to final EIR in response to comments did not trigger recirculation). MCWD cannot meet that burden.[20]

The Potrero Road site is very similar to the Moss Landing site analyzed in the initial Staff Report. AR3533. The addendum concluded the Potrero Road site would be inferior to the CEMEX site in several ways, including less aquifer depth, proximity to a wildlife refuge, and

[20] Agency determinations that recirculation is not required are to be upheld if supported by substantial evidence. *Laurel Heights II*, 6 Cal.4th at 1135; CEQA Guidelines § 15088.5(e). All "reasonable doubts" are to be resolved in favor of the agency's decision. *Laurel Heights II*, 6 Cal.4th at 1135. The agency's decision is presumed to be correct; petitioner bears the burden of demonstrating that the decision is not supported by substantial evidence. *South County Citizens*, 221 Cal.App.4th at 330 (petitioner "bears the burden of proving a double negative").

distance from other water infrastructure, and impacts to public beach parking. AR3533. Accordingly, the addendum concluded that the Potrero Road site would result in higher adverse impacts on public access and recreation as compared to the CEMEX site, and could also adversely affect areas of sensitive habitat and coastal agriculture. *Id.* The analysis of the Potrero Road site did not alter the Commission's finding that the CEMEX site is the preferred alternative for a subsurface seawater intake well. AR2744, 4196. As such, the inclusion of information on the Potrero Road site does not constitute "significant new information" and does not satisfy the four factors that must be met to require recirculation under CEQA Guidelines section 15088.5(a)(3). The Potrero Road site is not "considerably different from the alternatives or mitigation measures already evaluated," nor would the site "clearly lessen the project's significant environmental impacts." *South County Citizens*, 221 Cal.App.4th at 330. Thus, recirculation was not required.

Finally, MCWD asserts that the addendum's changes to mitigation for potential impacts to coastal agriculture required recirculation. Again, MCWD is wrong. The changes to Special Condition 11 described above did not identify new significant or more severe impacts or a new feasible alternative or mitigation measure that the Commission declined to implement. Rather, the changes clarified objective standards for avoiding any potential impacts to adjacent groundwater wells. This does not meet the standards for recirculation in the CEQA Guidelines.

V. CONCLUSION

MCWD has failed to meet its burden to demonstrate any abuse of discretion on the part of the Commission. The Commission complied with applicable Coastal Act and CEQA requirements and the Commission's determinations and findings are supported by substantial evidence. Cal-Am requests that this Court deny the Petition and uphold the Commission's approval of the CDPs.

Dated: June 5, 2015

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EXEMPT FROM FILING FEES
[GOVERNMENT CODE § 6103]

SUPERIOR COURT FOR THE STATE OF CALIFORNIA
COUNTY OF SANTA CRUZ

MARINA COAST WATER DISTRICT, AND DOES 1-10, Petitioner and Plaintiff, v. CALIFORNIA COASTAL COMMISSION, AND DOES 11-50, Respondents and Defendants. CALIFORNIA-AMERICAN WATER COMPANY, a California water corporation, AND DOES 51-100, Real Party in Interest.	Case No.: CV180839 **MARINA COAST WATER DISTRICT'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF** **(California Environmental Quality Act (CEQA))** [Code Civ. Proc., § 1094.5, subd. (g); Pub. Resources Code, §§ 21168 30803, subd. (a); Code Civ. Proc., § 525 et seq.] Filing Date of Action: December 11, 2014 Hearing Date: July 23, 2015 Time: 9:00 a.m. Department: 4

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INTRODUCTION

Marina Coast Water District (MCWD) files this reply in response to the California Coast Commission's (CCC's) and California-American Water Company's (Cal-Am's) opposition briefs. Given space limitations, MCWD focuses on the merits, ignoring where possible Cal-Am's specious arguments such as the argument MCWD does not seek to protect the Salinas Groundwater Basin (SVGB) or the environment in bringing this action. Our silence is not concession. As MCWD explained to CCC and in its opening brief, MCWD is not opposed to the Project, but to CCC's ultra vires decision to bypass the City of Marina's environmental review process (wherein the City determined an environmental impact report (EIR) was necessary to analyze and mitigate the Project's impacts) that would have required meaningful public review under the California Environmental Quality Act (CEQA) (Public Resources Code, § 21000 et seq.). Instead, the public and MCWD were subjected to a rushed environmental process that did not (1) allow for meaningful public participation; (2) adequately assess or mitigate impacts for the whole of the Project, including impacts to groundwater and extremely rare dune habitat, or (3) consider feasible alternatives to the location of the Project. Based on these violations of CEQA and the Coastal Act, MCWD requests the Court grant its petitions for a writ of mandate.

ARGUMENT

A. CCC violated the Coastal Act.

Cal-Am argues that CCC's determination that it had jurisdiction over Cal-Am's appeal is entitled to deference and reviewed for an "abuse of discretion." (Cal-Am 6-7.) It is wrong. While CCC's interpretation of an LCP is reviewed for abuse of discretion, jurisdictional issues involving the interpretation of the Coastal Act are questions of law this Court reviews de novo. (See *Burke v. CCC* (2008) 168 Cal.App.4th 1098, 1106; *Schneider v. CCC* (2006) 140 Cal.App.4th 1339, 1343-1344.) Courts do not defer to CCC's determination whether an action lies within the scope of authority delegated to it by the Legislature. (*Burke*, *supra*, 168 Cal.App.4th at p. 1106; *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 11, fn. 4.)

1. CCC lacked jurisdiction to consider the appeal.

When CCC certified the City's Local Coastal Program (LCP), it delegated to the City all development review authority for CDPs within the LCP boundaries, retaining only limited rights to hear appeals relating to compliance with the Coastal Act. (§§ 30519, subd. (a), 30603.)[1] As a result, CCC's appellate jurisdiction is limited by section 30603, which provides that "an action taken by a local government on a [CDP] application may be appealed to the commission for … a major public works

project," but "the *grounds for an appeal* of a denial of a [CDP] ... *shall be limited* to an allegation that the development conforms to the standards set forth in the certified [LCP] and the public access policies set forth in this division." (§ 30603, italics added.) CCC and Cal-Am acknowledge this provision applies, but argue it does not establish a jurisdictional limitation. Instead, they suggest that CCC can hear appeals from a local agency's denial of CDP of a "major public works project" on any grounds as long the appellant alleges the project conforms to the LCP. (CCC 1-4; Cal-Am 10-11.)[2] This suggestion vastly expands CCC's appellate jurisdiction and finds no support in the case law or statute.

As explained in MCWD's opening brief, an appeal may only be taken from a local agency's *denial* of a CDP where the agency denied the CDP on the grounds that it was inconsistent with the LCP. (MCWD 8-10.)[3] But, and CCC does not contest this point, the City did not deny the CDP on the grounds the project was inconsistent with the City's LCP. Rather the City found that it needed to complete its environmental review—before it could determine whether the Project was consistent with its LCP—as required by CEQA and the LCP. Therefore, the City correctly denied the CDP "without prejudice," subject to completing adequate CEQA review. (AR316.) Neither CCC nor Cal-Am cite any factual or legal authority for the proposition the City's finding were inadequate.

Ironically, despite asserting that a key purpose for CCC's appellate review is to "correct inadequate findings" (CCC 3), CCC and Cal-Am argue the City's findings and reasons for denying the CDP for the Project are not relevant to CCC's appellate jurisdiction. Even assuming these positions can be reconciled (they cannot), this argument conflicts with the Coastal Act. Based on CCC's and Cal-Am's interpretation of section 30603, the CCC could hear and grant an appeal from the denial of CDP irrespective of the decision's finality or grounds, as long as the appellant alleged the Project conformed with the agency's LCP.[4] Such an interpretation, however, would give CCC plenary land-use and judicial

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[1] All statutory references are to Public Resources Code unless otherwise noted.

[2] The Coastal Act does not define "appeal," but given its ordinary meaning "appeal" means "the transference of a case to a higher court for rehearing or review" and "a proceeding undertaken to have a decision reconsidered by a higher authority." (Webster's New World Dict. (2d ed. 1984), p. 66, cl. 1; Black's Law Dict. (9th ed. 2009), p. 112, cl. 2.) Thus, there is decision to appeal, on the grounds that the appellant seeks review. Here, there was no Coastal Act decision to appeal.

[3] CCC's own regulations explain that an appeal should only be heard where the appeal raises significant questions "as to conformity with the certified [LCP]." (§ 13115, subd. (b).)

[4] CCC's and Cal-Am's arguments that the City's denial "without prejudice" does not affect whether an appeal may be taken is illogical. CCC regulations explain that a local government action "shall not be deemed complete" until the agency has made all the required findings regarding the project's compliance with the LCP and **when all local remedies have been exhausted**. (§ 13570.) Here, the record unequivocally shows, as required by CEQA, the City deferred making these findings regarding the project consistency with its LCP until environmental review was complete. Cal-Am chose not to

authority over "major public works projects" in the Coastal Zone, in conflict with the Coastal Act's mandate that local agencies implement the LCP. (*Yost v. Thomas* (1984) 36 Cal.3d 561, 572-73 [after the CCC approves an LCP, "a local government has discretion to choose what action to take to implement its LCP: it can decide to be more restrictive with respect to any parcel of land, provided such restrictions do not conflict with the act."]; *Security Nat. Guar., Inc. v. CCC* (2008) 159 Cal.App.4th 402, 421; *City of Malibu v. CCC, supra,* 206 Cal.App.4th at pp. 555-556; § 30519.)[5] Moreover it would also allow an applicant to escape full review of a Project's impacts and mitigation under CEQA if the Court accepts CCC's arguments about the limits of its own environmental review. (See CCC 14-19.) Such a result, would be inconsistent with the primary purposes of both CEQA and the Coastal Act to protect the environment (§§ 21000, 30001).

Contrary to Cal-Am's unsupported arguments, CEQA mandated the City prepare an EIR for Project before approving a CDP after it determined there was a "fair argument" that the Project could result in unmitigated environmental impacts. (AR315-317) Neither CCC nor Cal-Am actually dispute this point. Instead, they suggest CCC was not subject to the CEQA's EIR requirement because CCC has a certified regulatory program (CRP). (CCC 4.) This argument misconstrues MCWD's arguments regarding CCC's appellate jurisdiction. Here, the City found that further environmental review was required before it (the City) could act – not CCC. This determination was never appealed, is not subject to the appellate jurisdiction of CCC, and is final. This is not the case where the City acted on the application, but simply refused or neglected to make findings, as Cal-Am and CCC feign. Nor is there any evidence that the City sought to delay the project. The City simply could not, consistent with its legal duty, reach the merits because it had to comply with CEQA first. (MCWD 10-12.) If the City had completed its CEQA review and denied the Project on the grounds that the Project was inconsistent with its LCP based on that review, such a decision would be subject to CCC's appellate jurisdiction. But the City's preliminary CEQA determination was not—any more than any other non-Coastal Act "action" taken by the City on the project. Any other interpretation would give CCC plenary land-use and judicial review of the City's actions in violation the Coastal Act, and likely the California Constitution. (Cal. Const., art. VI, § 1 [judicial power vested in the courts].)

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work with the City to complete the CEQA review for the Project.

[5] Cal-Am's attempt to distinguish *City of Malibu* misses the point. Ample authority supports the City's discretion to deny a project in the Coastal Zone on non-Coastal Act grounds (including CEQA) and the limited scope of CCC's appellate jurisdiction. (*Ibid*; § 30005 [City can adopt additional regulations or impose conditions on any land or water use that do not in conflict with the Coastal Act; *City of Dana Point v. CCC* (2013) 217 Cal.App.4th 170, 193; MCWD 8-9.)

In sum, because the City did not reach the merits on the project's consistency with the LCP, there could be no "significant questions" raised as to the City's interpretation of the LCP or the project's conformity with the LCP. (§ 13115, subd. (b).) Therefore, there were no grounds to appeal.

2. CCC's substantial-issue determination is inconsistent with the Coastal Act.

Despite the fact that the City plainly took no final action under the Coastal Act with respect to the CDP pending compliance with CEQA, CCC's findings on the "substantial issue" question pretend the City did. (AR4165-4166.) CCC attempts to dodge this issue by arguing all that matters is CCC ultimately determined it could find the Project conformed to the City's LCP. (CCC 4.) It cannot. Not only do CCC's findings on the "substantial issue" question fail to mention such a rationale, CCC's argument reads the phrase "substantial issue" out of the statute. (§ 30625, subd. (b)(2).) As explained above, CCC does not have plenary authority over "major public works projects" in the Coastal Zone. Rather, CCC can only exercise its appellate jurisdiction over a local agency's denial of CDP based on limited Coastal Act grounds. Again, as CCC admits, the City's denial raised no issues regarding the Project's conformance with the City's LCP or Coastal Act, but was based solely on CEQA grounds. (CCC 3.) Therefore, the City's denial of the CDP could not and did not present a "substantial issue" that allowed CCC to usurp the City's jurisdiction over the Project.

Cal-Am's attempt to justify CCC's "substantial issue" findings fairs no better. Cal-Am suggests the City's explanation for not making CDP findings based on CEQA grounds is a "red herring." Ignoring the voluminous authority that a local agency must comply CEQA before approving a CDP (See, e.g., MCWD 10-12), Cal-Am argues that the City was required to make findings regarding the Project's consistency with the LCP anyway. This argument ignores the practical matter that the City's consistency determinations were dependent on the environmental review for evidentiary support; they could not precede environmental review. (*Ibid.*) Moreover, Cal-Am fails to explain why the City should have made LCP's findings before completing CEQA. Even if the City found that the Project was consistent with its LCP, that would have changed nothing. The City would still have been required to deny the Project on CEQA grounds. Nor would the City's findings denying the Project on CEQA grounds (after making LCP consistency findings) have provided CCC with appellate jurisdiction.

Cal-Am's arguments, that a contrary interpretation would mean a local agency's denial could never be reviewed, also lack merit. CCC has jurisdiction to hear a denial of a permit under the Coastal Act; the courts can hear allegations of other errors. Cal-Am's citation to *Reddell v. CCC* (2009) 180 Cal.App.4th 956, 963, to suggest CCC has authority to override a City's CEQA determination in order to elevate regional over parochial concerns wholly misrepresents the case. While CCC could prevent a local agency from holding up a public works project based on an alleged inconsistency with its LCP in

order to further regional goals, CCC simply has no authority to review a local agency's CEQA determination. (*Hines v. CCC* (2010) 186 Cal.App.4th 830, 852.) Also, Cal-Am cites no evidence that parochial concerns motivated the City. Thus, as the record demonstrates, there are simply no bases upon which to make any of CCC's "substantial issue" findings. Under these facts, CCC acted ultra vires when it accepted jurisdiction. (*Burke, supra*, 168 Cal.App.4th at p. 1106) Moreover, its findings are unsupported by legally relevant evidence and analysis. (MCWD 12).

3. CCC's "consistency finding" was improper.

CCC's misconstrues MCWD's position, arguing that MCWD advances inconsistent arguments regarding CCC's consistency findings and section 30260. MCWD has consistently argued that CCC improperly relied on section 30260 in approving the project. Despite CCC's arguments advanced now, it cannot deny history; CCC's findings approved the Project on theses grounds. In fact, the first paragraph of CCC's Findings expressly state that CCC would approve the project, despite its unavoidable impacts and inconsistencies with the City's LCP, on the grounds that CCC could approve the project after making the three findings mandated by section 30260: (1) alternative locations are infeasible or more environmentally damaging; (2) denial of the permit would not be in the public interest; and, (3) the project is mitigated to the maximum extent feasible." (AR2693; 4143.) CCC reiterated the importance of section 30260 in its analysis of land use impacts. (AR4178.) In approving the project, notwithstanding its inconsistencies with the LCP's habitat protection policies, CCC concluded:

> "the proposed project meets all of the tests of section 30260 and the parallel LCP policies. It **therefore exercises its discretion to approve this coastal-dependent industrial project, despite its inconsistency with the LCP's habitat protection policy prohibiting non-resource dependent development in primary habitat."**

(AR4202, emphasis added.) Now recognizing that this was error, in as much as section 30260 is not one of the permissible grounds for appeals under Section 30603, CCC attempts to rewrite history. CCC now denies having relied on this section and insists that CCC "read various provisions" of the statute together to arrive at a unified view that the project was consistent with the LCP. (CCC 5-9.) Not only can CCC not run from its own findings, its new argument finds no support in the record.

The LCP says that in the vast dune area to the west of Dunes Drive, generally, "Coastal Conservation and Development uses" "shall be allowed." (AR820.) The LCP does not state that any proposed use, such as the test well, at any location within this area, however, must be approved. Rather, the LCP allows coastal-dependent industrial uses in the vicinity of the project but only after extensive site-specific analysis is conducted to determine if the use is appropriate (AR814-815). Moreover, the LCP states that, because no site-specific analysis has been done, the following policy applies to all areas designated with primary and secondary habitat (AR814-815, 895) like the Project site:

> Primary habitat areas shall be protected and preserved. All development must be sited and designed so as not to interfere with the natural functions of such habitat areas....
> ... ***"Primary habitat areas shall be protected and preserved*** against any significant disruption of habitat values and ***only uses dependent on those resources shall be allowed within those areas.*** All development must be sited and designed so as not to interfere with the natural functions of such habitat areas."

(AR4171.) It is undisputed that CCC's biologist found that the habitat on the project site was primary habitat and that CCC concurred in that designation. (AR4176, 2724-2726.) This did not call for CCC to look outside the LCP as CCC suggests; the LCP itself defines primary habitat as habitat that supports endangered and threatened species (AR4170, 4176, 895) and the site supports such species. (AR418.)

CCC further found that the project was not "resource dependent" (AR2726 ["The proposed project is not a resource dependent use"]) ***"so it cannot be approved consistent with the LCP's habitat protection policies."*** (*Ibid.*, emphasis added; AR 4178.) Accordingly, as MCWD has consistently argued, CCC was required to deny the appeal on the merits based on Section 30603. It did not. Rather, CCC found that—although "Project activities would further disturb the sensitive habitat areas in a manner not consistent with provisions of the LCP"—it could override the City's LCP. (AR2693.) It reasoned that because the project is a coastal-dependent industrial facility and the LCP allows such facilities in this location, consistent with Coastal Act Section 30260 as noted above. CCC cannot now switch theories, especially given its new theory is not included in its findings. (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 [findings must must "bridge the analytic gap between the raw evidence and ultimate decision" and to show the "analytic route the administrative agency traveled from evidence to action."].) Nor is the court required to defer to CCC's findings, as both CCC and Cal-Am argue. In questions of law, such as whether CCC applied the appropriate legal factors in making its consistency determination, however, the courts owe no deference to the agency's determination. (See, e.g., *Save Our Peninsula Committee v. Monterey County Bd. Of Supervisors* (2001) 87 Cal.App.4th 99, 118; *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1208.) In sum, CCC acted ultra vires when it approved the project.

B. Certified regulatory programs are not exempt from CEQA.

CCC and Cal-Am argue that its CRP essentially supplants compliance with the statutory and regulatory provisions of CEQA, and that compliance with the CRP is de jure compliance with CEQA. This argument contradicts the words of the statute and binding authority from the Supreme Court. As the Supreme Court held, "CEQA is a legislative act, and the Legislature both had and retains the authority to limit the projects to which CEQA applies. It has specified in section 21080 those projects that are categorically exempt from CEQA. (§ 21080, subd. (b)(1)-(16).) .... Section 21080.5 compels instead the

conclusion that [CRPs] in this state is exempt only from chapters 3 and 4 of CEQA and from section 21167 of that act." (*Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1230-1231.) The court held that it would be improper to "imply additional exemptions." (*Ibid.*)

CCC further argues that its "functional equivalent" environmental document need not be actually equivalent to other CEQA documents and need only address the list of topics set out in section 15252. (CCC 10.) CCC's argument that its functional equivalent document need only satisfy section 15252 ignores both the words of section 21080.5 and the large body of contrary case law, holding that "functional equivalent" documents, must comply with "CEQA's policies, evaluation criteria, and substantive standards."[6] These cases hold mere compliance with a CRP may not satisfy all of an agency's obligations under CEQA, and that a functional-equivalent document must comply with policies and standards that extend the analysis and considerations well beyond the topics addressed in section 15252. To claim an exemption from CEQA's EIR requirements, an agency must demonstrate *strict* compliance with these mandates. (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 132, citing § 21080.5.)

CCC acknowledges that there is vast authority for the proposition that CRPs are not "exempt" from CEQA, but argues that the provisions of CEQA only apply to CRPs when the provisions themselves expressly say they do. (CCC 12.) This is precisely the opposite of what the statute and the case law says. A long line of authority holds that CRPs must comply with the provisions in CEQA from which they are not exempt. Nowhere, did the courts place much emphasis on the mandate that the

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[6] See, e.g., 1 Monaster & Selmi, California Environmental Law and Land Use Practice (2015) Preliminary Review, Exemptions, and Negative Declarations, § 21.07[4], p. 21-64 (3/13), citing *Sierra Club, supra,* 7 Cal.4th at pp. 1228-1231; *Katzeff v. California Dept. of Forestry and Fire Protection* (2010) 181 Cal.App.4th 601, 609-610; *Elk County Water Dist. v. Department of Forestry & Fire Protection* (1997) 53 Cal.App.4th 1, 12; *Californians for Native Salmon etc. Assn. v. Department of Forestry* (1990) 221 Cal.App.3d 1419, 142-1423; *Laupheimer v. State of California* (1988) 200 Cal.App.3d 440, 462; *Environmental Protection Information Center, Inc. v. Johnson* (1985) 170 Cal.App.3d 604, 620 (*EPIC*). *Conway v. State Water Resources Control Board* (2015) 235 Cal.App.4th 671, 680, likewise, confirmed that the substitute document must include "significant documentation," including "written responses to significant environmental points raised during the evaluation process." Similalry, *Joy Road Area Forest and Watershed Ass'n v. California Dept. of Forestry & Fire Protection* (2006) 142 Cal.App.4th 656 (Joy Road) held CRP was not exempt from the requirement to recirculate the functional-equivalent document and rejecting the agencies argument that it did not have to comply with provisions of CEQA which, by their terms, relate to the EIR "process." Thus, the agency there advanced arguments very similar to CCC here. The court explained in as much as the "public review and comment … is a crucial component of CEQA," the agency also had to comply with the "substantive CEQA requirement at issue in this case, i.e., that when significant new information is added to an environmental report, the public and interested parties are entitled" to notice and the opportunity to

Guidelines or the statute expressly refer to "substitute documents" before the mandate is applicable to such programs.

As noted by CCC, the *EPIC* court did refer to the functional equivalent document as an "abbreviated EIR." (CCC 12-13.) The court nevertheless did not excuse the agency from a thorough analysis of the impacts of the project, as suggested by CCC. Rather, the court held that the functional-equivalent document had to include an analysis of cumulative impacts, even though such an analysis was not required by the agency's CRP. Because such programs remain "subject to other provisions in CEQA such as the policy of avoiding significant adverse effects on the environment where feasible," because a cumulative impact analysis is "considered as a substantive criterion for the evaluation of the environmental impact of a proposed project," the agency's failure to consider cumulative impacts was a prejudicial abuse of discretion. (170 Cal.App.3d at pp. 617, 625, citing § 21083, subd. (b), and § 15130.)

Moreover, the Supreme Court held that CRPs must "conform not only to the detailed and exhaustive provisions" of their native statutory scheme, here the Coastal Act, "*but also to those provisions of CEQA from which it has not been specifically exempted by the Legislature.*" (*Sierra Club, supra,* 7 Cal.4th at p. 1228, italics added.) In other words, CEQA mandates apply except where the Legislature has said they do not apply, which is the antithesis of the theory advanced by CCC. (CCC 12.) In *Sierra Club*, the CRP limited its CEQA analysis to the data and information that it already obtained through its CRP. During the comment period, the agency was asked to evaluate the potentially significant impacts on species. The agency determined that it did not have authority to ask for this information as it fell outside of its regulatory bailiwick, essentially the same argument advanced by CCC here. The court disagreed, reasoning that CEQA gives the agency direct authority to require information needed to fully evaluate the impacts of its actions, even if the rules of the CRP did not specifically address the point. (7 Cal.4th at pp. 1228-1231.) The provision at issue there, § 21160, does not specifically refer to CRPs or to functional-equivalent documents; the Supreme Court nevertheless held it applied.

C. CCC violated CEQA.

1. CCC had authority to and a duty to identify, disclose, and study all project impacts; it had a duty to mitigate all impacts within its jurisdiction.

CCC argues that it did not have to "consider all of the impacts of the project" as a CRP need only evaluate the impacts of the project "within the jurisdiction and expertise of the responsible agency." (CCC 15.) It also argues that it is "limited to applying the policies found in the City of Marina LCP" and

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comment. (*Id.* at pp. 667-669.)

therefore did not have to consider certain impacts, such as impacts to groundwater supply and quality. (*Ibid.*) These arguments are not only wrong but particularly ironic. They are ironic because CCC wrested the evaluation of the project away from the City, an agency of general police powers fully able to consider and mitigate for all of the impacts of the project. CCC and Cal-Am appear to have become impatient as the City completed its evaluation, prompting Cal-Am's premature appeal to CCC. These arguments are wrong because CCC was not acting as a "responsible agency." A "lead agency" under CEQA "means the public agency which has the principal responsibility for carrying out or approving a project. The lead agency will decide whether an EIR or negative declaration will be required for the project and will cause the document to be prepared." (§ 15367.) Here, **since no other agency approved the project, and** no other agency **prepared an environmental document, CCC** was the lead agency. In any event, a "responsible agency" under CEQA is not one with specialized expertise necessarily, as suggested by CCC, although often responsible agencies act second and do have specialized expertise. Under CEQA, a "responsible agency" "means a public agency which proposes to carry out or approve a project, for which a lead agency is preparing or has prepared an EIR or negative declaration." (§ 15381.) CCC was the lead agency here and was required to consider the full impacts of the project.

The Sixth District Court of Appeal in *Laupheimer* explained that CRPs are not excused from considering the full impacts of their proposed actions. (200 Cal.App.3d at p. 462; see also § 21002.1, subd. (d) ["The lead agency shall be responsible for considering the effects, both individual and collective, of all activities involved in a project. A responsible agency shall be responsible for considering only the effects of those activities involved in a project which it is required by law to carry out or approve."].)

Depending on the scope of its authority, an agency may or may not have authority to mitigate all of the impacts of a project—although CEQA instructs the agency to use any of its various discretionary power to mitigate or avoid significant impacts. (§ 21004.) Such a limitation on mitigation, however, does not obviate the need to identify and disclose impacts and mitigation. In such a case, CEQA instructs the agency to find that it has no authority to adopt the mitigation, but also to find that "**[t]hose changes or alterations are within the responsibility and jurisdiction of another public agency and have been, or can and should be, adopted by that other agency.**" (§ 21081, subd. (a)(2); but see *City of Marina v. Board of Trustees of the California State University* (2006) 39 Cal.4th 341, 366 ["disclaiming the responsibility to mitigate environmental effects is permissible only when the other agency said to have responsibility has exclusive responsibility"].)

Here, CCC argues that it lacked jurisdiction to mitigate the adverse effects of the project because it was limited to implementing the LCP. The LCP, however, confers broad discretion to mitigate the

impacts of the project. (See AR813 [noting policy to "ensure that environmental effects are mitigated to the greatest extent possible" when approving coastal-dependent development]; see also 934 [Coastal Development Permits in the project area may be approved if "[a]ll significant adverse environmental effects are either avoided or adequately mitigated"], 815, 842, 933.) Accordingly, CCC had authority.

CCC also makes the unexpected argument for the first time in its opposition brief that CCC actually found no impacts and adopted no "true mitigation." (CCC 13-14, fn 7.)[7] Although MCWD may agree as to CCC's failure to adopt "true mitigation," if by that CCC means legally adequate mitigation, but the assertion that the project would not result in environmental impacts is false. The Commission found that the project would have potentially significant environmental impacts and adopted mitigation. Tellingly, in the section entitled "California Environmental Quality Act" the Commission stated: **"Because the proposed project has the potential to result in significant adverse environmental impacts, the Commission has identified and adopted seventeen special conditions necessary to avoid, minimize, or mitigate these impacts."** (AR4206; see also AR4141 [noting Special Conditions are "meant to avoid and minimize effects" of the project]; 4173 [mitigation for lizards]; 4188 [noting mitigation for cultural resources]; 4192 [discussing hydrology mitigation]; 4120-4121 [discussing need to mitigate for biological resource impacts and how mitigation will not assure that all impacts are fully reduced to a less-than-significant level].)

2. CCC failed to provide adequate time for public review and comment on the Staff Report.

CCC argues that it is exempt from the CEQA requirement to provide 30 days for public review of environmental documents. (CCC 19.) As explained in MCWD's opening brief, CRPs are not exempt from CEQA's 30-day public notice requirement. (*Ultramar, Inc. v. South Coast Air Quality Management Dist.* (1993) 17 Cal.App.4th 689, 698-700.) The California Supreme Court has held that the statutory exemption for CRPs must be strictly construed. (See *Sierra Club, supra,* 7 Cal.4th at 1230-1231.) Because regulatory programs are not exempt from Public Resources Code section 21091, the 30-day notice and comment period required under that section applies to CCC. (See *Ultramar, supra*, at p. 700 ["an interpretation of [] section 21080.5 which contracts the public comment period would thwart the legislative intent underlying CEQA"].) It is that simple.

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[7] If CCC is asserting that it did not need to prepare the functional-equivalent of an EIR, then presumably CCC concedes the Staff Report is a negative declaration. The standard of review for such documents is the "fair argument" standard. If "***any*** substantial evidence in the record supports a ***fair argument*** that the project may result in significant adverse impacts, the proper remedy is to order preparation of an EIR." (*Communities For A Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 319-320.)

Despite the clear legislative directive in section 21091, and longstanding Supreme Court precedent, Cal-Am and CCC continue to argue that *Ross v. CCC* (2011) 199 Cal.App.4th 900, 932, grants CCC a blanket exemption from CEQA's 30-day notice requirement for all CCC staff reports. (Cal-Am 15; CCC 19-21.) Cal-Am and CCC are wrong. *Ross* is both factually and legally distinguishable and thus is neither controlling nor compelling.

First, *Ross* involved an entirely separate CRP. As explained in the CEQA Guidelines, the Secretary for the Resources Agency has certified two distinct programs operated by CCC. (§ 15251, subds. (c) and (f).) As Cal-Am concedes, CCC's CDP program, and the LCP program, present very different facts and are not comparable. (Cal-Am 10.) Of course, *Ross* considered the terms of the CRP for LCPs; here, the program for CDPs is at issue.

Does this make a difference? Indeed it does. The regulation as issue in *Ross* is fully contained within CCC's program for LCPs. Section 13532 falls within Chapter 8 (Implementation Plans), Subchapter 2 (Local Coastal Programs). It clearly falls within the regulatory scheme certified by the Secretary for the Resources Agency. Section 13532 dictates that staff reports for LCP amendments must be circulated at least seven days before the hearing. (*Ross, supra*, 199 Cal.App.4th at pp. 930, 937.) Because Public Resources Code section 21080.5, subdivision (d)(3)(B) mandated that the functional equivalent document be made available for a "reasonable time" for public review and comment, and because this provision was contained in the actual program certified by the Secretary on May 22, 1979, the Secretary must have determined that seven days was a "reasonable time" for this period. (*Ross, supra*, at p. 936.) It is important to note, as did the court in *Ross,* that the scheme for certifying LCPs certified by the Secretary contemplated **two** periods for public notice: first, the local government is required to provide a **six-week public review period** of both proposed LCP change and the environmental studies prior to voting on the action; only then is the matter transmitted to CCC for more review and a further seven-day review period. (*Ross*, at pp. 935, 939.) Moreover, according to *Ross*, the statutory period to challenge that determination ran 30 days after the certification. (*Ibid.*; see also § 21080.5, subd. (h)(1).) Contrary to CCC's assertion, the court's analysis in *Ross* did turn on the placement of the regulation within the context of the certified regulatory scheme. (CCC 20.) The court specifically distinguished both *Ultramar* and *Joy Road* since neither of those regulatory schemes contained a specific period for public review. (*Ross, supra*, 199 Cal.App.4th at pp. 930, 937 [section 13532 "expressly deviates from the 30-day notice time frame specified in [CEQA]."].)

CCC's CRP for CDPs, relevant here, contains no similar timing provision. Section 13059, which governs the circulation of Staff Reports for CDPs, states only that Staff Reports shall be distributed within a "reasonable time" to assure adequate notification prior to the public hearing; it thus differs in

important ways from the regulation at issue in *Ross*. The Secretary of the Resources Agency certified the program with that very general description of notice. Thus, the certified program in this case is like the programs at issue in *Ultramar* and *Joy Road* since neither of those regulatory schemes contained a specific period for public review, and not like the program at issue in *Ross* which did. And obviously, circulation of a Staff Report for at least 30 days would satisfy both CEQA's 30-day requirement and CCC's "reasonable time" requirement. There is simply no conflict between section 13059 and section 21091. For this reason, Cal-Am is wrong, and the certification of the CDP regulatory program does not shield CCC from future challenges under section 21080.5 for failure to provide reasonable notice. In the absence of a *Ross*-type bar, section 21080.5, subdivision (g), specifically recognizes that an agency's action can be challenged for failure to comply with section 21080.5, ***even after the agency's regulatory program has been certified***.

CCC argues that a notice provision—not contained within the CRP for CDPs (Chapter 5, CDPs)—but rather in the more generic rules for CCC's regular meetings (Chapter 2) —serves the same function as the notice provision in *Ross*, and establishes as a matter of law that an abbreviated notice provision is sufficient. (CCC 19-21.) This argument piles inference upon inference. It supposes that the Secretary of the Resources Agency—scoured the general regulations of CCC so as to know and understand that CCC intended the regular meeting notice period to serve as the "notice and comment period" for environmental review. In as much as the Secretary's duty was limited to certifying that the "program" met the "generic" requirements of Public Resources Code section 21080.5 subdivision (d), CCC's argument strains credulity. (Pub. Resources Code, § 21080.5, subd. (e)(2).)

As the Supreme Court explained in *Mountain Lion Foundation, supra,* 16 Cal.4th at p. 122, if the "benefits and purposes of the CEQA process can be reconciled with the Commission's duty under [its CRP] … we are obligated to harmonize the objectives common to both statutory schemes to the fullest extent the language of the statutes fairly permits." (Accord *Strother v. CCC* (2009) 173 Cal.App.4th 873, 880.) Section 13059 and section 21091 can be readily harmonized. CCC's notice requirement for regular meetings does not irreconcilably preclude circulation of the staff report for CEQA purposes in compliance with the Legislative directive for 30-day's notice in CEQA matters under section 21091. Agencies frequently have multiple notice provisions, including provisions under the Brown Act. Agencies can and do reconcile these various notice provisions. There is simply no basis to conclude that CCC's ordinary notice provisions trump the notice requirement for environmental documents under CEQA; such a conclusion would be inconsistent with Supreme Court's directive that the provisions of CEQA and the Coastal Act must be harmonized to the fullest extent possible.

Indeed, public participation is the bedrock element of both CEQA and the Coastal Act and is

essential to ensuring an informed decision-making process that minimizes adverse impacts. (See § 30006 ["the ... implementation of programs for coastal ... development should include the widest opportunity for public participation."]; § 15201 ["Public participation is an essential part of the CEQA process"].) "The requirement of public review has been called 'the strongest assurance of the adequacy of [environmental review under CEQA]' [Citation.]." (*Mountain Lion Coalition v. Fish & Game Com.* (1989) 214 Cal.App.3d 1043, 1051; accord *Ultramar, supra,* 17 Cal.App.4th at p. 703; see also *Sierra Club, supra,* 7 Cal.4th at p. 1229 [public review "demonstrate[s] to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action"]; *Schoen v. Department of Forestry & Fire Protection* (1997) 58 Cal.App.4th 556 ["public review provides the dual purpose of bolstering the public's confidence in the agency's decision and providing the agency with information from a variety of experts and sources"].) But CCC and Cal-Am ask the Court to remove the public participation component from both CEQA and the Coastal Act.

3. CEQA's 30-day notice requirement is compatible with CCC's procedure for CDP appeals and promotes the purposes of CEQA and the Coastal Act.

CCC's claim that complying with the 30-day notice requirement is unworkable under the Coastal Act is far-fetched and disingenuous. Case law is clear that CCC is only required to determine whether an appeal raises a "substantial issue" conferring jurisdiction on CCC within 49 days; it can hold the hearing on the appeal and decide whether to approve the CDP at a later date. (*Encinitas County Day School, Inc. v. CCC* (2003) 108 Cal.App.4th 575, 586; *Coronado Yacht Club v. CCC* (1993) 13 Cal.App.4th 860.) In *Coronado Yacht Club,* the court was emphatic that CCC is not required to hear an appeal within 49 days. The court explained that such a requirement would unduly "shackle" CCC and lead to "great difficulties." (*Id.*, at pp. 871-872.) In fact, among other problems, the court expressly noted that requiring CCC to hear an appeal within 49 days would make it difficult, if not impossible, for CCC to perform adequate environmental review for a proposed project. (*Id.* at p. 872.) Because the substantial issue determination is much narrower than CCC's ultimate decision on the appeal, CCC may prepare an abbreviated staff report on the limited substantial issue question, which can easily be accomplished within the 49 day period. (*Ibid.*) CCC's determination whether the appeal raised a "substantial issue" is not an approval of a project for purposes of CEQA, and therefore CCC would not be required to perform full environmental review before issuing the abbreviated staff report on that issue. Moreover, as noted by CCC, most appeals are from local approvals of CDPs. (CCC 22.) Because a local agency cannot approve a CDP without first complying with CEQA, a certified CEQA document will usually already exist before CCC even reaches the "substantial issue" question (unless the local agency determines a project is exempt from CEQA). Here, however, CCC asserted jurisdiction over the slant well before the

City could prepare an EIR and therefore there was no certified document

Indeed, this is precisely the procedure CCC typically follows. CCC's own guidance documents explain that the "substantial issue" determination and the hearing on an appeal are completely separate actions. (Wilkins Declaration in Support of Request for Judicial Notice (RJN), Ex. D, p. 3.) The guidance further explains that while the substantial-issue determination must be made within 49 days, "it takes approximately 6-8 months on average" to reach a final decision on appeal and "it may take longer to resolve more complicated appeals." (*Ibid.*) As indicated by CCC's own documents, there was no time crunch for CCC to make a final determination on the appeal. CCC's zeal to compress the entire process into 49 days is inexplicable.

There is simply no justification for CCC ignoring the CEQA-mandated 30-day review period. CCC should have complied with the 49-day requirement by determining whether Cal-Am's appeal raised a substantial issue. By issuing the Staff Report a mere 12 days before the hearing, CCC failed to comply with CEQA and deprived the public any meaningful opportunity to comment on the report.

4. CCC's responses to comments were inadequate; CCC failed to respond to a single significant environmental comment raised during the evaluation process.

Contrary to Cal-Am's assertion, *Ross* does not grant CCC an exemption from CEQA's responses to comments requirement. (Cal-Am14.) The issue in *Ross* was whether CCC was required to comply with Public Resources Code section 21091, subdivision (a), when circulating a staff report for a proposed LCP amendment. (*Ibid.*) Subdivision (a) prescribes the *amount of time* an agency must provide for public review and comment. It has nothing to do with an agency's obligation to respond to comments. The requirement that agencies provide written responses to comments is included in section 21091, subdivision (d). (See also § 15088.) Although the court in *Ross* determined CCC had adequately responded to comments in a separate section of the opinion, it did not hold CCC was exempt from section 21091, subdivision (d). There is simply no authority to support Cal-Am's position that CCC is exempt from CEQA's responses to comments requirement.

Furthermore, CCC's own regulations expressly state that a Staff Report must include "[r]esponses to significant environmental points raised during the evaluation of the proposed development **as required by [CEQA]**." (§ 13057, subd. (c)(3).) Nevertheless, Cal-Am argues that CCC did not need to comply with CEQA's responses to comments requirement and that CCC instead was only required to respond to comments it received *before* the initial Staff Report was issued. (Cal-Am 17-18.) This argument is nonsensical and would subvert the purposes of both CEQA and the Coastal Act. It is impossible for anyone to comment on the adequacy of the environmental review for the project without access to that review. (See, e.g., § §§ 15073-15074 [duty to make negative declaration available

for public review and comment], § 15087, subd. (c)(2) [duty to make EIR available for public review and comment].) Indeed, the main purpose of a Staff Report, as a substitute for a draft EIR, is to provide information about a proposed project's environmental impacts so the public can evaluate this information and provide comments. CCC is then required to provide written responses to significant environmental issues raised by commenters. (§ 21091, subd. (d); § 15088; see also § 21080.5, subd. (d)(2)(D); § 13057, subd. (c)(3).)[8] CCC acknowledges it is required to respond to comments. (CCC 22.)

Contrary to Cal-Am's argument, the language of the regulation does not limit this requirement to the "initial" Staff Report, as Cal-Am suggests. (Cal-Am 17.) The regulation states that the Staff Report shall include the staff's recommendation and shall include responses to comments as required by CEQA. (§ 13057, subds. (a)(6), (c)(3).) As occurred here, an initial staff report is often followed by addenda. The addenda include modifications to the initial Staff Report including any proposed changes recommended by staff (see AR3524), responses to comments on the staff report (see AR3535), and any changes to staff's recommendation. In other words, the addenda are part of the staff report and include the staff's recommendation. Thus, even under Cal-Am's interpretation of CCC's regulations, CCC must respond to comments in the final Staff Report as modified by the addenda. This practice is consistent with CEQA's requirement that documents prepared under a CRP must include written responses to significant environmental points raised during the evaluation process in the agency's "*final action* on the proposed activity." (§ 21080.5, subd. (d)(2)(D); see *Ross, supra,* 199 Cal.App.4th at pp. 940-941 [upholding CCC's responses to comments because an addendum to the Staff Report included written responses to comments regarding the content of the Staff Report].)

In fact, Cal-Am claims CCC did comply with this procedure and did respond to environmental concerns raised by commenters in addenda. (Cal-Am 18.) But that is plainly false. The "Responses to Comments" section of the Staff Report is just two-and-a-half pages long and does not respond to a single environmental concern raised during the evaluation period. (AR3535-3538 [the entire "Responses to Comments" section of the Staff Report, which responds only to comments regarding CCC's jurisdiction, and includes *no responses to any environmental issues*].) In short, by failing to respond to significant environmental comments, CCC completely ignored CEQA and its own regulations.

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[8] / Cal-Am suggests CEQA's responses to comments requirement cannot apply to CCC because written communications may be made on the day of the public hearing. (Cal-Am 18.) But Cal-Am ignores the fact that CEQA also permits comments to be submitted on the day of the hearing on a project, and even up till the close of the hearing. (See § 21177.) In fact, due to the improperly truncated comment period, MCWD contacted CCC to inquire about its procedures for responding to comments on the Staff Report. (AR3618.) CCC stated it would provide written responses to comments received through Friday,

D. CCC's analysis was inadequate.

1. CCC improperly piecemealed the project by analyzing the slant well separate from the larger MPWSP project.

Segmenting the slant well from the rest of the MPWSP project is textbook piecemealing and is prohibited under CEQA. (*Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376 (*Laurel Heights I*); see § 15378.) The two-part "piecemealing" test laid out by the Supreme Court in *Laurel Heights I* is readily satisfied here. First, the MPWSP is a reasonably foreseeable consequence of the slant well. The record plainly shows that the slant well is the initial phase of the MPWSP and that Cal-Am intends to convert the slant well into a production well for the MPWSP. (AR4142; 4156; 634; see also *Whitman v. Bd. of Supervisors* (1979) 88 Cal.App.3d 397 [EIR for test wells inadequate because it failed to analyze a pipeline that would eventually carry oil produced from the wells; the record "reflects that the construction of a pipeline was, from the very beginning, within the contemplation of [Real Party in Interest]."].) Second, the scope of the larger project (i.e. the full MPWSP including the slant well) and its environmental effects would obviously be much greater than the scope and environmental impacts of the slant well by itself. Cal-Am argument to the contrary is nonsense. (Cal-Am 21.) The Staff Report acknowledges that even converting the slant well to a water source well would enlarge the scope of environmental review. (See AR2706 [converting to use as a water source for the MPSWP "will require additional review and analysis"]; 2752.) Because the slant well and MPWSP are in fact two parts of the same project, CCC could not analyze them separately.

The "independent utility" test does not save CCC from this fatal error. (MCWD 24-25.) Cal-Am correctly states that two projects may undergo separate environmental review "when the projects have independent utility ***and can be implemented independently***." (Cal-Am 19; see also 1 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2d ed. 2014) § 12.8A [under the independent utility test, "[a] proposal that is related to a project but has independent utility ***and is not necessary for the project to proceed***, need not be included as part of the project . . . and may be reviewed in its own environmental document, as a separate project."].) But contrary to Cal-Am's argument, the slant well and the MPWSP do not satisfy either part of this test.

First, the slant well does not have independent utility apart from the MPWSP. The entire justification for the slant well is that it is necessary to determine whether MPWSP will be constructed and operated as proposed. (See AR2711; 2706; 4142; 215.) Moreover, because project proponents can almost always come up with a reason why portions of a project have utility independent of the rest of the

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November 7. (AR3618.) But CCC did not even do that. (AR3535-3538.)

project, as Cal-Am attempts to do here, courts have repeatedly emphasized that theoretical independent utility does not satisfy the test. (*Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214, 1229; *Banning Ranch, supra*, 211 Cal.App.4th at p. 1226, fn. 7.) Instead, courts must look at whether the two projects will be "interdependent in practice, even if theoretically separable[.]" (*Ibid.*) Here, the record clearly shows that, in practice, the slant well and the MPWSP are interdependent and are parts of the same project. (AR4142; 4156; 2711; 2706; 4634.)

Second, the MPWSP cannot be implemented independent of the slant well. The record confirms that the slant well is a necessary precedent for the MPWSP. (See, e.g., AR2711 [the test well is "a necessary precursor to determining whether slant wells are feasible at this site and determining whether the MPWSP will be constructed and operated as currently proposed."]; 2706; 2743.) Therefore, the slant well and the MPWSP do not satisfy the independent utility test and must be analyzed together as a single project. (See also § 15165 ["Where an individual project is a necessary precedent for action on a larger project . . . an EIR must address itself to the scope of the larger project."].) Cal-Am completely ignores these aspects of the test.

Moreover, contrary to Cal-Am's suggestion, the fact that CCC analyzed the slant well first before the MPWSP does not excuse CCC from its obligation to analyze the two parts of the project together. (See Cal-Am 20.) Even if the slant well could proceed without the MPWSP as Cal-Am claims, the MPWSP could not legally or factually proceed without the slant well. In other words, the two projects cannot, and would not, proceed independent of each other. And again, "[w]here an individual project is a necessary precedent for action on a larger project . . . an EIR must address itself to the scope of the larger project." (§ 15165.) As explained above, the MPWSP both legally and factually compelled completion of the slant well and the slant well was a necessary precedent for the MPWSP. Therefore, the slant well and the MPWSP could not be analyzed separately.

Lastly, Cal-Am and CCC completely ignore the fact that CCC's justification for asserting jurisdiction over and approving the Project, as well as for rejecting alternatives, are all premised on the MSWSP being approved at Cal-Am's preferred location and based on its preferred design. (See, e.g., AR4200; 4196; 4166.) Either CCC improperly piecemealed the slant well from the larger MPWSP, or the findings in the Staff Report cannot be upheld.

2. The alternatives analysis in the Staff Report is inadequate; CCC failed to analyze a single alternative to the Project.

Cal-Am claims CCC analyzed a reasonable range of alternatives in compliance with CEQA and the Coastal Act. (Cal-Am 28.) This claim is plainly false. Although the Staff Report *mentions* several potentially feasible alternatives, none were *analyzed*. (AR2742-2744; 4194-4196.) Instead, the two-page

discussion of alternatives in the Staff Report consists primarily of unsupported conclusions that no alternative methods or locations are feasible. (AR2743-2744; 4194-4196.) Because CCC improperly dismissed all alternatives in conclusory fashion, there is no analysis or discussion comparing the impacts of the alternatives to those of the Project as required under CEQA. (See § 15126.6, subd. (d) [the analysis "shall contain sufficient information about each alternative to allow meaningful evaluation, analysis, and comparison with the proposed project"]; *Village Laguna of Laguna Beach, Inc. v. Bd. of Supervisors* (1982) 134 Cal.App.3d 1022, 1029 [there must be sufficient information "to permit a reasonable choice of alternatives so far as environmental aspects are concerned."].) And the Staff Report utterly fails to analyze the comparative merits of any alternatives. (§ 15126.6, subd. (a).)

Rather than addressing MCWD's legal arguments, Cal-Am's argument tracks the discussion in the Staff Report and purports to explain why the few alternatives mentioned in the Staff Report were rejected and therefore *not analyzed.* (Cal-Am 28-30.) Indeed, Cal-Am argues the Staff Report should be upheld despite the lack of analysis because CCC's finding that there are no feasible alternatives is supported by substantial evidence elsewhere in the record. (Cal-Am 29-30.)

The Staff Report is not the place for CCC to make findings on whether the identified alternatives are in fact feasible. The Staff Report was required to analyze a reasonable range of alternatives that are considered *potentially feasible.* (§ 15126.6, subd. (a); *California Native Plant Soc. v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 981 (*CNPS*); *Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4th 1336, 1354.) The determination of "actual feasibility" can only be made by decisionmakers, who have the discretion under CEQA to reject alternatives. (*CNPS, supra*, 177 Cal.App.4th at p. 1001.)

Here, all of the alternatives mentioned in the Staff Report are at least potentially feasible, especially the alternative near Potrero Road which, by Cal-Am's own account, is "likely suitable for a slant well" and would "avoid impacts to the Salinas Basin." (AR3533; 3588, 3592.) In fact, the EIR prepared for the larger MPSWP analyzed the Porero Road alternative and concluded that constructing a slant well at that site is not only feasible, but it would also have less environmental impacts than the well at the Project site. (See RJN, Ex. A, pp. 7-259 to 7-261.) Most notably, the EIR explained that slant wells at the Potrero Road site would have **fewer impacts** to snowy plover and ESHA. (*Ibid.*)

Further, making feasibility determinations behind closed doors and outside of the public environmental review process, as CCC did here, is completely inappropriate under CEQA. (See *Laurel Heights I*, supra, 47 Cal.3d at p. 404 [an agency may not privately discuss the feasibility of alternatives, and thus limit the scope of analysis in an environmental document]; *Habitat and Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277, 1301-1305.) Cal-Am cites to several documents claiming that the various unstated alternatives were eliminated by "stakeholders," outside of the

public process, because they were determined to be "less preferable" than the Project. (Cal-Am 29-30.) Not only is that an improper basis for rejecting potentially feasible alternatives, the Staff Report cites to no actual evidence of this analysis and does not mention which alternatives were considered or the basis upon which they were determined to be "less preferable."

Cal-Am apparently believes that because CCC was already informed as to the alleged infeasibility of alternatives, there was no need to discuss them in the Staff Report. Cal-Am misses "the critical point that the public must be equally informed. Without meaningful analysis of alternatives in the EIR, neither the courts nor the public can fulfill their proper roles in the CEQA process." (*Laurel Heights I, supra,* 47 Cal.3d at p. 404.) Lastly, Cal-Am does not even attempt to address the inadequacies pointed out in MCWD's opening brief regarding the required "no project" analysis. Cal-Am merely repeats the conclusory and speculative statements in the Staff Report. (Cal-Am 29.) As explained in MCWD's opening brief, the discussion does not satisfy the intended purpose of the "no project" analysis. (AR4196; § 15126.6, subd. (e)(3)(B).)

3. The Staff Report failed to establish an adequate baseline and thresholds of significance against which to measure impacts to hydrology and water quality.

The baseline is the starting point by which changes from the project are measured; the threshold is the amount of change that constitutes a significant impact. Rather than establishing the baseline at the beginning of the process as CEQA and logic require, CCC elected to defer analysis of the baseline conditions until long after project approval. The Staff Report plainly states that "the baseline *will be* established by the Hydrological Working Group." (AR4193.) This was inadequate under CEQA. By deferring the analysis of baseline conditions, it was impossible for the Staff Report to provide the information necessary for the decisionmakers and the public to understand the impacts of the Project. (*Save Our Peninsula Committee* v. *Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 125; §§ 15125, 15126.2, subd. (a).) If CCC believed there was insufficient information to establish the baseline before it approved the project, the Staff Report should have at least explained the extent of information that was available. But CCC deferred the analysis without any explanation.

Cal-Am suggests that the Staff Report was not required fully and accurately describe existing hydrologic conditions in the SVGWB because there is sufficient evidence of existing conditions in other documents in the record. (Cal-Am 21-22.) Cal-Am is wrong. To fulfil CEQA's informational and public participation purposes, the baseline was required to be established at the beginning of the process and accurately described in the Staff Report itself. "If the description of the environmental setting of the project site and surrounding area is inaccurate, incomplete, or misleading, the EIR does not comply with CEQA." (*Cadiz Land Co. v. Rail Cycle* (2000) 83 Cal.App.4th 74, 87.) Further, it is "a central concept

of CEQA, widely accepted by the courts, that the significance of a project's impacts cannot be measured unless the EIR first establishes the actual physical conditions on the property." (*Save Our Peninsula Committee, supra,* 87 Cal.App.4th at p. 125.) Here, because the Staff Report included almost no information about existing hydrologic conditions near the project site, it was simply impossible for the public or decisionmakers to understand the Project's potential impacts to groundwater supplies and water quality. (AR2740-2741; see *Save Our Peninsula Committee, supra,* at p. 125; §§ 15125, 15126.2.)

Even if there was some evidence of existing conditions buried somewhere in the record, as Cal-Am contends, that does not make up for the lack of baseline information in the Staff Report itself. As the California Supreme Court has emphasized, "the data in an environmental document must be presented in a manner calculated to adequately inform the public and decision makers, who may not be previously familiar with the details of the project. Information 'scattered here and there in EIR appendices' or a report 'buried in an appendix,' is not a substitute for 'a good faith reasoned analysis.'" (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 442.) It is not the public's responsibility to comb the record and cobble together baseline information. That burden falls squarely on CCC. (See also *Save our Peninsula Committee, supra,* 87 Cal.App.4th at p. 128.) By failing to provide a complete and accurate description of existing conditions (i.e., baseline), the Staff Report is inadequate as an informational document as a matter of law. (*Ibid.*)

Moreover, the purported baseline information in the Staff Report describing the groundwater basin as "severely contaminated by seawater intrusion" is not supported by substantial evidence and is misleading. (RJN, Ex. C.) Publicly available data shows that seawater contamination in the basin is not nearly as pervasive as the Staff Report suggests. In fact, ample data directly contradicts the Staff Report's conclusory statements and shows the slant well would actually pump potable water from the groundwater basin. (*Ibid.*) Because there was hardly any baseline information in the Staff Report itself, and because CCC failed to provide adequate time for review and comment, the public was deprived any opportunity to evaluate or provide comments on the baseline and impacts of the slant well.

Cal-Am cannot identify any threshold of significance that was used to measure the Project's groundwater impacts. The best Cal-Am can do is point to a "performance standard" that was added to Special Condition 11 in a last-minute addendum. (Cal-Am 24.) A performance standard added to a mitigation measure at the end of the process is not a threshold of significance. As explained in MCWD's opening brief, a threshold of significance serves a completely separate function. The threshold of significance is used to determine whether an impact is considered significant. It was not appropriate for CCC to merely state that a standard included in mitigation will ensure impacts are less than significant. (*Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645, 656.)

Even if it was appropriate for CCC to only describe a threshold of significance as part of its mitigation, there is no explanation why this particular threshold was selected and there is no evidence to support the use of this threshold. (MCWD 30.) Cal-Am claims the required explanation was added to the Staff Report in the addendum and incorporated into CCC's findings. (Cal-Am 25, citingAR3535-3532 and 4192-4193.) Cal-Am is mistaken. The addendum and the findings do not explain why the purported threshold was appropriate or why there would be no impacts based on the threshold. (AR3535-3532; 4192-4193.) There is no explanation anywhere in the Staff Report or the addenda why a 1.5-foot water level drawdown or increase in TDS levels of more than 2,000 parts per million at Monitoring Well 4 provides a meaningful threshold for assessing impacts as required under CEQA.

Cal-Am suggests that Special Condition 11, which was added in the last-minute addendum, cured any flaws in the discussion of impacts to hydrology and water quality. Cal-Am is wrong again. As explained above, CCC could not rely on Special Condition 11 to establish the baseline or the threshold of significance to measure the Project's potential environmental impacts. But even on its own, Special Condition 11 does not satisfy CEQA's requirements for mitigation.

First, the Staff Report improperly assumes Special Condition 11 is part of the Project without first identifying or analyzing the significance of the impact apart from the proposed mitigation. Cal-Am cites to the City's MND (which was deemed inadequate by the City) and the Geoscience findings to support Cal-Am's assertion that the slant well alone would not result in significant impacts to groundwater. (Cal-Am 25.) But the Staff Report made no such determination and clearly relies on Special Condition 11 to support the conclusion that there would be no significant impacts. (AR4192-4193.) Like *Lotus*, the Staff Report does not include any information that enables the reader to evaluate the significance of the impact without the mitigation. (*Lotus, supra,* 223 Cal.App.4th at p. 654, 657 ["By compressing the analysis of impacts and mitigation measures into a single issue, the [Staff Report] disregards the requirements of CEQA."]

Second, despite Cal-Am's argument to the contrary, Special Condition 11 does not include adequate performance standards that would allow CCC to defer mitigation until after project approval. Cal-Am suggestion that Project activities will be halted upon reaching specific triggers—1.5 foot drawdown or 2,000 ppm TDS increase—ignores the fact that there is no assurance that impacts would in fact be avoided. Instead, it is left entirely up to the HWG and Executive Director to determine if the slant well caused such changes. (AR4151-4152.) There are no objective standards for determining whether the slant well caused the changes or whether they were caused by "natural variability." (4192-4193.) There is no evidence that meeting this standard in any event will avoid impacts. Thus, the condition does not include performance criteria that would allow deferral.

4. CCC failed to disclose, analyze, or propose adequate mitigation for the project's significant biological resource impacts.

By failing to disclose, analyze, or propose legally adequate mitigation for the Project's significant impacts on special-status species and ESHA, CCC violated CEQA and the Coastal Act. (MCWD 30-32.) Cal-Am argues all biological impacts claims are moot because Cal-Am completed major construction activities before the hearing on the merits. (Cal-Am 30-31.) Wrong. First, project construction is *not* complete.[9] For example, decommissioning activities have yet to occur, which would further disturb biological resources and ESHA at the site. (AR4153; see also 2353 [Cal-Am's false assurance to Monterey Bay National Marine Sanctuary that test well *demobilization activities* will not go into the Snowy Plover nesting season (March 1st - September 30th) under any condition]; 2749.) Decommissioning of the slant well and related activities would have significant impacts to ESHA and snowy plover. (AR4201 [mitigation applies to decommissioning].) Thus, MCWD's claims regarding biological impacts remain viable and are not moot.

Cal-Am's claim that the text of the LCP and the Coastal Act establish that there will be no impacts to ESHA and snowy plover is nonsense. (Cal-Am 32.) CCC's unsupported finding that impacts to ESHA have been mitigated "to the maximum extent feasible" is not undisputable proof that environmental harm will not occur. (Cal-Am 32; see AR4198-4202; § 30260.) Indeed, CCC's findings expressly state that biological impacts *will* occur: "***The key concern is the project's unavoidable effects on environmentally sensitive habitat areas ("ESHA").***" (AR4143; 4206 [CEQA finding that significant impacts remain, and no additional mitigation or alternatives have been identified as feasible].) Thus, the slant well was approved *despite* its significant and unavoidable impacts. Under CEQA, if there are any remaining significant, "unavoidable" impacts, i.e., impacts that cannot be mitigated or avoided, the project must either be denied or the agency must cite overriding considerations justifying approval of the project notwithstanding the impacts. (§§ 15091-15093.) It is undisputable that the project will result in harm to ESHA and snowy plover. This is true regardless of whether CCC could make the findings under Public Resources Code section 30260, overriding significant and unavoidable impacts, which is required to site coastal-dependent industrial facilities in ESHA.

Lastly, Cal-Am's suggestion that last minute changes to Special Condition 14 allowing construction activities to continue beyond the critical February 28 cut-off date and into Snowy plover

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[9] See RJN, Ex. B. Even as to well installation, Cal-Am has misrepresented the status of the construction. According to a memo from Cal-Am to the federal regulatory agencies, Cal-Am has not, and cannot, complete dune and sand restoration associated with well installation until later this year because the work was not completed prior to the snowy plover season. (*Ibid.*)

nesting and breeding season made the mitigation *more protective* to snowy plover defies logic and flies in the face of every expert biologist and wildlife agency that commented on the potential impacts of the slant well. (Cal-Am 31.) No expert every stated that the last-minute changes to mitigation would be effective, much less "more protective"; all experts agreed that construction had to cease before February 28 altogether to protect the species. (AR475, 2133, 3849.) There is simply nothing beyond counsel's self-serving argument that the modified mitigation will work to substantiate it. Worse still, Cal-Am claims it can escape scrutiny because further consultation with those wildlife agencies was not required. (Cal-Am 31, fn. 18.) This is nonsensical as well. It simply ignores the fact that there is no substantial evidence to support the effectiveness of the substitute mitigation. As explained below, the last-minute changes to the project allowing activities to occur during snowy plover breeding and nesting season was significant new information requiring the Staff Report to be recirculated to allow both the public and the resources agencies to comment on the actual project approved by CCC.

5. The Staff Report must be re-noticed and re-circulated.

Cal-Am claims that CCC is exempt from all CEQA requirements, including the recirculation requirement in Public Resources Code section 21092.1. (Cal-Am 32, citing § 21080.5.) Not so. Section 21092.1, CEQA's recirculation requirement, is not included in the specific list of exemptions for regulatory programs. (See Section B, *supra*.) Despite major changes to the project and significant new information added to the Staff Report the night before the hearing, Cal-Am further claims CCC was not required to recirculate the Staff Report because the additions were not "significant." (Cal-Am 33.) Again, Cal-Am is wrong. The last minute additions deprived the public any meaningful opportunity to comment on the project's impacts and on feasible alternatives and mitigation.

First, last minute changes to the project allowing construction to continue into the snowy plover nesting and breeding season was significant new information that was only disclosed after circulation for review and comment by the public and the wildlife agencies. (AR3525, 3526-3527.) Cal-Am's suggestion that this change made the project *more* protective of plover is beyond the pale. (Cal-Am 34.) Substantial evidence abounds showing this change would likely cause new and more severe impacts to plover than previously disclosed. (See AR357-482; 396; 2353; 475; 3849 RJN, Ex.B.) Yet neither the wildlife agencies nor the public were afforded any opportunity to comment on this significant change.

Second, Cal-Am claims addition of a new feasible alternative at Potrero Road does not trigger recirculation because it is not considerably different than the other alternatives analyzed in the Staff Report and because it would not clearly lessen the project's significant impacts. (Cal-Am 34-35.) Cal-Am is wrong. As explained above, CCC failed to analyze any alternatives in the Staff Report, so the Potrero Road alternative cannot be similar to any previously analyzed alternatives. Further, the Potrero

Road alternative is at least potentially feasible and would substantially lessen significant impacts. (RJN, Ex.A.) Indeed, Cal-Am itself has described the Potrero Road site "favorable for drilling" and noted that it would "avoid impacts to the Salinas Basin." (AR3588, 3592.)

Further, the addition of significant new information regarding hydrology and groundwater, including the extent of seawater intrusion near the site, also mandates recirculation. (AR3531-3532; 3525.) Foremost, as Cal-Am notes, the only purported threshold of significance to assess impacts to Coastal Agriculture was added to Special Condition 11 after the Staff Report was circulated. (Cal-Am 24, citing AR4151.) In other words, based on Cal-Am's own argument, the only possible measure of whether the Project would adversely impact hydrology and groundwater was added after the Staff Report was circulated. But the public was afforded no opportunity to review and comment on this critical information. Because the public was deprived any opportunity to comment on potential groundwater impacts, recirculation was required. (§ 21092.1; § 15088.5; see also *Save Our Peninsula Committee*, *supra*, 87 Cal.App.4th at p. 131 [the purpose of recirculation of an EIR is to allow public and other agencies the opportunity to evaluate new data or conclusions].) Moreover, the new data and information added in the addenda by Cal-Am at the last minute, without any opportunity for public comment, purportedly showing that all the groundwater in the SVGB was severely seawater intruded and unusable is contradicted by ample data. (RJN, Ex. C.) The public had no opportunity to review and comment on the changes or to submit information to CCC showing its assumptions were wrong. Thus, CCC's failure to recirculate the Staff Report was prejudicial, resulting in a flawed document.

Lastly, the Staff Report was so fundamentally and basically inadequate and conclusory in nature that public comment on the Staff Report was in effect meaningless. (See § 15088.5, subd. (a)(4).) Therefore, CCC was required to recirculate the Staff Report before approving the Project to comply with CEQA. (See § 21092.1; § 15088.5; *Laurel Heights II, supra,* 6 Cal.4th at pp 1124-1125.)

CONCLUSION

For the foregoing reasons, MCWD respectfully requests that the Court grant the petition.

Dated: June 16, 2015

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By: _____
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MARINA COAST WATER DISTRICT

Marina Coast Water District v. California Coastal Commission, et al.
Santa Cruz Superior Court Case No.: CISCV180839

PROOF OF SERVICE

I, Rachel N. Jackson, am a citizen of the United States, employed in the City and County of Sacramento. My business address is 555 Capitol Mall, Suite 800, Sacramento, California 95814. My email address is rjackson@rmmenvirolaw.com. I am over the age of 18 years and not a party to the above-entitled action.

On June 18, 2015, at approximately 4:00 p.m., I served the following:

MARINA COAST WATER DISTRICT'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

☑ On the parties in this action by causing a true copy thereof to be electronically delivered via the internet to the following person(s) or representative at the address(es) listed below. The parties on whom this electronic mail has been served have agreed to such form of service

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury that the foregoing is true and correct and that this Proof of Service was executed on this 18th day of June, 2015, at Sacramento, California.

Rachel N. Jackson

Marina Coast Water District v. California Coastal Commission, et al.
Santa Cruz Superior Court Case No.: CISCV180839

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