Case No. C088130 (related to Case No. C087892)

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

SIERRA WATCH

Plaintiff and Appellant,

v.

PLACER COUNTY and PLACER COUNTY BOARD OF SUPERVISORS

Defendants and Respondents.

and

SQUAW VALLEY REAL ESTATE, LLC

Real Party in Interest and Respondent.

Appeal From a Judgment Entered in Favor of Respondents
Placer County Superior Court Case No. SCV0038777
Honorable Michael W. Jones, Judge

APPELLANT'S REPLY BRIEF

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I. Introduction

The opposition brief filed by Real Party and joined by the County (collectively, "Respondents") cannot credibly explain the glaring omissions in the Environmental Impact Report ("EIR"). So Respondents engage in diversionary tactics. They misuse evidence in the administrative record, setting forth voluminous record citations that, upon examination, have little or no relevance to Appellant's actual claims. They also ignore or misinterpret applicable case law, while citing various precedents that have no bearing on the issues at hand. Appellant's reply, below, breaks through this smokescreen not only to reveal the bare deficiency of Respondents' defenses, but also to affirm the fundamental inadequacy of the EIR itself.

To defend the EIR's failure to describe the environmental setting of the Lake Tahoe Basin, for example, Respondents can cite only the EIR's few, glancing references to that resource. Respondents' Brief ("RB"):20. These passing mentions do not satisfy CEQA; they come nowhere close to explaining the Lake's environmental setting. *See San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 722-29 ("*Raptor*"). Moreover, the County's omission of the complete environmental setting inevitably compromised the EIR's analysis. Because the document never adequately described the regional setting for the development, it could not analyze that vast Project's impacts on the fragile resources of that setting, including Lake Tahoe.

In preparing the EIR, the County resisted this required analysis on the ground that the Project's footprint lies outside the boundary of the Tahoe Basin. Administrative Record ("AR"):7:4016. The California Supreme Court, however, has rejected this myopic approach to environmental analysis. *City of Marina v. Bd. of Trustees of Cal. State Univ.* (2006) 39 Cal.4th 341, 360, 367. Respondents have since changed course, now relying on the County's cursory attempt to cobble together an analysis *after* it completed the Final EIR ("FEIR"). This type of belated analysis, however, cannot satisfy CEQA. *Save Our Peninsula Com. v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 130-31 ("*SOPC*").

Faced with the issue of catastrophic wildfire, Respondents raise an equally shallow defense of the EIR's conclusion that the Project would result in insignificant impacts on emergency evacuation. Among other decisive facts, the record shows that, during a wildfire event, it will take up to 10.7 hours to evacuate the site via the single access road. Consequently, Respondents now cite a "shelter in place" response to fires (RB:50-51), but the record never examined the risks nor the efficacy of this strategy in a "very high" fire hazard severity zone. So, in the end, Respondents retreat to a remarkably weak argument: they claim the "site is mostly a paved parking lot [and s]urrounding terrain consists mainly of ski runs and bare rocks."

RB:45-46, 54. The EIR, however, flatly contradicts this revisionist geography. AR:4:1811 ("The project site is … surrounded by forest land").

A similar pattern of avoidance pervades Respondents' defense of the EIR's noise analysis. After acknowledging that Project construction would generate extreme noise over a 25-year period, Respondents reject as too "speculat[ive]" any analysis of actual noise impacts on nearby sensitive receptors. RB:60. This argument is untenable. The County *knows* the locations of Project components and the affected receptors, as shown by its completion of a noise analysis for one impacted school. It presents no excuse for arbitrarily refusing to undertake the same analysis for other sensitive receptors.

To defend the County's failure to recirculate the FEIR's new analysis of climate impacts, Respondents again attempt to distort history by suggesting that the FEIR did not actually change the Draft EIR's ("DEIR's") threshold of significance for those impacts. But this claim is demonstrably false: the use of a new threshold radically altered the climate analysis. Accordingly, CEQA mandates recirculation. Cal. Code Regs., tit. 14 ("Guidelines") § 15088.5(a). Respondents also cannot defend the EIR's climate mitigation by labeling it "flexible." RB:69. This vague mitigation, which relies on yet-to-be-determined efficiency standards, plainly contravenes CEQA.

Finally, Respondents cannot justify the EIR's failure to evaluate traffic mitigation that the County knew was feasible. Nor can Respondents defend the EIR's reliance on deferred transit mitigation that depends on unknown information: a nonexistent plan of a separate agency. To save the EIR, Respondents again list multiple citations to the record, but none provides the missing analysis of this mitigation.

Accordingly, Appellant respectfully requests that this Court reverse the trial court's decision and direct issuance of a writ of mandate.

II. Respondents Misrepresent the Standard of Review by Ignoring the Reasoning in the Supreme Court's Landmark *County of Fresno* Decision.

Respondents recognize, in passing, the applicability of the Supreme Court's recent decision in *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502 ("*Fresno*"). However, they largely ignore the case's clarification of CEQA's standard of review. Thus, while Respondents assert that the "substantial evidence" test applies to virtually all issues raised in this appeal, their argument conflicts with *Fresno*.

In *Fresno*, the Supreme Court held that the sufficiency of an EIR's discussion of environmental impacts is reviewed de novo. It explained that "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, 515-16. The "ultimate inquiry" is whether the EIR includes enough detail to allow 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.* The substantial evidence test, by contrast, applies only to purely factual questions. *Id.*

Respondents do not apply this law. First, they argue that the "substantial evidence" test applies to Appellant's claim challenging the adequacy of the EIR's description of environmental setting. RB:18-19. However, *Fresno* expressly affirmed the decision in *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 945-45, 952-56 ("*Amador*"), which applied de novo review to this question. 6 Cal.5th at 515.

Respondents dismiss this determinative law and instead cite two older, inapposite cases. *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (RB:19) concerned whether substantial evidence supported the "factual circumstances" justifying an agency's reliance on a future baseline for measuring a project's impacts. (2013) 57 Cal.4th 439, 447-48. The case nowhere suggests that an EIR's omission of information about a project's environmental setting—the defect in the EIR here—is not reviewed de novo. *Id*. Respondents also cite *Communities for a Better Environment v. South Coast Air Quality Management District* (RB:18), which similarly examined an agency's methodology for calculating

baseline—not the adequacy of its description of environmental setting. (2010) 48 Cal.4th 310, 327-28.

Respondents next argue that the Court must defer to the County's evaluation of impacts to the Lake Tahoe Basin because CEQA gives agencies some leeway in selecting thresholds of significance. RB:33-34. This point is unavailing. Here, the County circumvented CEQA by using thresholds that mask the nature and extent of impacts to the Basin. Such avoidance presents a legal question. *Fresno*, 6 Cal.5th at 514-16; *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1109.

Further, *Fresno* clarifies that this Court must review de novo the deficiencies in the EIR's analysis of the Project's emergency evacuation and noise impacts. *See* 6 Cal.5th at 515-16. Appellant challenges the EIR's omission of key information about the Project's threat to public safety and construction noise impacts. As *Fresno* explains, an EIR violates CEQA as a matter of law where its discussion of an impact "lacks analysis" or omits "'relevant information.'" *Id.* at 514-16. Here, factual issues unquestionably do not predominate, as Respondents claim (RB:44); the issue is a legal question of whether the EIR omitted critical information. Respondents' contention that the "substantial evidence" test applies cites old case law, ignoring the Supreme Court's recent holding. *Id*.

Next, Respondents fail to acknowledge *Fresno*'s applicability to Appellant's recirculation claim where failure to recirculate renders an EIR "inadequate as an informational document." 6 Cal.5th at 514. The Supreme Court's explanation in *Fresno* supersedes the earlier, blanket rule articulated in Respondents' cases. RB:63-64.

Respondents also err in asserting that the substantial evidence test applies to Appellant's claim that the EIR fails to identify feasible mitigation for the Project's climate impacts. RB:68. The Supreme Court has explicitly held that such claims are subject to de novo review. *City of Marina*, 39 Cal.4th at 355-56.[1]

Respondents then misstate Appellant's position on the standard of review regarding traffic and transit mitigation. *See* RB:71-72. Appellant always recognized that the substantial evidence test applies to review of the County's rejection of feasible traffic mitigation. Appellant's Opening Brief ("AOB"):23. Yet, de novo review applies to the County's failure to identify adequate mitigation for transit impacts. *Id.*

Finally, while Respondents insist that the deficiencies in the EIR were not "prejudicial" (RB:33), their argument contradicts *Fresno*. The Court emphasized that where an EIR "'omits material necessary to informed decisionmaking and informed public participation,'" it "subverts

[1] Respondents do not contest that the EIR's failure to provide adequate noise mitigation also presents a legal question.

the purposes of CEQA" and "'the error is prejudicial.'" *Fresno*, 6 Cal.5th at 515 (citations omitted). The omissions here easily meet that test.

III. Respondents Cannot Justify the EIR's Failure to Adequately Describe the Environmental Setting of the Lake Tahoe Basin.

CEQA expressly requires that an EIR describe a project in the context of its regional environmental setting. Guidelines § 15125(a). The Act further mandates that an EIR's environmental setting information 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). Such information is "critical to the assessment of environmental impacts." *Id.*

Respondents do not dispute these CEQA requirements. *See* RB:19. Furthermore, they admit two core components of Appellant's argument, that: (1) "Lake Tahoe is a significant environmental resource" and (2) the Project would affect the Lake. RB:26. They also do not dispute that the EIR provides *no* detailed description of Lake Tahoe or the area's distinct and fragile natural resources. *See, e.g.*, RB:21. Instead, they employ a series of diversionary tactics.

Specifically, Respondents erroneously argue that the law did not require any discussion of Lake Tahoe's setting. They then cite irrelevant snippets of the EIR to claim the document *does* adequately address the Lake's setting. Additionally, they assert that omitting this central

component of the EIR was not prejudicial. As explained below, each maneuver fails: the EIR simply does not describe this key feature of the Project's regional setting, as CEQA requires.

A. The EIR Essentially Ignores the Existence of Lake Tahoe and Thus Fails to Describe Its Renowned Clarity and Water Quality.

The EIR nowhere describes the water quality or world-famous clarity of Lake Tahoe, unique features that state and federal laws are designed to protect. *See* AOB:24-27. Respondents nonetheless claim that the EIR sufficiently describes that resource because "[t]he DEIR's Hydrology and Water Quality chapter noted that Lake Tahoe is a significant geographical feature in the region." RB:21 (citing AR:4:2126-2209). However, Respondents' multiple citations to the record contain only a *single* sentence referring to the Lake: "The plan area is located within the low elevation portion of the approximately eight square mile Squaw Creek watershed, a tributary to the middle reach of the Truckee River (downstream of Lake Tahoe)." AR:4:2126. This lone, abbreviated mention of the Lake in a four-word parenthetical in no way describes the Project's environmental setting, as CEQA requires.

The EIR in *Raptor* also barely alluded to nearby aquatic resources, noting that the project site bordered the "San Joaquin River," "San Joaquin River floodplain," and a "riparian corridor." 27 Cal.App.4th at 723-26. Because it omitted any specific details about those areas and ignored their

"environmental importance and sensitivity," the court held that the EIR could not properly analyze the project's impacts. *Id*. at 725-26. Here, the EIR makes only passing reference to Lake Tahoe, providing even *less* detail about nearby sensitive resources than the legally inadequate EIR did in *Raptor*.

Respondents attempt to move quickly past *Raptor*, along with five similar cases cited by Appellant, by labeling those cases as "involv[ing] resources directly threatened by proposed projects." RB:32. They assert that the EIR here does not need to provide information about Lake Tahoe because "[t]he Project did not propose development in the Tahoe Basin and would not result in stormwater runoff or other pollutants draining into the lake." RB:21 (citations omitted). Respondents' argument fails for three reasons.

First, as a factual matter, it is undisputed that the Project would generate 1,353 car trips and 23,842 vehicle-miles traveled (VMT) *in a single day* to the Tahoe Basin. AR:7:4016, 4132. As Appellant explained, scientists agree that such vehicle travel results in the deposition of pollutants and finely-crushed road sediment into Lake Tahoe, threatening its water quality and clarity. AOB:25-26. Respondents do not contest this science. *See, e.g.*, RB:28; AR:2:613 (County admitting "vehicle emissions and roadway fine [sediment] are known contributors to loss of [Lake]

clarity"). Instead, they change the subject, claiming the EIR adequately assessed the impacts resulting from the Project's vehicles. RB:21, 28.

But this claim is both incorrect (*see infra* Part IV) and irrelevant to the environmental setting issue. As this Court explained in *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; *see also Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal.App.4th 1109, 1123 (description of environmental setting invalid even though "[t]he final EIR acknowledge[d] that impacts from fugitive dust will be significant and unavoidable, even with mitigation measures").

Second, neither CEQA nor case law limits the requirement to provide adequate project setting information to the jurisdictional boundaries of the Project's location. The law is settled: "An 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). The decision in *South of Market Community Action Network v. City and County of San Francisco* (2019) 33 Cal.App.5th 321, 338, cited by Respondents (RB:19), likewise holds that "a

court may reject a study area if it is 'so narrowly defined that it necessarily eliminates a portion of the affected environmental setting.'" *See also Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 575; *Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4th 859, 873-75. Thus, the fact that the "Project did not propose development in the Tahoe Basin" (RB:21) provides no defense. To hold otherwise would greatly inhibit CEQA's informational purpose.

Third, the requirement that the EIR fully describe the environmental setting is not limited to areas "directly" affected by a project, as Respondents argue. RB:32 (claiming environmental setting cases "involved resources directly threatened by proposed projects"). Rather, CEQA does not distinguish between a project's direct and indirect impacts for the purposes of establishing the required setting information. "Direct and indirect significant effects of the project on the environment shall be clearly identified and described [in an EIR]… . The discussion should include relevant specifics of the area [including] the resources involved … ." Guidelines § 15126.2(a); *see also id.* § 15064(d); § 21065.3[2] (defining "project-specific effects" as "all the direct or indirect environmental effects of a project").

[2] Unless noted, all statutory references are to the Public Resources Code.

Thus, in *Raptor*, the court invalidated an EIR whose failure to describe a nearby wildlife preserve precluded, inter alia, an assessment of the proposed development's indirect impacts to that sensitive area "by activities such as mosquito abatement necessitated by an influx of population." 27 Cal.App.4th at 725. Likewise, in *Galante Vineyards*, the court invalidated an EIR that mentioned the existence of "several vineyards in the Cachagua Valley" but did not sufficiently describe the setting to enable the agency to evaluate the project's indirect impacts on viticulture. *Id*. at 1122-23. As the court explained, indirect impacts could result from vehicle trips generated by the project, including from fugitive dust and a grape pest spread by vehicle travel. *Id*.

The present EIR suffers from the same defect. The EIR in *Galante Vineyards* could not adequately analyze the significance of a project's vehicle impacts on vineyards without fully describing that resource. 60 Cal.App.4th at 1122-23. Here, the EIR could not analyze how pollution and fine sediment from Project vehicles will impact Lake Tahoe's water quality and clarity because it never describes current Lake conditions. *See also Cadiz Land Co., Inc. v. Rail Cycle, L.P.* (2000) 83 Cal.App.4th 74, 91-95 (failure to describe conditions of aquifer precluded adequate impacts analysis); Guidelines § 15064(b). Respondents' failure to grapple with this fundamental deficiency in the EIR is fatal to their defense.

B. Information about a Separate Air Basin Does Not Provide Sufficient Information about the Air Quality Setting for the Lake Tahoe Air Basin.

Vehicles streaming from the Project to the Lake Tahoe Basin will not only negatively impact the Lake, but also degrade the sensitive air quality of the Lake Tahoe Air Basin ("LTAB"). Nevertheless, the EIR's discussion of the air quality setting fails to supply the necessary information about the LTAB—an omission Respondents cannot explain.

Respondents note that the EIR describes the Mountain Counties Air Basin ("MCAB") and lists air quality standards, data, and mobile source emissions applicable to that basin. RB:22; *see also* AR:4:2057 (limiting mobile source emissions information to "Placer County and/or the MCAB"). They assert that this information "accurately portrayed regional air quality" and then blame Appellant for not identifying what contextual information pertaining to Tahoe is missing. RB:22. Respondents are wrong on both counts.

As Appellant explained, although the EIR admits that Project vehicles would enter and affect the LTAB, the EIR omits (1) essential information about the current overall air quality conditions in that Basin, and (2) any discussion of its special sensitivity. AOB:32-34; AR:4:2043-52. The EIR's reference to air quality conditions and regulations for a *different* air basin does not correct that deficiency.

The LTAB is a separate and distinct air basin from MCAB, with a unique regulatory regime. *See* Cal. Code Regs., tit. 17 § 60113; AR:2:944-46, 49:28882. The purpose of the separate regime is to ensure that air quality in the LTAB is sufficient to maintain the area's special environmental status. For example, it includes heightened requirements for visibility. *See, e.g.*, AR:30:17617-31:17621. Thus, the EIR could not narrowly focus on pollutant levels and regulations for MCAB when the Project will also impact the separate LTAB. *See* Guidelines § 15125(c)-(d); *Bakersfield*, 124 Cal.App.4th at 1216.

Recognizing these requirements, Respondents next argue that the EIR includes air quality data from a few stations in the Tahoe Basin. RB:22. But a handful of isolated data points do not provide a legally sufficient picture of the overall air quality conditions in the LTAB or the environmental resources at stake. *See Amador,* 76 Cal.App.4th at 955 (EIR's setting information "requires more than raw data"). Because it lacks complete information about existing air quality, the EIR cannot explain how Project emissions—including those from adding 1,353 car trips to the Basin each peak day—would impact air quality in this protected region. *See Cadiz*, 83 Cal.App.4th at 91-95 (EIR must provide complete contextual information regarding project setting).

Nor can Respondents claim that the relevant information was unavailable, for the County had access to the required air quality

information for the LTAB. *See, e.g.*, AR:85:49683-740; 98:57585-94 (same environmental consultant for Project EIR and TRPA Regional Plan Update). The County deliberately decided to exclude that information from the EIR, and its decision 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 omitted air quality setting information despite availability of data from which agency could develop "reasoned estimate[s]").

Finally, Respondents try to justify the EIR's limited information by reframing this case as merely presenting a "disagree[ment] about how much data is enough." RB:22. This is incorrect. Because the EIR lacks the most basic setting information for the LTAB, the County could not even utilize its own significance criteria for air quality impacts in that area. *See* AR:4:2053 (EIR fails to determine whether Project would "violate any air quality standard or contribute substantially to an existing or projected air quality violation"). Accordingly, the EIR precluded informed decision-making and is inadequate as a matter of law. *Fresno*, 6 Cal.5th at 502, 515.

C. The EIR's Traffic and VMT Information Does Not Supply the Missing Setting Information for the Lake Tahoe Basin.

Continuing their futile search for an adequate discussion of the Lake Tahoe environmental setting, Respondents note that the EIR "described existing traffic levels." RB:20, 30-31. Tellingly, however, Respondents

never attempt to explain how a description of existing traffic—a discussion about the amount of *delay* travelers face (AR:4:1988)—somehow substitutes for a description of the Lake Tahoe Basin's unique environmental resources, including water clarity and regional air quality. It does not.

Respondents also claim the FEIR corrected any deficiencies in the DEIR's setting information by providing an estimate of Basin VMT in response to comments. RB:28, 31. But this belated scrap of information does not suffice under CEQA. First, as with traffic counts, the VMT figure standing alone does not provide the informational base needed to analyze the Project's impacts on the Lake's water clarity or the Basin's air quality. *See Galante Vineyards*, 60 Cal.App.4th at 1123-24 (raw data on air temperatures did not provide relevant contextual information for analyzing impacts on existing environment). Notably, the EIR never utilizes that information to analyze the Project's air and water quality impacts. *See infra* Part IV.B.

Second, the data came too late in the administrative process to fulfill the function of environmental setting information. As the court explained in *Communities for a Better Environment v. City of Richmond*, "[e]stablishing a baseline at the beginning of the CEQA process is a fundamental requirement so that changes brought about by a project can be seen in context and significant effects can be accurately identified." 184

Cal.App.4th 70, 89 ("*CBE*"); *see also* Guidelines § 15120(c) (environmental setting information must appear in DEIR).

In sum, the FEIR does not cure the informational deficiency regarding the environmental setting.

D. Respondents Cite No Authority to Support the EIR's Inadequate Description of the Environmental Setting.

In contrast to the numerous authorities cited by Appellant, Respondents rely primarily on a single case, *North Coast Rivers Alliance v. Marin Municipal Water Dist. Bd. of Directors* (2013) 216 Cal.App.4th 614 ("*NCRA*"), to defend the EIR's truncated environmental setting. *See* RB:22-24. That case is unavailing. There, the court upheld an EIR's detailed description of the environmental setting for a proposed desalination plant. Among other information, the EIR (1) "described various aquatic habitat types located in the Project area, and organisms found in these habitats," (2) disclosed relevant protected species and critical habitat information, and (3) "used a year-long project-specific study and decades of CDFG data." *NCRA*, 216 Cal.App.4th at 644-45. Here, the County's EIR contains nothing remotely similar. The EIR mentions Lake Tahoe only in passing and says nothing about its aquatic resources.

Ultimately, Respondents fall back on a desperate plea that Appellant failed to show that the EIR's "absence of information was prejudicial." RB:33. Not so. As Appellant explained, courts have repeatedly held that,

without adequate information about the environmental setting, an assessment of environmental impacts is "*impossible*." AOB:28-29 (citing, *e.g.*, *Galante Vineyards*, 60 Cal.App.4th at 1122).

Clover Valley Foundation v. City of Rocklin (2011) 197 Cal.App.4th 200, 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." *Id.* at 219 (citation omitted). Because the EIR here comes nowhere close to providing such information about Lake Tahoe's unique environmental resources, it precluded informed decision-making, and a prejudicial abuse of discretion occurred. *Raptor*, 27 Cal.App.4th at 729.

IV. Respondents' Parade of Excuses Does Not Explain the EIR's Failure to Meaningfully Analyze the Project's Impacts on the Lake Tahoe Basin.

After failing to describe the environmental setting of the Lake Tahoe Basin, the EIR then does not assess the Project's impacts on the Lake's sensitive 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 to protect the Basin, as CEQA requires. Respondents' excuses for these omissions collapse under scrutiny.

A. The EIR's Analyses of Other Impact Areas Do Not Substitute for Assessing Impacts on the Tahoe Basin.

First, Respondents claim that the EIR's analyses of the Project's water quality, air quality, and traffic impacts somehow combine to adequately evaluate the Project's impacts on the Tahoe Basin. *See* RB:30-31, 34. They do not.

Water Quality: Respondents cannot cite any portion of the EIR that actually addresses the Lake. RB:34. Instead, they claim that no such analysis was necessary because "Project runoff would not affect lake water quality directly or cumulatively." RB:34. But runoff from Project construction is not the only way a project can affect the Lake. Here, nitrate deposition and sediment from the Project's addition of nearly 24,000 VMT into the Basin each day would cause such impacts. *See, e.g.*, AR:2:611-13; 39:22503-11. Respondents do not argue otherwise.

The Guidelines instruct that a project causes a significant environmental impact if it would "substantially degrade water quality." Guidelines Appx. G § IX(a), (f). Here, the EIR's water quality analysis recognizes this significance criteria (AR:4:2167-68) but never determines whether the Project would degrade the Lake's water quality. AR:4:2126-2209; 7:4076.

Air Quality: Respondents declare that the DEIR's "air quality analysis evaluated whether the Project would cause or contribute to

violations of any air quality standards inside or outside the Tahoe Basin." RB:34. Tellingly, however, they provide no citation to the EIR containing that evaluation for the LTAB; the EIR examines only standards applicable to the MCAB, a separate air basin. *See* AR:4:2043-66.

In fact, the LTAB is subject to separate numeric standards for carbon monoxide, ozone, and regional and subregional visibility, as well as management standards, such as reductions in nitrate deposition and VMT. AR:30:17617-31:17621; 85:49683-740. The EIR's assessment of the Project's air quality impacts ignores these standards. *See* AR:4:2043-66.

Traffic: Respondents claim the EIR's traffic analysis adequately assesses the Project's impacts on the Tahoe Basin because it "used TRPA's standards." RB:30-31. This is misleading. The traffic analysis examines only level-of-service ("LOS"), which measures delay from traffic congestion but not impacts to the Lake or LTAB. AR:4:1988-90, 2008-09.

Respondents declare that it was appropriate for the EIR to focus only on "reducing traffic," since the Project "did not contribute to the stormwater runoff problem." RB:37. But this reply is irrelevant to the issue of whether the EIR analyzes *all* impacts on the Basin, such as impacts on air and water quality. It does not.

B. The EIR's Limited Discussion of Project VMT Does Not Disclose the Project's Full Impacts on Lake Tahoe.

Respondents next claim that the DEIR discussed TRPA's VMT threshold standards. RB:36. Not so. While the DEIR's traffic chapter mentions that TRPA maintains a basin-wide VMT threshold, it does not address its relationship to the Project's impacts on air or water quality in the Basin. AR:4:2006-07. Instead, the DEIR dismisses that threshold and states that only LOS is relevant. *Id*.

Respondents then argue that the FEIR's discussion of Project VMT sufficiently explains that "the Project would not cause an exceedance of [TRPA's VMT] standard." RB:35. But Appellant demonstrated just the opposite. AOB:37-38. Neither the FEIR nor the County's post-EIR comments provide the missing analysis of VMT impacts on Lake Tahoe.

1. Respondents Admit the EIR Omits Any Standard for Assessing VMT Impacts on the Lake.

To begin, Respondents concede that the EIR never used TRPA's—or any other—standard to determine whether the Project's VMT impacts were significant. RB:35. This concession alone demonstrates the EIR is inadequate. Without a standard, the EIR cannot fulfill its mandate to "determine whether any of the possible significant environmental impacts of the project will, in fact, be significant." *See Protect the Historic Amador*, 116 Cal.App.4th at 1109.

2. The Project's VMT Reveals Potentially Significant Air and Water Quality Impacts on the Tahoe Basin.

Respondents admit that TRPA's VMT threshold "address[es] air quality" and "serve[s] as a surrogate for other environmental conditions," including "Lake Tahoe water quality due to exhaust deposition." RB:36-37. They then offer four arguments why the Project would not result in potentially significant impacts. However, given the Project would add nearly 24,000 VMT to the Basin each peak day, these arguments are untenable.

First, Respondents claim that the sum of adding Project VMT to the existing baseline in the Basin "was below TRPA's basin-wide limit of 2,030,938 VMT." RB:35-36. But as Appellant, the Attorney General, and others warned, TRPA's basin-wide limit represents the *cumulative* total of VMT, not an individual project threshold. AR:2:622, 750; *see Kings County Farm Bur. v. City of Hanford* (1990) 221 Cal.App.3d 692, 718, 720-21 (invalidating EIR analysis that compared project additions to cumulative totals). In fact, TRPA utilizes a *project-level* threshold—of 200 daily trips or 1,150 VMT—to determine significance. AR:7:4017 (FEIR admitting same), 4129 (TRPA citing Code Section 65.2.3.G). Under this project-level threshold, the Project would have a significant impact because (1) the Project's addition of 1,353 car trips into the Basin exceeds the daily

trip threshold by almost seven times, and (2) its 23,842 in-Basin VMT exceeds the daily VMT threshold by over twenty times. AR:7:4016, 4132.

Second, Respondents assert that Appellant "claims that the County was legally compelled to use TRPA's project-specific thresholds for in-basin projects—200 daily trips or 1,150 VMT—rather than the applicable traffic LOS threshold." RB:37. This is incorrect. What Appellant argues is that the EIR must employ *some* standard that adequately determines whether the Project's water and air impacts on the Tahoe Basin would be significant. AOB:43-44.

Moreover, the County may not ignore the science underpinning TRPA's well-established standards. *See Cleveland Nat. Forest Foundation v. San Diego Assn. of Governments* (2017) 3 Cal.5th 497, 515 ("*CNFF I*"); Guidelines § 15064(b). The EIR here never used that science, and Respondents do not argue otherwise. Rather, Respondents claim that TRPA's standards are immaterial because they "are aimed at restoring Lake Tahoe" rather than assessing a project's environmental impacts. RB:25. But that distinction is legally irrelevant.

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 an 80 percent reduction in greenhouse gas emissions—a reduction scientists found necessary to stabilize the climate. 3 Cal.5th at 515. The Supreme Court concluded: "This scientific information has important value to

policymakers" in analyzing the climate impacts of the project there. *Id*. While Respondents insist that *CNFF I* supports *validation* of the present EIR (RB:27), that decision upheld the EIR's climate analysis only because it (1) found the project's climate change impacts significant, and (2) disclosed the inconsistency between the project's greenhouse gas ("GHG") emissions and the state's reduction goals. 3 Cal.5th at 515-16. Here, the EIR made neither finding with respect to Tahoe Basin impacts and TRPA's efforts to protect the Lake.

Third, Respondents claim the EIR "explained[] there is no way to translate a single project's VMT into impacts on Tahoe's air or water quality." RB:27. But the EIR says no such thing. *See* AR:7:4016-17 (FEIR admitting other environmental documents adopted methodologies for evaluating project-level VMT impacts on Basin, but declining to do so for Project). Moreover, even if the science on VMT were inconclusive, the County violated its duty under CEQA. The Supreme Court instructs: "[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; *see also Berkeley Keep Jets Over the Bay Com. v. Bd. of Port Comrs.* (2001) 91 Cal.App.4th 1344, 1370-71 (lack of "universally accepted" methodology for calculating impacts does not excuse lack of

analysis). Here, the EIR includes no such explanation of existing versus unknown science regarding the effects of VMT.

Fourth, Respondents veer in a different direction, asserting that utilization of a project-level VMT standard was unnecessary because the County "approved[] mitigation requiring [the Applicant] to fund the same things" that TRPA mitigation funds. RB:36, 38-39. But later-imposed mitigation does not excuse an EIR's earlier failure to examine environmental impacts. AOB:39. Respondents do not contest this point. Similarly, the Applicant's "voluntary" payment to settle litigation threats from the Attorney General (RB:41; AR:16:9452), which was conceived long after preparation of the EIR, also cannot excuse the EIR's lack of analysis. *See CBE,* 184 Cal.App.4th at 88.

3. Respondents Cannot Explain the EIR's Failure to Evaluate the Project's Cumulative Impacts on the Tahoe Basin.

Finally, Respondents offer no rationale for the EIR's failure to evaluate the Project's cumulative VMT impacts on the Tahoe Basin. Respondent cite the County's *post-EIR* responses (RB:38-39), but as explained below (*infra* Part IV.E), these were too little, too late. *See SOPC*, 87 Cal.App.4th at 130-31 (post-EIR information does not "make up for the lack of analysis in the EIR"). Respondents also attempt to fall back on the EIR's cumulative air quality analysis (RB:39), but that analysis does not address the LTAB (*see* AR:4:2375-78).

C. TRPA Expressed Serious Concerns about the Project's Impacts on Lake Tahoe.

As a third defense, Respondents claim that TRPA's "lack of comment" validated the EIR's analysis of Tahoe Basin impacts. RB:21, 26, 35. This argument, however, contradicts the record. TRPA *did* submit a detailed comment letter on the DEIR, expressing the agency's concerns with the Project's individual and cumulative impacts on the Basin and describing TRPA's efforts to protect it. AR:7:4129 (if unmitigated, Project "would significantly affect Lake Tahoe's physical environment through increased vehicle trips into, and the amount of vehicle miles traveled within, the Tahoe Basin"); *see also* AR:2:688, 7:4128-31.

Notably, TRPA's letter calculated the Project's in-Basin trips and VMT—critical information missing from the DEIR. AR:7:4129. TRPA then warned that the Project exceeded TRPA's project-level threshold for vehicle trips, which defines a "'significant increase' … as more than 200 daily vehicle trips." *Id*. It also found the Project could "contribut[e] to exceedance of the TRPA's [basin-wide] VMT threshold." *Id*. Inexplicably, however, the County reached the opposite conclusion: "The Project will neither cause nor contribute to exceeding TRPA's basin-wide VMT threshold." RB:36.

Respondents selectively quote TRPA's letter, emphasizing that TRPA welcomed discussions with the County regarding mitigation for the

Project. RB:34-35. But the key point here is that TRPA, like the Attorney General, expressed grave concerns about the Project's significant impacts on the Tahoe Basin (AR:7:4128-31; 2:619-27), and the EIR never discloses those impacts. Respondents' attempt to misrepresent TRPA's comments only highlights their importance.

D. Respondents Cannot Justify the EIR's Failure to Discuss the Project's Inconsistencies with Plans for Lake Tahoe's Protection.

Respondents recognize that "[a]n 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:23 (quoting Guidelines § 15125(d)). They also tacitly concede that the EIR included no such discussion. *See* RB:23-24. Instead, they offer three unconvincing excuses for this omission.

First, Respondents claim TRPA's plans were irrelevant because the Project "did not need a permit from TRPA." RB:24. But the pertinent issue is whether disclosure of the Project's inconsistency with this agency's plans for protecting the Basin was necessary for informed decision-making. *See Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, 939. It was.

Respondents dismiss *Banning Ranch* on the ground that the Coastal Commission, unlike TRPA, had permit authority over the project there. RB:26. The Supreme Court's reasoning, however, was not limited 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*. Here, Respondents recognize TRPA's jurisdiction over resources the Project may affect. *See* RB:25-26. Accordingly, whether the Project would conflict with TRPA's policies for Basin resources was essential information for County decisionmakers.

The decision in *Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 544, cited by Respondents (RB:23), is distinguishable. There, the dispute concerned whether an EIR should use a county versus city LOS standard to evaluate a project's traffic impacts. *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). By contrast here, the EIR was not "sufficient as an informational document."

Next, Respondents assert that the Project *was* consistent with TRPA's plans. RB:24. The Project, however, plainly conflicts with TRPA's project-level threshold of 200 daily trips. AR:7:4129. Further, the FEIR's one-paragraph discussion of the issue that Respondents cite cannot suffice. RB:24 (quoting AR:7:4076). First, that discussion does not actually disclose any of TRPA's standards. Second, it was carefully hedged, stating

that "*most* of the impact areas addressed by TRPA thresholds … would be unaffected by the proposed project." AR:7:4076 (emphasis added). The County waffled for a reason: the Project's stream of cars into the Basin would impact TRPA's air and water quality thresholds.[3]

Finally, the County's supposed consistency determination is not entitled to deference. RB:24. Where 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, 933-34. Here, Appellant has established a fair argument that the Project conflicts with TRPA's plans for protecting Lake Tahoe.

E. The County's Post-FEIR Response Cannot Save the EIR.

Appellant explained that, under CEQA, the County's post-EIR response to comments could not retroactively cure the EIR's failure to disclose the Project's impacts on Lake Tahoe. AOB:39-42. Respondents do not dispute this legal point. Rather, they claim the County's belated response merely "confirm[ed] the EIR's analysis." RB:42-44. But there was no previous "analysis" to confirm, and Respondents cite none. *Id.*; *see*

[3] Respondents' claim that "[t]he sole TRPA threshold cited by Appellant pertained to VMT" (RB:27) is incorrect. *See* AOB:26-27, 33, 39.

supra Part IV.A-B. Thus, their efforts to distinguish Appellant's case law fall flat. RB:42-43.

In fact, much of Respondents' defense of the EIR relies on the post-EIR response. For example, Respondents cite this response as providing sufficient information on (1) the Project's cumulative VMT impacts, and (2) Respondents' misleading claim that VMT is trending downward and not an effective measure of Tahoe impacts. RB:28-29, 38-39; AR:7:4016, 4132. Yet, critically, the information in the response, which appeared for the first time after the FEIR, was both tardy and substantively deficient. *See* AR:7:4129-31; 85:49731-32 (TRPA noting Basin is within 1.5% of reaching VMT threshold and affirming link between VMT and water and air quality impacts).[4]

Finally, Respondents protest that it would be "bad policy" to force an agency to reopen an EIR just because the agency decides to respond to "late comments." RB:42-43. But the comments here were not "late." Appellant and others commented early on that the EIR fails to adequately address the Project's impacts on the Basin. *See, e.g.*, AR:8:4387-92 (League to Save Lake Tahoe), 4364-77 (Friends of West Shore), 4610 (Sierra Watch). Appellant's comments on the FEIR merely reiterated points that were previously asserted—and that the County had not addressed.

[4] Contrary to Respondents' assertions (RB:29), Appellant cited this information. *See* AOB:40-42.

AR:2:748-50. The County's post-EIR response to this timely-raised issue "is too little, and certainly too late, to satisfy CEQA's requirements." *CBE*, 184 Cal.App.4th at 88.

V. Respondents Cannot Support the EIR's Conclusion that the Project Would Not Significantly Impact Wildfire Evacuations.

Respondents admit that the Project is located in a "very high fire hazard severity zone"—the worst fire risk rating available—and that it would take between 5 to 10.7 hours to evacuate the site via a single access road. RB:45, 49. Yet, Respondents cite no analysis or substantial evidence supporting the EIR's conclusion that the Project's impacts on emergency evacuations would be insignificant. Instead, they offer excuses that are patently infirm.

A. Respondents' Attempts to Minimize Fire and Evacuation Risks Contradict the Record.

Respondents attempt to downplay the Project's fire risk, claiming it is not as bad as what the designation as a "very high fire hazard severity zone" "suggests." RB:45. They reason: "The site is mostly a paved parking lot [and s]urrounding terrain consists mainly of ski runs and bare rocks." RB:45-46, 54. But the record debunks this specious argument. The EIR explains: "The project site is situated in the Sierra Nevada, surrounded by forest land." AR:4:1811; *see also* AR:3:1744-46. Indeed, the Project's avowed purpose is to attract more visitors to "Squaw Valley's spectacular mountain setting," including the adjacent Tahoe National Forest.

AR:2:1120; 3:1223-24 (touting Project's "publicly accessible forests"); 4:1972. And the Project's Specific Plan repeatedly states its intention to blend the Project with the forest. *See, e.g.*, AR:2:1087 ("the developed portions of the site transition to surrounding forested areas"), 1103, 1108, 1120 (Plan "seek[s] to bring the forest into the Village"), 1124 (Project "takes its cue from the surrounding forested areas"). Even the "paved parking lot" area contains almost 1,000 trees. AR:97:56775-76.

The "very high" fire rating is "based on consistent statewide criteria" such as "fuel loading, slope, fire weather, and other relevant factors." Gov. Code § 51178. Notably, fire risks in the Sierra Nevada are at an all-time high given the millions of dead or vulnerable trees from a warming climate, drought, and bark beetles. *E.g.*, AR:2:602-03; 4:2110-11; 5:2791-2817; 12:6932-33, 6945-51; 32:18732; 33:19039; 39:22574, 22587, 22694; 58:33899-900. As the County recognized, "[d]uring fire season, the combination of dense forests, heavy fuel loads, low humidity, potential for high winds and the steep terrain in the Sierra Nevadas can rapidly turn even small fires into lethal, major disasters." AR:21:12229.

Respondents admit that a severe wildfire (the King Fire) occurred in close proximity to the Project site in 2014. RB:46. They then dismiss its risks by claiming the handling of the fire shows the "system works" because a large summer Squaw event was cancelled. *Id*. The Fire Chief, however, "disagree[d]" with this assessment and explained what really

occurred: although "a 152 square mile wildland fire was burning within a few miles," the event was only "cancelled literally several minutes prior to the planned start time due to miserable air quality." AR:2:660. Rather than alleviating concerns over fire, this incident demonstrates the difficulty in timely extracting large numbers of people from the Project area in an emergency. *See id*. That some of the Project site is already developed does not erase the dire fire hazard from the region's millions of acres of forest land or related evacuation risks. *See* AR:115:67442-47.

Still trying to re-categorize the fire risks, Respondents next claim that summer traffic in the area "is much lighter" than winter. RB:46. Nonsense. As the EIR recognizes, "the worst-case peak traffic days" occur "in summer, under both existing and cumulative conditions." AR:8:4782. And a stated Project purpose is to attract additional summer visitors. *See* AR:1:243-244.

Moreover, as Respondents concede, the EIR identifies the Project's addition of cars to already overburdened traffic as a significant impact under non-evacuation conditions. RB:46; AR:1:420-25, 464-66. Then, however, the EIR illogically concludes that the Project's evacuation impacts would be insignificant. AR:4:2274. That conclusion directly contravenes the holding in *East Sacramento Partnership*, which condemned similar faulty reasoning. AOB:50-51 (citing *E. Sacramento*

Partnership for a Livable City v. City of Sacramento (2016) 5 Cal.App.5th 281, 302-03). Respondents ignore that case.

Finally, Respondents claim that area "roads flow freely 99% of time." RB:46. But the consultant's report cited by Respondents explains that it is evaluating total volume and "does not reflect episodic conditions impacting traffic flow, such as accidents … ." AR:18:10279. Wildfire, of course, is a paradigmatic "episodic condition."

B. The Mitigation Measures Cited by Respondents Do Not Excuse the Need to Analyze the Project's Emergency Evacuation Impacts.

Next, Respondents rely on various safety regulations and other purported "mitigation" to defend the EIR's limited discussion of evacuation impacts. None can provide that defense. As a matter of law, mitigation cannot substitute for the missing *analysis* of the severity and extent of evacuation impacts: "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 (citation omitted); *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 project's hazards).

Further, as explained below, the measures cited here are inadequate to address the wildfire evacuation risks.

Staffing and "Substation": Respondents claim that the EIR is sufficient because of additional fire staffing and a west-end substation (MM 14-7b), adopted pursuant to a consultant's (Citygate) report. RB:47-48.[5] These measures, however, were intended to address standard "incident" calls, such as medical emergencies and small housefires, not an extensive, valley-wide wildfire evacuation. AR:28:16185-99 (Citygate report addressing standard incident response needs). Notably, the "substation" would house two firefighters and "one quick attack unit," and would be built and available only after the Project is 50% complete. AR:1:350-52; 4:2252-54; 7:4011-12. In an evacuation, this small substation could not, as Respondents claim, "provide emergency responders with direct access to both ends of the valley, thus addressing Squaw Valley Road congestion." RB:50. In such circumstances, the record shows there is only one, extremely congested escape route for Project occupants and only one entry point for the multitude of firefighters responding to a wildfire. *See* AR:4:2274; 75:44406 (nearby King Fire burned nearly 100,000 acres and required over 5,000 firefighters).

[5] Respondents accuse Appellant of "ignore[ing]" this mitigation and the Citygate report. RB:48, 50. They are incorrect. *See* AOB:53-54.

CalFire Standards: Respondents cite MM 15-6a (adopted for Impact 15-6), which requires compliance with CalFire's minimum fire safety standards for "defensible space." RB:47; AR:4:2267-68, 2275-76; § 4290. But these are fire *prevention* standards. They do not address what happens when such efforts are unsuccessful—either on the Project site or elsewhere—and a wildfire forces thousands to hurriedly evacuate the Project area. *See Cal. Clean Energy Com. v. City of Woodland* (2014) 225 Cal.App.4th 173, 211 ("*CCEC*") (reliance on standards insufficient where they do not address impact at issue); Gov. Code § 51175 (recognizing fire risks extend far beyond wildfire front); Guidelines § 15126.2(a).[6]

Construction Traffic Management Plan (CTMP): Respondents' attempt to rely on a CTMP (RB:47-49) immediately collapses upon scrutiny. The CTMP applies only "during construction." *Id.*; AR:2:1042-43. It does not address evacuation impacts during the Project's operation. *Id.*

Shelter in Place: Respondents claim Appellant needs "expert evidence" to challenge the EIR's bald reliance on "shelter in place." RB:50-51. Not so. In *CCEC*, this Court held that a resident's lay opinion that a mitigation measure was too vague sufficed to challenge that measure, and

[6] For the same reason, *Maacama Watershed Alliance v. County of Sonoma*, 2019 WL 4926956, cited by Respondents in a letter to this Court dated October 10, 2019, is inapposite. There, the court rejected a challenge to a small winery where "[t]here is no indication that the activities at the winery will cause an elevated risk of fire." *Id.* at *11. That case did not concern emergency evacuation.

then invalidated the mitigation because it "[l]ack[ed] any 'criteria for success.'" 225 Cal.App.4th at 191-92, 195-96; *see also City of Redlands v. County of San Bernardino* (2002) 96 Cal.App.4th 398, 411 (no requirement for expert testimony).

The County's cursory reliance on "shelter in place" here is likewise too vague. In particular, the County cites no standards for determining whether this strategy is a safe alternative to evacuation, or merely the *only* alternative for occupants trapped in the valley by a fire. *See* AR:7:3863, 4014; Guidelines § 15126.4(a)(1)(D) (EIR must discuss significant impacts from mitigation).

Emergency Preparedness Evacuation Plan (EPEP): Respondents also point to the EPEP, prepared after the release of the FEIR. RB:51-52. This plan, however, does not purport to analyze either (1) the capacity for evacuation of Squaw Valley Road or SR 89, or (2) the Project's effect on that evacuation. *See, e.g.*, AR:21:12220-23.

As Respondents admit (RB:51), the Fire Chief criticized the EIR's discussion of wildfire evacuation as "rife with generalization and inaccuracy" and plainly deficient. AR:2:657-60. Respondents attempt to avoid this strong condemnation by citing the Fire Chief's subsequent statement that the EPEP was "appropriate." RB:55. Notably, however, the Fire Chief never retracted or changed his harsh criticism of the EIR's analysis.

Because the EIR only perfunctorily analyzes evacuation hazards, Respondents cannot distinguish *City of Maywood v. Los Angeles Unified School Dist.* (2012) 208 Cal.App.4th 362, 393 (EIR's "conclusory statements, which are unaccompanied by any information or facts explaining how … [there is no safety impact,] are insufficient to satisfy CEQA's requirements") or *Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1988) 47 Cal.3d 376, 405 (relevant information must be in EIR). *See also Fresno*, 6 Cal.5th at 521-22 (same).

C. Neither the EIR Nor the Applicant's Consultant Report Supplies the Required Analysis of the Project's Evacuation Impacts.

Respondents next claim "[t]he DEIR described and attached SVFD's adopted 'Wildland Fire Evacuation Plan'" and "[t]he Project will not impede this plan." RB:46-7. But that Plan only calls for "evacuating via Squaw Valley Road to SR 89; or, if it is not possible to leave the Valley, driving to the Squaw Valley Ski Resort parking lot." AR:4:2274. The Plan does not provide the analysis missing from the EIR: an examination of whether and how the Project would contribute to hazards in an emergency evacuation by, for example, doubling the number of people exiting the valley on a single access road. AR:4:1823-24, 2274 (SR 89 is "only [] means of ingress and egress" to Project site); 7:3863; 12:6874 (traffic expert stating Plan does not provide requisite analysis).

After Appellant and others identified this omission, the Applicant retained a consultant (LSC) to estimate Project evacuation times. AR:18:10297-307. The FEIR then cited the LSC report and its alarming finding that it would take up to 10.7 hours to evacuate the site. AR:7:4013. Respondents now claim this finding somehow supports the conclusion that evacuation impacts were insignificant. RB:49. However, as Appellant showed, the EIR never explained how such a lengthy evacuation time—up to 4.5 hours longer than currently estimated evacuation times—"does not necessarily generate a safety risk." AOB:49-50 (quoting AR:7:4013). Indeed, such a conclusion is questionable on its face, given the explosive nature of a wind-driven wildfire. *See* AR:2:659; *City of Davis v. Coleman* (9th Cir. 1975) 521 F.2d 661, 675 (based on "currently available information and plain common sense," agencies' finding of insignificance was "hardly 'reasonable'"); Guidelines § 15065(a)(4) (mandating significance finding for project that will directly or indirectly cause substantial adverse effects on humans). And bald conclusions, lacking analysis or evidentiary support, can never satisfy CEQA, especially on important public safety issues. *City of Maywood*, 208 Cal.App.4th at 393.

Unable to cite any actual analysis, Respondents claim that the EIR's finding of insignificance still allows for some risk. RB:54-55. But that assertion only begs the question: given the fire risk, what is an acceptable evacuation time? The EIR and the LSC report never answer that

fundamental question. Nor do they evaluate the Project's impact on the response times of emergency personnel summoned during a wildfire emergency—a point that Respondents never address and thereby concede. *See Trinkle v. Cal. State Lottery* (2003) 105 Cal.App.4th 1401, 1413.

Respondents' cited cases only illustrate the deficiency here. For example, in *Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884, 888-91, the trial court initially invalidated an EIR for failure to adequately assess a project's seismic hazards. The city then corrected course by "includ[ing] an extensive discussion" of those hazards in a revised EIR and adopting mitigation with "life safety" performance standards. *Id*. at 891-900; *see also Natl. Parks & Conservation Assn. v. County of Riverside* (1999) 71 Cal.App.4th 1341, 1359 (affirming agency's use of residential noise standards based "on scientific and factual data"); *City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176 Cal.App.4th 889, 912-13 (EIR identified train hazards as a significant impact based on specific risk standards). The EIR here includes no similar analysis of evacuation hazards and thus is inadequate as a matter of law. *See Fresno*, 6 Cal.5th at 514, 514-16.

Finally, even the analysis found in the LSC report was plainly inadequate. Respondents claim the consultant calculated evacuation times "using highly conservative assumptions." RB:49. However, as Appellant explained, the LSC memorandum employs unsupported, optimistic

assumptions. AOB:51-52. For example, it assumes unobstructed evacuation routes in this heavily wooded area and an orderly, largely uneventful evacuation. *See* AR:18:10297-307; 7:4013-14. Respondents' brief does not deny that these assumptions are unrealistic during the chaotic circumstances of a wildfire. Thus, even if Respondents were correct that the substantial evidence test applies (RB:44, 54-5), which they are not, no substantial evidence allowed the County to issue a finding of insignificance. *See Center for Biological Diversity v. Dept. of Fish & Wildlife* (2015) 62 Cal.4th 204, 225-28, as modified on denial of reh'g (Feb. 17, 2016) ("*CBD*") (agency failed to sufficiently document assumptions to substantiate finding of insignificance); AR:2:657-60.

D. The Facts in *Clews*, the Principal Case Cited by Respondents, Do Not Remotely Resemble the Situation Here.

Respondents rely on *Clews Land and Livestock, LLC v. City of San Diego* (2017) 19 Cal.App.5th 161, even while admitting that the "facts here differ." RB:53-54. That admission is remarkably understated. *Clews* challenged construction of a single, house-sized building for 95 people in an area with two established evacuation routes. *Clews*, 19 Cal.App.5th at 173, 176, 183. The Project here involves a massive expansion of a resort in a high-risk, forested area with only one exit route.

Still, Respondents cite *Clews* to argue that a "very high" fire risk designation, "standing alone," does not necessitate a finding of

significance. RB:45. But Appellant never so argued. Rather, it is the Project's substantial exacerbation of already precarious fire evacuation conditions that demonstrates the significant impact here. *See, e.g.*, AR:1:420-25; 2:659; 7:4013; Guidelines § 15065(a)(4). *Clews* did not involve such a circumstance.

Finally, Respondents claim that Appellant's argument "would usurp the Board's discretion." RB:55. But discretion is not the issue. CEQA dictates that a full understanding of the Project's significant environmental impacts must inform the Board's decision-making. *Fresno*, 6 Cal.5th at 515-16. Here, the EIR presents no analysis or substantial evidence to support its conclusion that the Project's impacts on evacuation will be insignificant.

VI. Respondents Offer Specious Defenses for the EIR's Inadequate Noise Analysis and Vague Mitigation.

To defend the EIR's cursory analysis of the Project's construction noise impacts and inadequate mitigation, Respondents offer seven responses to Appellant's arguments. None have merit.

First, Respondents contend that because no construction schedule yet exists, the EIR could not disclose the duration of noise impacts. RB:58. But as Appellant explained, even without a specific schedule, the County could have disclosed *how long* it would take to construct individual components of the Project—like the Mountain Adventure Center and parking garages.

The EIR did just that for the analysis of impacts on the Squaw Valley Academy. AOB:59-60. This disclosure would inform the community of the duration of construction noise at specific locations where it would disrupt their lives. Without this information, readers are left in the dark about the actual effect of noise over the long life of the Project.

Second, Respondents are wrong in claiming the EIR takes a "'worst-case' scenario" approach, which "model[s] peak noise generated during the 'single most active possible construction year.'" RB:59. The EIR does not "model" peak noise in this manner or identify what a "worst-case scenario" noise year would sound like. Instead, it notes only that "it is anticipated that during the single most active possible construction year, no more than 20 percent of the total Specific Plan construction could occur." AR:4:2084. It never explains what the *noise* from 20 percent of the Project's construction happening in a single year would sound like, or how that noise would impact sensitive receptors.

Third, Respondents assert that a more detailed noise analysis is unnecessary due to the "programmatic" nature of the Project and EIR. RB:58. But, as Appellant explained, merely labeling an EIR "programmatic" does not, ipso facto, absolve the County of its obligation to "analyze Project impacts to the extent it 'ha[d] "sufficient reliable data to permit preparation of a meaningful and accurate report on the impact" of the factor in question.'" AOB:58 (quoting *Los Angeles Unified School Dist.*

v. City of Los Angeles (1997) 58 Cal.App.4th 1019, 1028 ("*LAUSD*"). Tellingly, the County has not seriously contended that it lacked access to such data. While Respondents now assert that the EIR's noise analysis "explained the impossibility of providing site-specific noise levels" (RB:60, citing AR:2:849-50), the EIR never informed readers why it could not provide information about where construction would occur and for how long.

Additionally, the fact that further studies might be conducted if future development applications conflict with the EIR's analysis (*see* RB:59) does not excuse the County from conducting a thorough analysis now. *LAUSD*, 58 Cal.App.4th at 1028. Respondents attempt to distinguish *LAUSD*, but they do so on the basis of an issue—cumulative impacts—completely unrelated to the question here. RB:58. Critically, they do not contest that *LAUSD* requires detailed analysis in a program EIR where, as here, sufficient data is available.

Fourth, Respondents try to shrink the required noise analysis by employing an arbitrary distance limitation. They argue that the EIR can ignore construction noise impacts for any sensitive receptor beyond 50 feet, claiming this limit is a "standard practice" in environmental analyses. RB:59 (citing *Pfeiffer v. City of Sunnyvale City Council* (2011) 200 Cal.App.4th 1552, 1578). But Respondents identify no record evidence confirming the existence of this "standard practice," and *Pfeiffer* did not

consider appropriate distances for noise analyses. *See Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn.2 ("[A]n opinion is not authority for a proposition not therein considered.").

Respondents cite two pages of the EIR consultant's "Noise Calculations" to show the "standard" (RB:59 (citing AR:7:3808-09)), but the cited pages simply reference a federal transportation agency's model for transit noise and vibration assessment. They do not explain whether this approach is "standard" or why it should be used here. Further, the documents on which the Noise Calculations rely are for *roadway* construction—not building demolition and construction, the activities at issue here. Thus, contrary to Respondents' suggestion, this Court owes no deference to a nonexistent "standard practice."

Moreover, the EIR did not even follow this alleged "standard practice." The Squaw Valley Academy lies 250 feet from the nearest construction—a distance five times greater than the supposed 50-foot limit. Yet the EIR reveals that construction noise would negatively impact it. AR:7:4031. The EIR never explains why noise would not impact other sensitive receptors located more than 50 feet from construction, thus arbitrarily distinguishing between sensitive receptors that are similarly situated.

Recognizing this inconsistency, Respondents now attempt to distinguish Squaw Valley Academy from the other sensitive receptors on

the ground that the East Parcel is "relatively small … with limited flexibility to accommodate the proposed buildings." RB:60. But this distinction is not sourced in the record. The principal "evidence" of less flexibility cited by Respondents is their counsel's oral argument at trial. *Id.* (citing Hearing Transcript at 117-18). Respondents also cite to a map of potential development for the Project (*id.* [citing AR:2:1105, 1117]), but that document shows that the County possessed just as much conceptual information about construction on the main Project site as it did about the East Parcel.[7]

Fifth, Respondents tout the County's noise ordinance, suggesting it absolves the agency of any duty to analyze the Project's construction noise impacts. RB:62 (noting ordinance exempts daytime construction noise). This argument is untenable. Even if County regulations choose to ignore these impacts, CEQA requires a rigorous analysis. *Berkeley Keep Jets*, 91 Cal.App.4th at 1380-82.

[7] Respondents' other, lengthy record citations are simply irrelevant. *See* AR:8:4783 (noting FEIR contains more detail about Academy, but not explaining why); 7:3956-58 (supplying, without explanation, more detailed analysis for Academy), 4045-47 (general comments about Project's 25-year buildout), 4029-31 (claiming noise analysis was appropriate for programmatic EIR); 3:1751 (map of East Parcel, without explanation), 1269 (no discussion of difference between East and Village parcels), 1504 (list of construction noise mitigation, with no explanation of East and Village parcel differences); 4:2092 (irrelevant discussion of operational, not construction, noise).

Sixth, Respondents misuse recent case law to reject any need to disclose the health impacts of the Project's construction noise. RB:60. Respondents correctly state that *Mission Bay Alliance* did not require application of a "separate, health-based threshold" for noise. But this statement is simply misdirection, as Appellant never so argued. Respondents then ignore what the EIR in that case *did* do, and what the present EIR *does not*: relate expected noise levels to adverse health consequences. *See Mission Bay Alliance v. Off. of Community Investment & Infrastructure* (2016) 6 Cal.App.5th 160, 194-96.

Here, Respondents can cite only a single comment in the EIR that construction during "more noise-sensitive periods of the day can result in increased annoyance and potential sleep disruption for occupants of nearby residences." RB:60 (citing AR:4:2084). This vague comment never defines what is "nearby," much less discusses what levels of noise would trigger the annoyance or potential sleep disruption. Respondents suggest that the missing analysis does not matter because the EIR mitigates any noise that could disrupt sleep. RB:60. However, the mitigation they cite would protect *new* sensitive receptors from *operational* noise, not *existing* sensitive

receptors from *construction* noise. *Id.* (citing AR:4:2096, 3:1571 [MM 11-4b]).[8] That mitigation is irrelevant.

Respondents then attempt to distinguish the two cases that demonstrate the EIR's legal failure to address these health effects: *Fresno* and *Berkeley Keep Jets*. RB:61. But this argument fails. Just as in *Fresno*, the EIR here fails to link estimated noise levels to health effects and never explains why such a linkage was impossible. 6 Cal.5th at 519-21; *cf. Mission Bay Alliance*, 6 Cal.App.5th at 194-96 (approving EIR that did link noise levels to specific health effects). And *Berkeley Keep Jets* remains applicable for the proposition for which Appellant cited it: that an EIR must "enable readers to determine whether project-related noise would 'merely inconvenience' people or 'damn them.'" AOB:57-58 (*quoting Berkeley Keep Jets*, 91 Cal.App.4th at 1371, 1382).

Seventh, Respondents do not seriously defend the EIR's sparse mitigation for the Project's construction noise impacts. Appellant's opening brief showed how the County's vague and undefined mitigation measures violate CEQA. AOB:60-62. Instead of directly addressing this argument,

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[8] Respondents complain that Appellant "barely hinted" at this issue in the record or at trial. RB:60. But Appellant adequately exhausted remedies on the topic, and Respondents do not claim otherwise. *See* AR:8:4675; Joint Appendix ("JA"):2:231, 306. After the trial court ruling, the Supreme Court decided *Fresno*, which confirmed the lead agency's duty to disclose a project's health impacts. 6 Cal.5th at 521. Given this new authority, which clarified that the EIR's analysis here is insufficient, Appellant reiterated the issue on appeal.

Respondents merely restate those measures. RB:62-63. They point to no record evidence indicating that the measures would actually reduce noise impacts, or address why the EIR fails to include performance standards.

Respondents then direct the Court to two other mitigation measures, but these are unrelated to construction noise and therefore irrelevant. *See* RB:62 (referencing MM 11-5 and MM 9-8). Nor do Respondents explain why the County could devise specific noise mitigation for the Squaw Valley Academy but not for other sensitive receptors in the Project area—yet another example of the EIR's disparate and arbitrary treatment of receptors similarly affected by noise.

Given Respondents' inability to respond to Appellant's argument on this issue, the conclusion is inescapable: the EIR violated CEQA by failing to identify specific, enforceable mitigation for the vast majority of sensitive receptors in the Project area.

VII. The Fundamental Change in the Climate Analysis Required Recirculating the FEIR and Identifying Effective Mitigation.

The Supreme Court's decision in *CBD* demonstrated the legal inadequacy of the DEIR's climate analysis: it relied on a statewide "efficiency" standard for GHGs that was unrelated to the Project. 62 Cal.4th at 227-28. Consequently, the FEIR replaced the DEIR's inadequate analysis. The new analysis, however, both (1) revealed that the Project's climate impacts would be more severe than previously disclosed, and (2)

never identified effective measures to mitigate these impacts. *See* AOB:64-70. The County violated CEQA by refusing to recirculate the fundamentally revised FEIR for public comment.

In response, Respondents do not dispute the legal standard for recirculation described by Appellant. *Compare* RB:64 *with* AOB:63. Rather, they attempt to evade the FEIR's changes to the climate analysis and discount the need for new mitigation. These tactics fail.

A. Respondents Cannot Avoid the Fundamental Difference Between the DEIR and the FEIR.

To justify the County's refusal to circulate the FEIR's new climate analysis, Respondents reconstruct reality. First, Respondents mischaracterize the DEIR's threshold of significance for climate impacts, claiming the document determined that "emissions above 1,100 metric tons of CO_2 equivalent per year ($MTCO_2e$/year) were significant." RB:65. The record shows otherwise. For projects such as the one here exceeding 1,100 $MTCO_2e$/year, the DEIR utilized an "efficiency" metric (*i.e.*, compliance with statewide reduction goals under the Scoping Plan of 21.7 percent) to evaluate the significance of climate impacts. AOB:64. As the DEIR explains, the County "considers that an impact would be significant if *both* Tier I [1,100 $MTCO_2e$/year] *and* Tier II [efficiency metric] thresholds are exceeded." AR:4:2286 (emphasis added).

Second, Respondents admit that the DEIR conducted this "efficiency analysis" but then dismiss it as meaningless because the DEIR "did not base its conclusions on this efficiency metric." RB:65. This is inaccurate. The DEIR states: "The County's impact conclusion is based on the GHG-efficiency of the proposed project … ." AR:4:2286. It concludes: "[T]he proposed project would achieve a reduction in greenhouse gas emissions of 24.7 percent by 2020, which would be a less-than-significant impact." AR:4:2296.

Respondents note (RB:65-66) that the DEIR also includes "a discussion of GHG reduction targets that may be established by ARB and/or the California State Legislature beyond 2020." AR:4:2291. The DEIR then determines the Project "may be less efficient than needed" *after* 2020, resulting in potentially significant impacts. AR:4:2292. However, that post-2020 "qualitative discussion" fails under *CBD* because, like the 2020 analysis, it depends on statewide targets not linked to the Project. AR:4:2286, 2294-96; 62 Cal.4th at 227-28.

Third, still trying to escape the alteration in the FEIR, Respondents suggest that the FEIR could not have revealed more severe climate impacts than the DEIR because it shows a small decrease in the Project's GHG emissions. RB:67. However, providing raw data on emissions is only one component of the agency's climate analysis. *See* Guidelines § 15064.4. The EIR must also answer the critical question: *will these emissions cause a*

significant impact on the environment? *See Fresno*, 6 Cal.5th at 518-19 (EIR readers not required to infer conclusions from data; EIR must provide meaningful analysis so public can understand full extent of adverse impacts). To do so, it must evaluate "[w]hether the project emissions exceed a threshold of significance." Guidelines § 15064.4(b)(2).

Here, *CBD* invalidated the DEIR's efficiency threshold for evaluating the Project's climate impacts. Consequently, the FEIR changed the threshold of significance to utilize *only* the Tier I numeric threshold. AR:7:3924 (deleting efficiency standard), 3972 (Air district "no longer recommends using the NAT-based approach as the sole threshold criterion []; Tier II is not considered a significance criterion for this project."). The new, single threshold then produces an entirely different result.

Under the now-discarded Tier II standard, the Project would have resulted in "less-than-significant" impacts in 2020 and unknown efficiency impacts thereafter. AR:4:2296. Under the revised threshold, it will *vastly exceed* the Tier I standard of 1,100 $MTCO_2e$/year even in the Project's early years. *See* AR:3:1772 (20% of Project could be constructed in one year); 7:3924, 3974-76 (Project emits roughly 40,000 $MTCO_2e$/year at build-out).

Thus, Respondents err in asserting the FEIR reached "the same conclusion" regarding significance as the DEIR. RB:67. Indeed, Respondents concede that the FEIR changed the DEIR's sole mitigation

measure "to apply throughout the Project's life, not just after 2020." *Id*. This change reflects the Project's new-found significant GHG impacts. And it demonstrates recirculation was necessary.

Fourth, Respondents try artful wording to gloss over the substantial changes in the FEIR, claiming it "simply updated the [DEIR's] analytic path based on *Newhall Ranch [CBD].*" RB:68. But this was no "update." *CBD* prohibited the type of analysis used in DEIR, thereby requiring fundamental changes in the FEIR's efficiency analysis. These changes mandated recirculation of the EIR. AR:7:3924; Guidelines § 15088.5(a)(4). *Rodeo Citizens Assn. v. County of Contra Costa* (2018) 22 Cal.App.5th 214, cited by Respondents (RB:66), demonstrates this point. There, the county circulated a revised DEIR after the air district pointed out the inadequacy of the initial GHG analysis. *Id*. at 218, 227-28. Here, the County refused recirculation, even though the air district changed its threshold recommendation after *CBD*. AR:7:3972.

Finally, because Appellant met its burden to detail the EIR's deficiencies, Respondents' other cited cases are inapposite. *See S. County Citizens for Smart Growth v. County of Nevada* (2013) 221 Cal.App.4th 316, 331-32 (appellant provided no record citations or analysis to demonstrate recirculation was required); *Western Placer Citizens for an Agricultural & Rural Environment v. County of Placer* (2006) 144

Cal.App.4th 890, 905 (appellant asserted "without argument or analysis" that project change would affect mitigation).

B. Respondents Cannot Rewrite the Plain Meaning of the EIR's Climate Mitigation to Cure Its Illusory Content.

Respondents advance four arguments to support the EIR's legally defective climate mitigation. Each is unavailing.

First, Respondents say that "MM 16-2 included a comprehensive suite of GHG reduction tools, including acquiring offsets." RB:68. But Respondents omit a crucial fact: MM 16-2 requires use of such tools *only* to demonstrate compliance with an adopted state "target or plan" that has a substantiated linkage to the Project. AR:2:1064. The County's findings confirm this purpose:

> [MM 16-2] If the subdivision does not meet the target, then measures shall be incorporated into the subdivision to reduce GHG emissions to the target or plan level and to the extent feasible. …These measures may include any combination of GHG reduction actions needed to achieve the target including [list of measures].

AR:1:263.

Here, this mitigation is illusory. As the County admits, no such target or plan currently exists (AR:7:3974, 3980), and it may never exist. CEQA prohibits such sham mitigation. *CBE*, 184 Cal.App.4th at 95 (invalidating EIR where agency "offered no assurance" GHG mitigation "was both feasible and efficacious, and created no objective criteria for measuring success").

Second, Respondents argue that CEQA allows an agency to "'substitute the adopted mitigation with equally or more effective measures in the future.'" RB:68-69 (quoting *Fresno*, 6 Cal.5th at 523-24). This argument sidesteps the issue. The legal defect in the mitigation here does not concern what the County may do later. The defect is the County's failure in the first instance to consider *any* effective mitigation for the Project's significant impacts. AR:1:263-64.

Third, Respondents defend the EIR's mitigation on the grounds that "[t]he County did not rely on MM 16-2 to conclude that GHG impacts would be insignificant," citing *Fresno*. RB:70. In other words, Respondents contend that an agency can ignore further mitigation if it finds an impact significant after imposition of *some* mitigation. But Respondents misread *Fresno*. That case does not hold that labeling a Project's impacts as "significant" excuses an agency from considering feasible and effective mitigation. Rather, it held that when unmitigated significant effects remain, agencies must "implement *all* mitigation measures unless those measures are truly infeasible." 6 Cal.5th at 524-25 (emphasis added). Thus, *Fresno* does *not* justify the EIR's wholly ineffective mitigation.

Finally, Respondents assert that the County could do nothing further to mitigate climate impacts. RB:69-70. In their typical pattern, Respondents then offer an array of record citations, including responses to comments. *Id.* None of the cites, however, justifies the County's failure to consider the

EIR's "suite of GHG reduction tools" (RB:68) as direct mitigation for the Project's impacts, rather than as options to comply with a non-existent "target or plan." *See CBE*, 184 Cal.App.4th at 92 (rejecting "menu" approach where no assurance of plan's effectiveness); *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"); AR:1:263-64. Here, the tools listed are, on their face, potentially feasible and could reduce the Project's GHG impacts. The County erred in refusing to consider them. *See CNFF II*, 17 Cal.App.5th at 432-34.[9]

Respondents' cited cases also do not excuse the lack of mitigation. RB:69. In *City of Hayward v. Trustees of Cal. State Univ.* (2015) 242 Cal.App.4th 833, 851-57, the court upheld traffic mitigation for a campus expansion because the agency included specific requirements to ensure the measure's efficacy. In *Neighbors for Smart Rail*, the court upheld mitigation for parking impacts of a rail project because the transit agency committed to monitoring the parking and paying for a permit program if necessary. 57 Cal.4th at 465-66. In *Citizens for a Sustainable Treasure Island v. City and County of San Francisco* (2014) 227 Cal.App.4th 1036,

[9] The letters from Appellant and the Attorney General regarding the FEIR's failure to adequately consider GHG mitigation were not "[l]ate." RB:70; *Bakersfield*, 124 Cal.App.4th at 1201.

1059, the court upheld deferred mitigation, but only because the EIR included "ample information regarding the standards that will be applied, the techniques used, and the oversight provided in the event the City assumes future responsibility for remediation."

By contrast here, MM 16-2 includes *no* performance standards to guide the future climate mitigation. For example, it neither provides a particular timeframe nor specifies the required GHG reductions. AR:1:263-64. CEQA disallows this type of empty deferral. *See, e.g., City of Hayward*, 242 Cal.App.4th at 854 ("agency goes too far when it simply requires a project applicant to obtain a [future] … report and then comply with any recommendations that may be made in the report").

VIII. Respondents Do Not Demonstrate that the EIR Adequately Identifies Mitigation for the Project's Transportation Impacts.

A. The EIR Omits Feasible Mitigation for the Project's Traffic Impacts.

Respondents do not convincingly answer Appellant's argument that the EIR lacked adequate mitigation for the Project's traffic impacts. Instead, they offer distraction in the form of lengthy citations to irrelevant portions of the EIR and detailed descriptions of what the EIR did do (while ignoring what it did not). This tactic cannot save them.

First, Respondents exhaustively cite the EIR's analysis of traffic impacts, listing hundreds of pages without explaining their relevance. RB:72, 75. But in doing so, they avoid the issue. Appellant has not

challenged the adequacy of the EIR's traffic analysis, but rather its failure to mitigate. Respondents also cite components of the Project that they claim would improve traffic circulation (*id.*), but Project components do not constitute mitigation. *See CNFF II*, 17 Cal.App.5th at 433 ("A mitigation measure is not part of the project." [citing *Lotus v. Dept. of Transportation* (2014) 223 Cal.App.4th 645, 656 & fn. 8]). Respondents' argument therefore has no bearing on whether the Project's impacts—which the Project's components will cause—are adequately mitigated.

Finally addressing mitigation, Respondents proclaim the Project's traffic impacts—more than 2,800 new peak-day trips on crowded roads (AR:4:2015)—are "relatively modest" (RB:72) and tout the paltry mitigation that the EIR does provide (RB:73-74, 75). But once again, this ploy avoids Appellant's point: the EIR found some traffic impacts to be "significant and unavoidable" *after* implementation of the EIR's mitigation. AR:4:2034-38. Under these circumstances, CEQA required the County to evaluate other, feasible measures that could further reduce the traffic impacts, such as measures that would take Project-related vehicles off the road. *See LAUSD*, 58 Cal.App.4th at 1029-31 (EIR must evaluate each proposed mitigation measure that is not "facially infeasible"); § 21002.

In another diversion, Respondents assert that the EIR's air-quality mitigation can also serve as mitigation for the Project's traffic impacts. RB:74. The record, however, rebuts this argument. To begin, the EIR

recognizes that the traffic impacts will remain significant and unavoidable after implementation of the air quality measure. *See* AR:4:2034-38. In addition, the air quality measure, MM 10-2, provides no guarantee that it will reduce traffic. It merely includes a menu of options from which the Applicant can choose to reduce Project air emissions. Tellingly, many of these options are completely unrelated to reducing traffic. AR:4:2059-63 (e.g., Applicant can choose to reduce air emissions by electrifying well pumps, banning charcoal grills, and increasing swimming pool heater energy efficiency).

Unable to show that the EIR adequately mitigates the traffic impacts, Respondents attack Appellant for proposing additional traffic-reduction measures. RB:74. Inexplicably, they object that Appellant's list of feasible measures was transmitted in a comment letter by "its lawyer[]." *Id.* But contrary to Respondents' insinuation, the Act does *not* require that commenters retain technical experts on matters of common sense like this one. *See*, *e.g.*, *Georgetown Preservation Society v. County of El Dorado* (2018) 30 Cal.App.5th 358, 375 ("lay commentary of nontechnical matters admissible and probative" in CEQA context); *see also CCEC*, 225 Cal.App.4th at 191-92 (recognizing objection to mitigation analysis made by city resident). Commenters simply must "explain the basis for their comments" and "submit data or references offering facts." Guidelines § 15204(c). Appellant did just that, reminding the County that it had

already identified as feasible Appellant's proposed trip-reduction measures. AR:8:4653-56.

Critically, Respondents do not try to explain or justify the County's failure to respond to Appellant's proposed mitigation. Instead, employing their now-familiar tactic, they cite a slew of irrelevant comment responses. *See, e.g.*, RB:75 (citing AR:2:843-44 [regarding parking], 847 [regarding greenhouse gases], 988-99 [regarding other commenter's proposal]; 8:4600-01 [regarding efficacy of EIR's adopted mitigation]). And while they attempt now to argue that Appellant's proposals would not work (*see* RB:75-76), this litigation-crafted position comes far too late. *See Environmental Protection Information Center v. Cal. Dept. of Forestry & Fire Protection* (2008) 44 Cal.4th 459, 486 (courts will not countenance post hoc rationalizations for previous decisions). CEQA requires that the lead agency respond to timely comments *during the administrative process.* Guidelines § 15088(b). Here, the FEIR never even acknowledges most of the suggested mitigation measures, much less finds that they would not work.

Still blaming Appellant for their failure, Respondents cite *Santa Clarita Organization for Planning the Environment v. City of Santa Clarita* (2011) 197 Cal.App.4th 1042, 1055 ("*SCOPE*"). RB:76. But that case is plainly inapposite. As Appellant explained in its opening brief, the plaintiff in *SCOPE* dumped an extensive list of unvetted mitigation measures on the

lead agency for evaluation. AOB:73. Here, by contrast, Appellant asked the County to review only ten measures—all of which the County had previously determined could reduce the number of car trips from the Project. AR:4:2060-61. The County's failure to respond violated CEQA. *The Flanders Foundation v. City of Carmel-by-the-Sea* (2012) 202 Cal.App.4th 603, 615-17.

B. The EIR Improperly Defers Mitigation for the Project's Transit Impacts.

In defending the EIR's reliance on deferred mitigation for the Project's transit impacts, Respondents never explain how the deferred mitigation is legally permissible. Under CEQA, an agency may postpone formulating mitigation measures *only* if the EIR defines "specific performance criteria." *CNFF II*, 17 Cal.App.5th at 442-43 (quoting *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 280-81); Guidelines § 15126.4(a)(1)(B). Respondents provide no excuse for the EIR's omission of these required criteria.

Respondents have acknowledged that MM 9-7 provides only an abbreviated outline of the transit mitigation. Specifically, they concede that the amount of transit funding under the measure—a critical feature—is unknown. RB:78. So, Respondents try to soften this defect by characterizing the funding as the "only open issue" regarding the mitigation. *Id*. But it is not. The EIR also fails to identify a second core

component of the mitigation: what transit improvements, exactly, the funding would pay for. Indeed, Respondents admitted at trial that the EIR "declined to speculate" how the funds would be used. *See* JA:2:269. And nothing in Respondents' lengthy record citations identifies the missing information. *See* RB:78 (citing AR:2:1041-42 [text of MM 9-7]; 7:3951-52 [same], 3917-18 [same], 4129-30 [TRPA suggesting ways mitigation funds might be used]; 8:4385-86 [EIR admitting that determination of Applicant's fair share for transit mitigation program will not occur until recordation of final map]; 9:4928-30 [County requiring Applicant to join transportation management association]). Without this information, it is impossible to assess whether the mitigation would be effective.

Because the County declined to establish these two core features of the transit mitigation, CEQA required that the EIR provide performance criteria, such as standards specifying how much increased transit the mitigation would fund. *See Preserve Wild Santee*, 210 Cal.App.4th at 280. But the EIR does not include these criteria. Instead, it admits that performance metrics remain to be developed sometime in the future. AR:8:4385. Consequently, Respondents' brief cannot point to any performance standards, for they do not exist.

Since they cannot defend the legality of the EIR's approach, Respondents try to distract the Court with a cloud of irrelevant points. First, Respondents attempt to downplay the magnitude of the Project's impacts

on transit, accusing Appellant of "distort[ing] the record" on this subject. RB:78. That accusation is false, as the record shows: the EIR found the Project's impacts on transit to be significant (AR:4:2040), thus requiring mitigation (*see* § 21002). As a second diversion, Respondents point to the Applicant's *other* commitment to pay money to the local transit agency. RB:79. This commitment, however, is a red herring. Those funds are not mitigation for the Project's impacts and thus are irrelevant. *See* AR:1:131 (distinguishing other commitments from requirements of MM 9-7).

Finally, Respondents seek shelter in inapplicable case law. They cite various cases upholding an EIR's reliance on specific, well-defined traffic mitigation plans. *See* RB:79 (citing *City of Hayward*, 242 Cal.App.4th at 854; *Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal.App.4th 807, 818; *SOPC*, 87 Cal.App.4th at 136-41). But here, no such well-defined mitigation plan exists: the EIR includes no information about the amount or the use of MM 9-7's transit funding.

At the same time, Respondents unsuccessfully attempt to distinguish *Preserve Wild Santee*, on which Appellant relies. They claim that, while *Santee* involved an "unformulated plan," "TART's [Tahoe Truckee Regional Transit's] plan was adopted." RB:79. But they do not prove their factual claim. None of Respondents' citations (AR:2:1041-42; 7:4018; 8:4385) show that TART has adopted a transit plan funded by the EIR's mitigation measure. Instead, the EIR acknowledges that no such plan exists.

See AR:8:4385 (explaining that monitoring and performance metrics would be determined in the future).

In sum, Respondents have neither established that the EIR properly defines mitigation for the Project's transit impacts nor pointed to specific performance criteria that would allow deferred mitigation. Lacking these key elements of adequate mitigation, the EIR violates CEQA as a matter of law.

IX. Conclusion

For the foregoing reasons, Appellant respectfully requests that this Court reverse the trial court's ruling; direct issuance of a writ of mandate, commanding the County to vacate its approval of the Project and the EIR; and award Appellant costs on appeal.

DATED: October 29, 2019

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

I certify that this brief contains 13,999 words, not including tables of contents and authorities, signature block, and this certificate of word count as counted by Microsoft Word, the computer program used to produce this brief.

DATED: October 29, 2019

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PROOF OF SERVICE

Sierra Watch v. Placer County et al.
Case No. C088130 (related to Case No. C087892)
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 October 29, 2019, I served true copies of the following document(s) described as:

APPELLANT'S REPLY BRIEF

on the parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY ELECTRONIC SERVICE: I served the document(s) on the person listed in the Service List by submitting an electronic version of the document(s) to TrueFiling, through the user interface at www.truefiling.com.

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Shute, Mihaly & Weinberger LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and

mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on October 29, 2019, at San Francisco, California.

/s/ Patricia Larkin
PATRICIA LARKIN

SERVICE LIST

Sierra Watch v. Placer County et al.
Case No. C088130 (related to Case No. C087892)
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