Case No. C087102 (consolidated for limited purposes with C087117)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

LEAGUE TO SAVE LAKE TAHOE, MOUNTAIN AREA PRESERVATION FOUNDATION, and SIERRA WATCH

Petitioners, Appellants, and Cross-Respondents

v.

COUNTY OF PLACER and PLACER COUNTY BOARD OF SUPERVISORS

Respondents and Cross-Appellants.

and

SIERRA PACIFIC INDUSTRIES, MOUNTAINSIDE PARTNERS, LLC, and MVWP DEVELOPMENT, LLC

Real Parties in Interest and Cross-Appellants.

Appeal from Judgment Entered in Favor of Petitioners,
Placer County Superior Court Case No. SCV38666
(consolidated with SCV38578)
Honorable Michael W. Jones, Judge

APPELLANTS' REPLY BRIEF AND CROSS-RESPONDENTS' OPPOSITION BRIEF

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APPELLANTS' REPLY BRIEF

INTRODUCTION

The opposition brief filed by Real Parties in Interest and joined by the County (collectively, "Respondents") does not dispute dispositive facts that demonstrate the fundamental errors in the Environmental Impact Report ("EIR") for the Project. Respondents recognize that more than 1,000 cars from the Project would travel into the Lake Tahoe Basin each day, and the County acknowledges that such activity threatens to degrade the Lake's water quality and clarity, as well as the Tahoe Basin's air quality. At the same time, Respondents tacitly concede that the EIR developed no specific thresholds of significance for evaluating these impacts and declined to consider the Tahoe Regional Planning Agency's ("TRPA's") specially tailored standards for the Lake. Likewise, Respondents do not dispute that, even though the County was forced to substantially revise its analysis of the Project's significant climate impacts due to a Supreme Court decision, it did not (1) recirculate the new analysis for public comment or (2) alter its mitigation for these impacts in light of the revised analysis.

Respondents also concede important facts directly linked to their failure to comply with the Timberland Productivity Act ("Act"). They admit that, to justify the immediate removal of the West Parcel out of a Timberland Production Zone ("TPZ"), the County relied on the fact the landowner would place another piece of land, the East Parcel, into a TPZ.

Tellingly, the County's approval documents do not state that the land removed from a TPZ was no longer "necessary or desirable" for timber use, as the Act requires, and Respondents make no claim in this appeal that the West Parcel was unsuitable for that use.

Given the breadth of these concessions, how do Respondents defend the County's approvals? They begin by trying to divert the Court's attention. Respondents repeatedly focus on the Martis Valley Opportunity Agreement ("MVOA"), a now-defunct agreement executed over five years ago by some of the parties to this case. Real Parties' Opposition and Opening Brief ("RB"):16-18; Administrative Record ("AR"):40:23199-208. It's a classic red herring. Respondents assert that the Project somehow fulfills the MVOA's goals (RB:17, 103), but, in reality, the massive luxury development falls far outside its bounds. *See* Appellants' Opening Brief ("AOB"):18; AR:1:400; 2:706-07. More importantly, the MVOA is entirely irrelevant to the questions before the Court: whether the County complied with the California Environmental Quality Act ("CEQA") and the Timberland Productivity Act when it approved the Project. The agreement expired under its own terms, and the County was not even a party to it.

In a related gambit, Respondents systematically refer to all Appellants as "Sierra Watch," even though that organization is not the first-named plaintiff in the case. RB:18. Their intent is obvious: given the EIR's failure to properly evaluate the Project's impacts to Lake Tahoe, they wish

to obscure that the lead challenger to the Project is the League to Save Lake Tahoe—which, for over sixty years, has worked to preserve Lake Tahoe and the Tahoe Basin. Joint Appendix ("JA"):1:69. Notably, the League was not a party to the MVOA that Respondents repeatedly mention.

Still avoiding the merits, Respondents next offer a series of untenable excuses for the County's violations. To defend the EIR's fundamental failure to describe the environmental setting of the Lake Tahoe Basin or evaluate the Project's impacts there, Respondents emphasize that the Project's footprint is outside the Basin. RB:49 ("Project did not propose development in the Tahoe Basin"). But, as Respondents themselves concede (RB:72-73), the Supreme Court has long held that an EIR "may not ignore the regional impacts of a project proposal, including those impacts that occur outside its borders." *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 575. Here, the County's own consultant found that vehicles entering the Tahoe Basin contribute to impacts on the Lake's water and air quality (AR:20:11117), and this Project would add 1,394 new car trips each day (AR:6:3118).

Nor does TRPA's lack of permitting authority over the Project—another red herring raised by Respondents (RB:20)—assist them. Appellants have never contended that the County's EIR must adopt TRPA's thresholds of significance. *See* RB:40-41 (Respondents' contention to contrary). Instead, Appellants argue that the County must fulfill CEQA's

mandate that the EIR adequately describe the environmental conditions in the Tahoe Basin and undertake a meaningful, science-based analysis of the Project's impacts on this sensitive resource. *See* Guidelines §§ 15125(d), 15064(b)[1]; *Cleveland Nat. Forest Foundation v. San Diego Assn. of Governments* (2017) 3 Cal.5th 497, 504 ("*CNFF I*") (environmental analyses must "stay in step with evolving scientific knowledge and state regulatory schemes"). The EIR's failure to carry out that required analysis rendered the document inadequate as a matter of law.

Next, to defend the County's failure to recirculate the Final EIR's ("FEIR") new analysis of climate impacts, Respondents attempt to reinvent history. The California Supreme Court's holding in *Center for Biological Diversity v. Department of Fish and Wildlife* (2015) 62 Cal.4th 204, 227-28 ("*CBD*") required the County to revamp the Draft EIR's ("DEIR") analysis of climate impacts. The DEIR had used a threshold of significance that bore no relation to the Project, and the holding in *CBD* condemned this specific practice. This defect rendered the DEIR "fundamentally and basically inadequate." Guidelines § 15088.5(a)(4).

[1] The state CEQA Guidelines ("Guidelines") appear at Cal. Code Regs., title 14, section 15000 et seq. The California Natural Resources Agency approved comprehensive revisions to the Guidelines in December 2018. The citations in this brief refer to the Guidelines as they existed in 2016, when the County approved the Project.

Conceding as much, the County prepared a revised analysis for the FEIR that used a new threshold—and the FEIR then revealed that the Project's climate impacts would be far more severe than previously disclosed. To rebut Appellants' claim that the County should have recirculated the new analysis, Respondents argue that it does not constitute "significant new information" under CEQA. RB:80-93. To support this argument, they claim that the FEIR employed essentially the same threshold as the DEIR (RB:84-85) and that the significance determinations in the two documents are virtually indistinguishable (RB:86-88). The administrative record flatly refutes these assertions, as the FEIR (1) uses a different and more rigorous threshold of significance than the DEIR (AR:3:1567; 6:3076); and (2) reveals that the Project's climate impacts would be more severe than the DEIR disclosed (AR:6:3131-33).

Respondents also cannot defend the County's failure to identify effective measures to mitigate the Project's significant climate impacts. The DEIR's sole mitigation for climate impacts required the Project to comply with an "efficiency" standard that did not exist. When the Supreme Court disallowed such standards for developments like the Project, the County refused to revise its defective mitigation or consider other feasible mitigation suggested by the public. While Respondents now assert that the County did impose other mitigation, such as requiring GHG emissions offsets (RB:96), once again the record proves otherwise (AR:1:200-02).

Respondents' excuses for the County's noncompliance with the Timberland Productivity Act fare no better. First, Respondents remain unable to explain how the immediate rezoning of the West Parcel from a TPZ designation could possibly comply with the plain language of the Act. Critically, the statute nowhere authorizes an agency to immediately rezone TPZ land by including that land in a "package" with other land use approvals, as the County did here.

Second, Respondents cannot plausibly defend the County's failure to make "urgency" findings documenting why the landowner could not have used the normal, ten-year rollout process for the rezoning. In fact, no record evidence suggests that there was any need, much less an urgent need, for a second-home subdivision in the area. In litigation, Respondents now offer up the explanation that the Project would provide "needed workforce housing." RB:115. But that excuse founders on the record, which conclusively shows just the opposite. *See* AOB:68-69 (Project will aggravate workforce housing shortage).

Accordingly, Appellants respectfully request that this Court reverse the trial court's rulings denying Appellants' claims under CEQA and the Timberland Productivity Act.

ARGUMENT

I. Respondents Misrepresent the Standard of Review.

A. CEQA

Respondents recognize that the California Supreme Court's recent decision in *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502 ("*Fresno*") is now the leading case law on the standard of review for CEQA cases.[2] RB:29-30. In *Fresno,* the Court began by reaffirming that "[t]he foremost principle under CEQA is that the Legislature intended the act 'to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.'" 6 Cal.5th at 511 (citations omitted). The Court also made clear that the sufficiency of an EIR's discussion of environmental impacts is reviewed *de novo*. *Id.* at 515-16. As the Court explained, "whether a description of an environmental impact is insufficient because it lacks analysis or omits the magnitude of the impact is not a substantial evidence question." *Id.* at 514. The "ultimate inquiry" is whether the document includes enough detail to enable members of the public "'to understand and to consider meaningfully the issues raised by the proposed project.'" *Id.* at 516 (citation omitted). This inquiry is "generally subject to independent review." *Id.* at 516.

Inexplicably, however, Respondents either ignore or misapply

[2] *Fresno* was published on December 24, 2018, after Appellants filed their Opening Brief.

Fresno's holding with respect to this case. First, Respondents claim the "substantial evidence" test applies to Appellants' claims regarding the adequacy of the EIR's description of environmental setting. *See* RB:47-48. In fact, the Supreme Court expressly affirmed *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 952-56, which applied *de novo* review to the question of whether the lead agency adequately described the environmental conditions, or context, for a project. *Fresno*, 6 Cal.5th at 515.

Respondents brush pass this current law and rely instead on older cases that are inapposite. RB:47-48. *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 447-48 (RB:47), involved the question of whether substantial evidence supported the existence of "factual circumstances" to justify an agency's reliance on a future baseline date against which to measure a project's environmental effects. The case nowhere suggests that an EIR's omission of information about environmental conditions in the Project area does not present a legal question. *Id*. Respondents also cite *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310, 327-28 (RB:48), which similarly examined an agency's temporal methodology for calculating baseline data—not whether its description of the environmental setting was complete. *Ebbetts Pass Forest Watch v. California Department of Forestry and Fire Protection* (2008) 43 Cal.4th

936 (RB:47) is even further afield. It stands for the unremarkable proposition that *de novo* review applies to an agency's legal determination regarding the scope of its cumulative impacts analysis (*id.* at 949), whereas the substantial evidence test applies to its factual findings (*id.* at 954).

Respondents next claim that the Court must afford deference to the County's evaluation of impacts to the Lake Tahoe Basin because CEQA gives agencies some leeway in selecting an EIR's thresholds of significance. RB:59. But this argument is misleading. It remains a legal question whether the County avoided its disclosure obligations under CEQA by selecting thresholds that mask the true nature and extent of impacts to the Basin. *See Fresno*, 6 Cal.5th at 514-16; *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1109 ("*Amador*").

Similarly, Respondents fail to acknowledge *Fresno*'s applicability to Appellants' recirculation claim. While earlier cases had suggested the substantial evidence test applied to all such claims, *Fresno* indicates that this blanket rule no longer holds. Here, Appellants argue that the DEIR's climate change analysis must be recirculated because it was "fundamentally and basically inadequate"—a question of law under *Fresno*. 6 Cal.5th at 514 ("the adequacy of an EIR's discussion of environmental impacts" is reviewed *de novo*); Guidelines § 15088.5(a)(4). To the extent that Appellants' remaining recirculation argument (i.e., that the FEIR included

significant new information showing that the Project would result in more severe climate impacts) is subject to the substantial evidence test, that test does not call for blind deference to an agency's determinations, as Respondents essentially argue. *See* RB:78-79. Under CEQA, "[a]rgument, speculation, unsubstantiated opinion or narrative, [and] evidence which is clearly erroneous or inaccurate … does not constitute substantial evidence." Guidelines § 15384(a). Here, the EIR is inadequate even under this more deferential standard.

Respondents also err in asserting that the substantial evidence test applies to Appellants' claim that the EIR failed to identify feasible mitigation for the Project's climate impacts. RB:93-96. The Supreme Court has held that such claims are subject to *de novo* review. *See City of Marina v. Bd. of Trustees of the Cal. State Univ.* (2006) 39 Cal.4th 341, 355-56.

Finally, despite Respondents' suggestion otherwise (RB:58), the deficiencies in the EIR were clearly "prejudicial." Once again *Fresno* is dispositive. The Supreme Court clarified that where, as here, an EIR "'omits material necessary to informed decisionmaking and informed public participation,'" it "subverts the purposes of CEQA" and "'the error is prejudicial.'" 6 Cal.5th at 515 (citations omitted).

B. Timberland Productivity Act

Respondents attempt to frame nearly all of the issues raised in Appellants' Timberland Productivity Act claim as subject to the substantial

evidence test. RB:96-118. This strategy fails. In fact, courts review *de novo* a claim that an agency has failed to proceed in the manner required by law. AOB:27 (citing *Coe v. City of San Diego* (2016) 3 Cal.App.5th 772, 781).

Here, the County's approval of the immediate rezoning raises several purely legal issues: (1) whether the Act permits a local agency to justify the removal of a parcel from TPZ by placing a different parcel into TPZ; (2) whether the agency may consider the receipt of local tax revenues as a "public interest" benefit under the Act; and (3) whether the Act requires an agency to determine that the normal rollout of a rezoning is infeasible before it approves immediate rezoning. The Court must review each of these questions *de novo*.

By contrast, Appellants' challenges to the sufficiency of the County's findings regarding the purported housing demand and the purported preservation of the East Parcel are subject to the substantial evidence test.

II. Respondents Cannot Defend the County's Failure to Comply with CEQA's Requirements to Disclose and Mitigate the Project's Significant Impacts on the Lake Tahoe Basin.

A. Respondents Cannot Justify the EIR's Failure to Provide an Adequate Description of the Environmental Setting for the Basin.

CEQA expressly requires that an EIR describe a project in the context of its regional environmental setting. Guidelines § 15125(a) ("[a]n EIR must include a description of the physical environmental conditions in

the vicinity of the project … from both a local and regional perspective"); *see* RB:48 (admitting same). The regulations further mandate that this information about the environmental setting place "[s]pecial emphasis … on environmental resources that are rare or unique to that region and would be affected by the project." Guidelines § 15125(c).

Respondents do not dispute that the Lake Tahoe Basin is a rare and unique regional resource in the Project vicinity. Instead, they claim that the EIR's description of that resource is sufficient, based on (1) the EIR's passing mention of two locations in the Basin in its overall discussion of the environmental setting for the Project; and (2) the EIR's brief references to the Basin in its chapters on water quality and air quality. But, as detailed below, these abbreviated discussions do not come close to providing the setting information that CEQA requires. By omitting this information, which is fundamental to an EIR's analysis of project impacts, the County precluded informed decision-making and meaningful public participation. *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 729.

1. The EIR's Overall Environmental Setting Information for the Project Does Not Sufficiently Describe the Tahoe Basin.

Respondents claim that the EIR's main discussion of the Project's environmental setting was sufficient because it mentions two locations: Kings Beach and Tahoe Vista. RB:49 (noting that if readers cross-reference

maps, they will find that "both [are] located in the Tahoe Basin"); AR:3:1260. But a passing reference to two communities in the Tahoe Basin, with no discussion of Lake Tahoe itself or the area's distinct and fragile natural resources, does not afford Lake Tahoe the "special emphasis" that CEQA requires.

San Joaquin Raptor is on point. In that case, the EIR noted only that the project site bordered the "San Joaquin River," "San Joaquin River floodplain," and a "riparian corridor." *San Joaquin Raptor*, 27 Cal.App.4th at 723-26. The court held that the EIR could not properly analyze the project's impacts because it omitted specific details about those areas and ignored their "environmental importance and sensitivity." *Id*. at 725-26. Here, the EIR's overall description of the area, which only briefly mentions Kings Beach and Tahoe Vista, provides even less detail about nearby sensitive resources than the EIR did in *San Joaquin Raptor*.

2. The EIR's Brief Mention of Lake Tahoe in the Water Quality Setting Does Not Supply the Missing Information.

The limited reference to the Lake Tahoe Basin in the setting information for the EIR's water quality chapter also does not meet CEQA's requirements. Respondents admit that the EIR's description of water quality setting "did not … provide a detailed description of Lake Tahoe's water quality." RB:50. That discussion only briefly mentions Lake Tahoe, burying it as one of several "features" within the 3.91 million-acre

hydrologic region. AR:3:1633; AOB:34-35. Nonetheless, Respondents contend that this glancing reference was sufficient because: (1) runoff from Project construction will not drain into the Lake; and (2) the Lake Tahoe Total Maximum Daily Load ("TMDL") standards had already anticipated any water quality impacts from the Project. RB:49-50. Both excuses fail.

The fact that Project construction does not drain into Lake Tahoe does not excuse the EIR's failure to describe the Lake's water quality. As Respondents admit, the Project would send an additional 1,394 car trips, and an additional 13,745 vehicle miles traveled ("VMT") into the Tahoe Basin each day. RB:50; AR:6:3118. These cars would emit pollutants and produce fine sediments that would degrade Lake Tahoe's water quality and famous clarity. AOB:29. The County's EIR consultant admitted as much: "[V]ehicles that enter the basin could contribute to vehicle related effects on water quality, including from vehicle emissions and fine particulates from roadway surfaces, particularly in the winter." AR:20:11117; *see also* AR:20:11238-39.

Given these effects, the EIR could not exclude Lake Tahoe from the discussion of the environmental setting. As one court explained, "[a]n EIR is required to discuss significant impacts that the proposed project will cause in the area that is affected by the project. This area cannot be so narrowly defined that it necessarily eliminates a portion of the affected environmental setting." *Bakersfield Citizens for Local Control v.*

City of Bakersfield (2004) 124 Cal.App.4th 1184, 1216 (citation omitted). By describing the full context for the project, the EIR allows readers to understand the significance of its regional impacts. *See, e.g.*, *Galante Vineyards v. Monterey Peninsula Water Management Dist*. (1997) 60 Cal.App.4th 1109, 1122-23 (EIR's inadequate description of vineyards in project area prevented public from understanding full extent of project's impacts on agricultural resources); *Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4th 859, 873-75. Here, the EIR provides no such regional context.

Respondents fare no better with their second argument: that the Project's car trips "have already been accounted for in" the Lake Tahoe TMDL program. RB:50. Pursuant to the federal Clean Water Act, the TMDL sets overall maximum pollutant levels for Lake Tahoe that are consistent with plans for achieving the Lake's historic clarity. *See* AR:2:808; 17:10162; 20:11238-40. But the TMDL program in no way substitutes for CEQA compliance; it does not describe the current physical conditions of Lake Tahoe or the Project's impacts on it. *See* AR:2:808-10, 819-20; 3:1633-48 (no environmental setting information on Lake Tahoe water quality in DEIR); *County of Amador*, 76 Cal.App.4th at 953, 955 (regulatory "requirements for [the] Project [] do not define the existing, baseline environment"). Indeed, as the Attorney General warned, "[i]f anything, the Project may actually make it more difficult to achieve the

TMDL." AR:2:819 fn. 2. Thus, the Attorney General continued, "discussion of the TMDL only underscores that the EIR should have included an analysis of the Project's impacts on Lake Tahoe's water quality." *Id.*

Tellingly, Respondents never contend that the TMDL standard actually includes adequate information on the environmental setting for Lake Tahoe. Rather, they claim that the EIR did not need to include such information because, given the operation of the TMDL, the Project's impact on the Lake would be insignificant. RB:50-52. Specifically, they assert that because the Project's planned development is consistent with the level of development anticipated by the TMDL program, then *ipso facto* its effect on Lake Tahoe cannot be significant. *Id.* At the same time, they claim that implementation of the TMDL program will somehow "mitigate" the Project's impacts on the Lake. *Id*.

Respondents' TMDL arguments fail for several reasons. First, the argument contradicts the County's earlier representation that the EIR does *not* use the TMDL as a basis for a finding that the Project's impacts on the Basin are less than significant. AR:2:832-33. Indeed, discussion of the TMDL occurred almost entirely after the EIR. *See, e.g.*, AR:2:808-810 (County's post-EIR response). The DEIR includes no discussion of the Lake Tahoe TMDL, and the FEIR only briefly mentions it. AR:6:3249; *see Fresno*, 6 Cal.5th at 520-21 (information regarding impacts must be in EIR

itself). In short, the TMDL argument is an after-the-fact, litigation-driven position.

Second, neither the EIR nor the post-EIR discussion actually establishes, based on substantial evidence, that the Project is consistent with the TMDL program. AR:2:808-810; 6:3249. Nor do those documents conclude that compliance with the TMDL will effectively mitigate the Project's impacts on the Lake. *Id*. The County could not make such findings because the TMDL program does not specifically address the Project. *See* AR:2:819-20; 20:11238-40. Moreover, that program focuses on sediment from stationary sources affecting deep water clarity; it does not address vehicle pollutants. *See, e.g.*, AR:69:41552-53 (TMDL relies on TRPA's air quality and transportation plans to address pollutants from mobile sources); 2:756. Accordingly, the record does not support Respondents' newly-minted reliance on the TMDL.

Third, Respondents cannot rely on the TMDL program to replace the required information and analysis under CEQA. As this Court explained in *County of Amador*, "*[b]efore* 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." 76 Cal.App.4th at 952 (emphasis added); *see also* Guidelines §§ 15125, 15126.2. Thus, regardless of its ultimate conclusion about the significance of an impact, an EIR is invalid if

it fails to adequately discuss the project's environmental setting, which then serves as the benchmark for the environmental analysis. *See San Joaquin Raptor*, 27 Cal.App.4th at 729; *Galante Vineyards*, 60 Cal.App.4th at 1122-24. Here, the County could not avoid describing the Project's regional setting, including Lake Tahoe's water quality, simply by asserting that the Project is consistent with a federal program. *County of Amador*, 76 Cal.App.4th at 952-55.

Nor can the County avoid the required analysis by claiming the TMDL program will "mitigate" the Project's impacts. *See* RB:51-52, 52, fn. 11. Even if the County had required compliance with the TMDL as mitigation for the Project's impacts—a fact which, again, the EIR fails to establish—an EIR may not skip the steps of describing the environmental setting and analyzing the Project's impacts. *See, e.g.*, *POET, LLC v. State Air Resources Bd.* (2017) 12 Cal.App.5th 52, 79-83 ("*POET II*") (agency cannot assume project impacts will be mitigated without analysis based on proper baseline); *Ukiah Citizens for Safety First v. City of Ukiah* (2016) 248 Cal.App.4th 256, 264 ("CEQA EIR requirements are not satisfied by saying an environmental impact is something less than some previously unknown amount") (citation omitted); AR:2:820 (Attorney General stating same).

Respondents next veer in yet another direction, arguing that Guidelines section 15064(h)(3) allowed the EIR to omit the crucial first

step of disclosing the environmental setting. *See* RB:51. Respondents are wrong. Section 15064(h)(3) provides that an agency "may determine that a project's incremental contribution to a cumulative effect is not cumulatively considerable if the project will comply with the requirements in a previously approved plan or mitigation program." This section addresses determining the significance of a cumulative impact. It nowhere exempts an EIR from the prior, required steps of describing the project's environmental setting and then analyzing its individual and cumulative impacts. *See* Guidelines §§ 15125, 15126.2, 15130, 15358; *see also Georgetown Preservation Society v. County of El Dorado* (2018) 30 Cal.App.5th 358, 372 ("[C]onformity with a [] plan does not insulate a project from EIR review where it can be fairly argued that the project will generate significant environmental effects.") (citation omitted); *Communities for a Better Environment v. Cal. Resources Agency* (2002) 103 Cal.App.4th 98, 110-14 ("*CBE*") (invalidating prior version of Guidelines section 15064(h) because it allowed an agency to avoid preparation of EIR without a full assessment of a project's impacts) (disapproved on other grounds).

Respondents then claim Appellants contradict themselves by requesting both an assessment of Project impacts and disclosure of the Project's inconsistencies with plans for protection of the Basin. RB:51. Not so. The Guidelines are clear that, even when analyzing a Project's

consistency with an adopted plan, an EIR must examine impacts with respect to both (1) "existing physical conditions" *and* (2) "potential future conditions discussed in the plan." Guidelines § 15125(e); *Woodward Park Homeowners Assn., Inc. v. City of Fresno* (2007) 150 Cal.App.4th 683, 706-07. Here, because the EIR lacks a proper description of the Tahoe Basin as part of the Project's regional setting, the EIR could not adequately analyze the Project's individual or cumulative effects on the Lake, much less determine whether a TMDL program could mitigate them.

Finally, Respondents offer a last, remarkably weak argument: that the estimate of Basin VMT—added to the FEIR in response to comments—adequately describes the environmental setting in the Basin. *See* RB:49-52. But this belated, single snippet of information does not nearly suffice under CEQA for two reasons. First, the raw data on VMT plainly does not describe the current physical conditions of Lake Tahoe, including water quality and clarity. *See Galante Vineyards*, 60 Cal.App.4th at 1123-24 (raw data on air temperatures did not provide relevant contextual information). Notably, such water quality and clarity information was readily available to the County. *See* AR:41:23795-832; 20:10897 (same environmental consultant for Project EIR and TRPA Regional Plan Update).

Second, the data came too late in the process to fulfill the function of environmental setting information, which is to provide the foundation for the EIR's assessment of project impacts. *See Save Our Peninsula Com. v.*

Monterey County Bd. of Supervisors (2001) 87 Cal.App.4th 99, 125 ("baseline determination is the first rather than the last step in the environmental review process"); *see also* Guidelines § 15120(c) (DEIR must contain environmental setting information).

3. The EIR's Discussion of the Air Quality Setting Lacks the Required Information About the Lake Tahoe Air Basin.

The EIR's discussion of air quality setting likewise does not provide the necessary information about the Lake Tahoe Basin, despite Respondents' arguments to the contrary.

Respondents note that when the EIR describes the Mountain Counties Air Basin, it lists air quality standards and mobile source emissions in Placer County, and discloses air quality data from one station in the Tahoe Basin (in South Lake Tahoe, 26 miles from the Project). RB:33, 52-53; *see also* AR:3:1531-57. Respondents assert that this information was sufficient and claim that Appellants did not identify what contextual information pertaining to Tahoe was missing. RB:53. Respondents are wrong.

As Appellants explained in their Opening Brief, the EIR not only lacks essential information about the current air quality conditions in the Tahoe Basin, but it also omits any discussion of the special regulatory regime governing the Basin. AOB:36; AR:3:1531-57. The EIR's reference to air quality conditions and regulations for *other* air basins is insufficient.

The Lake Tahoe Air Basin is a separate and distinct air basin from Mountain Counties and has a regulatory regime that is separate from Placer County air pollution agencies. *See* Cal. Code Regs., tit. 17, § 60113; AR:12:7035-36; 46:26630-708. The purpose of the separate regime is to ensure that the air quality in the Basin is sufficient to maintain the area's special environmental status. *See, e.g.*, AR:41:23833-34. Thus, contrary to Respondents' assertions, the EIR's narrow focus only on pollutant levels and regulations in Placer County was insufficient. *See* Guidelines § 15125(c)-(d); *Bakersfield*, 124 Cal.App.4th at 1216.

Respondents stress that the EIR includes air quality data from one station in South Lake Tahoe. RB:33, 53; *see also* AR:3:1533. These isolated numbers, however, do not begin to describe the overall air quality conditions in the Lake Tahoe Air Basin or the environmental resources at stake. Lacking more comprehensive information, the EIR cannot explain how the Project's emissions—including those from over 1,000 cars travelling to the Basin each day—would impact air quality in this protected region. *See Cadiz Land Co., Inc. v. Rail Cycle, L.P.* (2000) 83 Cal.App.4th 74, 91-95 (lack of contextual information regarding aquifer precluded adequate impacts analysis). Nor can Respondents claim the data was unavailable; the County had access to the required air quality information for the Tahoe Basin. *See, e.g.*, AR:41:23833-90. The County's decision to exclude that information from the EIR violated CEQA. *See Cleveland Nat.*

Forest Foundation v. San Diego Assn. of Governments (2017) 17 Cal.App.5th 413, 438-40 ("*CNFF II*") (invalidating EIR that failed to provide air quality setting information despite availability of data from which agency could develop "reasoned estimate[s]").

As with the water quality setting, Respondents claim the FEIR corrected any deficiencies in the Tahoe Basin air quality setting by providing a 2010 estimate of VMT in the Basin. RB:53. However, as explained above, this information was too little, too late. *See supra* Part II.A.2; Guidelines § 15120(c). The VMT figure, by itself, simply does not provide the needed informational base for analyzing the impacts on the Basin's air quality. Respondents similarly argue the EIR is adequate because it "described existing traffic levels," including on a few roads in the Tahoe Basin. RB:55-56; *see also* RB:33. But, like the calculation of VMT, a description of existing traffic does not substitute for a description of the important environmental resources at stake.

The court's holding in *Galante Vineyards* is on point. There, the FEIR attempted to analyze a reservoir project's impacts on local climate conditions, including temperature changes. 60 Cal.App.4th at 1122-24. The court invalidated the analysis because it failed to consider "the highly susceptible nature of the local agriculture." *Id.* at 1124. Similarly here, the EIR fails to describe the unique susceptibility of the Lake Tahoe Air Basin to air pollution. *See* AR:6:3118.

Finally, Respondents try to rescue the weak analysis by categorizing this case as merely presenting "a disagreement about how much data is enough." RB:53. Not so. Because the EIR lacks even the most basic setting information for the Lake Tahoe Air Basin, it precluded informed decision-making and thus was inadequate as a matter of law. *Fresno*, 6 Cal.5th at 515.

4. Respondents Cannot Distinguish Appellants' Cases and Cite No Authority to Support the EIR's Inadequate Description of the Environmental Setting.

Respondents attempt to dismiss the cases cited by Appellants as "involv[ing] instances in which the EIR failed to disclose the presence of important resources the project would affect." RB:56. But that is precisely the omission at issue here. The EIR contains no meaningful information about the Lake Tahoe Basin, including the Lake's water quality and clarity and the region's air quality. At the same time, the County's EIR consultants have conceded that the large volume of cars generated by the Project and entering the Basin each day could affect these unique resources. *E.g.*, AR:20:11117, 11238-39.

Respondents rely primarily on *North Coast Rivers Alliance v. Marin Municipal Water District Board of Directors* (2013) 216 Cal.App.4th 614 and *Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, but neither case helps them. RB:54-57. In *North Coast Rivers*

Alliance, the court upheld an EIR's detailed description of the environmental setting for a proposed desalination plant. Among other information, the EIR "described various aquatic habitat types located in the Project area, and organisms found in these habitats," disclosed relevant protected species and critical habitat information (including life-cycle information), and "used a year-long project-specific study and decades of CDFG data." 216 Cal.App.4th at 644-45. By contrast here, the County's EIR mentions Lake Tahoe only in passing and says nothing about its aquatic resources.

The court's holding in *Clover Valley* is even further afield. That case dealt with a unique CEQA provision that prohibits the lead agency's disclosure of certain information regarding sensitive cultural resources where necessary to prevent destruction of those resources. Upholding the city's EIR, the court found, "[t]he City made a remarkably good faith effort at full disclosure of the existence of archaeological resources on the site, but did so in recognition of, and submission to, express prohibitions in CEQA not to disclose information regarding the location, use and character of the resources." *Id.* at 222. In the present case, no similar prohibition prevents the full disclosure of environmental setting information for Lake Tahoe, and the EIR's brief mention of the Basin is the opposite of a "remarkably good faith effort at full disclosure."

Finally, Respondents claim that Appellants failed to show that the EIR's "absence of information was prejudicial." RB:58. Not so. Appellants explained that the courts have repeatedly held that, without adequate information about the environmental setting, an assessment of environmental impacts is "*impossible*." AOB:31-32 (citing, *e.g.*, *Galante Vineyards*, 60 Cal.App.4th 1109, 1122). *Clover Valley*, cited by Respondents, is in accord. There, the court held that "[w]ithout 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." 197 Cal.App.4th at 219. Where, as here, an EIR comes nowhere close to providing such information, its omission precludes informed decision-making and a prejudicial abuse of discretion occurs. Pub. Resources Code § 21005(a)[3]; *San Joaquin Raptor*, 27 Cal.App.4th at 729.

B. Respondents Cannot Excuse the EIR's Failure to Meaningfully Analyze the Project's Impacts on the Lake Tahoe Basin's Air and Water Quality.

Not only does the EIR fail to describe the environmental setting of the Lake Tahoe Basin, it also omits an adequate analysis of the Project's impacts on that unique resource. The EIR includes no thresholds or other standards by which to measure the Project's effect on the Lake's sensitive

[3] Except as otherwise noted, all future statutory references are to the Public Resources Code.

air and water quality, despite ample evidence that emissions and fine sediment from the Project's cars could cause significant impacts. Nor does the EIR discuss the Project's inconsistencies with TRPA's plans for protection of the Basin, as required by CEQA. While the County's last-minute, post-EIR response adds some minimal information trying to correct these errors, that material was still deficient and came too late in the process to satisfy CEQA.

Respondents concede that the EIR must analyze all of the Project's potentially significant impacts on the environment, even those occurring outside the County's jurisdiction. *See* RB:72. They also concede that the EIR does not "separately evaluate the Project's impacts on the Tahoe Basin" or establish any specific thresholds of significance for the Basin. RB:60. They nonetheless offer three excuses for omitting such an analysis. All three fail.

1. The EIR's Analyses of Various Other Impacts Do Not Adequately Assess the Project's Impacts on the Tahoe Basin.

First, Respondents claim that, despite the absence of specific thresholds for the Tahoe Basin, the EIR's analyses of the Project's water quality, air quality, traffic, and climate impacts constitute an adequate evaluation of the Project's impacts on the Basin. *E.g.*, RB:32-36, 42, 59-60;

AR:6:3366.[4] They do not.

Water Quality Analysis: Respondents contend that the EIR sufficiently addresses impacts on Lake Tahoe's water quality by explaining that "the Project does not drain into Lake Tahoe or its tributaries and therefore would not impact Lake Tahoe's water quality." RB:61. However, as discussed above, drainage is far from the only way that a project can impact the Lake's water quality and clarity. Here, the nitrate deposition and sediment from the Project's 1,394 cars traveling into the Basin *each day* would cause such impacts. AOB:29; *see also, e.g.*, AR:2:809; 6:3118; 20:11117, 11238-39.

The CEQA Guidelines instruct that a project would have a significant environmental impact if it would "[v]iolate any water quality standards" or "[o]therwise substantially degrade water quality." Guidelines Appx. G § IX(a), (f). Here, the DEIR's water quality analysis never determines whether the Project would violate a water quality standard for or would degrade the water quality of Lake Tahoe. AR:3:1633-64. The FEIR's response to comments only briefly references the Lake Tahoe TMDL, and that reference is unaccompanied by any analysis of, or conclusion regarding, the Project's impacts on Lake Tahoe's water quality

[4] Respondents also assert that EIR's analyses of the Project's effect on biological resources and light and glare discuss the Project's impacts on Lake Tahoe. RB:32, 60. This point is irrelevant, however, as the present appeal does not concern these environmental issues.

or clarity. *See supra* Part II.A.2 (TMDL does not substitute for required CEQA analysis); AR:6:3249; RB:64. Respondents point to no part of the EIR that plainly sets forth how this Project will affect the Lake's world-famous water quality and clarity.

Air Quality Analysis: Respondents next contend that "[t]he EIR's air quality analysis evaluated whether the Project would violate or contribute substantially to violation of any air quality standard inside or outside the Tahoe Basin." RB:60. But they do not cite any part of the EIR that actually does so. The EIR's analysis of the Project's air quality impacts does not take into account the air quality standards for the Lake Tahoe Air Basin; instead, it largely relied on the Placer County Air Pollution Control District's standards. *See* AR:3:1543-57. This approach ensured that the EIR's analysis masked the impacts to the Tahoe Air Basin, as Placer District's standards were not designed to protect the Basin's unique resources.

The Tahoe Air Basin is subject to TRPA's separate protections for air quality and visibility, which apply in addition to any applicable County, state, or national standards. *Supra* Part II.A.3; AR:41:23833-40. TRPA sets numeric standards for carbon monoxide ("CO"), ozone, and regional and subregional visibility. AR:41:23843-80. It also maintains management standards to help achieve these numeric standards, such as reductions in nitrate deposition and VMT. AR:41:23881-86. Tellingly, the EIR's

assessment of the Project's air quality impacts mentions none of these standards. *See* AR:3:1543-57.

In particular, the EIR applies no standards to evaluate the Project's individual impacts on regional and subregional visibility, nitrate deposition, or VMT in the Basin. AR:3:1543-53. Although it does examine standards used in Placer County for CO and ozone precursors, those standards differ from, and are more lax than, TRPA's standards for the Tahoe Basin. *Compare* AR:3:1548-51 *with* AR:41:23843-61.

Likewise, the EIR includes *no* standards to address the Project's *cumulative* impacts on subregional visibility, nitrate deposition, or VMT in the Tahoe Basin. AR:3:1554-57. Moreover, the standards the EIR uses for cumulative CO, ozone, and regional visibility likewise differ from, and are more lax than, TRPA's standards for the environmentally sensitive Tahoe Basin. *Compare id. with* AR:41:23843-86. For example, TRPA's CO standard for Lake Tahoe is half that of the national standard and two-thirds that of the state standard.[5]

In short, the EIR ignores the only air quality standards that are specially tailored to the Lake Tahoe Air Basin.

The County's decision not to adopt TRPA's air quality standards for evaluating the Project did not itself violate CEQA. But CEQA did require

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[5] *See* http://www.baaqmd.gov/about-air-quality/research-and-data/air-quality-standards-and-attainment-status.

the County to meaningfully analyze the Project's potentially significant impacts on the Tahoe Basin's unique resources. Because the EIR turned a blind eye to the TRPA standards *and substituted no comparable air quality standards that reflect the Basin's unique environment*, its analysis fell woefully short.

Traffic Analysis: Next, Respondents claim the EIR's traffic analysis adequately assessed the Project's impacts on the Tahoe Basin. RB:33, 55, 61. They assert that "[t]he analysis included an examination of both congestion (level of service, or 'LOS') and VMT, using the TRPA's own criteria for roads within TRPA's jurisdiction." RB:55. However, the EIR's traffic analysis did not sufficiently analyze the Project's significant impacts on Lake Tahoe's air and water quality.

First, a LOS analysis measures only one impact: the time delay that travelers experience due to traffic congestion. AR:3:1490. It does not purport to assess air or water quality impacts from traffic. Moreover, the LOS analysis here does not even adequately address the Tahoe Basin. The EIR examines traffic on only one roadway segment and one intersection in the Basin. AR:3:1511, 1514.

Second, while Respondents are correct that TRPA does use VMT as a proxy for air and water quality impacts (RB:45; AR:6:3118), here the DEIR does not assess the Project's VMT impacts on the Basin. *See* AR:3:1502-30. The DEIR briefly mentions that TRPA maintains a basin-

wide VMT threshold but then does not identify that threshold level, much less examine its purpose or relationship to actual air quality in the basin. AR:3:1501.

Third, Respondents point to additional, late-arriving material in the FEIR (RB:63), but that belated information does not supply the missing analysis. AOB:42-43. The FEIR did not adopt any standards to assess the Project's in-basin VMT, and thus could not actually examine the project's air quality impacts. AR:6:3118-19. And the FEIR presented only a flawed discussion of cumulative VMT. *Id*.

Respondents claim the FEIR sufficiently analyzed the Project's impacts because it (1) "identified the proportionate increase represented by the addition [of project generated VMT to the Basin] (approximately 0.7 percent)," and then (2) "determined that with the addition of the project's VMT to cumulative VMT within the Tahoe Basin, the basin would remain below the VMT threshold." RB:63. But the court in *Kings County* rejected this exact approach:

> The point is not that … the proposed [] project will result in the ultimate collapse of the environment into which it is to be placed. The significance of an activity depends upon the setting. The relevant question to be addressed in the EIR is not the relative amount of precursors emitted by the project when compared with preexisting emissions, *but whether any additional amount of precursor emissions should be considered significant in light of the serious nature of the ozone problems in this air basin.*

Kings County Farm Bur. v. City of Hanford (1990) 221 Cal.App.3d 692,

718 (citation omitted) (emphasis added); *see also id*. at 720-21 (rejecting "ratio" approach for cumulative impacts analysis).

Moreover, even the analysis that was presented was inadequate. The FEIR failed to consider cumulative VMT from other planned projects in the region, thus ensuring that the cumulative analysis was incomplete.[6] AR:6:3118-19.

Lastly, Respondents defend the EIR's faulty analysis of the Project's VMT impacts by assuring the Court that the County will mitigate whatever impacts that would occur—even though the EIR never fully identified them. Specifically, they cite the FEIR's bald assertion that the Project's transit mitigation (Measure 10-5) "would reduce VMT impacts of the project in the Basin." RB:63; AR:6:3119. Again, however, CEQA case law definitively forbids such sleight-of-hand: "CEQA EIR requirements are not satisfied by saying an environmental impact is something less than some previously unknown amount." *Ukiah Citizens for Safety First v. City of Ukiah* (2016) 248 Cal.App.4th 256, 264 (quoting *Cal. Clean Energy Com. v. City of Woodland* (2014) 225 Cal.App.4th 173, 210 ("*CCEC*")).

Respondents argue that the County complied with *Ukiah* by noting

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[6] Respondents assert they are "mystif[ied]" that Appellants would claim the EIR fails to include information regarding cumulative in-basin VMT from other area projects. However, they cite only to the DEIR's cumulative traffic information, which does not provide this analysis, and the County's post-EIR response to comments, issued just days before Project approval. RB:66-67; *infra* Part II.D. The EIR does not include this information.

that "these measures would fund transit, just like TRPA's fee program." RB:68, fn. 14. But Respondents ignore the point. Regardless of what the measure will fund, the EIR skips the crucial step of identifying the significance of the Project's impacts on the Basin. CEQA mandates a logical, sequential analysis: the EIR first examines environmental impacts and then identifies mitigation measures that would lessen or avoid those impacts. *Lotus v. Dept. of Transportation* (2014) 223 Cal.App.4th 645, 653-54. In the absence of that initial analysis, it forbids an agency from leaping to conclusions about a project's ultimate impacts after mitigation. *Id.*

In any event, no substantial evidence supports Respondents' assertion that fees from Measure 10-5 would "support the same programs funded by TRPA's fee." RB:66. Neither Respondents' brief nor the EIR provides a citation for this point. Moreover, Measure 10-5 itself does not specifically address impacts to the Basin, but rather requires the developer to pay an undefined fee to a County "Zone of Benefit." AR:3:1517; 6:3119. Finally, the fact that the fees generically support transit does not constitute substantial evidence that the Measure 10-5 will reduce this Project's significant impacts on the Basin—impacts that the EIR never fully identifies.

Climate Analysis: Still reaching, Respondents assert that the EIR's discussion of climate change provides the missing analysis of impacts on Lake Tahoe. RB:32, 60. The Court need not tarry over this claim, as it is

demonstrably false. Here is the entire "analysis" that Respondents now rely upon: the "project site is located in Placer County, outside of the Lake Tahoe Basin." AR:3:1563. The climate change chapter contains no other mention of Lake Tahoe. *See* AR:3:1559-77.

Thus, the EIR's analysis of the Project's water, air, traffic, and climate impacts does not provide the requisite analysis of the Project's impacts on the Tahoe Basin.

2. The County Cannot Rely on Its Discretion in Evaluating Impacts to Avoid Analyzing the Project's Impacts on the Tahoe Basin.

As a second excuse for omitting the required analysis of impacts on the Tahoe Basin, Respondents ask the Court to validate the EIR because the County has discretion in conducting the environmental analysis. They rely on cases holding that public agencies have some leeway in selecting thresholds of significance and "may choose between differing expert opinions." RB:74 (citation omitted); *see also* RB:59, 62, 64-65. But these authorities are inapplicable here.

This Court and others have long held that, while agencies have some discretion in evaluating impacts, an agency may not select thresholds that avoid analysis of a project's potentially significant impacts. *See, e.g.*, *Amador*, 116 Cal.App.4th at 1109 (agency narrowly applied thresholds of significance to avoid finding significant impacts from stream flow reductions); *Berkeley Keep Jets Over the Bay Com. v. Bd. of Port Comrs.*

(2001) 91 Cal.App.4th 1344, 1381 (agency used noise threshold that did not provide meaningful measure of project's significant impacts); AOB:45. As this Court stated in *Amador*, "[A] threshold of significance cannot be applied in a way that would foreclose the consideration of other substantial evidence tending to show the environmental effect to which the threshold relates might be significant." 116 Cal.App.4th at 1109; *see also, e.g.*, *CBE*, 103 Cal.App.4th at 110-14 (invalidating Guideline section that allowed agencies to rely on compliance with regulatory standards to avoid complete analysis of projects' potentially significant impacts); *E. Sacramento Partnerships for a Livable City v. City of Sacramento* (2016) 5 Cal.App.5th 281, 302-03 (agency improperly used city's general plan standard as sole threshold to avoid finding significant traffic impacts).

Here, the County erred by relying on lax standards, or no standards at all, when it evaluated the Project's impact on the Tahoe Basin. Under CEQA, it cannot hide behind general notions of agency discretion to justify this failure. While Respondents offer several rationalizations for the County's "discretionary" action, none withstands scrutiny.

a. Respondents' Claim that Appellants Presented No Fair Argument that the Project Could Significantly Impact the Lake Is Specious.

To begin, Respondents blame Appellants. They argue that the County had discretion not to focus its analysis on the Tahoe Basin because

Appellants did not show that the Project's impacts there were potentially significant. Specifically, they claim that Appellants have not presented a "fair argument" that the Project could cause significant impacts on the Basin, but merely offered a "dire prediction[] by nonexperts." RB:70-71 (citation omitted).

This new tack fails. As one court explained, "There is no requirement [] that [a commenter] produce expert testimony in order to support a fair argument that the project may have a significant effect on the environment." *City of Redlands v. County of San Bernardino* (2002) 96 Cal.App.4th 398, 411. Rather, "evidence of facts and reasonable assumptions from those facts" is sufficient. *Id.* at 410-11 (fair argument that general plan amendments would result in environmental impacts on neighboring cities).

Here, Appellants and others cited TRPA documents and other expert studies for the well-documented proposition that emissions and crushed sediment from vehicles contribute substantially to the degradation of Lake Tahoe's water quality and clarity and of the Basin's air quality. AOB:29, 46 (citing, *e.g.*, Federal Lake Tahoe Watershed Assessment (AR:45:26584-85); TRPA Regional Plan (AR:60:35665-68); "Technical Paper: Fugitive Dust Emissions from Paved Road Travel in the Lake Tahoe Basin" (AR:30:17436); Attorney General's letter, which relies upon Final Lake Tahoe TMDL Report (AR:29:16765; 69:41522)); *see also Sierra Club v.*

Tahoe Regional Planning Agency (9th Cir. 2016) 840 F.3d 1106, 1109 (recognizing scientific consensus regarding such impacts). CEQA required no more.

Thus, this case is a far cry from the situation presented in *Joshua Tree Downtown Business Alliance v. County of San Bernardino* (2016) 1 Cal.App.5th 677, cited by Respondents. RB:70-71. In that case, the court found that a comment from a member of the public was insufficient to require preparation of an EIR where that person had no relevant expertise and offered no factual basis for her opinion regarding urban decay. *Joshua Tree*, 1 Cal.App.5th at 690-92. That was hardly the case here. Indeed, the League to Save Lake Tahoe, the Attorney General's Office, and TRPA have decades of relevant expertise regarding impacts on Lake Tahoe. *See* JA:1:69; AR:29:16763; 6:3154.

Respondents quibble that an expert study cited by Appellants was not specifically focused on the instant Project. RB:69. But TRPA's and other's comments *were* about the Project and EIR. *See, e.g.*, AR:6:3154-57. As the agency with special expertise on the Lake, TRPA explained, "By proposing to increase the bedbase and retail, the MWSP [Martis West Specific Plan], if implemented without adequate mitigation, would significantly affect Lake Tahoe's physical environment through increased vehicle trips into, and the amount of vehicle miles traveled within, the Tahoe Basin." AR:6:3155. Notably, even the County and its EIR

consultants conceded that the Project's vehicles could harm the Basin. *See, e.g.*, AR:15:8726 ("The connection between VMT and Lake clarity is important, as vehicle emissions and roadway fine[] [sediment] are known contributors to loss of clarity."); 20:11117, 11238-39.

Moreover, Respondents have identified no reason why vehicles from the Project entering the Basin are any different from other vehicles that impact the Basin. *Compare Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 171-75 (where many factors caused local impacts from plastic bags to vary greatly from global impacts, generic studies were insufficient to show local ordinance would result in significant environmental impacts). The studies cited here were directly relevant to the impacts on the Basin.

Accordingly, Respondents cannot reasonably dispute that Appellants presented a fair argument that the Project may have significant impacts on the Tahoe Basin. The relevant dispute here is whether the EIR adequately evaluated those potentially significant impacts. It did not.

In a related argument, Respondents suggest that it is Appellants' *burden* to provide this analysis in order to demonstrate an error under CEQA. *E.g.*, RB:35-36, 47. But the case law prohibits defendants from using their own analytic failures as a defense. As the Supreme Court has held, "[t]his argument is somewhat disingenuous given the [County's] own failure to provide any meaningful information" in the EIR. *Fresno*, 6

Cal.5th at 514 (quoting *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 405 ("*Laurel Heights I*"); *see also City of Redlands*, 96 Cal.App.4th at 408 ("The agency should not be allowed to hide behind its own failure to gather relevant data.") (citation omitted). Here the County, not Appellants, bears the responsibility to provide the requisite analysis in the first instance. *Fresno*, 6 Cal.5th at 514.

b. Respondents' Excuse that CEQA Includes No Separate Requirements for Analyzing Impacts on the Tahoe Basin Is Unavailing.

Respondents next assert that the County had discretion to ignore impacts on the Tahoe Basin's unique resources because CEQA includes no requirement to separately analyze those impacts. RB:60. They are wrong. As discussed below (*infra* Part II.C), CEQA requires an EIR to discuss a Project's impacts on plans for the protection of the Basin. Furthermore, CEQA mandates an analysis of the Project's significant impacts "on the environment," which "means the physical conditions which exist within the area which will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance." § 21060.5. Under CEQA, such impacts "vary with the setting." Guidelines § 15064(b). Here, the Project may impact Lake Tahoe's famed water clarity and air quality, which are protected by a bi-state compact, so the County's analysis must carefully address those impacts. *See, e.g.*, *Banning Ranch Conservancy v. City of Newport Beach*

(2017) 2 Cal.5th 918, 935-36; RB:42 ("there is no dispute that Lake Tahoe is a significant environmental resource").

Respondents attempt to distinguish *Banning Ranch* on the ground that the Coastal Commission would ultimately have to approve the project there, whereas TRPA has no permitting authority over the Project here. RB:42, 73-74. But the Supreme Court did not limit its holding in *Banning Ranch* to situations where a permit is required. *See Banning Ranch*, 2 Cal.5th at 935-41. Rather, the Court emphasized the broad reach of CEQA's disclosure requirements in circumstances where a project may have significant impacts on sensitive resources. *Id.*; *see also* RB:72 (Respondents recognizing EIR must "analyze[] the Project's impacts without regard to jurisdictional boundaries"). Here, the Project's impacts on the Tahoe Basin, a regionally significant resource, are the same regardless of whether or not the Project needs a permit from TRPA. As the Court in *Banning Ranch* explained, if the lead agency fails to disclose project impacts on such resources, then it cannot comply with CEQA's mandate to evaluate measures that will avoid or reduce those impacts. 2 Cal.5th at 937-39 (citing Guidelines §§ 15126.6(f)(1), 15206(b)(4)).

c. The County Could Not Ignore the Science Underlying TRPA's Environmental Standards for Lake Tahoe.

Finally, Respondents resort to mischaracterizing Appellants' argument. Appellants *do not claim*, as Respondents insist, that the County

must adopt TRPA's thresholds as its own (*e.g.*, RB:37, 40-41, 64), or that the County lacked discretion to craft its own standards for Lake Tahoe. Appellants' principal argument is different: As the Supreme Court teaches in *CNFF I*, the County may not ignore the science underpinning TRPA's well-established standards. 3 Cal.5th at 515; AOB:29, 47-48. While the County has some discretion to choose thresholds other than TRPA's, its EIR must utilize the best available science to evaluate the full extent of this Project's impacts on Tahoe Basin resources. *See CNFF I,* 3 Cal.5th at 515; Guidelines § 15064(b). The EIR here never used that science.

Still avoiding Appellants' argument, Respondents claim that TRPA's standards are irrelevant to the EIR's analysis because their purpose is "to restore environmental conditions in the Tahoe Basin" rather than to assess environmental impacts. RB:40-41. This distinction, however, finds no support in the law. The standard at issue in *CNFF I* also was not targeted at assessing the impacts of individual projects; instead, it established a general "goal of reducing California's greenhouse gas emissions to 80 percent below 1990 levels"—a reduction scientists consider necessary to stabilize the climate. 3 Cal.5th at 515. Still, the Supreme Court concluded that "[t]his scientific information has important value to policymakers and citizens in considering the emission impacts of" the transportation project at issue in that case. *Id*. Similarly here, the science underlying TRPA's thresholds has important value to the County as it evaluates the Project's

impacts on Lake Tahoe.

Respondents nonetheless insist that *CNFF I* supports *validation* of the present EIR. RB:43, 71-72. This claim gains no traction. In *CNFF I*, the Court ultimately upheld the EIR's climate analysis, but only because the EIR there (1) found the project's climate change impacts significant, and (2) disclosed the inconsistency between the project's GHG emissions and the state's reduction goals. 3 Cal.5th at 515-16.[7] Here, the EIR did neither: it did not find the Project's impacts on the Tahoe Basin's air and water quality to be significant, nor did it disclose the Project's inconsistencies with plans for the Basin's protection. It simply never undertook the required analysis that would allow it to reach such conclusions.

Respondents now claim the EIR "explained[] [that] there is *no way* to translate the VMT generated by a particular project into impacts on Lake Tahoe's water quality." RB:43 (emphasis added). But the EIR made no such assertion, much less support it with substantial evidence. *See* AR:3:1295-96 (DEIR stating it did not address TRPA standards because Project footprint was outside Basin); 6:3118-19 (FEIR admitting that other environmental documents adopted methodologies for evaluating VMT

[7] Moreover, *CNFF I* "emphasize[d] the narrowness of [its] holding" validating the EIR. *Id*. at 518. The Court "caution[ed] that our conclusion that [the agency] did not abuse its discretion in its analysis of greenhouse gas emission impacts in the 2011 EIR does not mean that this analysis can serve as a template for future EIRs." *Id*. Given this admonition, Respondents reliance on *CNFF* is misplaced.

impacts on the Basin but declining to do so for Project).

Respondents also cite *Citizens for East Shore Parks v. California State Lands Commission* (2011) 202 Cal.App.4th 549, 562 (RB:41), but that case merely notes that TRPA is not subject to CEQA. Here, the County, like the State Lands Commission, *is* subject to CEQA. *Citizens for E. Shore Parks*, 202 Cal.App.4th at 562.

In sum, Respondents' attempt to take refuge in agency discretion cannot excuse the EIR's failure to adequately analyze the Project's impacts on Lake Tahoe.

3. TRPA, along with the Attorney General and Others, Expressed Concerns about the Project's Impacts on Lake Tahoe.

As a third attempt to justify the failure to analyze impacts on the Tahoe Basin, Respondents claim that TRPA's alleged "lack of comment" on the Project's impacts on the Lake somehow equates to validating the EIR's analysis of Tahoe Basin impacts. RB:41-42, 61-62. However, this argument is specious, as TRPA *did* submit a detailed comment letter on the DEIR. The letter set forth the agency's concerns with the Project's impacts on the Basin and TRPA's efforts to protect it, and the EIR's lack of mitigation for those impacts. AR:6:3154-57. For example, TRPA explained that the Project's cars could impact the Basin's air and water quality, and even went so far as to calculate the Project's in-Basin trips and VMT—

critical information that the DEIR failed to provide.[8] AR:6:3155.

TRPA also informed the County that TRPA's programs for environmental redevelopment were key to achieving "substantial reductions of fine sediment and nutrient deposition, the pollutants degrading Lake Tahoe's famed clarity and blueness." AR:6:3157. It then warned that "[t]he environmentally beneficial redevelopment relied upon by TRPA may be threatened by unmitigated out-of-basin increases in trips and VMT" from the Project. *Id*.; *see also* AR:29:16771-72 (Attorney General noting same). Respondents cherry-pick the letter, citing a footnote that stated TRPA did not have comments "on other DEIR chapters." RB:62; *see* AR:6:3155, fn. 2. The point is irrelevant: TRPA was understandably focused on the Project's impacts on, and mitigation for, the Basin.

In the end, it is noteworthy that both TRPA and the Attorney General expressed grave concerns about the Project's impacts on the Tahoe Basin. *See, e.g.*, AR:6:3154-57; 29:16765-75; 20:10897 (Real Parties' attorney noting that it is "unusual for the Attorney General to weigh in on what is ultimately a local land-use decision" and so "it's appropriate that folks take note of that fact"). Respondents' attempt to undercut TRPA's comments serves only to illustrate the importance of those comments by the

[8] TRPA's VMT estimates for the Project were also considerably higher than what the FEIR later asserted. *Compare* AR:6:3155 (TRPA estimating up to 21,311 VMT), *with* AR:6:3118 (FEIR estimating 13,745 VMT).

agency charged with the Lake's protection.

C. Respondents Have No Viable Explanation for the EIR's Failure to Discuss the Project's Inconsistencies with Plans for the Protection of the Lake Tahoe Basin.

Respondents recognize CEQA's separate requirement "that an EIR must 'discuss any inconsistencies between the proposed project and applicable general plans and regional plans … [including] plans for the protection of the … Lake Tahoe Basin.'" RB:38 (quoting Guidelines § 15125(d)). They also concede that the EIR did not include such a discussion here. *See* RB:39. Nevertheless, Respondents try to excuse this omission by arguing that (1) TRPA's plans are not "applicable" to the Project, and (2) there are no such inconsistencies. RB:37-39. Respondents are wrong on both counts for three reasons.

First, Respondents claim TRPA's plans were not "applicable" because the Project "proposed no development in the Tahoe Basin and did not need a permit from TRPA." RB:39. But black-letter law forbids this narrow construction of CEQA's provisions. The relevant test is not whether the developer needed a permit from TRPA but, rather, whether disclosure of the Project's inconsistency with TRPA's plans for protecting the Basin was necessary for informed decision-making. *See Banning Ranch*, 2 Cal.5th at 939 ("[A] lead agency must consider related regulations and matters of regional significance when weighing project [impacts and] alternatives").

Here, Respondents admit that a portion of the Project site lies within

the Basin, and that TRPA has jurisdiction "over resources which may be affected by the project." RB:39, 41; AR:3:1259 ("[T]he MVWPSP Land Use Plan encompasses … 130 acres co-located in the Tahoe Basin, which is under the jurisdiction of both Placer County and the Tahoe Regional Planning Agency"). Whether the Project would conflict with TRPA's policies for Basin resources was essential information for County decisionmakers and the public.

The decision in *Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 544, cited by Respondents (RB:38), is readily distinguishable. There, the dispute was about whether an EIR should use a county versus a city "level of service" standard for the evaluation of a project's traffic impacts, where the project was within the city's sphere of influence. *City of Orange*, 163 Cal.App.4th at 544. The court determined that because the "EIR is sufficient as an informational document," the disagreement about which standard to employ was beyond the court's "scope of review." *Id*. at 544-45 (citation omitted). Here, unlike in *City of Orange*, there is no dispute about which plan protects Lake Tahoe. TRPA is the agency designated to protect the Basin, and it has adopted the Regional Plan for that purpose. *See* AOB:28-29. Yet here the County committed the same legal error as the city in *Banning Ranch*: "Instead of flagging and addressing potential conflicts with Coastal Act provisions, the City avoided any mention of them." 2 Cal.5th at 940; *see* AR:3:1295-96. Without that

analysis, the EIR here was not "sufficient as an informational document" like the EIR in *City of Orange.*

Second, Respondents claim that, because the County determined there were no inconsistencies between the Project and TRPA's plans, the EIR did not need to include any discussion of the issue. RB:38-39. This argument distorts the record in several ways. To begin with, the DEIR here does *not* conclude there was no conflict with TRPA plans. Instead, the only reason given by the DEIR for omitting the consistency issue was that TRPA had no jurisdiction over the Project. AR:3:1295-96. The DEIR never addresses (1) any of TRPA's air and water quality thresholds, or (2) TRPA's plans for environmental redevelopment. *Id.*; *see also* AR:6:3157 (TRPA's warning that unmitigated trips from Project could negatively impact its plans for environmental redevelopment).

The FEIR focuses on only one TRPA standard. Specifically, it asserts that the Project was consistent with TRPA's *cumulative* VMT threshold. But even that analysis, which ignores the bulk of the TRPA standards, is unsupported by substantial evidence. AOB:42-44. Moreover, and significantly, the FEIR includes no discussion of the Project's glaring inconsistency with TRPA's *project-level* VMT threshold of 200 trips per day. AOB:42-43; AR:6:3155; 6:3118 (Project would generate 1,394 trips per day to the Basin); *see also supra* Part II.A.2 (FEIR's brief mention of TMDL insufficient).

Respondents now offer yet another excuse, claiming that the Project is consistent with TRPA's Regional Plan Update because that plan, and the environmental review for it, "considered impacts caused by other anticipated development in the region," including the Project. RB:44-45. But as explained above (*supra* Part II.A.2), when assessing consistency with an applicable plan, "the analysis shall examine the existing physical conditions … as well as the potential future conditions discussed in the plan." Guidelines § 15125(e). Here, the EIR does not purport to include the former analysis, and its brief mention of the environmental review for the Regional Plan Update is not sufficient to accomplish the latter.

If an agency wishes to "tier" off of, or rely on, environmental analysis from another planning document to demonstrate consistency, it must inform the public of this approach *and* identify where the other analysis is located. Guidelines § 15152(g); *see also Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1128-29 (failure to "provid[e] and specify[] the location where the planning documents could be viewed by the public" resulted in prejudicial abuse of discretion). Here, the EIR does neither. Indeed, the applicable environmental analysis for TRPA's Regional Plan Update is not even in the administrative record.

Third, Respondents claim the County's supposed consistency determination is entitled to deference. RB:39. They are wrong. Where, as here, the plan "policies at issue were adopted at least in part to avoid or

mitigate environmental effects," the court considers consistency "under the fair argument test with no presumption in favor of the [agency]." *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 933-36 (statements of neighborhood group's spokesperson sufficient to demonstrate fair argument of project's inconsistency with land use policies). Here, Appellants have established a fair argument that the Project conflicts with TRPA's plans for protecting Lake Tahoe. *See supra* Parts II.A and II.B. The County's refusal to analyze this question violated CEQA.

D. The County's Post-EIR Response Does Not and Could Not Correct the EIR's Deficiencies.

As Appellants explained in their Opening Brief, the County's post-EIR response to comments does not retroactively cure the EIR's failure to disclose the Project's impacts on Lake Tahoe's air and water quality. AOB:49-52. Respondents do not dispute the legal point that post-EIR comments cannot supply a missing analysis in an EIR. *See* RB:74-78. Rather, they defend the County's post-EIR response as a "further explanation [that] confirmed the EIR's analysis." RB:75. But Respondents' reliance on the County's belated "further explanation" immediately collapses under scrutiny, because there was no previous "explanation" to build upon.

First, Respondents claim the post-EIR response "confirmed" that "a

link between a specific number of VMT and attainment of Lake clarity goals is difficult to determine" and that even TRPA "questions the VMT threshold's efficacy to evaluate potential air and water quality impacts." RB:36, 45-46, 75; AR:2:809. But the post-EIR response could not "confirm" these claims because the EIR never made any such claims. *See* AR:6:3118-19.

Further, even assuming the truth of Respondents' "confirmation" theory, it does not excuse the EIR's lack of analysis. As the post-EIR response recognizes, "[t]he connection between VMT and Lake clarity is important, as vehicle emissions and roadway fines [i.e. sediments] are known contributors to loss of clarity … ." AR:2:809. Although TRPA has suggested that "the question of *what level* of VMT needs to be maintained in order to avoid excessive loading of nitrate to Lake Tahoe, should be addressed by research" (AR:41:23882), it has never questioned the link between VMT and impacts to the Lake's air and water quality (*see, e.g.*, AR:6:3154-55). In situations where further research may be helpful to the environmental analysis—situations which are not uncommon under CEQA—the Act does not relieve an agency of its duty to disclose a project's impacts "merely because the agency's task may be difficult." *Laurel Heights I*, 47 Cal.3d at 399. As the Supreme Court recently explained, "[S]cientific certainty is not the standard. But if it is not scientifically possible to do more than has already been done … the EIR

itself must explain why, in a manner reasonably calculated to inform the public of the scope of what is and is not yet known about the Project's impacts." *Fresno*, 6 Cal.5th at 520.

Here, the EIR provided no plausible reason for why it could not have utilized appropriate thresholds to measure the Project's impacts on the Tahoe Basin. Rather, the FEIR reveals that, in the past, both TRPA and the County have employed thresholds to evaluate projects' impacts on the Basin. AR:6:3118-19; *see also* AR:2:833 (County post-EIR response admitting that an assessment of the Project's VMT impacts on the Basin "could theoretically be undertaken"). While Respondents now claim the EIR's LOS analysis is a "better metric" than VMT (RB:75, 77), this argument is illogical. A LOS analysis evaluates only traffic delay; it says nothing about the Project's impacts on water or air quality in the Basin. *See supra*, Part II.B.1 (Traffic Analysis).

Second, Respondents note the County's belated explanation that the Project's impacts on the Tahoe Basin cannot be significant because the Basin is currently in compliance with TRPA's cumulative threshold for VMT, and VMT in the Basin "is trending downward." RB:36. However, the Basin has been in compliance only since 2007—and remains only barely under the threshold. AR:41:23882. In its 2011 Threshold Evaluation Report, TRPA assessed Basin VMT at "about 1.5% better than the standard, resulting in an 'at or somewhat better than target' status

determination." *Id.* TRPA warned that "overall confidence in the [VMT] status and trend determination is 'low,'" given that models and input parameters have changed over the years. *Id.*[9]

Thus, VMT in the Basin stands at the brink of exceeding maximum capacity. According to settled case law, the Project itself does not need to tip the Basin over its cumulative threshold in order to cause a significant impact on that resource. *Kings County*, 221 Cal.App.3d at 718-21. The County's last-minute response ignored this critical legal problem.

Third, Respondents suggest that the County's post-EIR response provided sufficient information on the Project's cumulative impacts on VMT. RB:76-77. But this claim is incorrect; the response was both tardy and substantively deficient. In *Save Our Peninsula Committee*, for example, the court found that information included in an errata shortly before project approval did not "make up for the lack of analysis in the EIR" because the public had not had "'an opportunity to test, assess, and evaluate the data

[9] Respondents request judicial notice of the 2015 Threshold Evaluation Report, claiming it "confirms" the downward trend in VMT. RB:46, fn. 10. However, that document maintains the same "at or somewhat better than target" status determination as well as the overall "low" confidence rating as in the 2011 Report. Declaration of Nathan O. George ("George Decl."), Exh. B at 69-70. Critically, Respondents admit the 2015 Report "was not before the County at the time the Board approved the Project." RB:46, fn. 10. Thus, the Court should reject Respondents' improper attempt to admit this extra record evidence. *See* Petitioners and Appellants' Opposition to Real Parties in Interest and Cross-Appellants' Motion and Request for Judicial Notice ("Appellants' RJN Opp.") at 7-9.

and make an informed judgment as to the validity of the conclusions to be drawn therefrom.'" 87 Cal.App.4th at 130-31 (citation omitted).

Moreover, even Respondents do not dispute that the County's response included a disturbing discrepancy in the cumulative VMT calculations, whereby the purported cumulative total (which includes the Project) was less than the VMT from the Project alone. *See* AOB:50-51. Respondents insist that this "'discrepancy' did not affect the bottom line"; even with the Project's additional VMT, the County concluded, the Basin would "still [be] below TRPA's basin-wide threshold." RB:76-77. But CEQA does not permit bare conclusions, based on insufficient data and analysis. *Kings County*, 221 Cal.App.3d at 736. And the County's "trust us" response is especially troubling here, given TRPA's "low" confidence in the Basin-wide VMT figure.

Finally, Respondents claim they should be commended for their "good faith" efforts in responding to "belated" comments. *E.g.*, RB:73-74, 77. But Appellants and others commented early and often that the EIR failed to adequately address the Project's impacts on the Basin. *See, e.g.*, AR:36:21041-63 (League to Save Lake Tahoe comments on DEIR). When Appellants commented on the FEIR, they merely reiterated arguments that they had previously asserted—and that the County had not addressed. *See, e.g.*, AR:30:17257-70. Their comments were thus not late. The County could have recirculated the EIR to address the inadequacies identified by

Appellants, but it did not. Instead, it tried to plug the document's gaping analytic holes with a hasty, inadequate response.

E. Respondents' Affirmative Defenses Are Demonstrably Without Merit.

Finally, in a last-ditch attempt to avoid the merits of Appellants' challenge to the EIR's inadequate analysis of impacts on the Tahoe Basin, Respondents offer three affirmative defenses. Each is unfounded.

First, Respondents claim that because Appellants' Tahoe Basin arguments focus "only" on TRPA's threshold standard for VMT, "[a]rguments pertaining to TRPA's other threshold standards are therefore waived." RB:35, fn. 6. Respondents are wrong. Appellants prominently argued that the EIR failed to evaluate the Project's impacts on Lake Tahoe's air and water quality, and on TRPA's plans for protecting the Lake. *See* AOB:27-49.

Second, Respondents assert that Appellants' Tahoe Basin claim is "moot" because, after the County's approval of the Project, the developer agreed to pay a mitigation fee to TRPA. RB:68, fn. 15 (citing Motion and Request for Judicial Notice In Support Of Opposition Brief). But, as Respondents admit, a claim is moot only when it is impossible for the court to grant relief. *Id.* Here, the Court can grant effective relief by invalidating the EIR for CEQA violations. *See Woodward Park Homeowners Assn. v. Garreks, Inc.* (2000) 77 Cal.App.4th 880, 888-890 (CEQA claim not moot

even after project had been built). Furthermore, the fee agreement in no way indicates that the County complied with CEQA. Not only is this agreement outside the administrative record for this case, but it specifically states that the parties "disagree as to whether the EIR complies with CEQA." George Decl., Exh. C at 80. Accordingly, this Court should deny Respondents' mootness claim as well as their improper attempt to introduce extra-record evidence.

Third, Respondents claim that Appellants "forfeit[ed]" their argument challenging the County's post-EIR analysis of VMT in the Tahoe Basin, by "ignor[ing] … evidence" favorable to the County. RB:36. But Appellants cited the very page of analysis that Respondents claim they ignored. AOB:49 (citing AR:15:8726, which is a duplicate of AR:2:809, cited by Respondents).

The fact that Respondents principally relegate these defenses to footnotes (RB:35, fn. 6; RB:68, fn. 15) is telling. The arguments lack merit, and this Court should reject them.

In sum, Respondents have no valid explanation for the EIR's failure to (1) describe the Lake Tahoe Basin's sensitive environmental resources; and (2) provide "enough detail 'to enable those who did not participate in its preparation to understand and to consider meaningfully'" the Project's impacts on those resources. *Fresno*, 6 Cal.5th at 516 (citation omitted).

III. Respondents Cannot Justify the County's Failure to Comply with CEQA's Requirement to Recirculate the FEIR's New Climate Analysis and to Identify Effective Mitigation for the Project's Significant Climate Impacts.

The Supreme Court's decision in *CBD* revealed the fundamental inadequacy of the DEIR's climate analysis: it relied on a statewide standard for greenhouse gases ("GHGs") that bore no relationship to the Project. Facing this deficiency problem, the County corrected the flawed analysis in the FEIR but then refused to recirculate that document for public comment. This failure violated CEQA. Not only did the FEIR replace the DEIR's legally inadequate analysis, but the new analysis revealed that the Project's climate impacts would be more severe than previously disclosed. *See* AOB:52-57. In addition, the FEIR never identified effective measures to mitigate these impacts. *See* AOB:57-60.

In response, Respondents do not dispute the legal standard for recirculation as set forth in Appellants' Opening Brief. *Compare* RB:81 *with* AOB:52-53. Rather, they mischaracterize the facts in an attempt to minimize the FEIR's changes to the climate analysis and discount the need for new mitigation. These tactics cannot succeed.

A. The FEIR Triggered the Need to Recirculate by Significantly Changing the DEIR's Climate Analysis.

1. Respondents Misrepresent the Fundamental Difference Between the Methodologies Used in the DEIR and the FEIR.

To justify the County's refusal to circulate the FEIR's new climate

analysis, Respondents repeatedly attempt to minimize the substantial changes in the revised analysis. *E.g.*, RB:86 (FEIR merely "updated" the DEIR's analysis "in light of the *Newhall* decision"). To support this position, they first claim that the DEIR and the FEIR used essentially the same methodology for evaluating the Project's climate impacts. RB:82-85. This claim is inaccurate.

According to Respondents, both the DEIR and the FEIR used numeric thresholds for determining whether the Project's climate impacts were significant. They claim that "the Draft EIR compared GHG at full buildout to the numeric threshold" and that "[t]he Final EIR did not alter this threshold, or adopt a 'new' threshold." RB:85 (citing AR:3:1571-74). This argument is deeply misleading. In fact, the DEIR recognized that the numeric threshold applied *only to developments emitting less than 1,100 metric tons ("MT") of CO2 each year* ("Tier I" projects). AR:3:1567; *see* RB:82 (admitting that DEIR's numeric threshold applied to such low-emitting projects). For projects exceeding this amount ("Tier II" projects), however, the DEIR recognized that an "efficiency" metric – an entirely different standard – would apply to evaluate emissions. AR:3:1567; *see* RB:85 (admitting that Tier II "emissions were measured against an efficiency metric derived from the California Air Resources Board's ("CARB's") Scoping Plan: 21.7% below 'business as usual' ('BAU')."). Because the instant Project emits roughly 30,000 MT of CO2 per year and

thus falls into Tier II, the DEIR used the efficiency standard to determine the significance of its emissions. AR:3:1567.

The Supreme Court's decision in *CBD* required the County to abandon the DEIR's efficiency standard for evaluating the Project's climate impacts, and Respondents admit as much. RB:83-84 ("the Final EIR dropped the efficiency metric as a threshold"). As the FEIR acknowledged, the air district "no longer recommends using the [BAU]-based approach as a sole threshold criterion…." AR:6:3076 (citation omitted). Consequently, the FEIR *changed* the threshold of significance for the Project to utilize only the Tier I numeric threshold, a fundamental change from the "two-tiered threshold" approach used in the DEIR. *Id.* ("Tier II is therefore not considered a significance criterion for this project.").

In a similar vein, Respondents next claim that the DEIR used both quantitative and qualitative thresholds, and so it would have found the Project's impacts significant regardless of its compliance with the efficiency metric. RB:82-83. Again, Respondents are wrong. The DEIR plainly explains that, for the Project's impact to be deemed significant, its emissions would have to exceed *both* the efficiency standard *and* the numeric metric. AR:3:1567 (DEIR stating that it "considers that a[] [climate change] impact would be significant *if both Tier I and Tier II thresholds are exceeded*") (emphasis added). If Respondents' revisionist theory were correct, the DEIR would have provided that an impact is

significant if it exceeds *either* the efficiency or the numeric standard. But it did not. Under the DEIR's more lax approach, the Project's climate impacts could be found insignificant as long as emissions did not exceed the flawed efficiency standard, regardless of exceeding the numeric standard.

Finally, Respondents backtrack, proclaiming that the FEIR actually *retained* an efficiency threshold to assess the Project's long-term GHG impacts. RB:84. However, the FEIR directly refutes this argument. It states that "[f]or the evaluation of the MVWP[], the County considers that an impact would be significant *if the Tier I [numeric] threshold is exceeded*." AR:6:3076 (emphasis added). It further explains that a "GHG-efficiency analysis of the MVWP[] is provided *for informational purposes* … ." AR:6:3076 (emphasis added).[10] Later, the County's supplemental response to comments confirmed that the efficiency "standard is not used [in the FEIR] as a threshold of significance to determine the project's impact." AR:2:620-21.

In sum, the DEIR utilized an efficiency metric as a threshold of significance for climate impacts; the FEIR did not. The two analyses are

[10] The FEIR text shows the changes made to the DEIR in strikethrough and underline, as follows: "For the evaluation of the MVWP[], the County ~~bases its significance determination for operational emissions on the two-tier method above, but~~ considers that an impact would be significant if the Tier I [1,100 MT CO2e/year] ~~and Tier II~~ threshold~~s~~ is exceeded. ~~The County's impact conclusion is based on the~~ A GHG-efficiency analysis of the of the MVWP[] is provided for informational purposes … ." AR 6:3076.

fundamentally different. Furthermore, the changes in the FEIR were needed to correct the defective DEIR. Because the *CBD* decision exposed the DEIR's analysis as "fundamentally and basically inadequate," CEQA required that the FEIR's new analysis—which the public never had an opportunity to comment upon—be recirculated. *See* Guidelines § 15088.5(a)(4); *Pesticide Action Network N. America v. Dept. of Pesticide Reg.* (2017) 16 Cal.App.5th 224, 251-52 ("*PANNA*") (recirculation required where agency's subsequent reevaluation of pesticide revealed "that public comment on the draft was effectively meaningless").[11]

2. Respondents Cannot Refute that the FEIR Revealed More Severe Climate Impacts.

Respondents next try to fashion another route around the legal problem posed by the FEIR's change in the method of analysis. They assert that the climate impacts revealed in the FEIR were similar to, or even less than, those shown in the DEIR. RB:86. The record, however, contradicts this claim. In fact, the FEIR's new threshold of significance showed that the Project's climate change impacts, both short- and long-term, would be more severe than the DEIR had previously disclosed.

[11] Respondents claim that they believed the DEIR's approach was lawful and that CEQA does not require the County to "have had the powers of a soothsayer" to predict the Supreme Court would invalidate the DEIR's approach. RB:92. CEQA does not require fortune-telling, but it does require recirculation where, as here, the DEIR's approach was inadequate as a matter of law. Guidelines § 15088.5(a)(4).

Using the efficiency methodology later repudiated by the Supreme Court, the DEIR had assured readers that the Project would have no significant short-term climate impacts. *See* AR:3:1571 ("[The Project] would not exceed the GHG efficiency-based Tier II threshold recommended by [the air district] for 2020."). While the DEIR did recognize that the Project would have long-term significant climate impacts, it downplayed this problem by suggesting that the Project might be able to comply with future, yet-to-be developed state efficiency standards. AR:3:1571 (DEIR noting that, in the long-term, "*the project may be less efficient than necessary to achieve GHG reduction targets that could be in place after 2020*"); *see also* AR:3:1573-74 (discussing post-2020 efficiency considerations).

By contrast, when the FEIR used the numeric standard in place of the efficiency standard, it revealed for the first time that the Project's short-term climate impacts would be significant. AR:6:3131-33. The FEIR also found that the Project's long-term climate effects would be significant, but unlike the DEIR, the FEIR's significance threshold did not consider whether the Project's GHG emissions might conform to a later-enacted efficiency standard (*id.*); the Supreme Court had ruled out that option (AR:6:3076).

Respondents do not credibly confront the undeniable difference between the conclusions in the DEIR and the FEIR about the significance

of the Project's impacts. Instead, they offer two untenable justifications. First, Respondents suggest that the DEIR's conclusions regarding the Project's short-term impacts (in 2020) can be ignored because only the DEIR's long-term significance conclusion matters. RB:86, 89. This is incorrect. As the Supreme Court explained, an EIR must "'giv[e] due consideration to both the short-term and long-term effects' of the project." *Neighbors for Smart Rail*, 57 Cal.4th at 455 (citing Guidelines § 15126.2(a)).

Respondents also claim that the DEIR's 2020 conclusions were irrelevant because they were based on the false premise that the entire Project would be constructed in 2020, when in fact it will be built in phases. *See* RB:89. But this point only highlights the fundamental inadequacy of the DEIR: the document concluded that, even if the *entire* Project were built, it would meet the DEIR's efficiency threshold in 2020, causing no significant climate impacts. The FEIR, however, revealed that the Project will have significant climate impacts when only a small fraction of it is built. AR:6:3131-33; 30:17312.[12]

[12] Respondents also claim the DEIR's 2020 conclusions are irrelevant because the litigation has already delayed construction through 2019. RB:89, fn. 18. But a legally inadequate EIR cannot stand, regardless of the Project's construction status. *See* § 21005 (prejudicial abuse of discretion may occur "regardless of whether a different outcome would have resulted if the public agency had complied with [CEQA's] provisions"); Guidelines § 15088.5(a)(4).

Second, Respondents suggest that the FEIR could not have revealed more severe climate impacts than the DEIR because it showed a small decrease in the Project's GHG emissions. RB:86. This, argument, however, is a classic red herring. Providing raw data on emissions is only one component of the agency's climate analysis. *See* Guidelines § 15064.4. Under CEQA, the EIR not only must determine the amount of project emissions, it must then proceed to address the critical question of *whether these emissions will cause a significant impact on the environment*. Guidelines § 15064.4(b)(2); *Fresno*, 6 Cal.5th at 518-19 (reader of EIR not required to infer conclusions from data; EIR must provide meaningful information so public can understand how adverse impacts will be). Here, the FEIR utilized a brand new threshold of significance to make this second determination, and it then reached a brand new conclusion: that the Project would have more severe climate impacts than previously disclosed. AR:6:3131-33. Specifically, the FEIR revealed that the Project's emissions would exceed the threshold by 2,600%. *Id.* In other words, when the County used a correct threshold in the FEIR instead of the DEIR's defective qualitative threshold, it finally recognized the full extent of the Project's significant GHG impacts.

Because the FEIR disclosed significant new information of more severe climate impacts, CEQA required the County to recirculate the document for public comment. *See* § 21092.1; Guidelines § 15088.5(a)(1),

(2). Here, as in *American Canyon Community United for Responsible Growth v. City of American Canyon* (2006) 145 Cal.App.4th 1062, 1078-82, the County's FEIR revealed that impacts would be increased "in ways that the [DEIR] had not analyzed." *See* RB:90. Accordingly, the public must have a "meaningful opportunity to comment on the [new] information." *Spring Valley Lake Assn. v. City of Victorville* (2016) 248 Cal.App.4th 91, 108 (recirculation required where FEIR added new discussion of project's compliance with city's climate and energy standards).

3. Respondents' Cited Cases Are Inapposite.

Respondents do not contest Appellants' description of CEQA's standard for recirculation of the EIR. Instead, they invoke appellate decisions on the subject that are plainly inapplicable to the circumstances here. In particular, neither of the two cases that they principally cite, *South County Citizens for Smart Growth v. County of Nevada* (2013) 221 Cal.App.4th 316, 322-25 nor *Silverado Modjeska Recreation and Park District v. County of Orange* (2011) 197 Cal.App.4th 282, 288-89, involved a recirculation claim where, as here, the revised analysis replaced a draft EIR that was legally inadequate.

The *South County Citizens* case concerned a relatively small 20-acre project. The petitioner claimed that the lead agency violated CEQA by failing to recirculate the final EIR to include a new alternative proposed

after the final EIR's release. This Court rejected the claim, emphasizing that the petitioner had never alleged that the draft EIR's alternatives analysis had been inadequate. *S. County Citizens*, 221 Cal.App.4th. at 329, 332. To the contrary, not only had the draft EIR analyzed a reasonable range of alternatives, but the agency had actually adopted an alternative that reduced project impacts. *Id*. at 329-32. Because the petitioner presented no evidence that the new, later-proposed alternative was feasible and would further lessen the project's impacts, CEQA did not require recirculation. *Id*. at 332; *see* Guidelines § 15088.5(a)(3) (requiring recirculation where there is a new feasible alternative or mitigation measure that substantially lessens the project's significant impacts and the project's proponent declines to adopt it).

The instant case presents an entirely different situation. Here, a Supreme Court decision rejected the analytic approach taken in the County's DEIR, an outcome that compelled the agency to revamp its climate analysis for the FEIR. Because the new analysis replaced a legally inadequate one in the DEIR and revealed more severe environmental impacts, CEQA requires that it be recirculated. Guidelines § 15088.5(a)(1), (2), (4). The addition in *South County Citizens* of a new alternative after the FEIR, when the discussion of alternatives in the DEIR was never challenged, is not remotely comparable to the County's action here: jettisoning the analysis in its DEIR and adopting a new analysis and

conclusion in the FEIR regarding significant impacts.

Respondents' reliance on *Silverado Modjeska* fares no better. There, the petitioner had previously lost a legal challenge to an EIR's analysis of a project's impacts on the arroyo toad. Thereafter, when the lead agency issued a supplemental EIR for the same project, the petitioner tried again to challenge the agency's analysis of impacts on the toad, based on a subsequent report that the species resided on a neighboring property. *Silverado Modjeska*, 197 Cal.App.4th at 288-89. The Fourth District rejected the challenge, emphasizing that the initial EIR's analysis of the toad had been found valid. *Id*. at 306-07. Moreover, because the prior EIR had already addressed the neighboring toads, the report presented no "new information" triggering the recirculation requirement. *Id*.

By contrast here, no court previously validated the DEIR, and the County admitted the need to revise the analysis in it. AR:6:3076. Moreover, unlike the report in *Silverado Modjeska,* the FEIR's revisions here—which used a very different threshold and reached new findings of significance—constituted new information that required recirculation to the public.

Respondents also cite *Center for Biological Diversity v. California Department of Forestry and Fire Protection* (2014) 232 Cal.App.4th 931, 949 ("*CBD v. CalFire*") (RB:88), but that case is even farther afield. Unlike the present case, the new information there "disclosed no new environmental impacts nor any substantial increase in the severity of an

environmental impact." *CBD v. CalFire*, 232 Cal.App.4th at 949-50. Respondents' other two cited cases are likewise irrelevant. *See* RB:88-89; *Clover Valley*, 197 Cal.App.4th at 223 (additional material about cultural resources provided no new information that changed the resources' significance or the need for their preservation); *Fort Mojave Indian Tribe v. Cal. Dept. of Health Services* (1995) 38 Cal.App.4th 1574, 1605 (post-approval critical habitat designation "was an already anticipated recharacterization of the site's status under the federal act"). Accordingly, the situation in the present case contrasts markedly with those cited by Respondents "where the new information added to the EIR 'merely clarifies or amplifies or makes insignificant modifications in an *adequate* EIR.'" *PANNA*, 16 Cal.App.5th at 251-52 (citing *CBD v. CalFire*, 232 Cal.App.4th at 949) (emphasis added).

4. Appellants Did Not Forfeit Their Recirculation Claim.

Finally, Respondents try to circumvent the County's legal error by claiming that Appellants did not adequately cite the FEIR and therefore "forfeit[ed]" their recirculation claim. RB:87 (citing *Tracy First v. City of Tracy* (2009) 177 Cal.App.4th 912, 934-35). The argument is specious.

Appellants' Opening Brief cites the FEIR more than a dozen times. AOB:54-59. Appellants summarize Respondents' trial court brief (with all their referenced evidence cited therein) and then show why each of

Respondents' arguments lack merit. AOB:55-57. This carefully supported approach does not remotely resemble the situation in *Tracy First*, where the appellant made "no attempt" to present the facts backing the agency's decision and instead offered only "bare assertions" of lack of substantial evidence. 177 Cal.App.4th at 935; *see also S. County Citizens*, 221 Cal.App.4th at 331-32 (appellant failed to provide record citations or reasoned analysis to demonstrate that standards for recirculation of an alternative had been met).

B. The FEIR Failed to Correct the DEIR's Legally Defective Climate Mitigation.

The County also erred in failing to evaluate adequate mitigation of climate impacts in the FEIR. Using the legally flawed efficiency metric, the DEIR had understated the Project's impacts on climate change and then identified only a single measure to mitigate those impacts (Measure 12-2). AR:3:1574-75. Tellingly, that measure involved compliance with an efficiency standard that did not yet exist. AOB:57-60. After correcting its methodology for evaluating climate impacts and abandoning the efficiency metric, the County issued its new analysis in the FEIR, which revealed more severe impacts to climate change. However, the County then retained the DEIR's defective mitigation measure. This action violated CEQA, and Respondents' purported justifications for the County's action fall flat.

1. CEQA Does Not Allow a Public Agency to Adopt Mitigation Measures, Such as Measure 2-12, that Defer the Identification of Actual Mitigation to an Unknown Later Date.

A fundamental purpose of an EIR is to identify all feasible mitigation for the proposed project's significant effects. *Citizens of Goleta Valley*, 52 Cal.3d at 564; §§ 21002.1(a), 21061. An agency may not defer the development of actual, specific mitigation measures unless it meets three separate requirements: (1) the EIR contains "performance standards" that will govern future actions implementing the mitigation, (2) the agency has assurances that the future mitigation will be both "feasible and efficacious," and (3) practical considerations precluded developing the mitigation prior to project approval. *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 94-95 ("*City of Richmond*"); Guidelines § 15126.4 (a)(1). As the *City of Richmond* court warned, "An EIR is inadequate if '[t]he success or failure of mitigation efforts ... may largely depend upon management plans that have not yet been formulated.'" 184 Cal.App.4th at 92.

Here, the County's sole measure to mitigate climate impacts, Measure 2-12, does not come close to complying with these three requirements. Respondents admit that the measure depends on a statewide efficiency program that does not exist, so the required "performance standards" are necessarily unknown. They specifically acknowledge that

"CARB's Scoping Plan did not provide the evidentiary link that would enable the County to identify a specific emission reduction target [applicable to the Project]. Nor was any other such metric available." RB:94. At the same time, given the absence of performance standards, Respondents do not disagree that no assurances existed that the Measure 2-12 would be "feasible and efficacious," as *City of Richmond* requires. Finally, Respondents do not dispute that other feasible climate mitigation was available for use, and thus there were no practical considerations prohibiting the development of adequate mitigation.

Respondents' failure to justify the measure decides the legal issue. Respondents nevertheless offer several meritless excuses for the FEIR's continued reliance on Measure 12-2. First, Respondents double down on their assertion that "[t]he Final EIR's conclusions regarding the project's GHG emissions were no different than those appearing in the Draft EIR." RB:93. Then, based on this assumption, they claim that no reevaluation of mitigation was necessary. *Id.* However, as explained above, the record directly refutes their assumption. *See supra* Part III.A. The FEIR recognized that the County could no longer rely on state efficiency metrics for the Project, and it also revealed that the Project would cause more severe climate impacts than previously disclosed. Either one of these changes, by itself, triggered the requirement that the County reevaluate its climate mitigation. Guidelines § 15088.5(a)(1), (2), (4).

Second, Respondents misconstrue Appellants' argument. They assert that Appellants' "argument [] amounts to a claim that the County had to either commit to an efficiency metric that did not exist, or abandon its commitment to adhere to such a target upon its adoption." RB:94. But this is not Appellant's position. Instead, Appellants cite black-letter CEQA law for the proposition the County may not rely solely on a nonexistent plan to mitigate the Project's significant climate impacts, especially when other feasible measures exist now. *See City of Richmond*, 184 Cal.App.4th at 92; *CNFF II*, 17 Cal.App.5th at 432-34; *see also Federation of Hillside & Canyon Assns. v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1260-62 ("*Federation*") (transportation mitigation insufficient where EIR recognized uncertainty in the funding and implementation of those measures).

Third, Respondents claim that the County actually "committed to mitigating the Project's GHG impacts." RB:94. Respondents, however, cite only to Measure 12-2 (*id*.) and then fail to explain how committing to comply with nonexistent efficiency standards can meet CEQA's mandate (AR:1:200). Respondents cite *City of Hayward v. Trustees of California State University* (2015) 242 Cal.App.4th 833, 851-57 and *Neighbors for Smart Rail*, 57 Cal.4th at 465-66 (RB:94-95), but those cases do not excuse such lack of mitigation. In *City of Hayward*, the court upheld traffic mitigation for a campus expansion because the lead agency included

specific requirements to ensure the measure's efficacy. 242 Cal.App.4th at 851-57. The EIR first established "minimum performance goals of reducing the percentage of single driver vehicle trips onto campus from the existing 79 percent to 64 percent, and increasing present transit use by 50 percent." *Id.* at 851. It then identified detailed transportation demand measures, which it would specifically monitor to ensure compliance with the performance standards. *Id*. at 851-57.

Similarly, the Court in *Neighbors for Smart Rail* upheld mitigation for the parking impacts of a rail project because the respondent transit agency committed to monitoring the parking and paying for a permit program if necessary. 57 Cal.4th at 465-66. Furthermore, the ultimate responsibility for that parking program did not even rest with the transit agency, for another local government operated the parking.

By contrast here, not only does Measure 12-2 include no performance standards to guide the future climate mitigation, it does not even establish a timeframe for adopting such standards. AR:1:200-01. Moreover, unlike the respondent agency in *Neighbors for Smart Rail*, the County here *has* direct jurisdiction over the Project's climate mitigation. Accordingly, by adopting mitigation that merely required the developer to agree to an undefined future plan, the County violated CEQA. *City of Hayward*, 242 Cal.App.4th at 854 ("an agency goes too far when it simply requires a project applicant to obtain a [future] biological … report and then

comply with any recommendations that may be made in the report"); *CCEC*, 225 Cal.App.4th at 195-96.

Fourth, Respondents note that, under CEQA, a mitigation measure may allow an agency to substitute a later-developed, superior mitigation plan for the plan adopted at the time of project approval. RB:95 (citing *Fresno*, 6 Cal.5th at 523-24). But once again, this argument misses the point. The legal defect in the mitigation here is not that the County wishes to substitute future, superior mitigation for its adopted mitigation. It is that the County failed in the first instance to adopt *any* effective mitigation for the Project's significant climate impacts. AR:1:200-01.

Finally, Respondents tout that the County "acknowledged that, notwithstanding the adoption of [Measure] 12-2, GHG impacts remained significant." RB:95. But this recognition only highlights the basic legal failure. An agency's disclosure of significant impacts does not excuse its failure to identify feasible mitigation to lessen those disclosed impacts. As the Supreme Court recently reiterated, even when a project has "unmitigated effects, agencies are still required to implement *all mitigation measures* unless those measures are truly infeasible." *Fresno*, 6 Cal.5th at 524-25 (emphasis added); *see also CBD*, 62 Cal.4th at 231.

2. Respondents Cannot Defend the County's Refusal to Consider Feasible Mitigation Measures Proposed by the Public.

During the administrative process, Appellants, the Attorney General,

and others proposed numerous feasible measures to mitigate the Project's significant climate impacts. AR:7:3615-16; 30:17315-17; 29:16777-81. Respondents claim the EIR's response to such measures was adequate, for three reasons. RB:95-96. Each of these excuses fails.

First, Respondents claim that "most of Sierra Watch's proposals revolved around requiring a single development project to require zero-emission vehicles." *Id.* This claim is wrong. Appellants suggested a host of widely available measures, including programs and infrastructure that incentivize "low or zero-emission vehicles," car-sharing, transit use, and energy efficiency. AR:6:3615-3616. None of these measures "requir[ed] a single development project to require zero emission vehicles." Appellants also requested that the County mandate several measures that the DEIR had only listed as "encouraged." AR:7:3615; *see also* AR:29:16777-79. The County never explained why such measures were infeasible, and no such explanation exists. In fact, the County admitted that many of these measures were feasible but simply declined to require them. AR:3:1575; 7:3665-66; 2:621-22, 835-38.

Second, Respondents represent that the County actually committed to acquiring GHG emission offsets. RB:96. But Measure 12-2 did *not* require GHG emission offsets or any other specific measure to mitigate the Project's emissions. Rather, the measure allows the Project to *avoid* such requirements as along as it "operates within the targets or adopted plan

established at the time the project is submitted for approval." AR:1:200. Under Measure 12-2's plain terms, the County will impose additional mitigation measures such as emission offsets *only* "[i]f the project does not meet the target." AR:1:201-02.

The County's Findings of Fact confirm this lax arrangement:

> [MM 12-2] will require the project applicant to demonstrate consistency with GHG targets or plans adopted by the state when submitting subdivision maps. *If the project does not meet the GHG targets, additional feasible mitigation measures will be required*, though the Project can choose from the options listed in Mitigation Measure 12-2, as long as the overall target is met.

AR:1:200 (emphasis added). Notably, the County refused to reconsider this "future target" approach even after acknowledging that, under the Supreme Court's decision in *CBD*, there are no currently applicable reduction targets for the Project. AR:6:3081, 3077.

Accordingly, no basis exists for Respondents' assertion that Appellants' proposed mitigation measures "were not 'considerably different from others previously analyzed.'" RB:96 (citing CEQA Guidelines § 15088.5). Appellants' proposed mitigation would have imposed *mandatory* commitments to emission reduction programs, as CEQA requires. *Federation*, 83 Cal.App.4th at 1260-61 (to be "fully enforceable," mitigation must be "required in, or incorporated into, the project"); *see also* Guidelines § 15088.5(a)(3). By contrast, Measure 12-2 included only optional commitments to such programs in the event that a

future applicable reduction target is established. AR:1:200-02; *see County of Amador*, 76 Cal.App.4th at 949 (where promised mitigation is "for all intents and purposes, nonexistent, [the court] cannot put much stock in a willingness to agree to phantom terms").

Finally, Respondents suggest that the County had no obligation to respond to Appellants' proposed mitigation because their comments were late. RB:96 (*citing Residents Against Specific Plan 380 v. County of Riverside* (2017) 9 Cal.App.5th at 971-72). This desperate tactic fails. Appellants submitted their comments on the DEIR prior to the close of the comment period on the DEIR. AR:6:3052, 3102; *see* § 21177(b). They also submitted comments on the substantial changes made in the FEIR, an action that CEQA also allows. *Bakersfield*, 124 Cal.App.4th at 1201; AR:30:17315-17; AOB:58-59. The comments were not late.

In sum, Respondents have offered no plausible justification for the County's failure to include effective climate mitigation in the FEIR. After the County recognized that, under the Supreme Court's holding in *CBD*, the state's efficiency targets could not apply to this Project, Measure 12-2's approach became legally untenable. By refusing to revise the Project's climate mitigation to ensure its effectiveness and thus cure that defect, the County abused its discretion.

IV. Respondents' Defense of the County's Immediate Rezoning of the West Parcel Conflicts with the Plain Meaning of the Timberland Productivity Act, and No Substantial Evidence Supports the Findings Purporting to Justify the County's Action.

By rezoning the West Parcel out of Timberland Productivity Zone ("TPZ") zoning, the County violated the Timberland Productivity Act ("Act") as a matter of law in three ways. First, the County purported to justify the removal of the West Parcel from a TPZ by placing a *different piece of land*, the East Parcel, into a TPZ. The statutory language does not authorize such a "swap." Second, the County failed to explain why deviation from the usual ten-year waiting period for rezonings under the Act was necessary in this case, but Supreme Court case law requires such an explanation. Third, the County improperly relied on an illegal factor, the Project's impact on local tax revenue, to justify the immediate rezoning.

Respondents do not dispute these facts; instead, they debate the law. However, as explained below, they offer a reading of the relevant statute that strays wildly from its specific terms and violates accepted principles of statutory interpretation. As a result of the County's legal errors alone, the rezoning must be set aside.

In addition to these legal errors, the County adopted findings for the rezoning that the record does not support. Respondents make no serious effort to defend the County's finding that the Project would address "residential demands in the area"—and the record reveals the opposite. Nor

can Respondents justify the County's finding that the East Parcel's conservation value exceeded that of the West Parcel. Because no substantial evidence supports the County's findings, the immediate rezoning must be set aside.

Finally, in an eleventh-hour attempt to avoid the merits of Appellants' cause of action under the Act, Respondents argue for the first time that the claim is moot. Tellingly, they cite no applicable law to support their remarkable new theory. The Court should reject it out of hand.

A. Respondents Falsely Insinuate that Agencies Routinely Approve Immediate Rezonings of TPZ Land.

To begin, Respondents attempt to excuse the County's immediate rezoning of the West Parcel by suggesting that such rezonings commonly occur. RB:97-98. They chastise Appellants for stating that immediate rezonings are intended to be rare in California and that the state's rules governing such actions are strict. *Id.* The implication, apparently, is that Appellants are asking the Court to overturn a legal, routine practice. This tactic fails.

Appellants do *not* mischaracterize the extent of the Act's restrictions on immediate rezonings; instead, they simply echo the California Supreme Court's recognition of those restrictions. In *Sierra Club v. City of Hayward* (1981) 28 Cal.3d 840, the Supreme Court declared: "[W]e harbor no doubt that the Legislature intended cancellation to be approved only in the most

extraordinary circumstances." *Id.* (discussing parallel provisions in Williamson Act, where "cancellation" has same effect as immediate rezoning) (superseded by statute on other grounds) (emphasis added). The Court further clarified that agencies may use these provisions only "in *rare* instances [where] unforeseen events might require the release of land" from the restrictive zoning early. *Id.* at 852 (emphasis added). Otherwise, the Act would "simply function as a tax shelter for real estate speculators." *Id.* at 853.

Just as the Supreme Court recognized for farmland in *Sierra Club*, routine agency approval of immediate rezonings of TPZ land would contradict the Act's goal of discouraging urban encroachment on timberland. *See Clinton v. County of Santa Cruz* (1981) 119 Cal.App.3d 927, 934, fn.7[13]; *see also* Gov. Code § 51102. The Legislature specifically sought to protect the Act's goals by revising the Act to create more rigorous requirements for immediate rezoning. *See* Appellants' Motion and Request for Judicial Notice, Exh. 1, at RJN008-12 (Act revised due to concern that earlier draft, which placed no restrictions on immediate rezoning, would violate state Constitution). The Act now requires both a four-fifths vote of

[13] Respondents attempt to distinguish *Clinton* by arguing that the case is about a different section of the Act. RB:111. But that difference is irrelevant to the proposition for which Appellants cited the case: the court's overarching observations about the purpose of the Act and the legislative intent behind it. *Clinton*, 119 Cal.App.3d at 932, 934.

the legislative body to approve immediate rezoning, in addition to the adoption of specific findings regarding the purpose and need for the action.

Accordingly, the Legislature indicated its intent to limit the use of immediate rezonings to extraordinary circumstances, and the state's highest court has confirmed this intent, construing statutory language that, Respondents admit, is analogous to the Act. RB:109 (Williamson Act language "is indistinguishable from the parallel provisions in the [Timberland Productivity Act]"). Therefore, Appellants' contention that immediate rezonings are rare is precisely correct.

B. Respondents' Theory that the Timberland Productivity Act Permits Land Swaps Ignores the Plain Statutory Language of the Act.

To defend the immediate rezoning of the West Parcel, Respondents principally argue that the County placed the East Parcel into a TPZ as a substitute. RB:98-99, 101-06, 112-117. But the Act does not authorize such a land swap. This issue of statutory interpretation presents a question of law, which this Court reviews *de novo*. *Alliance for Cal. Business v. State Air Resources Bd.* (2018) 23 Cal.App.5th 1050, 1060.

Remarkably, while accusing Appellants of "embellish[ing] the plain language of the [Timberland Productivity Act]" (RB:97), Respondents never confront and analyze the statutory language at issue. Instead, they simply cite the statute and then abruptly conclude that it does not mean "the agency must put blinders on, and focus solely on the land being removed

from TPZ." RB:101. They avoid the language because its meaning contradicts their position.

First, the statute in question, Government Code section 51130 et seq., states its purpose: to provide relief from TPZ. Gov. Code § 51130. However, the statute immediately cautions that such relief is allowed "only" under a specific set of circumstances. *Id.* The overall authorization to take land out of a TPZ is thus limited.

The critical discussion of those limiting circumstances then follows. The Act allows immediate rezoning "only when the *continued use of the land in timberland production* is neither necessary nor desirable to accomplish the purposes of [the Constitution and the Act]." Gov. Code § 51130 (emphasis added).[14] This language requires that, here, the County focus its rezoning determination solely on the West Parcel, the "land in timberland production." In other words, the jurisdiction must look at the land currently zoned and determine that something about the land renders its "continued use" in TPZ neither "necessary nor desirable." The land was zoned TPZ: what *changed* about the timberland use of that land to alter the propriety of that zoning now, as opposed to waiting the full period for a

[14] Section 51130 states in its entirety: "The purpose of this article is to provide relief from zoning as timberland production pursuant to this chapter only when the continued use of land in the timberland production zone is neither necessary nor desirable to accomplish the purposes of Section 3(j) of Article XIII of the Constitution and of this chapter."

rezoning?

And that is the problem here: *nothing* has changed on or about the use of the West Parcel. Indeed, the County never even addressed that question. Instead, Respondents argue that the County's inquiry can be vastly broader by pointing to the last phrase in Government Code section 51130: "to accomplish the purposes of [the Constitution and the Act]." RB:101-02. Under their theory, as long as the County's action in approving *the Project, overall*, serves the purposes of the Constitution and the Act, then the immediate rezoning of part of the project site must be upheld. *See id.* ("These purposes allow a local agency to take a broader view of the effect of removing land from TPZ.").

But this interpretation withers under scrutiny. Black-letter law dictates that Respondents may not broaden the scope of the Act by reading language into or out of it. *See Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 545 (court "may not broaden or narrow the scope of the provision by reading into it language that does not appear in it or reading out of it language that does"). Here, the Respondents' construction of section 51130 contravenes both prohibitions.

First, they would read additional language into the statute. They effectively interpret the statute as declaring: continued use of land in the timberland production zone is neither necessary nor desirable when considered together with other land that is placed in a timber production

zone at the same time. This reading broadens the statute far beyond its plain meaning.

Second, under Respondents' interpretation, as long as a project serves the purposes of the Constitution and the Act, then a local agency may ignore the specific limitation in the same sentence—that "continued use of the land in the zone is neither necessary nor desirable." Thus, it would not matter if, in a specific case, the "continued use" of TPZ land *was* necessary or desirable. A local agency could simply ignore that fact by taking other land into account and then deciding that the rezoning "accomplish[ed] the purposes" of the Act. But the law does not allow this "cherry-picking" approach to statutory construction, which focuses only on part of the statute. *See Khajavi v. Feather River Anesthesia Medical Group* (2000) 84 Cal.App.4th 32, 46 (court must look at words of statute as a whole; it cannot consider words or phrases in isolation).

Respondents then go even further in defending the immediate rezoning. They claim that "arguably the County would have erred had it considered less than the 'whole' of what MVWP proposed." RB:104. In other words, they say the law demanded that the County look more broadly in justifying the rezoning of the West Parcel. But they cite only to one case under CEQA and to the CEQA Guidelines. CEQA, of course, has nothing to do with the Timberland Productivity Act.

Indeed, Respondents have the legal situation exactly backwards.

Considering the "whole" of the Project here conflicts with the Act's limits on immediate rezoning. Those limitations require the agency to focus only on the attributes of the land proposed for removal from a TPZ—its "continued use" as timberland.

Appellants also pointed out that Respondents' reading of section 51130 would create a huge loophole for developers wishing to escape a TPZ and prematurely convert TPZ land to urban use. AOB:67. If the Court adopts Respondents' proposed interpretation, landowners could evade the Act's strict requirements by simply identifying other land, including land that is not subject to development pressures and is located miles away, and placing it into a TPZ.

Respondents do not deny that possibility. Instead, they respond: "Whether such a scenario is permissible is entirely beside the point because it bears no relationship to what actually happened in this case." RB:113. But this type of scenario is *exactly* the point. Under Respondents' interpretation, no bounds exist on the circumstances originating outside the rezoned land that would suffice to support the immediate rezoning. Respondents imply that any action would still have to achieve the purposes of the Act, but the Act provides no standard to judge whether these outside benefits were sufficient to "overrule" the fact that the currently zoned TPZ land remained consistent with the Act's purposes. If the Legislature had intended to approve such a swap, it certainly would have established some

conditions—e.g., equal or greater value as timberland—to guide and cabin them. But it did not.

Respondents make much of the fact that, in the present case, the County approved a "simultaneous swap," so that the East Parcel was placed into TPZ at the same time that the West Parcel was removed. RB:104. They also tout that the two parcels are in close proximity. RB:113. But these circumstances do not somehow overcome the plain language of the Act. As explained above, the statute requires that the "*continued use of land in the timberland production zone*" must be no longer necessary or desirable. Gov. Code § 51130 (emphasis added). Here, the County never made that determination, but instead justified the conversion of the West Parcel by its zoning action on a separate piece of property. If the Court allows this sort of land swap, landowners across the state could use the same tactic to prematurely convert productive timberland, thereby undermining the state's statutory commitment to conserving these dwindling resources.

C. Respondents Wrongly Argue that Appellants Have Invented New Findings Requirements.

Respondents next attempt to escape the key substantive requirements of the Act by asserting a novel findings argument. RB:107-11. First, Respondents claim the County can ignore Government Code section 51130's overarching requirement that land to be immediately rezoned must be "neither necessary nor desirable to accomplish the purposes [of the

Constitution and the Act]" because the statute does not specifically require findings addressing this requirement. *See* RB:107-08. Second, Respondents assert that the County can ignore Supreme Court precedent prohibiting an immediate rezoning in the absence of "urgency findings" because the statute does not mention such findings. *See* RB:108-10.

Neither law nor reason supports these arguments. Statutes routinely establish requirements governing agency action without specifically requiring the agency to document its compliance in findings. *See, e.g.*, Gov. Code §§ 66478.4-.5 (Subdivision Map Act requirement that maps must include public access to rivers and streams). Not surprisingly, no court has held that the absence of an explicit findings requirement eradicates a statute's substantive requirements. To the contrary, agencies have an implicit obligation to adhere to those substantive requirements by making findings that demonstrate that their land use adjudications comply with the substance of a law. *Sierra Club*, 28 Cal.3d at 854-55 (local agency must make findings demonstrating compliance with Williamson Act even though that law did not include specific findings requirement).

Here, the Act plainly conditions the immediate rezoning of TPZ land on the existence of a specific set of facts: a showing that the land in question is "neither necessary nor desirable" for continued timber use. Gov. Code § 51130. The County avoided the issue by making no findings on the subject. *See* AR:1:30-34. Its avoidance is not surprising, for it could not

have made such a finding: the West Parcel *is* productive timberland. *See* AR:17:9622. Respondents argue that because the East Parcel *also* is productive timberland, the Act's requirements were satisfied. But, as explained above, relying on that fact skirts the statutory conditions for allowing immediate rezoning. The question is whether the *continued use of the land zoned as TPZ* is necessary and desirable for timber production—not whether some other piece of land could make good timberland.

The County also made no finding that it was necessary to deviate from the normal, ten-year rollout period, as required by the Supreme Court in *Sierra Club*. *See* 28 Cal.3d at 854; AR:1:30-34. Respondents now argue that *Sierra Club* does not apply because the Legislature later "repudiated" the Supreme Court's ruling. RB:109. They are wrong.

After the Supreme Court's decision in *Sierra Club*, the Legislature amended the Williamson Act to remove any implicit requirement that the local agency make urgency findings, i.e., that the normal rollout period for cancellation of the Williamson Act contract was infeasible. The new provision states: "In approving a cancellation pursuant to this section, the board or council shall not be required to make any findings other than or in addition to those expressly set forth in this section, and, where applicable, in Section 21081 of the Public Resources Code." Gov. Code § 51282(f); *see also* George Decl., Exh. F at 104 [Stats. 1981, ch. 1095, § 2, p. 4251].

Respondents claim that this amendment somehow applied to a

separate law that it did not even mention—the Timberland Productivity Act—so that the Act now likewise requires no findings beyond those specifically enumerated in it. Thus, conclude Respondents, the County did not need to make an "urgency finding" to justify the immediate rezoning of the West Parcel. RB:109-10. The flaw in Respondents' logic is obvious and legally elemental: the Legislature has never adopted a similar amendment to the Timberland Productivity Act, even though it has amended the Act twice since the *Sierra Club* decision. *See* Stats. 1982 ch. 1489 § 20; Stats. 1998 ch. 972 § 6. Nor did the Legislature ever explicitly state, as Respondents allege, that "the Supreme Court had erred." RB:109. It is well settled that "[t]he Legislature is presumed to know about existing case law" when it amends a statute. *See In re W.B.* (2012) 55 Cal.4th 30, 57.

In short, the TPZ provisions remain parallel to those of the Williamson Act before the latter was amended and as the Supreme Court construed them in *Sierra Club*. Because the Legislature declined to loosen the requirements for immediate rezonings of TPZ land, as it did for cancellations of Williamson Act contracts, the holding in *Sierra Club* applies here.

Finally, Respondents yet again argue that, even if *Sierra Club* did apply, the ten-year rollout "would not work" because the rezoning of the West Parcel "was not a stand-alone proposition" but "integrated" with preservation of the East Parcel. RB:110. This assertion fails for two

reasons. First, the County's approval documents do not explain why the ten-year rollout was infeasible. Respondents' justification is merely a post-hoc rationalization created during litigation, and such grounds do not provide legal support for prior agency action. *See S. Cal. Edison Co. v. P.U.C.* (2000) 85 Cal.App.4th 1086, 1111 ("[A] court 'may not accept appellate counsel's *post hoc* rationalizations for agency action.'") (quoting *Motor Vehicle Mfrs. Assn. v. State Farm Mutual Automobile Insurance Co.* (1983) 463 U.S. 29, 50). Second, Respondents' brief never explains why the development Project that the immediate rezoning would facilitate—yet another second-home subdivision whose occupancy would be low (*see* AR:3:1274)—was urgently needed in the area. As the evidence discussed below unequivocally shows, it was not needed at all—much less urgently. *See infra* Part IV.E.2.

Thus, the County erred in failing to support its immediate rezoning of the West Parcel by finding that (1) the continued use of that parcel for timberland production was neither necessary nor desirable, and (2) the normal, ten-year rollout was infeasible.

D. Increased Local Tax Revenues Alone Cannot Legally Justify the Rezoning.

The County also committed legal error by relying on increased local tax revenues as a basis for approving the immediate rezoning. *See* AR:1:32. As the Supreme Court held in *Sierra Club*, if local agencies could cite such

revenue increases as a "public interest" justification for an immediate rezoning, then all such rezonings would be allowable, "render[ing] the Act ineffective as a land-use control device." 28 Cal.3d at 853.

Respondents have no excuse for the County's error and barely mention the Supreme Court's holding, even though it is dispositive. *See* RB:116. Instead, they protest that "opt[ing] to receive an immediate tax recoupment fee … over a future payment" was a "policy call" for the Board. *Id.* The Act, however, *constrains* local governments in making this "policy call." Then, Respondents change the subject by claiming that the County's decision to preserve the East Parcel will benefit the area generally. RB:116-17. But this argument leads once again to the same legal cul-de-sac: the County may not justify its immediate rezoning of one parcel by its actions with respect to a different parcel.

E. The County's Response Cites No Substantial Evidence that Would Support Its "Housing" and "Public Interest" Findings for the Immediate Rezoning.

The County's findings not only overlooked the Act's key legal requirements for immediate rezonings, but the principal findings the agency did make also lack the required support in the administrative record. Because no substantial evidence supports the County's action, the rezoning must be set aside.

1. Invalidation of Any of the County's Findings Nullifies the Rezoning.

To begin with, the County's defense of its findings hinges on its assertion that "[i]f substantial evidence supports any one of those findings, Sierra Watch's claim fails." RB:113. The County cites *Habitat and Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277, 1307-1308, but they misuse the case.

In *Habitat and Watershed Caretakers*, the court found that three of six findings were sufficient to support a statement of overriding significance under CEQA. Critically, however, the court noted the findings explicitly stated that each finding, *by itself*, was sufficient to support the statement of overriding significance. 213 Cal.App.4th at 1308. As the court explained, "three of the six reasons provided by the City find support in the record, and the City found that each of the reasons was individually sufficient to outweigh the significant impact on the City's water supply." *Id.*

By contrast here, the County did *not* find that each of its findings "was individually sufficient" to support the rezoning. *See* AR:1:30-34. It relied on all the findings. Accordingly, if any of its findings lacks support, then its approval of that rezoning necessarily falls as well.

2. Two of the County's Findings Are Unsupported by Substantial Evidence

Here, substantial evidence does not support two key findings that the County adopted for the rezoning. First, the County found that the rezoning

addresses "residential demands of the area." AR:1:32. As Appellants explained, however, nothing in the record shows any need for additional second-homes in the region. AOB:68. In response, Respondents do not rebut this point. *See* RB:115. Instead, they offer a new argument: that the Project would "provide needed workforce housing." *Id.* This argument, offered for the first time in this litigation, also fails.

In fact, the record evidence shows only that the Project would *aggravate* the shortage of workforce housing in the area. AOB:68-69. Importantly, *no part of the record, including portions cited by Respondents, disputes this showing*. *See* RB:115. While the Project would bring between 66.58 and 122.68 full-time-equivalent, service-wage workers to the area, the Project would only build housing for 47 employees and fund construction of five more units. *See* AR:3:1342; 20:10900-01. A project cannot "provide needed workforce housing" when the overall effect of the development *reduces* available workforce housing.

Second, the County erred in finding that the rezoning of the West Parcel was in the public interest because the East Parcel would be placed into a TPZ. *See* AR:1:32. Not only does this "land swap" justification constitute legal error (*see supra* Part IV.B), but substantial evidence does not support the finding. Nothing in the record indicates that the East Parcel's timber stand is superior in quality to that of the West Parcel, or that the East Parcel was subject to any development pressure. *See* Gov. Code

§ 51102(a)(2) (purpose of Act is to "[d]iscourage premature or unnecessary conversion of timberland to urban and other uses").

F. Appellants' Claim Under the Timberland Productivity Act Is Not Moot.

Respondents now argue, for the first time in this litigation, that Appellants' claim under the Timberland Productivity Act is moot due to CalFire's decision to approve the immediate rezoning, which occurred during the trial court proceedings. Respondents could have raised this issue before the trial court, but never did so.[15] And for good reason: the argument lacks merit.

A case is moot only if the court can grant no effective relief. *McClatchy v. Coblentz, Patch, Duffy & Bass, LLP* (2016) 247 Cal.App.4th 368, 375. But in this case, relief does remain available. Appellants have challenged the County's decision to approve the immediate rezoning of TPZ land. Respondents do not dispute that this Court, if it finds a violation, is empowered to overturn the County's legislative decision via a writ of mandamus. *See* RB:100.

Nevertheless, they claim that CalFire's later approval of the

[15] CalFire sent its approval letter to Kurt Krieg of MVWP Development, LLC (a Real Party to this case) on July 21, 2017. George Decl., Exh. E. This was well before Respondents filed their brief in the trial court on September 5, 2017. JA:4:0897. Respondents thus had ample time to argue to the trial court that, as they now claim, Appellants' challenge had become moot.

immediate rezoning somehow "supersedes" the County's decision. Neither the Act nor any other state law supports this novel theory.

Under the Act, approval of immediate rezoning of TPZ land is a two-step process. First, the County must make findings in support of the rezoning and tentatively approve it. Gov. Code § 51133(a).[16] Then, CalFire must make additional findings before it can approve the rezoning. *Id.* § 51133(b). If this Court finds that the County abused its discretion or exceeded its authority in approving the rezone, and then vacates the County's action, "it necessarily follows" that CalFire "would lack the power" to subsequently act on the rezone. *Pulskamp v. Martinez* (1992) 2 Cal.App.4th 854, 861.

In *Pulskamp*, the plaintiff challenged the validity of a city clerk's action placing a charter amendment on the ballot on the grounds that the mayor had actually vetoed that ordinance. *Id.* at 856. During litigation, the city clerk argued that the challenge to her action was rendered moot by subsequent voter approval of the charter amendment. *Id.* at 857. The court disagreed, holding that if the clerk's earlier action was found illegal, then

[16] As Respondents now admit (RB:98, fn. 21), the County mistakenly made its findings under Government Code section 51134 and never corrected that mistake (AR:1:31). Section 51134 provides for final County determinations on TPZ rezones under certain circumstances, with no further action by CalFire. Because it chose to rely on Section 51134, and thereby provided no notice that any subsequent action by CalFire was needed, Respondents cannot now assert that such subsequent action under a separate statute moots Appellants' claim.

the later action would be a nullity. *Id.* at 861. Similarly, in *Kriebel v. City of San Diego* (1980) 112 Cal.App.3d 693, 702-03, the court rejected a claim that an agency's approval of a final subdivision map mooted a legal challenge to the agency's earlier approval of the tentative map. *See also Center for Biological Diversity v. U.S. Environmental Protection Agency* (9th Cir. 2017) 847 F.3d 1075, 1092-93 (because various steps of the agency's pesticide approval process involved different findings, each one could be independently challenged).

If a plaintiff may challenge a single, initial decision of one agency on a project, as *Kriebel* and *Pulskamp* hold, then *a fortiori* a plaintiff can challenge a decision made by one of two entirely separate agencies on a project. Here, the two agencies involved, the County and CalFire, each made independent decisions and independent findings under the Act. *See* Gov. Code § 51133(a) (listing County findings); § 4621.2(a) (listing CalFire findings). Projects often involve multiple layers of approvals by various responsible agencies, and no authority requires a petitioner to challenge each separate approval.[17] For example, in *San Mateo County Coastal Landowner's Assn. v. County of San Mateo* (1995) 38 Cal.App.4th

[17] Respondents suggest that Appellants should have challenged the CalFire approval (RB:120), but that avenue was unavailable. The process to appeal CalFire's determination is available only to an applicant whose immediate rezoning application is denied. *See* § 4624.5. Furthermore, the CalFire approval was issued through an internal agency process with no public notice or hearing.

523, 531-33, the petitioner's challenge to a County initiative was not rendered moot by the Coastal Commission's later certification of the initiative.

Similarly in the present case, the County and CalFire each must make independent findings regarding the immediate rezoning, and these findings do not address identical issues. Most importantly, only the County must find that the immediate rezoning is not inconsistent with purposes of the California Constitution and the Timberland Productivity Act. *Compare* Gov. Code § 51133(a) *with* § 4621.2(a). Respondents' mootness theory—that CalFire's decision somehow "supersede[d]" the County's (RB:118-20)—would insulate the legality of the County's findings on that issue from judicial review.

Respondents base their argument on two cases under the Coastal Act that are plainly inapposite. RB:120 (*citing McAllister v. County of Monterey* (2007) 147 Cal.App.4th 253, 294 and *Fudge v. City of Laguna Beach* (2019) 32 Cal.App.5th 193, 198-99, 201-02). In these cases, the courts held that any legal action challenging a local agency's issuance of a coastal development permit is mooted by an "appeal" of that same decision to the Coastal Commission. *McAllister*, 147 Cal.App.4th at 294; *Fudge*, 32 Cal.App.5th at 198-99, 201-02. In each case, the court reasoned that, because the Commission was undertaking a *de novo* review on appeal of the local agency determinations, it was pointless to adjudicate the validity

of the local agency's approval. *McAllister*, 147 Cal.App.4th at 294; *Fudge*, 32 Cal.App.5th at 198-99, 201-02. By contrast here, no one "appealed" the County's rezoning decision to CalFire and CalFire does not conduct *de novo* review of the County's decision. Rather, CalFire makes its own independent findings *in addition* to those of the County. *See* Gov. Code § 51133; § 4621.2.

Last, even if the issue were somehow moot (which it is not), the Court should still decide the matter. This case presents an important issue in the public interest and one that is capable of repetition. *See In re William M.* (1970) 3 Cal.3d 16, 23; *NBC Subsidiary (KNBC-TV), Inc. v. Super. Ct.* (1999) 20 Cal.4th 1178, 1190 fn. 6.

OPPOSITION BRIEF ON CROSS-APPEAL

INTRODUCTION

Respondents and Cross-Appellants (referred to herein as "Respondents") appeal the trial court's ruling, in favor of Appellants and Cross-Respondents (referred to herein as "Appellants"), that invalidated the EIR's analysis of the Project's impact on emergency evacuation. Respondents do not dispute that the Project would build over 700 homes in a "Very High" Fire Severity Zone (RB:125; AR:3:1725, 1725), or that fires in the Project's vicinity could "rapidly turn … into lethal, major disasters" (AR:17:10163-64). Additionally, Respondents acknowledge that the only route in and out of the Project, State Route ("SR") 267, would be

gridlocked even under non-emergency conditions. Indeed, these facts were significant in the County Planning Commission's recommendation to deny the Project. AR:20:11241-51.

Yet the EIR is inexplicably indifferent to the public's safety concerns in the event of a wildfire or other emergency. With no real analysis, it summarily concludes that the proposed massive development in a densely forested area would result in no significant impacts to emergency evacuations, and that mitigation is unnecessary. AR:3:1742.

In their Opening Brief on Cross-Appeal, Respondents attempt to patch together snippets from various parts of the record to conjure an after-the-fact justification for the EIR's bald insignificance determination and its non-existent mitigation. For example, they claim that providing two paved internal emergency access roads will address the evacuation problem. RB:140. They ignore the fact that both of these roads funnel into SR 267, which will be gridlocked during a wildfire. Respondents also tout an emergency plan that relies in part on a "shelter-in-place" strategy. RB:135. But that plan never analyzes whether "shelter-in-place" would actually work in this location, or what the safety risks of "sheltering" during a raging, rapidly moving forest fire would be.

In the end, as the trial court held, "[t]he EIR lacks a meaningful discussion on this issue, relying more on conclusions rather than facts." JA:8:1572-73. Accordingly, the trial court vacated the Project approvals,

finding that "proceeding further with the MVWP Approvals: (i) would prejudice Respondents' consideration or implementation of mitigation measures or alternatives to the MVWP Approvals, and (ii) could result in an adverse change or alteration to the physical environment." JA:8:1558-59.

This Court should affirm. The County did not take the fire issue seriously.

ARGUMENT

I. Standard of Review

Pursuant to the Supreme Court's holding in *Fresno*, this Court reviews *de novo* the fundamental deficiencies in the EIR's analysis of the Project's emergency evacuation impacts. *See* 6 Cal.5th at 515-16. Appellants challenged the EIR's omission of critical information about the Project's threat to public safety. As *Fresno* explains, an EIR violates CEQA as a matter of law where, as here, its discussion of an impact "lacks analysis" or omits "'relevant information.'" *Id.* at 514-16. Respondents' contention that the "substantial evidence" test applies (RB:122-23) is therefore incorrect. But even if that contention were accurate, it would not matter. As the trial court found, "[e]ven with [a] deferential review that favors respondents, substantial evidence does not exist to support the County's conclusions regarding emergency evacuations." JA:8:1573.

II. The EIR Did Not Adequately Analyze the Obvious Fire Evacuation Risks Created by the Project.

CEQA requires an EIR to discuss any "health and safety problems caused by physical changes" in the environment that arise out of a project. Guidelines § 15126.2(a). Where those physical changes contribute to or exacerbate wildfire and evacuation risks, the EIR must adequately inform the public and decisionmakers about the risks of attempting to evacuate the Project area. *Id.* Here, those risks unquestionably exist. *See* RB:131 (admitting that "by bringing people to the area, the Project would increase the potential risk of wildfire, as well as the number of people potentially exposed to this risk"). Given the state's recent experience with horrendous fires, common sense dictates that an EIR should *at least* consider (1) the number of cars attempting to evacuate the project area, along with the significant impacts incident to such an evacuation; and (2) the significant impacts to emergency personnel attempting to respond while an evacuation is underway. *See Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 175 ("Common sense … is an important consideration at all levels of CEQA review.").

The DEIR, however, contains no such evaluation. AR:3:1741-42. Instead, it baldly concludes that "the project's impact relative to emergency evacuation is less than significant" and immediately dismisses any need for mitigation. AR:3:1742 (emphasis omitted). It asserts that the Project

"would not cut off or otherwise modify any existing evacuation routes," includes emergency evacuation routes, calls for a future Fire Protection Plan, and causes only an "incremental increase" in normal operational traffic. AR:3:1741-42, 1745.

However, as the trial court found, the EIR provided insufficient facts and analysis to support these statements and its insignificance conclusion. JA:8:1572-73; *see also* AR:37:21191-95. For example, while the Project may not physically "cut off" or "modify" existing evacuation routes, this fact by itself does not establish that the Project development would not otherwise adversely affect an emergency evacuation. Here, the Project would add 760 houses and substantial commercial development to an area with a dangerously high fire risk that has only one main escape route (SR 267). And that escape route is already overly congested.

Paying lip-service to the concerns raised by commenters, the FEIR provides some additional data, but this does not begin to fill the informational gap left by the DEIR. AR:6:3138-40; 30:17304-306; *see also* AR:1:324-25 (post-final EIR response). While concealing the key assumptions that underlay its analysis of evacuation figures, the FEIR asserts "it would take approximately 1.3 hours for all vehicles to exit the MVWPSP project site under existing plus project conditions and 1.5 hours under cumulative plus project conditions." AR:6:3140. It then concludes that while the Project "would increase the amount of time to complete an

evacuation, this does not necessarily generate a safety risk." *Id*. However, the FEIR never discloses by how much the Project would increase evacuation times, or why such an increase would not create a safety risk. *Id.*

Additionally, the FEIR neither considers nor analyzes the time residents would need to evacuate the area once they reach SR 267, a road which the EIR admits is likely to be gridlocked even under non-emergency conditions. *Id.*; AR:1:182-83; 3:1511-16. Nor does the FEIR attempt to explain how emergency response times would be affected by a mass evacuation. *See, e.g.*, AR:6:3140; *cf.* AR:3:1715-16 (providing response times only for standard "incident" calls).

The limited information provided in the EIR does not meet the standards recently confirmed by the Supreme Court in *Fresno*. That Court made clear that "[t]he ultimate inquiry … is whether the EIR includes enough detail 'to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.'" *Fresno*, 6 Cal.5th at 516 (quoting *Laurel Heights I*, 47 Cal.3d at 405). Such detail "protects not only the environment but also informed self-government," as it empowers the public both to "know the basis on which its responsible officials [act]" and to "respond accordingly to action with which it disagrees." *Id.* at 512 (internal quotations omitted). The present EIR, however, fails even to identify, much less analyze, numerous assumptions that underly its core conclusions. *See, e.g.*, AR:6:3138-40.

Without this basic information, the public has no basis on which to evaluate the County's decision or hold elected officials accountable. *See Sierra Club*, 6 Cal.5th at 512. The EIR therefore fails in its role as an informational document. *Id.* at 522 (EIR must at least make "reasonable effort" to give context for its conclusions).

III. Respondents Offer No Valid Excuse for the EIR's Failure to Support Its Conclusion that the Project Would Have No Significant Impact on Wildfire Evacuations.

Respondents propound a series of six excuses, hoping one of them will justify the EIR's failure to support its conclusion that the Project would have no significant impacts on emergency evacuations during a wildfire or other emergency. Each fails.

A. The County's Reliance on Fire Prevention Standards Does Not Obviate the Need to Meaningfully Analyze the Project's Emergency Evacuation Impacts.

First, Respondents rely on existing fire prevention standards and procedures, such as for defensible space, building codes, thinning forests, and controlled burns, to justify the EIR's conclusion that the Project will have insignificant impacts on emergency evacuations. *See, e.g.*, RB:129-30 (emphasizing defensible space and fire prevention) (citing AR:3:1732-34; 4:1809-12). These standards, however, do not answer the question of what happens when fire prevention fails—either within the Project area or

elsewhere—and a wildfire forces people to evacuate in a hurry.[18] *See CCEC*, 225 Cal.App.4th at 211 (citing standards is insufficient where they do not address impact at issue); Gov. Code § 51175 ("The wildfire front is not the only source of risk since embers, or firebrands, travel far beyond the area impacted by the front and pose a risk of ignition to a structure or fuel on a site for a longer time."); AR:28:15788 (consultant noting that "[w]ith mitigation techniques already deployed in the Northstar Fire District, the biggest risk would be a fire coming from the outside in"). The Project bears a "Very High" fire hazard status, so the Project's impacts on emergency evacuation *during* a wildfire or other emergency are of great consequence to the health and safety of future residents and the surrounding community. Yet, the EIR "lacks a meaningful discussion on this issue." JA:8:1573.

Respondents contend this distinction between pre-fire standards and risks during a forest fire is irrelevant. They claim that the EIR properly considered whether the Project "would 'interfere with an adopted emergency response plan or emergency evacuation plan,' or 'expose people or structures to a significant risk of loss, injury or death involving wildland fires." RB:130 (quoting AR:3:1735). But Respondents are incorrect, as the EIR's superficial review does not meaningfully *analyze* compliance with

[18] Accordingly, the Court should deny Real Parties' Request for Judicial Notice, Exhibit D, which attempts to introduce an extra-record fire prevention ordinance. *See* Appellants' RJN Opp. at 11-12.

these thresholds. *See* AR:3:1741-42 (concluding, without factual support, that Project would not materially impact evacuation). Without a foundation comprised of independent facts used to analyze the impacts in a reasoned manner, the EIR's conclusory determinations cannot satisfy CEQA. *See Californians for Alternatives to Toxics v. Dept. of Food & Agriculture* (2005) 136 Cal.App.4th 1, 15-20 (reliance on safety regulations "is inadequate to address environmental concerns under CEQA"; EIR must independently analyze the project's hazards); *see also Kings County*, 221 Cal.App.3d at 736 (EIR's conclusions must be informed by facts and reasoned analysis); RB:130 (citing EIR's unsupported conclusions as sole evidence of analysis).

B. The Two Emergency Access Roads Within the Large Project Do Not Support the EIR's Insignificance Finding.

Second, Respondents repeatedly claim the existence of two emergency access roads within the Project, in addition to the main access point off SR 267, provide sufficient evidence that the Project will not significantly impact emergency evacuations. *E.g.*, RB:141; *see also* AR:2:1078. But this argument neglects the real issue: each of these internal routes quickly funnels into SR 267, which is the *only* road out of the area in an evacuation. *See, e.g.*, RB:130. Respondents now contend that one internal road connects to the local "Fibreboard Freeway"—an historic logging route now used primarily for recreation (AR:3:1416, 1712)—which

allegedly provides "an alternative evacuation route to the west, away from SR 267." RB:141. But the EIR never analyzed that aspect of the road; it considered the road only as a connector to SR 267. *See* AR:3:1715, 1282 (noting that "Fibreboard Freeway" connects to SR 267); 6:3063, 3164 (noting same); 28:15789-802 (projecting that *all* evacuees would be directed to Truckee Tahoe Airport via SR 267). The existence of these internal routes therefore has no bearing on the Project's impacts on SR 267 during an evacuation.

Likewise, the County's last-minute decision to require paving of the internal access roads at the Fire Department's request provides no assurance that evacuation impacts along SR 267 will be insignificant. *See* AR:6:3164; *see also* AR:1:311-12 (expert review describing evacuation analysis as "fatally flawed at all levels"). Nor does the paving requirement supply the missing information to justify the EIR's conclusion that the Project would have insignificant impacts on emergency evacuations even without mitigation. *See City of Maywood v. L.A. Unified School Dist.* (2012) 208 Cal.App.4th 362, 391-92 (rejecting school district's assertion that inclusion of pedestrian bridge negated potential for pedestrian safety impacts, because EIR never analyzed safety or effectiveness of that bridge); *see also Fresno*, 6 Cal.5th at 514, 522.

Moreover, neither the provision of internal access roads nor the paving of them supplies the required analysis of the Project's impact on

response times for emergency personnel during a large-scale evacuation. *See* RB:140; AR:6:3163 (letter from Northstar Fire Chief Mark Shadowens, indicating that paving requirement is independent of the need for adequate response times). Here, (1) emergency responders will use the same roads as evacuees, and (2) all Project egress routes lead to SR 267. Accordingly, information about response times during an evacuation is vital to understanding whether the Project will significantly impact emergency response or evacuation plans. *See* Guidelines Appx. G, ¶ VIII(g); AR:3:1735, 1709, 1746 ("[l]onger response times could result in larger fires," which in turn "require more firefighting resources"); 28:15787-88 (noting "rapid response time … will be key to a successful outcome" and advising response time analysis). By omitting this critical information, upon which lives will depend, the County prejudicially abused its discretion under CEQA. *See Californians for Alternatives to Toxics*, 136 Cal.App.4th at 20.

C. The Evaluation of Evacuation Times by the Developer's Consultant Does Not Supply the Missing Analysis in the EIR.

Third, Respondents claim the County was entitled to rely on a memorandum prepared by the developer's consultant ("LSC") to support the EIR's conclusion that the time it would take for cars to evacuate the Project area presents an insignificant risk. RB:136. But as the trial court held, "[e]ven when considering the LSC Transportation Consultants

memorandum, dated April 26, 2016, the analysis is lacking. The memorandum fails to present sufficient discussion that integrates into the overall analysis to support the EIR's conclusions." JA:8:1573.

Respondents' reliance on the LSC memorandum is unavailing for several reasons. First, and perhaps most importantly, the EIR fails to adequately explain why LSC's estimated evacuation times for the Project supported a finding of no significant impact. AR:6:3140. Citing LSC's calculations, the EIR determined that a full evacuation of the Project site to the Truckee Tahoe Airport would take 1.3 hours under existing conditions, or 1.5 hours under cumulative conditions. AR:6:3140; 28:15789-93. The EIR then deemed this evacuation time acceptable without further reasoned explanation. *See* AR:6:3140. But this conclusion is questionable on its face, given that a wind-driven fire could easily "move across the county in a few hours." *See* AR:1:311. As one fire expert noted, "[t]he assumption that 1.5 hours will be available for complete mobilization and evacuation provides NO margin of safety even under the best of circumstances." *Id.*; *see also* AR:2:789-91.

The LSC memorandum is notably silent about whether its projected evacuation times would allow time for the safe exit of individuals trying to escape a fast-moving forest fire. *See* AR:28:15789-93. Perhaps recognizing this flaw, Respondents do not cite the memorandum to support their contention that the Project does not pose a significant safety risk. *See, e.g.*,

RB:136. Instead, Respondents rely on the FEIR and the County's post-EIR response to comments. *Id.*(citing AR:6:3140; AR:1:324). However, aside from speculating about other, uncontrollable factors, neither document contains any justification for the EIR's conclusion. *See* AR:6:3140 (discussing emergency responders' time management skills and noting that "[h]ours or days of lead time *could* be available") (emphasis added); 1:324. The result, as the trial court noted, is that "the EIR, even when read in conjunction with LSC's memorandum, fails to adequately address the Project's impacts on emergency evacuations in the area—especially in light of its high fire hazard status—so as to leave the analysis incomplete and failing to properly disclose to the public the actual impacts of the Project." JA:8:1573.

Further, even the analysis that the LSC memorandum did contain was plainly inadequate. Respondents claim the "consultant based its analysis on conservative assumptions." RB:132. However, the LSC memorandum in fact relies on unsupported, optimistic assumptions. For example, it assumes that evacuation routes in this heavily wooded area would remain unobstructed, and that an evacuation would proceed in an orderly and largely uneventful manner. *See* AR:28:15789-93 (projecting evacuation speed of "40 to 50 miles per hour"); *see also* RB:138-39 (relying on smooth execution of an evacuation order to tame an otherwise chaotic event). However, as one fire expert noted, and as recent, devastating

wildfires in the state have shown, "[t]here's rarely anything orderly about evacuations in the archival footage of wild-land fire emergencies." AR:1:312; *see also* AR:20:11134 (County official noting that "it's always going to be difficult. There's no evacuation that ever goes textbook smooth"); 1:311-13 (fire expert noting that disorientation of drivers during wildland-urban interface fires has led to documented civilian deaths, such as from blowing embers and smoke); 29:16707 (evacuation plan for nearby Homewood Mountain Resort, recognizing that car-crashes, downed powerlines, and other compounding factors can easily upset evacuation plans). Here, because the primary and secondary emergency access roads out of the Project all go through forestland where burning trees or limbs may fall, the assumption that evacuation will proceed unobstructed is not supported. *See* AR:6:3063.

The fact that SR 267 provides the lone egress route from the Project area only compounds these problems, greatly increasing the risk to the public. *See* RB:130 (describing "primary and secondary evacuation routes to SR 267"); AR:6:3138-40; 28:15789-793 (projecting that all evacuees would be directed to Truckee Tahoe Airport via SR 267). SR 267 is regularly gridlocked, and the Project's additional traffic would worsen these bad conditions. AR:1:182-83; 3:1511-16. Indeed, as Respondents admit, even under non-emergency scenarios the EIR found that the Project would cause significant traffic impacts on SR 267 during peak hours.

RB:140-41; *see also* AR:3:1511-16.

If a project would result in significant traffic impacts during non-emergency conditions, then *a fortiori*, the Project would result in significant impacts during an emergency evacuation. *See* AR:20:11145-50 (testimony of Highway Patrol Captain Stonebraker); *City of Davis v. Coleman* (9th Cir. 1975) 521 F.2d 661, 675 (based on "currently available information and plain common sense," court found that agencies' finding of insignificance was "hardly 'reasonable'"); *see also Gray*, 167 Cal.App.4th at 1116-17 (rejecting an EIR's conclusion that mitigation measures would effectively remedy significant impact when such conclusion "def[ied] common sense").

Yet for reasons known only to the County, the EIR reached exactly the opposite conclusion. *See* AR:6:3138-40. Despite calculating evacuation impacts based on these same peak hour volumes and assuming that all evacuation traffic would proceed to the same location, the EIR concludes that the Project would not significantly impact evacuations via SR 267. *See id.*; AR:3:1741-42; 28:15789-93. Tellingly, however, the EIR makes no attempt to justify this conclusion; it does not explain how an evacuation during peak traffic levels that cause gridlock on a summer afternoon would not lead to a similar or more significant gridlock in the chaos of an emergency. AR:6:3138-40.

Attempting to sidestep these flaws, Respondents claim that the level-

of-service analysis that found a significant impact during peak, non-emergency operations "says little about how a roadway will operate during an evacuation." RB:141. The thrust of Respondents' argument is that during an evacuation, "authorities assume control" and "override normal traffic controls." *Id*. Neither the LSC memorandum nor the EIR, however, provides any support for this theory—that in the midst of an inherently unpredictable, dynamic, and likely chaotic situation, emergency responders could manage traffic more efficiently than traffic controls operating under regular, predictable circumstances. *See* AR:28:15789-93; 6:3138-40; *E. Sacramento*, 5 Cal.App.5th at 300-03 (agency abused discretion in finding traffic insignificant in one area, where it was significant in another).

The LSC memorandum also (1) ignores the contribution of other regional communities to evacuation times; and (2) assumes that all Project evacuees would park and wait at the Truckee Tahoe Airport, rather than attempt to leave the area via I-80, which would likely be gridlocked. AR:28:15789-802; 1:312; *see also* AR:1:324; 3:1311; 7:3654 (I-80 at SR 267 routinely operates at unacceptable service levels). At no point does the memorandum, or the EIR which relies upon it, explain the basis for these important assumptions of fact or attempt to demonstrate their validity.

Given these flaws, neither of the cases that Respondents cite support their assertion that the County could assume its evacuation plan would be carried out as discussed in the LSC memorandum. RB:139-40; *see Citizens*

for a Sustainable Treasure Island v. City & County of San Francisco (2014) 227 Cal.App.4th 1036, 1064 (noting petitioners never actually challenged effectiveness of the EIR's plan and never alleged it would not be carried out as designed); *Dry Creek Citizens Coal. v. County of Tulare* (1999) 70 Cal.App.4th 20, 33-34 (assuming "*structures* [could] be designed to accomplish their purposes" because "[t]he structures *and the analysis* are based on the hydrology study (*facts*) completed for the project") (emphasis added). Because the present EIR lacks supporting facts or analysis, Respondents cannot meet the standards of their own cases.

D. The EIR Cannot Rely on Response Times for "Standard" Incident Calls When It Is Evaluating Response Times for a Wildfire-Scale Disaster.

Fourth, Respondents claim the EIR adequately evaluated response times of emergency personnel in a wildfire. RB:140. But the EIR uses response time calculations only for normal, "incident"-type calls. AR:3:1715. Using an average incident rate of "41 incidents per year per 1,000 people," the EIR concludes that "a total response time of 9 to 10 minutes can be expected." *Id.* Critically, however, the "incidents" contemplated by the EIR include only "emergency medical services calls" and structure fires under business-as-usual conditions. *See id.* The EIR never analyzes how a wildfire-scale disaster would impact emergency response times. *Id.*

Respondents' emphasis on a mitigation measure designed to address

the equipment and staffing needs of the Northstar Community Services District's ("NCSD") fails for the same reason. RB:128-29. This mitigation measure requires "MVWP to provide supplemental funding according to a specified schedule … so that Fire Department staffing would keep pace with demand." RB:128; *see also* RB:140. But again, the NCSD study that supplied the basis for this mitigation only considered "emergency incident demand" driven primarily by "medical [and] emergency medical services calls." AR:3:1715. The study determined that the current daily staff of *four firefighters* was "insufficient to properly handle a serious *building fire* that occurs within 5 miles of the fire station." *Id.* (emphasis added). The mitigation measure proposed by the EIR in response to this report is designed to fund a few additional firefighters "to properly respond to a serious *building fire*." AR:3:1716 (emphasis added). It says nothing about the County's ability to respond to a large-scale wildfire. *See id.*; *see also* AR:29:16733.

E. The Project's "Emergency Preparedness and Evacuation Plan" Does Not Retroactively Supply the EIR's Omitted Analysis.

Fifth, Respondents rely on the Project's Emergency Preparedness and Evacuation Plan ("EPEP"), prepared late in the administrative process, to fill the gaps in the EIR. RB:129, 133, 134-35. However, the EPEP simply does not supply the missing analysis. First, neither the EPEP nor the East Side Evacuation Plan includes nearby areas, such as the Lake Tahoe

Basin Management Unit, which also rely on SR 267 for evacuation. *See* AR:2:1057; 30:17055-56. Additionally, the EPEP does not analyze SR 267's capacity for an evacuation, or the Project's impacts on such an evacuation. Instead, the EPEP simply refers back to the EIR, which did not contain that analysis. *See, e.g.*, AR:2:1083 (referring back to same inadequate "analysis" in EIR). The County cannot comply with CEQA by engaging in this type of shell game. *See Kings County*, 221 Cal.App.3d at 736; *see also Laurel Heights I*, 47 Cal.3d at 405 (relevant information must be in EIR itself).

The EPEP does have a short paragraph noting that "shelter-in-place" may be necessary as an alternative to evacuating the area. But contrary to what Respondents imply, that single paragraph never examines whether having residents seek shelter in the midst of a raging forest fire provides an adequate substitute plan. *See* AR:2:1083; *compare* RB:135, 142 (claiming the shelter-in-place location would provide sufficient refuge). The paragraph succeeds only in raising a series of obvious questions: Where would the shelter-in-place building be located? How would people access it through the Project's sprawling forested area during a wildfire? How many people would it hold, and for how long? How would the building operate to provide a safe refuge? The EPEP nowhere addresses these critical issues. By arguing that this paragraph suffices to address the grave safety issues that arise from a policy of sheltering in place during a forest fire,

Respondents demonstrate only that the County ignored its responsibility to take this issue seriously.

Furthermore, to the extent the County is proposing a shelter-in-place building as mitigation for impacts on emergency evacuation, the County cannot use the measure as an excuse to bypass the impact analysis required by CEQA. Under black-letter law, an EIR must first examine and disclose a project's impacts before it can determine whether any mitigation is sufficient to alleviate such impacts. *See Lotus*, 223 Cal.App.4th at 658; *Ukiah Citizens*, 248 Cal.App.4th at 266; *see also* Guidelines § 15126.4(a)(1)(D) (EIR must discuss any significant impacts caused by mitigation measures). Here, the EIR fails to do so. AR:3:1741-42; 6:3140.

F. The County's Suggestion that It Possesses Broad, Virtually Unbounded "Discretion" Does Not Cure Its Failure to Provide the Reasoned Analysis Required by CEQA.

Finally, Respondents fall back on a "catch-all" argument that would justify all the EIR's omissions as exercises of the County's "discretion." They essentially argue that the County has the discretion to decide whether to believe the Project's emergency evacuation impacts are significant. *E.g.*, RB:136 ("Whether the Project's estimated evacuation time was, or was not, acceptable was therefore a judgment call for the County."). However, an agency's discretion under CEQA "is not unbounded." *E. Sacramento*, 5 Cal.App.5th at 300. An EIR must provide reasoned analysis to support a

finding of insignificance. *Kings County*, 221 Cal.App.3d at 736.

City of Maywood is instructive. In that case, the court considered whether the Los Angeles Unified School District ("LAUSD") adequately analyzed impacts to pedestrian safety from the construction of a new school. *City of Maywood*, 208 Cal.App.4th 362 at 370, 390. The EIR incorporated a safety study that considered (1) "hazards that pedestrians might encounter while traveling to the school from adjacent neighborhoods" and (2) "hazards associated with the placement and design of student dropoff zones, parking entryways, and [school] entrances." *Id.* at 392. Notably, however, the EIR did not discuss impacts related to the bisection of the campus by an active roadway. *Id.* at 391-92. Despite the missing analysis, LAUSD concluded that because the project incorporated a pedestrian bridge over the problem roadway, it would not significantly impact pedestrian safety. *Id.* at 391.

On review, the court rejected LAUSD's argument that the presence of a pedestrian bridge and the agency's reliance on its expert report rendered the analysis sufficient. *Id.* at 392-94. First, the court held that the EIR's acknowledgment that a pedestrian bridge crossed the roadway did "not show that the expert [relied on by the EIR] studied or considered the safety of those design features." *Id.* at 392. Second, the court rejected LAUSD's argument that fencing and other design features would "force pedestrians to use the pedestrian bridge as the exclusive means of" crossing

the roadway. *Id.* Although the record contained evidence that fencing would be built, the EIR never analyzed whether such fencing would be sufficient to force use of the pedestrian bridge. *Id.* at 393-94. The court then held that LAUSD did not have discretion to find the project's impacts insignificant without first conducting a reasoned analysis. *Id.* at 394-95.

The EIR at issue here is devoid of key analysis just like the EIR in *City of Maywood*. *See* AR:6:3140. In neither the EIR nor the LSC report did the County actually consider what evacuation and response times would be safe and whether, when, or how the public could shelter in place. Instead of providing a reasoned explanation, the EIR simply cited its plans and concludes, *ipse dixit*, that its analysis was legally sufficient. But it was exactly this approach that the *City of Maywood* court rejected. Moreover, such an approach is particularly insufficient here in light of the ample evidence in the record, including statements by fire and emergency professionals, that the Project could interfere with the ability of Project residents and others to safely evacuate the area. *See, e.g.*, AR:1:311-12; 20:11145-50; 24:13488-540; 29:16700; *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 440, 449. The EIR's emergency evacuation analysis will remain incomplete unless it is revised to fully analyze evacuation impacts with respect to SR 267, emergency personnel response times, and safe evacuation periods. *See Fresno*, 6 Cal.5th at 514; JA:8:1573 (trial court noting that in its present

form, EIR leaves "the analysis incomplete and fail[s] to properly disclose to the public the actual impacts of the Project").

To support their theory that the County possessed virtually unbounded "discretion" to determine whether impacts are significant, Respondents cite a series of cases. RB:137-38. In each of these cases, however, the lead agency's significance determination was supported by substantial evidence derived from reasoned, fact-based analysis. *See City of Maywood*, 208 Cal.App.4th at 424 ("the FEIR contains evidence demonstrating" reasoned analysis supported by observable, site-specific facts); *Clover Valley*, 197 Cal.App.4th at 243 (to enjoy deference, a lead agency's impact analysis must be supported by substantial evidence); *City of Long Beach v. L.A. Unified School Dist.* (2009) 176 Cal.App.4th 889, 895 (finding EIR "analyze[d] the challenged impacts . . . and is sufficient as an informational document"). Here, as the trial court correctly held, no such substantial evidence exists. JA:8:1572-73.

In a related argument, Respondents claim that under Appellants' argument, no development could ever be approved in a high fire severity zone, because evacuation risks will always exist. RB:142. This desperate argument to shift the blame for the County's analytic failures ignores the law. The County ultimately has discretionary power over the Project, but it must follow the decision-making structure mandated by CEQA. If the Project will have significant impacts on emergency evacuations, the EIR

must fully disclose these risks and then consider any feasible mitigation measures. *See* Guidelines § 15126.2(a). If, after implementing mitigation, the County ultimately determines that the Project's benefits outweigh any remaining safety risks, it may still approve the Project, but only if it adopts findings and a statement of overriding considerations consistent with CEQA's requirements. *See, e.g.*, *City of Carmel-by-the-Sea v. U.S. Dept. of Transportation* (9th Cir. 1997) 123 F.3d 1142, 1164.

In sum, before the County can approve the building of over 700 second-homes and commercial development in this hazard-prone area, it must fully come to grips with the safety risks. The EIR's unsubstantiated finding of insignificant emergency evacuation impacts does not even begin to undertake that responsibility.

IV. Respondents Mistakenly Rely on the Decision in Clews, Which Involved Vastly Different Factual Circumstances from the Present Situation.

To justify the County's reliance on incomplete evidence, Respondents cite *Clews Land and Livestock, LLC v. City of San Diego* (2017) 19 Cal.App.5th 161, 173 ("*Clews*"). RB:126, 135, 141. The facts of that case, however, are fundamentally different from the case at bar. The project there "consist[ed] of a 5,340-square-foot school … under a single roof, on an approximately one-acre site." *Clews*, 19 Cal.App.5th at 173; *see also id.* at 183 (describing school as a "modest project … about the size of a large home"). The court ultimately found that this small project would not

increase fire or evacuation risks because the site was already developed, the site saw regular traffic, and the evidence suggested that the school's 95 students and personnel could safely traverse one or both of the school's short evacuation routes during an emergency. *Id.* at 193-95.

The Project here—with 760 luxury homes and extensive commercial development on more than 1,000 acres—stands in stark contrast to the "modest project" in *Clews*. AR:2:708, 899; 3:1267. The Project site is completely isolated, is currently undeveloped and densely forested, and connects to only one major regional road: SR 267. AR:3:1262. Equally important, while the court in *Clews* found the school would not exacerbate evacuation risks, Respondents here admit the Project would do so. *See* RB:131; AR:6:3140 (admitting Project would increase evacuation times). And here, unlike in *Clews*, what little evidence exists in the record does not support the County's questionable assumptions regarding wildfire and evacuations. *Clews* is therefore plainly inapposite and cannot absolve the County of its responsibility to fully analyze the Project's impacts. The trial court's decision to require the County to conduct that analysis was correct.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court:

1. Reverse the trial court's ruling under CEQA that upheld (a) the EIR's description of environmental setting of the Lake Tahoe Basin, (b)

the EIR's analysis of Project impacts on the Lake Tahoe Basin, and (c) the County's failure to recirculate the FEIR's discussion of climate impacts and consider adequate mitigation;

2. Reverse the trial court's ruling under the Timberland Productivity Act that upheld the County's immediate rezoning of the West Parcel;

3. Affirm the trial court's ruling invalidating the EIR's analysis of the Project's impacts on emergency evacuations;

4. Remand the matter to the trial court to amend the judgment and writ in accordance with the Court's opinion; and

5. Award Appellants their costs on appeal.

DATED: May 9, 2019

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CERTIFICATE OF WORD COUNT
(California Rules of Court 8.204(c))

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DATED: May 9, 2019

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PROOF OF SERVICE

League to Save Lake Tahoe et al. v. County of Placer et al.
Case No. C087102
(consolidated for limited purposes with Case No. C087117)
California Court of Appeal, Third Appellate District

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the City and County of San Francisco, State of California. My business address is 396 Hayes Street, San Francisco, California 94102.

On May 9, 2019, I served true copies of the following document(s) described as:

APPELLANTS' REPLY BRIEF AND CROSS-RESPONDENTS' OPPOSITION BRIEF

on the parties in this action as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on May 9, 2019, at San Francisco, California.

/s/ Patricia Larkin
PATRICIA LARKIN

SERVICE LIST

League to Save Lake Tahoe et al. v. County of Placer et al.
Case No. C087102
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California Court of Appeal, Third Appellate District

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