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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF AMADOR

IONE VALLEY LAND, AIR, AND WATER DEFENSE ALLIANCE, LLC Petitioner, v. COUNTY OF AMADOR Respondent. NEWMAN MINERALS, LLC; WILLIAM BUNCE, an individual; FARALLON CAPITAL MANAGEMENT; JOHN TELISCHAK, an individual; EDWIN LANDS, LLC; GREENROCK RANCH LANDS, LLC and DOES 1 to 10; Real Parties in Interest.	CASE NO.: 15-CV-9240 **PETITIONER'S REPLY BRIEF** (California Environmental Quality Act; Planning and Zoning Law) Judge: Hon. Leslie Nichols Petition Filed: April 21, 2015 Hearing Date: March 4, 2015 Time: 10:00 a.m. Department: 2

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I. INTRODUCTION.

Respondents seek to frame the challenge of Petitioner Ione Valley Land, Air, and Water Defense Alliance (Petitioner) to the 2015 approval of the Newman Ridge Project as yet another in a series of challenges to the County's approval of the Newman Ridge Quarry and asphalt plant project (Project). This Project has been challenged because of the unmitigated damage it would cause to the environment, where mitigation is feasible and necessary, and the County's continuing failure to seriously confront or mitigate those impacts as required by law. Since the 2012 approval of the Project was set aside by this Court because of the County's failure to comply with statutory mandates, the drought in California- and in the County in particular- has worsened, new legislation to deal with allocation of scarce groundwater resources has been enacted, new sources of aggregate production within the County have been approved, new sources of traffic congestion on roads impacted by the County have been approved, new evidence of potential impacts from the rail line usage only recently identified in the EIR have been revealed. Nevertheless, the County seeks to pretend its analysis from 2012 or before does not need to be updated to reflect current conditions or support its current 2015 approval. The County is incorrect. It has again violated CEQA and has now violated the Sustainable Groundwater Management Act. Its approval of the Project must be again set aside and scrupulous compliance with statutory mandates must be ensured.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY.

Respondents mischaracterize this Court's ruling on the first writ petition. (Respondent and Real Parties' Joint Opposition Brief (Opp), p. 3.) The Court agreed with a key claim of Ione Valley, finding the inaccuracy in the EIR's traffic data was significant and deprived the public of the ability to comment about traffic impacts. (SAR 649.) The issue of rail lines was not merely to "properly restate" the information in the EIR, as characterized by the County (Opp., p. 3) but to provide adequate information in the first place. The Court found the information regarding rail impacts was not reasonably calculated to inform the public about increased rail traffic impacts. (SAR 651.) The Court further found that these were not merely technical errors, but were prejudicial to public review of the EIR.

After the County revoked the approval of the original project, the County grudgingly complied with the Court's order by recirculating an isolated section of the EIR related to traffic. Ione Valley LAWDA and others, including the California Farm Bureau and Caltrans, objected to the County's

further certification because the changes in the traffic and circulation section affected other sections of the EIR that were not recirculated. (SAR 101 et seq. [Caltrans]; SAR 131 et seq. [City of Galt]; SAR 137 [California Farm Bureau]; and SAR 139 et seq. [Petitioner].) Commenters, including Petitioner, requested that the full EIR be recirculated in light of new information. (*Ibid*.) However, the County obstinately refused to recirculate the EIR. Instead, the County re-approved the Project. The County alleges it addressed the deficiencies in the 2012 EIR. (Opp., p. 4.) However, the County refused to meaningfully respond to numerous comments on the recirculated EIR (REIR) that provided new information or issues that had not been addressed.

III. PETITIONER'S CLAIMS ARE NOT BARRED BY RES JUDICATA, COLLATERAL ESTOPPEL, OR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES.

Respondents claim "many" of Petitioner's claims are barred under various theories. (Opp., p. 5.) However, this is not the case because the circumstances surrounding the project approval and the information contained in the Recirculated EIR are new and different from those that existed in 2012 when the County approved the prior iteration of the Project.

Respondents argue that the 2012 Action included claims related to use of groundwater data that were litigated previously. (Opp, p. 6). However, the passage of the Sustainable Groundwater Management Act, the continuing drought, and the drying of local wells all created new conditions in which analysis of groundwater supply from 2012 no longer could serve as an adequate basis for approval of the Project in 2015. Similarly, with regard to air quality impacts and mitigation measures, which Respondents claim were already litigated in the 2012 Action, the misleading information in the 2012 EIR related to project traffic and railroad impacts prevented informed public comment and analysis of the consequences of these impacts such as increased air pollution or railroad bridge reconstruction impacts on biological resources. Therefore, they are not blocked by collateral estoppels or res judicata.

Respondents claim that Petitioner failed to exhaust administrative remedies with regard to groundwater related claims. (Opp., pp. 6, 25.) However, Petitioner sufficiently raised these claims, since as discussed below Petitioner and other members of the public made comments regarding groundwater, this was sufficient to alert Respondent to the issue of groundwater and the EIR's faulty analysis. Citation of particular sections of applicable codes is not required:

> We conclude that the comments set out above, as well as other similar comments in the administrative record, were sufficient to alert appellants to the issue raised in the trial court because the Board was alerted to the fact that its method of analysis was faulty and should be expanded to include analysis of long-term impacts, traffic and safety. The fact that the above comments do not refer to specific statutory language is not dispositive. Less specificity is required to preserve an issue for appeal in an administrative proceeding than in a judicial proceeding because in administrative proceedings parties generally are not represented by counsel.

(*East Pen. Ed. Council, Inc. v. Palos Verdes Pen. Unified School Dist.* (1989) 210 Cal.App.3d 155, 176-77.)

IV. THE COUNTY VIOLATED THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

A. Standard of Review.

Respondents argue that claims related to the omission of information are reviewed for substantial evidence. (Opp., p. 9.) However, challenges to an agency's failure to proceed in the manner required by CEQA are subject to a significantly different standard of review than challenges that an agency's decision is not supported by substantial evidence. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.) "Where the challenge is that the agency did not proceed in the manner required by law, a court must 'determine de novo whether the agency has employed the correct procedures, 'scrupulously enforc[ing] all legislatively mandated CEQA requirements.'' " (*Sierra Club v. County of San Diego* (2014) 231 Cal.App.4th 1152, 1164, *quoting Vineyard Area Citizens for Responsible Growth, Inc., supra,* 40 Cal.4th at 435.)

The County is incorrect in relying on an overly expansive application of the substantial evidence standard of review, claiming it applies to the scope of CEQA analysis. As found by the California Supreme Court, the Court exercises its independent judgment when determining whether someone who prepares an EIR has "applied the correct legal standard to determine the scope of analysis." (*Ebbetts Pass Forest Watch v. California Dept. of Forestry and Fire Protection* (2008) 43 Cal.4th 936, 954.)

The County's citation to *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376 ("*Laurel Heights I")* is unavailing. (Opp. p. 8.) In *Laurel Heights I*, the Court applied the deferential substantial evidence standard of review to a neighborhood association's claim that challenged an agency's *ultimate conclusion* as to whether the project's adverse environmental effects would be mitigated. (*Id.* at 387.) The Court exercised its independent judgment in determining that the Regents were required to consider and discuss the impacts of reasonably foreseeable future activities. (*Id*. at 396.) The Court also exercised its independent judgment in determining that the fact

that the Regents had not yet formally approved future plans was irrelevant. The Court exercised its independent judgment in determining that the Regents were required to consider and discuss project alternatives, that the EIR did not discuss and consider alternatives and also in determining that the fact that the Regents had decided alternatives were not feasible before the EIR was prepared was irrelevant. The Court stated:

> The Regents miss the critical point that the public must be equally informed. Without meaningful analysis of alternatives in the EIR, neither the courts nor the public can fulfill their proper roles in the CEQA process. We do not impugn the integrity of the Regents, but neither can we countenance a result that would require blind trust by the public, especially in light of CEQA's fundamental goal that the public be fully informed as to the environmental consequences of action by their public officials. 'To facilitate CEQA's informational role, the EIR must contain facts and analysis, not just the agency's bare conclusions or opinions.' [Citations.]

(*Id*. at 404-405.) The County also relies upon *Barthelemy v. Chino Basin Mun. Water Dist.* (1995) 38 Cal.App.4th 1609 (Opp., p. 7), but the reasoning in this case was criticized as "unsound" in *Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1392.

Here, many of Petitioner's arguments focus on issues that are reviewed under the less deferential failure to proceed in a manner required by law standard. As stated in the Opening Brief, challenges to an agency's failure to proceed in the manner required by CEQA are subject to a less deferential standard than challenges to an agency's factual conclusions. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435 ("*Vineyard*").) In reviewing these claims, the court must "determine de novo whether the agency has employed the correct procedures, 'scrupulously enforc[ing] all legislatively mandated CEQA requirements.'" (*Id., quoting Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564 ("*Citizens of Goleta II"*).)

The County overstates the burden placed upon Petitioner to cite evidence favorable to the County. (Opp., p. 8.) Petitioner agrees that it is petitioner's burden to show that an agency has violated the procedural requirements of CEQA or that an EIR's findings are not supported by substantial evidence. (*Santa Clarita Organization for Planning the Environment v. County of Los Angeles* (2007) 157 Cal.App.4th 149, 158 ("*SCOPE II*").) The need to discuss evidence that supports an agency's decision only arises in the context of causes of action reviewed under the substantial evidence standard

of review. (*Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1266; *see also Citizens for a Sustainable Treasure Island v. City and County of San Francisco* (2014) 227 Cal.App.4th 1036, 1064 ["CSTI's burden on appeal is to set forth the evidence supporting this finding, and then to show why it is lacking."].) The cases relied upon by the County do not stand for the idea that petitioners must summarize all evidence in favor of the agency, but instead that the petitioner bears the burden of showing that an agency's findings are not supported by substantial evidence. Petitioner has met its legal obligations, as constrained by the page limit on briefing and the size of the administrative record, in discussing how evidence relied upon by the City fails to constitute substantial evidence.

Respondents claim that the determination of the feasibility of mitigation measures is reviewed under the substantial evidence standard. (Opp. p. 9.) However, the public agency has the burden of proving that mitigation measures are "truly infeasible." (*City of Marina v. Board of Trustees of the California State University* (2006) 39 Cal.4th 341, 369; *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 134; *Village Laguna of Laguna Beach, Inc. v. Board of Supervisors* (1982) 134 Cal.App.3d 1022, 1034.)

The County is prohibited from approving the Project "if there are … feasible mitigation measures available which would substantially lessen the significant environmental effects . . ." (Pub. Resources Code § 21002.) The California Supreme Court concluded that:

> Under CEQA, the public agency bears the burden of *affirmatively demonstrating* that . . . the agency's *approval* of the proposed project *followed meaningful consideration of* alternatives and *mitigation measures*.

(*Mountain Lion Foundation v. Fish and Game Commission* (1997) 16 Cal.4th 105, 134, *emphasis added*; *accord Village Laguna of Laguna Beach v. Board of Supervisors* (1982) 134 Cal.App.3d 1022, 1035.) While an EIR is "the heart of CEQA", the "core of an EIR is the mitigation and alternatives sections." (*Citizens of Goleta Valley v. Bd. Of Supervisors* (1990) 52 Cal.3d 553, 564 ("*Goleta II*").)

B. The EIR Failed to Address Water Supply and Water Quality Issues.

Respondents argue the REIR was not required to address water supply and water quality issues. (Opp., p. 9.) CEQA requires analysis of water supply, including groundwater. **(***Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 431 ["An EIR

evaluating a planned land use project must . . . analyze, to the extent reasonably possible, the impacts of providing water to the entire proposed project.]) Specifically with regard to groundwater, where groundwater is a potential source of water for a project, the impact of the increased groundwater pumping at peak production on other water users must be analyzed. (*San Joaquin Raptor Rescue Center v. County of Merced* (2007), 149 Cal.App.4th 645, 663.) CEQA also requires that an EIR address "any inconsistencies between the proposed project and . . . regional plans." (Tit. 14 Cal.Code Regs. (CEQA Guidelines) § 15125 (d).) Thus, the EIR is required to address the inconsistency of the project with County or regional plans related to groundwater. The passage of the Sustainable Groundwater Management Act ("SGMA") underscores the need for regional groundwater management plans. The County's failure to address groundwater usage in the larger context of regional groundwater plans violates both CEQA and SGMA.

While in 2012 local water users may not have had to rely on the groundwater that would be used by the Project, the situation changed since then, with the continuing drought. Respondents deny that there is any evidence local water users would need to search out new water sources. (Opp., p. 10.) A comment letter directly stated, "Wells have been running dry throughout the county and the state." (SAR 453.) Specific wells were identified as running dry, and the County provided no contradiction of this factual information. (SAR 145 ["We have been informed that the wells of John and Evelyn Dubois near the Irish Hill quarry have run dry within the past six months and they have been buying water from the Amador Water Agency. We also understand that properties near local Newman Minerals operations have lost water from their wells this past summer."]) When wells run dry, it is a logical inference that the water users would have to search out new sources of water. This situation was not present in 2012 when the original EIR was approved. The County did not update its analysis to address new conditions.

Respondents claim that the Project would draw water from a "drought-resistant groundwater source." (Opp., p. 11.) However, even if the aquifer were drought resistant, the drought would cause other local users to find new sources, including possibly the same aquifer. The County's failure to analyze the impact of the Project potentially depriving other local users of necessary groundwater violates CEQA. Nearby ranchers have overlying rights to the groundwater as much as the Project proponents do. An overlying right "is the owner's right to take water from the ground underneath for

use on his land within the basin or watershed; it is based on the ownership of the land and is appurtenant thereto." (*City of Barstow v. Mojave Water Agency (*2000) 23 Cal.4th 1224, 1240.) "As between overlying owners, the rights, like those of riparians, are correlative; [i.e.,] each may use only his reasonable share when water is insufficient to meet the needs of all. [Citation]. (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1241.) The County failed to determine whether the Project's use of groundwater as an overlying right would be a reasonable share, or deprive other landowners with similar overlying rights of their reasonable shares in the Mehrten or Ione Formation water. "When the water is insufficient, overlying owners are limited to their 'proportionate fair share of the total amount available based upon [their] reasonable need[s].'" (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1253.) Despite the fact that water in the area is clearly insufficient, the County failed to determine or attempt to limit the Project proponents to their proportionate fair share of the total amount available based upon their reasonable needs. In this, the County completely failed to fulfill its duties under both CEQA and SGMA.

Respondents argue that the failure to use groundwater yield data from the Ione basin may not be adjudicated now because of res judicata or collateral estoppel. (Opp., p. 11.) Petitioner's reference to the groundwater yield data was to highlight the County's failure to provide necessary background information about groundwater usage. The continued drought, drying of local wells, and the Sustainable Groundwater Management Act make groundwater yield data issues relevant to the 2015 approval.

C. The County Did Not Adequately Address the Water Board's Specific Comment Letter.

Respondents claim that a Central Valley Water Board letter was a "pro-forma comment." (Opp., p. 12.) The County's disdain of the Water Board's comment is reflected in its failure to respond to the substance of the letter. The Water Board's very specific comments followed on the heels of prior letters specifically contradicting the County's position that no Waste Discharge Requirements (WDRs) would be required. The Water Board stated on August 17, 2011: "When waste is stored on or disposed to land, Waste Discharge Requirements (WDRs) are required. This applies to aggregate wash water, concrete wash water, returned/rejected concrete, and uncured concrete in recycling piles." (AR 11:7058.) Additionally, in October 2014, the Water Board stated that a Waste Discharge Requirement permit and coverage under the General Permit for Storm Water Discharges were required for the Project. (SAR

1:125, 127.) These were not "generic" comments as characterized by the County, but rather responded to the County's earlier position, which continued in the REIR (SAR 1:129), that considers WDRs as unnecessary on the theory that wastewater would not be discharged from the Project site (AR 1:206). The Water Board's letter made it very clear that even if water were merely stored on the site, WDRs are required. (AR 11:7058.) The County did not address the point that at the end of Project operation, the water stored onsite would have to be discharged, even if not discharged during operation. (AR 12:7221 ["Most abandoned mining pits in the area hold water."])

On January 14, 2013, the Water Board wrote a very specific letter to the Project proponents responding to an earlier letter from the Project proponents. The Water Board's letter stated, "[Y]our letter did not discuss the solids that will be collected in those clarifier tanks or how they will be managed and disposed. . . . [T]he Board cannot yet conclude that there is no need to either issue WDRs or conditionally waive the issuance of WDRs." (SAR 230-231.) The Water Board then required the Project proponent to submit various items of information to the Water Board by February 28, 2013 including whether it operates another aggregate quarry or processing plant in the County, a description of its operations, and a plan of operations to discharge aggregate wash water. (SAR 231.) None of the answers to these questions, asked by the Water Board in 2013 after the original 2012 approval, appear in the REIR, nor elsewhere in the record. The County may not fail to obtain this necessary information and disclose it in the EIR.

The County repeats its claim, asserted elsewhere in the brief, that comments it deemed "outside the scope" of the REIR did not require a response. (Opp., p. 12.) This position oversimplifies the requirements for recirculation of an EIR. While the County cites CEQA Guidelines section 15088(f)(2) (Opp., p. 12), that section is subsumed in the mandatory requirement of section 15088(f) that "[i]n no case shall the lead agency fail to respond to pertinent comments on significant environmental issues." (CEQA Guidelines § 15088 (f).)

D. The REIR Does Not Adequately Address Traffic Impacts.

1. The County's Refusal to Analyze Altered Project Access and Potential Highway Improvements Is Not Supported by Substantial Evidence.

While Respondents are correct that a lead agency may reject criticism from another agency as long as its reasons for doing so are supported by substantial evidence (Opp., p. 13), Respondents' refusal

to comply with Caltrans' request to analyze the impacts of a wider driveway access and related potential highway improvements is not supported by any evidence.

Respondents erroneously argue that no response was even required. (Opp., p. 14.) Respondents' claim that "all of the issues raised in Caltrans' comment letter were addressed by the County" during the 2012 EIR process (Opp., p. 14) is belied by 1) the application on August 4, 2014, after the 2012 EIR process, for substantial modifications to the project access and significant highway improvements, and 2) the fact that in a September 15, 2014 meeting of Caltrans staff, County staff, and the applicant's representatives, it was confirmed that the proposed driveway and improvements would be for shared use of the ISP Granule facility and the Edwin Center North. (SAR 102.) Respondents argue that the 2012 EIR "fully analyzed the use of an existing, in-use access point" (Opp., p. 14), but Respondents do not state that the driveway is shared or was being shared at the time of the 2012 EIR. Caltrans stated in its letter that "it considers the proposal for shared use or the driveway to be new information of substantial importance." (*Ibid.*)

Additionally, Respondents mistakenly allege that no response was required because "Caltrans' comments do not otherwise relate to that portion of the Transportation and Circulation chapter that actually was revised and recirculated." (Opp., p. 14.) On February 6, 2014, this Court ordered the County to "recirculate for public comment the revised DEIR *pertaining to traffic issues*." (SAR, p. 653, *emphasis added*.) Thus, Respondents may not merely revise the portion of the Transportation and Circulation chapter they deem appropriate, thus avoiding other important traffic issues, including project access and potential highway improvements that could result in a "lowering of the highway profile by as much as eight feet for approximately one-quarter mile." (SAR 102.)

2. The Consultant's Conclusion that There Will Be No Impact From the Mule Creek Prison Expansion Project Is Based On Speculation.

Speculation is not substantial evidence. (Pub. Resources Code § 21082.2(c).) Expert opinions "rise only to the level of reliability and credibility as the evidence constituting the foundation for those opinions." (*Citizens' Committee to Save Our Village v. City of Claremont* (2nd Dist. 1995) 37 Cal.App. 4th 1157, 1170.) With circular reasoning, Respondents state that the traffic consultant's report analyzes the issue of potential traffic impacts associated with the Mule Creek State Prison Expansion Project "and concludes that there will be no impact associated with such expansion. The County's conclusion

therefore is supported by substantial evidence." (Opp., p. 15.) The proposition that the traffic consultant determined there would be no impact does not meet the requirement of proving that the County's conclusion is supported by substantial evidence. Rather, the consultant's determination itself must be supported by substantial evidence. It is not.

Respondents state, "The consultant explained the basis for th[e] conclusion [that adding Mule Creek traffic to the Project would not change any of the 2012 EIR impact results or conclusions]: those intersections with significant impacts would remain significant, and those with less than significant impacts would remain far below the significance thresholds. (SAR 661.)" (Opp., p. 16.) Instead of performing an analysis supported by facts and data, the consultant engages in mere speculation.

Respondents' decision not to update the traffic study is also based upon the traffic consultant's determination that the threshold for updating had not been met. (Opp., p. 16.) However, since the consultant's determination is based upon the consultant's speculative conclusions regarding traffic impacts, Respondent's decision not to update the traffic study is not supported by substantial evidence.

Respondents improperly attempt to shift the burden for preparation of the traffic studies onto Petitioner by stating that Petitioner "is not a traffic expert and did not retain a traffic expert." (Opp., p. 16.) However, "CEQA places the burden of environmental investigation on government rather than the public." (*Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311.) The fact that a petitioner does not hire its own traffic expert does not absolve the agency from conducting a reasoned analysis supported by evidence.

3. The County's Trip Calculations Are Unsupported.

Respondents repeat their claim that no response to the City of Galt's comments was required because the comments "do not otherwise relate to that portion of the Transportation and Circulation chapter that was revised and recirculated." (Opp., p. 17.) As previously explained, this Court ordered the County to recirculate the revised DEIR pertaining to traffic issues. (SAR, p. 653.) Since Galt raised the concern that the additional trains generated by the project "will significantly impact traffic operation at those crossings" (SAR 1:131), Respondents are unable to evade responsibility for addressing these traffic impacts.

In its Opposition Brief, Respondents fail to address Petitioner's concern that the County did not require the Project to contribute any fair share funding to build the grade separated crossings to address the impacts created by the trains generated by the Project despite the fact that the City of Galt's General Plan calls for these overcrossings. (SAR 1:133.)

Respondents defend the County's use of its 25% assumption in its trip calculations on the basis that "peak hour volumes and the directional distribution were developed from data on industrial uses contained in the 8th Edition of the ITE Trip Generation Manual. (SAR 596-597.)" (Opp., p. 18.) However, the pages Respondents cite – SAR 596-597 – are not to the relevant pages of the Trip Generation Manual. Rather, the cited pages merely confirm that the ITE Trip Generation Manual was the source of this information. The County should have included the relevant pages of the ITE Trip Generation Manual as an attachment to the Revised EIR.

To allow the EIR to fulfill its informational purpose, "[t]he EIR must contain facts and analysis, not just the bare conclusions of a public agency. An agency's opinion concerning matters within its expertise is of obvious value, but the public and decision-makers, for whom the EIR is prepared, should also have before them the basis for that opinion so as to enable them to make an independent, reasoned judgment." (*Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 831.) Since expert opinions "rise only to the level of reliability and credibility as the evidence constituting the foundation for those opinions," (*Citizens' Committee to Save Our Village, supra,* 37 Cal.App. 4th at 1170), and no evidence is supports the EIR's trip calculations, the County's analysis is deficient.

The County again improperly attempts to shift the burden to Petitioner by arguing, "Petitioner also provides no substantial evidence to show that the 25 percent assumption is not reasonable." (Opp., p. 18.) However, "CEQA places the burden of environmental investigation on government rather than the public." (*Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311.) Since the County has withheld the data underlying the EIR's conclusions, Petitioner and other members of the public are unable to analyze the validity of this 25% assumption.

E. The 2012 EIR Did Not Analyze Potential Biological Impacts of Railroad Bridge Reconstruction and Improvement.

Respondents claim that because the REIR "does not include any change to the UPRR rail line that the Project would utilize, no analysis of biological or other issues is needed. (Opp. p. 18.) The

point is that, in the face of the evidence submitted, the County in the REIR should have recognized that upgrades of railroad bridges would be required, and those upgrades would cause biological resource impacts. The County refused to address this issue. The County states, without addressing contrary evidence, that "the existing rail line and the existing bridges along that line can accommodate the Project's traffic." (Opp., p. 18.) The County claims the requirement of 20 new bridges is factually wrong. (Opp, p. 19, citing SAR 237.) The cited page merely states that the existing line serves existing quarry use by SGI Quarry. (SAR 237.) However, such use is very limited, and the County does not state how much material is moved on the existing train.

The scale, and therefore the frequency and weight of ISP usage of the rail line, simply does not compare to that projected for the Project. The number of operations would increase thirteen-fold in frequency, and train length would increase four times. Therefore in the weight of materials to be moved would increase by 52 times. (Compare SAR 1:93 [1 train per week] with SAR 3:595-569 [1.88 trains per day = 13.16 trains per week].) Each train would be four times longer than the trains that currently operate. (SAR 395 [current 20-car, 1200 foot train increasing to 80-car, 4800 foot train].) Therefore, *52 times more material (13.16 times four) will move over the same track each week.* This would be over track apparently built as long ago as 1875. (SAR 209.) Even if existing bridges are adequate for moving the small amount of material quarried at the SGI Quarry currently, that does not demonstrate their adequacy for moving the large volumes and weight of material from the proposed Newman Ridge Quarry. Information from a local online newspaper, the Voice of Ione, submitted along with public comments, stated the Project as proposed "called for an estimated 200 carloads of rock being shipped each day. The Ione line in its current condition was considered [by UPRR sources] to be not physically adequate to handle the proposed tonnage to be shipped by rail." (SAR 206.) Therefore, according to a reporter's source "within the Union Pacific Railroad," necessary improvements would not be economical to the UPRR: "'[D]o you know how many bridges there are between Ione and Galt? About twenty. *They would all have to be rebuilt.*'" (SAR 207, emphasis added.) An EIR may not avoid addressing a potentially significant impact without providing specific factual analysis of the issue. The County should have considered and resolved every fair argument that could be made about the possible environmental effects of the project. (*Protect the Historic Amador Waterways v. Amador Water Agency*

(2004) 116 Cal.App.4th 1099, 1109.) Instead, the County refused to examine bridge reconstruction.

The County downplays the significance of the concern of the Department of Fish and Wildlife about impacts to biological resources within the Department's jurisdiction in the form of stream crossings affected by the need for reconstructed rail bridges. (Opp., p.19.) Because the Department is a trustee agency responsible for resources potentially impacted by the Project, the County was obligated to consult with the Department both as regards the proper "scope" of the EIR and as to the substance of the EIR. (Pub. Resources Code § 21080.4 (a) and (b); CEQA Guidelines §§ 15082, 15086 (a)(2).) The Department is one of only four trustee agencies recognized in the CEQA Guidelines. (CEQA Guidelines § 15386 [" 'Trustee Agency' is defined as "a state agency having jurisdiction by law over natural resources affected by a project which are held in trust for the people of the State of California."]) Instead of properly consulting, the County not only failed to alert the Department to potential impacts, but misled the Department into believing no biological resources would be affected by the Project by referring only to "traffic" as it recirculated the REIR. The County makes much of the fact that the Department "did not comment" on the REIR. (Opp., p. 19.) The Department did not submit a written comment because it was not informed of the significant changes to the EIR, including the new information provided about heavy new railroad traffic traversing the line to the City of Galt. As was explained by a member of the public who spoke with staff at the Department, staff at "CDFW were not pleased that their need for involvement was not made clear in a partially recirculated chapter entitled Traffic, and that they were not given clarity with which to respond, nor enough time." (SAR 455.) Even though the Department did not submit anything in writing, Department personnel took the unusual step of calling staff at the County on the record to express their displeasure and need to be involved in analysis of stream crossings. (SAR 455.) The County thus failed to meaningfully consult with a trustee agency as required by CEQA and instead deferred their involvement to some unspecified future review process. Instead of highlighting the change in the REIR with new railroad line information or how it would potentially impact resources (biological resources at stream crossings) within the Department's jurisdiction, the County alleged there would be no impact at all. This violated CEQA, and the need to rebuild bridges was a reasonably foreseeable part of the Project. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 396.)

F. Air Quality Impacts Were Not Sufficiently Analyzed to Support the 2015 Approval.

The County claims that air quality impacts were sufficiently analyzed in 2012. However, the Revised EIR provided new information about increased traffic impacts that had not been provided in 2012. Therefore, arguments about the impacts of that traffic, such as increased air pollution, are new.

1. The County Failed to Consider the Creation or Exacerbation of Hotspots.

The 2012 EIR had misleadingly claimed "implementation of the project would not result in the degradation of LOS at any signalized intersections in the vicinity of the project site to LOS E or worse." (AR 2:522.) Hotspot analysis is required to evaluate the potential for significant air quality impacts if a project will cause or contribute to an intersection operating at LOS E or worse. (AR 2:522). The original EIR did not disclose that intersections were already at LOS F or would operate at LOS E under cumulative impact conditions.

Respondents claim that the Project will not result in the degradation of any intersection to LOS E or worse. (Opp., p. 20, citing SAR 235.) However, the page cited by Respondents states Intersection 4 operates at LOS F, but excuses analysis of hotspots at this intersection by asserting the intersection would operate at LOS F even without project traffic. (SAR 235.) It also confirms that Intersections 1, 4, 5, and 6 would operate at LOS E under the cumulative impact scenario, but again excuses analysis of them by asserting the Project does not create the impact. (*Ibid*.) This does not excuse analysis of the intersection. Instead, the Project's traffic would be exacerbating already degraded conditions. As such, cumulative impact analysis of air quality conditions is required. (*Los Angeles Unified School Dist. v. City of Los Angeles* (1997) 58 Cal.App.4th 1019, 1024–1025; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 721.)

2. The County Failed to Analyze Cumulative Impacts to Air Quality.

In addition to failing to conduct required hotspot analysis of intersections that would be degraded by contributions from Project traffic, the County failed to analyze cumulative impacts to the region. Respondents claim the County did not need to update its air quality analysis for the 2015 approval. (Opp., p. 20.) With the approval of the Mule Creek State Prison, the Jackson Valley Quarry, and other local projects after 2012, air quality conditions in the region would be worse than they were in 2012. However, the County provides no statement of projects that might be expected to contribute to

cumulative air quality impacts. The County did not update its analysis of cumulative air quality impacts, and its initial analysis failed to sufficiently address cumulative impacts in any case. Air quality experts had stated "Adverse health impacts would be most significant at locations within 1 to 2 miles from the project sites. Cumulative impacts would also be significant for both air quality and public health." (AR 5:2642, emphasis added; AR 13:8158.) Numerous sensitive receptors sit within this 2-mile radius, including schools, housing for veterans and retirees, ranches, farms, and homes. The 2012 cumulative air quality impact analysis, even if it had been adequate for conditions in 2012, was not adequate to support the 2015 approval of the Project.

G. Approval of the Jackson Valley Quarry is Significant New Information Requiring Recirculation of the Alternatives Analysis.

Recirculation is required when an alternative is shown to be feasible. (Guidelines, § 15162, subd. (a)(3)(C), (D); *Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1130.) Respondents argue that the County's approval of the Jackson Valley Quarry is not new evidence and would not change the County's conclusion that there are no valid alternatives to the Project. (Opp., p. 23.) The original EIR did not even mention or consider expansion of Jackson Valley Quarry as a means to achieve the objective of aggregate production in the County, or as a means of reducing the amount of aggregate that would be needed from the Newman Ridge site. A response to comments in the Final EIR claimed that Jackson Valley Quarry is an infeasible alternative. (AR 5:2738.) However, since the County approved the expansion of the Jackson Valley Quarry in 2013, this claim of infeasibility is clearly false. In rejecting Jackson Valley Quarry as an alternative to the Project, or a means of reducing the volume required to be extracted from the Project site, the original EIR relied upon "[i]nability to use or expand those facilities" and other "additional reasons" including its proximity to neighbors and small size. (AR 5:2738.) None of these reasons is sufficient under CEQA. Even where a project proponent does not own a potential alternative site, other sites may nonetheless be feasible. (*Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437, 1457.) "In-depth analysis of alternative sites may also be appropriate where two or more private developers are seeking the approval of a local agency for the same type of development at different locations." (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 575.) This is exactly what happened in this case – two or more developers sought approvals for the same type of development, a quarry, in different

locations. Nonetheless, the County failed to analyze the alternative development of one site or the other, rather than assuming both would be necessary.

V. THE COUNTY FAILED TO ADEQUATELY ADDRESS THE SUSTAINABLE GROUNDWATER MANAGEMENT ACT.

A. Petitioner Sufficiently Raised SGMA Issues to the County.

Respondents seek to apply an unreasonable standard of specificity to assert that Petitioner should have raised various issues more specifically. (Opp. p. 26.) Contrary to this argument, the adequacy of the objections for purposes of exhaustion is a practical doctrine governed, in part, by concerns of judicial efficiency, not a shield for agencies to invoke to elude judicial review of their decisions. "[W]e…apply our decisions in such a manner as to preserve, rather than foreclose, a litigant's day in court on the merits of his or her action." (*Sierra Club v. San Joaquin LAFCO* (1999) 21 Cal.4th 489, 509.) The exhaustion doctrine requires CEQA litigants to have first raised objections to an EIR during the administrative process in order to permit agencies to meet these objections and avoid litigation. (*Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 535 (*City of Orange*); *Woodward Park Homeowners Ass'n, Inc. v. City of Fresno* (2007) 150 Cal.App.4th 683, 720 (*Woodward Park*).)

"To satisfy the exhaustion requirement, objections a party seeks to raise in a CEQA action must have been made known in *some* fashion, however unsophisticated [in the administrative proceeding]." (*California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 629 ("*CNPS*"), internal citations omitted, *emphasis added*.) "To satisfy the exhaustion doctrine, someone had to have raised these challenges – *or something like them at least* – in front of the City during the administrative proceeding." (*Id.* at 630, emphasis added.)

Omitted by Respondents is the exception to the exhaustion requirement that applies when information has not been provided to the public, or has been provided late. (*Woodward Park, supra,* 150 Cal.App.4th at 720; *accord Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1200 (*Bakersfield Citizens*).) In the instant case, the County omitted disclosure of the passage of SGMA or any discussion of its relevance to the groundwater issues addressed by the EIR.

Respondents attempt to hide behind the "exact issue" requirement of the exhaustion doctrine to evade judicial review of the County's unlawful decision to certify the EIR. (Opp. p. 6, citing *Resource Defense Fund v. Local Agency Formation Comm'n* (1987) 191 Cal.App.3d 886, 894.) However, less

specificity is required to exhaust an issue in an administrative proceeding as opposed to a judicial proceeding (*Woodward Park, supra,* (2007) 150 Cal. App. 4th 683, 712), even when parties are represented by counsel. (*Mani Brothers Real Estate Group v. City of Los Angeles* (2008) 153 Cal.App.4th 1385, 1395.) As *City of Orange* makes clear, an issue need not be raised with the exact same level of technical or legal detail in the administrative process that appears in subsequent briefing to preserve an issue for litigation. Rather, the "exact issue" requirement is met when "the objections [are] sufficiently specific so that the agency has the opportunity to evaluate and respond to them." (*City of Orange, supra,* 163 Cal.App.4th at 536.)

As a factual matter, Petitioner sufficiently raised claims related to SGMA to the County to give it a chance to deal with the important question of affirmative management of groundwater, rather than passive approval of whatever groundwater pumping was requested by Project proponents. The public noted that SGMA anticipated that "groundwater will be managed on a large scale [because] [i]t's been known about for decades that underground water has to be managed and regulated in some way" and that the laws "apply to this project." (SAR 453.)

As commenters stated, "state government has recognized that groundwater simply cannot be pumped without consequences being suffered by surrounding users." (SAR 453.) The County refused to confront these consequences that would be suffered by surrounding users, as required by SGMA. The County chose instead to rely on its analysis prepared prior to the passage of SGMA (SAR 466 ["The 2012 Draft EIR concluded that the proposed project would result in a less-than-significant impact to groundwater supply and recharge, noting that nearby landowners would not be directly affected by the project's groundwater extraction"]), and to claim that SGMA made no difference at all to its approval (*Ibid.*) Even if nearby landowners would not be directly impacted by water withdrawals, they would be indirectly impacted in the long run because of depletion of groundwater sources they might otherwise rely upon. The County reasoned, "The Drought Proclamation does not impose restrictions on use of groundwater as proposed by the project." (SAR 466.) While it may be true that the Drought Proclamation and SGMA did not impose restrictions on usage, the proclamation highlighted the urgency of, and SGMA mandated, new requirements for consideration of, and fair allocation to, various users of groundwater in a comprehensive fashion.

B. The County Failed to Review and Consider Plans or Methods to Allow Other Groundwater Users Including Nearby Ranchers to Use Groundwater That Would be Consumed By the Project.

The County failed to consider potential future usage of the groundwater that would be used by the Project for any users other than the Project proponents. SGMA required the County to consider adoption of a groundwater sustainability plan, an adjudication of water rights, *and* (not "or") a plan for groundwater usage by the State Water Board. (Govt. Code § 65350.5.) Each of these allocation methods potentially would have allowed other nearby users, such as ranchers, to draw upon the same water sources in the future that the proposed Project would drain and possibly exhaust. Instead, the County approved the use of groundwater for the Project without regard to other potential users.

While SGMA would not affect existing groundwater use rights (Opp., p. 29), the ranchers whose land overlies the Mehrten and Ione formations have just as much right to use the Ione formation groundwater as the Project site does, even if they are not presently drawing upon it. Therefore, the Project's usage of the groundwater would deprive them of future supplies. Instead of adjudicating or planning an orderly allocation of the groundwater, the County defaulted to allowing the Project proponents to take as much of the groundwater as they wanted, without regard to other potential users, and to exercise that right over the life of the Project, which could be over 50 years.

The County argues no groundwater plan need be enacted until 2022. (Opp., p. 28.) While this may be true, the County is not required to wait until 2022 before developing such a plan. The County could have, but did not, consider the impact of approving new groundwater users such as the Project on the availability of groundwater to other users when it eventually would create a groundwater plan. The Project would likely be using hundreds of acre feet of groundwater each year for the next 50 years or more. Therefore, the County should have analyzed how this enormous new use would impact plans it would have to develop in the next several years for groundwater usage. The County failed to do so.

The County argues the groundwater basin underlying the Project site is not adjudicated, nor subject to any State Board order. (Opp., p. 28.) This is true, but the County did not consider seeking an adjudication of it, nor a State Board order allocating its limited resources among potential users. Instead, the County approved the Project's sole usage of it in a first come, first served manner of disposition of irreplaceable resources. SGMA was intended to replace such practices of shortsighted allocation of precious groundwater resources with a more regularized system of planning and allocation. Rather than adhere to the requirements of SGMA, despite Petitioner's requests to do so, the County approved the Project's extensive groundwater usage without considering plans for other users to be able to share the same groundwater. This violates SGMA in addition to violating CEQA.

The County argues that the water supply assessment for the Project considered Groundwater Bulletin 118. (Opp., p. 28.) However, the County fails to acknowledge that its own Environmental Health Department expressed concern that the published specific yield estimates for the Consumnes Subbasin would not be representative of groundwater supplies to the Project site: "Generalized groundwater trends for the Consumnes Subbasin as presented [in] DWR [Department of Water Resources] Bulletin 118 may not [be] representative of groundwater trends or expected aquifer behavior in the Ione Basin, which is a small basin semi-isolated from the Consumnes Subbasin." (AR 5:2863.) Furthermore, despite the Environmental Health Department's criticism of the use of the information from this bulletin, and the EIR's reference to it, Department of Water Resources Bulletin 118 was not circulated to the public, submitted to the County, or contained in the County's files since it is absent from the administrative record. Since the EIR does not use yield estimates for the Ione Basin, and bases groundwater estimates on a document not available to the County or public, the groundwater yield estimates in the EIR omitted necessary information from public review.

The County argues that the Project did not require a "substantial amendment" to the General Plan. (Opp., p. 28.) The amendment of the General Plan for the Project was substantial. It allowed a change of 141 acres of property designated as General Agricultural (A-G) and Mineral Resources Zone (MRZ) to be designated as Industrial (I) property. (AR 2:458.) As facilitated by the General Plan designation change, the proposed zone change for the Edwin Center North site would convert land designated as "single family residential-agricultural" (R1-A) to "manufacturing." (*Ibid*.) Whereas with agricultural use, groundwater usage might be expected to be minimal (on the order of 4-10 acre feet per year), with industrial use of such a large parcel of property, groundwater usage would increase exponentially. Whereas a quarry might use 40 acre feet of water annually, an industrial center would be expected to use 140 acre feet. (AR 751.) Thus, by changing the general plan designation, the potential water usage for this large area would be expected to more than triple, with all supplies of water coming from groundwater. This is clearly a substantial general plan amendment within the meaning of SGMA.

By changing the designation of the property, the County allows a drastic increase in groundwater usage of the area even though its EIR predicted, without evidence, an overall decrease in groundwater usage for agricultural purposes. Before the change to industrial designation, the EIR states there is an annual drawdown of over 4,000 acre-feet per year of groundwater supply in the basin from which the Project would draw water. (AR 2:744.) The EIR recognizes that there is an annual drawdown of groundwater in the basin serving the Project site (AR 2:657), yet the Project proponents plan to remove an additional 182 acre-feet annually. (AR 2:751-752.) Thus, drawdown of groundwater would occur

even without the Project pumping groundwater, and overdraft would be exacerbated by the Project. However, the EIR argued without support that the actual groundwater loss is lower because groundwater extraction for agricultural purposes has "likely decreased." (AR 2:744.) The EIR provides no evidence supporting this statement. A local family rancher, Jim Scully, objected to the lack of information, asking, "On what information is the report basing the contention that water use in the immediate area has dropped since 1995? Where does that information come from?" (AR 241.) The FEIR responded that the alleged decrease was "not intended to completely offset the drop in groundwater levels, but is included merely as a note." (AR 1:251.) The effect of the exacerbation of the loss of groundwater, especially in continuing drought conditions where local water wells are running dry, was not analyzed nor were methods of fair allocation of groundwater from the local basin considered.

VI. CONCLUSION.

Because the County violated both CEQA and SGMA, a writ of mandate should be issued to set aside the County's approval of the project unless and until it complies with statutory mandates.

Date: February 19, 2016

Respectfully Submitted,
CHATTEN-BROWN & CARSTENS LLP

By: 
Douglas Carstens
Joshua Chatten-Brown

PROOF OF SERVICE Case No: 15-CV-09240

I am employed by Chatten-Brown & Carstens LLP in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 2200 Pacific Coast Highway, Ste. 318, Hermosa Beach, CA . On February 19, 2016 I served the within documents:

PETITIONER'S REPLY BRIEF

☒ **VIA UNITED STATES MAIL.** I am readily familiar with this business' practice for collection and processing of correspondence for mailing with the United States Postal Service. On the same day that 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 enclosed the above-referenced document(s) in a sealed envelope or package addressed to the person(s) at the address(es) as set forth below, and following ordinary business practices I placed the package for collection and mailing on the date and at the place of business set forth above.

☐ **VIA OVERNIGHT DELIVERY.** I enclosed the above-referenced document(s) in an envelope or package designated by an overnight delivery carrier with delivery fees paid or provided for and addressed to the person(s) at the address(es) listed below. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

☐ **VIA MESSENGER SERVICE.** I served the above-referenced document(s) by placing them in an envelope or package addressed to the person(s) at the address(es) listed below and provided them to a professional messenger service for service. (A declaration by the messenger must accompany this Proof of Service or be contained in the Declaration of Messenger below.)

☐ **VIA FACSIMILE TRANSMISSION.** Based on an agreement of the parties to accept service by fax transmission, I faxed the above-referenced document(s) to the persons at the fax number(s) listed below. No error was reported by the fax machine that I used. A copy of the record of the fax transmission is attached.

☐ **VIA ELECTRONIC SERVICE.** Based on a court order or an agreement of the parties to accept service by electronic transmission, I caused the above-referenced document(s) to be sent to the person(s) at the electronic address(es) listed below.

I declare that I am employed in the office of a member of the bar of this court whose direction the service was made. I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on February 19, 2016, at Hermosa Beach, California.

Cynthia Kellman

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