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W13b

Addendum

March 6, 2012

To: Commissioners and Interested Persons

From: California Coastal Commission
San Diego Staff

Subject: Addendum to **Item W13b**, Coastal Commission Permit Application **#A-6-NOC-11-086 (City of San Diego Master Storm Water Maintenance Program)**, for the Commission Meeting of March 7, 2012

On March 1, 2012, the City submitted a letter responding to the staff report. The following is a response to the City's letter:

City Comment 1. *"Impacts to biological resources from the maintenance activities will have, at most, temporary impacts on existing flood control channels, one third of which are lined with concrete…"*

The City claims that impacts on biological resources from channel maintenance will be temporary as any vegetation that is removed will grow back. However, this is not the case. The impacts on biological resources (specifically vegetation removal), which are not known at this time, will be permanent. Where necessary, vegetation will be removed from the channels to improve storm water flows. Based on the City's program, the City would then repeat this maintenance every one to three years. While some vegetation may grow back, it will be removed again year after year. Thus, the impacts to biological resources are permanent.

City Comment 2. *"The City has spent the last eight years developing the Master Maintenance Program to ensure a comprehensive planning approach to its annual facility maintenance projects…. This "late hit" hinders the City's ability to effectively plan an efficient and comprehensive approach to flood control and water quality protection that that has been specifically requested by other resource agencies."*

Commission staff did early on discuss our concerns with the City to a programmatic approach regarding public works maintenance activities. The City maintains that our comments were on a different project dealing with sewer maintenance. Whatever, the name of the program, the issues raised by Commission Staff to City staff developing programs for long-term maintenance of City public works facilities remain the same;

such a program needs to include detailed and specific information on impacts and mitigation.

While Commission staff acknowledges that we did not comment on the draft PEIR, the City was well aware of our concerns to such a programmatic approach. In addition to identifying our concerns with the program early on (as described above), in 2006 and 2007, Commission staff participated in a County-wide effort to develop a permitting guide for channel maintenance activities on a programmatic basis. The purpose of the guide was to assist the local governments in pursuing a programmatic approach to permitting their storm water and flood control maintenance activities. Along with each of the municipalities in the County (including the City of San Diego), the Army Corps of Engineers, Water Board, Department of Fish and Game, the U.S. Fish & Wildlife Service and Coastal Commission staff participated. In 2008, a document titled "Channel Maintenance Programmatic Permitting Guide" was published after signoff by each of the participants. During this effort, Commission Staff was consistently clear that such an approach was problematic for us as the Coastal Act does not include specifications for obtaining permits on a programmatic level and that the only way it would work for our agency is to have very specific information on impacts and mitigation, up front, with any application submittal. This is documented in the guide.

The City, as an alternative to the CDP process, could have applied to the Commission for approval of a public works plan (PWP) pursuant to Section 30605 of the Coastal Act. If a local jurisdiction applies for a PWP after certification of its LCP, then the standard of review for the PWP is that is must be in conformity with the City's certified LCP. The following PWP procedures would allow the City to develop the required specificity to meet the Commission's information needs for project review while giving the City the option to create a plan that covered the entirety of its project area.

The manner in which development is authorized is different for PWPs compared to development approved pursuant to an LCP. Under a certified LCP, a local government is delegated primary coastal permitting authority to approve and deny coastal permits for proposed development. This delegated permitting authority is similar to that of the Commission prior to LCP certification. In certain cases, those local government decisions can be appealed to the Commission, which can also approve or deny coastal permits for development. With a certified PWP, however, the concept of approving and denying coastal development permits for proposed development does not apply. Rather, the Commission is certifying a PWP and the projects it provides for at the onset. Further review of projects after a PWP is certified is limited to ensuring such projects are consistent with the PWP, including modifying such projects as necessary to ensure that this is the case. Thus, development of the specific projects contained in a certified PWP can proceed without a coastal permit provided the local government sends a Notice of Impending Development (NOID) to the Commission and other interested persons, organizations, and governmental agencies prior to undertaking development, and either the Commission deems the identified development project consistent with the approved PWP (with or without

conditions to make it so) or does not respond in a timely manner to the NOID. Pursuant to Coastal Act Sections 30605 and 30606, the Commission may impose conditions on such development project proposals to ensure that they are consistent with the certified PWP. It is in this respect that the level of specificity in a PWP is amplified. Once certified, the PWP establishes the scope of development that may be authorized with more limited oversight by the Commission than is typical of LCP implementation.

The differences between the manner in which development is authorized for PWPs compared to development approved pursuant to an LCP mean that it is critical that a certified PWP provide detailed specifications applicable to potential development projects, including detailed specifications related to mitigation and associated offsetting improvements (e.g., habitat restoration, public access improvements, etc.) that can be relied upon for ensuring that the development project conforms to the certified LCP. Thus, the need for detailed information on impacts and mitigation is the same as that required under a CDP.

As defined in the Commission's regulations, Section 13353, a PWP must delineate, at a minimum, the kinds, locations, and intensities of development allowed pursuant to it. Generally, PWPs are more geographically specific than LCPs. This is largely because lands subject to a PWP tend to cover less area than, for example, a whole city or county. Whereas an LCP might contain general policies that are applicable to an entire city or county geographic area, a PWP tends to include specific policy language tailored to a much smaller geographic area. For example, in 1982, the Commission approved a PWP for the 4,500 acre Wilder Ranch State Park in Santa Cruz County (PWP 2-82). PWP 2-82 provided specific information regarding potential development projects in natural and cultural preserve areas, on agricultural lands within the park, and for underwater areas, beach areas, and inland use areas. PWP 2-82 also provided specific information for development of a trail system in the park, as well as information on administration and operational facilities necessary to run the park. In 1997, the Commission approved PWP 7-97, which provided specific information regarding potential development projects for the 2,300-acre Gray Whale Ranch addition to Wilder Ranch State Park. The specific projects outlined in PWP 7-97 for the 2,300-acre site included public trail improvements, elimination of unauthorized roads, fencing and gates, parking lots, restrooms, interpretive and regulatory signs, and protection of historic lime kiln areas.

Thus, in this case, the City could have processed its proposed project, which includes several drainage channels in the coastal zone, as a PWP since it involves a much greater area than development typically authorized under a CDP. In return, a certified PWP then gives the City a more streamlined process when it implements specific development projects that are allowed under the PWP.

City Comment 3. *"The Master Maintenance Program includes an explicit process intended to allow state and federal agencies an opportunity to comment on storm water maintenance activities which the City intends to carry out each year. Under the terms of the Master Maintenance Program, the City will not conduct maintenance within a storm*

water facility until it has received approval from state and federal agencies with jurisdiction over the resources within that facility."

As noted in the City's comments, the Coastal Commission was not identified in the above-described annual review process in its Master Program. While it is true that the City has offered to include the Commission in this process, there is not sufficient information available in the Program for Commission Staff to analyze what this means. The Program identifies that if a problem is raised, that the City will work with the concerned agency to identify measures to bring the proposed activities into compliance and that work will not begin until they have approval from the agencies. However, the Program does not identify what happens if agreement is not reached. There is no process specifically identified to have the proposed activities brought back before the Commission if Staff finds that they are not consistent. For permitting purposes, the process for staff to bring concerns to the Commission is an appeal. There is no mechanism for an appeal to the Commission in the City's Program.

While the City has indicated that the Commission would get another chance to review the project through its Federal Consistency process, that is a separate review process and should not be the basis for finding the proposed CDP consistent with the City's certified LCP. In addition, there is insufficient information available at this time for staff to understand what this means as the ACOE has not issued a permit yet and it is not clear if the annual review will trigger federal consistency review or if the City would be submitting separately for such a review each year. Additionally, it is not clear if all proposed maintenance activities would trigger review by the ACOE as some activities could occur outside of their jurisdiction, but still result in impacts to sensitive biological resources.

City Comment 4. *"References to policies restricting activities associated with diking, filling, dredging, channelization and placement of riprap do not apply to the proposed maintenance activities. Exhibit G, SDMC Section 143.0145 (applies only to new channelization or substantial alteration of rivers or streams)."*

The City's statement is incorrect. Section 143.0145 of the City's certified Land Development Code (LDC) applies to all development, including maintenance activities that include among other things, excavating and disturbing existing vegetation. There is nothing in this code section that makes it only apply to new channelization projects. In fact, Section 143.0145 (d) of the LDC states, in part:

> The following development regulations and all other applicable requirements and regulations of FEMA apply to all *development* proposing to encroach in a Special Hazard Flood Area…

Development is then defined in the LDC as follows:

> Development means the act, process, or result of dividing a parcel of land into two or more parcels; of erecting, placing, constructing, reconstructing, converting,

> establishing, altering, maintaining, relocating, demolishing, using, or enlarging any building, structure, improvement, lot, or premises; of clearing, grubbing, **excavating**, embanking, filling, managing brush, or agricultural clearing on public or private property including the construction of slopes and facilities incidental to such work; **or of disturbing any existing vegetation**. [Emphasis added]

Thus, the cited provisions of the certified LCP do apply to the proposed project.

City Comment 5. *"The City's ESL regulations permit incidental public service projects such as maintenance of storm water facilities in the Coastal Overlay Zone….The Master Maintenance Program complies with the ESL regulations because it does not allow any expansion or modification to the storm water facilities beyond their original configuration."*

The City is correct that the project can be considered an incidental public service project and thus be a permitted use in wetlands under the City's ESL regulations. However, the ESL regulations further require that in order to qualify as an incidental public service project, it must also be "demonstrated that there is no feasible less environmentally damaging location or alternative, and where mitigation measures have been provided to minimize adverse environmental effects." As noted in the staff report, there is inadequate information at this time to conclude that the City's program is the least environmentally damaging alternative or that adequate mitigation has been provided. Impacts to sensitive biological resources including wetlands, uplands and potentially birds and mammals will occur as a result of the proposed project. However, the impacts to these resources have not been specifically identified. Even though the City has done an initial worst case impact analysis of wetlands, such an analysis may not be relevant 10 or 15 years in the future where changes in the habitat, species, hydrology and upland watershed could be significantly different. Thus, the project is not consistent with the certified LCP.

City Comment 6. *"The staff report unreasonably asks the City to specify the exact sites where mitigation will occur for impacts to wetlands. This is impracticable at best and impossible at worst because this CDP is not for a specific project, but for a program that covers maintenance activities that will be repeated over a number of years within seven miles of drainage channels over four watersheds.…In the context of mitigating biological resources, it is well-established that mitigation measures involving creation of replacement habitat need not identify the specific site where mitigation will occur."*

The statement by the City is exactly the reason why the project is a problem. The Commission consistently requires that mitigation site for impacts to wetlands and other sensitive biological resources be identified up front. First and foremost, the Commission cannot conclude that mitigation requirements have been met if a mitigation site is not identified. Reliance on identification of a mitigation site in the future does not assure that mitigation has adequately been provided.

City Comment 7. *"[T]he City identified the maximum extent of the impacts of each channel…Impacts were quantified within each facility based on vegetation mapping.*

Furthermore, the extent of impact was based on representative hydrological analysis which determined that the storm water carrying capacity of the majority of the facilities could be enhanced without removing vegetation on the side slopes."

While the City has identified impacts to wetlands based on a "worst-case" scenario, this does not account for all the impacts to sensitive biological resources or take into account that vegetation and conditions at the project sites and within the upland watersheds can and will likely change over the 20 year life of the permit. Thus, it is not clear how it can be stated that all impacts on wetlands have been identified. In addition, the City's analysis does not include temporary impacts (which in some cases, the Commission considers the same as permanent), impacts on sensitive upland resources resulting from the project, impacts from water quality measures or impacts from mitigation itself. Additionally, surveys of sensitive birds and mammals have not been conducted, so it is unclear, what impacts will occur to these creatures. Thus, impacts on sensitive biological resources have not been identified.

City Comment 8. The Master Maintenance Program specifically requires a qualified hydrologist to consider the potential upstream and downstream impacts from maintenance and to identify controls to minimize risks. The Master Maintenance Program includes Protocol WQ-10 as a safeguard to make sure that the downstream erosion control features are functioning properly by requiring inspection within 30 days of the first two-year storm following maintenance. WQ-10 also requires appropriate remedial measures be implemented in the event that erosion is discovered.

Given the significant resources located downstream (Los Penasquitos Lagoon, Tijuana Estuary, Mission Bay, etc.) from the proposed maintenance activities, impacts from erosion could be significant. Again, as detailed in the staff report, waiting until 30 days after the first rain event to inspect maintained drainages could be too late. Depending on the time of year and number of storms, significant erosion could occur before the City inspects maintained drainages and comes up with measures to help address it.

On Page 24 of the staff report, the following shall be added after the first incomplete paragraph:

<u>In its letter responding to the staff report, the City makes several arguments that its project is consistent under CEQA, relying on several judicial opinions to support its claim, which precludes the Commission from denying the project based on a finding that the project is inconsistent with the certified LCP. The cited cases and the letter, however, do not negate the Commission's core issue with this project, its lack of consistency with the certified LCP. As a responsible agency operating pursuant to its certified regulatory program authority, the Commission is responsible for "considering only the effects of those activities involved in a project which it is required by law to carry out or approve." (Pub. Res. Code, § 21002.1, subd. (d); see, Sierra Club v. California Coastal Commission (2005) 35 Cal.4th 839, 860 (Sierra Club).) Thus, under CEQA, the Commission is responsible for making findings consistent with its governing law—the Coastal Act. Pursuant to Section 30603 of the Coastal Act, the</u>

Commission has appellate jurisdiction over a proper and timely appealed CDP that was issued by a local government. In this case, the Commission has relied on its appellate jurisdiction to make findings relative to the proper and timely appealed CDP's consistency with the City's certified LCP. In doing so, the Commission has found that the project cannot be found consistent with the City's certified LCP for the reasons stated in the report which include, in part, that the City has not submitted sufficient site-specific information to allow the Commission to determine how, and to what extent, the project will affect coastal resources that are protected under the City's LCP. Therefore, notwithstanding the City's claim to the contrary, the Commission has complied with its CEQA mandate, as a certified regulatory agency, to consider the effects of the City's activity as they relate to consistency with the City's certified LCP.

The City also seems to imply that the Commission cannot exceed the evidentiary requirements beyond that which is allowed under CEQA, arguing that CEQA does not require the level of specificity sought by the Commission. Even if the City cited an arguable inconsistency between the City's CEQA findings and the Commission's findings under the Coastal Act as they relate to the subject appeal, Public Resources Code, Section 21174 provides, in part: "To the extent of any inconsistency or conflict between the provisions of the … Coastal Act … and the provisions of [CEQA], the provisions of [the Coastal Act] shall control." The Supreme Court endorsed this CEQA provision, relying on it to dismiss an argument offered by a plaintiff that argued that the Commission was required, under CEQA, to review effects of part of a project that was outside of its jurisdiction in addition to the part of the project that was within its jurisdiction. (Sierra Club, *supra*, 35 Cal.4th at p. 859.) The Court held that CEQA requires the Court to honor the limits of the Commission's authority under the Coastal Act and to reject an argument to override or expand those limits even if they are inconsistent with certain CEQA provisions. (Id.) In this case, the City's compliance with CEQA and its certified PEIR is a distinct and separate regulatory requirement than its compliance with its LCP through the CDP process. Even though its PEIR may be entirely consistent with CEQA, there is no guarantee that those findings and the evidence used to support the findings will also be consistent with its certified LCP. Thus, the Commission is not bound to use the City's CEQA findings in making its own findings under the Coastal Act, including its findings related to a project's conformity with a certified LCP. Rather, the Commission makes its own determination as to what evidentiary support is required before it can find that a development project is consistent with a certified LCP and/or the Coastal Act.

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THE CITY OF SAN DIEGO

W13b

March 1, 2012

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CALIFORNIA
COASTAL COMMISSION
SAN DIEGO COAST DISTRICT

Mary K. Shallenberger, Chair
California Coastal Commission
45 Fremont St., Suite 2000
San Francisco, CA 94105

RE: Agenda Item W13b, Appeal No. A-6-NOC-11-086, City of San Diego Coastal Development Permit for Storm Water Facility Maintenance Master Program

To Commissioner Shallenberger and Honorable Commissioners:

The City of San Diego appreciates this opportunity to submit comments on the appeal of the Coastal Development Permit (CDP) for the City's Master Storm Water System Maintenance Program (Master Maintenance Program). The City strongly disagrees with staff's recommendation that the Coastal Commission find a substantial issue and deny the CDP. Granting this appeal and denying the CDP on the grounds set forth in the staff report would not be legally defensible. The CDP permits a carefully planned and well-documented ***maintenance*** program for storm water facilities located within the Coastal Zone. Impacts to biological resources from these maintenance activities will have, at most, temporary impacts on existing flood control channels, ***one third of which are lined with concrete***. Exhibit A, PEIR page 3-5 to 3-10.

The City is especially disappointed by the number of incorrect statements and assumptions in the staff report, each of which is addressed in detail below. Had Commission staff taken the opportunity to submit comments on the City's Program Environmental Impact Report (PEIR) -- as ***all of the other federal and state regulatory agencies did*** -- then many of these issues could have been resolved before this late date. The City has spent the last eight years developing the Master Maintenance Program to ensure a comprehensive planning approach to its annual storm water facility maintenance projects. The San Diego Regional Water Quality Control Board, California Department of Fish and Game, U.S. Department of Fish and Wildlife, and U.S. Army Corps of Engineers support the City's efforts to secure long-term permits for their storm water maintenance activities to protect San Diego homes and businesses from overflowing flood control channels across the City. Thus, Commission staff stand alone in second guessing this approach and recommending denial of the Master Maintenance Program CDP in favor of going

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APPLICANT'S Response to STAFF Recommendation

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DIVERSITY

back to the unworkable and environmentally less desirable case-by-case permitting. This "late hit" hinders the City's ability to effectively plan an efficient and comprehensive approach to flood control and water quality protection that has been specifically requested by other regulatory agencies. The CDP for the Master Maintenance Program complies with the City's certified Local Coastal Program (LCP), the Coastal Act, and the California Environmental Quality Act (CEQA), and ***the City, therefore, respectfully requests that the Coastal Commission deny the appeal.***

The Master Maintenance Program Complies With the Coastal Act. The Coastal Act and the City's LCP specifically allow for maintenance and incidental public service projects such as storm water facility maintenance. Exhibit B, Pub. Res. Code § 30610(d) (exempting "maintenance activities" that do not result in enlargement of a facility from CDP requirements); Exhibit C, San Diego Municipal Code (SDMC) § 143.0130(d)(3) (allowing "incidental public service projects" in wetlands in the Coastal Overlay Zone). The staff report ignores these provisions and repeatedly claims that the CDP is inconsistent with the Coastal Act and the City's LCP but fails to identify any specific conflict. Instead, it quotes large portions of the City's LCP -- many of which do not even apply to this maintenance program -- and then vaguely concludes that "the City's approval of the master coastal development permit is inconsistent with resource protection policies of the City's certified LCP." Staff Report at 11. In fact, staff's biggest issue with the CDP seems to be the fact that the Coastal Commission "would be giving up jurisdiction to review the analysis of potential impacts or required mitigation for individual projects approved by this permit for at least 20 years." *Id.* To the contrary, the Coastal Commission will have ample opportunity to review individual projects: (1) Commission staff will review each annual maintenance plan for conformance with the CDP and PEIR, along with the other state and federal resource agencies; and (2) the Coastal Commission will have to make federal consistency determinations on the permits that will be issued by the U.S. Army Corps of Engineers. Exhibit D, Master Maintenance Program pages 27-28. In any case, Staff's concern boils down to simple distrust and is an improper encroachment into the City's authority under the Coastal Act to implement its own LCP.

The Master Maintenance Program Complies With CEQA. CEQA encourages the use of a Program EIR where a series of related actions can be characterized as one large project. Exhibit E, 14 Cal. Code Regs. 15168. Preparing a PEIR instead of doing CEQA analysis on a case-by-case basis provides efficiency benefits to the lead agency, including avoiding duplicative reconsideration of basic policy considerations and avoiding unnecessary paperwork. *Id.* Benefits of PEIRs, however, also include enhanced environmental review, such as the opportunity for more exhaustive consideration of impacts and alternatives than would be practical in an EIR on an individual action, more comprehensive consideration of cumulative impacts, and the ability to consider program-wide mitigation measures. *Id.* All of these benefits support the City's programmatic approach to storm water facility maintenance.

Given the recognized benefits of large-scale planning and environmental review, it comes as a surprise that Commission staff takes issue with the programmatic approach that the City has been pursuing for eight years, especially since Commission staff did not provide any comments on the

City's Draft PEIR or Recirculated PEIR. The staff report's recommendation that the City instead issue individual CDPs for each drainage channel in the coastal zone flies in the face of effective land use planning and is not required by the Coastal Act, CEQA, or any other law.

The City offers the following responses to issues and concerns expressed in the staff report dated February 23, 2012. For the Commission's convenience, these comments and concerns have been grouped into categories containing individually numbered issues raised by staff and corresponding responses from the City.

Coastal Act

Issue CA1: Commission staff previously asked the City to remove storm water facilities within the Coastal Zone from the Master Maintenance Program.

Response CA1: Commission staff is confusing the current Storm Water Maintenance project with the City's Canyon Sewer project that was being processed in 2005. The City never received a request from Commission staff to remove the storm water facilities in the Coastal Zone from the Master Maintenance Program. In fact, the City never received any written comments from the Commission staff during either of the two public review periods for the PEIR, despite sending copies of the Draft PEIR and Recirculated PEIR directly to Commission staff.

Issue CA2: Granting 20-year CDP would cause the Coastal Commission to forfeit its ability to review annual maintenance activities.

Response CA2: The Master Maintenance Program includes an explicit process intended to allow state and federal agencies an opportunity to comment on the storm water maintenance activities which the City intends to carry out every year. Exhibit D. Under the terms of the Master Maintenance Program, the City will not conduct maintenance within a storm water facility until it has received approval from state and federal agencies with jurisdiction over the resources within that facility. Exhibit D, page 28.

The annual process includes a comprehensive evaluation of each proposed maintenance activity including a facility-specific analysis of archaeological, biological, and water resources to quantify impacts and incorporate specific mitigation measures required by the PEIR. The annual process also includes detailed hydrology studies of each facility to identify the minimal amount of vegetation and silt removal needed to maximize the capacity of each facility to transport storm water. These studies will be provided to the state and federal agencies along with a comprehensive checklist consisting of 70 specific questions designed to determine if the proposed activities are within the scope of both the Master Maintenance Program and Program EIR. Exhibit D, Appendix J.

As no request was received from Commission staff to be included in the annual review process, the California Coastal Commission is not specifically identified in Section 6.2 of the

Master Maintenance Program. However, during a recent meeting with Commission staff on the appeal issue, the City volunteered to include the California Coastal Commission in the annual review process, and agreed to modify the text of the Master Maintenance Program accordingly. In an email from the United States Army Corps of Engineers, the Corps agreed to include the California Coastal Commission in its annual conformance review process. Exhibit F, email from Corps dated 1/31/12. The Corps goes on to discuss the fact that a Coastal Consistency Determination by the Coastal Commission is required by Section 307 of the Coastal Zone Management Act (CZMA). For facilities that require CZMA consistency determinations, the Corps will require all special conditions of the determination be incorporated into the Individual 404 Permit issued for the Master Maintenance Program.

Issue CA3: Factors other than environmental protection and flood capacity could affect maintenance by causing it to be deferred allowing the value of habitat to increase.

Response CA3: The City is uncertain as to the nature of Commission staff's concern regarding "other factors" but assures the Commission that the purpose of the Master Maintenance Program is to provide proactive maintenance to reduce flooding while minimizing impacts to environmental resources and/or providing adequate compensation. In addition, the Master Maintenance Program commits the City to conduct numerous studies in the annual review process, and to evaluate whether there are changed circumstances with regard to habitat impacts warranting additional environmental review in accordance with CEQA Guidelines 15168 and 15162.

Issue CA4: The Master Maintenance Program would not comply with the City's LCP policies which limit diking, filling, dredging, channelizing and/or placement of riprap or concrete in drainage channels (citing SDMC § 143.0145).

Response CA4: Many of the City's LCP policies identified in the staff report are not applicable to the Master Maintenance Program. References to policies restricting activities associated with diking, filling, dredging, channelizing and placement of riprap do not apply to the proposed maintenance activities. Exhibit G, SDMC § 143.0145 (applies only to new channelization or substantial alteration of rivers or streams). The Master Maintenance Program is solely intended to allow maintenance of existing storm water facilities through the removal of vegetation and sediment deposits which impede the transport of storm water. Construction of new storm water facilities or the placement of structures within existing facilities (other than those for temporary erosion control, which would be removed after vegetation re-establishes) is not proposed under the Master Maintenance Program. Removal of material is limited to accumulated sediment and vegetation. The original dimensions of the underlying drainage will not be modified under the Master Maintenance Program. Thus, no dredging leading to new channelization or substantial alteration would occur.

Also, the LDC and many of the land use plan policies cited in the Staff Report allow for "incidental public services" which includes flood control. Exhibit G, SDMC § 143.0130(d)(3).

Issue CA5: Storm water maintenance would not comply with City's Environmentally Sensitive Lands (ESL).

Response CA5: The City's ESL regulations permit incidental public service projects such as maintenance of storm water facilities in the Coastal Overlay Zone. Exhibit G, SDMC § 143.0130(d)(3). The Master Maintenance Program complies with the ESL regulations because it does not allow any expansion or modification to the storm water facilities beyond their original configuration. Maintenance activities will take place within existing storm water facilities that have been maintained in the past. The only deviation from the ESL required is permission to enter the 100-foot wetland buffer to perform maintenance. The buffer deviation is unavoidable because storm water facilities by their very nature and function are located within wetlands.

Biological Resources

Issue BR1: The extent of biological impacts and effectiveness of mitigation is unknown. Specific biological impacts and mitigation measures are not identified.

Response BR1: The Staff Report severely understates the extensive environmental analysis the City performed in approving the CDP. The staff report repeatedly and erroneously states that the impacts to sensitive biological resources are not known.

To the contrary, the City identified the ***maximum*** extent of the impacts on each channel. For channels with a width of twenty feet or more from bank to bank, impacts are assumed for the channel bottom and adjacent two feet of bank. Exhibit A, PEIR page 4.3-25. For channels with a width of less than twenty feet, impacts are assumed for the entire channel. *Id.* The actual impacts on biological resources may be ***less*** than this, but they will not be more.

Impacts were quantified within each facility based on the vegetation mapping. Furthermore, the extent of impact was based on representative hydrological analysis which determined that the storm water carrying capacity of the majority of the facilities could be enhanced without removing vegetation on the side slopes. Thus, the analysis was based on a realistic prediction of the amount of vegetation removal required. It should be noted that the initial analysis in the PEIR assumed that all vegetation would be removed within a facility to assure a "worst-case" analysis. However, members of the public objected to this approach because they believed it would discourage the City from minimizing the amount of vegetation removed. The City disagreed with this concern given the fact that the cost of removing vegetation would be a major incentive to limit the amount of vegetation removed during maintenance. Nevertheless, the City modified the analysis based on the conclusions of hydrological analysis. The resulting impacts are summarized in Table 4.3-7. Exhibit A, PEIR pages 4.3-27 through 4.3-29.

The staff report unreasonably asks the City to specify the exact sites where mitigation will occur for impacts to wetlands. This is impracticable at best and impossible at worst because

this CDP is not for a specific project, but for a program that covers maintenance activities that will be repeated over a number of years within seven miles of drainage channels over four watersheds. For exactly this reason, CEQA does not require the level of specificity the staff report seeks. "[F]or the kinds of impacts where mitigation is known to be feasible, ***but where practical considerations prohibit devising such measures early in the planning process*** (e.g., at the general plan amendment or rezone state), the agency can commit itself to eventually devising measures that will satisfy specific performance criteria articulated at the time of project approval." Exhibit H, *Sacramento Old City Ass'n v. City Council of Sacramento*, 229 Cal. App. 3d 1011, 1028-29 (1991) (emphasis added). Accordingly, the CEQA Guidelines themselves specify that an agency need not always include specific mitigation measures, but instead "may specify performance standards which would mitigate the significant effect of the project and which may be accomplished in more than one specified way." Exhibit I, 14 Cal. Code Regs 15126.4(a)(1)(B). "Where future action to carry a project forward is contingent on devising means to satisfy such criteria, ***the agency should be able to rely on its commitment*** as evidence that significant impacts will in fact be mitigated." Exh. H, *Sacramento Old City Ass'n*, 229 Cal. App. 3d at 1029.

In the context of mitigating biological impacts, it is well-established that mitigation measures involving creation of replacement habitat need not identify the specific site where mitigation will occur. Exhibit J, *California Native Plant Soc'y v. City of Rancho Cordova*, 172 Cal. App. 4th 603, 622 (2009). In that case, the city properly mitigated impacts on wetlands and vernal pools where "the City determined the impact the Project would have -- habitat loss -- and identified a specific measure to mitigate that impact -- preservation or creation of replacement habitat off site in a specific ratio to the habitat lost as a result of the Project." *Id.* The court reasoned that the city "was entitled to rely on the results of a future study to fix the exact details of the implementation of the mitigation measures the agency identified in the EIR." *Id.* In other words, all that CEQA requires for mitigating impacts on wetlands is a commitment to achieving a performance standard in the form of a mitigation ratio. Exhibit J, *California Native Plant Soc'y*, 172 Cal. App. 4th at 610, 622 (upholding a mitigation ratio of 2:1 for habitat preservation and 1:1 for habitat creation); Exhibit K, *Endangered Habitats League, Inc. v. County of Orange*, 131 Cal. App. 4th 777, 794 (2005) (upholding a mitigation ratio of 2:1 for gnatcatcher habitat preservation on-site or off-site); Exhibit L, *Defend the Bay v. City of Irvine*, 119 Cal. App. 4th 1261, 1274-76 (2004) (upholding a mitigation measure identifying seven avoidance measures for Least Bell's Vireo habitat with a specific mitigation plan to be developed at a later date though consultation with the U.S. Fish and Wildlife Service and California Department of Fish and Game).

This CDP complies with CEQA by requiring a minimum mitigation ratio of 3:1 for wetlands impacted within the coastal zone. In addition, at least one of the units of mitigation will consist of creation of new wetlands. Exhibit A, PEIR pages 4.3-39 and 4.3-40. In other words, ***the City has committed to create, restore, or enhance at least three acres of wetlands to mitigate for every one acre of wetlands impacted in the Coastal Overlay Zone*** by the maintenance activities. Denying this CDP because the City has not mapped out exactly where that mitigation will occur would be contrary to CEQA.

Lastly, the City believes it is important to realize that the wetland impacts associated with maintenance in storm water facilities are unlike typical development projects for which CDPs are issued. Typical development projects result in the ***permanent*** loss of wetland vegetation ***and*** the drainage course. Storm water maintenance results in the ***temporary*** loss of wetland vegetation without the loss of the underlying drainage course. Since the underlying drainage course remains after maintenance, wetland vegetation generally begins to re-establish within one year after maintenance occurs. It is this ability of wetlands to recover after maintenance that necessitates regular maintenance.

Issue BR2: Mitigation for biology impacts in wetlands is not guaranteed to be within coastal zone, which is inconsistent with the Land Development Code Biological Guidelines section (B)(1)(a).

Response BR2: The City is required to follow its own regulations. As indicated in the staff report, the City's Land Development Code Biology Guidelines requires impacts to Coastal Zone resources to be mitigated within the Coastal Zone. Exhibit M, Land Development Code Biology Guidelines, page 14. The City is entitled to a presumption that it will follow its own environmental regulations. Exhibit N, *Oakland Heritage Alliance v. City of Oakland*, 195 Cal. App. 4th 884, 910 (2011). Therefore, staff's concern is not a proper basis for denying the CDP. However, should the Commission wish to make this an explicit condition of the CDP, the City would support this condition.

Issue BR3: Inadequate information is provided on the amount of impact to upland habitat within coastal zone.

Response BR3: Given the sensitivity of wetlands and the special consideration they receive in the Coastal Act, the PEIR did quantify the potential impacts to wetlands within the Coastal Zone. The total impacts to upland habitat are anticipated to be less than 5 acres distributed over the entire metropolitan area. Thus, the City did not feel it was necessary to include a specific estimate of upland loss within the coastal zone. Also, the City has identified all of the access and staging areas that will be used to perform this maintenance. These areas are in established uplands and any impacts to sensitive habitat will be minimal.

Issue BR4: Biological conditions within storm water facilities may change over time if no maintenance occurs which would change the mitigation assumptions made in the PEIR.

Response BR4: The City acknowledges that the condition of vegetation within storm water facilities may change with time; particularly, if regular maintenance does not occur. This potential is precisely the reason why the Master Maintenance Program and PEIR require annual biological surveys prior to conducting maintenance in order to identify the current condition of the vegetation and assure that the mitigation adequately reflects the impact. This is all that CEQA requires. Exhibit O, *National Parks & Conserv. Ass'n v. County of Riverside*, 71 Cal. App. 4th 1341, 1366 (1999) (holding that a lead agency may rely on future studies to define the design of a mitigation measure where the results of later field studies are

used to tailor mitigation measures to fit actual environmental conditions). Furthermore, if the Coastal Commission believes that the impacts of a particular maintenance project were not adequately covered by the PEIR, the Substantial Conformance Review process contained in the Master Maintenance Program gives the Coastal Commission the option of withholding approval of that project.

Issue BR5: Impacts from access and stockpiling in coastal zone are not adequately addressed. Impacts from mitigation in the coastal zone not considered.

Response BR5: Access and stockpiling locations are specifically identified in the Master Maintenance Program and impacts from access and stockpiles are specifically addressed in the Recirculated PEIR. Impacts from access and stockpiling would be limited to upland resources, as access and stockpiling would not occur within storm water facilities. As discussed earlier, impacts to upland resources within the coastal zone did not warrant separation from the overall estimated impacts to upland resources.

Although impacts from mitigation are not expected, the PEIR contains a specific mitigation measure requiring potential impacts from mitigation to be evaluated and compensated, as appropriate. Exhibit A, PEIR Mitigation Measure 4.3.14, page 4.3-43.

Issue BR6: Sensitive species surveys were not conducted.

Response BR6: The potential for sensitive species to occur in or adjacent to storm water facilities was addressed in the PEIR based on the occurrence of suitable habitat and historic sitings. Protocol surveys for sensitive species were not conducted because they would not necessarily reflect what species may exist at the time maintenance occurs. CEQA does not require a lead agency to conduct every recommended test or perform all recommended research to evaluate the impacts of a proposed project. The fact that additional studies might be helpful does not mean that they are required. [internal citations omitted] The agency has discretion to reject a proposal for additional testing or experimentation." Exhibit P, *Ass'n of Irritated Residents v. County of Madera*, 107 Cal. App. 4th 1383, 1396, 133 Cal. Rptr. 2d 718, 729 (2003) (holding that County was not required to conduct a protocol level study merely because it was requested by a commenter to the EIR.) The analysis in the PEIR is based on suitable habitat and historic sitings and provides substantial evidence to support the conclusions regarding impacts to sensitive species. *Id.* This approach complies with CEQA. Exhibit O, *National Parks & Conserv. Ass'n,* 71 Cal. App. 4th at 1366.

Issue BR7: It is unknown whether adequate mitigation has been provided.

Response BR7: The PEIR contains very detailed mitigation measures designed to describe the nature and amount of mitigation that would occur. The amount of mitigation is established by explicit mitigation ratios in compliance with the City's adopted Biology Guidelines. Exhibit M. The nature of the mitigation is described in the Conceptual Wetland Restoration Plan. Exhibit A, PEIR Appendix C.3.

Issue BR8: There is no specific provision documenting when the mitigation should occur or specifying necessary performance criteria.

Response BR8: Mitigation ratios are included in Table 4.3-10 of the PEIR. Exhibit A, PEIR pages 4.3-39 and 4.3-40. The City will conduct the mitigation for one year's maintenance before commencing maintenance in a subsequent year. Completion of the mitigation for the preceding year will be confirmed in the annual report required by Mitigation Measure 4.3.8.

Water Quality

Issue WQ1: Master Maintenance Program does not adequately protect downstream habitat following maintenance.

Response WQ1: The Master Maintenance Program requires the preparation of an Individual Hydrology and Hydraulic Assessment (IHHA). The IHHA and Protocol WQ-9 of the Master Maintenance Program specifically require a qualified hydrologist to consider the potential upstream and downstream impacts from maintenance (e.g., vegetation removal) and to identify specific controls (e.g., check dams) to minimize any risk to upstream and/or downstream property. As indicated in the Commission staff report, the Master Maintenance Program includes Protocol WQ-10 as a safeguard to make sure that the downstream erosion control features are functioning properly by requiring a downstream inspection within 30 days of the first two-year storm following maintenance. WQ-10 also requires appropriate remedial measures be implemented in the event that erosion is discovered.

The protections afforded by Protocols WQ-9 and 10 are considered appropriate given the characteristics of the portions of storm water facilities that normally require maintenance, especially sediment removal. Runoff velocities in the affected storm water facilities are generally low and non-erosive, which is exactly why they require regular maintenance. In other words, the storm water facilities commonly act as sediment traps rather than sediment generators and sediment accumulation is a problem in many of the urban storm water facilities. Therefore, the downstream structures required by Protocol WQ-10, with an initial inspection to confirm their effectiveness, is adequate protection from downstream erosion following maintenance.

Project Alternatives

Issue PA1: The alternatives discussion is insufficient and the City has not demonstrated that the proposed project is the least environmentally damaging.

Response PA1: The City is perplexed by the inference that the PEIR does not contain an adequate discussion of alternatives. The staff report second guesses the City's CEQA findings by recommending that the CDP should be denied because there are feasible alternatives. The staff report, however, provides no evidence to support this statement.

Based on the requirement that alternatives meet most of the basic objectives of the proposed project and reduce significant impacts associated with the proposed project, the PEIR analyzed the following alternatives. The City went to great lengths to meet with concerned citizens and environmental organizations to identify alternatives. In fact, the widening and offsite reduction alternatives were identified by members of the public during those meetings.

- No Project: No Maintenance;
- No Project: Maintenance Pursuant to Separate Permits;
- Raising the channel banks by constructing walls or berms along the top of the channels;
- Diverting storm water in pipes around constrained segments;
- Widening channels to accommodate vegetation; and/or
- Off-site Runoff Reduction.

Commission staff focuses on the "no project" and individual permit alternatives. The City studied the "no project" and individual permit alternatives in the PEIR and explicitly found these alternatives are infeasible based on substantial evidence that "[s]pecific economic, legal, social, technological, or other considerations . . . make infeasible the mitigation measures or alternatives identified in the environmental impact report." Exhibit Q, *California Native Plant Soc'y v. City of Santa Cruz*, 177 Cal. App. 4th 957, 982 (2009). Specifically, the City rejected the "no project" alternative "because ***it would not fulfill the basic objective to protect life and property from flooding***. The overgrowth within storm water facilities that would occur from lack of regular maintenance would impede flood waters and cause flooding." Exhibit A, PEIR at 7-4 (emphasis added). Similarly, the City rejected the individual permit alternative because "it would not provide the comprehensive approach to maintenance which characterizes the proposed Master Maintenance Program." *Id.* The City noted that federal agencies with jurisdiction over wetlands expressed concerns with the case-by-case approach that the City had historically used and "[t]hese agencies objected to the fact that separate permits do not allow consideration of cumulative effects of maintenance activities or the creation of larger more viable mitigation areas." *Id.*

The PEIR provides a clear and reasoned conclusion that each of the alternatives are infeasible and/or would not substantially reduce the environmental effects of the proposed Master Maintenance Program. A summary of the alternatives that were considered and the results of the evaluation is provided in the Executive Summary of the PEIR. Exhibit A, PEIR pages ES-4 through ES-9.

Implementation of the proposed Master Maintenance Program represents the least environmentally damaging, feasible means of protecting the public against life and property risks related to flooding. The preparation of individual maintenance plans is based on the results of detailed hydrology and hydraulic analysis (IHHA) which is mandated by the Master Maintenance Program. The hydrological engineer preparing the IHHA is specifically required to determine what plant material can be left in place during maintenance to assure that impacts to biological resources are minimized to the greatest extent possible.

Issue PA2: City should consider obtaining separate Coastal Development Permits for each storm water facility as an alternative.

Response PA2: This recommendation contradicts the position taken by other state and federal resource agencies which have directed local agencies conducting storm water maintenance to combine their requests for permits into single, long-term permit requests. In a letter dated September 22, 2004, the California Regional Water Quality Control Board directed local agencies to pursue programmatic permits for storm water maintenance (Exhibit R, letter from RWQCB dated 9/22/04). As a result of this direction, many of the local cities formed a Regional Channel Maintenance Workgroup which issued a Work Plan on June 7, 2006. The Work Plan contains many of the concepts included in the City's proposed Master Maintenance Program. Exhibit S, Work Plan pages 1-5.

Issue PA3: City should consider adopting a public works plan as an alternative.

Response PA3: The City is unclear how a Public Works Plan would differ from the proposed Master Maintenance Program.

For all of these reasons, the City respectfully requests that the Commission deny the appeal so that the City can move forward with implementation of this crucial maintenance program.

Sincerely,

Signature on file

Kris McFadden
Deputy Director

Enclosures:

Exhibit A.	Program EIR Excerpts (pages 3-5 through 3-10, 4.3-25 through 4.3-30, 4.3-39, 4.3-40, and 7-4, Appendix D.3)
Exhibit B.	Pub. Res. Code § 30610(d)
Exhibit C.	San Diego Municipal Code (SDMC) § 143.0130(d)(3)
Exhibit D.	Master Maintenance Program Excerpts (pages 27 and 28 and Appendix J)
Exhibit E.	Section 15168 of the CEQA Guidelines
Exhibit F.	Email from U.S. Army Corps of Engineers dated 1/31/12
Exhibit G.	SDMC § 143.0145
Exhibit H.	Sacramento Old City Ass'n v. City Council of Sacramento, 229 Cal. App. 3d 1011, 1028-29 (1991)
Exhibit I.	14 Cal. Code Regs 15126.4(a)(1)(B)
Exhibit J.	California Native Plant Soc'y v. City of Rancho Cordova, 172 Cal. App. 4th 603, 622 (2009)

Exhibit K.	Endangered Habitats League, Inc. v. County of Orange, 131 Cal. App. 4th 777, 794 (2005)
Exhibit L.	Defend the Bay v. City of Irvine, 119 Cal. App. 4th 1261, 1274-76 (2004)
Exhibit M.	Biological Guidelines Excerpts (pages 14 and 16)
Exhibit N.	Oakland Heritage Alliance v. City of Oakland, 195 Cal. App. 4th 884, 910 (2011)
Exhibit O.	National Parks & Conserv. Ass'n v. County of Riverside, 71 Cal. App. 4th 1341, 1366 (1999)
Exhibit P.	Ass'n of Irritated Residents v. County of Madera, 107 Cal. App. 4th 1383, 1396, 133 Cal. Rptr. 2d 718, 729 (2003)
Exhibit Q.	California Native Plant Soc'y v. City of Santa Cruz, 177 Cal. App. 4th 957, 982 (2009)
Exhibit R.	Letter from Regional Water Quality Control Board dated September 22, 2004
Exhibit S.	Regional Channel Maintenance Work Plan Excerpts (pages 1-5)

Cc: Commissioner Steve Blank, California Coastal Commission, w/enc.
Commissioner Dayna Bochco, California Coastal Commission, w/enc.
Commissioner Dr. William A. Burke, California Coastal Commission, w/enc.
Commissioner Wendy Mitchell, California Coastal Commission, w/enc.
Commissioner Jana Zimmer, California Coastal Commission, w/enc.
Commissioner Martha McClure, California Coastal Commission, w/enc.
Commissioner Steve Kinsey, California Coastal Commission, w/enc.
Commissioner Mark W. Stone, Vice-Chair, California Coastal Commission, w/enc.
Commissioner Brian Brennan, California Coastal Commission, w/enc.
Commissioner Richard Bloom, California Coastal Commission, w/enc.
Commissioner Esther Sanchez, California Coastal Commission, w/enc.
Deborah Lee, California Coastal Commission, San Diego Coast District Office District Manager
Lee McEachern, California Coastal Commission, San Diego Coast District Office Coastal Program Analyst, w/enc.
Sherilyn Sharb, California Coastal Commission, San Diego Coast District Office Deputy Director
Mayor Jerry Sanders, City of San Diego
Councilmember Sherri Lightner, City of San Diego, District 1
Council President Pro Tem Kevin Faulconer, City of San Diego, District 2
Councilmember Todd Gloria, City of San Diego, District 3
Council President Tony Young, City of San Diego, District 4
Councilmember Carl DeMaio, City of San Diego, District 5
Councilmember Lorie Zapf, City of San Diego, District 6
Councilmember Marti Emerald, City of San Diego, District 7
Councilmember David Alverez, City of San Diego, District 8

Exhibit A

PROGRAM EIR EXCERPTS
(PAGES 3-5 THROUGH 3-10,
4.3-25 THROUGH 4.3-30,
4.3-39, 4.3-40, AND 7-4, APPENDIX C3)

Implementation of the maintenance activities included in the Master Program would require a variety of discretionary actions. Due to the long-term nature of the Master Program, ~~long-term (master)~~ permits from the City as well as state and federal agencies are being sought to streamline the maintenance process. Long-term authorizations include an SDP (City of San Diego), CDP (City of San Diego), Section 404 Permit (U.S. Army Corps of Engineers [Corps]), 1605 Streambed Alteration Agreement (California Department of Fish and Game [CDFG]), and Section 401 Certification (California Regional Water Quality Control Board [RWQCB]). If surface discharges of water are involved, maintenance would require a Wastewater Discharge Permit from the RWQCB.

ES-3 SUMMARY OF ENVIRONMENTAL EFFECTS AND MITIGATION

The PEIR addresses the following major environmental issues: aesthetics/neighborhood character, air quality, greenhouse gas emissions (GHG), biological resources, historical resources, hydrology, land use, noise, paleontological resources, and water quality. The analyses and conclusions for each environmental issue are found in Sections 4.1 through 4.8. The environmental effects discussed in Chapter 4.0, Environmental Analysis, of the PEIR are summarized in Table ES-1, Impacts and Proposed Mitigation. In addition, Table ES-1 summarizes the mitigation measures identified in Chapter 4.0, Environmental Analysis that would reduce project impacts and indicates whether implementation of the mitigation measures would reduce impacts to below a level of significance. Direct impacts with respect to biological resources, historical resources, land use policy, paleontological resources, and water quality are considered significant but mitigable. Direct impacts with respect to air quality/GHG emissions, hydrology and noise are considered not significant. Cumulative impacts related to the following issues would be significant and unavoidable: aesthetics/neighborhood character, air quality, biological resources, GHG, historical resources, paleontological resources, solid waste, and water quality.

ES-4 ALTERNATIVES

Based on the requirement that alternatives meet most of the basic objectives of the proposed project and reduce significant impacts associated with the proposed project, this EIR analyzes the following alternatives which would reduce the need for regular maintenance of storm water facilities.

- No Project: No Maintenance;
- No Project: Maintenance Pursuant to Separate Permits;
- Raising the channel banks by constructing walls or berms along the top of the channels;
- Diverting storm water in pipes around constrained segments;
- Widening channels to accommodate vegetation; and/or
- Off-site Runoff Reduction.

Alternative locations are not considered given the nature of the proposed project. Proposed maintenance activities must occur within the channel segments included in the Master Program in order to achieve the primary goal of protecting life and property from flooding. Conducting

maintenance activities in other locations would not achieve this goal and would result in continued flooding of adjacent property.

Table ES-2, Comparison of Environmental Effects of the Proposed Project with Project Alternatives, summarizes the direct and cumulative environmental effects of the project in comparison with the alternatives. These alternatives are summarized below. As illustrated in Table ES-2, the No Project: No Maintenance Alternative would be the environmentally-preferred alternative because it would eliminate all impacts associated with the proposed project. The Off-site Runoff Reduction Alternative would be the next environmentally preferred alternative but it is considered infeasible, as discussed below.

No Project: No Maintenance Alternative

Under this alternative, the City would not conduct any maintenance activities within the storm water system. Vegetation would grow unchecked within the facilities and sediment would not be removed.

Although this alternative would avoid all impacts of the proposed project, the City rejected the alternative because it would not fulfill the basic objective to protect life and property from flooding, as mandated by Section 26.1 of the San Diego City Charter. The overgrowth within the storm water facilities that would occur from lack of regular maintenance would impede flood waters and cause flooding.

No Project: Maintenance With Separate Permits Alternative

Under this alternative, storm water maintenance would occur pursuant to separate permits issued for individual maintenance projects, as it has been historically done in the City. In addition, a Master Program would not be adopted to guide future maintenance activities. Thus, no comprehensive maintenance protocols and individual technical assessments would be performed prior to maintenance.

This alternative would not result in a reduction of environmental maintenance because maintenance would still be performed. Other potential impacts related to aesthetics/neighborhood character, historical resources, land use policy, solid waste and water quality would be comparable to the proposed project.

Maintenance with separate permits was rejected because it would not provide the comprehensive approach to maintenance which characterizes the proposed Master Program. The CDFG, RWQCB and Corps have all expressed concern about the way the City has conducted storm water maintenance in the past. Historically, the City has conducted maintenance under separate Streambed Alteration Agreements and Section 404 Permits. As a result, mitigation has been on a case by case basis. These agencies have also objected to the fact that separate permits do not allow consideration of cumulative effects of maintenance activities or the creation of larger more viable mitigation areas.

Raised Bank Alternative

Under this alternative, structures (e.g. levees or walls) would be added along the top of channels to allow them to contain vegetation without compromising their ability to convey flood waters. The structures would offset the effect of vegetation and sediment by allowing water elevations to increase without spilling out into adjacent developed areas. However, accumulation of sediment and vegetation would ultimately eliminate the increased flood capacity created by the structures. Channel-specific engineering would be undertaken to determine the additional "bank" height needed.

Although this alternative would potentially impact less wetlands, allow natural removal of urban pollutants to continue and generate less solid waste, the City rejected the alternative for factors related to impacts to wildlife habitat, cost, visual quality, public safety, and the temporary nature of the solution. With respect to wildlife habitat, the structures along storm water facilities would have an adverse impact on wildlife by making it more difficult for upland wildlife to access the channels for water, food and cover. Walling off the storm water facilities would also have an adverse visual impact. With respect to public safety, allowing the channels to fill with sediment could block side drains that empty into the channels which could cause water to back up and flood adjacent public and/or private properties. This accumulation of sediment would likely eventually offset the additional capacity created by the structures.

With respect to financial feasibility, the cost of designing and constructing structures along existing drainage facilities would be substantial. In addition, the cost would be increased by the need to acquire private property to construct the structures. Given the number of miles of drainage channels within the City, the cost of increasing flood capacity by constructing walls or levees is considered infeasible. Funding would be required to design and construct these structures. Council Policy 800-04 (Drainage Facilities) states that all projects with significant or total funding by the City shall be specifically identified and scheduled in the Capital Improvement Program (CIP). Council Policy 800-14 (Prioritizing CIP Projects) outlines the prioritization and funding policy for which projects compete. The prioritization process allows for the analytical comparison of the costs and benefits of individual project as well as providing an opportunity to evaluate projects against one another on their relative merits. This alternative would, therefore, compete with other CIP projects for funding and implementation. Construction could be delayed indefinitely until funding is available while the need to maintain facilities would still exist. Also, due to the uncertainty associated with the ultimate approval of these structures as a CIP project, this alternative is considered infeasible.

Channel By-pass Alternative

This alternative would involve construction of underground pipes that would divert some or all of the runoff around a channel segment to allow the channel to be naturally vegetated. Channel-specific engineering would be undertaken to determine the location and sizing of by-pass pipes to assure that vegetated channel segments can continue to support vegetation without resulting in flooding.

Although this alternative would be the next environmentally-preferred alternative (after the No Maintenance Alternative) because it could potentially result in reduced impacts related to wetlands, water quality and solid waste disposal, the City rejected the alternative as financially infeasible. As with the Raised Bank Alternative, the cost of constructing the by-pass pipes would be high. Beyond the cost of acquiring easements, adjacent development would make it difficult to construct by-pass pipes without impacting structures including homes and businesses. Condemning structures would further add to the cost of the by-pass alternative. As discussed with the Raised Bank Alternative, pursuant to Council Policy 800-14, this alternative would compete with other CIP projects for funding and implementation. Construction could, therefore, be delayed indefinitely until funding is available, or never occur because the by-pass structures would not be approved as a CIP project.

In addition, this alternative would not be effective in the long-term because accumulation of sediment in the main channel would likely eventually offset the additional capacity created by the by pass. Given these cost factors, accommodating flood waters with by-pass pipes is considered infeasible. Lastly, by-pass pipes could physically impact or burden adjacent property owners related to construction of pipelines and/or easement acquisition.

Widened Channel Alternative

Under this alternative, the configuration of channels would be modified to increase the volume capacity of the channel. The goal of increasing the channel volume would be to enable vegetation to exist in the channel without causing flooding. Channel-specific hydraulic analysis would be undertaken to determine the additional width needed. In most cases, the capacity would likely be increased by widening the cross-section of the channel. Increasing the depth of the channel would also increase capacity but is expected to be difficult to achieve in most cases due to constraints imposed by the slope limitations on the channel banks and maintaining downstream gradients.

Allowing vegetation to remain in the widened channels would reduce the impact of maintenance on water quality and solid waste. The vegetation remaining within the channels would allow the natural process of urban pollutant control to continue. This alternative would also reduce the long-term impact on solid waste disposal. Although the initial widening effort would generate plant material requiring off-site disposal, subsequent clearing and related disposal would be reduced in the long-term.

Although this alternative would allow vegetation to remain over some portion of the widened channels without periodic maintenance, the initial widening would impact the same amount of vegetation as the full maintenance approach. However, since a portion of the vegetation within a widened channel would be allowed to remain during future maintenance, the long-term impact of maintenance on wetland habitat would be reduced. Also, as with the proposed project, the actions within channels would not result in the permanent loss of the channels themselves.

The City considers this to be an infeasible alternative to the proposed Master Program for social and economic reasons. With respect to economic feasibility, the cost of designing and widening existing drainage facilities would be substantial. In addition, the cost would be increased by the need to acquire private property to accommodate widening. As discussed with the Raised Bank

Alternative, pursuant to Council Policy 800-14, this alternative would compete with other CIP projects for funding and implementation. Construction could, therefore, be delayed indefinitely until funding is available, or never occur because the widening would not be approved as a CIP project. With respect to social issues, as with the other alternatives, widening of the channels would impact adjacent homes as businesses through the loss of property and/or the need to complete relocation.

Off-site Runoff Reduction Alternative

The Off-site Runoff Reduction Alternative would involve implementing low impact development (LID) Best Management Practices and Integrated Management Practices (BMPs/IMPs) within the affected watersheds to substantially reduce associated runoff generation and flows into storm water facilities included in the Master Program. The use of LID BMPs/IMPs could involve: (1) reducing impervious surfaces through the use of vegetation or permeable pavement, and reducing impervious surfaces and compaction in landscaped and open space areas; (2) directing runoff into pervious areas (e.g., landscaping); (3) directing runoff into engineered IMP sites (e.g., bio-retention facilities, planter boxes, cisterns or infiltration facilities); and/or (4) creating self-contained/self-treating drainage management areas such as green roofs or basins.

This alternative would, by nature, be implemented in areas outside the storm water facilities. The Off-site Runoff Reduction Alternative would target retrofitting LID BMPs/IMPs in applicable existing developed areas because sites with new development are already subject to storm water standards requiring the use of LID BMPs/IMPs.

To the extent this alternative would be able to minimize or eliminate the need for removing vegetation and sediment to improve floodwater conveyance, this alternative would reduce impacts of the proposed Master Program related to aesthetics/neighborhood character, biological resources, cultural resources and water quality. Cumulative aesthetic/neighborhood character impacts would be lessened by reducing the number of trees that require removal to improve conveyance of flood water. Similarly, the ability to leave wetland vegetation within the storm water facilities, due to reductions in storm runoff, would proportionately reduce impacts to biological resources related to the proposed Master Program. Lastly, the LID BMPs/IMPs would reduce the urban pollutants reaching the storm water facilities, and minimize the impacts of storm water facility maintenance on the ability of the storm water facilities to remove water-born pollutants.

Although the Off-site Runoff Reduction Alternative could potentially result in fewer impacts to aesthetic/neighborhood character and biological resources, it was rejected by the City as financially infeasible and posing a burden on adjacent property owners. The cost of constructing and maintaining adequate LID BMPs/IMPs to generate a meaningful reduction in runoff, while unknown, would likely be high due to the anticipated extensive nature of BMPs/IMPs that would be required. In addition to construction and long-term maintenance costs, the City would incur additional costs related to acquiring private property/easements for the placement of BMPs/IMPs. In addition to cost and acquisition issues, the timing associated with a substantial reduction of off-site surface water generation is problematic. Although future development projects are required to incorporate LID concepts, the rate at which this occurs is likely to be

extremely protracted, given today's economic conditions. Thus, it may take decades for enough new development to incorporate LID concepts to result in a substantial reduction in storm water runoff and the associated maintenance activities. Based on these considerations, the Off-site Runoff Reduction Alternative is considered infeasible as a stand-alone alternative to the proposed Master Program.

ES-5 AREAS OF CONTROVERSY/ISSUES TO BE RESOLVED

As described in Secion 3.5, a number of concerns were expressed by the public during the public review period for the original Draft PEIR. These concerns were primarily related to water quality impacts of maintenance, the need for more information regarding hydrologic and hydraulic conditions within individual segments, maintenance proposed within open space, and the need to consider other alternatives to the proposed maintenance. Although this Recirculated Draft PEIR includes additional information related to each of these areas, it is anticipated that members of the public may still have concerns in these areas.

Although the Master Program has been amended to require hydrology and hydraulic studies be completed for each of the individual storm water facilities at the time maintenance is proposed, some of the members of the public are expected to insist that hydrology and hydraulic studies be completed for all of the storm water facilities before adoption of the Master Program. In addition, members of the public are expected to insist that detailed maintenance plans be identified prior to approval of the Master Program and PEIR to assure that the impacts are adequately anticipated.

In response to concerns expressed regarding maintenance in open space, the City's Storm Water Division (SWD) removed many of the storm water facilities within open space where maintenance was not likely to be required. As a result, the number of miles of storm water facilities included in the Master Program was reduced from 50 to 32 miles. In addition, SWD has determined that the estimates of disturbance width in the original PEIR was over conservative. With the reduction in the number of storm water facilities combined with the reduced disturbance width assumptions, the impact to wetlands within the City's jurisdiction would be reduced by approximately 43 percent (30 acres) when compared to the original Master Program. Nevertheless, some members of the public are expected to request further reductions in the number of facilities to be maintained under the Master Program.

Concerns are likely to continue to be expressed regarding alternatives to the proposed maintenance. Although the City's DSD staff believe that a reasonable range of alternatives is presented in this PEIR, members of the public are expected to contend that other alternatives exist to the proposed project.

Water quality is also expected to continue to be a concern of the public. Although the water quality discussion has been expanded in the PEIR, members of the public are expected to take the position that the water quality impacts are understated and that additional mitigation should be proposed.

In addition, the public has expressed a desire to have more involvement in reviewing annual maintenance proposals which are required as part of the Master Program. In meeting with these individuals and groups, the City has cited specific CEQA statues and guidelines and San Diego

Table 3-1
MASTER PROGRAM STORM WATER FACILITIES

Map No.[1]	Hydrologic Unit	Facility Description	Total Length (feet)	Facility Type (length in feet)		Coastal Zone?	Multiple Habitat Designation?	Estimated Disturbance Width[2] (feet)
				Concrete Bottom	Earthen Bottom			
1	San Dieguito	Rancho Bernardo Rd & Bernardo Center Dr	116	--	116	N	N	15
2	San Dieguito	Rancho Bernardo	1,811	1,811	0	N	N	14
3	San Dieguito	Rancho Bernardo	2,487	2,439	48	N	N	14
4	Penasquitos	11044 Via San Marco	711	73	638	N	N	5
6	Peñasquitos	11689 Sorrento Valley Rd	1,847	1,470	378	Y	N	20
6a	Peñasquitos	3000 Industrial Court	682	417	265	Y	N	12
7	Peñasquitos	Los Peñasquitos Creek Channel	1,609	--	1,609	Y	Y	104
8	Peñasquitos	Los Peñasquitos Creek Channel	1,600	--	1,600	Y	Y	104
9	Peñasquitos	11000 Roselle St / 11100 Flinkote Ave	1,030	1,016	14	Y	N	15
10	Peñasquitos	Dunhill St & Roselle St	405	--	405	Y	N	16
11	Peñasquitos	Soledad Creek Channel	2,539	891	1,648	Y	Y	26
12	Peñasquitos	Soledad Creek Channel	1,397	1,397	--	Y	Y	59
18	Peñasquitos	Maya Linda & Via Pasar	964	--	964	N	N	22
19	Peñasquitos	Candida & Via Pasar	1,178	1,178	--	N	N	12
32	Peñasquitos	Rose Creek Channel	1,349	1,337	12	N	Y	57
33	Peñasquitos	Rose Creek Channel	1,329	1,329	--	N	N	57
34	Peñasquitos	Rose Creek Channel	1,416	376	1,040	Y	N	124
35	Peñasquitos	Rose Creek Channel	2,270	--	2,270	Y	N	104
36	Peñasquitos	Mission Bay High School	900	900	1	Y	N	10
37	Peñasquitos	Pacific Beach Dr & Olney St	1,078	178	900	Y	N	17
40	Peñasquitos	Chateau Creek Channel	2,242	1,387	856	N	N	18

Table 3-1 (cont.)
MASTER PROGRAM STORM WATER FACILITIES

Map No.[1]	Hydrologic Unit	Facility Description	Total Length (feet)	Facility Type (length in feet)		Coastal Zone?	Multiple Habitat Designation?	Estimated Disturbance Width[2] (feet)
				Concrete Bottom	Earthen Bottom			
41	Peñasquitos	Chateau Creek Channel	2,471	1,681	790	N	N	20
42	Peñasquitos	Chateau Creek Channel	874	834	41	N	N	20
47	San Diego	7969 & 7971 Engineer Rd	1,230	--	1,230	N	N	8
51	San Diego	Red River Dr & Conestoga Dr	876	876	--	N	N	10
52	San Diego	Camino del Arroyo	1,039	--	1,039	N	N	9
53	San Diego	Cowles Mtn Channel	711	378	333	N	N	8
54	San Diego	San Carlos Creek Channel	957	433	524	N	N	10
55a	Peñasquitos	West Morena Blvd	270	--	270	N	N	12
55	Peñasquitos	Tecolote Creek Channel	2,584	2,443	142	N	N	25
56	Peñasquitos	Tecolote Creek Channel	2,018	1,606	412	N	N	29
57	Peñasquitos	Tecolote Creek Channel	768	120	648	N	N	29
58	San Diego	Murphy Canyon Creek Channel	2,523	772	1,752	N	N	57
58a	San Diego	Murphy Canyon Creek Channel	2,371	633	1,738	N	N	15
59	San Diego	Alvarado Creek Channel	1,072	869	203	N	Y	46
60	San Diego	Alvarado Creek Channel	582	570	12	N	Y	29
61	San Diego	Alvarado Creek Channel	2,130	2,104	26	N	N	46
62	San Diego	Alvarado Creek Channel	2,392	2,348	45	N	N	32
64	San Diego	Alvarado Creek Channel	2,600	1,335	1,265	N	Y	40
65a	San Diego	Fairmont Creek Channel	813	749	64	N	Y	19
65b	San Diego	Fairmont Channel	848	38	811	N	Y	12
65c	San Diego	Fairmont Channel	1.235	1,233	2	N	Y	15
66	San Diego	Montezuma Channel	1,420	1,420	--	N	N	19

Table 3-1 (cont.)
MASTER PROGRAM STORM WATER FACILITIES

Map No.[1]	Hydrologic Unit	Facility Description	Total Length (feet)	Facility Type (length in feet)		Coastal Zone?	Multiple Habitat Designation?	Estimated Disturbance Width[2] (feet)
				Concrete Bottom	Earthen Bottom			
67	Pueblo San Diego	Auburn Creek Channel	635	--	635	N	N	16
68	Pueblo San Diego	Auburn Creek Channel	2,693	1,566	1,127	N	N	20
69	Pueblo San Diego	Auburn Creek Channel	2,356	2,355	1	N	N	12
70	Pueblo San Diego	Auburn Creek Channel	1,418	413	1,006	N	N	39
71	Pueblo San Diego	Chollas Creek Channel	1,199	376	823	N	N	26
72	Pueblo San Diego	Chollas Creek Channel	435	433	2	N	N	26
76	Pueblo San Diego	Auburn Creek Channel	964	--	964	N	N	27
77	Pueblo San Diego	Auburn Creek Channel	422	--	422	N	N	33
78	Pueblo San Diego	Chollas Creek Channel	2,633	2,633	--	N	N	54
79	Pueblo San Diego	Chollas Creek Channel	1,410	1,410	--	N	N	54
79a	Pueblo San Diego	Delevan Dr	991	--	991	N	N	30
80	Pueblo San Diego	Chollas Creek Channel	1,899	539	1,360	N	N	54
81	San Diego	Camino de la Reina & Camino del Arroyo	648	648	--	N	N	9
82	San Diego	Nimitz Channel	865	234	631	Y	N	12
83	San Diego	Famosa Blvd & Valeta St	185	66	119	Y	N	20
84	Pueblo San Diego	Washington Channel	2,515	1,026	1,489	N	N	20
86	Pueblo San Diego	Pershing Channel	2,047	1,698	349	N	N	20
89	Pueblo San Diego	Chollas Creek Channel	2,442	2,318	124	N	N	25
90	Pueblo San Diego	Imperial and Gillette Street	385	--	385	N	N	15
91	Pueblo San Diego	Chollas Creek Channel	2,498	2,498	--	N	N	32
92	Pueblo San Diego	35th St & Martin Ave	1,097	--	1,097	N	N	12 (t) 5 (b)

Table 3-1 (cont.)
MASTER PROGRAM STORM WATER FACILITIES

Map No.[1]	Hydrologic Unit	Facility Description	Total Length (feet)	Facility Type (length in feet)		Coastal Zone?	Multiple Habitat Designation?	Estimated Disturbance Width[2] (feet)
				Concrete Bottom	Earthen Bottom			
93	Pueblo San Diego	Chollas Creek Channel	2,590	1,267	1,323	Y	N	54
94	Pueblo San Diego	South Chollas Creek Channel	2,595	40	2,555	Y	N	59
95	Pueblo San Diego	South Chollas Creek Channel	1,604	--	1,604	Y	N	50
97	Pueblo San Diego	South Chollas Creek Channel	1,098	--	1,098	N	N	45
97a	Pueblo San Diego	South Chollas Creek Channel	854	292	562	N	N	55
98	Pueblo San Diego	South Chollas Creek Channel	2,800	661	2,139	N	N	49
99	Pueblo San Diego	South Chollas Creek Channel	278	--	278	N	N	34
100	Pueblo San Diego	42nd & J St	257	--	257	N	N	12
101	Pueblo San Diego	South Chollas Creek Channel	1,911	1,122	789	N	Y	34
103	Pueblo San Diego	South Chollas Creek Channel	1,237	1,046	191	N	Y	34
104	Pueblo San Diego	South Chollas Creek Channel	1,969	1,071	898	N	Y	34
105	Pueblo San Diego	Euclid & Castana	277	--	277	N	N	20
106	Pueblo San Diego	Encanto Channel	2,436	405	2,031	N	N	44
107	Pueblo San Diego	Encanto Channel	2,607	644	1,963	N	N	44
108	Pueblo San Diego	Encanto Channel	1,900	1,900	--	N	N	29
109	Pueblo San Diego	Encanto Channel	2,390	1,793	597	N	N	29
110	Pueblo San Diego	Encanto Channel	1,606	1,418	188	N	N	29
111	Pueblo San Diego	Encanto Channel	842	719	123	N	N	29
113	Pueblo San Diego	Jamacha Channel	815	--	815	N	N	15
114	Pueblo San Diego	Jamacha Channel	2,683	--	2,683	N	N	15
115	Pueblo San Diego	Jamacha Channel	1,886	--	1,886	N	N	20
117	Pueblo San Diego	Solola Channel	1,244	1,176	68	N	N	20

Table 3-1 (cont.)
MASTER PROGRAM STORM WATER FACILITIES

Map No.[1]	Hydrologic Unit	Facility Description	Total Length (feet)	Facility Type (length in feet)		Coastal Zone?	Multiple Habitat Designation?	Estimated Disturbance Width[2] (feet)
				Concrete Bottom	Earthen Bottom			
118	Pueblo San Diego	Solola Channel	2,416	2,084	332	N	N	18
119	Pueblo San Diego	Solola Channel	846	728	118	N	N	8
120	Pueblo San Diego	Cottonwood Channel	1,904	1,885	19	Y	N	23
121	Pueblo San Diego	Cottonwood Channel	530	522	8	Y	N	19
122	Sweetwater	Parkside Channel	1,202	1,163	40	N	N	14
123	Tijuana	Sanyo Channel	1,255	1,225	30	N	N	15
124	Tijuana	La Media & Airway	628	--	628	N	N	20
125	Tijuana	Camino Maquiladora & Cactus	1,073	822	251	N	N	10
126	Tijuana	Siempre Viva & Bristow	2,321	140	2,181	N	N	19
127	Tijuana	Britannia & Bristow	597	--	597	N	N	20
128	Tijuana	Virginia Channel	503	--	503	N	N	20
129	Tijuana	Smythe Channel	1,956	1,635	321	N	N	12
130	Tijuana	Smythe Channel	1,365	--	1,365	N	N	24
131	Otay	Nestor Creek Channel	1,201	978	223	N	N	10
132	Otay	Nestor Creek Channel	968	--	968	N	N	29
133	Otay	Nestor Creek Channel	2,982	--	2,982	N	N	54
134	Otay	Nestor Creek Channel	1,309	990	320	Y	N	30
136	Tijuana	Tocayo Channel	2,637	2,485	152	Y	N	8
137	Tijuana	Tocayo Channel	1,076	1,043	33	Y	N	8
138a	Tijuana	Tijuana River Pilot Channel	2,476	--	2,476	Y	Y	25
138b	Tijuana	Tijuana River Pilot Channel	2,653	--	2,653	Y	Y	25
138c	Tijuana	Tijuana River Pilot Channel	719	--	719	Y	Y	25

Table 3-1 (cont.)
MASTER PROGRAM STORM WATER FACILITIES

Map No.[1]	Hydrologic Unit	Facility Description	Total Length (feet)	Facility Type (length in feet)		Coastal Zone?	Multiple Habitat Designation?	Estimated Disturbance Width[2] (feet)
				Concrete Bottom	Earthen Bottom			
138	Tijuana	Smugglers Gulch Channel	1,837	--	1,837	Y	Y	35
139	Tijuana	Smugglers Gulch Channel	1,031	--	1,031	Y	Y	35
145	San Diego	First San Diego River Improvement Project	3,325	--	3,325	N	N	250
146	San Diego	First San Diego River Improvement Project	3,231	--	3,231	N	N	250
147	San Diego	First San Diego River Improvement Project	3,370	--	3,370	N	N	250

[1] The Storm Water Division assigns a map number to each of the facilities which are within its jurisdiction. However, not all of these facilities are included in the Master Program. Thus, the map numbers in this table are not all sequential.

[2] Disturbance width for channels wider than 20 feet (top of bank to top of bank) is assumed to be the width of the bottom of the channel plus two feet up each side slope. Disturbance width for channels less than 20 feet includes bottom and all of the side slopes.

Approximately 561.50 acres of the study area are within the City's MHPA. The MHPA in these portions of the project provides connectivity through several creeks and tributary drainages, as well as the San Diego River corridor. Several storm water channels within the Master Program are likely to function as wildlife corridors including but not necessarily limited to the San Diego River, Smuggler's Gulch, Rose Creek, Chollas Creek, Soledad Creek, and Los Peñasquitos Creek.

4.3.2 Impacts

This analysis addresses potential impacts resulting from maintenance of the storm water facilities included in the proposed Master Program including access roads, stockpiling and staging areas.

The following analysis is intended to provide a programmatic estimate of the magnitude of impacts to biological resources that could occur from the various maintenance activities anticipated to result from implementation of the proposed Master Program. The impacts are based on the assumption that disturbance would be normally limited to the bottom and adjacent two feet of bank area when the top-of-bank to top-of-bank width is 20 feet or more. For facilities with a width less than 20 feet, it was assumed that the bottom and all of the banks would be disturbed in order to maximize the ability of these narrower facilities to convey flood water. This analysis includes potential impacts associated with bringing equipment into the storm water facilities on access roads which have been identified for each facility included in the Master Program. The estimated disturbance widths are identified in Table 3-1.

The analysis characterizes impacts as direct or indirect. An impact is considered direct when the primary effect is removal of existing habitat and/or species. Direct impacts would result from clearing of vegetation and removal of accumulated sediment and debris. Indirect impacts occur when secondary effects of adjacent activities, such as noise, reduced water quality, dust, or non-native plant invasion may adversely affect adjacent biological resources. The magnitude of an indirect impact may be the same as a direct impact; however, the effect usually takes a longer time to become apparent because indirect impacts are related to changes in animal behavior or transition of habitats from one type to another which typically takes longer to manifest.

Significance Criteria

According to the City's Significance Determination Thresholds (2011), impacts to biological resources would be significant if the project would:

- Cause a substantial adverse impact on any Tier I, Tier II, Tier IIIA, or Tier IIIB habitats, as identified in the Biology Guidelines of the Land Development manual or other sensitive natural community identified in local or regional plans, policies, regulation, or by the CDFG or USFWS;
- Cause a substantial adverse impact on more than 0.01 acre of wetlands (including, but not limited to marsh, vernal pool, riparian, etc.) through direct removal, filling, hydrological interruption, or other means;
- Cause a substantial adverse impact, either directly or through habitat modifications, on any species identified as a candidate, sensitive, or special status species in the

MSCP or other local or regional plans, policies or regulations, or by the CDFG or USFWS;

- Interfere substantially with the movement of any native resident or migratory fish or wildlife species or with established native resident or migratory wildlife corridors; including linkages identified in the MSCP Plan, or impede the use of native wildlife nursery sites; and/or
- Cause a conflict with the provisions of an adopted Habitat Conservation Plan, Natural Conservation Community Plan, or other approved local, regional, or state habitat conservation plan, either within the MSCP plan area or in the surrounding region.

Analysis of Impacts

Issue 1: Would the Project impact sensitive habitat, including but not limited to City, State, or federally regulated wetlands through direct removal, filling, hydrological interruption, or other means?

Direct Impacts

Impacts on biological resources associated with the proposed Master Program would be related to disturbance to resources located within the storm water facilities to be maintained as well as dewatering, access and staging/stockpiling areas. In addition, impacts could occur from implementation of mitigation measures which involve interim erosion control (e.g. check dams) or off-site enhancement, restoration or creation of habitat to offset impacts from maintenance.

Quantifying the impact of off-site habitat enhancement, restoration or creation is considered speculative pursuant to Section 15145 of the CEQA Guidelines. As discussed in mitigation section of this subchapter, both the amount and location of off-site mitigation are dependent on a number of factors which cannot be forecast at this time. However, impacts would normally consist of temporary to permanent displacement of the vegetation and wildlife which occur on the off-site mitigation site prior to implementation. As off-site mitigation traditionally is limited to areas which do not support high quality biological resources, it is anticipated that off-site mitigation would not result in a significant impact on biological resources. In fact, mitigation is expected to result in improved biological resources once established. In any case, the potential effects of the off-site mitigation would be evaluated in accordance with CEQA. The CEQA process would identify mitigation measures for any impacts to biological resources which are found to be significant from off-site mitigation.

Similarly, quantifying the impact of water quality control measures is difficult to determine. As discussed in Subchapter 4.8, Water Quality, temporary check dams or similar features may be required to reduce water quality impacts from maintenance. The initial impact of these features would be estimated and mitigated as part of the mitigation program developed for the overall maintenance activity which would include installation of the water quality control feature. As temporary facilities, they are intended to be removed when no longer required. For example, once the vegetation has become re-established, it is anticipated that check dams and other interim facilities would be removed. Where these features are located within native vegetation, removal

may cause minimal impact in the course of removing the feature. However, these impacts would not be significant in light of the fact that mitigation would have already occurred for the installation process and because disturbed vegetation would be expected to quickly re-establish.

Quantifying the impact of maintenance on biological resources would depend on the results of a site-specific IHHA required to be completed for each maintenance activity. As discussed in Chapter 3.0 Project Description, the IHHA would identify the minimum amount of vegetation required to be removed to improve the ability of storm water facilities to convey floodwater. However, in order to provide a programmatic basis for evaluating the impacts of maintenance on biological resources, it is assumed that disturbance would be limited to the channel bottom and the adjacent two feet whenever a channel has a bank-to-bank width of over 20 feet. Where the overall width is less than 20 feet, it is assumed that the channel banks as well as bottom would have to be cleared to maximize floodwater conveyance. Table 3-1 included in Chapter 3.0, Project Description, quantifies the assumed width of disturbance in each channel based on these parameters.

Based on the width of disturbance identified in Table 3-1, maintenance activities described in the Master Program would affect up to approximately 41.62 acres of vegetated wetland habitat and 37.08 acres of unvegetated earthen-bottom streambed/natural flood channel. An estimated 61.3 acres of upland habitat could be impacted, of which approximately 50.3 acres are developed (Table 4.3-7). This table quantifies the impacts by HU. A segment by segment breakdown of wetland impacts is provided in Appendix D.1. As many as approximately 14.59 acres of wetland vegetation impacts, 29.23 acres of unvegetated stream impacts and 3.1 acres of upland (excluding developed land) impacts would occur within the MHPA.

Approximately 10.6 acres of wetland impacts and 9.2 acres of unvegetated natural flood channel impacts would occur within the coastal overlay zone. However, in reality, the contemplated maintenance activities would occur over an extended period of time and, thus, the estimated areas of impacts would not occur at any one time. The amount of vegetation that may be impacted would be dependent on the results of the limits of disturbance shown on the IMP for each facility.

<u>Wetland/Riparian Vegetation Communities</u>

As indicated earlier, maintenance activities would impact up to approximately 41.62 acres of wetland/riparian habitats including 4.95 acres of southern riparian forest (including disturbed), 0.09 acre of southern sycamore riparian woodland, 7.49 acres of southern willow scrub (including disturbed), 1.99 acres of mule fat scrub (including disturbed), 0.15 acre of riparian scrub, 17.90 acres of freshwater marsh (including disturbed), 1.57 acres of coastal saltmarsh, 0.51 acre of coastal brackish marsh, and 6.97 acres of disturbed wetland (Table 4.3-7). In addition, 37.08 acres of streambed/natural flood channel would be impacted. The wetland information associated within each specific channel is contained in Appendix D.1.

While dewatering by retaining water upstream or diverting it in a pipe during maintenance would eliminate surface water from the area being maintained, this condition would not result in significant impacts on biological resources that would be any greater than the disruption caused by the maintenance activity itself. Furthermore, the diversion would be short-term in nature, generally lasting less than four weeks.

Table 4.3-7
ESTIMATED AREA OF VEGETATION COMMUNITIES AFFECTED[1]

HU	Wetlands Outside MHPA[2]											Total
	SRF	SRW	SWS	MFS	RS	FWM	CAM	CSM	CBM	DW	STM/ NFC	
San Dieguito	0.00	0.00	0.00	0.00	0.00	0.16	0.00	0.00	0.00	0.02	0.01	**0.19**
Peñasquitos	0.00	0.00	1.60	0.35	0.00	4.66	0.00	0.19	0.05	0.00	1.35	**8.20**
San Diego	0.00	0.09	0.75	0.00	0.00	2.96	0.00	0.00	0.00	0.27	0.20	**4.27**
Pueblo San Diego	0.00	0.00	1.68	0.46	0.15	4.36	0.00	0.32	0.00	4.78	6.29	**18.04**
Sweetwater	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.02	0.00	**0.02**
Otay	0.00	0.00	0.28	0.00	0.00	1.73	0.00	0.00	0.00	0.06	0.00	**2.07**
Tijuana	0.00	0.00	0.50	0.01	0.00	1.04	0.00	0.00	0.00	0.54	0.00	**2.09**
Non-MHPA Subtotal	**0.00**	**0.09**	**4.81**	**0.82**	**0.15**	**14.91**	**0.00**	**0.51**	**0.05**	**5.69**	**7.85**	**34.88**
HU	**Wetlands Within MHPA[2]**											**Total**
	SRF	SRW	SWS	MFS	RS	FWM	CAM	CSM	CBM	DW	STM/ NFC	
San Dieguito	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	**0.00**
Peñasquitos	0.00	0.00	1.90	0.17	0.00	1.81	0.00	1.06	0.46	0.04	3.90	**9.34**
San Diego	4.95	0.00	0.00	0.00	0.00	1.00	0.00	0.00	0.00	0.11	22.88	**28.94**
Pueblo San Diego	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	**0.00**
Sweetwater	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	**0.00**
Otay	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	**0.00**
Tijuana	0.00	0.00	0.78	1.00	0.00	0.18	0.00	0.00	0.00	1.13	2.45	**5.54**
MHPA Subtotal	**4.95**	**0.00**	**2.68**	**1.17**	**0.00**	**2.99**	**0.00**	**1.06**	**0.46**	**1.28**	**29.23**	**43.82**
WETLANDS TOTAL	**4.95**	**0.09**	**7.49**	**1.99**	**0.15**	**17.90**	**0.00**	**1.57**	**0.51**	**6.97**	**37.08**	**78.70**

Table 4.3-7 (cont.)
ESTIMATED AREA OF VEGETATION COMMUNITIES AFFECTED[1]

HU	Uplands Outside MHPA[2]							Total
	Tier II	Tier IIIA	Tier IIIB	Tier IV				
	DCSS	SMC	NNG	EW	NNV/ ORN	DH/ RUD	DEV	
San Dieguito	0.0	0.0	0.0	0.0	0.0	0.0	1.2	**1.2**
Peñasquitos	0.0	0.1	0.2	0.0	0.9	0.2	12.8	**14.2**
San Diego	0.4	0.0	0.3	0.1	0.4	0.7	7.0	**8.9**
Pueblo San Diego	1.8	0.0	1.4	0.0	0.8	1.1	25.7	**30.8**
Sweetwater	0.0	0.0	0.0	0.0	0.0	0.0	0.4	**0.4**
Otay	0.0	0.0	0.1	0.0	0.4	0.9	0.8	**2.2**
Tijuana	0.0	0.0	0.3	0.0	0.2	0.1	1.5	**2.1**
Non-MHPA Subtotal	**2.2**	**0.1**	**2.3**	**0.1**	**2.7**	**3.0**	**49.4**	**59.8**
HU	**Uplands Within MHPA[2]**							**Total**
	Tier II	Tier IIIA	Tier IIIB	Tier IV				
	DCSS	SMC	NNG	EW	NNV/ ORN	DH/ RUD	DEV	
San Dieguito	0.0	0.0	0.0	0.0	0.0	0.0	0.0	**0.0**
Peñasquitos	0.0	0.1	0.2	0.1	0.1	0.0	0.1	**0.6**
San Diego	0.0	0.0	0.0	0.0	0.0	0.0	0.8	**0.8**
Pueblo San Diego	0.0	0.0	0.0	0.0	0.0	0.0	0.0	**0.0**
Sweetwater	0.0	0.0	0.0	0.0	0.0	0.0	0.0	**0.0**
Otay	0.0	0.0	0.0	0.0	0.0	0.0	0.0	**0.0**
Tijuana	0.0	0.0	0.0	0.0	0.0	0.1	0.0	**0.1**
MHPA Subtotal	**0.0**	**0.1**	**0.2**	**0.1**	**0.1**	**0.1**	**0.9**	**1.5**
UPLANDS TOTAL	**2.2**	**0.2**	**2.5**	**0.2**	**2.8**	**3.1**	**50.3**	**61.3**

[1]Totals reflect rounding
[2]Habitat acronyms: CAM=cismontane alkali marsh, CBM=coastal brackish marsh, CSM=coastal salt marsh, DCSS=Diegan coastal sage scrub, DH/RUD=disturbed habitat/ruderal, DEV=developed, DW=disturbed wetland, EW=eucalyptus woodland, FWM=freshwater marsh, MFS=mule fat scrub, NFC=City natural flood channel, NNG=non-native grassland, NNV/ORN=non-native vegetation/ornamental, RS=riparian scrub, SMC=southern mixed chaparral, SRF=southern riparian forest, SRW=southern sycamore riparian woodland, STM=CDFG streambed (includes open water habitat), SWS=southern willow scrub

Mitigation Measure 4.3.8: Within six months of the end of an annual storm water facility maintenance program, the monitoring biologist shall complete an annual report which shall be distributed to the following agencies: the City of San Diego DSD, CDFG, RWQCB, USFWS, and Corps. At a minimum, the report shall contain the following information:

- Tabular summary of the biological resources impacted during maintenance and the mitigation; and
- Master table containing the following information for each individual storm water facility or segment which is regularly maintained:
  - Date and type of most recent maintenance;
  - Description of mitigation which has occurred; and
  - Description of the status of mitigation which has been implemented for past maintenance activities.

Wetland Mitigation

Mitigation Measure 4.3.9: Wetland impacts resulting from maintenance shall be mitigated in one of the following ~~three~~ two ways: (1) habitat creation, restoration, and/or enhancement ~~concurrent with maintenance~~, ~~(2) habitat creation, restoration, and/or enhancement prior to maintenance,~~ or (~~3~~2) mitigation credits. The amount of mitigation ~~When mitigation is proposed to be accomplished through concurrent creation, restoration or enhancement, the amount of planting~~ shall be in accordance with ratios in Table 4.3-10 unless different mitigation ratios are required by state or federal agencies with jurisdiction over the impacted wetlands. In this event, the mitigation ratios required by these agencies will supersede, and not be in addition to, the ratios defined in Table 4.3-10.~~.~~ ~~When previously created, restored or enhanced wetland habitat is proposed to be used for mitigation, the ratio shall be 1:1, provided the habitat has been determined to be successfully established by the ADD Environmental Designee in consultation with the Resource Agencies prior to commencing the maintenance activity. Mitigation credits may be used at a ratio of 1:1, provided the mitigation credits are from a mitigation bank which has been approved by the Resource Agencies.~~ No maintenance shall commence until the ADD Environmental Designee has determined that mitigation proposed for a specific maintenance activity meets one of these ~~three~~ two options.

Table 4.3-10
WETLAND MITIGATION RATIOS

WETLAND TYPE	MITIGATION RATIO[1]
Southern riparian forest	3:1
Southern sycamore riparian woodland	3:1
Riparian woodland	3:1
Coastal saltmarsh	4:1
Coastal brackish marsh	4:1
Southern willow scrub	2:1

Table 4.3-10 (cont.) WETLAND MITIGATION RATIOS	
WETLAND TYPE	**MITIGATION RATIO[1]**
Mule fat scrub	2:1
Riparian scrub[2]	2:1
Freshwater marsh[2]	~~1~~2:1
Cismontane alkali marsh	4:1
Disturbed wetland	~~1~~2:1
Streambed/natural flood channel	~~NA~~2:1

[1] Mitigation ratio within the Coastal Zone will be 3:1
[2] Mitigation ratio within the Coastal Zone will be 4:1
~~[1]Mitigation done in advance or through purchase of mitigation credits would be at a 1:1 ratio.~~

Mitigation locations for wetland impacts shall be selected using the following order of preference, based on the best mitigation value to be achieved.

1. Within impacted watershed, within City limits.
2. Within impacted watershed, outside City limits on City-owned or other publicly-owned land.
3. Outside impacted watershed, within City limits.
4. Outside impacted watershed, outside City limits on City-owned or other publically-owned land.

In order to mitigate for impacts in an area outside the limits of the watershed within which the impacts occur, the SWD must demonstrate to the satisfaction of the ADD Environmental Designee in consultation with the Resource Agencies that no suitable location exists within the impacted watershed.

Mitigation Measure 4.3.10: Whenever maintenance will impact wetland vegetation, a wetland mitigation plan shall be prepared in accordance with the Conceptual Wetland Restoration Plan contained in Appendix H of the Biological Technical Report, included as Appendix D.3 of the PEIR.

Mitigation which involves habitat enhancement, restoration or creation shall include a wetland mitigation plan containing the following information:

- Conceptual planting plan including planting zones, grading, and irrigation;
- Seed mix/planting palette;
- Planting specifications;

Off-site Mitigation

Mitigation Measure 4.3.14: Whenever off-site mitigation would result in a physical disturbance to the proposed mitigation area, the City will conduct an environmental review of the proposed mitigation plan in accordance with CEQA. If the off-site mitigation would have a significant impact on biological resources associated with the mitigation site, mitigation measures will be identified and implemented in accordance with the MMRP resulting from that CEQA analysis.

Impact

Issue 2: Would the Project reduce the level of diversity or numbers of any unique, rare, endangered, sensitive, or fully protected species of plants or animals?

Direct Impacts

Sensitive Plant Species

Implementation of the proposed maintenance would directly impact four sensitive plant species observed within the study area: single-whorl burrobush, San Diego marsh-elder, southwestern spiny rush, and San Diego sunflower. These species are not: (1) federal- or state-listed as threatened or endangered, (2) City narrow endemic plant species, or (3) covered under the City's MSCP Subarea Plan. In the absence of information concerning the nature of the ultimate maintenance activities on specific storm water facilities, the potential impacts to sensitive plant species from future maintenance activities is considered potentially significant.

Several listed and/or narrow endemic plant species have the potential to occur within the Master Program study area. Listed and/or narrow endemic plant species with moderate potential or, low to moderate potential, to occur within or adjacent to the Master Program study area include the following: San Diego ambrosia, willowy monardella, Otay tarplant, snake cholla, variegated dudleya, San Diego thorn-mint, San Diego button-celery, California Orcutt grass, Otay Mesa mint, and spreading navarretia. San Diego ambrosia is known to occur within floodplain areas, and willowy monardella can be found in dry creek beds, and both have been reported in the vicinity of areas mapped for the Master Program. Snake cholla is primarily a sage scrub species, and has been reported in the vicinity of several storm water facilities in the Master Program study area. The remaining plants are primarily grassland or vernal pool species and were considered to have low to moderate potential to occur because of their known distributions in the Otay Mesa area where some channels within the Master Program are located, and where critical habitat for spreading navarretia occurs. Critical habitat for spreading navarretia would be expected to support other listed vernal pool plants such as San Diego thorn-mint, San Diego button-celery, California Orcutt grass, and Otay Mesa mint. As discussed earlier, the City has relinquished coverage and cannot rely on the City's Federal ITP to authorize an incidental take of San Diego thorn-mint, San Diego button-celery, or California Orcutt grass until an HCP has been approved. Although the Master Program would not impact vernal pools, vernal pools may occur near certain areas in which maintenance is proposed. Any impacts to listed or narrow endemic plant species would be considered significant.

adsorbed pollutants. In addition, the benefit associated with periodic removal of polluted sediment and plant material that would occur with maintenance would not occur with the No Maintenance Alternative.

Without storage or operation of equipment within storm water facilities, this alternative would avoid impacts related to the on-site use and (potentially) storage of hazardous materials such as vehicle fuels or lubricants. The accidental discharge of maintenance-related hazardous materials or trash into the storm water system during maintenance would also be eliminated.

7.1.3 Basis for Rejection

Although the No Maintenance Alternative would be the environmentally-preferred alternative because it would avoid significant environmental impacts related to the proposed project, the City rejected the alternative because it would not fulfill the basic objective to protect life and property from flooding, as mandated by the City Charter. The overgrowth within the storm water facilities that would occur from lack of regular maintenance would impede flood waters and cause flooding. On average, the City receives approximately 35 risk management claims related to flooding each year. The primary cause of flooding and damages to property cited in these claims are attributed to the lack of maintenance in facilities that have accumulated sediment, trash/debris, and vegetation. In addition, the City's costs associated with claims may remain constant or increase by precluding preventative maintenance of channels that would restore as-built or natural conveyance capacities. Overgrowth and sedimentation also may facilitate ponding of water within the channels and increase the risk of mosquito infestation and other vector problems. Additionally, accumulation of sediment may not only cause floodwaters to escape from the channels more frequently, prolonged flooding may cause the drainage patterns to change.

7.2 NO PROJECT: MAINTENANCE WITH SEPARATE PERMITS

7.2.1 Description

Section 15126.6(e)(3)(A) of the CEQA Guidelines requires that a no project alternative discuss what is reasonably expected to occur if the proposed project is not approved. If the proposed Master Program is not adopted, storm water facility maintenance would be expected to continue in the manner in which it has occurred in the past. Historically, the City has maintained storm water facilities in a much less systematic way than would occur with the proposed Master Program. The City generally conducted regular maintenance activities largely on an "as needed" basis based on a perceived need and/or citizen complaints. Unlike the Master Program's proposal to base maintenance requirements on the results of site-specific hydrology studies, the amount of maintenance conducted within individual segments was based primarily on the premise that all existing vegetation and accumulated sediment must be removed to achieve the desired capacity to convey floodwater. Also, no universal list of maintenance protocols would be followed by the City crews in the course of maintenance under separate permits.

City of San Diego Master Storm Water System Maintenance Program

CONCEPTUAL WETLAND RESTORATION PLAN
Project No. 42891

APPENDIX H TO THE BIOLOGICAL TECHNICAL REPORT

May 2011

Prepared for:

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City of San Diego Master Storm Water System Maintenance Program
Conceptual Wetland Restoration Plan

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I. INTRODUCTION

This report presents a conceptual wetland restoration plan (plan) to guide future wetland compensation to offset impacts related to maintenance activities associated with the City of San Diego's (City's) Master Storm Water System Maintenance Program (Master Program). Under the Master Program, specific storm water system facilities would be periodically cleaned to remove vegetation and sediment impeding the ability of these facilities to effectively convey floodwaters. In the course of this maintenance, wetland vegetation is expected to be removed; however, the underlying condition of the facilities (e.g. concrete or earthen substrate) would be retained. Wetland compensation pursuant to this plan would provide mitigation for impacts to U.S. Army Corps of Engineers (Corps) jurisdictional wetlands under Section 404 of the federal Clean Water Act, California Department of Fish and Game (CDFG) jurisdictional areas under Section 1605 of the California Fish and Game Code, and areas considered wetlands by the Regional Water Quality Control Board (RWQCB) and City. The proposed wetland compensation also would implement the goals and objectives of the City's Multiple Species Conservation Program (MSCP) Subarea Plan (City 1997a) by enhancing and restoring wetland habitat in numerous watersheds within the City.

Two forms of wetland compensation are addressed in this plan: enhancement and restoration. Wetland enhancement includes actions taken to increase the function of an existing wetland. Enhancement activities would include removal of invasive plants, minor grading to remove accumulated sediment and restore surface conditions, and installing native wetland plants as seed and/or container stock. Installation of cuttings, container stock, and seed would begin following removal of invasive species. Irrigation may be provided, depending on the type and location of the habitat to be restored.

Wetland restoration includes actions taken to return wetland functions to an area that was previously a wetland but has since become an upland habitat. Restoration actions would be essentially the same as described above for enhancement.

Detailed planting and maintenance plans would be prepared on an annual basis to compensate for the impacts associated with the maintenance proposed for the coming year. Restoration and/or enhancement would occur in various locations depending on the type and location of impact within each storm water facility. The mitigation will occur within the same watershed as the impact, to the greatest degree possible. The initial mitigation efforts will focus at the upstream of ends of watersheds and drainages as much as possible in order to reduce the spread of exotic plant seeds and propagules downstream.

II. PROJECT DESCRIPTION

A. PROJECT LOCATION

The storm water facilities included in the Master Program are situated throughout the San Diego metropolitan area (Figure 1). The facilities consist of named creeks and smaller unnamed tributaries, some of which have been channelized and/or lined with concrete and/or riprap along portions of their lengths.

The storm water facilities mapped for the Master Program occur within 7 Hydrologic Units (HUs [watersheds]), as defined in the San Diego Regional Water Quality Control Board (RWQCB) Water Quality Control Plan for the San Diego Basin. From north to south, these Hus are: San Dieguito, Peñasquitos, San Diego, Pueblo San Diego, Sweetwater, Otay, and Tijuana (Figure 2). Map numbers shown on Figure 2 correspond to Appendix B of the Biological Technical Report (HELIX 2011a) for the project, which provides detailed mapping of vegetation communities and jurisdictional areas.

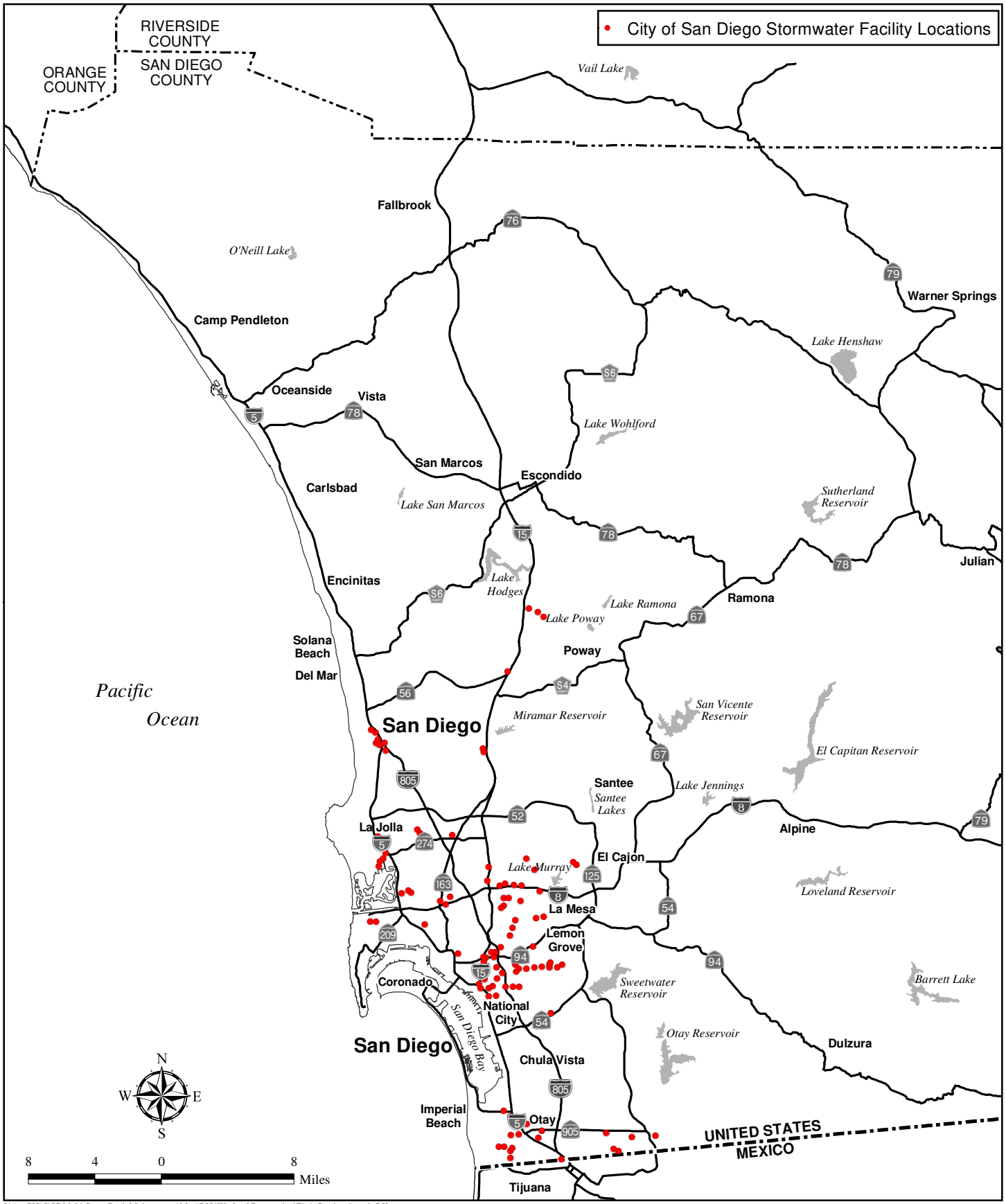
B. PROJECT SUMMARY

Recognizing the need for, and importance of, continuing the periodic inspection, cleaning, and maintenance of storm water facilities in the future, the City has proposed the Master Program, the focus of which is to identify the long-term maintenance requirements for storm water facilities within the City. The Master Program describes the maintenance techniques to be employed as well as the protocols to be followed to minimize the impact of maintenance activities to environmental resources.

Maintenance would be done by hand or with mechanized equipment. Hand clearing would be done by City maintenance personnel using hand tools, such as trimmers and shovels. Cleared material would be manually brought out of the facility and loaded by hand onto a dump truck for offsite disposal. Mechanized equipment clearing would be utilized whenever possible to reduce cost. Depending on the conditions associated with each facility, different types of equipment would be utilized. The types of equipment would include, but not be limited to, skid-steers, backhoes, Gradalls, excavators, loaders, dump trucks, and bulldozers**.** Maintenance equipment would utilize access routes identified in the Master Program.

The frequency of storm water facility maintenance would be based upon routine inspections and past maintenance history. Maintenance frequencies typically occur at three-year intervals. Facilities that have a known history of flooding and/or accumulation of soil, debris, and vegetation, and have the potential to impact adjacent properties and increase the risk to life and property, would be placed on a priority maintenance list which would require maintenance annually or bi-annually.

Prior to each fiscal year, the City will determine which facilities need to be maintained in the coming year. Under the Substantial Conformance Review (SCR) process described in the Master Program, the City would conduct site-specific biological assessments of each facility proposed for maintenance to determine the extent and composition of wetland habitat that would be impacted. The biological assessment would also determine the compensation required to offset these wetland impacts. Based on these compensation requirements, one or more wetland compensation plans would be prepared pursuant to this conceptual plan. Prior to beginning maintenance, the City would submit the maintenance plans, biological assessments and wetland compensation plans to local, state and federal agencies with jurisdiction over the maintenance areas. Maintenance would not proceed until the applicable local, state and federal agencies have authorized the maintenance pursuant to master permits issued to the Master Program.



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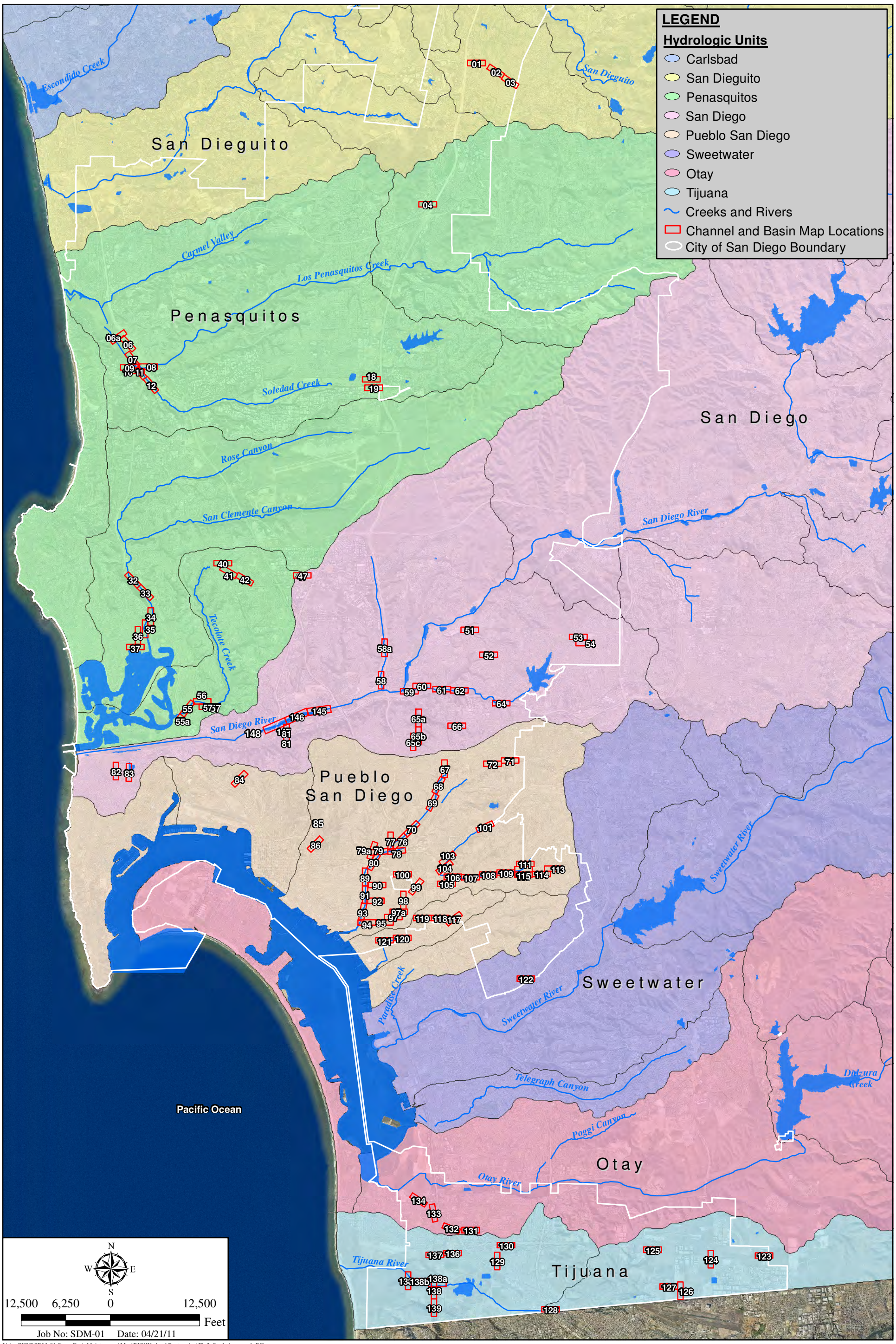
Regional Location Map

CITY OF SAN DIEGO MASTER STORMWATER SYSTEM MAINTENANCE PROGRAM

Figure 1



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Study Area Locations in Relation to Hydrologic Units

CITY OF SAN DIEGO MASTER STORMWATER SYSTEM MAINTENANCE PROGRAM

HELIX

Figure 2

C. FUNCTIONS AND SERVICES OF IMPACTED AREAS

The storm water facilities within the Master Program are diverse in terms of size, vegetative cover, substrate, hydrology, and environmental setting. The smallest storm water facilities are only a few feet wide, while segments of the largest are over 100 feet wide. Vegetative cover ranges from mature riparian forest to marsh habitat to unvegetated surfaces, with substrates including loams, sands, cobbles, rock, riprap, and concrete. Hydrology varies from permanently flowing creeks to ephemeral streambeds that flow only following rainfall or in response to urban runoff. Some storm water facilities are in highly urbanized settings and present little opportunity for wildlife utilization due to their location and individual characteristics, while others traverse open space areas and/or function as important wildlife corridors within the City's Multi-Habitat Planning Area (MHPA).

The storm water facilities provide varying degrees of storm water conveyance and flood abatement, pollutant uptake, ground water recharge, wildlife habitat, and corridors for wildlife movement. Factors affecting the degree to which each of these functions occurs within a specified storm water facility include its width, substrate condition, habitat type and vegetative cover (if any), and proximity to urban development.

A total of 4 sensitive plant were observed within the project study area during the mapping effort: single-whorl burrobush (*Ambrosia monogyra*), San Diego marsh-elder (*Iva hayesiana*), southwestern spiny rush (*Juncus acutus* ssp. *leopoldii*), and San Diego sunflower (*Viguiera laciniata*).

A total of 4 sensitive animal species were observed within the project study area during the mapping effort: coastal California gnatcatcher (*Polioptila californica californica*), northern harrier (*Circus cyaneus*), yellow warbler (*Dendroica petechia brewsteri*), and little blue heron (*Egretta caerulea*). Although not detected during the biological surveys, the federally and state listed endangered least Bell's vireo (*Vireo bellii pusillus*) and light-footed clapper rail (*Rallus longirostris levipes*), federally listed endangered southwestern willow flycatcher (*Empidonax traillii extimus*) and San Diego fairy shrimp (*Branchinecta sandiegonensis*), and California species of special concern yellow-breasted chat (*Icteria virens*) also have been documented in or near portions of the Master Program study area. Several other plant and animal species also have potential to occur within or adjacent to some of the storm water facilities.

D. MITIGATION REQUIREMENTS

The Corps, CDFG, RWQCB, and City require mitigation for impacts to wetland habitat. Although the actual amount of wetland habitat impacted by maintenance in accordance with the Master Program will vary with the extent of maintenance ultimately required to achieve the desired levels of flood control, the Program EIR prepared for the Master Program estimates that up to approximately 41.62 acres of vegetated wetland habitat and 37.08 acres of unvegetated streambed/natural flood channel could be impacted. In addition, the City expects to use this plan to mitigate for 2.84 acres of wetland impacts that have occurred as a result of previous emergency maintenance activities that the City's Storm Water Division (SWD) has carried out over the last 6 years. Impacts to unvegetated streambed/natural flood channel do not require mitigation as the channel would remain in place and would only be affected by sediment removal and/or bank support/reconstruction in the case of excessive erosion.

E. TIMING OF IMPACTS AND MITIGATION

Mitigation for impacts associated with the Master Program outlined in this plan will be initiated within 12 months of impacts or as stipulated in the permits.

III. MITIGATION SITE DESCRIPTION

A. SITE SELECTION PROCESS

An initial search for wetland compensation sites revealed a number of potential sites which could accommodate the initial years of maintenance pursuant to the Master Program. Subsequent sites will be identified, as required, to meet demand for wetland compensation which cannot be accommodated by the initial sites. Potential mitigation sites were selected through research and coordination with the City as well as organizations involved in wetland/riparian area conservation (e.g., San Diego River Conservancy), in addition to review of documents prepared by others in support of other potential mitigation locations in the City (i.e., Merkel 2004a-b and KTU&A 2005).

Specific acreages and locations of mitigation required for projected impacts will be determined on a yearly basis. Each year, the City will compile a list of facilities to be maintained during that year and individual maintenance plans will be developed to determine the extent of impacts. Individual biological assessments will then be conducted in the field for each facility in order to determine the type and acreage of habitat(s) to be impacted and the required mitigation. Specific mitigation site(s) will then be selected based on the type, size, and location of impact(s). Because the Master Program will be implemented in several watersheds throughout the City of San Diego, creeks and river systems that are moderately to highly disturbed were selected so that mitigation could take place over relatively large areas, rather than in a piece-meal fashion.

B. POTENTIAL SITES

To the greatest extent practicable, mitigation for impacts will be located within the same watershed in which the impact(s) occurred. Potential mitigation sites for impacts within the various watersheds have been identified (Table 1; Figure 3). More specific information on the location and mitigation potential can be found in the referenced attachments contained in the appendices to this wetland compensation program. A brief discussion of compensation opportunities within each watershed follows.

Table 1 MITIGATION SITE LOCATIONS	
Attachment No.*	**Attachment Name**
SAN DIEGUITO HU	
A-1	Lake Hodges/San Pasqual Valley Area
A-1a	Giant Reed Occurrences in the Lake Hodges / San Pasqual Valley Area
A-1b	Tamarisk Occurrences in the Lake Hodges / San Pasqual Valley Area
PEÑASQUITOS HU	
B-1	Peñasquitos Watershed Overview
B-1a	Peñasquitos Watershed Northwest
B-1b	Peñasquitos Watershed Northeast
B-1c	Peñasquitos Watershed South
B-2	Los Peñasquitos Canyon Preserve
B-3	Upper Rose Canyon
B-4	Upper San Clemente Canyon
B-5	Tecolote Canyon Natural Park
SAN DIEGO HU	
C-1	Invasive Coverage Near Qualcomm Stadium
PUEBLO SAN DIEGO HU	
D-1	Chollas Creek Enhancement Program
D-2	Pueblo Watershed Enhancement
D-2a	Florida Canyon
D-2b	Switzer Canyon
D-2c	Chollas Parkway
D-2d	Highland Park Canyon
OTAY HU	
E-1	Rancho Jamul Mitigation Bank
E-2	Otay Valley Regional Park
SWEETWATER HU	
E-1	Rancho Jamul Mitigation Bank
TIJUANA HU	
F-1	Tijuana River Valley

*Refers to attachments at the back of this report.

1. <u>San Dieguito HU</u>

Impacts within the San Dieguito HU may be mitigated through restoration or enhancement of City-owned parcels in the San Dieguito River floodplain, which may include mitigation on

City-owned lands in the San Pasqual Valley (Figure 3). As the impacts projected to occur within this HU are minimal, minimal amounts of compensation would be required in this watershed.

San Pasqual Valley

The Lake Hodges/San Pasqual Valley open space is owned by the City of San Diego and serves as a major core resource area of the MSCP preserve system. The City-owned lands in this portion of the San Dieguito River watershed are surrounded by other publicly owned lands, other conserved lands, and lands in other jurisdictions that are the subject of ongoing Natural Community Conservation Planning efforts (Conservation Biology Institute [CBI] 2003). The Lake Hodges/San Pasqual Valley open space is approximately 9,036 acres in size and is located in the northernmost portion of the City. Lake Hodges is located approximately 10 miles from the coast, and the associated open space extends about 15 miles upstream along the San Dieguito River and Santa Ysabel Creek. The City-owned land around Lake Hodges and in the San Dieguito River Valley upstream to the "Narrows" (approximately 3,400 acres) is part of the Lake Hodges Cornerstone Lands Segment Area (CBI 2003). Cornerstone Lands are City Water Department-owned lands that were used as primary building blocks for creating the MSCP preserve system (City 1997a). Per the Cornerstone Lands Mitigation Bank Agreement (City 1997b), the City's Cornerstone Lands serve as mitigation banks, with conservation easements conveyed for each Cornerstone Segment Area when the credits for that Segment Area of the Cornerstone Lands Mitigation Bank are converted for sale.

Potential enhancement/restoration areas within the Lake Hodges/San Pasqual Valley open space have been identified (Attachment A-1), along with specific mapping of the extent of giant reed and tamarisk infestations (Attachments A-1a and A-1b). The source for this mapping is CBI's Habitat Management Plan for the open space (2003).

2. <u>Peñasquitos HU</u>

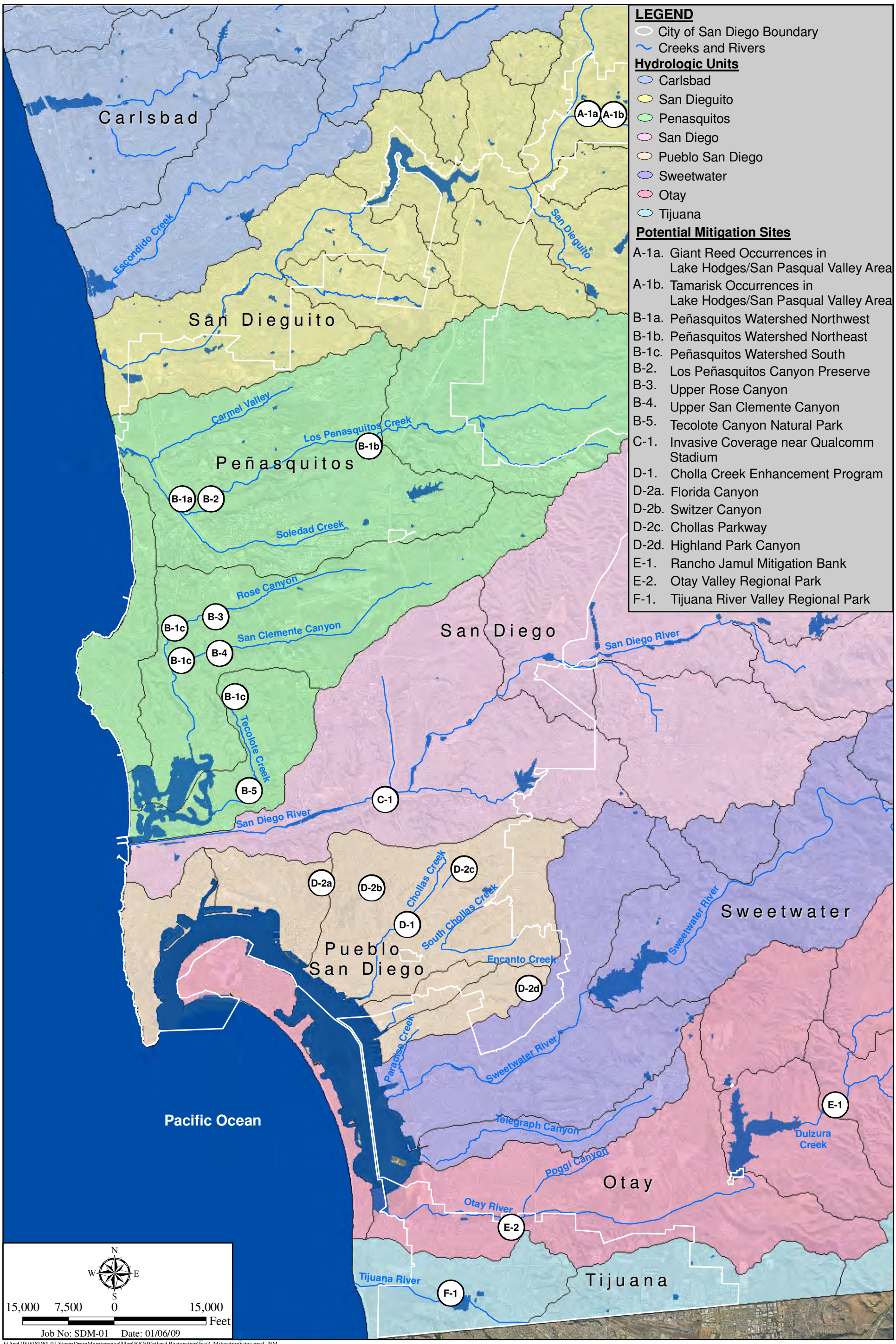
Potential mitigation sites within the Peñasquitos HU include: Los Peñasquitos Canyon Preserve, and areas identified in the Rose Creek Watershed Opportunities Assessment (KTU&A 2005), as well as Tecolote Canyon Natural Park. Merkel & Associates, Inc. (2004a) also conducted a wetland mitigation site investigation for the Peñasquitos HU and identified multiple potential sites, many of which overlap with those discussed in the 2005 Rose Creek study.

Peñasquitos Watershed Overview

Eighteen potential wetland mitigation sites on City-owned land in the Peñasquitos watershed were identified by Merkel & Associates (2004a; Attachments B-1 and B-1a-c).

Los Peñasquitos Canyon Preserve

Los Peñasquitos Canyon Preserve lies south of State Route 56, between the communities of Rancho Peñasquitos and Sorrento Hills to the north and Mira Mesa to the south. Stretching approximately 7 miles from the merge of Interstate 5 (I-5) and Interstate 805 to just east of Interstate 15; it encompasses approximately 4,000 acres of both Peñasquitos and Lopez Canyons



Potential Mitigation Site Locations

CITY OF SAN DIEGO MASTER STORM WATER SYSTEM MAINTENANCE PROGRAM

HELIX

Figure 3

(Attachment B-2). The preserve is jointly owned and administered by the City and County of San Diego. A number of wetland mitigation sites (El Cuervo, El Cuervo Norte, etc.) have already been established in the Los Peñasquitos Canyon Preserve, and additional mitigation opportunities likely exist. The City's Park Rangers provide management for the preserve.

Upper Rose Canyon and Upper San Clemente Canyon

Upper Rose Canyon is located east of I-5 and north of SR 52 in the University City area of San Diego. Upper San Clemente Canyon is located east of I-5 and south of SR 52 in the Clairemont area of San Diego. The Rose Creek Watershed Opportunities Assessment (KTU&A 2005) identified 21 potential wetland creation sites and numerous areas dominated by exotic vegetation within upper Rose Canyon and upper San Clemente Canyon (Attachments B-3 and B-4), many of which are on land owned and managed by the City's Park and Recreation Department. Several of the 21 sites have been used as mitigation by the City's Metropolitan Wastewater Department (MWWD), though Sites 7-11, 13-15, and 17-21 remain available at this time. Potential wetland mitigation sites identified by Merkel & Associates (2004b) are in the central portion of Rose Canyon, occurring in the area from Genesee Avenue west to Regents Road. These sites overlap with those presented in the Rose Creek Watershed Opportunities Assessment.

Tecolote Canyon Natural Park

Tecolote Canyon Natural Park is an open space area located within a narrow coastal valley in the City, approximately 0.5 mile east of I-5 and 0.8 mile east of the Pacific Ocean (Attachment B-5). The roughly 950-acre park is approximately 5 miles long and up to 0.5 mile wide. The majority of the park (approximately 926 acres) is owned by the City, with the remaining acreage owned by San Diego Gas & Electric (HELIX 2006).

Tecolote Canyon is one of the few remaining relatively natural coastal canyons in the City. This situation allows a high level of diversity for plant and animal species, which contribute to the unique richness of the park in urban San Diego. The park is traversed by Tecolote Creek, a roughly north to south flowing perennial stream. The riparian corridor along Tecolote Creek supports varying amounts of exotic plant species cover, which could be enhanced and/or restored for mitigation credit. There is also potential for creation of riparian habitat in non-native grassland or disturbed habitat areas adjacent to the corridor. Portions of the riparian corridor between Balboa Avenue and Mount Acadia Boulevard have been identified as riparian restoration/enhancement mitigation for the City's Metropolitan Waste Water Department (HELIX 2008), but other mitigation opportunities exist along the corridor.

3. <u>San Diego HU</u>

The focus of mitigation efforts within the San Diego HU will be on City-owned parcels within and adjacent to the San Diego River, with specific emphasis on wetlands in the vicinity of Qualcomm Stadium (Attachment C-1). The San Diego River flows in a southwesterly direction through the eastern portion of the City, east of I-15. Shortly before crossing under I-15, the river turns more or less to the west, paralleling the north side of I-8 until the river outfalls at the

Pacific Ocean. Qualcomm Stadium is located at the intersection of I-8 and I-15. The San Diego HU presents abundant opportunities for removal of invasive exotics, particularly giant reed, followed by enhancement/restoration with native species. Restoration efforts along the San Diego River would be coordinated with the San Diego River Conservancy.

4. <u>Pueblo San Diego HU</u>

Impacts within the Pueblo San Diego HU may be mitigated through implementation of enhancement/restoration proposals identified in the Chollas Creek Enhancement Program (City 2002; Attachment D-1) and potentially carried out in cooperation with the non-profit Groundwork organization or other non-profit organization, or through purchase of mitigation credits from the Rancho Jamul Mitigation Bank (further discussed in Section III.B.6 below). The Chollas Creek Enhancement Program encompasses the central and southern portions of the Pueblo HU and includes portions of Chollas Creek, South Chollas Creek, Encanto Creek, and Auburn Creek. These areas occur both along I-15 from San Diego Bay north to I-805 and east of I-15 and I-805. Merkel and Associates (2006; Attachment D-2) also identified 2.69 acres of land with wetland enhancement potential along portions of Florida Canyon (0.12 acre; Attachment D-1a), Switzer Canyon (0.21 acre; Attachment D-1b), Chollas Parkway (1.65 acres; Attachment D-1c), and Highland Park Canyon (0.71 acre; Attachment D-1d).

5. <u>Sweetwater HU</u>

Impacts within the Sweetwater HU (which are very minimal) will be mitigated through the purchase of mitigation credits from the Rancho Jamul Mitigation Bank (discussed in Section III.B.6 below).

6. <u>Otay HU</u>

Impacts within the Otay HU may be mitigated through the purchase of mitigation credits from the Rancho Jamul Mitigation Bank and/or through mitigation in the Otay Valley Regional Park (Figure 3; Attachments E-1 and E-2).

Rancho Jamul Mitigation Bank

The Rancho Jamul Mitigation Bank (Bank), an important biological resource area, consists of approximately 150 acres of riparian and wetland habitat on a 3,700-acre preserve located in southern San Diego County, just upstream of the Lower Otay Reservoir and southwest of SR 94 (Attachment E-1). Restoration activities within the Bank consist of restoration and enhancement of wetlands, floodplain riparian habitat, and tributaries associated with Dulzura and Jamul Creeks (Corps 2001). Another major goal of the Bank is to establish nesting habitat for the least Bell's vireo. Projects eligible for purchasing mitigation credits from the Bank include those located within watersheds that drain to San Diego Bay or Mission Bay, as follows:

- In-kind mitigation for projects located in areas draining into San Diego Bay, including the Otay River, Sweetwater River, and Chollas Creek watersheds.

- For projects located in areas draining to Mission Bay, including the San Diego River, Rose Creek, San Clemente Creek, and Tecolote Creek watersheds, the first 1:1 of any mitigation requirement for impacts to freshwater wetland or intermittent waters, or 2:1 for impacts to riparian habitat must occur in the same watershed as the impact site. The balance of the functional loss can be mitigated through purchase of credits at the Bank.

Otay Valley Regional Park

Otay Valley Regional Park (OVRP) is a multi-jurisdictional planning effort by the County of San Diego and the cities of San Diego and Chula Vista. The planning area for OVRP is located in the southern portion of San Diego County, 4 miles north of the U.S./Mexico International Border. The regional park will extend approximately 11 miles inland from the southeastern edge of the salt ponds at the mouth of the Otay River, upstream through the Otay River Valley, to the land surrounding both Lower and Upper Otay Lakes (County et al. 1997). A map of the concept plan for the OVRP is presented as Attachment E-2. Upon completion, the OVRP will represent one of the major open space areas within the southern area of San Diego County, linking south San Diego Bay with lower Otay Lake. Any mitigation proposed within the OVRP would occur along the Otay River or within or adjacent to existing ponds near the river.

7. Tijuana HU

Mitigation sites for impacts to wetlands within the Tijuana HU have not been located at this time. The City owns very little land within this southernmost HU, with most of the land owned by the County of San Diego (County). The County has historically allowed other agencies to mitigate on County-owned land, and, if mitigation on City-owned parcels is not possible, mitigating on County-owned land will be attempted. If an agreement between the City and County cannot be reached, mitigation will likely have to occur outside of the Tijuana HU. However, every attempt will be made to mitigate for impacts within the Tijuana HU on City-owned parcels and/or on County-owned parklands within the Tijuana HU, and may include land along the Tijuana River (Attachment F-1) or Smuggler's Gulch.

C. MITIGATION SUMMARY

Tables 2 and 3 4 provide a breakdown of estimated Corps, CDFG, and City wetland impacts and mitigation by HU. The estimates are based on the maximum assumed impact within each facility and do not take into account site specific measures that would be taken to reduce impacts to the greatest extent practicable. Based on the assumed implementation of the channel maintenance activities, project-related impacts could occur to approximately 29.22 acres of Corps jurisdictional wetlands, 41.62 acres of CDFG jurisdictional wetlands, and 41.62 acres of City-defined wetlands.

The actual amount of impacts and resulting mitigation required each year would be determined by completing an individual maintenance plan and individual biological assessment for each facility to be impacted in a given year. Table 4 identifies wetland impacts which have occurred as a result of previous emergency maintenance activities that the SWD has carried out over the last 6 years, and the resulting mitigation required.

Table 2
SUMMARY OF IMPACTS AND MITIGATION WITHIN CORPS JURISDICTIONAL WETLANDS (acre[s])*

HU	**Estimated Wetland Impacts†**										
	SRF	SRW	SWS	MFS	RS	FWM	CAM	CSM	CBM	DW	**Total Wetland Impacts‡**
San Dieguito	0.00	0.00	0.00	0.00	0.00	0.01	0.00	0.00	0.00	0.00	**0.01**
Peñasquitos	0.00	0.00	1.94	0.08	0.00	5.55	0.00	1.25	0.31	0.01	**9.14**
San Diego	4.95	0.00	0.30	0.00	0.00	2.76	0.00	0.00	0.00	0.02	**8.03**
Pueblo San Diego	0.00	0.00	0.75	0.19	0.06	2.74	0.00	0.32	0.00	2.90	**6.96**
Sweetwater	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	**0.00**
Otay	0.00	0.00	0.28	0.00	0.00	1.46	0.00	0.00	0.00	0.05	**1.79**
Tijuana	0.00	0.00	0.77	0.22	0.00	1.06	0.00	0.00	0.00	1.24	**3.29**
Total Impacts	**4.95**	**0.00**	**4.04**	**0.49**	**0.06**	**13.58**	**0.00**	**1.57**	**0.31**	**4.22**	**29.22**
Mitigation	**Estimated Mitigation**										**Total Estimated Wetland Mitigation**
Restoration/Enhancement Ratio	3:1	3:1	2:1	2:1	2:1	1:1	4:1	4:1	4:1	1:1	--
Acre(s)	**14.85**	**0.00**	**8.08**	**0.98**	**0.12**	**13.58**	**0.00**	**6.28**	**1.24**	**4.22**	**49.35**
Mitigation Credit Ratio	1:1	1:1	1:1	1:1	1:1	1:1	1:1	1:1	1:1	0.5:1	--
Acre(s)	**4.95**	**0.00**	**4.04**	**0.49**	**0.06**	**13.58**	**0.00**	**1.57**	**0.31**	**2.11**	**27.11**

*Totals reflect rounding
†Habitat acronyms: CAM=cismontane alkali marsh, CBM=coastal brackish marsh, CSM=coastal salt marsh, DW=disturbed wetland, FWM=freshwater marsh, MFS=mule fat scrub, RS=riparian scrub, SRF=southern riparian forest, SRW=southern sycamore riparian woodland, SWS=southern willow scrub
‡Does not include impacts from maintenance conducted in non-wetland WUS, as no mitigation is anticipated

Table 3
SUMMARY OF IMPACTS AND MITIGATION WITHIN CDFG AND CITY JURISDICTIONAL WETLANDS (acre[s])*

HU	Estimated Wetland Impacts†										
	SRF	SRW	SWS	MFS	RS	FWM	CAM	CSM	CBM	DW	**Total Estimated Riparian Impacts‡**
San Dieguito	0.00	0.00	0.00	0.00	0.00	0.16	0.00	0.00	0.00	0.02	**0.18**
Peñasquitos	0.00	0.00	3.50	0.52	0.00	6.47	0.00	1.25	0.51	0.04	**12.29**
San Diego	4.95	0.09	0.75	0.00	0.00	3.97	0.00	0.00	0.00	0.38	**10.14**
Pueblo San Diego	0.00	0.00	1.68	0.46	0.15	4.36	0.00	0.32	0.00	4.78	**11.75**
Sweetwater	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.02	**0.02**
Otay	0.00	0.00	0.28	0.00	0.00	1.73	0.00	0.00	0.00	0.06	**2.07**
Tijuana	0.00	0.00	1.28	1.01	0.00	1.21	0.00	0.00	0.00	1.67	**5.17**
Total Impacts	**4.95**	**0.09**	**7.49**	**1.99**	**0.15**	**17.90**	**0.00**	**1.57**	**0.51**	**6.97**	**41.62**
Mitigation	**Estimated Mitigation**										**Total Estimated Riparian Habitat Mitigation**
Enhancement/ Restoration Ratio	3:1	3:1	2:1	2:1	2:1	1:1	4:1	4:1	4:1	1:1	--
Acre(s)	**14.85**	**0.27**	**14.98**	**3.98**	**0.30**	**17.90**	**0.00**	**6.28**	**2.04**	**6.97**	**67.57**
Mitigation Credit Ratio	1:1	1:1	1:1	1:1	1:1	1:1	1:1	1:1	1:1	0.5:1	--
Acre(s)	**4.95**	**0.09**	**7.49**	**1.99**	**0.15**	**17.90**	**0.00**	**1.57**	**0.51**	**3.49**	**38.14**

*Totals reflect rounding
†Habitat acronyms: CAM=cismontane alkali marsh, CBM=coastal brackish marsh, CSM=coastal salt marsh, DW=disturbed wetland, FWM=freshwater marsh, MFS=mule fat scrub, RS=riparian scrub, SRF=southern riparian forest, SRW=southern sycamore riparian woodland, SWS=southern willow scrub
‡Does not include impacts from maintenance conducted in unvegetated streambeds, as no mitigation is anticipated

Table 4 IMPACTS FROM PAST EMERGENCY MAINTENANCE ACTIVITIES					
	Wetland Impact By Watershed (acres)				
Date of Activity	**San Diego**	**Tijuana**	**Pueblo**	**Peñasquitos**	**Total**
October-December 2004	0.99	0.0	0.01	0.0	1.00
January – March 2005	0.82	0.77	0.0	0.0	1.59
June 2005	0.0	0.0	0.0	0.12	0.12
October-November 2005	0.0	0.0	0.0	0.13	0.13
March 2006	0.0	0.0	0.0	0.0	0.0
Total Impacts	**1.81**	**0.77**	**0.01**	**0.25**	**2.84**
Mitigation by Watershed (acres)					
Restoration/Enhancement Ratio	3:1	3:1	3:1	3:1	**Total**
Total Mitigation	**5.43**	**2.31**	**0.03**	**0.75**	**8.52**

Wetland mitigation often consists of a combination of creation, enhancement, or restoration to satisfy local, state, and federal mitigation requirements. Typically, creation at a ratio of 1:1 is required as a component of the mitigation. However, in the case of mitigating for storm water facility maintenance activities conducted in channels, enhancement and restoration without the traditional creation component are considered appropriate for three primary reasons. First, the channel itself would remain after maintenance and would continue to function for wildlife movement and, in the case of earthen bottom facilities, would continue to filter out urban runoff pollutants. Second, wetland vegetation has historically returned to these channels between maintenance events. Third, maintenance, in most cases, occurs in urban channels where repeated maintenance activities have already occurred for many years.

Mitigation for maintenance impacts to wetlands may take one or a combination of the following three actions: (1) enhancement/restoration, (2) purchase of mitigation credits, or (3) creation. These actions would occur on a one-time basis pursuant to the ratios shown in Table 5. However, if the mitigation were carried out and successfully established before the impact were to occur, the mitigation ratio would be 1:1 for that particular impact since no temporal loss would occur.

Table 5 WETLAND MITIGATION RATIOS	
WETLAND TYPE	**MITIGATION RATIO[1]**
Southern riparian forest	3:1
Southern sycamore riparian woodland	3:1
Riparian woodland	3:1
Coastal saltmarsh	4:1
Coastal brackish marsh	4:1
Southern willow scrub	2:1
Mule fat scrub	2:1
Riparian scrub	2:1
Freshwater marsh	1:1
Cismontane alkali marsh	4:1
Disturbed wetland	1:1
Streambed/natural flood channel	--

[1]Mitigation done in advance or through purchase of mitigation credits would be at a 1:1 ratio.

Enhancement/Restoration

Enhancement/restoration would involve the rehabilitation of highly degraded wetlands with the goal of repairing natural or historic functions. Activities would include removal of invasive plants in addition to installing native wetland plants as seed and/or container stock. Installation of cuttings, container stock, and seed would begin following removal of any exotic species. Irrigation may be provided, depending on the type and location of the habitat to be restored.

For the enhancement/restoration to achieve the highest wildlife and water quality value, these activities would occur in large, continuous areas (e.g., San Diego River and Rose Creek). In addition, wherever possible, the enhancement/restoration would occur at the uppermost region of a drainage course or watershed to minimize the likelihood of invasive plants being transported into the mitigation area from areas further upstream. Also, whenever possible, mitigation would occur within the same watershed as the impact.

Mitigation ratios are proportional to the habitat type and quality, and are typically higher for wetland habitat types that have a higher function and diversity and typically take longer to establish. Enhancement/Restoration activities would be considered “permanent” mitigation and, assuming the initial mitigation continues to thrive, would allow storm channel maintenance to occur at the impacted area without additional mitigation for future clearing events.

Purchase of Mitigation Credits

In place of enhancement/restoration, the City could choose to purchase mitigation credits. Mitigation ratios would be 1:1 for all wetland habitat impacts when the native habitat associated with mitigation credits is fully established in advance of the impact. In some cases, mitigation credits would have a higher value than the impacted habitat.

Creation

Although opportunities for creation have not been specifically identified, the City may opt to create wetland habitat as part of the mitigation process should suitable locations arise and be economically feasible.

D. MITIGATION SITE SUITABILITY

To meet Corps, CDFG, RWQCB, and City mitigation requirements, this plan recommends measures to increase the amount and/or quality of native habitat through enhancement or restoration. The target riparian restoration and enhancement areas are considered suitable because they occur within and alongside natural creeks, which support soil conditions and hydrological regimes conducive to the establishment and persistence of native wetland/riparian vegetation.

E. OWNERSHIP STATUS

The majority of mitigation lands that are outside of established mitigation banks are expected to be on land owned by the City, with some potential areas owned by the County of San Diego (County).

F. EXISTING CONDITIONS

Proposed restoration/enhancement areas are currently dominated by non-native plants, which are sometimes intermixed with sparse native vegetation. Invasive and non-native plants that may occur in the restoration/enhancement areas include: giant reed (*Arundo donax*), Mexican fan palm (*Washingtonia robusta*), tamarisk (*Tamarix* sp.), Canary Island date palm (*Phoenix canariensis*), Brazilian pepper tree (*Schinus terebinthifolius*), pampas grass (*Cortaderia* sp.), fennel (*Foeniculum vulgare*), bristly ox-tongue (*Picris echioides*), umbrella sedge (*Cyperus involucratus*), annual beard grass (*Polypogon monspeliensis*), hottentot fig (*Carpobrotus edulis*), and castor bean (*Ricinus communis*), among others.

Areas where creation might occur are dominated by non-native upland species such as mustard (*Brassica* sp.), star-thistle (*Centaurea melitensis*), filaree (*Erodium* sp.), artichoke thistle (*Cynara cardunculus*), or non-native grasses such as red brome (*Bromus madritensis* ssp. *rubens*), soft chess (*Bromus hordaceus*), oat (*Avena* sp.), Bermuda grass (*Cynodon dactylon*), and ryegrass (*Lolium* sp.).

G. EXISTING FUNCTIONS AND SERVICES

The areas proposed for restoration and enhancement are dominated by non-native vegetation. Existing functions and services include storm water conveyance and flood abatement, pollutant uptake, ground water recharge, wildlife habitat, and corridors for wildlife movement. However, fewer wildlife species can use these areas than native habitat, and native cover is either not present or only present as a few scattered individuals. Restoration and enhancement of these areas will greatly increase the value of these areas to native flora and fauna, and also reduce the spread of non-native species to downstream areas within the watershed.

H. TARGET FUNCTIONS AND SERVICES

The goal of wetland restoration/enhancement for the project is to establish habitat that can perform the same functions and services (storm water conveyance and flood abatement, pollutant uptake, ground water recharge, wildlife habitat, and corridors for wildlife movement) that are performed by the areas proposed for impact. At the end of 5 years of maintenance and monitoring, the restored habitats are still expected to be in relatively early stages of habitat development. However, all restored habitat is expected to support sufficient native vegetation and be on the trajectory toward developing into the target vegetation type.

Recent Corps documents (Regulatory Guidance Letter published by the Corps on December 24, 2002, and Special Public Notices published by the Los Angeles District on January 27, 2003 and April 19, 2004) emphasize the importance of maximizing the functions provided by compensatory mitigation, and encourage the use of functional assessments (such as the Corps' Hydrogeomorphic Methodology [HGM]) for evaluating impacted aquatic resources, determining appropriate mitigation ratios and success criteria, and assessing the compensatory mitigation following implementation.

In accordance with the Corps' HGM approach, target hydrological, biochemical, and biological functions related to habitat are included as goals for the compensation plan and are discussed below (Brinson et. al. 1995; Smith et. al. 1995).

1. <u>Hydrological</u>

Typical hydrological criteria used in functional assessments such as the HGM (Brinson et al. 1995; Smith et. al. 1995) include characteristics of flood prone areas and micro- and macro-topographic complexity that result in short-term and long-term storage of surface and sub-surface water, and dissipation of energy. The proposed compensation areas are located in areas with varied hydrologic regimes. As such, the hydrological criteria for these areas could include one or more of the following: (1) evidence of sediment movement through the site; (2) evidence of moist soil in the top 18 inches of soil within Corps jurisdictional areas 2 weeks after a major rain event; and (3) evidence of one or more of the following field indicators of dynamic hydrogeomorphic processes: (a) topographic complexity from sediment scour and deposition resulting in meander scroll and pools, small surface channels, or hummocks; (b) redistribution of detritus such as debris jams or drift lines; (c) overbank or

overland flooding indicated by high-water marks or silt layers on vegetation; or (d) presence of surface deposition from microbial processing such as humus layer or woody debris.

2. Biochemical

Biochemical functions include the cycling of nutrients, removal of imported elements and compounds from the system, retention of particulates, and export of organic carbon. Nutrient cycling includes 2 variables: aerial net primary productivity (ANPP) and annual turnover of detritus. The ANPP of a wetland typically corresponds to the total leaf area, which in turn is a measure of what the biomass produces, and is balanced with the detrital turnover of the system. Because direct measurements of ANPP are impractical, measurements of nutrient cycling will rely on vegetative cover tracked over time relative to the amount of cover following initial enhancement and restoration activities (removal of invasive species and installing native wetland/riparian species). The goal for native vegetation cover will vary by target habitat type and are outlined in Section VIII.B.2 of this report.

Removal of elements and compounds shall be measured by evidence of flooding, as observed by the presence of any of the following: water marks, silt lines, drift and/or wrack lines, sediment scour, or deposition. Export of organic carbon also includes evidence of flooding, as well as visual estimates of litter and course woody debris.

3. Biological

Target biological functions and services include increased cover by native vegetation and increased use by a variety of wildlife. Biological monitoring will consist of technical monitoring outlined in Section VII.D, as well as documentation of wildlife usage. Although focused surveys for specific wildlife species will not be conducted, any species observed or detected in the restoration areas during monitoring events will be noted.

I. MSCP LAND USE CONSISTENCY

Maintenance activities would be consistent with relevant policies and guide lines of the City's MSCP (refer to Table 13 of the Biological Technical Report [HELIX 2011]). Many of the storm water facilities and proposed mitigation areas are located within the City's MHPA. Disturbed lands within the MHPA can be enhanced or restored to improve the functions and services of the MHPA.

IV. PROJECT RESPONSIBILITY

A. PROJECT PROPONENT

Proponent: City of San Diego, Storm Water Division
Contact: Daniel Lottermoser
Address: 2781 Caminito Chollas
San Diego, CA 92105
Phone: 619-527-5423
Email: dlottermoser@sandiego.gov

B. RESTORATION SPECIALIST

Overall supervision of the installation, maintenance, and monitoring of this restoration/enhancement project will be the responsibility of a restoration specialist experienced with wetland habitat restoration. The restoration specialist will oversee the efforts of the installation and maintenance contractor(s) for the life of the project. Specific tasks of the restoration specialist include educating all participants with regard to mitigation goals and requirements, directly overseeing fencing, planting, seeding, weeding, and other maintenance activities, and conducting annual assessments of the restoration/enhancement effort. The restoration specialist will explain to the contractor(s) how to avoid impacts to existing sensitive habitat and sensitive species. The restoration specialist will prepare an annual report which will be submitted to the Corps, CDFG, RWQCB, and City Development Services Department [DSD] and SWD.

C. LANDSCAPE ARCHITECT

If a creation or restoration component is included in the implementation of the mitigation plan, a licensed landscape architect will prepare the necessary construction documents; including grading (if necessary), irrigation and planting plans. This person will inspect the irrigation system prior to seeding and planting.

D. INSTALLATION/MAINTENANCE CONTRACTOR(S)

The installation and maintenance contractor(s) will have experience in wetland habitat restoration and be under the direction of the restoration specialist, who will assist the contractor(s) with the installation and maintenance of the target vegetation types.

The installation contractor will be responsible for removal of targeted invasive plants within the restoration and enhancement areas, irrigation installation (as needed), pre-planting weed control, installation of cuttings, container plants and seed, and maintenance of all restoration/enhancement areas during the 120-day installation period. The restoration specialist must recommend sign off, and the SWD must approve and sign off on all of these criteria, to end the installation period, at which point the 5-year monitoring period would begin.

After the installation contract is completed, the SWD will hire a maintenance contractor for the duration of the five-year monitoring period. The maintenance contractor and the installation contractor may be the same entity. The SWD may change contractors at its discretion. The maintenance contractor should be knowledgeable as to the maintenance of native plant habitat and the difference between native and non-native plants. The maintenance contractor will service the restoration and enhancement areas once per month, or as needed. Service will include but not be limited to weed control, irrigation maintenance, trash removal, watering, dead plant replacement, and re-seeding. All activities conducted will be seasonally appropriate and approved by the restoration specialist. The maintenance contractor will meet the restoration specialist at the site when requested and will perform all checklist items in a timely manner as directed.

V. IMPLEMENTATION PLAN

A. RATIONALE FOR EXPECTING IMPLEMENTATION SUCCESS

Restoration and enhancement of wetland habitat within the designated mitigation areas is anticipated to be successful because the proposed areas are: (1) located within or adjacent to existing wetland habitats, and (2) located in areas containing the same slope, aspect, soils, and hydrology as adjacent native habitat. Habitat restoration and enhancement would increase the value of existing habitat by creating larger, contiguous blocks of native habitat.

The areas to be designated for enhancement may support substantial native habitats, with patches of non-native, invasive vegetation, or they may be almost completed dominated by invasive species. In either case, enhancement of these areas would involve removing trash, debris, and noxious, invasive weed species, thereby improving the overall quality of the habitat. The removal of invasive plants within the enhancement areas is expected to provide an overall benefit to the City's MHPA by decreasing the seed bank of these aggressive colonizers.

B. SENSITIVE HABITAT AND SENSITIVE SPECIES

As a result of the mitigation areas being located adjacent to sensitive habitat, including wetlands, all areas will be staked by a restoration specialist and all access routes will be identified in advance of starting restoration/enhancement work. Due to the potential presence of sensitive animal species such as least Bell's vireo and southwestern willow flycatcher (*Epidonax taillii extimus*), non-native plant removal should not occur during the reproductive seasons of sensitive species in areas where such species may be present (between March 15 and September 15 in riparian forest or scrub habitats). In addition, mechanized or intensive removal activities should not occur within 300 feet of potentially occupied habitat during the same periods, or within 500 feet of an active nest of a tree-nesting raptor or 800 feet of an active nest of a ground-nesting raptor (typically present between February 1 and July 15). If removal of invasive non-native plants needs to occur between February 1 and July 15, a pre-impact survey for nesting raptors will be required. Likewise, if this removal needs to occur between March 15 and September 15, protocol surveys for least Bell's vireo and southwestern willow flycatcher will need to be conducted prior to impacts. Manual non-native plant removal or control (including use of herbicides) may be conducted in the mitigation areas at any time of year during the maintenance and monitoring periods.

C. IMPLEMENTATION SCHEDULE

Wetland mitigation activities will begin immediately after all applicable permits are secured, as weather allows, and should be completed within 2 months or as quickly as practicable.

Restoration as well as creation would occur in the fall (after September 15) to ensure that planting and seeding coincide with the beginning of the rainy season. If grading and clearing must occur during the least Bell's vireo breeding season (March 15 through September 15), pre-construction vireo protocol surveys will be conducted in suitable habitat prior to any construction (grading or clearing) activity to determine their presence/absence in areas to be directly impact by clearing or grading or indirectly impacted by noise. No grading or clearing will occur within 300 feet of occupied habitat during the vireo breeding season.

Enhancement activities (e.g., invasive plant removal and/or trash removal) may occur at any time provided they do not involve use of equipment which could result in noise-related direct or indirect impacts to the least Bell's vireo or other sensitive bird species. As with restoration, if heavy equipment must be used during the least Bell's vireo breeding season (March 15 through September 15), pre-construction vireo protocol surveys will be conducted in suitable habitat prior to any construction (grading or clearing) activity to determine their presence/absence in areas to be directly impacted by clearing or grading or indirectly impacted by noise. No grading or clearing will occur within 300 feet of occupied habitat during the vireo breeding season. Oversight by the restoration specialist would also ensure that impacts from maintenance activities would be avoided.

Monitoring of the enhancement/restoration effort will begin with its installation. The monitoring program will continue for a 5-year period (or until all success criteria have been met) following completion of the installation. Regular monitoring visits will be conducted during the monitoring period with an annual report distributed by the end of each year. The results of the annual reports will be used to determine both the success of the restoration effort and any necessary remedial actions. Specific monitoring measures are addressed in Section VII.

D. ENHANCEMENT/RESTORATION

1. <u>Site Preparation</u>

Pre-restoration Meeting

Prior to initiation of enhancement/restoration activities, an on-site meeting will be held with the installation contractor and the restoration specialist to identify sensitive areas and devise a strategy for avoidance.

Site Access

Vehicle access may be required for tree removal within the restoration areas as well as chipping or mowing of exotics, such as giant reed. Vehicles would access the mitigation sites for enhancement/restoration activities along existing access paths, where present. Site access for

each mitigation site would be determined on a case-by-case basis, depending on the location and surrounding habitat as well as presence of existing access paths. Temporary construction areas and roads, staging areas, or permanent access roads would not disturb existing habitats unless determined to be unavoidable. All such activities would occur on existing disturbed areas rather than in habitat. If temporary habitat disturbance is unavoidable, then restoration of and/or mitigation for the disturbed areas after project completion will be required. Some equipment (e.g., irrigation materials or container plantings) may be temporarily stored directly inside of delineated enhancement/restoration areas.

Fencing

Prior to any enhancement/restoration activities, each work area will be staked and roped off, or fenced with silt fencing or orange construction fencing to restrict access and ensure that personnel do not undertake activities outside the authorized areas. Project boundaries will be marked by a surveyor, and fencing will be installed by the installation contractor. Straw wattles or silt fencing will be installed on down slope portions of enhancement/restoration areas, as needed, to restrict sediment movement off site. This fencing would be removed after sufficient vegetation has established to control erosion.

Temporary Signage

Temporary signs will provide an explanation of the project and a contact number for any public inquiries. Signs will be installed at all entrances to the project area.

Documenting Pre-mitigation Conditions

At least 2 photographic documentation locations shall be identified prior to non-native plant removal for each enhancement/restoration area. These photos will be used for comparison with post-installation photos to document the mitigation effort.

Non-native Plant and Debris Removal

All non-native, invasive plant species as well as debris will be removed from the enhancement/restoration areas. All large woody exotics will be cut to ground level with all above-ground portions removed from the site. Remaining stumps will be treated with herbicide, as necessary. Trash and other debris removed from the project area will be disposed of in a licensed landfill. Plant material may be mulched and left on site or may be hauled away and disposed of in a licensed landfill. Giant reed is anticipated to be one of the primary invasive plants removed from the mitigation areas. As such, two potential giant reed removal techniques, as outlined on the Santa Margarita–San Luis Rey Weed Management Area (SMSLRWMA) program website (SMSLRWMA 2008) are provided below. The suggested timing for these methods is presented in Table 6.

(1) Foliar Spray Herbicide Method. This method involves spraying herbicide on the stems and leaves of giant reed without any cutting. The herbicide that has been found to be most effective is a glyphosate. If treatment is in or adjacent to water, Rodeo® or other

herbicide approved by the U.S. Environmental Protection Agency (EPA) for use in aquatic systems must be used. Although the manufacturer's recommendations for Rodeo® use on giant reed are to use 2% solution, field tests have indicated that a low rate of kill is achieved with 2% foliar application. A much higher kill rate (up to 95% with one treatment) has been achieved when using a higher percentage (5% to 6%). The leaves and stems need to be thoroughly sprayed - in some cases this is difficult due to the height of the vegetation and the presence of non-target vegetation nearby. Pressurized sprayers (mounted on an all-terrain vehicle) and the use of ladders are helpful where the giant reed is tall. The giant reed can be 'prepped' prior to spraying by pulling the stem away from non-target vegetation and pushing it down to the ground. Because the giant reed rhizome mass remains in the ground, if a sub-lethal dose of herbicide is applied, resprouting will occur. While some resprouting usually does occur, it is generally composed of very scattered, small giant reed sprouts. This method can also be followed by mowing and/or cutting.

(2) Cut and Spray Herbicide Method. This method involves cutting the giant reed stems and then applying herbicide to the cut stem surface. Herbicide may either be sprayed on (generally with a backpack sprayer using 100% glyphosate) or for smaller projects herbicide may be applied using a hand pump sprayer or a sponge dauber. If treatment is in or adjacent to water then Rodeo® or other herbicide approved by the U.S. EPA for use in aquatic systems must be used. There are varying success rates for this method, ranging from about 50% to 90% kill in the first year. The difference in success rate may be due to factors such as: size and age of the giant reed clump(s), proximity to water, herbicide concentration, time between cutting and herbicide application, etc. Whatever the success rate, there is always some resprouting. It is hypothesized that the action of cutting the stem triggers the resprouting response, causing the production of new stems from the rhizomes. This method always requires follow-up treatment. Follow-up treatment of resprouts can either be the foliar spray method or the cut or spray method again. The foliar spray method works fairly well because the sprouts are much smaller, so it is easy to target them with little overspray. Depending on the situation, the cut giant reed stems may be left on site (but not in a moist area where they may sprout or in a flood-prone area) or the giant reed biomass can be disposed of in a licensed landfill.

Table 6
METHODS AND TIMING OF GIANT REED REMOVAL

METHOD	TIMING		
	October-November	**February-March**	**April-August**
Foliar Spray	Spray herbicide	Mow/cut stems, as necessary	NA
Cut and Spray	Cut stems and spray herbicide	Spray resprouts	Spray resprouts unless it poses a threat to nesting of sensitive bird species

Because removal of the dead giant reed biomass from the mitigation sites can be very expensive, alternative methods of dealing with the biomass have been used by the SMSLRWMA program and are discussed below. In some cases, the biomass can be left on site to decompose naturally over time, however, this could be a concern due to potential flood or fire hazard, aesthetics, or the biomass may need to be removed for native re-planting. The main methods of dealing with giant reed stems that require removal that are used by the SMSLRWMA program are: (1) chipping, and (2) mowing. The following descriptions are taken from the SMSLRWMA website.

(1) Chipping. High-powered drum chippers are recommended because the material is finely chipped and the machine feeds itself, creating a much safer environment for workers and chipping at a faster rate than regular chippers. Although high powered drum chippers are more expensive to rent than regular chippers, crews can work faster. Furthermore, the green giant reed stems are chipped so fine that there is almost no resprouting.

(2) Mowing. Mowing is carried out in place using a hammer-flail mowing attachment that is mounted on the front of a rubber-tired tractor. Alternatively, slope mowers, hydroax, and other mowing devices can be used (not all are rubber tired). Mowing is generally best suited to dense giant reed stands. However, if the stands are very old it may be hard to maneuver through them and there may be hidden obstacles or unexpected drops. Mowing is advantageous because no giant reed material has to be moved by hand or moved off-site. The limitations to mowing include site access, terrain, amount of native vegetation, and noise issues.

Irrigation

Following non-native removal, the installation contractor will install irrigation according to the project plans for specific mitigation sites. Irrigation may or may not be installed depending on the type and location of the mitigation area(s). Sources of irrigation water may include (1) water pumped from creeks/rivers adjacent to the mitigation area, (2) water brought in by a water truck, or (3) hook-up to a nearby water source.

2. Planting

Once an enhancement/restoration area has been weeded and irrigation installation is complete (as appropriate), cuttings, plantings, and/or seed will be installed. All seed and plant material will be collected or propagated from local plant populations occurring in coastal San Diego County within 25 miles of the coast. Substitutions, other donor sites, or use of commercial material may be allowed if materials are unavailable, at the discretion of the restoration specialist and Park and Recreation Department (for mitigation occurring on land owned or managed by the Park and Recreation Department). All seed and container stock must be inspected and approved by the restoration specialist prior to installation. Container stock would be installed in holes that are at least 1.5 times larger than the container. Holes will be dug with mechanical augers where possible and by hand elsewhere. Plant protectors may be used, at the restoration specialist's direction. Initial container stock

orders should include 10 to 15 percent more plants than specified in the plans to help ensure adequate establishment success. Extra container stock may be installed at the time of initial planting, or be held in a nursery to be used to replace plants that die during the establishment period, at the contractor's discretion. Seed would be hand-spread following planting and raked in.

Southern Riparian Forest/Woodland

Appropriate cuttings, container stock, plugs, and/or seed will be installed. The goal is to create native riparian habitat that supports a riparian tree canopy, a relatively open understory, and a diverse low shrub/herbaceous component. Shrubby willows are excluded from the plant palette because of their potential to impede the flow of water, thereby increasing flood potential in surrounding urban areas. In addition, shrubby willows act as visual barriers and therefore increase the likelihood of transient encampments becoming established, which is an issue of high concern in many of the surrounding neighborhoods and businesses. A general plant palette for southern riparian forest/woodland restoration is presented in Table 7. Species may be added or deleted from the palette depending on the desired outcome as well as plant availability and cost at the time of implementation. Southern riparian forest and riparian woodland naturally may contain openings that are dominated by native grasses and herbs with scattered shrubs. To help re-create this mosaic, the restoration effort will group tree plantings and will also target the establishment of native understory herb and shrub species, thereby increasing habitat diversity and allowing for natural succession to occur. Southern riparian forest/riparian woodland will be the target habitat type for: (1) mitigating for in-kind impacts as well as (2) mitigating for riparian scrub impacts (including southern willow scrub and mule fat scrub), where the resulting mitigation would occur in close proximity to residential communities or commercial areas.

Table 7
SOUTHERN RIPARIAN FOREST/WOODLAND PLANT PALETTE

SCIENTIFIC NAME	COMMON NAME	SPACING ON CENTER (feet)†	GROUPING SIZE†	NUMBER OR POUNDS PER ACRE
CONTAINER STOCK*				
Trees				
Platanus racemosa	Western sycamore	12-20	3-7	30-60
Populus fremontii	Western cottonwood	12-20	3-8	30-75
Quercus agrifolia	Coast live oak	15	3-5	40
Salix gooddingii	Black willow	15	6-7	65
Salix laevigata	Red willow	15	6-7	65
Sambucus mexicana	Blue elderberry	12	4	40

Table 7 (cont.) **SOUTHERN RIPARIAN FOREST/WOODLAND PLANT PALETTE**				
SCIENTIFIC NAME	**COMMON NAME**	**SPACING ON CENTER (feet)†**	**GROUPING SIZE†**	**NUMBER OR POUNDS PER ACRE**
CONTAINER STOCK* (cont.)				
Shrubs/Herbs				
Artemisia palmeri	Palmer's sagewort	5	22	220
Baccharis salicifolia	Mule fat	8	3-5	175
Distichlis spicata	Saltgrass	2	100	350
Iva hayesiana	San Diego marsh elder	5	5-7	220
Leymus triticoides	Creeping wild rye	2	50	350
Rubus ursinus	California blackberry	4	15	150
Vitis girdiana	Desert wild grape	4	15	150
SEED MIX				
Ambrosia psilostachya	Western ragweed	--	--	3
Anemopsis californica	Yerba mansa	--	--	1
Artemisia douglasiana	Douglas mugwort	--	--	2
Juncus acutus ssp. *leopoldii*	Southwestern spiny rush	--	--	1
Juncus arcticus var. *mexicana*	Wire rush	--	--	2
Leymus condensatus	Giant wild rye	--	--	2
Muhlenbergia rigens	Deergrass	--	--	2
Isocoma menziesii	Coastal goldenbush	--	--	3
Urtica dioica ssp. *holoserica*	Stinging nettle	--	--	1

*Container stock may be cuttings, plugs, or one gallon size, depending on species and availability.
†Grouping size and spacing may vary depending on the desired density of tree and shrub canopy.

Southern Riparian Scrub

Southern riparian scrub will be the target habitat type for mitigating for in-kind impacts (including impacts to southern willow scrub and mule fat scrub) where the resulting mitigation would occur in areas further away from residential communities and commercial areas, where flood hazard risks are lower and where potential transient encampments pose less of a safety concern. A general plant palette for southern riparian scrub restoration is presented in Table 8. Species may be added or deleted from the palette depending on the desired outcome as well as plant availability and cost at the time of implementation.

Freshwater Marsh/Emergent Wetland

Freshwater marsh/emergent wetland restoration would occur for: (1) in-kind impacts to these habitats, or (2) impacts to disturbed wetlands. A general plant palette for freshwater marsh/emergent wetland restoration is presented in Table 9. Species may be added or deleted from the palette depending on the desired outcome as well as plant availability and cost at the time of implementation.

Table 8
SOUTHERN RIPARIAN SCRUB PLANT PALETTE

SCIENTIFIC NAME	COMMON NAME	SPACING ON CENTER (FEET)†	GROUPING SIZE†	NUMBER OR POUNDS PER ACRE
CONTAINER STOCK*				
Trees				
Sambucus mexicana	Blue elderberry	10	4-6	50
Shrubs/Herbs				
Baccharis salicifolia	Mule fat	6	30-40	400
Distichlis spicata	Saltgrass	2	100	350
Iva hayesiana	San Diego marsh elder	5	5-7	220
Salix exigua	Sandbar willow	10	25-30	300
Salix lasiolepis	Arroyo willow	10	25-30	300
SEED MIX				
Ambrosia psilostachya	Western ragweed	--	--	2
Artemisia douglasii	Douglas mugwort	--	--	2
Baccharis sarothroides	Broom baccharis	--	--	1
Isocoma menziesii	Coastal goldenbush	--	--	2

*Container stock may be cuttings, plugs, or one gallon size, depending on species and availability.
†Grouping size and spacing may vary depending on the desired density of tree and shrub canopy.

Table 9 FRESHWATER MARSH/EMERGENT WETLAND PLANT PALETTE (seed mixture)		
Scientific Name	**Common Name**	**Pounds Per Acre**
Cyperus eragrostis	Tall flatsedge	1
Eleocharis macrostachya	Spike rush	1
Pluchea odorata	Salt marsh fleabane	1
Scirpus acutus var. *occidentalis*	Viscid bulrush	2
Schoenoplectus californicus (*Scirpus californicus*)	California bulrush	2
Scirpus maritimus	Bulrush	2
Sesuvium verrucosum	Western sea-purslane	1
Typha latifolia	Broad-leaved cattail	2

Coastal Salt Marsh/Brackish Marsh/Cismontane Alkali Marsh

Coastal salt marsh/brackish marsh/cismontane alkali marsh restoration may occur for: (1) in-kind impacts to these habitats, or (2) impacts to disturbed wetlands in areas suitable for marsh restoration. General plant palettes these habitats are presented in Tables 10 to 12. Species may be added or deleted from the palettes depending on the desired outcome as well as plant availability and cost at the time of implementation.

Table 10 COASTAL SALT MARSH PLANT PALETTE				
SCIENTIFIC NAME	**COMMON NAME**	**SPACING ON CENTER (feet)†**	**GROUPING SIZE†**	**NUMBER OR POUNDS PER ACRE**
CONTAINER STOCK*				
Below Mean High Water				
Spartina foliosa	Cordgrass	4	NA	3,450
Low Marsh or Marsh Plain				
Spartina foliosa	Cordgrass	4	70	700
Batis maritima	Saltwort	2	100	1,000
Jaumea carnosa	Jaumea	5	22	220

Table 10 (cont.) **COASTAL SALT MARSH PLANT PALETTE**				
SCIENTIFIC NAME	**COMMON NAME**	**SPACING ON CENTER (feet)†**	**GROUPING SIZE†**	**NUMBER OR POUNDS PER ACRE**
CONTAINER STOCK*				
Mid-Marsh				
Distichlis spicata	Saltgrass	2	140	1,400
Frankenia salina	Alkali heath	2	200	2000
Limonium californicum	Marsh rosemary	2	70	700
Monathochloe littoralis	Shoregrass	2	150	1,500
Sarcocornia pacifica (*Salicornia virginica*)	Common pickleweed	6	95	950
High Marsh				
Arthrocnemum subterminale (Salicornia subterminalis)	Glasswort	6	45-50	465
Atriplex watsonii	Watson's saltbush	4.5	14	140
Distichlis spicata	Saltgrass	2	70	700
Frankenia salina	Alkali heath	2	70	700
Limonium californicum	Marsh rosemary	2	35	350
Monathochloe littoralis	Shoregrass	2	35	350
Sarcocornia pacifica (*Salicornia virginica*)	Common pickleweed	6	45-50	465
Suaeda tasifolia (californica)	Sea-blight	3	50	500
SEED MIX				
Low Marsh or Marsh Plain				
Salicornia bigelovii	Annual pickleweed	--	--	3
High Marsh				
Heliotropium curassavicum	Salt heliotope	--	--	1
Cressa truxillensis	Alkali weed	--	--	2

*Container stock may be cuttings, plugs, or one gallon size, depending on species and availability.
†Grouping size and spacing may vary depending on the desired plant density and composition.

Table 11 BRACKISH MARSH PLANT PALETTE				
SCIENTIFIC NAME	**COMMON NAME**	**SPACING ON CENTER (feet)†**	**GROUPING SIZE†**	**NUMBER OR POUNDS PER ACRE**
CONTAINER STOCK*				
Bolboschoenus maritimus	Prairie bulrush	4	100	700
Distichlis spicata	Saltgrass	2	100	400
Sarcocornia pacifica (Salicornia virginica)	Common pickleweed	6	92	150
Juncus acutus ssp. *leopoldii*	Southwestern spiny rush	4.5	55	550
Schoenoplectus californicus (*Scirpus californicus*)	California bulrush	4	100	700
SEED MIX				
Typha latifolia	Broad-leaved cattail	--	--	2
Pluchea odorata	Salt marsh fleabane	--	--	2

*Container stock may be cuttings, plugs, or one gallon size, depending on species and availability.
†Grouping size and spacing may vary depending on the desired plant density and composition.

Table 12 CISMONTANE ALKALI MARSH PLANT PALETTE				
SCIENTIFIC NAME	**COMMON NAME**	**SPACING ON CENTER (feet) †**	**GROUPING SIZE†**	**NUMBER OR POUNDS PER ACRE**
CONTAINER STOCK*				
Anemopsis californica	Yerba mansa	5	30	300
Distichlis spicata	Saltgrass	2	100	1,400
Juncus arcticus var. *mexicana*	Wire rush	2	70	700
Juncus acutus ssp. *leopoldii*	Southwestern spiny rush	4.5	110	1,100
Sarcocornia pacifica (Salicornia virginica)	Common pickleweed	6	92	30

Table 12 (cont.) **CISMONTANE ALKALI MARSH PLANT PALETTE**				
SCIENTIFIC NAME	**COMMON NAME**	**SPACING ON CENTER (feet) †**	**GROUPING SIZE†**	**NUMBER OR POUNDS PER ACRE**
SEED MIX				
Pluchea odorata	Salt marsh fleabane	--	--	2
Typha domingensis	Southern cattail	--	--	2

*Container stock may be cuttings, plugs, or one gallon size, depending on species and availability.
†Grouping size and spacing may vary depending on the desired plant density and composition.

3. Irrigation

An irrigation system may be used to help the native seed and container stock in the wetland areas become established. After the initial plant establishment period, water will be applied infrequently and only as needed to prevent the mortality of plants and seedlings. The irrigation schedule will promote deep root growth with evenly spaced, infrequent, deep applications of water. To obtain deep penetration of water, the irrigation system may be activated several times in one 24-hour period. Irrigation will be minimized following natural rainfall events.

Once the plant material is established and no longer requires supplemental irrigation, the system will be deactivated. The above-ground portions of the system will be removed at project sign-off.

4. As-built Documentation

The restoration specialist shall submit a brief letter report to the appropriate regulatory agencies (Corps, CDFG, RWQCB, and City), including an as-built graphic, within six weeks of completion of restoration installation. This letter will describe site preparation, installation methods, and the as-built status of the overall mitigation project. Pre- and post-installation photographs taken from identified photo stations shall be included as part of the as-built report.

VI. MAINTENANCE PLAN

A. ENHANCEMENT/RESTORATION

A 5-year maintenance program is proposed to ensure the successful establishment and persistence of wetland habitat enhanced or restored as mitigation for permanent impacts. The maintenance program will involve removal of non-native species and trash, irrigation maintenance, and any remedial measures deemed necessary for the success of the mitigation program (e.g., re-seeding and re-planting). Maintenance activities will be directed by the restoration specialist and implemented by the maintenance contractor.

1. General Maintenance

The maintenance guidelines are tailored to native plant establishment. Maintenance personnel will be informed of the goals of the restoration effort and the maintenance requirements. A professional with experience and knowledge in native habitat restoration maintenance will supervise all maintenance. It is the maintenance contractor's responsibility to keep all seeded and planted areas free of debris, and to monitor irrigation function and scheduling, plant material condition and health, removal of non-native species, and erosion control. The maintenance contractor will also be responsible for replacing any dead or terminally diseased plants, at the direction of the restoration specialist. Damage to plants, irrigation systems, and other facilities occurring as a result of unusual weather or vandalism will be repaired as directed by the restoration specialist. The cost of such repairs will be paid for as extra work. The contractor will be responsible for damage caused by the contractor's inadequate maintenance or operation of irrigation facilities, as determined by the restoration specialist.

2. Non-native Plant Control

Within the restoration areas, targeted non-native species will be removed to ground level. For the duration of the maintenance period, there will be a very low tolerance for non-native species, and eradication will be conducted as necessary to minimize competition that could prevent the establishment of native species. To help decrease the potential for re-infestation by non-native species, all restoration/enhancement areas will also have a buffer zone that will be maintained free of non-native vegetation. As non-native species become evident, they should be removed by hand or controlled with appropriate herbicides (e.g., only herbicides approved for aquatic use should be applied, following manufacturer's guidelines, and used only as necessary). The restoration specialist will oversee non-native plant removal by the maintenance contractor; however, maintenance personnel must be knowledgeable in distinguishing non-native species from desirable native vegetation.

3. Invasive Plant Control

Within the restoration areas, certain highly invasive plant species will be targeted for complete eradication: tamarisk, Mexican fan palm, Canary island date palm, pampas grass, castor-bean, Brazilian pepper tree, and giant reed. These species are rated as either High or Moderate in the California Invasive Plant Inventory prepared by the California Invasive Plant Council (Cal-IPC 2006), which includes highly invasive pest plants that have been documented as aggressive invaders that displace natives and disrupt natural habitats. Additional species may be added to this list if found to be a threat to the long-term success of the restoration and enhancement effort.

4. Other Pests

Insects, vertebrate pests, and diseases will be monitored. Generally speaking, pests will be tolerated unless they pose a significant threat to project success. If deemed necessary, a licensed pest control adviser will make specific pest control recommendations. All applicable federal and state laws and regulations will be closely followed. The restoration specialist will be consulted on any pest control matters.

5. Fertilizer Application

Fertilizer will not be applied except in extraordinary circumstances and only at the written direction of the restoration specialist.

6. Pruning

No post-installation pruning is necessary unless otherwise directed by the restoration specialist.

7. Sensitive Species Issues

Following removal of targeted non-native species within the restoration areas, which will be conducted per the specifications outlined in Section V.B (above), maintenance activities will not include use of heavy equipment or vehicles and, as such, are not anticipated to have adverse effects on sensitive species.

8. Schedule

Maintenance will be conducted at least once per month, or as needed, throughout the five-year monitoring plans following implementation of the mitigation program. The installation/maintenance contractor(s) will complete maintenance requests from the restoration specialist within 14 days of any written request or monitoring report. The installation contractor will conduct maintenance during the 120-day establishment period until the restoration specialist recommends and the SWD approves sign off in writing. To complete the installation period, all irrigation (if installed) must be functional, container plantings must have 100 percent survivorship, and all invasive non-native species listed in Section VI.A.3 must be removed from the restoration areas. Any replacement plantings added to attain the survivorship criterion must be installed for at least 30 days prior to sign off. The maintenance contractor will be responsible for all maintenance activities during the remainder of the five-year maintenance periods.

C. RESPONSIBLE PARTY

The SWD will be responsible for ensuring implementation of maintenance programs.

VII. MONITORING PLAN

A. ENHANCEMENT/RESTORATION

The restoration specialist will monitor habitat enhancement/restoration activities, including site fencing, removal of non-native species, installation of irrigation, pre-planting, planting, and seeding. Specifically, the restoration specialist will:

- Document pre-enhancement/restoration site status at designated photo locations;
- Attend one pre- enhancement/restoration meeting with the maintenance contractor for each mitigation site;

- Ensure that installation personnel understand the project requirements and limitations;
- Stake the perimeters of all enhancement/restoration areas;
- Monitor all target non-native plant removal within existing riparian habitat;
- Check that all fencing and signs are properly installed prior to initiating restoration activities;
- Regularly monitor all restoration installation;
- Inspect plant and seed material prior to installation;
- Monitor the manner in which the plant and seed material is installed; and
- Prepare a letter for submittal to the appropriate regulatory agencies (e.g., Corps, CDFG, RWQCB, and City) stating that the installation is complete.

The five-year maintenance and monitoring periods will begin for each enhancement/restoration area after the City SWD Project Manager has field verified that all planting has been installed and the site has met conditions for completion of the 120-day establishment period.

1. Pre-enhancement/Restoration Monitoring

The restoration specialist will attend one pre-enhancement/restoration meeting for each site to review project goals, site access, and maintenance restrictions (e.g., timing for use of mechanized equipment for non-native plant control) with the installation contractor. In addition, the restoration specialist will mark all enhancement/restoration areas with staking or flagging and monitor fence and sign installation by the installation contractor. Pre-installation photos will also be taken from designated photo documentation stations. This information will later be used to track the changes in vegetation as a result of site enhancement/restoration.

2. Installation Monitoring

A restoration specialist will monitor all phases of the installation process, including initial non-native plant removal, irrigation installation, and installation of plants and seed (Table 13). The restoration specialist must inspect and authorize each phase of work before the next phase may begin.

Table 13
MAINTENANCE MONITORING SCHEDULE

PHASE	SCHEDULE
Installation Monitoring	
Site preparation and installation	Daily
120-day establishment period	Monthly (4 visits)

Table 13 (cont.) **MAINTENANCE MONITORING SCHEDULE**	
PHASE	**SCHEDULE**
Maintenance Monitoring	
Year 1	Monthly (12 visits)
Year 2	
February to July	Monthly (6 visits)
August to January	2 visits
Years 3 to 5 (enhancement/ restoration areas)	6 visits

3. Maintenance Monitoring

Following installation, a restoration specialist will monitor maintenance activities conducted by the installation contractor during the 120-day establishment period and by the maintenance contractor during the applicable maintenance and monitoring period (in accordance with the schedule outlined in Table 13). Monitoring visits will be conducted monthly during Year 1. In Year 2, monitoring will be conducted monthly from February through July (to cover the peak establishment period of both spring and summer germinating species) and once every three months the remainder of the year. During Years 3 through 5, monitoring will be conducted bi-monthy. This monitoring schedule is the minimum; more frequent inspections may be necessary if there are problems with contractor performance or habitat development. Monitoring memos noting any issues with plant establishment, irrigation, sediment control, etc., will be provided as necessary to the installation/maintenance contractor(s) and SWD.

4. Technical Monitoring

In addition to maintenance monitoring visits, the restoration specialist will conduct annual monitoring of enhancement/restoration areas, preferably in May of each year, during the five-year maintenance and monitoring period. The visits are scheduled for May to coincide with the peak of the growing season for most native herbs and shrubs; however the exact timing of the visits will depend on site and weather conditions.

Annual monitoring will include both qualitative (visual assessment) and quantitative (transect data collection; Elzinga et al. 1998) sampling within the enhancement/restoration areas. This sampling will include assessments of cover (native and non-native), observations of plant recruitment, and lists of wildlife and plant species observed on site each year. A functional assessment (including hydrological and biogeochemical assessments) of the enhancement/restoration areas will be conducted according to the criteria discussed in Section III.H, above. In Years 1 and 2, monitoring will only be qualitative and be based on a visual survey of all mitigation areas. In Years 3 through 5, quantitative transect monitoring will be conducted in the enhancement/restoration areas, while the enhancement areas will continue to be monitored qualitatively. Success criteria milestones are provided in Section VIII.A, below.

Vegetation

Fifty-meter transects will be used to collect data for the annual monitoring of enhancement/restoration areas during Years 3 through 5. The number of transects will vary depending on the size, type, and location of the individual enhancement/restoration areas. Transects will be randomly located during the first quantitative sampling event (to occur in Year 3), and permanently marked with rebar to facilitate their use in subsequent years. Vegetative data will be collected along each transect using the point intercept line transect sampling methods described in the California Native Plant Society's Field Sampling Protocol (Sawyer and Keeler-Wolf 1995). Species cover data will be collected by recording all of the species intercepted at each 0.5-meter interval along the length of each transect. Vegetation will be recorded separately for herb (0 to 0.6 meter), shrub (0.6 to 2 meters), and tree (greater than 2 meters) layers. Species richness data will be collected by noting all species occurring within a 5-meter belt transect centered on each line transect.

Animal Diversity

Wildlife use of the corridor will be noted incidentally during each annual assessment by hearing species-specific vocalizations or by observing the species, or their tracks, scat, or dens. No focused wildlife surveys will be conducted.

Photo Documentation

In addition to the qualitative and quantitative monitoring, several permanent stations for photo documentation will be established prior to installation. Photos will be taken as part of all five annual monitoring events and will be included in the respective year's annual report.

Annual Reports

An annual report will be prepared each year during the five-year monitoring period and submitted to the Corps, CDFG, RWQCB, and City (SWD and Development Services Department Mitigation Monitoring Coordination Section [MMC]).

VIII. FINAL SUCCESS CRITERIA

The following sections provide standards to determine the successful completion of the mitigation effort as well as measurement methods for success criteria. Attainment of these standards indicates that the mitigation area is progressing toward, and has the habitat function and services specified by, this plan.

A. ENHANCEMENT/RESTORATION

1. 120-Day Establishment Period

Success at the end of the 120-day establishment period will be met if all targeted non-native species located within the project area have been eradicated (by removing to ground level and killing any remaining stumps to prevent resprouting), there is 100 percent survivorship of container stock within planting areas, seed has been installed, any installed irrigation provides adequate cover and application rates, and there are no erosion-related issues. Container stock shall be in the ground for at least 30 days prior to the end of the 120-day establishment period.

2. Five-Year Maintenance Period

Species Richness

Species richness is the number of native species present in a given area. Species richness will be determined by visual assessment during the Year 1 and 2 annual monitoring events. While no species richness success criteria have been established for Years 1 or 2, there should be an indication that sufficient species are present to meet Years 3 through 5 goals. In Years 3 through 5, species richness within the enhancement/restoration areas will be determined within the belt transects centered on the sampled line transects (see Section VII.A.4, above, for more details on transect sampling). The annual success criterion for native plant species richness varies by year and habitat type (Table 14). If the species richness goal for a given year is not met, corrective measures (e.g., reseeding, planting, etc.) will be taken to ensure eventual achievement of the five-year goal.

Table 14
SPECIES RICHNESS SUCCESS CRITERIA FOR RESTORATION AREAS*
(number of species)

HABITAT	YEAR 3	YEAR 4	YEAR 5
Southern riparian forest/riparian woodland	5	6	6
Southern riparian scrub	3	4	5
Freshwater marsh/emergent wetland	2	2	3
Southern coastal salt marsh/brackish marsh/ cismontane alkali marsh	2	2	3

*No success criteria for Years 1 and 2

3. Native Cover

Annual performance goals for native cover track the progress of the mitigation effort. No specific cover criteria have been established for Years 1 or 2; however, sufficient cover should be observed to indicate that the enhancement/restoration effort is on track to meet final success

criteria. For Years 3, 4, and 5, plant cover will be determined along the sampled line transects (Tables 15 to 18). If the annual goals for native cover are not met, additional measures (e.g., reseeding, planting, weeding, etc.) will be taken as necessary to ensure final success.

Table 15
VEGETATIVE COVER SUCCESS CRITERIA
FOR SOUTHERN RIPARIAN FOREST/RIPARIAN WOODLAND RESTORATION AREAS
(percent)

VEGETATION TYPE	YEAR 3	YEAR 4	YEAR 5
Native cover	40/35	50/45	60
Non-native cover	10	10	10
Target (noxious) weed cover*	0	0	0

*Invasive non-native plants targeted for complete eradication are listed in Section VI.A.3

Table 16
VEGETATIVE COVER SUCCESS CRITERIA
FOR SOUTHERN RIPARIAN SCRUB RESTORATION AREAS
(percent)

VEGETATION TYPE	YEAR 3	YEAR 4	YEAR 5
Native cover	50	60	75
Non-native cover	10	10	10
Target (noxious) weed cover*	0	0	0

*Invasive non-native plants targeted for complete eradication are listed in Section VI.A.3

Table 17
VEGETATIVE COVER SUCCESS CRITERIA
FOR FRESHWATER MARSH/EMERGENT WETLAND RESTORATION AREAS
(percent)

VEGETATION TYPE	YEAR 3	YEAR 4	YEAR 5
Native cover	50	65	80
Non-native cover	10	10	10
Target (noxious) weed cover*	0	0	0

*Invasive non-native plants targeted for complete eradication are listed in Section VI.A.3

Table 18 VEGETATIVE COVER SUCCESS CRITERIA FOR SOUTHERN COASTAL SALT MARSH/BRACKISH MARSH/CISMONTANE ALKALI MARSH RESTORATION AREAS (percent)			
VEGETATION TYPE	**YEAR 3**	**YEAR 4**	**YEAR 5**
Native cover	40	50	60
Non-native cover	10	10	10
Target (noxious) weed cover*	0	0	0

*Invasive non-native plants targeted for complete eradication are listed in Section VI.A.3

Non-native Plant Cover

Cover by non-native species in the enhancement/restoration areas should not exceed 10 percent in any year of monitoring, including Years 1 and 2, while target weed species should be completely eradicated each year (listed in Section VI.A.3).

Invasive Plant Cover

At least 7 species are targeted for eradication within all enhancement/restoration areas, including: giant reed, pampas grass, castor-bean, Mexican fan palm, Canary Island date palm, tamarisk, and Brazilian pepper tree. These species include the Cal-IPC High- or Moderate-rated species that have been observed, or have potential to occur, within the mitigation sites. Each year of the maintenance and monitoring period, the acceptable cover value for each of the targeted weed species will be zero. Additional species may be added to this list if found to be a threat to the long-term success of the mitigation effort.

Irrigation

To provide evidence that vegetation is self-sufficient, direct irrigation of the enhancement/restoration areas must be shut off at least 2 years prior to the end of the maintenance/monitoring period.

IX. COMPLETION OF MITIGATION

A. NOTIFICATION OF COMPLETION

1. Restoration Areas

The Corps, CDFG, RWQCB, and City (SWD and MMC) will be notified of completion of the enhancement/restoration effort through submittal of a final (Year 5) monitoring report.

2. Enhancement/Restoration Areas

The Corps, CDFG, RWQCB, and City (SWD and MMC) will be notified of completion of the enhancement or restoration effort through submittal of a final (Year 2) monitoring report.

B. CONFIRMATION

If the enhancement/restoration mitigation effort meets all success standards at the end of the monitoring period or sooner, then the mitigation will be considered a success; if not, the maintenance and monitoring program will be extended until the standards are met. Specific remedial measures (approved by the Corps, CDFG, RWQCB, and City) will be used during any extension. Monitoring extensions will be done only for areas that fail to meet final success criteria. This process will continue until all standards are attained or until the Corps, CDFG, RWQCB, and City determine that other mitigation measures are appropriate. Should the mitigation effort meet all goals prior to the end of the monitoring period, the Corps, CDFG, RWQCB, and City, at their discretion, may terminate the monitoring effort. If requested, a site visit may be conducted with the Corps, CDFG, RWQCB, and City to verify site conditions.

X. CONTINGENCY MEASURES

A. INITIATING PROCEDURES

If the mitigation effort is not meeting success standards for the project, the SWD shall notify the Corps, CDFG, RWQCB, and City (SWD and MMC) and propose corrective measures.

B. ALTERNATIVE LOCATIONS FOR CONTINGENCY MITIGATION

Sufficient contingency mitigation areas may be present in some areas where mitigation is to occur. If the success criteria are not being met on site, the Corps, CDFG, RWQCB, and City will work together to reach an alternative mutually acceptable solution.

XI. LONG-TERM MANAGEMENT

This plan assumes that mitigation credits associated with enhancement/restoration areas will remain valid so long as the mitigation site is properly revegetated with native species and is adequately maintained for the “life” of the mitigation credit that is being sought. Long-term management for enhancement/restoration areas would be carried out by the City of San Diego under contract to a non-profit land conservancy.

XII. CERTIFICATION/QUALIFICATION

The following individuals contributed to the fieldwork and/or preparation of this report:

Tom Huffman	M.P.A., San Diego State University, 1994 B.S., Ecology, University of Arizona, 1978
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Nathan Mendenhall	M.S., Geography with an emphasis on Geographic Information Systems, San Diego State University, 2008 B.S., Geography with an emphasis on Geographic Information Systems, Brigham Young University, 2003
Stacy Nigro	B.S., Forest Resources and Conservation (Wildlife Ecology), University of Florida-Gainesville, 1994
W. Larry Sward	M.S., Biology, San Diego State University, 1979 B.S., Biology, San Diego State University, 1975
Phillip Tran	J.D., Law, Seattle University School of Law, 2001 M.A., Communication, San Diego State University, 1998 B.A., Political Science, University of California at San Diego, 1994
Sally Trnka	M.S., Biology, San Diego State University, 1998 B.S., Biological Sciences, University of California-Davis, 1992

XIII. REFERENCES

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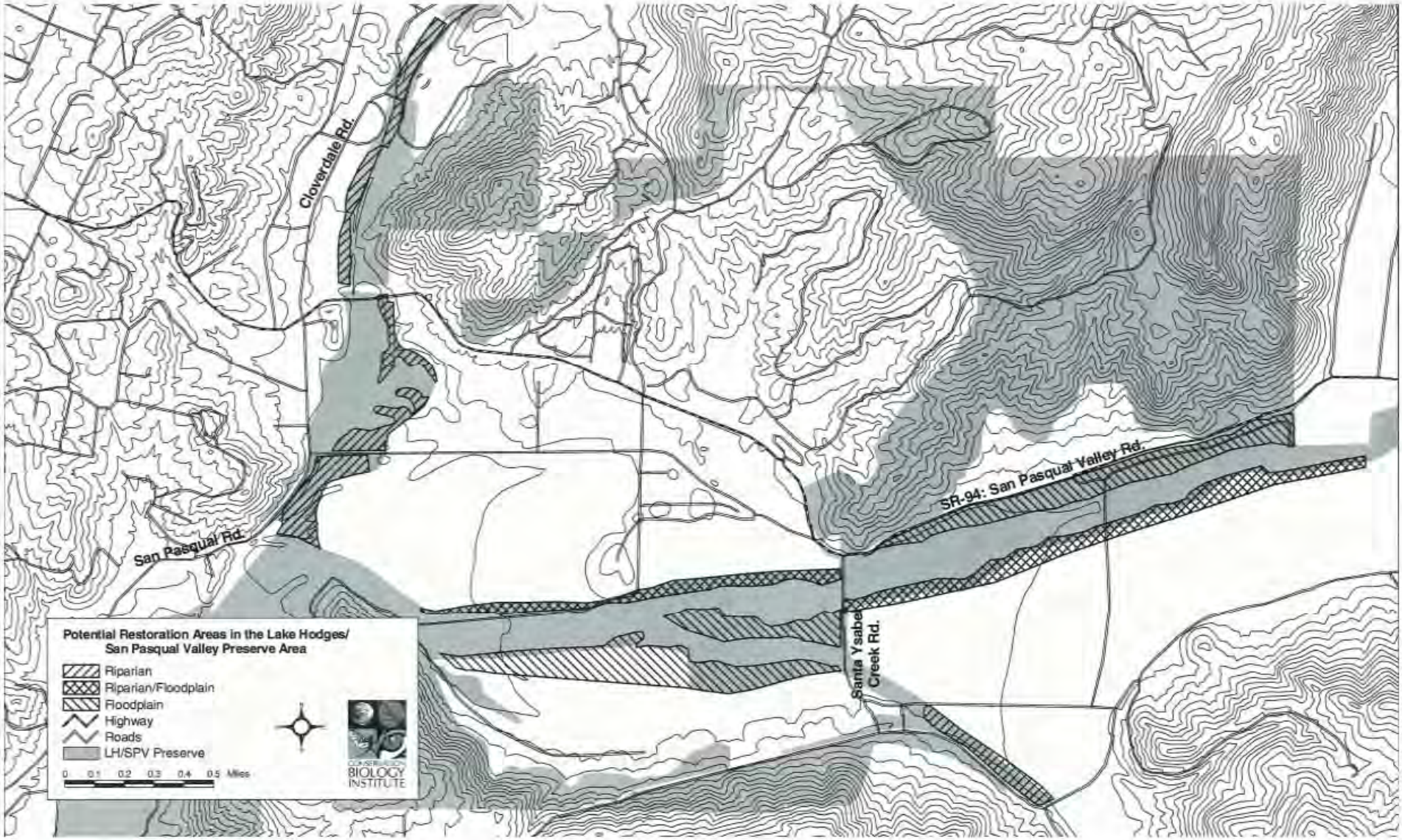
Attachments



Source: Conservation Biology Institute (2003)

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Potential Restoration Areas in the Lake Hodges/San Pasqual Valley Area - San Dieguito HU

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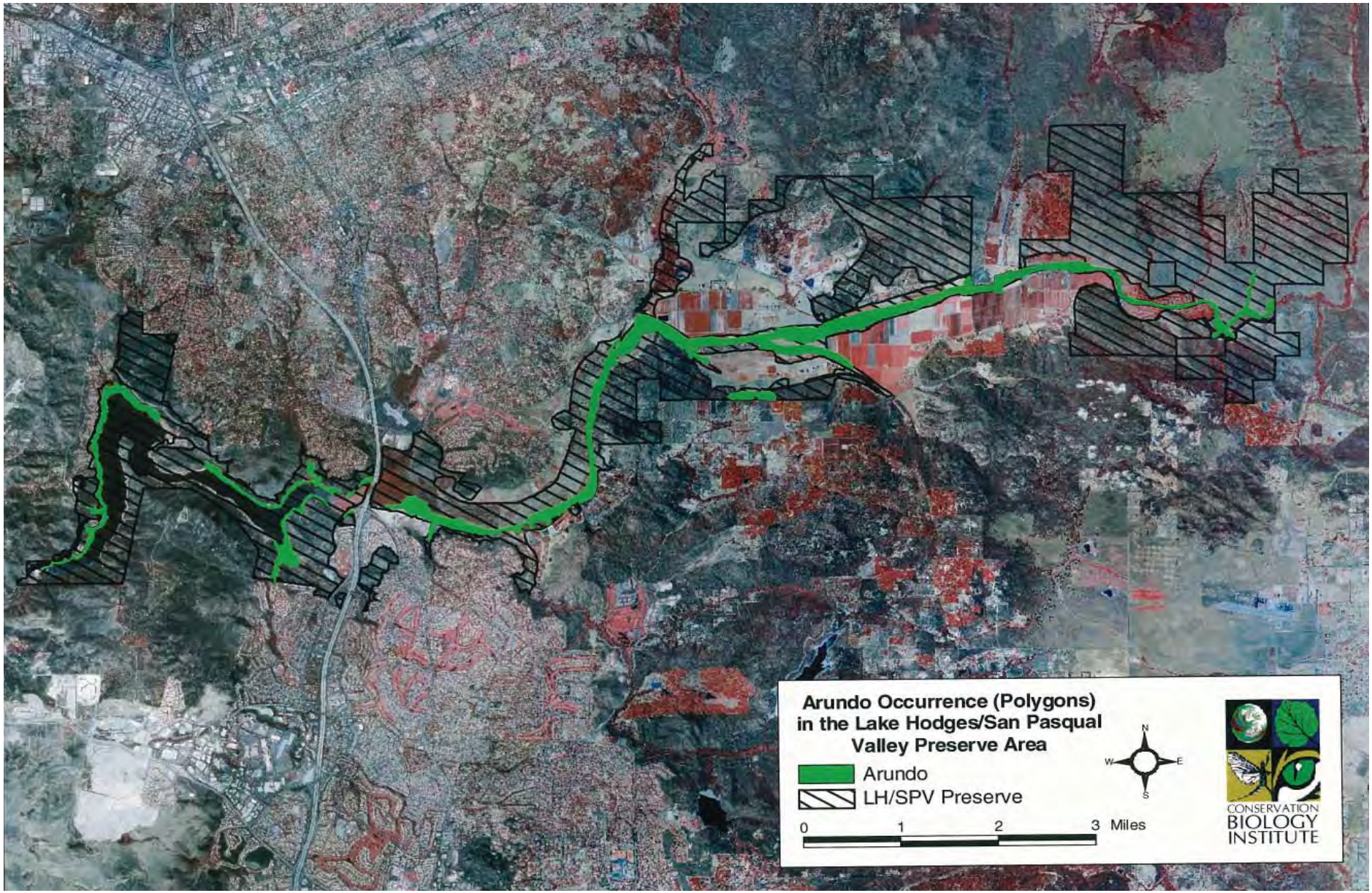
Attachment A1



Source: Conservation Biology Institute (2003)

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Giant Reed Occurrences in the Lake Hodges/San Pasqual Valley Area

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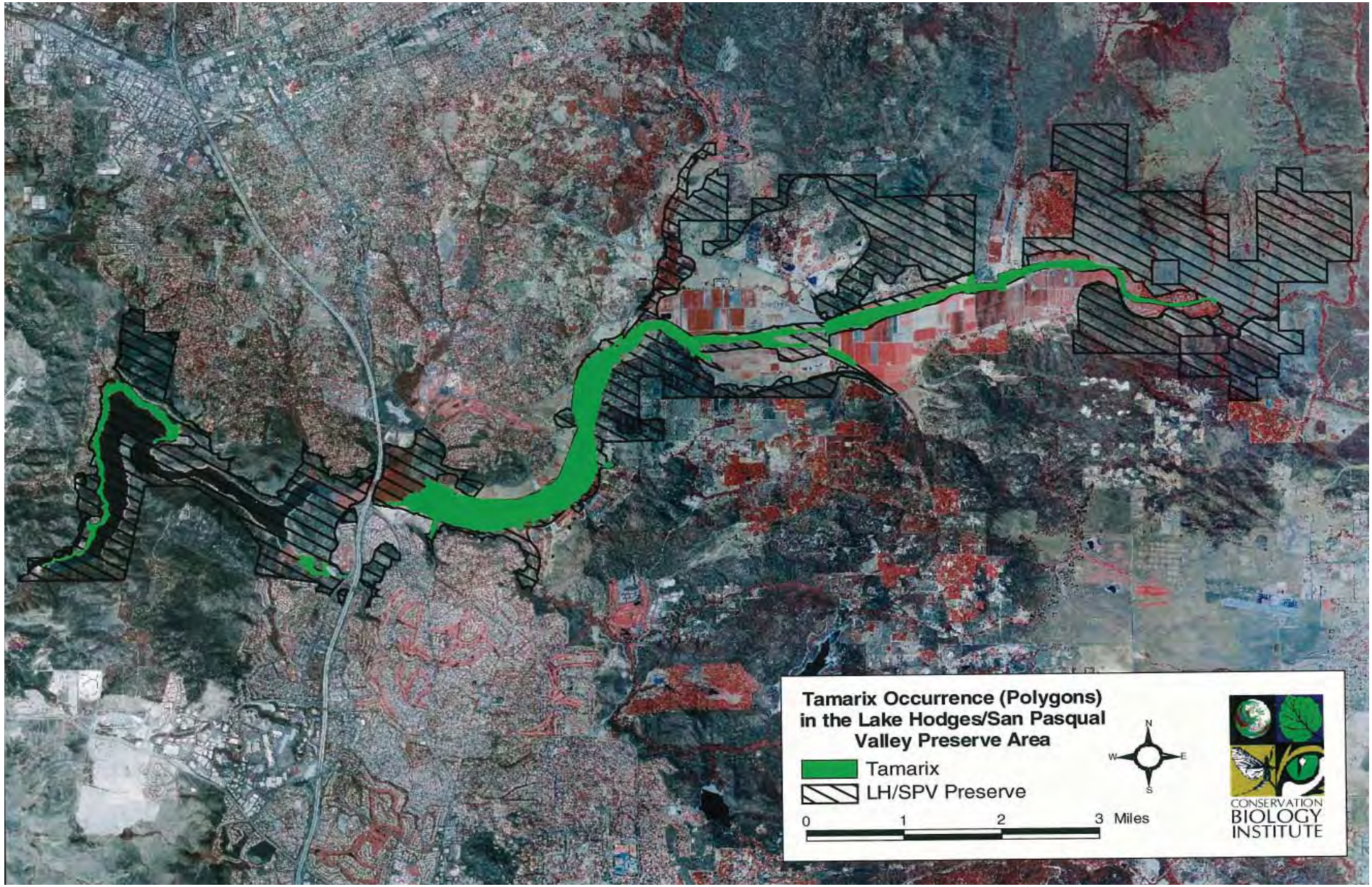
Attachment A-1a



Source: Conservation Biology Institute (2003)

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Tamarisk Occurrences in the Lake Hodges/San Pasqual Valley Area

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Attachment A-1b

Source: Merkel & Associates, Inc. (2004a)

E:\ArcGIS\S\SDM-01 StormDrainMaintenance\Map\BIO\Wetland Restoration\ B1_Penasquitos.indd -NM

Peñasquitos Watershed Overview

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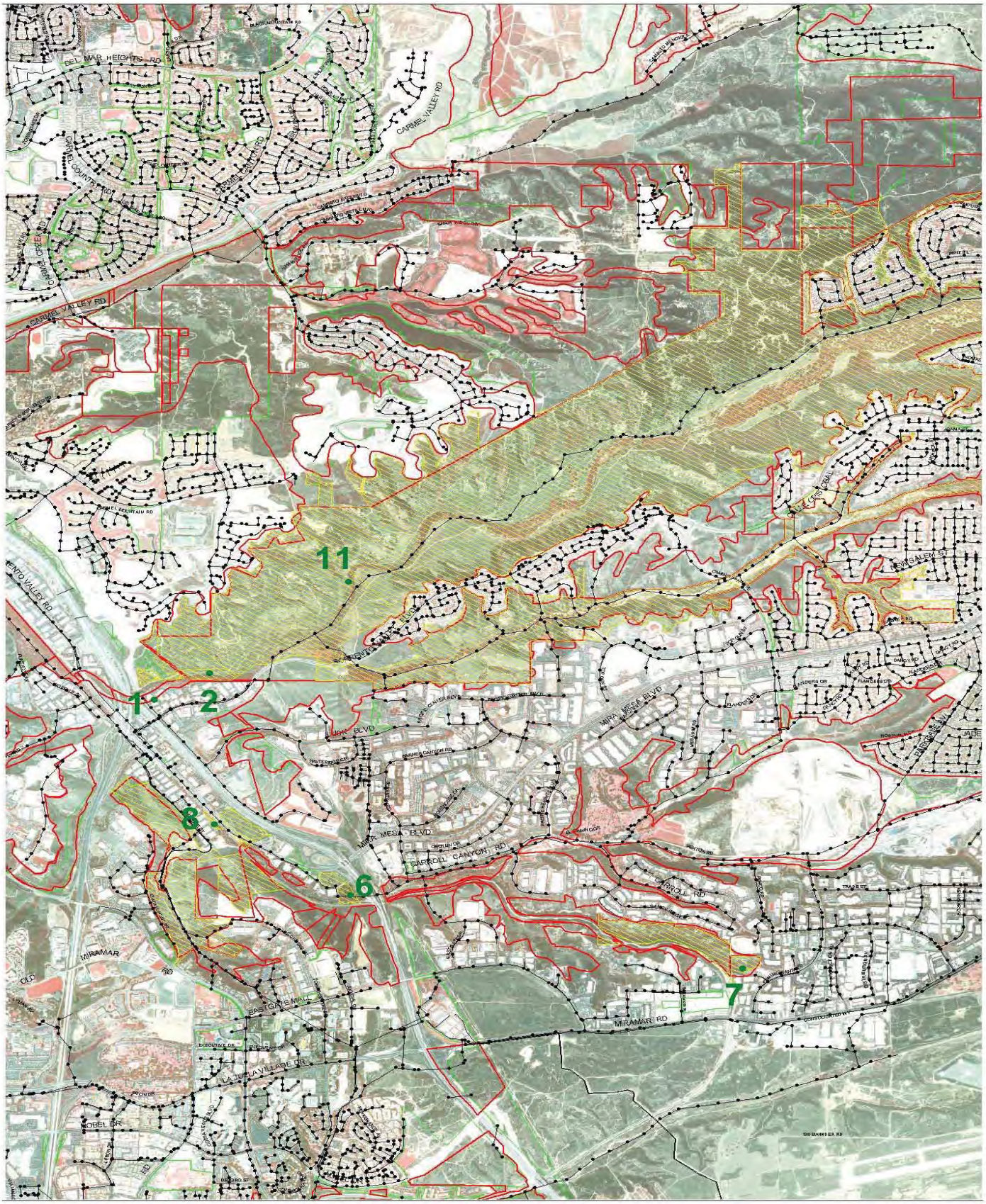
Attachment B-1



Source: Merkel & Associates, Inc. (2004a)

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Peñasquitos Watershed Northwest

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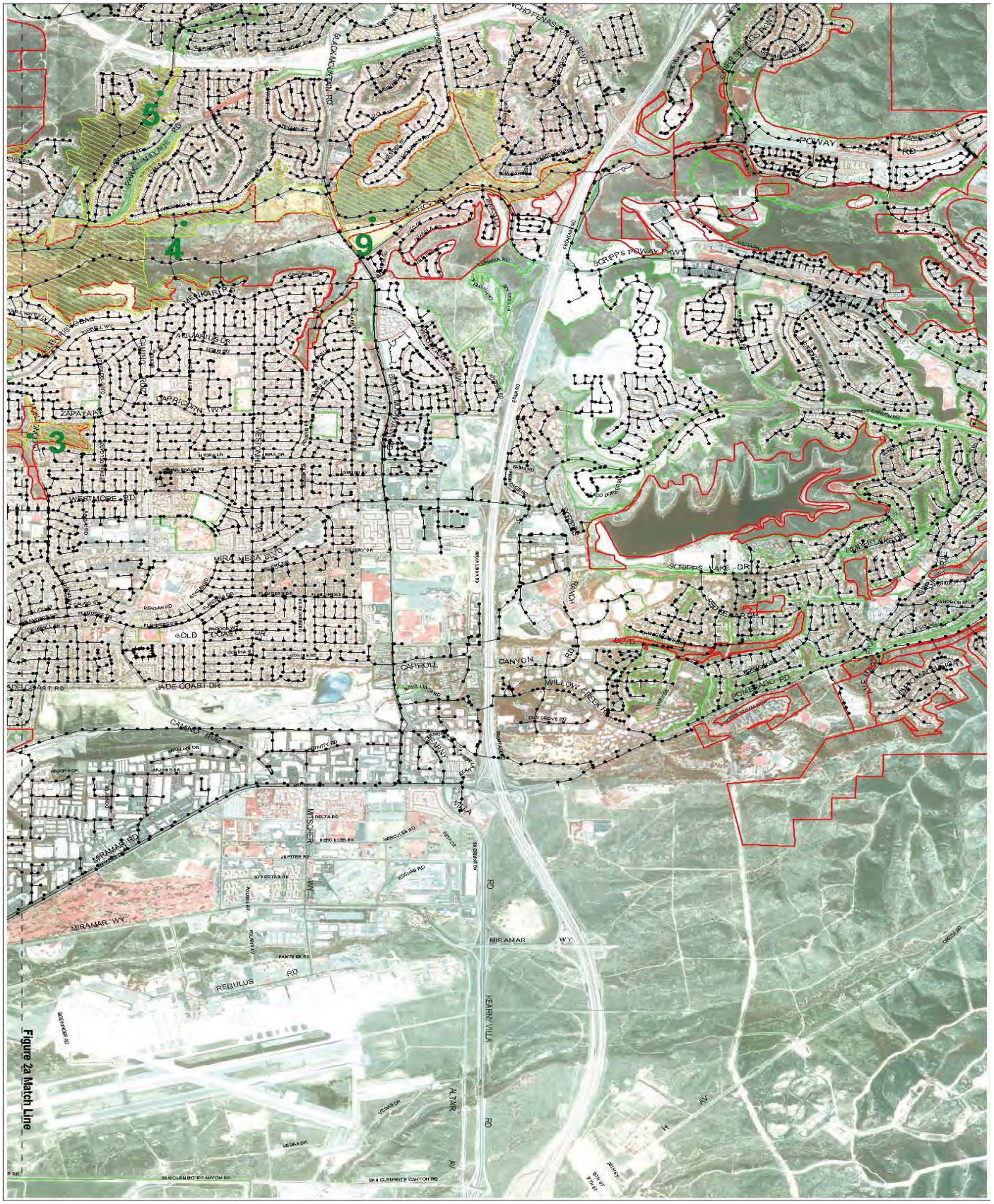
Attachment B-1a



Source: Merkel & Associates, Inc. (2004a)

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Peñasquitos Watershed Northeast

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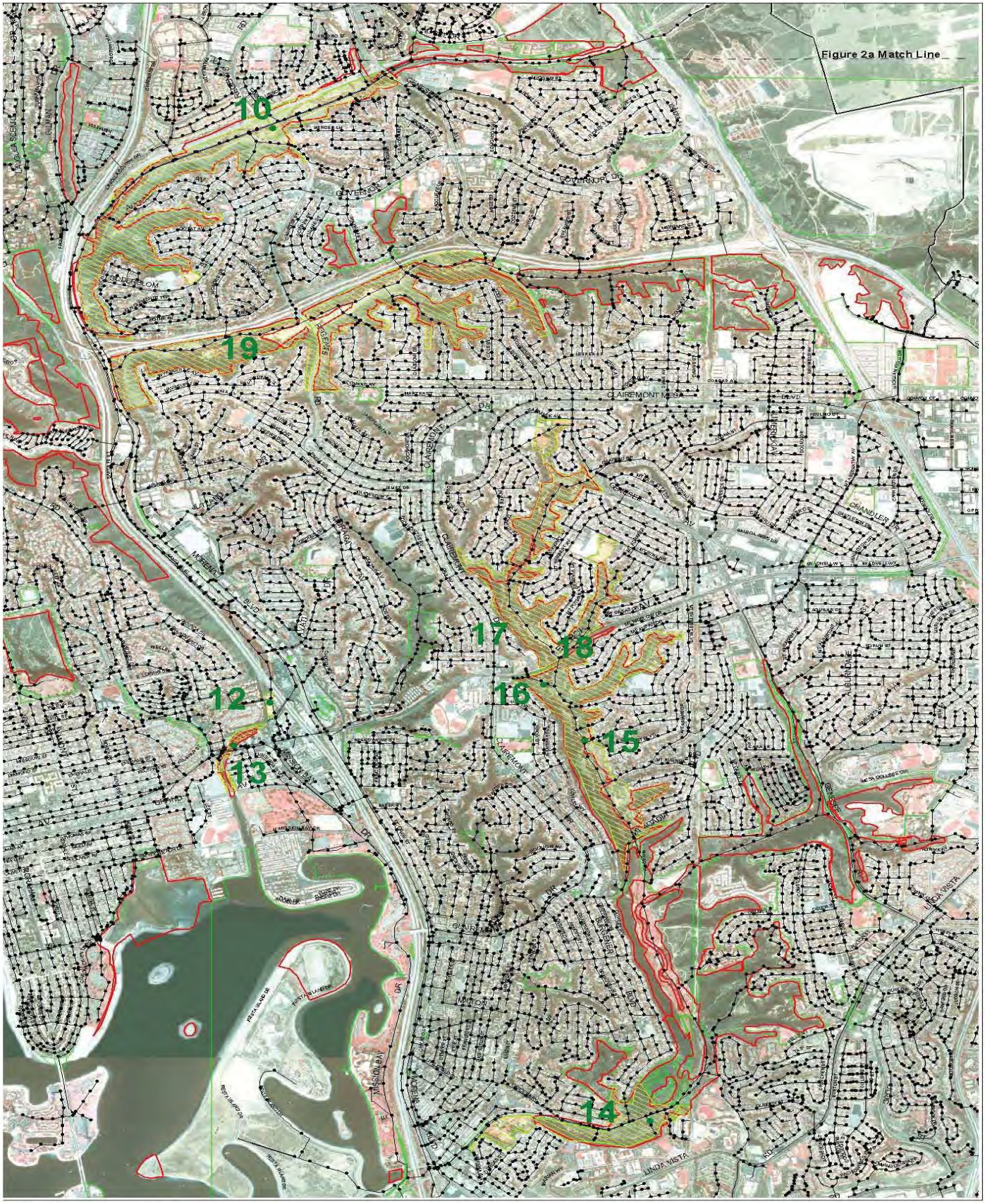
Attachment B-1b



Source: Merkel & Associates, Inc. (2004a)

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Peñasquitos Watershed South

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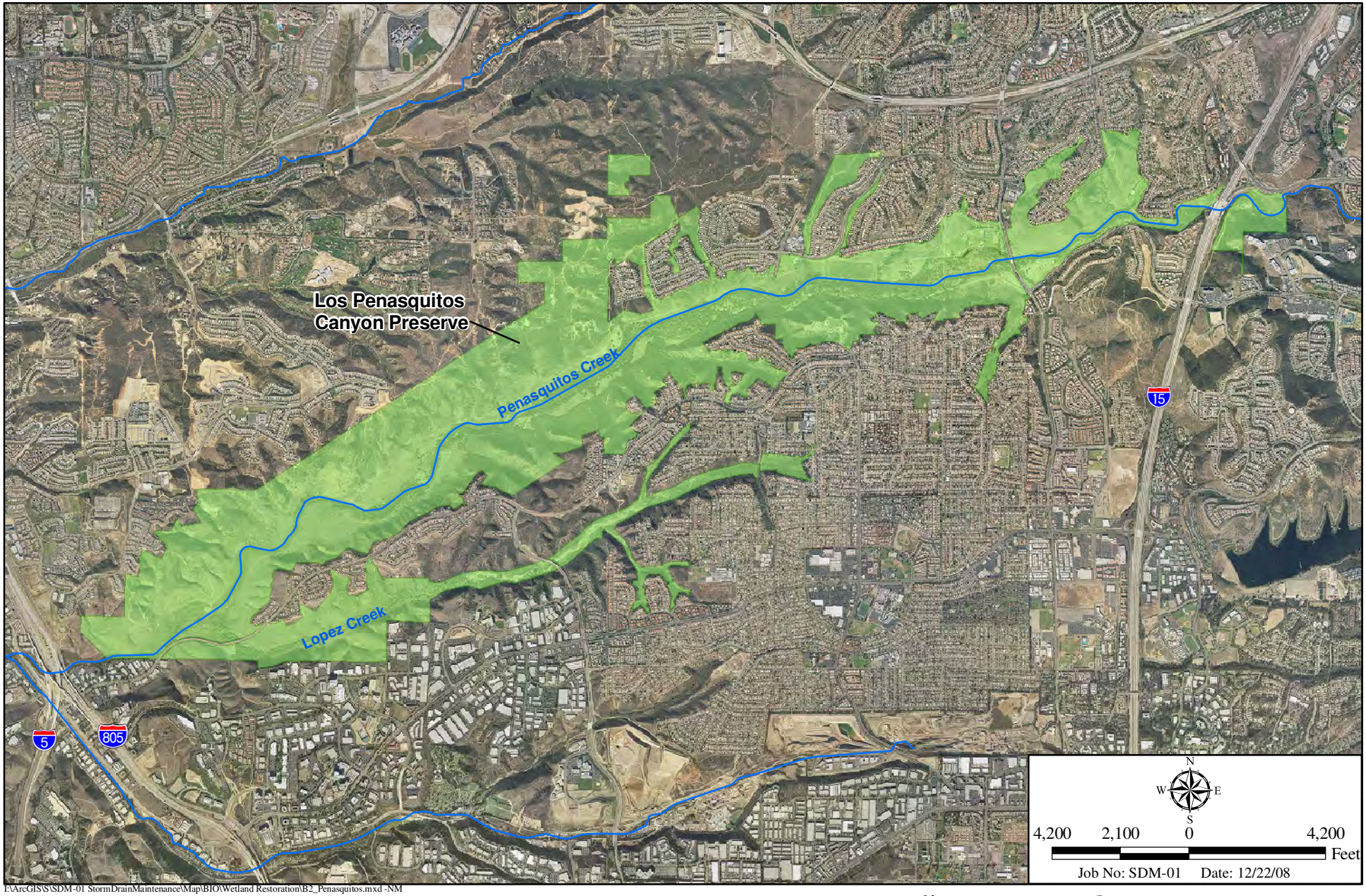
Attachment B-1c



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Los Peñasquitos Canyon Preserve

CITY OF SAN DIEGO MASTER STORM WATER SYSTEM MAINTENANCE PROGRAM

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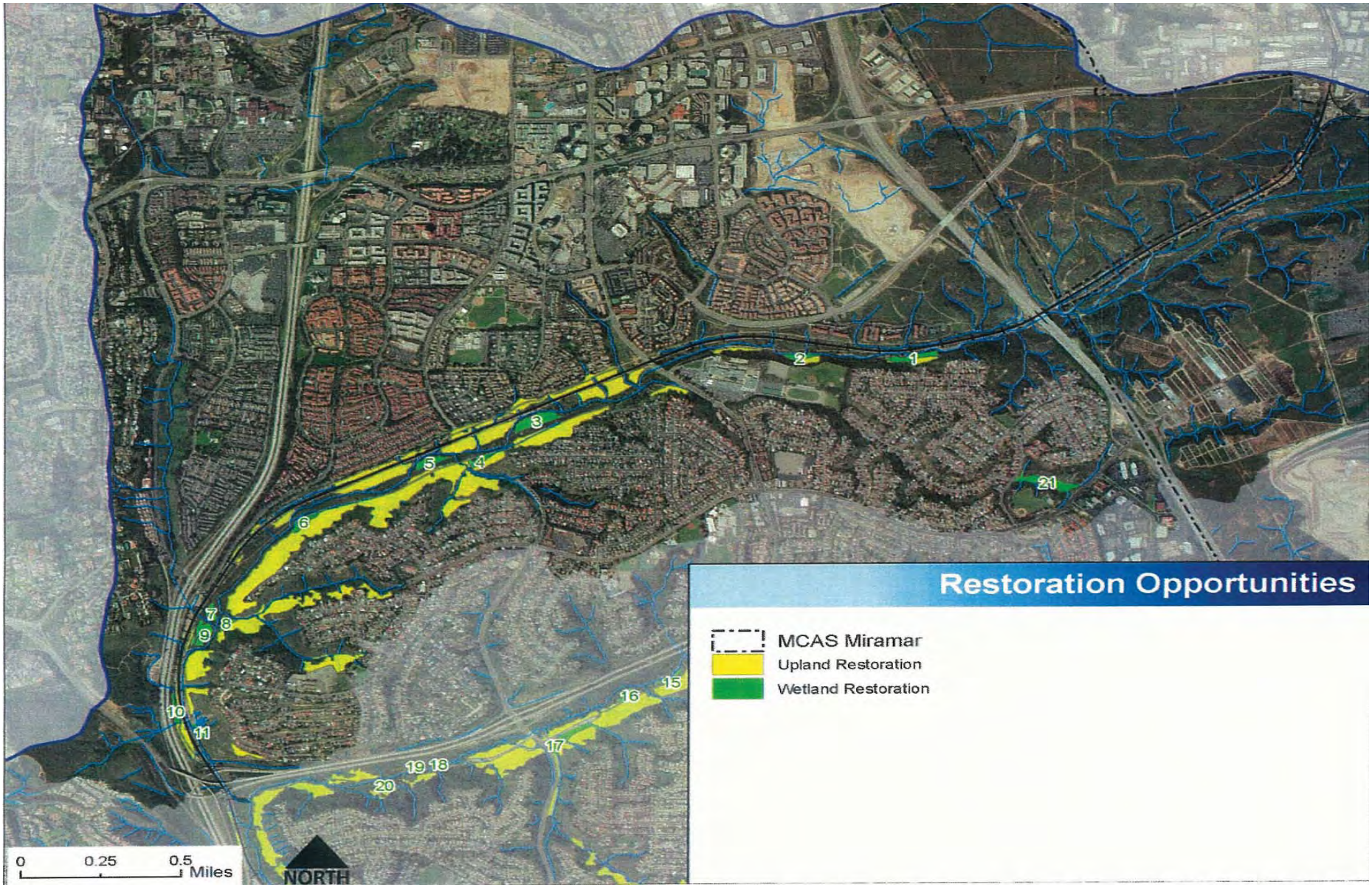
Attachment B-2



Source: KTU+A (2005)

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Upper Rose Canyon - Peñasquitos HU

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HELIX

Attachment B-3

Source: KTU+A (2005)

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Upper San Clemente Canyon - Peñasquitos HU

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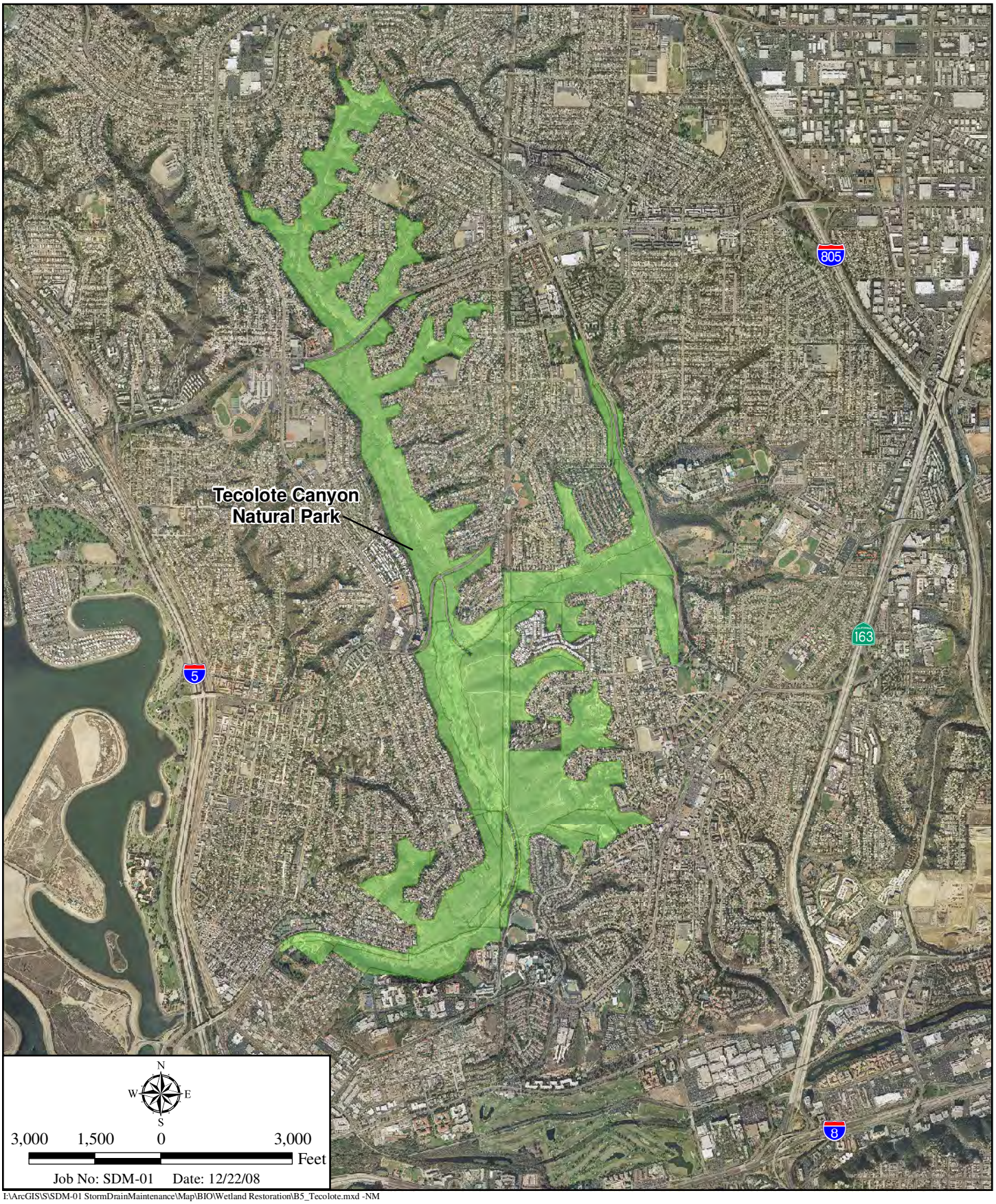
Attachment B-4



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Tecolote Canyon Natural Park - Peñasquitos HU

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HELIX

Attachment B-5

Source: San Diego River Conservancy (2008)

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Invasive Coverage Near Qualcomm Stadium - San Diego HU

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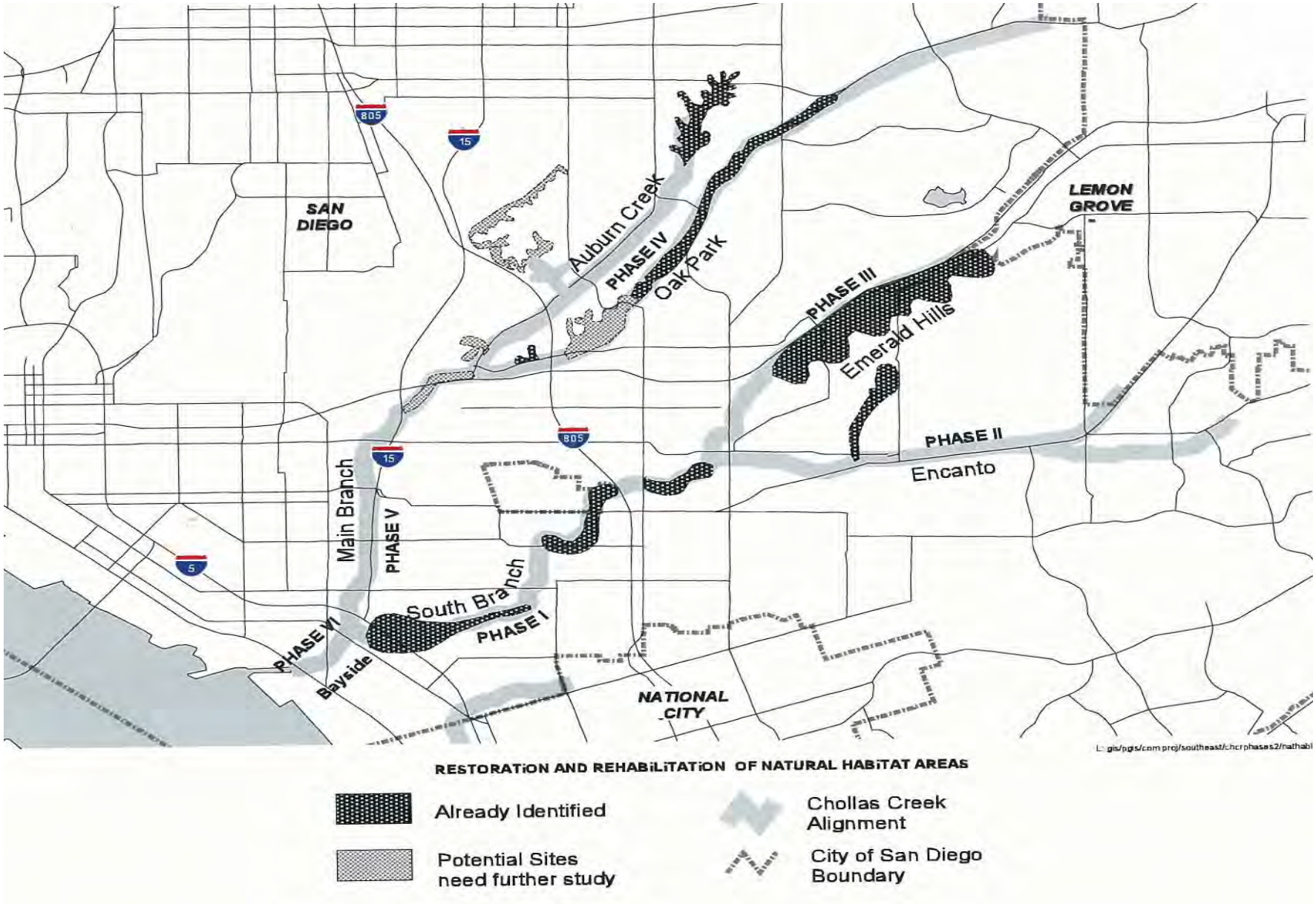
HELIX

Attachment C-1



Source: City of San Diego (2002)

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Chollas Creek Enhancement Program - Pueblo HU

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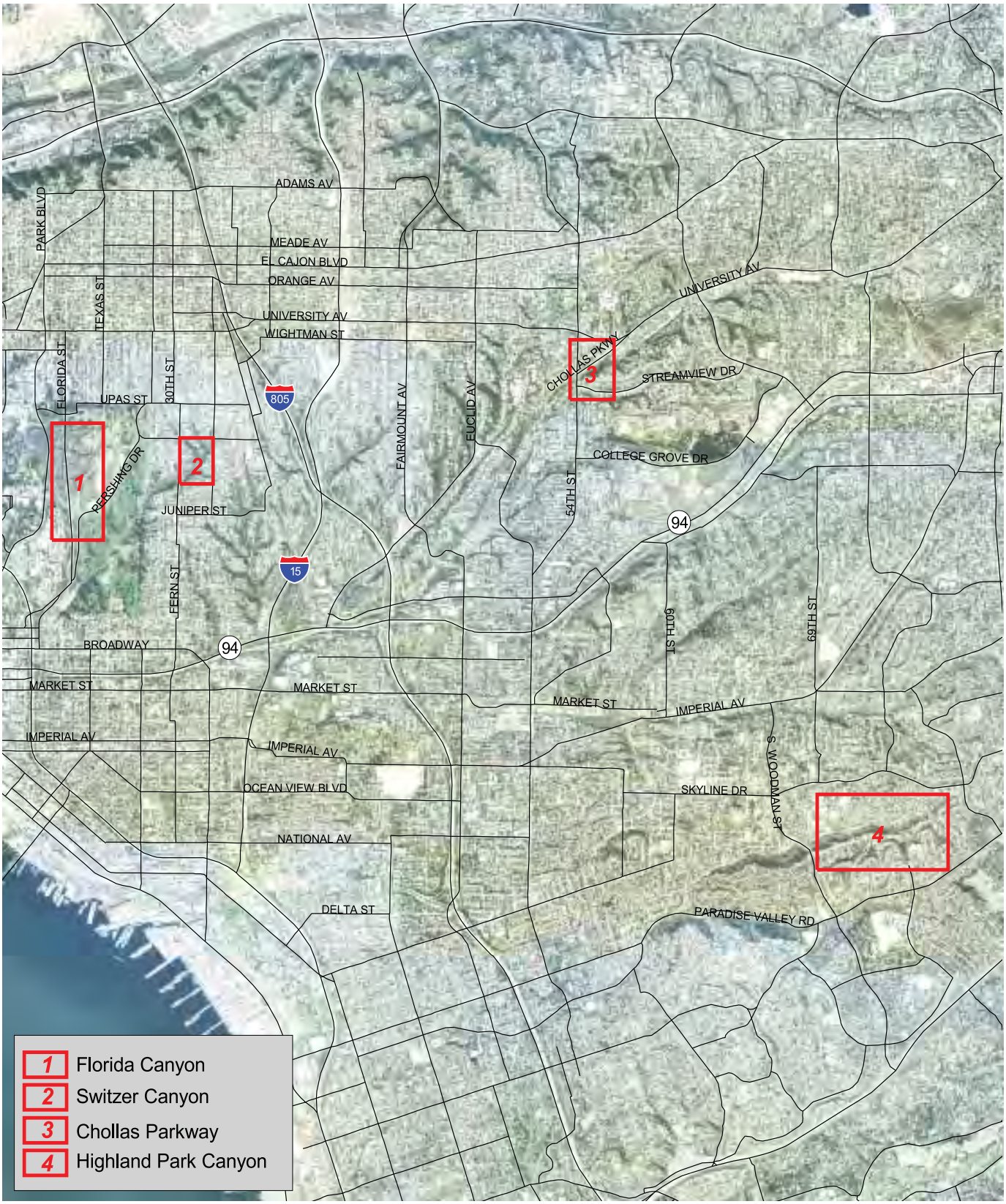
HELIX

Attachment D-1



Source: Merkel & Associates, Inc. (2003)

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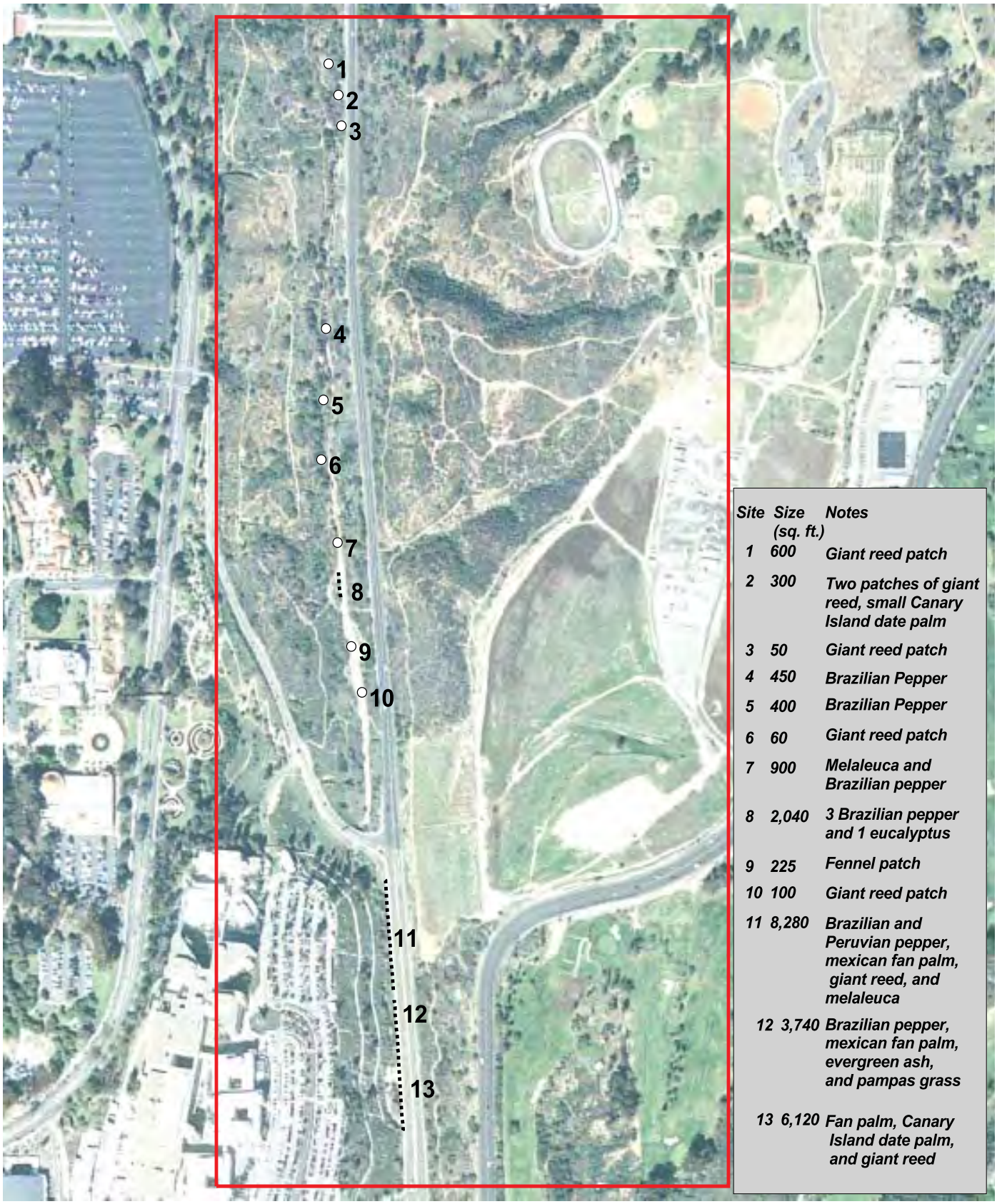
Pueblo Watershed Enhancement

CITY OF SAN DIEGO MASTER STORM WATER SYSTEM MAINTENANCE PROGRAM

HELIX

Attachment D-2



Site	Size (sq. ft.)	Notes
1	600	Giant reed patch
2	300	Two patches of giant reed, small Canary Island date palm
3	50	Giant reed patch
4	450	Brazilian Pepper
5	400	Brazilian Pepper
6	60	Giant reed patch
7	900	Melaleuca and Brazilian pepper
8	2,040	3 Brazilian pepper and 1 eucalyptus
9	225	Fennel patch
10	100	Giant reed patch
11	8,280	Brazilian and Peruvian pepper, mexican fan palm, giant reed, and melaleuca
12	3,740	Brazilian pepper, mexican fan palm, evergreen ash, and pampas grass
13	6,120	Fan palm, Canary Island date palm, and giant reed

Source: Merkel & Associates, Inc. (2003)

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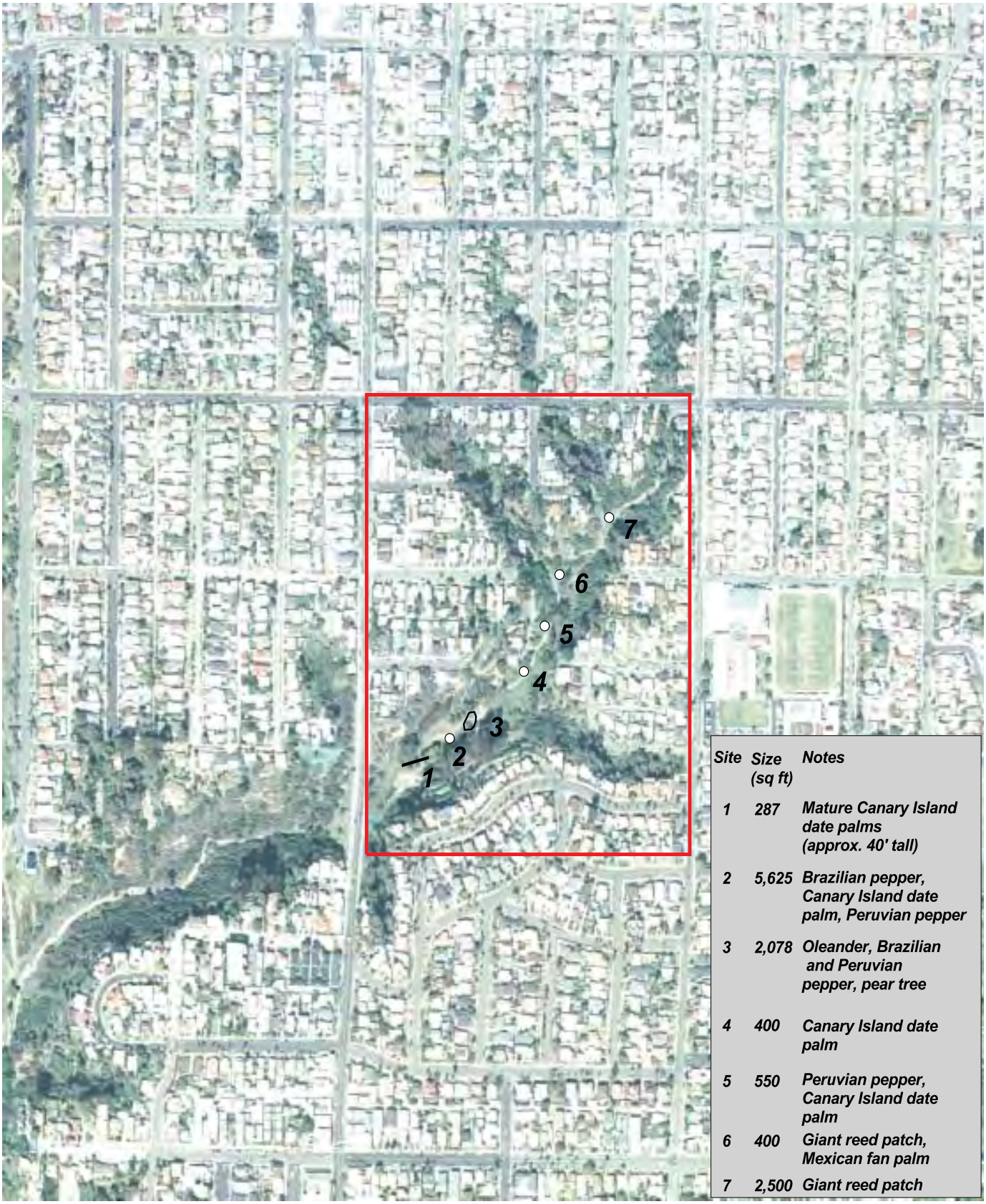
Florida Canyon-Pueblo HU

CITY OF SAN DIEGO MASTER STORM WATER SYSTEM MAINTENANCE PROGRAM

HELIX

Attachment D-2a



Site	Size (sq ft)	Notes
1	287	Mature Canary Island date palms (approx. 40' tall)
2	5,625	Brazilian pepper, Canary Island date palm, Peruvian pepper
3	2,078	Oleander, Brazilian and Peruvian pepper, pear tree
4	400	Canary Island date palm
5	550	Peruvian pepper, Canary Island date palm
6	400	Giant reed patch, Mexican fan palm
7	2,500	Giant reed patch

Source: Merkel & Associates, Inc. (2003)

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Switzer Canyon-Pueblo HU

CITY OF SAN DIEGO MASTER STORM WATER SYSTEM MAINTENANCE PROGRAM

HELIX

Attachment D-2b

Site	Size (sq. ft.)	Notes
1	72,085	Brazilian and Peruvian pepper, Canary Island date palm, Mexican fan palm

Source: Merkel & Associates, Inc. (2003)

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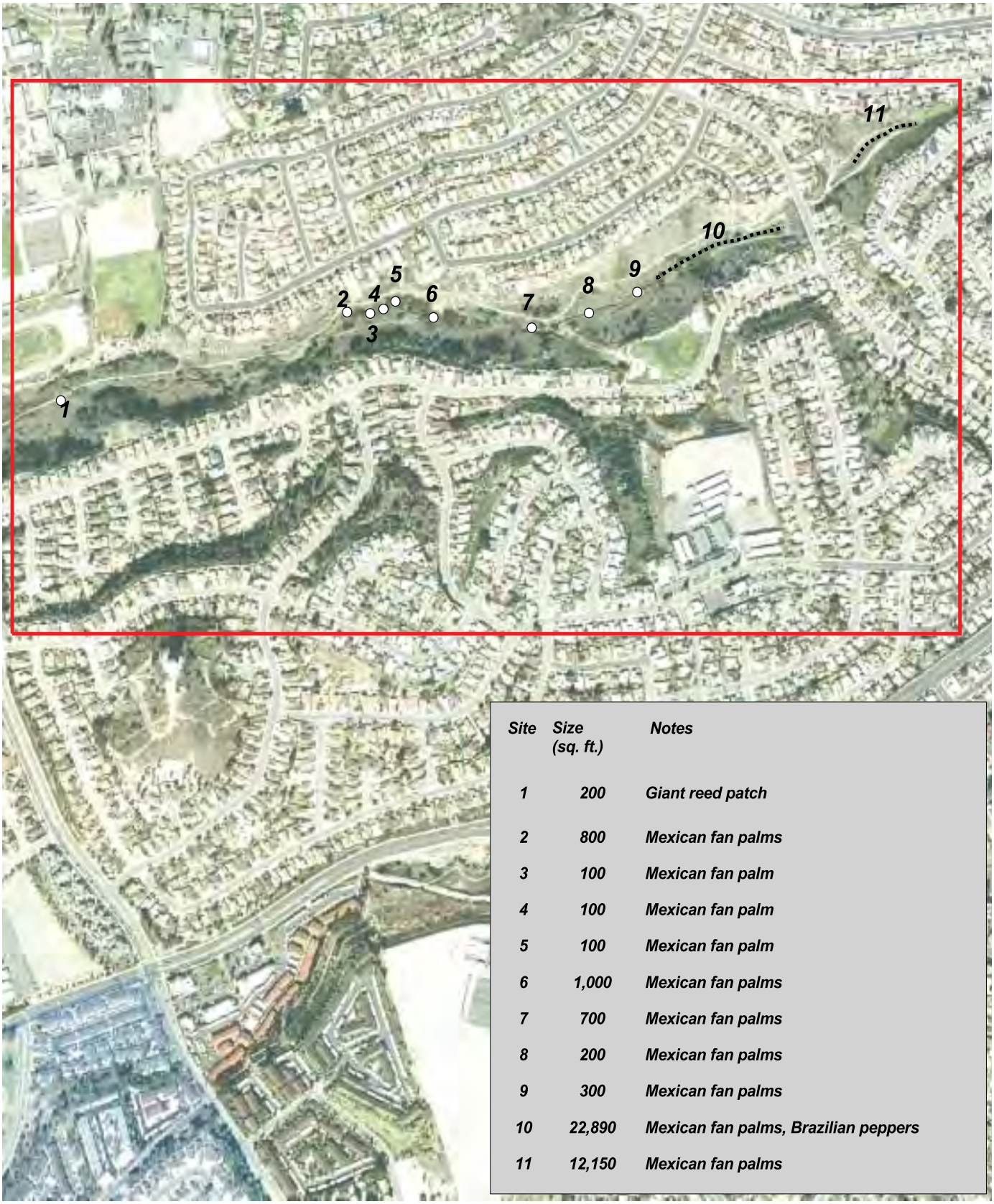
Chollas Parkway-Pueblo HU

CITY OF SAN DIEGO MASTER STORM WATER SYSTEM MAINTENANCE PROGRAM

HELIX

Attachment D-2c



Site	Size (sq. ft.)	Notes
1	200	Giant reed patch
2	800	Mexican fan palms
3	100	Mexican fan palm
4	100	Mexican fan palm
5	100	Mexican fan palm
6	1,000	Mexican fan palms
7	700	Mexican fan palms
8	200	Mexican fan palms
9	300	Mexican fan palms
10	22,890	Mexican fan palms, Brazilian peppers
11	12,150	Mexican fan palms

Source: Merkel & Associates, Inc. (2003)

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Highland Park Canyon-Pueblo HU

CITY OF SAN DIEGO MASTER STORM WATER SYSTEM MAINTENANCE PROGRAM

HELIX

Attachment D-2d

Mitigation for all In-Kind Impacts

All In-Kind Mitigation beyond In-Watershed Replacement*

*In-Watershed Replacement is:
2:1 for Riparian Habitat
1:1 for other In-Kind Habitats

TYPES OF MITIGATION:
Corps Jurisdictional Freshwater Wetlands/Waters of the U.S.
Corps Jurisdictional Riparian Habitat
Corps Jurisdictional Ephemeral/Intermittent Wetlands/Waters
Corps Jursidictional Enhancement Credits (for temporary impacts)
Non-Corps Jurisdictional Oak/Riparian Habitat
Least Bell's Vireo Habitat

N
W E
S

5 0 5 Miles

Rancho Jamul Mitigation Bank Restoration and Management Plan

Wildlands, Inc.

Source: Wildlands, Inc.

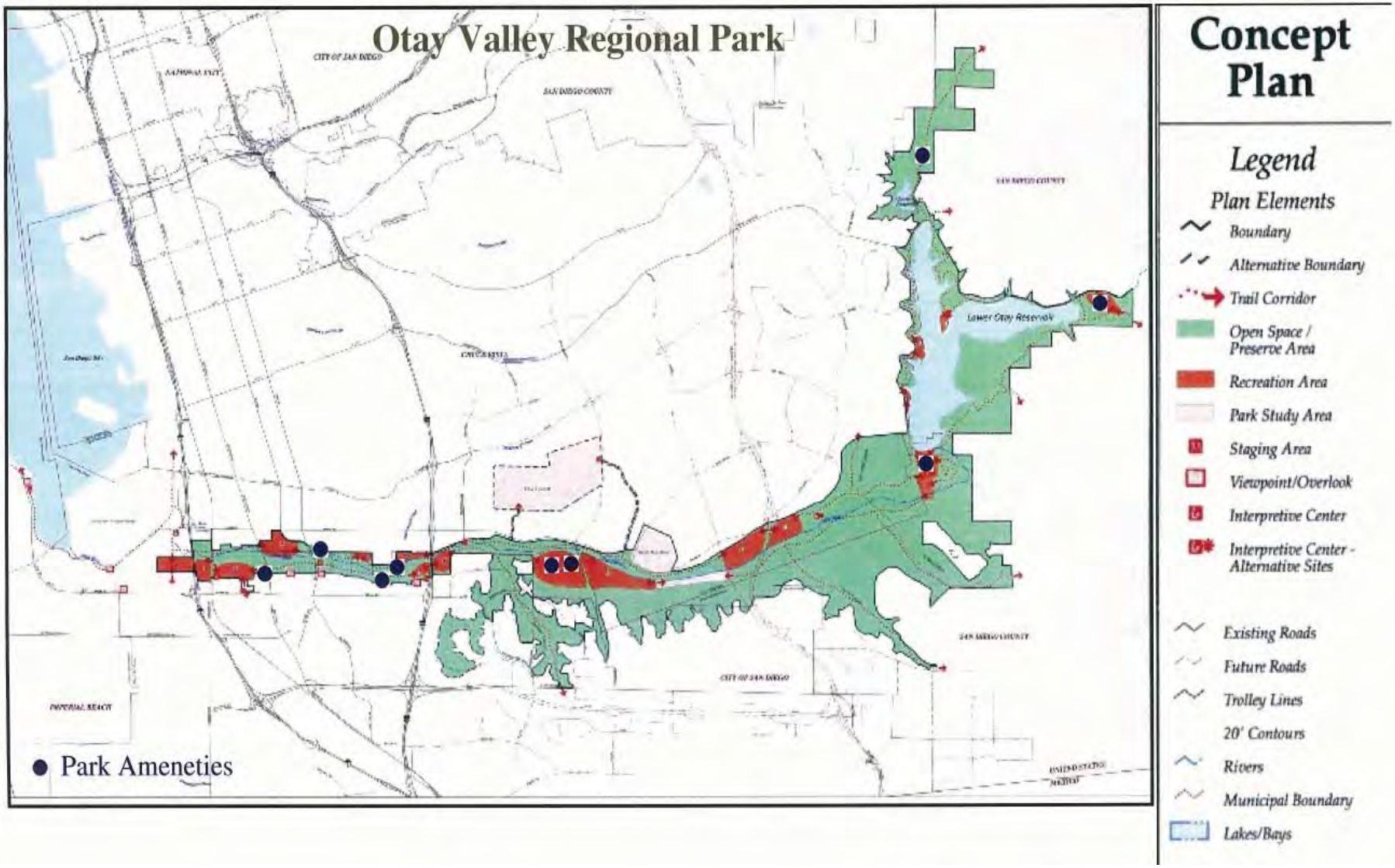
I:\ArcGIS\S\SDM-01 StormDrainMaintenance\Map\BIO\Wetland Restoration\E1_RanchoJamul.indd -NM

Rancho Jamul Mitigation Bank - Otay HU

CITY OF SAN DIEGO MASTER STORM WATER SYSTEM MAINTENANCE PROGRAM

HELIX

Figure E-1



Source: City of San Diego (1999)

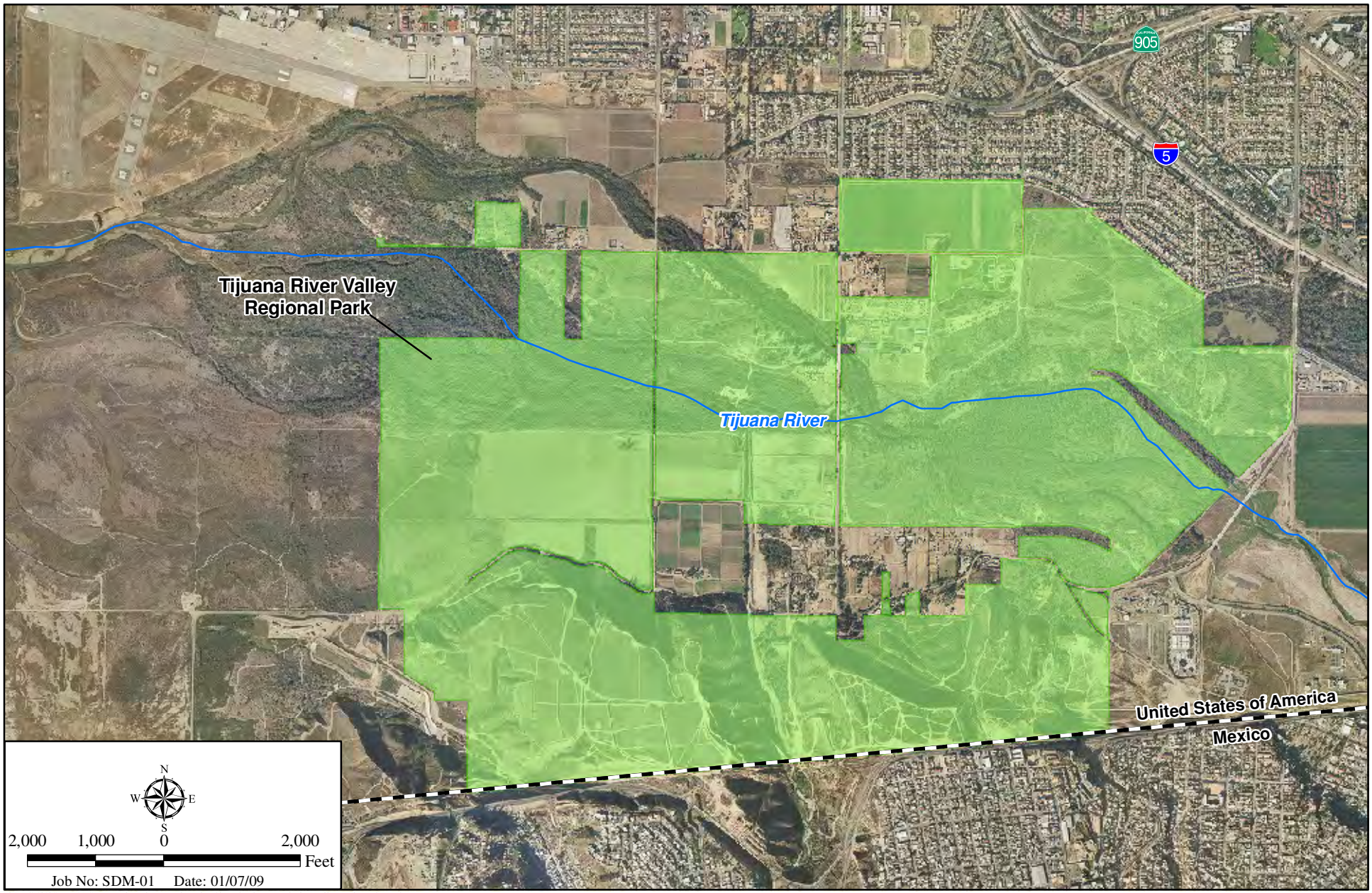
I:\ArcGIS\S\SDM-01 StormDrainMaintenance\Map\BIO\Wetland Restoration\E2_OtayPark.indd -NM

Otay Valley Regional Park - Otay HU

CITY OF SAN DIEGO MASTER STORM WATER SYSTEM MAINTENANCE PROGRAM

HELIX

Attachment E-2



I:\ArcGIS\S\SDM-01 StormDrainMaintenance\Map\BIO\Wetland Restoration\F1_TijuanaRiverV1y.mxd -NM

Tijuana River Valley Regional Park

CITY OF SAN DIEGO MASTER STORM WATER SYSTEM MAINTENANCE PROGRAM

HELIX

Attachment F-1

Exhibit B

PUBLIC RESOURCES CODE § 30610(d)

Public Resources Code

(a) Except as provided in subdivisions (b) and (c), no state land that is located between the first public road and the sea, with an existing or potential public accessway to or from the sea, or that the commission has formally designated as part of the California Coastal Trail, shall be transferred or sold by the state to any private entity unless the state retains a permanent property interest in the land adequate to provide public access to or along the sea. In any transfer or sale of real property by a state agency to a private entity or person pursuant to this section, the instrument of conveyance created by the state shall require that the private entity or person or the entity or person's successors or assigns manage the property in such a way as to ensure that existing or potential public access is not diminished. The instrument of conveyance shall further require that any violation of this management requirement shall result in the reversion of the real property to the state.

(b) This section shall not apply to the transfer of state land to a non-profit organization that exists for the purposes of preserving lands for public use and enjoyment and meets the requirements of subdivision (b) of Section 831.5 of the Government Code.

(c) Notwithstanding the provisions of subdivision (a), state lands between the first public road and the sea, that are under the possession and control of the Department of Parks and Recreation or the State Coastal Conservancy, may be transferred or sold if the department or the conservancy makes one or more of the following findings at a noticed public hearing relating to the transfer or sale of the property:

(1) The state has retained or will retain, as a condition of the transfer or sale, permanent property interests on the land providing public access to or along the sea.

(2) Equivalent or greater public access to the same beach or shoreline area is provided for than would be feasible if the land were to remain in state ownership.

(3) The land to be transferred or sold is an environmentally sensitive area with natural resources that would be adversely impacted by public use, and the state will retain permanent property interests in the land that may be necessary to protect, or otherwise provide for the permanent protection of, those resources prior to or as a condition of the transfer or sale.

(4) The land to be transferred or sold has neither existing nor potential public accessway to the sea.

(d) Nothing in this section shall be construed to interfere with the management responsibilities of state resource agencies, including, but not limited to, the responsibilities to ensure public safety and implement the California Endangered Species Act (Chapter 1.5 (commencing with Section 2050) of Division 3 of the Fish and Game Code).

(e) As used in this section, "state land" means any real property in which the state or any state agency has an ownership interest including, but not limited to, a fee, title, easement, deed restriction, or other interest in land. It does not include land in which a city, county, city and county, or district has an ownership interest.

(f) Nothing in this section is intended to restrict a private property owner's right to sell or transfer private property.

(Added by Ch. 822, Stats. 1999.)

Section 30610 Developments authorized without permit

Notwithstanding any other provision of this division, no coastal development permit shall be required pursuant to this chapter for the following types of development and in the following areas:

(a) Improvements to existing single-family residences; provided, however, that the commission shall specify, by regulation, those classes of development which involve a risk of adverse environmental effect and shall require that a coastal development permit be obtained pursuant to this chapter.

(b) Improvements to any structure other than a single-family residence or a public works facility; provided, however, that the commission shall specify, by regulation, those types of improvements which (1) involve a risk of adverse environmental effect, (2) adversely affect public access, or (3) involve a change in use contrary to any policy of this division. Any improvement so specified by the commission shall require a coastal development permit.

(c) Maintenance dredging of existing navigation channels or moving dredged material from those channels to a disposal area outside the coastal zone, pursuant to a permit from the United States Army Corps of Engineers.

(d) Repair or maintenance activities that do not result in an addition to, or enlargement or expansion of, the object of those repair or maintenance activities; provided, however, that if the commission determines that certain extraordinary methods of repair and maintenance involve a risk of substantial adverse environmental impact, it shall, by regulation, require that a permit be obtained pursuant to this chapter.

(e) Any category of development, or any category of development within a specifically defined geographic area, that the commission, after public hearing, and by two-thirds vote of its appointed members, has described or identified and with respect to which the commission has found that there is no potential for any significant adverse effect, either individually or cumulatively, on coastal resources or on public access to, or along, the coast and, where the exclusion precedes certification of the applicable local coastal program, that the exclusion will not impair the ability of local government to prepare a local coastal program.

(f) The installation, testing, and placement in service or the replacement of any necessary utility connection between an existing service facility and any development approved pursuant to this division; provided, however, that the commission may, where necessary, require reasonable conditions to mitigate any adverse impacts on coastal resources, including scenic resources.

(g) (1) The replacement of any structure, other than a public works facility, destroyed by a disaster. The replacement structure shall conform to applicable existing zoning requirements, shall be for the same use as the destroyed structure, shall not exceed either the floor area, height, or bulk of the destroyed structure by more than 10 percent, and shall be sited in the same location on the affected property as the destroyed structure.

(2) As used in this subdivision:

(A) "Disaster" means any situation in which the force or forces which destroyed the structure to be replaced were beyond the control of its owner.

(B) "Bulk" means total interior cubic volume as measured from the exterior surface of the structure.

(C) "Structure" includes landscaping and any erosion control structure or device which is similar to that which existed prior to the occurrence of the disaster.

(h) Any activity anywhere in the coastal zone that involves the conversion of any existing multiple-unit residential structure to a time-share project, estate, or use, as defined in Section 11212 of the Business and Professions Code. If any improvement to an existing structure is otherwise exempt from the permit requirements of this division, no coastal development permit shall be required for that improvement on the basis that it is to be made in connection with any conversion exempt pursuant to this subdivision. The

Exhibit C

SAN DIEGO MUNICIPAL CODE (SDMC) § 143.0130(D)(3)

(g) Within the Coastal Overlay Zone, a Coastal Development Permit is required for any emergency *coastal development* in accordance with Section 126.0718.

(Added 12-9-1997 by O-18451 N.S.; amended 10-18-1999 by O-18691 N.S.; effective 1-1-2000.)
(Amended 11-28-2005 by O-19444 N.S.; effective 2-9-2006.)
(Retitled from "Emergency Authorization to Impact Environmentally Sensitive Lands" to "Procedures for Emergency Authorization to Impact Environmentally Sensitive Lands" and amended 8-4-2011 by O-20081 N.S.; effective 10-6-2011.)

[Editors Note: Amendments as adopted by O-20081 N. S. will not apply within the Coastal Overlay Zone until the California Coastal Commission certifies it as a Local Coastal Program Amendment.
Click the link to view the Strikeout Ordinance highlighting changes to prior language http://docs.sandiego.gov/municode_strikeout_ord/O-20081-SO.pdf]

§143.0130 Uses Allowed Within Environmentally Sensitive Lands

Allowed uses within *environmentally sensitive lands* are those allowed in the applicable zone, except where limited by this section.

(a) *Sensitive Coastal Bluff* Areas. Permitted uses and activities in *sensitive coastal bluff* areas, as indicated on Map Drawing No. C-713, are limited to the following:

(1) *Single Dwelling Units* together with *accessory structures* and landscape features incidental to residential uses;

(2) Bicycle storage facilities;

(3) Public comfort stations;

(4) Public pergolas and gazebos;

(5) Public parking lots;

(6) Public seating benches;

(7) *Open fences* and walls for public safety, provided they do not interfere with existing or designated public or visual access ways;

(8) Safety and public information *signs*;

(9) Public stairways, ramps, and other physical beach access facilities, as identified within an applicable land use plan;

(10) Essential public walkways leading to permitted beach access facilities;

(11) Essential public drainage facilities; and

(12) Bluff repair and erosion control measures, when necessary to protect existing primary *structures* and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply.

(b) *Coastal Beach* Areas. Permitted uses and activities in *coastal beach* areas, as identified on Map Drawing No. C-713, are limited to the following:

(1) Lifeguard towers and stations and associated life and security facilities;

(2) Public comfort stations;

(3) Public piers;

(4) Safety and public information *signs*;

(5) Shoreline protective works when necessary to prevent bluff and beach erosion and to protect coastal dependent uses, public beach roadways, or existing primary *structures* in danger from wave action and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply;

(6) Public stairways, ramps, and other physical access *structures*, as proposed within an applicable land use plan; and

(7) Public recreational equipment.

(c) *Floodways*. Uses permitted within the *floodway* portion of a *Special Flood Hazard Area* are those allowed by the OF zone, as indicated in Table 131-02B.

(d) *Wetlands* in the Coastal Overlay Zone. Uses permitted in *wetlands* shall be limited to the following:

(1) Aquaculture, *wetlands*-related scientific research and wetlands-related educational uses;

(2) Wetland restoration projects where the primary purpose is restoration of the habitat;

(3) Incidental public service projects, where it has been demonstrated that there is no feasible less environmentally damaging location or alternative, and where mitigation measures have been provided to minimize adverse environmental effects.

(e) *Wetland Buffer* Areas in the Coastal Overlay Zone. Permitted uses in *wetland buffer* areas shall be limited to the following:

(1) Public Access paths;

(2) Fences;

(3) Restoration and enhancement activities; and

(4) Other improvements necessary to protect *wetlands*.

(Amended 4-22-2002 by O-19051 N.S.; effective 10-8-2002.)

Exhibit D

MASTER MAINTENANCE PROGRAM EXCERPTS (PAGES 27 AND 28, AND APPENDIX J)

Process Four. As discussed earlier, any subsequent amendments to Section 112.0507 of the SDMC will supersede the following summary.

1. SWD will submit an application for a discretionary permit with a Public Notice package to DSD.

2. DSD will prepare an Initial Study for the proposed activities. Based on the Initial Study and after considering the information contained the individual assessments required by the Master Program, DSD will prepare a tiered Negative Declaration, Mitigated Negative Declaration, or EIR, or a Supplemental or Subsequent EIR or an addendum to the PEIR to address the proposed maintenance activities. The CEQA document will be circulated for public review in accordance with the CEQA Guidelines.

3. A Notice of Application will be posted at each storm water facility proposed to be maintained.

4. A Notice of Application will be mailed to the SWD, property owners and occupants within a 300-foot radius of a proposed maintenance activity and the appropriate community planning group(s)

5. City staff will review the application. Once all issues have been resolved, City staff will begin the hearing process.

6. DSD staff will prepare a Notice of Public Hearing and Planning Commission Report. At least ~~T~~ten business days before the hearing, the Public Notice will be mailed to the SWD, property owners and occupants within a 300-foot radius of the proposed maintenance activity that is being appealed and applicable community planning group(s).

7. The Planning Commission will consider the discretionary permit application and CEQA documentation, and make a decision. This decision will be appealable to the City Council.

8. The public or SWD will have 10 business days after the Planning Commission's decision to file appeal to the City Council.

9. City Council will hear any appeal and affirm, reverse or modify the Planning Commission's decision.

6.2 State And Federal Agencies

Concurrent with the City's SCR process, the SWD will also submit appropriate applications and supporting documentation to the California Department of Fish and Game (CDFG), California Regional Water Quality Control Board (RWQCB), and U.S. Army Corps of Engineers (Corps) for approval under the terms and conditions of their respective general wetland permits. The agencies will review the application and supporting documentation to determine whether the proposed maintenance activities are consistent with the analysis contained in the PEIR and the specific terms of any permit issued by the respective agency.

The City will not conduct any proposed maintenance without prior approval from the state or federal agency with jurisdiction over the affected resources.

Under the state and federal regulations, maintenance activities that could impact wetland habitat and/or species protected by state and federal endangered species acts would require one or more of the following permits or approvals.

404 Permit

Under Section 404 of the federal Clean Water Act (CWA), a permit issued by the Corps would be required for maintenance proposals that would affect "waters of the United States". The City is proposing to obtain an Individual 404 Permit under which it would conduct future maintenance activities pursuant to the proposed Master Program.

401 Certification

A Section 401 Water Quality Certification issued by the RWQCB would be required for all maintenance proposals within waters of the U.S. The City is proposing to obtain a series of four-year 401 Certifications under which it would conduct future maintenance activities pursuant to the proposed Master Program.

1605 Streambed Alteration Agreement

A Section 1605 Streambed Alteration Agreement issued by CDFG would be required for maintenance proposals that would impact streambeds. The City is proposing to obtain a ~~Master~~ 1605 Streambed Alteration Agreement under which it would conduct future maintenance activities pursuant to the proposed Master Program.

National Pollutant Discharge Elimination System Permit

A Section 402 NPDES Permit issued by the RWQCB, and/or compliance with the state General Permit for Construction Activities may be required to conduct maintenance when water quality impacts could occur during maintenance.

Wastewater Discharge Regulations

Wastewater Discharge Regulations (WDRs) could be required from the RWQCB whenever dewatering would occur as part of a maintenance activity. Dewatering is necessary when water within the storm water facility must be removed so that maintenance may be accomplished

Coastal Development Permit

A CDP issued by the California Coastal Commission would be required for maintenance within the Coastal Commission Permit jurisdiction and the Deferred Certification Areas of the Coastal Zone.

PTS#_____

SUBSTANTIAL CONFORMANCE REVIEW CHECKLIST

MASTER STORM WATER SYSTEM MAINTENANCE PROGRAM

Purpose: This Substantial Conformance Review (SCR) Checklist is intended to be used by Development Services Department Staff as an aid in reviewing storm water system maintenance projects for consistency with the ~~Master~~ Site Development Permit (SDP) and Coastal Development Permit (CDP) based on conformance with the Mitigation, Monitoring and Reporting Program (MMRP); the Maintenance Protocols contained in the Master Program; and the ~~Master Site Development Permit~~SDP and CDP Conditions. It will also assist in the determination as to whether the maintenance activity should be approved through Process One or Process Two.

Date: _____

Name of Preparer: _____

Phone Number: _____

Email: _____

ACTIVITY INFORMATION

Master Program Map #(s): _____

City Equipment #(s): _____

Creek Name: _____

Watershed(s): _____

Location: _____

_____

DOCUMENTS INCLUDED IN ~~CONSISTENCY DETERMINATION~~SCR PACKAGE

Included	NA	Document
☐	☐	Individual Maintenance Plan (IMP)
☐	☐	Individual Biological Assessment (IBA)
☐	☐	Individual Historical Assessment (IHA)
☐	☐	Individual Hydrologic and Hydraulic Assessment (IHHA)
☐	☐	Individual Water Quality Assessment (IWQA)
☐	☐	Individual Noise Assessment (INA)
☐	☐	
☐	☐	
☐	☐	

PTS#_____

SUBSTANTIAL CONFORMANCE REVIEW CHECKLIST

MASTER STORM WATER SYSTEM MAINTENANCE PROGRAM

No.	Measure/Criteria	Y/N/NA	Basis for Determination (attach separate sheet(s) as necessary)
Master Program PEIR Mitigation, Monitoring, and Reporting Program			
General Mitigation			
1	Have mitigation measures for impacts to biological resources, historical resources, land use, and paleontological resources, as appropriate, been included in entirety on the submitted maintenance documents and contract specifications, under the heading, "Environmental Mitigation Requirements"? (General Mitigation Measure 1)		
2	Is a Pre-maintenance Meeting required, including, as appropriate, the Mitigation Monitoring Coordinator (MMC), Storm Water Division (SWD) Project Manager, Biological Monitor, Historical Monitor, Paleontological Monitor, and Maintenance Contractor (MC), and other parties of interest? (General Mitigation Measure 2)		
3	Is there documented evidence of compliance with other permitting authorities (e.g., copies of permits issued, letters of resolution issued by the Responsible Agency documenting compliance, or other evidence documenting compliance and deemed acceptable by the Assistant Deputy Director [ADD] Environmental Designee), as applicable? (General Mitigation Measure 3)		

PTS#_____

SUBSTANTIAL CONFORMANCE REVIEW CHECKLIST

MASTER STORM WATER SYSTEM MAINTENANCE PROGRAM

No.	Measure/Criteria	Y/N/NA	Basis for Determination (attach separate sheet(s) as necessary)
Master Program PEIR Mitigation, Monitoring, and Reporting Program			
General Mitigation (cont.)			
4	Is there documented evidence of compliance with Section 1602 of the State of California Fish & Game Code (e.g., copies of permits issued, letters of resolution issued by the Responsible Agency documenting compliance, or other evidence documenting compliance and deemed acceptable by the ADD Environmental Designee), as applicable? (General Mitigation Measure 4)		
Biological Resources			
5	Has a qualified biologist prepared an IBA for each area proposed to be maintained in accordance with the specifications included in the Master Program? (Mitigation Measure 4.3.1)		
6	Have the IMPs and IBAs for maintenance activities within a proposed annual maintenance program been approved by the City's Assistant Deputy Director (ADD) Environmental Designee and state and federal agencies with jurisdiction over maintenance activities? (Mitigation Measure 4.3.2)		
7	Has an IBA been prepared by a qualified biologist for each proposed maintenance activity, including the required contents? (Mitigation Measure 4.3.3)		

SUBSTANTIAL CONFORMANCE REVIEW CHECKLIST

MASTER STORM WATER SYSTEM MAINTENANCE PROGRAM

No.	Measure/Criteria	Y/N/NA	Basis for Determination (attach separate sheet(s) as necessary)
Master Program PEIR Mitigation, Monitoring, and Reporting Program			
Biological Resources (cont.)			
8	Has a mitigation account been established to provide sufficient funds to implement all biological mitigation associated with the proposed maintenance act? (Mitigation Measure 4.3.4)		
9	Has evidence been provided documenting approval of the proposed maintenance by permitting authorities? (Mitigation Measure 4.3.5)		
10	Does the IMP call for a pre-maintenance meeting, if identified in the associated IBA? (Mitigation Measure 4.3.6)		
11	Does the IBA for each proposed maintenance activity identify appropriate wetland mitigation measures according to the ratios identified in Table 4.3-10? (Mitigation Measure 4.3.9)		
12	Have wetland mitigation plans and enhancement and/or restoration plans been prepared and submitted to the DSD pursuant to the requirements described in Mitigation Measure 4.3.10? Are they consistent with Appendix H of the Biological Technical Report (BTR) contained in Appendix D.3 of the PEIR? (Mitigation Measure 4.3.10)		
13	Would upland impacts be compensated through payment into the City's Habitat Acquisition Fund, or through acquisition and/or preservation of land in accordance with the ratios and requirements identified in Table 4.3-11? (Mitigation Measure 4.3.11)		

SUBSTANTIAL CONFORMANCE REVIEW CHECKLIST

MASTER STORM WATER SYSTEM MAINTENANCE PROGRAM

No.	Measure/Criteria	Y/N/NA	Basis for Determination (attach separate sheet(s) as necessary)
Master Program PEIR Mitigation, Monitoring, and Reporting Program			
Biological Resources (cont.)			
14	If the maintenance activity would result in loss of habitat for the coastal California gnatcatcher, is mitigation planned (i.e., through the acquisition of suitable habitat or mitigation credits within the MHPA at a ratio of 1:1, to be accomplished within six months of the date of maintenance completion? (Mitigation Measure 4.3.12)		
15	If sensitive biological resources may be impacted, would the monitoring biologist be able to verify that the following actions have been taken: • Has fencing, flagging, signage, or other means to protect sensitive resources been implemented? • Are noise attenuation measures needed to protect sensitive wildlife in place and effective? • Have nesting raptors been identified and necessary maintenance setbacks have been established if maintenance is to occur between February 1 and August 1? (Mitigation Measure 4.3.13)		
16	Have off-site mitigation areas been reviewed to determine if the mitigation would have a significant impact on biological resources located within the disturbance area of the mitigation? If so, have appropriate mitigation measures been proposed to reduce these impacts to below a level of significance? (Mitigation Measures 4.3.14)		

SUBSTANTIAL CONFORMANCE REVIEW CHECKLIST

MASTER STORM WATER SYSTEM MAINTENANCE PROGRAM

No.	Measure/Criteria	Y/N/NA	Basis for Determination (attach separate sheet(s) as necessary)
Master Program PEIR Mitigation, Monitoring, and Reporting Program			
Biological Resources (cont.)			
17	Does the IBA discuss appropriate actions to offset impacts to listed or endemic sensitive plant species? (Mitigation Measure 4.3.15)		
18	Would maintenance activities meet setback requirements for sensitive species? (Mitigation Measure 4.3.16)		
19	Would clearing, grubbing, or grading (inside and outside the MHPA) be restricted during the breeding season of the listed species? Have protocol surveys been conducted for other potentially occurring sensitive species? If observed, have adequate mitigation measures been identified in the IBA? (Mitigation Measure 4.3.17)		
20	Has evidence been submitted to document that protocol surveys have been conducted for potentially occurring sensitive bird species? (Mitigation Measure 4.3.18)		
21	Has the IBA included appropriate mitigation measures when the potential exists for a sensitive bird species to occur near a proposed maintenance area and no protocol surveys have been conducted? (Mitigation Measures 4.3.19, 20 and 21)		
22	Would removal of any eucalyptus trees or other trees used by raptors for nesting be proposed within the maintenance area? If yes, would maintenance include appropriate setbacks and limitations? (Mitigation Measure 4.3.22)		
23	Would maintenance activities occur at known localities for listed fish species? If yes, would maintenance include appropriate mitigation? (Mitigation Measure 4.3.23)		

SUBSTANTIAL CONFORMANCE REVIEW CHECKLIST

MASTER STORM WATER SYSTEM MAINTENANCE PROGRAM

No.	Measure/Criteria	Y/N/NA	Basis for Determination (attach separate sheet(s) as necessary)
Master Program PEIR Mitigation, Monitoring, and Reporting Program			
Biological Resources (cont.)			
24	Would maintenance activities occur within areas supporting listed and/or narrow endemic plants? If yes, would maintenance proceed as described in Mitigation Measure 4.3.24?		
25	If maintenance is proposed during the nesting season of avian species, including those species not covered by the MSCP, does the IBA require maintenance within or adjacent to avian nesting habitat occur outside of the avian breeding season (January 15 to August 31) unless postponing maintenance would result in a threat to human life or property? (Mitigation Measure 4.3.25)		
Historical Resources			
26	Has a qualified archaeologist determined the potential for significant historical resources to occur in the maintenance area and prepared an IHA? (Mitigation Measure 4.4.1)		
27	Has an Individual Historical Assessment (IHA) been prepared for the proposed maintenance? (Mitigation Measure 4.4.1)		
28	If required, has a field survey of the maintenance activity APE been performed by a qualified archaeologist and a Native American monitor? (Mitigation Measure 4.4.1)		
29	Has a record search been requested from the South Coastal Information Center (SCIC)? (Mitigation Measure 4.4.1)		
30	Has an archaeological testing program been performed based on the City's Historical Resources Guidelines? (Mitigation Measure 4.4.1)		

SUBSTANTIAL CONFORMANCE REVIEW CHECKLIST

MASTER STORM WATER SYSTEM MAINTENANCE PROGRAM

No.	Measure/Criteria	Y/N/NA	Basis for Determination (attach separate sheet(s) as necessary)
Master Program PEIR Mitigation, Monitoring, and Reporting Program			
Historical Resources (cont.)			
31	Have significant historical resources been identified within the proposed maintenance activity APE? If yes, address criteria numbers 36 through 42. If no, proceed to criteria number 43. (Mitigation Measures 4.4.1 and 4.4.2)		
32	Has a Principal Investigator (PI) been selected and approved by the SWD and ADD Environmental Designee? (Mitigation Measure 4.4.2.1)		
33	Have mitigation recommendations from the IHA been incorporated into the IMP to the satisfaction of the PI and the ADD Environmental Designee? (Mitigation Measure 4.4.2.2)		
34	If impacts to significant historical resources cannot be avoided, has the PI prepared and implemented an Archaeological Research Design and Data Recovery Program (ARDDRP) for the affected resources, with input from a Native American consultant (approved by the ADD Environmental Designee? (Mitigation Measure 4.4.2.3)		
35	Has a pre-maintenance meeting been planned and/or conducted on site, including representatives from the PI, Native American consultant, SWD, MMC, Resident Engineer (RE), and MC? (Mitigation Measure 4.4.2.4)		
36	If human remains have been discovered in the course of conducting the ARDDRP, would the procedures set forth in the California Public Resources Code (Sec. 5097.98) and State Health and Safety Code (Sec. 7050.5) be implemented? (Mitigation Measure 4.4.2.5?		

SUBSTANTIAL CONFORMANCE REVIEW CHECKLIST

MASTER STORM WATER SYSTEM MAINTENANCE PROGRAM

No.	Measure/Criteria	Y/N/NA	Basis for Determination (attach separate sheet(s) as necessary)
Master Program PEIR Mitigation, Monitoring, and Reporting Program			
Historical Resources (cont.)			
37	Will the PI and Archaeologist assume required responsibilities? (Mitigation Measures 4.4.2.6, 4.4.2.7, and 4.4.2.8)		
38	If the IHA identifies a moderate to high potential for the occurrence of significant historical resources within the APE, would mitigation measures be implemented? (Mitigation Measure 4.4.3)		
Land Use			
39	Has the ADD Environmental Designee verified that all MHPA boundaries and limits of work have been delineated on all maintenance documents? (Mitigation Measure 4.1.1)		
40	Has a qualified biologist (possessing a valid Endangered Species Act Section 10(a)(1)(a) recovery permit) surveyed habitat areas inside and outside the MHPA suspected to serve as habitat for the coastal California gnatcatcher, least Bell's vireo and/or other listed species? (Mitigation Measure 4.1.2)		
41	Has a qualified acoustician (possessing current noise engineer license or registration with monitoring noise level experience with listed animal species) performed a noise analysis for the proposed maintenance activity? (Mitigation Measure 4.1.3)		
42	Would the proposed maintenance have the potential to impact breeding activities of listed species? If yes, would maintenance activities be restricted to the breeding season? (Mitigation Measure 4.1.4)		

SUBSTANTIAL CONFORMANCE REVIEW CHECKLIST

MASTER STORM WATER SYSTEM MAINTENANCE PROGRAM

No.	Measure/Criteria	Y/N/NA	Basis for Determination (attach separate sheet(s) as necessary)
Master Program PEIR Mitigation, Monitoring, and Reporting Program			
Land Use (cont.)			
43	If maintenance cannot be avoided during an identified breeding season for a listed bird which is determined to be potentially significantly affected by maintenance, would the appropriate measures be taken? (Mitigation Measure 4.1.5)		
44	Has a pre-maintenance meeting been planned and/or conducted, including the MC, Project Biologist, and City representative? (Mitigation Measure 4.1.6)		
45	Does the IMP include appropriate maintenance designs? (Mitigation Measure 4.1.7)		
46	Has the ADD Environmental Designee verified that the MHPA boundaries and the requirements regarding coastal California gnatcatcher been included in the IMP and/or IBA? (Mitigation Measure 4.1.8)		
Master Program Protocols			
Water Quality			
47	Does the IMP include measures to stabilize designated access roads (or other graded areas) with permeable protective surfacing (e.g., grasscrete), storm water diversion structures (e.g., brow ditches or berms), or crossing structures (e.g., culverts) to control erosion and prevent off-site sediment transport? (WQ-1)		

SUBSTANTIAL CONFORMANCE REVIEW CHECKLIST

MASTER STORM WATER SYSTEM MAINTENANCE PROGRAM

No.	Measure/Criteria	Y/N/NA	Basis for Determination (attach separate sheet(s) as necessary)
Master Program Protocols (cont.)			
Water Quality (cont.)			
48	Does the IMP include measures to prevent off-site sediment transport during maintenance through the use erosion and sediment controls within storm water facilities, along access routes and around stockpile/staging areas? Will temporary erosion or sediment control measures be removed upon completion of maintenance unless their removal would result in greater environmental impact than leaving them in place? (WQ-2)		
49	Does the IMP require storage of BMP materials on-site in a way that provides complete protection of exposed areas and prevent off-site sediment transport? (WQ-3)		
50	Does the IMP require training for personnel responsible for the proper installation, inspection, and maintenance of on-site BMPs. (WQ-4)		
51	Does the IMP require revegetation of spoil and staging areas within 30 days of completion of maintenance activities? Does it require monitoring and maintenance of revegetated areas for a period of not less than 25 months following planting? (WQ-5)		
52	Does the IMP require sampling and analysis; monitoring and reporting; and post-maintenance management programs per National Pollutant Discharge Elimination System (NPDES) and/or City requirements? (WQ-6)		

SUBSTANTIAL CONFORMANCE REVIEW CHECKLIST

MASTER STORM WATER SYSTEM MAINTENANCE PROGRAM

No.	Measure/Criteria	Y/N/NA	Basis for Determination (attach separate sheet(s) as necessary)
Master Program Protocols (cont.)			
Water Quality (cont.)			
53	Does the IMP prohibit storing hazardous materials used during maintenance within 50 feet from storm water facilities? Does it require hazardous materials to be managed and stored in accordance with applicable local, state and federal regulations? (WQ-7)		
54	Does the IMP prohibit storage of maintenance-related trash in areas within 50 feet from storm water facilities, and require removal of trash in receptacles at least weekly? (WQ-8)		
55	Does the IMP require installation of any check dam or other comparable mechanism identified in the corresponding IHHA? Are these structures required to be removed when vegetation growth has reached a point where the structure is no longer required unless removal would result in greater environmental harm than leaving them in place? (WQ-9)		
56	Does the IMP require inspection of earthen-bottom storm water facilities within 30 days of the first 2-year storm following maintenance? Are erosion control measures recommended by the field engineer incorporated into the IMP? (WQ-10)		
57	Does the IMP incorporate mitigation measures identified in the IWQA and/or Table 4.8-8 of the PEIR?		

SUBSTANTIAL CONFORMANCE REVIEW CHECKLIST

MASTER STORM WATER SYSTEM MAINTENANCE PROGRAM

No.	Measure/Criteria	Y/N/NA	Basis for Determination (attach separate sheet(s) as necessary)
Master Program Protocols (cont.)			
Biological Resource Protection			
~~57~~58	Does the IMP restrict vehicles to access designated in the Master Program? (BIO-1)		
~~58~~59	Does the IMP require delineation and flagging of all sensitive biological resources to remain within or adjacent to the maintenance area? (BIO-2)		
~~59~~60	Does the IMP require a pre-maintenance meeting when maintenance will occur within or adjacent to sensitive biological resources? (BIO-3)		
~~60~~61	Are erosion control measures designed to avoid introduction of invasive plant species? (BIO-4)		
~~61~~62	Does the IMP require conducting pre-maintenance protocol surveys if maintenance is proposed during the breeding season of a sensitive animal species? (BIO-5)		
~~62~~63	If arundo will be removed during maintenance, does the IMP include appropriate removal methods to minimize downstream dispersal? (BIO-6)		
~~63~~64	Does the IMP prohibit the use of mechanized maintenance within 300 feet of a Cooper's hawk nest, 900 feet of a northern harrier's nest, or 500 feet of any other raptor's nest until any fledglings have left the nest? (BIO-7)		
Historical Resource Protection			
~~64~~65	Does the IMP call for flagging, capping, or fencing of all historical resource areas in the field prior to initiation of maintenance activities in the presence of a qualified historical resource specialist, as necessary)? (HIST-1)		

SUBSTANTIAL CONFORMANCE REVIEW CHECKLIST

MASTER STORM WATER SYSTEM MAINTENANCE PROGRAM

No.	Measure/Criteria	Y/N/NA	Basis for Determination (attach separate sheet(s) as necessary)
Master Program Protocols (cont.)			
Historical Resource Protection (cont.)			
~~65~~66	Does the IMP require a pre-maintenance meeting on-site when maintenance activities are determined in the IHA to potentially impact historic resources? (HIST-2)		
Waste Management			
~~66~~67	Does the IMP call for disposable of compostable green waste material at an approved composting facility, if available? (WM-1)		
~~67~~68	Does the IMP call for screening of soil, sand, and silt to remove waste debris and, wherever possible, to be re-used as fill material, aggregate, or other raw material? (WM-2)		
~~68~~69	Does the IMP call for separation and transport of waste tires to an appropriate disposal facility, including the completion of a Comprehensive Trip Log (CTL) if more than nine tires are in a vehicle or waste bin at any one time? (WM-3)		
~~69~~70	Does the IMP require hazardous materials encountered during maintenance to be logged under a hazardous materials manifest and transported to an approved hazardous waste storage, recycling, treatment or disposal facility? (WM-4)		

Exhibit E

SECTION 15168 OF THE CEQA GUIDELINES

(b) When a staged EIR has been prepared, a supplement to the EIR shall be prepared when a later approval is required for the project, and the information available at the time of the later approval would permit consideration of additional environmental impacts, mitigation measures, or reasonable alternatives to the project.

(c) Where a statute such as the Warren-Alquist Energy Resources Conservation and Development Act provides that a specific agency shall be the Lead Agency for a project and requires the Lead Agency to prepare an EIR, a Responsible Agency which must grant an approval for the project before the Lead Agency has completed the EIR may prepare and consider a staged EIR.

(d) An agency requested to prepare a staged EIR may decline to act as the Lead Agency if it determines, among other factors, that:

(1) Another agency would be the appropriate Lead Agency; and

(2) There is no compelling need to prepare a staged EIR and grant an approval for the project before the appropriate Lead Agency will take its action on the project.

Note: Authority cited: Section 21083, Public Resources Code; Reference: Section 21003, Public Resources Code.

15168. PROGRAM EIR

(a) General. A program EIR is an EIR which may be prepared on a series of actions that can be characterized as one large project and are related either:

(1) Geographically,

(2) A logical parts in the chain of contemplated actions,

(3) In connection with issuance of rules, regulations, plans, or other general criteria to govern the conduct of a continuing program, or

(4) As individual activities carried out under the same authorizing statutory or regulatory authority and having generally similar environmental effects which can be mitigated in similar ways.

(b) Advantages. Use of a program EIR can provide the following advantages. The program EIR can:

(1) Provide an occasion for a more exhaustive consideration of effects and alternatives than would be practical in an EIR on an individual action,

(2) Ensure consideration of cumulative impacts that might be slighted in a case-by-case analysis,

(3) Avoid duplicative reconsideration of basic policy considerations,

(4) Allow the Lead Agency to consider broad policy alternatives and programwide mitigation measures at an early time when the agency has greater flexibility to deal with basic problems or cumulative impacts, and

(5) Allow reduction in paperwork.

(c) Use with Later Activities. Subsequent activities in the program must be examined in the light of the program EIR to determine whether an additional environmental document must be prepared.

(1) If a later activity would have effects that were not examined in the program EIR, a new Initial Study would need to be prepared leading to either an EIR or a Negative Declaration.

(2) If the agency finds that pursuant to Section 15162, no new effects could occur or no new mitigation measures would be required, the agency can approve the activity as being within the scope of the project covered by the program EIR, and no new environmental document would be required.

(3) An agency shall incorporate feasible mitigation measures and alternatives developed in the program EIR into subsequent actions in the program.

(4) Where the subsequent activities involve site specific operations, the agency should use a written checklist or similar device to document the evaluation of the site and the activity to determine whether the environmental effects of the operation were covered in the program EIR.

(5) A program EIR will be most helpful in dealing with subsequent activities if it deals with the effects of the program as specifically and comprehensively as possible. With a good and detailed analysis of the program, many subsequent activities could be found to be within the scope of the project described in the program EIR, and no further environmental documents would be required.

(d) Use with Subsequent EIRs and Negative Declarations. A program EIR can be used to simplify the task of preparing environmental documents on later parts of the program. The program EIR can:

(1) Provide the basis in an Initial Study for determining whether the later activity may have any significant effects.

(2) Be incorporated by reference to deal with regional influences, secondary effects, cumulative impacts, broad alternatives, and other factors that apply to the program as a whole.

(3) Focus an EIR on a subsequent project to permit discussion solely of new effects which had not been considered before.

(e) Notice with Later Activities. When a law other than CEQA requires public notice when the agency later proposes to carry out or approve an activity within the program and to rely on the program EIR for CEQA compliance, the notice for the activity shall include a statement that:

(1) This activity is within the scope of the program approved earlier, and

(2) The program EIR adequately describes the activity for the purposes of CEQA.

Note: Authority cited: Section 21083, Public Resources Code; Reference: Section 21003, Public Resources Code; *County of Inyo v. Yorty*, (1973) 32 Cal. App. 3d 795.

15169. MASTER ENVIRONMENTAL ASSESSMENT

(a) General. A public agency may prepare a Master Environmental Assessment, inventory, or data base for all, or a portion of, the territory subject to its control in order to provide information which may be used or referenced in EIRs or Negative Declarations. Neither the content, the format, nor the procedures to be used to develop a Master Environmental Assessment are prescribed by these Guidelines. The descriptions contained in this section are advisory. A Master Environmental Assessment is suggested solely as an approach to identify and organize environmental information for a region or area of the state.

(b) Contents. A Master Environmental Assessment may contain an inventory of the physical and biological characteristics of the area for which it is prepared and may contain such additional data and information as the public agency determines is useful or necessary to describe environmental characteristics of the area. It may include identification of existing levels of quality and supply of air and water, capacities and levels of use of existing services and facilities, and generalized incremental effects of different categories of development projects by type, scale, and location.

(c) Preparation.

(1) A Master Environmental Assessment or inventory may be prepared in many possible ways. For example, a Master Environmental Assessment may be prepared as a special, comprehensive study of the area involved, as part of the EIR on a general plan, or as a data

Exhibit F

EMAIL FROM U.S. ARMY CORPS OF ENGINEERS DATED 1/31/12

From:	Bantilan-Smith, Meris Ms SPL
To:	Steve Neudecker
Cc:	Jarque, Anne; McFadden, Kris; lmceachern@coastal.ca.gov; mdeloplaine@coastal.ca.gov; lsimon@coastal.ca.gov; Bruce McIntyre
Subject:	RE: SDMSWSMP - Coastal Commission Participation (UNCLASSIFIED)
Date:	Tuesday, January 31, 2012 10:45:07 AM

Classification: UNCLASSIFIED
Caveats: NONE

Steve,
I am responding to your request below. The Coastal Commission would be included in the review process for all facilities that are located within the Coastal Zone and that require a coastal consistency determination by the Coastal Commission in accordance with Section 307 of the Coastal Zone Management Act (CZMA). For facilities that require CZMA consistency determinations, all special conditions of the determination would be incorporated (likely by reference) into the Department of the Army Permit, should one be issued.

Please let me know if you have any other questions.

Please note that I created a new file number for the most recent application submittals. Please refer to the following number, SPL-2012-00049-MBS, when providing any correspondence regarding this project to this office.

Thanks in advance,

Meris

-----Original Message-----
From: Steve Neudecker [mailto:SteveN@helixepi.com]
Sent: Tuesday, January 31, 2012 10:04 AM
To: Bantilan-Smith, Meris Ms SPL
Cc: Jarque, Anne; McFadden, Kris; lmceachern@coastal.ca.gov; mdeloplaine@coastal.ca.gov; lsimon@coastal.ca.gov; Bruce McIntyre
Subject: SDMSWSMP - Coastal Commission Participation

1/31/12

0902 hrs.

San Diego Master Storm Water System Maintenance Program (SDMSWSMP)

IP File No. SPL-2008-01175-MB

MERIS:

The California Coastal Commission is considering an appeal of the SDMSWSMP because some of the facilities are within the Coastal Zone.

During our previous meetings with the Corps and other agencies, we established the following annual consistency determination process:

Agency Review of Annual Maintenance Program and Determination of Permit Compliance

Following completion of all of the individual technical assessments of each storm water facility proposed for maintenance in the upcoming year (IBA, IHA, IHHA, INA and IWQA), the SWD shall submit the Annual Maintenance Plan and supporting information that identifies the facilities to be maintained to the Corps for distribution to the responsible resource agencies. All agencies shall then have 30 days from receipt to review the Annual Maintenance Plan and determine whether the identified facilities are covered in the Master Program and the impacts and appropriate mitigation are pursuant to the FPEIR. If the agencies concur, then the proposed maintenance is therefore authorized to commence under the issued aquatic resource permits. Should the agencies determine that a facility does not conform to the Master Program and/or the FPEIR, the agencies may then request additional consultation to resolve issues with the proposed maintenance of that facility.

Meris, could you please confirm that the Coastal Commission will be included in that review process?

Your prompt attention to this request will be most graciously appreciated.

Regards,
Steve

Stephen Neudecker, Ph.D.

Certified Senior Ecologist

Independent Contractor

HELIX Environmental Planning, Inc.

7578 El Cajon Boulevard

Suite 200

La Mesa, CA 91942

619.462.1515, ext. 230

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Classification: UNCLASSIFIED
Caveats: NONE

Exhibit G

SDMC § 143.0145

§143.0145 Development Regulations for Special Flood Hazard Areas

(a) *Special Flood Hazard Areas* within the City of San Diego are established in accordance with the report entitled "*Flood Insurance Study*, San Diego County, California," dated June 16, 1999 and the accompanying *Flood Insurance Rate Maps (FIRM),* published by the Federal Emergency Management Agency (FEMA), on file in the office of the City Clerk as Document Nos. 18910-1 and 18910-2, including any supplements, amendments, and revisions which are properly promulgated by FEMA or the Federal Insurance Administrator.

(b) For the purpose of Sections 143.0145 and 143.0146, the City Engineer is the designated Floodplain Administrator and shall administer, implement, and enforce these regulations.

(c) The degree of *flood* protection required by this section is considered reasonable for regulatory purposes and is based on scientific and engineering considerations. Larger *floods* can and will occur on rare occasions. It is possible that increased *flood* heights may result from man-made or natural causes. This section does not imply that land outside a *Special Flood Hazard Area* or uses permitted within such areas will be free from *flooding* or *flood* damages. This section shall not create liability on the part of the City, any officer or employee thereof, or the FEMA, for any *flood* damages that result from reliance on this chapter or any administrative decision lawfully made there under.

(d) The following development regulations and all other applicable requirements and regulations of FEMA apply to all *development* proposing to encroach into a *Special Flood Hazard Area*, including both the *floodway* and *flood fringe* areas or that does not qualify for an exemption pursuant to Section 143.0110(c):

(e) *Floodways*

(1) Within the *floodway* portion of a *premises*, development regulations are as set forth for the OF zone, pursuant to Section 131.0231.

(2) *Structures* associated with any allowed use shall comply with the following requirements:

(A) *Structures* shall not be attached to a foundation, in order to readily move them in case of *flood*; and

(B) *Structures* shall be removed upon imminence of *flooding*, as predicted by the National Weather Service or local public weather broadcast. If a *structure* is not removed and *flooding* occurs, the retrieval or salvage of the *structure* and repair of any damage caused by the *structure* shall be the responsibility of the owner.

(3) *Channelization* or other substantial alteration of rivers or streams shall be limited to that necessary for the following:

(A) Essential public service projects, where no other feasible construction method or alternative project location exists; and

(B) *Flood* control projects, where no other feasible method for protecting existing public or private *development* exists and where such protection is necessary for public safety.

(C) Projects where the primary function is the improvement of fish and wildlife habitat.

(4) *Development* in *floodways* shall be offset by improvements or modifications to enable the passage of a *base flood*, in accordance with the FEMA standards and regulations provided in Section 143.0146.

(5) *Development* that involves *channelization* or other substantial alteration of rivers or streams is subject to the following requirements.

(A) All requirements and relevant recommendations of hydrological studies for the watershed of the affected stream, as approved by the City Engineer, shall be incorporated into the project design and mitigation measures. These requirements include erosional characteristics, flow velocities, volume, sediment transport, and maintenance of hydrology.

(B) The channel shall be designed to ensure that the following occur:

(i) Stream scour is minimized;

(ii) Erosion protection is provided;

(iii) Water flow velocities are maintained as specified by the City Engineer;

(iv) There are neither significant increases nor contributions to downstream bank erosion and sedimentation of *sensitive biological resources*; acceptable techniques to control stream sediment include planting riparian vegetation in and near the stream and detention or retention basins;

(v) Wildlife habitat and corridors are maintained;

(vi) Resource management criteria are implemented consistent with applicable *land use plans*; and

(vii) Groundwater recharge capability is maintained or improved.

(C) Channels that accommodate a *base flood* shall do so without increasing the water surface elevation more than one foot at any point from the level of a nonconfined *base flood* in the natural undeveloped floodplain. Channels may accommodate less than a *base flood* (low-flow channels), but shall be designed and constructed in accordance with FEMA regulations.

(D) All artificial channels shall consist of natural bottoms and sides and shall be designed and sized to accommodate existing and proposed riparian vegetation and other natural or proposed constraints. Where maintenance is proposed or required to keep vegetation at existing levels compatible with the design capacity of the channel, a responsible party shall be identified and a maintenance and monitoring process shall be established to the satisfaction of the City Engineer.

(6) *Development* shall not significantly adversely affect existing *sensitive biological resources* on-site or off-site.

(7) Within the Coastal Overlay Zone, no *structure* or portion thereof shall be erected, constructed, converted, established, altered or enlarged, or no landform alteration *grading*, placement or removal of vegetation, except that related to a historic and ongoing agricultural operation, or land division shall be permitted, provided:

(A) Parking lots, new roadways and roadway expansions shall be allowed only where indicated on an adopted *Local Coastal Program land use plan.*

(B) *Floodway* encroachments for utility and transportation crossings shall be offset by improvements or modifications to enable the passage of the *base flood*, in accordance with the FEMA standards and regulations provided in Section 143.0146.

(f) *Flood Fringe*. The applicable development regulations are those in the underlying zone, subject to the following supplemental regulations:

(1) Within the *flood fringe* of a *Special Flood Hazard Area*, permanent *structures* and *fill* for permanent *structures*, roads, and other *development* are allowed only if the following conditions are met:

(A) The *development* or *fill* will not significantly adversely affect existing *sensitive biological resources* on-site or off-site;

(B) The *development* is capable of withstanding *flooding* and does not require or cause the construction of off-site *flood* protective works including artificial *flood* channels, revetments, and levees nor will it cause adverse impacts related to *flooding* of properties located upstream or downstream, nor will it increase or expand a *(FIRM)* Zone A;

(C) *Grading* and *filling* are limited to the minimum amount necessary to accommodate the proposed *development*, harm to the environmental values of the floodplain is minimized including peak flow storage capacity, and *wetlands* hydrology is maintained;

(D) The *development* neither significantly increases nor contributes to downstream bank erosion and sedimentation nor causes an increase in *flood* flow velocities or volume; and

(E) There will be no significant adverse water quality impacts to downstream wetlands, lagoons or other *sensitive biological resources*, and the *development* is in compliance with the requirements and regulations of the National Pollution Discharge Elimination System, as implemented by the City of San Diego.

(F) The design of the *development* incorporates the findings and recommendations of both a site specific and coastal watershed hydrologic study.

(2) All *development* that involves *fill*, *channelization*, or other alteration of a *Special Flood Hazard Area* is subject to the requirements for *channelization* in Section 143.0145(e)(5) and with FEMA regulations.

(Amended 4-22-2002 by O-19051 N.S.; effective 10-8-2002.)
(Amended 11-13-08 by O-19805 N.S; effective 12-13-2008.)

Exhibit H

SACRAMENTO OLD CITY ASSOCIATION V. CITY COUNCIL OF SACRAMENTO, 229 CAL. APP. 3d 1011, 1028-29 (1991)

Court of Appeal, Third District, California.
SACRAMENTO OLD CITY ASSOCIATION, et al., Plaintiffs and Appellants,
v.
CITY COUNCIL OF SACRAMENTO, Defendant and Respondent.

Civ. C007769.
April 30, 1991.
Rehearing Denied May 28, 1991.
Review Denied Aug. 22, 1991.

Association and others sought writ of mandamus pursuant to California Environmental Quality Act, challenging decision of city to expand downtown convention center. The Sacramento Superior Court, No. 360355,Michael Virga, J., denied writ, and appeal was taken. The Court of Appeal, DeCristoforo, J., assigned, held that: (1) lack of specificity in parking mitigation measures discussed in environmental impact report did not amount to illegal segmentation of project; (2) report adequately addressed mitigation measures; (3) proposed mitigation measures satisfied Act; and (4) substantial evidence supported findings related to mitigation measures.

Affirmed.

Sims, J., filed dissenting opinion.

West Headnotes

[1] Administrative Law and Procedure 15A ⚷496

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(D) Hearings and Adjudications
15Ak496 k. Effect in General. Most Cited Cases

Environmental Law 149E ⚷689

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek677 Scope of Inquiry on Review of Administrative Decision
149Ek689 k. Assessments and Impact Statements. Most Cited Cases
(Formerly 199k25.15(10) Health and Environment)

Courts reviewing California Environmental Quality Act decisions generally will defer to agency's substantive judgments while requiring strict compliance with procedures required by law. West's Ann.Cal.Pub.Res.Code § 21000 et seq.

[2] Administrative Law and Procedure 15A ⚷760

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(D) Scope of Review in General
15Ak754 Discretion of Administrative Agency
15Ak760 k. Wisdom, Judgment or Opinion. Most Cited Cases

Environmental Law 149E ⚷689

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek677 Scope of Inquiry on Review of Administrative Decision
149Ek689 k. Assessments and Impact Statements. Most Cited Cases
(Formerly 199k25.15(10) Health and Environment)

Courts reviewing California Environmental Quality Act decisions must not overturn agency's discretionary decisions and substitute their own opinions as to what constitutes wise public policy. West's Ann.Cal.Pub.Res.Code § 21000 et seq.

[3] Administrative Law and Procedure 15A ⚷791

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15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(E) Particular Questions, Review of
15Ak784 Fact Questions
15Ak791 k. Substantial Evidence. Most Cited Cases

Environmental Law 149E 689

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek677 Scope of Inquiry on Review of Administrative Decision
149Ek689 k. Assessments and Impact Statements. Most Cited Cases
(Formerly 199k25.15(10) Health and Environment)

In applying substantial evidence standard, court reviewing California Environmental Quality Act decision must resolve reasonable doubt in favor of administrative finding and decision. West's Ann.Cal.Pub.Res.Code §§ 21168, 21168.5.

[4] Environmental Law 149E 604(2)

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek598 Adequacy of Statement, Consideration, or Compliance
149Ek604 Particular Projects
149Ek604(2) k. Land Use in General. Most Cited Cases
(Formerly 199k25.10(6.1) Health and Environment)

Environmental impact report prepared by city for proposed expansion of downtown convention center did not have to include detailed provisions for expanded parking to avoid improper segmentation of project; while necessity for adequate parking was reasonably foreseeable given worst case scenario and potential mitigation measures considered by city could greatly expand scope and nature of project's environmental consequences, until those specific measures were adopted and more fully flushed out, their effects remained abstract and speculative, and they did not have to be included in report. West's Ann.Cal.Pub.Res.Code § 21000 et seq.

[5] Environmental Law 149E 604(2)

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek598 Adequacy of Statement, Consideration, or Compliance
149Ek604 Particular Projects
149Ek604(2) k. Land Use in General. Most Cited Cases
(Formerly 199k25.10(6.1) Health and Environment)

Measures proposed in environmental impact report for expansion of downtown convention center to mitigate deficit of 2,621 parking spaces caused by project under worst case scenario satisfied the California Environmental Quality Act; report offered seven distinct types of alternatives to be studied, analyzed, and possibly incorporated into transportation management program, including scheduling changes for expanded center's activities, satellite parking locations, public transit, and construction of new parking or expanded use of existing parking. West's Ann.Cal.Pub.Res.Code § 21002.

[6] Environmental Law 149E 604(2)

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek598 Adequacy of Statement, Consideration, or Compliance
149Ek604 Particular Projects
149Ek604(2) k. Land Use in General. Most Cited Cases
(Formerly 199k25.10(6.1) Health and Environment)

Environmental impact report for expansion of downtown convention center was not unsatisfactory for its failure to consider possible cumulative impacts stemming from seven measures proposed to mitigate deficit of 2,621 parking spaces created by expansion under worst case scenario; city used its best efforts to find out and disclose all it reasonably could. West's Ann.Cal.Pub.Res.Code § 21000 et seq.

[7] Environmental Law 149E 604(2)

149E Environmental Law

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149EXII Assessments and Impact Statements
149Ek598 Adequacy of Statement, Consideration, or Compliance
149Ek604 Particular Projects
149Ek604(2) k. Land Use in General. Most Cited Cases
(Formerly 199k25.10(6.1) Health and Environment)

City adequately discussed cumulative traffic impact of convention center expansion on surrounding roads and intersections in its environmental impact report for expansion, insofar as report took into consideration severity of traffic impacts and likelihood of their occurrence, despite request by state agencies that city analyze impact of center expansion on freeway interchanges. West's Ann.Cal.Pub.Res.Code § 21000 et seq.

[8] Environmental Law 149E ⚷606

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek606 k. Effect of Statement or Other Requirements. Most Cited Cases
(Formerly 199k25.10(1) Health and Environment)

Agency cannot fulfill its duties under California Environmental Quality Act simply by considering environmental impact report before approving project; if agency decides to approve project despite its significant adverse impacts, agency must issue findings which specifically state how agency has responded to significant impacts identified in report. West's Ann.Cal.Pub.Res.Code § 21000 et seq.

[9] Environmental Law 149E ⚷601

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek598 Adequacy of Statement, Consideration, or Compliance
149Ek601 k. Consideration of Alternatives. Most Cited Cases
(Formerly 199k25.10(6.1), 199k25.10(6) Health and Environment)

Environmental Law 149E ⚷602

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek598 Adequacy of Statement, Consideration, or Compliance
149Ek602 k. Mitigation Measures. Most Cited Cases
(Formerly 199k25.10(6.1), 199k25.10(6) Health and Environment)

For each significant effect identified in environmental impact report, agency must make one or more of following findings, supported by substantial evidence in administrative record: that changes or alterations have been required in, or incorporated into, project that would avoid or substantially lessen effect; that lead agency lacks jurisdiction to make change, but that another agency does have such authority; and/or that specific, economic, social, or other considerations make infeasible mitigation measures or project alternatives identified in final environmental impact report. West's Ann.Cal.Pub.Res.Code § 21081.

[10] Environmental Law 149E ⚷615

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek612 Evidence
149Ek615 k. Weight and Sufficiency. Most Cited Cases
(Formerly 199k25.10(6.1) Health and Environment)

Substantial evidence in administrative record supported city's finding that potentially significant effects that convention center expansion would have on traffic, circulation, and parking would be reduced below level of significance by mitigation measures to extent those measures related to preparation of transportation management plan, provision of satellite parking, and promotion of alternative transportation. West's Ann.Cal.Pub.Res.Code § 21081.

[11] Environmental Law 149E ⚷604(2)

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek598 Adequacy of Statement, Consideration, or Compliance
149Ek604 Particular Projects
149Ek604(2) k. Land Use in General.

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Most Cited Cases
(Formerly 199k25.10(6.1) Health and Environment)

Mitigation findings for demolition of apartment building, listed as priority structure on city's official register of historic properties, in city's environmental impact report for expansion of convention center were supported by substantial evidence and complied with requirements of California Environmental Quality Act; report provided that city would establish aggressive program to locate appropriate replacement housing for tenants displaced from apartment building and would cause replacement housing to be built if relocation of building was found to be infeasible. West's Ann.Cal.Pub.Res.Code § 21000 et seq.

****479 *1015** Law Offices of Kathryn Burkett Dickson, Kathryn Burkett Dickson, Oakland, for plaintiffs and appellants.

Evelyn M. Matteucci, Deputy City Atty., Sacramento, for defendant and respondent.

DeCRISTOFORO, Associate Justice, Assigned. FN*

FN* Retired Justice of the Court of Appeal sitting under assignment by the Chairperson of the Judicial Council.

Plaintiffs Sacramento Old City Association, Elaine Hamby, and Susan Steinsapir ("SOCA") appeal from the denial by the Sacramento Superior Court of a writ of mandamus sought pursuant to the California Environmental Quality Act ("CEQA"). In their writ petition, SOCA sought to set aside the decision of defendant, City Council of Sacramento ("the City") to expand the downtown Sacramento Convention Center complex ("the center") and to construct ****480** an office tower at 1325 J Street ("the office tower"). Plaintiffs also sought an injunction against the future demolition of the Merrium Apartments until the City prepares an adequate environmental impact report ("EIR") on the project. On appeal, plaintiffs argue the EIR approved by the City is inadequate under CEQA. Plaintiffs contend the EIR is deficient because: (1) the EIR fails to adequately address mitigation of parking and traffic impacts; (2) the EIR contains insufficient findings concerning parking and the destruction of the Merrium Apartments.FN1

FN1. This action originally included D. Benvenuti Properties and Daniel Benvenuti Jr., the developer of the officer tower, as real parties in interest. Subsequent to the filing of this appeal, plaintiffs entered into a settlement agreement with those two real parties in interest, providing for dismissal of the appeal as to those said parties. On January 10, 1991, we granted plaintiff's Request for Dismissal of Real Parties in Interest D. Benvenuti Properties and Daniel Benvenuti, Jr. Since those issues are no longer before us, we do not consider or address any of the contentions which had been directed to the office tower.

We find the record supports the City's certification of the community center expansion. Therefore, we shall affirm the judgment.

***1016** FACTUAL AND PROCEDURAL BACKGROUND

In 1987, the City proposed an expansion of its existing Community Convention Center, located in downtown Sacramento. After considering various studies, the City determined the existing center was unable to attract and accommodate its full potential of convention-related events. This failure was partially based on size constraints of the existing center.

The City also sought, by enlarging the existing center, to further its goal of revitalization of downtown Sacramento. As part of this downtown revitalization, the City proposed the development and support of an entertainment/hotel district in downtown Sacramento, expanding outward from the existing center. In a report, the City noted, "it has been broadly agreed that this district should be such that the performing arts, restaurants and retail establishments can all flourish. An expanded convention capability will serve to provide increased financial support to these activities, in addition to existing local support. [¶] Indeed, the location of an expanded, vital, Community/Convention Center in the entertainment/hotel district will serve to counteract those forces currently drawing development away from the central core, and will allow these sought after downtown activities to thrive." The City began formal consideration of expansion of the center.

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Subsequently, the City's Planning and Development Department received applications from several developers for special permits to allow construction of high-rise office towers within a block of the center. The City, citing the geographic proximity of the office towers to the center and the resulting interrelated environmental issues, decided to prepare a single EIR, covering the proposed office towers and the expansion of the center.[FN2]

FN2. The draft EIR discussed the environmental impacts of office towers at 1215 "K" Street, 1325 "J" Street (the office tower) and 1301 "I" Street. The latter project was dropped before the issuance of the final EIR. Plaintiffs do not challenge the adequacy of the "K" Street tower EIR on appeal.

The City commissioned a marketing analysis to provide space planning requirements for the proposed center expansion. This analysis recommended an additional 140,000 gross square feet of exhibit, meeting and ballroom space and additional loading dock facilities in order to realize the center's full market potential. The analysis proposed no specific design for the expansion.

The City considered five design alternatives for the proposed expansion: north (175,000 additional square footage); east (130,000 additional square footage); west (135,000 additional square footage); a SOCA alternative (210,000 additional square footage); and a no-project alternative.

***1017** The City prepared and made available a draft EIR. In the draft EIR each of the ****481** five proposed alternatives to the center expansion and each of the three proposed office towers were evaluated in 14 subject areas: land use; historic preservation and cultural resources; population; employment; housing; visual quality; traffic circulation and parking; noise; air quality; microclimate; public services; fiscal impacts; geology and soils; and biotic resources. Under each subject area the draft EIR analyzed any potential impacts and listed potential mitigation measures. The draft EIR also considered the cumulative impacts of the various proposed center expansion alternatives when combined with one or more of the office towers.

Several public hearings were held on the draft EIR. In addition, written comments were submitted to the City, and, ultimately incorporated into the final EIR. At the public meetings numerous questions were raised regarding the potential impact of traffic and parking on downtown Sacramento. The City was also questioned regarding the lack of specific mitigation measures to alleviate the impact of parking. The City responded that it was too soon in the design process of the center to make specific recommendations.

Following the meetings, on October 4, 1988, the City certified the EIR as complete and in compliance with CEQA. The City also adopted a motion of intent to select the east alternative to the proposed center expansion (including the office tower). The east alternative necessitated the removal or destruction of the Merrium Apartments, a priority structure on Sacramento's Official Register of Historic Properties. The City held a hearing on the feasibility of retaining the Merrium Apartments. The City determined that, in order to achieve the contiguous square footage required for the needed expansion of the center's exhibit hall, the Merrium could not remain in its present location. The City adopted a requirement of replacement housing as a condition of approval of the expansion of the center.

On October 25, 1988, by a five to four vote, the City certified the EIR and formally approved the east alternative. The City also adopted Findings of Fact and a Statement of Overriding Considerations.

In its findings the City found that, should the relocation of the Merrium prove to be infeasible, the adverse impact of the loss of the Merrium was overridden by the benefits of the expansion of the project. In addition, the findings required the City to explore the possibility of relocating the Merrium. However, a feasibility study commissioned by the City concluded moving the Merrium was not feasible because of the weight, width and depth of the structure. Subsequently, the City issued a finding stating moving the Merrium was not feasible, and reaffirming its statement of overriding considerations for the loss of the Merrium.

***1018** Plaintiffs petitioned for a writ of mandamus in Sacramento Superior Court, to which City and Benvenuti, developer of the office tower, filed an opposition. Following a two-day bench trial, the court

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denied the writ. The court's minute order states: "The Court took the above matter under submission following oral arguments by the attorneys for the parties. The Court has given the matter careful consideration. In the view of the Court, the City of Sacramento substantially complied with the California Environmental Quality Act (CEQA) when it certified the final environmental impact report (EIR) for the Sacramento Community Center expansion and the 1325 J Street office towers. Therefore, the Petition for Writ of Mandamus and Complaint for Declaratory and Injunctive Relief is denied." FN3

FN3. Plaintiffs filed a petition for writ of mandamus with this court, which was also denied.

Plaintiffs filed a notice of appeal, following the entry of judgment.FN4

FN4. Subsequently, SOCA requested this court to take judicial notice of the placement of the Merrium Apartments on the National Register of Historic Places, and of the City's vote to approve demolition of the Merrium. We deny SOCA's request. We note SOCA previously sought a stay pending appeal, alleging irreparable harm, which we denied. Moreover, the placement of the Merrium on the National Register does not change the facts before us. As noted in the letter from the State Historic Preservation Office, attached to SOCA's letter, demolition of historically designated properties "may require review under local ordinances or under the California Environmental Quality Act."

Following this request, SOCA filed a petition for writ of supersedeas with this court, which we denied. SOCA then filed a request for an emergency stay in the California Supreme Court, which the Supreme Court granted.

**482 I. *Compliance with CEQA*

Plaintiffs' appeal attacks the validity and sufficiency of the EIR with respect to its treatment of mitigation of impacts and analysis of cumulative impacts. The impacts plaintiffs focus on are the problems associated with parking and traffic.

A. *Standard of Review*

[1][2] When plaintiffs challenge CEQA decisions, reviewing courts generally will defer to the agency's substantive judgments while requiring strict compliance with procedures required by law. Courts must not overturn an agency's discretionary decisions and substitute their own opinions as to what constitutes wise public policy. (*El Dorado Union High School Dist. v. City of Placerville* (1983) 144 Cal.App.3d 123, 130, 192 Cal.Rptr. 480.) "The court does not pass upon the correctness of the EIR's environmental conclusions, but only upon its sufficiency as an informative document." (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 189, 139 Cal.Rptr. 396.)

[3] ***1019** Two CEQA provisions, Public Resources Code sections 21168 and 21168.5 govern the standard of review applied by courts in CEQA actions. The Supreme Court in *Laurel Heights* noted the standard of review under both sections is essentially the same: "[W]hether substantial evidence supports the agency's determination." (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392, at fn. 5, 253 Cal.Rptr. 426, 764 P.2d 278, citation omitted.) The Supreme Court went on to state: "A court may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable. A court's task is not to weigh conflicting evidence and determine who has the better argument when the dispute is whether adverse effects have been mitigated or could be better mitigated. We have neither the resources nor scientific expertise to engage in such analysis, even if the statutorily prescribed standard of review permitted us to do so. Our limited function is consistent with the principle that 'The purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind. CEQA does not, indeed cannot, guarantee that these decisions will always be those which favor environmental considerations.' " (*Id.* at p. 393, 253 Cal.Rptr. 426, 764 P.2d 278, citations omitted.)

In applying the substantial evidence standard, the reviewing court must resolve reasonable doubt in favor of the administrative finding and decision. Substantial evidence consists of enough relevant information and reasonable inferences from this information that a fair argument can be made to support the

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agency's conclusion, even though other conclusions might also be reached. (*Laurel Heights,* supra, 47 Cal.3d at pp. 392–393, 253 Cal.Rptr. 426, 764 P.2d 278.)

B. *Mitigation of Parking and Traffic Impacts*

Plaintiffs argue the City's EIR is defective because it fails to properly analyze or adequately mitigate the potential environmental effects of the parking necessitated by the project.

1. Impacts Discussed in the EIR

Before we address the specifics of plaintiffs' contention, we review the parking impacts discussed in the EIR. In preparation for the EIR, the City analyzed the number of vehicle trips and parking impacts the various center expansion alternatives would generate. For each alternative, the City used a hypothetical "worst-case" scenario based on the assumption that all expanded convention center facilities were programmed to be utilized on the ****483 *1020** same day, at the same time. This scenario assumed all the center's facilities would be in use at 2:00 p.m. on a weekday.[FN5]

FN5. The City determined the potential for the worst case scenario would occur at most three to five times per year, if ever.

The EIR found that, under the worst case scenario, every available parking space, both public and private within a three-block radius would be occupied. In addition, even with full occupancy of available spaces, an additional 1,760 parking spaces would be needed. Further, the project would eliminate 200 existing parking spaces, bringing the spaces required to a total of 1,960.

When the impacts of the 1215 K Street office tower (227 parking spaces needed) and the 1325 J Street office tower (434 parking spaces needed) were added, the total rose to 2,621 needed spaces.

In summary, under the worst case scenario, the vehicles generated by the full use of the expanded convention center and two office towers would fill all the available parking spaces within three blocks, and parking spaces would still be needed for 2,621 cars.

In the draft EIR, which considered the various expansion proposals, the City summarized in detail the parking impacts under each proposal. In addition, the City prepared tables outlining: the number of trips expansion of the convention center and construction of the office towers would generate; a comparison of the number of trips generated by the existing center and by an expanded center; and a graph summarizing parking impacts.

2. *Mitigation Measures in the EIR*

The City's draft EIR discussed ways of mitigating the impact of parking. The draft EIR outlined mitigation measures for each of the proposals, as well as mitigation measures for the cumulative effects of the office towers and center.

Because the proposed traffic and parking mitigation measures for the subsequently adopted east alternative are the primary focus of plaintiffs' appeal, we reproduce them in full: "*Mitigation Measures* [¶] The following measure is required by the City to offset potential traffic impacts:

"The City will require preparation of a Transportation Management Plan (TMP) to reduce project-related traffic and parking impacts.

***1021** "The following additional measures are recommended by the Consultant and should be considered as part of an overall program to reduce area parking utilization to less than 90 percent occupancy:

"*Parking.* Mitigation measures to reduce projected parking impacts have been developed with the overall goal being an overall area parking utilization rate of 90 percent during the critical weekday afternoon period. Potential mitigations include satellite parking facilities, and program controls to reduce parking demands. Specific potential mitigations are described as follows:

"a. Limit the Size of "Short–Term" Weekday Events. A significant amount of the projected parking impact is the result of assumed attendance at secondary "short-term" events, such as state exams or seminars. The worst-case analysis assumes 1,735 persons attend such an event. Restricting the size of these secondary events when a public show or convention is being held would reduce parking impacts.

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"b. Promote Regional/National Conventions. This analysis has assumed that a locally-oriented convention, such as has occurred in the past, would occur. Such conventions or conferences which draw from the local area population also feature high private automobile usage. Regional/national conventions, with greater emphasis on airplane travel and downtown hotel accommodations, would create less impact, and promoting and booking such events would reduce parking demands. To promote regional/national conventions, additional downtown hotel space would probably have to be provided.

****484** "c. Provide Satellite Parking. Area parking impacts could be reduced if event attendees parked elsewhere and walked or were shuttled to the Convention Center. Satellite parking locations would have to be readily identifiable to patrons and shuttle service would have to be timely and convenient. Implementation of this mitigation is complicated by the need to locate a source of available parking during the critical weekday afternoon hours. This parking would have to be located outside the study area and would have to be designated for Convention Center attendees. Use of light rail parking areas for satellite parking might be considered if sufficient parking capacity could be provided and enought [sic] light rail seats are available.

"d. Promote Alternative Transportation Modes for Attendees. The use of existing RT Metro and Bus service by event attendees should be promoted through advertising, passes or subsidies.

***1022** "e. Restrict Event Schedules. Large locally-oriented conventions or conferences could be restricted to evenings and weekends when the area parking supply may more adequately meet projected demands. Such inc[e]ntives are already provided for many public downtown events (i.e., jazz festival) where parking is at a premium.

"f. Promote Alternative Transportation Modes for Existing Area Employees and Visitors. Additional parking could be made available if downtown employees or visitors, now driving private automobiles, were encouraged to carpool or to use transit service. Designating existing parking for pools, increasing parking rates or subsidizing transit utilization are potential measures to reduce current parking demands.

"g. Construct Additional Parking. Impacts to area parking conditions could be partially mitigated by redesigning the project to provide on-site parking or by constructing additional parking in the study area which would be designated for Convention Center attendees. The *Downtown Sacramento Parking Study* (Wilbur Smith Associates 1/88) notes a proposal to expand Lot E (12th & I) to provide 381 spaces, and describes the East End Garage (1,058 spaces on I Street between 10th and 11th). Both projects would be available to the general public but could be designated for Convention Center use in order to accommodate large concurrent events. The study also describes development of a Lot C structure, which could provide a net increase of 733 spaces on H Street between 14th and 15th Street. In addition, the recently completed Hyatt Regency Ho[t]el is intended to provide some public parking. This additional parking was not included in the demand analysis. To mitigate project parking demands, the overall level of parking utilization in the study area should not exceed 90 percent. Table 4–25 provides a schedule for calculation of variable mitigations which would achieve this level of utilization. Use of this schedule is described in detail under cumulative conditions, and an example application is presented in Appendix C."

After circulation of the draft EIR, during a series of public meetings, the City was bombarded by questions concerning, among other issues, the impact of parking in downtown Sacramento. SOCA questioned some of the parking mitigation alternatives. The Department of Public Works and the Department of Transportation commented on parking mitigation measures. In response, the City outlined, discussed and attempted to clarify the various mitigation measures. In addition, written comments concerning parking were solicited, discussed and ultimately included in the EIR.

On appeal, plaintiffs argue the EIR's consideration of parking impacts fails to comply with the requirements of CEQA. Plaintiffs phrase this ***1023** argument in three different ways: (1) the City has treated parking as a separate, independent future project, rather than a necessary component of the current project, thereby improperly segmenting the project; (2) the City's discussion of parking mitigation measures is inadequate and incomplete; and (3)

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by deferring the discussion of specific mitigation measures, the City fails to properly evaluate the cumulative effects of the project.

****485** 3. *Improper Segmentation of the EIR*

[4] Initially, plaintiffs argue the lack of specificity in the parking mitigation measures discussed in the EIR amounts to an illegal segmentation of the project. According to plaintiffs' reasoning, by deferring the complete review of parking problems until an undetermined future date, the City has illegally truncated the proposed project and treated parking impacts as a separate independent project.

As plaintiffs point out, the heart of the EIR process is an accurate description in the EIR of the proposed project. "A curtailed or distorted project description may stultify the objectives of the reporting process. Only through an accurate view of the project may affected outsiders and public decision-makers balance the proposal's benefit against its environmental cost, consider mitigation measures, assess the advantage of terminating the proposal ... and weigh other alternatives in the balance. An accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR." (*Inyo County v. City of Los Angeles,* supra, 71 Cal.App.3d at pp. 192–193, 139 Cal.Rptr. 396.)

Plaintiffs argue specific, detailed provisions for necessary parking fall within the project's scope, and must be included in the EIR. In support, plaintiffs cite *Laurel Heights,* supra, 47 Cal.3d at page 376, 253 Cal.Rptr. 426, 764 P.2d 278. In order to address plaintiffs' concerns a detailed discussion of *Laurel Heights* is necessary. In *Laurel Heights* a citizens association challenged the University of California's certification of an EIR for the expansion of the pharmacy school's biomedical research operations, and the creation of a new facility in a residential neighborhood.

One of the plaintiffs' contentions centered on the scope of the University's EIR. Plaintiff argued the EIR did not accurately assess the project's reasonably foreseeable impacts, because the analysis ignored the fact the University intended to expand the research facility within a few years after opening it. (*Id.* at pp. 393–394, 253 Cal.Rptr. 426, 764 P.2d 278.) [FN6] The EIR omitted *any* discussion of ***1024** the impacts of the project in its probable ultimate expanded form. The University argued it need not evaluate the effects of future use of the site, because it had not yet formally approved any expansion of the facility. (*Id.* at p. 394, 253 Cal.Rptr. 426, 764 P.2d 278.)

FN6. The proposed initial research facility would occupy 100,000 square feet in a residential neighborhood. The operations would then be expanded, perhaps within three years to include the full 354,000 available square feet. (*Id.* at p. 393, 253 Cal.Rptr. 426, 764 P.2d 278.)

The Supreme Court agreed with plaintiff and held that the EIR should have addressed anticipated future uses of the site and their environmental effects. The Court also found that "a public agency's approval of a project or future portions of a project is not a prerequisite for an environmental impact report under CEQA." (*Id.* at p. 395, 253 Cal.Rptr. 426, 764 P.2d 278, fn. omitted.)

The court went on to explain: "The more important and difficult question is what circumstances require consideration in an EIR of future action related to the proposed project. A basic tenet of CEQA is that an environmental analysis should be prepared as early as feasible in the planning process to enable environmental considerations to influence project program and design and yet late enough to provide meaningful information for environmental assessment. The [University] Regents correctly noted that where future development is unspecified and uncertain, no purpose can be served by requiring an EIR to engage in sheer speculation as to future environmental consequences. We agree that environmental resources and the public fisc may be ill served if the environmental review is too early. On the other hand, the later the environmental review process begins, the more bureaucratic and financial momentum there is behind a proposed project, thus providing a strong incentive to ignore environmental concerns that could be dealt with more easily at an early stage of the project. This problem may be exacerbated where, as here, the public agency prepares *and* approves the EIR for ****486** its own project. For that reason, EIRs should be prepared as early in the planning process as possible to enable environmental considerations to influence project, program or design." (*Id.* at p. 395, 253 Cal.Rptr. 426, 764 P.2d 278, citations omitted; internal quotation marks omitted.)

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The court then considered how to balance these competing concerns stating: "We hold that an EIR must include any analysis of the environmental effects of future expansion or other action if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects. Absent these two circumstances, the future expansion need not be considered in the EIR for the proposed project. Of course, if the future action is not considered at that time, it will have to be discussed in a subsequent EIR before the future action can be approved under CEQA. [¶] This standard is consistent with the principle that 'environmental considerations do not become submerged by chopping a large project into many little ones—each with a minimal ***1025** potential impact on the environment—which cumulatively may have disastrous consequences.' The standard also gives due deference to the fact that premature environmental analysis may be meaningless and financially wasteful. Under this standard, *the facts of each case will determine whether and to what extent an EIR must analyze future expansion or other action.*" (*Id.* at p. 396, 253 Cal.Rptr. 426, 764 P.2d 278, citation omitted; emphasis added.) The Court found the University's expansion was reasonably foreseeable and would change the scope of the initial project. (*Id.* at p. 398, 253 Cal.Rptr. 426, 764 P.2d 278.)

Plaintiffs in the present case contend the facts before us concerning parking compel the same conclusion. According to plaintiffs, provision of necessary parking for the expansion of the center was reasonably foreseeable and provision for adequate parking "by any method would be a major undertaking that would of necessity greatly expand the scope and nature of the initial project's environmental consequences beyond the effects of the building of the expansion and office towers alone."

We must disagree with plaintiffs' analysis of the facts of this case. We agree the necessity for adequate parking is reasonably foreseeable given the worst case scenario of 2,621 automobiles searching for parking in downtown Sacramento. In response to this foreseeable impact, the City provided a list of seven "specific potential mitigation" measures ranging from limiting the size of weekday events to constructing additional parking.

However, unlike the situation in *Laurel Heights* where the University *knew* it would be expanding in the immediate future, and knew *exactly* how many square feet the expansion would be, the City in this case knows only that it will have to mitigate parking, probably by implementing some or all of the potential mitigation measures listed in the EIR. These potential mitigation measures may, *in certain combinations* greatly expand the scope and nature of the project's environmental consequences. However, until these specific measures are adopted and more fully fleshed out, their effects remain abstract and speculative.

This was not the case in *Laurel Heights* where the record revealed the University had already decided on expanding the project to twice its original size.[FN7] Nothing ****487** in the record before us shows the City had already ***1026** decided, at the time of the EIR, on any *one* mitigation measure (for example the construction of a parking structure) which would be a "future expansion or action ... significant in that it will likely change the scope or nature of the initial project or its environmental effects." (*Laurel Heights*, supra, 47 Cal.3d at p. 396, 253 Cal.Rptr. 426, 764 P.2d 278.) Therefore, we do not find the City, by considering a list of seven parking mitigation measures, impermissibly segmented the project.[FN8]

FN7. In *Laurel Heights* the Court considered a myriad of facts which revealed the proposed expansion was a reasonably foreseeable and environmentally significant consequence of the initial project. The draft EIR submitted by the University acknowledged the University would expand as soon as land became available, and estimated the number of staff needed to run the expanded facility. (*Id.* at p. 396, 253 Cal.Rptr. 426, 764 P.2d 278.) The University's final EIR contained references to the future expansion as a future certainty. (*Id.* at p. 397, 253 Cal.Rptr. 426, 764 P.2d 278.) In addition, the record contained private correspondence referring to the University's plan to occupy the 350,000 square feet. (*Id.* at p. 397, 253 Cal.Rptr. 426, 764 P.2d 278.) The court concluded, "In short, there is telling evidence that the University, by the time it prepared the EIR, had

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either made decisions or formulated reasonably definite proposals as to future uses of the building. At a minimum, it is clear that the future expansion and the general types of future activity at the facility are reasonably foreseeable." (*Id.* at p. 397, 253 Cal.Rptr. 426, 764 P.2d 278.) The court also found the future expansion of the project would change the scope and nature of the initial project and its environmental effects. (*Id.* at p. 398, 253 Cal.Rptr. 426, 764 P.2d 278.)

FN8. Plaintiffs also direct our attention to the holding in *Christward Ministry v. Superior Court* (1986) 184 Cal.App.3d 180, 228 Cal.Rptr. 868. In *Christward* plaintiffs challenged an EIR contending it impermissibly segmented the proposed project into several discrete projects: a general plan amendment, a trash-to-energy resource recovery project and a methane extraction project. (*Id.* at p. 195, 228 Cal.Rptr. 868.) The appellate court rejected the EIR characterizing it as "exactly the type of piecemeal environmental review prohibited by CEQA." (*Id.* at p. 195, 228 Cal.Rptr. 868.) The court in *Christward* concluded, "to allow the resource recovery project approval to stand would be to sanction piecemeal environmental review, allowing one aspect of a project to be approved before the environmental consequences of the larger project are reviewed." (*Id.* at p. 196, 228 Cal.Rptr. 868.) We do not find the proposed parking mitigation measures in the present case to constitute a discreet project separate from the center expansion. Nor do we find the City's EIR, which includes the mitigation measures, to be a "piecemeal" review.

In oral argument SOCA relied upon *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 270 Cal.Rptr. 650 as further proof the City has impermissibly segmented the convention center project. In *Kings County* an EIR on a proposed cogeneration plant divided the resulting emissions into two categories: on-site emissions, which result from fuel and material handling as well as fuel combustion; and secondary emissions, which result from employee traffic, delivery truck traffic, train delivery of coal and coal handling facilities. (*Id.* at p. 714, 270 Cal.Rptr. 650.) Each category was found to not, individually, constitute an environmentally significant impact. The court found this division an effort to circumvent CEQA by chopping up the project into bite-size pieces. (*Id.* at p. 716, 270 Cal.Rptr. 650.) The court noted: "The project *requires* the delivery of coal for fuel. The resulting emissions from truck or train traffic are related to the project and cannot be ignored when determining whether air emissions meet existing standards for purposes of invoking the presumption of no significant impact. (*Id.* at pp. 716–717, 270 Cal.Rptr. 650, emphasis added.) In *Kings County* no alternatives to truck delivery were either contemplated or discussed, truck delivery and its subsequent emissions were *required* by the project. That is not the case in the situation presented here. The City *has* proposed several alternatives to a parking structure; therefore we find the City has not segmented the project.

4. *Adequacy of Mitigation Measures*

[5] Plaintiffs argue the EIR is defective because the City failed to describe and examine "true" mitigation measures and failed to analyze the potential environmental impacts of implementing such measures. Plaintiffs contend the EIR provides no specific mitigation measures for the parking impacts, but instead offers a list of "seven general measures of the sort that *might* be included in [the City's] *unformulated* 'Transportation Management Plan.' " This, according to plaintiffs, is not enough to satisfy CEQA.

***1027** Public Resources Code section 21002 requires agencies to adopt feasible mitigation measures to substantially lessen or avoid otherwise significant adverse environmental impacts.

The CEQA guidelines state that to be legally adequate mitigation measures must be capable of: "(a) Avoiding the impact altogether by not taking a certain action or parts of an action. (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation. (c) Rectifying the im-

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pact by repairing, rehabilitating, or restoring the impacted environment. (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action." (Guidelines, § 15370.) [FN9]

FN9. In 1973, pursuant to authority granted in the Public Resources Code section 21083, the California Resources Agency issued the first set of CEQA guidelines ("guidelines") (Cal.Code Regs., tit. 14, § 15000 et seq). These guidelines embody the statutory mandates of CEQA and the subsequent case law interpreting CEQA. The procedures adopted by public agencies to implement CEQA must be consistent with the guidelines. (Pub. Resources Code, § 21082.) The Supreme Court has not yet determined whether the guidelines are regulatory mandates or only aids to interpreting CEQA. However, in *Laurel Heights,* supra, 47 Cal.3d at page 391, footnote 2, 253 Cal.Rptr. 426, 764 P.2d 278 the Court directed agencies to "afford [them] great weight ... except when a provision is clearly unauthorized or erroneous."

****488** For each significant effect, the EIR must identify specific mitigation measures; where several potential mitigation measures are available, each should be discussed separately, and the reasons for choosing one over the others should be stated. If the inclusion of a mitigation measure would itself create new significant effects, these too, must be discussed, though in less detail than required for those caused by the project itself. (Guidelines, § 15126, subd. (c); see also *Stevens v. City of Glendale* (1981) 125 Cal.App.3d 986, 995–996, 178 Cal.Rptr. 367.)

For projects for which an EIR has been prepared, where substantial evidence supports the approving agency's conclusion that mitigation measures will be effective, courts will uphold such measures against attacks based on their alleged inadequacy. (*Laurel Heights,* supra, 47 Cal.3d at p. 407, 253 Cal.Rptr. 426, 764 P.2d 278.)

Plaintiffs compare the situation in the present case to the situation in ***Sundstrom v. County of Mendocino*** **(1988) 202 Cal.App. 3d 296, 248 Cal.Rptr. 352.** In ***Sundstrom,*** the appellate court set aside a county's approval of a conditional use permit authorizing construction of a sewage treatment plant to serve an existing development. The court found the county had violated CEQA by approving the project based on a negative declaration without first resolving uncertainties regarding the project's potential to cause significant environmental impacts. **(*Id.* at pp. 307– 308, 248 Cal.Rptr. 352.)**

***1028** Among the conditions of approval were directions to the project applicant to develop and implement concrete mitigation measures *after* project approval. The applicant was to prepare a hydrological study evaluating the project's potential environmental effects and proposing any necessary mitigation measures. The appellate court concluded because the success of mitigation was uncertain, the county could not have reasonably determined that significant effects would not occur. This deferral of environmental assessment until after project approval violated CEQA's policy that impacts must be identified before project momentum reduces or eliminates the agency's flexibility to subsequently change its course of action.[FN10]

FN10. In addition, because the permit authorized the applicant himself, subject to planning staff approval, to conduct the required studies, the county violated CEQA's requirement that all environmental analysis must ultimately derive from the decision-making body itself. **(*Id.* at pp. 308– 309, 248 Cal.Rptr. 352.)**

Although plaintiffs contend the lack of specific parking mitigation in the present case mirrors the situation in ***Sundstrom*** and compels a similar result, we note several distinct differences between the two cases. First, ***Sundstrom*** involved a negative declaration. A negative declaration must be prepared when an agency determines, after preparing an initial study, that a project "does not have a significant effect on the environment." Such a determination can be made only if "[t]here is no substantial evidence before the agency" that such impacts may occur. (Pub. Resources Code, § 21080, subd. (c); Guidelines, § 15070, subd. (a).) In other words, in ***Sundstrom*** the county had determined, before the required studies were even performed, that the project would not have a significant impact on the environment. In contrast, the City in the present case, acknowledged traffic and

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parking have the potential, particularly under the worst case scenario, of causing serious environmental problems. The City did not minimize or ignore the impacts in reliance on some future parking study.

Moreover, the county in ***Sundstrom*** approved the project without considering or addressing *any* mitigation measures. In ****489** the present case, the City has set forth a list of alternatives to be considered in the formulation of a transportation management plan, a plan the City itself, not the developer, will prepare.

As one commentator has opined ***Sundstrom*** "need not be understood to prevent project approval in situations in which the formulation of precise means of mitigating impacts is truly infeasible or impractical at the time of project approval. In such cases, the approving agency should commit itself to eventually working out such measures as can be feasibly devised, but should treat the impacts in question as being significant at the time of project approval. Alternatively, for kinds of impacts for which mitigation is ***1029** known to be feasible, but where practical considerations prohibit devising such measures early in the planning process (e.g., at the general plan amendment or rezone stage), the agency can commit itself to eventually devising measures that will satisfy specific performance criteria articulated at the time of project approval. Where future action to carry a project forward is contingent on devising means to satisfy such criteria, the agency should be able to rely on its commitment as evidence that significant impacts will in fact be mitigated. (*See Laurel Heights, supra,* 47 Cal.3d at 418 [253 Cal.Rptr. 426, 448, 764 P.2d 278, 300,] (upholds mitigation measure by which project noise levels will be kept within performance standards); and *Schaeffer Land Trust v. San Jose City Council* (6th Dist.1989) 215 Cal.App.3d 612, 632 [263 Cal.Rptr. 813, 819] (upholds approval of general plan amendment based on a negative declaration because actual physical development will be contingent on devising plan to ensure compliance with city standards for traffic levels of service).)" (Remy, Thomas, Duggan & Moose, Guide to the California Environmental Quality Act (1991 edition), pp. 200–201, fn. omitted.)

The City in the present case has, in fact, committed itself to mitigating the impacts of parking and traffic. The City approved funds for a major study of downtown transportation.

The draft EIR discussed several options for mitigating the parking problem. The EIR section on mitigation noted: "Impacts to area parking conditions could be partially mitigated by redesigning the project to provide on-site parking or by constructing additional parking in the study area which would be designated for Convention Center attendees. The *Downtown Sacramento Parking Study* (Wilbur Smith Associates 1/88) notes a proposal to expand Lot E (12th & I) to provide 381 spaces, and describes the East End Garage (1,058 spaces on I Street between 10th and 11th). Both projects would be available to the general public but could be designated for Convention Center use in order to accommodate large concurrent events. The study also describes development of a Lot C structure, which could provide a net increase of 733 spaces on H Street between 14th and 15th Street. In addition, the recently completed Hyatt Regency Ho[t]el is intended to provide some public parking. This additional parking was not included in the demand analysis."

The City, in its brief, points out how in *Laurel Heights* the Supreme Court held a list of parking mitigation options sufficient to satisfy the requirements of CEQA. In *Laurel Heights* the University's EIR found that relocation of the research facilities would not appreciably increase traffic. The Court went on to note: "The discussion [in the EIR] of parking also fails to show any significant defects. UCSF [the University] estimated that without mitigation measures 507 on-site parking spaces will be available. ***1030** After mitigation measures (new spaces and restriping), there will be 547 spaces. UCSF estimated a need for 576 on-site spaces and acknowledged a deficit of 29 spaces. To eliminate this deficit, UCSF promised 'to promote ongoing campus transportation systems, management programs, including promotion of transit, carpooling, vanpooling, and related activities.' On these facts, we believe the discussion of mitigation was adequate." (*Laurel Heights,* supra, 47 Cal.3d at p. 418, 253 Cal.Rptr. 426, 764 P.2d 278.)

While we agree with plaintiffs' observation that the 29 parking space deficit in ****490** *Laurel Heights* is far less egregious than the deficit of 2,621 parking spaces in the present case, we also find the alternatives proposed as a means of mitigating this deficit are far more extensive than those found sufficient in

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Laurel Heights. In the present case, the EIR offered seven distinct types of alternatives to be studied, analyzed and possibly incorporated into a transportation management program. The range of alternatives includes scheduling changes for the expanded center's activities, satellite parking locations; public transit, carpooling; and construction of new parking or expanded use of existing parking. Given the facts of the case before us, we find the trial court did not err in finding these proposed mitigation measures satisfied CEQA.

5. *Cumulative Effects of Mitigation Measures*

[6] Plaintiffs argue the convention center expansion will generate significant mitigation measures, which will, in turn, create new and significant environmental effects. Plaintiffs contend the EIR fails to adequately discuss these mitigation impacts, and therefore the EIR violates CEQA.

A draft EIR must discuss cumulative impacts when they are significant. (Guidelines, § 15130, subd. (a).) Cumulative impacts are defined as "two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts." (Guidelines, § 15355.)

According to plaintiffs, "it is clear that significant measures will have to be taken in order to accommodate the over–2,600–space parking deficit that the project would generate in the heart of downtown Sacramento. Because any such measures—whether the construction of new downtown parking lots, the erection of a large parking garage or the shuttling of hundreds of people from unspecified outlying parking areas—are likely to create substantial additional adverse environmental effects" these cumulative effects must by analyzed in the EIR.

In effect, plaintiffs contend the EIR must include a discussion of the cumulative effects of projects which have not yet been approved. This ***1031** contention conflicts with the Supreme Court decision in *Laurel Heights.* In *Laurel Heights* the court noted, "prophecy" is not required in an EIR. "Nor do we require discussion in the EIR of specific future action that is merely contemplated or a gleam in the planner's eye. To do so would be inconsistent with the rule that mere feasibility and planning studies do not require an EIR. A detailed environmental analysis of every precise use that may conceivably occur is not necessary at this stage." (*Laurel Heights,* supra, 47 Cal.3d at p. 398, 253 Cal.Rptr. 426, 764 P.2d 278, citations omitted.) [FN11]

FN11. In *Laurel Heights* the Court found the University's EIR deficient in that it failed to discuss "in at least general terms" the general effects of future expansion of a research facility. (*Laurel Heights,* supra, 47 Cal.3d at p. 398, 253 Cal.Rptr. 426, 764 P.2d 278.) Again we note the record in *Laurel Heights* was replete with evidence the University knew, at the time it formulated the EIR, that the expansion of the facility would take place. Moreover, the University knew the square footage and location of the expansion. (*Id.* at pp. 396–397, 253 Cal.Rptr. 426, 764 P.2d 278.) Here the mitigation alternatives consist of seven different options—a far cry from one definite structure the Court considered in *Laurel Heights.*

In a similar case, *Towards Responsibility in Planning ["TRIP"] v. City Council* (1988) 200 Cal.App.3d 671, 246 Cal.Rptr. 317, TRIP, a citizen's group, challenged an EIR contending the industrial development of an agricultural area would precipitate the need for a sewage treatment plant. TRIP argued the EIR did not adequately discuss the environmental costs and benefits of the treatment plant and contended the City had to wait until the five-year study on the plant was completed before the EIR could be adopted. (*Id.* at p. 676, 246 Cal.Rptr. 317.)

The court disagreed, finding, "Adoption of an EIR need not be interminably delayed to include results of works in progress which might shed some additional light on the subject. The sufficiency of an EIR as an informative document is judged 'in light of what is reasonably feasible.' [¶] We are ****491** satisfied that the EIR was sufficiently detailed in its discussion of the effect of the proposed projects on water quality. It is unnecessary in an EIR to engage in sheer speculation as to future environmental consequences. It would be unreasonable to expect this EIR to produce detailed information about the environmental impacts of a future regional facility whose scope is uncertain and which will in any case be subject to its own environmental review." (*Id.* at p. 681, 246 Cal.Rptr. 317, citations omitted.)

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In *No Oil, Inc. v. City of Los Angeles* (1987) 196 Cal.App.3d 223, 242 Cal.Rptr. 37, the appellate court considered plaintiffs' challenge of an EIR on the drilling of exploratory wells and development of transport pipelines. Plaintiffs argued the EIR's discussion of pipeline routes was inadequate. The court found the EIR to be adequate, holding that the lack of detail on proposed pipeline routes did not violate CEQA. The EIR identified the planned pipeline's ultimate destinations, but did not explore either all the ***1032** potential routes that could be used to reach them or the specific impacts that would result under each route. (*Id.* at pp. 234–237, 242 Cal.Rptr. 37.) The court found, "the EIR adequately informed City Council of the environmental risks associated with the entire project including the pipeline. A detailed environmental analysis of each potential route the pipeline might take was not necessary at this stage." (*Id.* at pp. 237–238, 242 Cal.Rptr. 37.) [FN12]

FN12. Plaintiffs argue *No Oil* "may be of questionable continuing validity in light of *Laurel Heights.*" However, we find the situation in *Laurel Heights,* where the University *knew* exactly where it would expand, different from the facts of *No Oil.* In *No Oil* the record revealed the project proponent *did not* know which pipelines, if any, would be needed to transport oil. (*No Oil,* supra, 196 Cal.App.3d 223, 237, 242 Cal.Rptr. 37.) We further note the citation by *Laurel Heights,* with approval, of *No Oil* at 47 Cal.3d 398, 253 Cal.Rptr. 426, 764 P.2d 278.

In the present case, we find unreasonable plaintiffs' contention that the EIR is unsatisfactory because of its failure to consider the possible cumulative impacts stemming from the seven proposed mitigation measures. As the Guidelines point out, "Drafting an EIR ... involves some degree of forecasting. While foreseeing the unforeseeable is not possible, an agency must use its best efforts to find out and disclose all it reasonably can." (Guidelines, § 15144.) We find the City has met this test of reasonableness in regards to the mitigation measures proposed in the EIR.[FN13]

FN13. The City had authorized a subsequent EIR (referred to for convenience as "SEIR") but it had not been completed and certified and was only in draft outline form at the time of the hearing below. That draft provides a list of parking alternatives for the center expansion, and delineates parking spaces for each parking alternative. Underground parking below the expanded center itself would create 600 spaces. The East End Garage would provide 652 spaces; expansion of the Lot E garage 400 spaces; expansion of Lot C and E 647 spaces. In addition, a satellite lot at a light rail station would provide 1,300 spaces. These alternatives would provide 4,216 available spaces to meet the projected need for 2,621 spaces.

The trial court considered this post-decision material in the administrative record over plaintiffs' objection. However, under Code of Civil Procedure section 1094.5 courts can only review evidence that was actually before the administrative decision-makers prior to or at the time of their decision. (*Browning–Ferris Industries v. City Council* (1986) 181 Cal.App.3d 852, 861, 226 Cal.Rptr. 575.) The City's assertion, at oral argument, that the draft outline was properly considered by the trial court under *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 276 Cal.Rptr. 410, 801 P.2d 1161, is not supported by that case because a proposed draft which has not been finalized and adopted, cannot be considered part of the administrative record before us. We find the trial court's error in admitting this evidence to be harmless, since we find sufficient evidence in the administrative record itself to support the City's approval of the EIR. (See *Merz v. Board of Supervisors* (1983) 147 Cal.App.3d 933, 937, 195 Cal.Rptr. 370.)

C. *EIR's Analysis of Cumulative Impacts*

[7] Plaintiffs contend the City has failed to adequately address the *cumulative* parking and traffic impacts.[FN14] In particular plaintiffs focus on the ***1033** project's ****492** cumulative impacts on freeway interchange traffic, and argue the EIR's examination of these impacts is inadequate.

FN14. In their opening brief, plaintiffs in this section on cumulative impacts again

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raise the issue of the cumulative effect of mitigation measures. This issue is discussed in the preceeding section.

In support of this assertion, plaintiffs cite a written comment by CALTRANS which stated, in part: "Caltrans is concerned that this draft EIR, as with other documents prepared for the downtown area, does not address impacts to state facilities. We are particularly concerned about impacts to ramps on Business 80 and Interstate 5 during peak hours.... We request the final EIR address the above concerns." In addition, the plaintiffs point out the State Department of General Services also requested that the City analyze the impact of center expansion on freeway interchanges. Despite these comments, plaintiffs argue, the City refused to do any additional analysis.

The City included these written comments in the EIR. The EIR also includes an analysis of the cumulative traffic impacts caused by expanding the existing center. This analysis considers the increase in traffic in downtown Sacramento as well as on nearby freeway interchanges. The study concludes the additional traffic would *not* cause the "level of service" at the intersections and onramps to fall below "Level C." As the EIR states, in part: "City of Sacramento utilizes Level–of–Service 'C' as an operational level beyond which mitigations are required to improve intersection performance.... Projected intersection performance would vary at each location depending upon the development alternative.... This is especially true at intersections immediately adjacent to proposed individual access locations. However, traffic volumes generated from the operation of an expanded Convention Center would allow satisfactory intersection operation at all locations. AM and PM peak hour Levels–of–Service are projected to be satisfactory for the East Alternative and all other Convention Center alternatives when projected Convention Center volumes are added to existing traffic conditions."

Given the record before us, we find the City adequately discussed the cumulative traffic impact of the project on surrounding roads and intersections. The EIR takes into consideration the severity of the traffic impacts, and the likelihood of their occurrence. As the Guidelines instruct, "the discussion [of cumulative impacts] should be guided by the standards of practicality and reasonableness." (Guidelines, § 15130, subd. (b).) Moreover, apropos of the comments by CALTRANS and the Department of General Services, as the Supreme Court in Laurel Heights noted: "A project opponent or reviewing court can always imagine some additional study or analysis that might provide helpful information. It is not for them to design the EIR." (*Laurel Heights,* supra, 47 Cal.3d at p. 415, 253 Cal.Rptr. 426, 764 P.2d 278.)

***1034** D. *Sufficiency of the Findings*

Plaintiffs challenge the sufficiency of the evidence in support of two of the City's findings: (1) traffic and parking impacts will be mitigated to a level of insignificance; and (2) loss of the Merrium Apartments will be mitigated.

[8] An agency cannot fulfill its CEQA duties simply by considering the EIR before approving the project. (*Burger v. Mendocino County* (1975) 45 Cal.App.3d 322, 326, 119 Cal.Rptr. 568.) If the agency decides to approve a project despite its significant adverse impacts, the agency must issue findings which specifically state how the agency has responded to the significant impacts identified in the EIR. "The purpose of the statutory requirement for findings is to ensure that the decision making agency actually considers mitigation measures." (*Resource Defense Fund v. Local Agency Formation Com.* (1987) 191 Cal.App.3d 886, 896, 236 Cal.Rptr. 794.)

[9] For each significant effect identified in the EIR, the agency must make one or more of the following findings: (1) that changes or alterations have been required in, or incorporated into, the project that avoid or substantially lessen the effect; (2) that the lead agency lacks jurisdiction to make the change, but that another agency does have such authority; and/or (3) that specific economic, social, or other considerations****493** make infeasible the mitigation measures or project alternatives identified in the final EIR. (Pub. Resources Code, § 21081.) All of these findings must be supported by substantial evidence in the administrative record. (Guidelines, § 15091, subd. (b).) Substantial evidence consists of enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached. (*Laurel Heights,* supra, 47 Cal.3d at pp. 392–393, 253 Cal.Rptr. 426, 764 P.2d 278.)

In *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 113

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Cal.Rptr. 836, 522 P.2d 12, the Supreme Court explained the reason for requiring detailed findings: "Among other functions, a findings requirement serves to conduce the administrative body to draw legally relevant sub-conclusions supportive of its ultimate decision; the intended effect is to facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from evidence to conclusions. In addition, findings enable the reviewing court to trace and examine the agency's mode of analysis. [¶] Absent such roadsigns, a reviewing court would be forced into unguided and resource-consuming explorations; it would have to grope through the record to determine whether some combination of credible evidentiary items which supported some line of factual and legal conclusions supported the ultimate order or decision of the agency." (*Id.* at pp. 516–517, 113 Cal.Rptr. 836, 522 P.2d 12, citations omitted.)

***1035** 1. *Findings Regarding Parking and Traffic*

[10] After approving the project, the City approved mitigation measures for parking and traffic. The City also issued the following finding:

"The City Council finds, based on substantial evidence in the record, that the following mitigation measures will reduce the above described potentially significant effects on traffic, circulation and parking, below a level of significance.

"1) The City will require preparation of a Transportation Management Plan (TMP) to reduce project related traffic and parking impacts and

"2) The City will set a goal of achieving 90 percent utilization of the available parking supply during the critical weekday afternoon period. Of the potential measures discussed in the EIR for achieving the 90 percent parking utilization rate, the Council finds that the following measures are feasible:

"—promote regional/national conventions;

"—provide satellite parking;

"—promote alternative transportation mode for attendees;

"—promote alternative transportation modes for existing area employees and visitors; and

"—construct additional parking." FN15

FN15. The City found two measures infeasible: (1) to limit the size of "short term" weekday events; and (2) restrict event schedules. The City found these measures infeasible limitations on the size of events, and noted that restrictions on events would defeat the purpose of center expansion. The City also noted, "[o]f the five measures that are feasible to achieve the 90 percent parking utilization rate, the City will plan the specific measur[e] be utilized as more specific details on the final design of the project are developed."

In their attack on the findings, plaintiffs reiterate their objections to sufficiency of the mitigation measures proposed by the City and argue the finding concerning parking mitigation completely lacks evidentiary support. In particular, plaintiffs argue there is no description of either the Transportation Management Plan or the satellite lots. FN16

FN16. Plaintiffs also renew their contention that the EIR contains an insufficient discussion of the possible construction of additional parking. This contention is discussed in section II(b)(4), supra.

***1036** As the City points out in its response, at the time the community center expansion was being considered, the City was in the process of revising its transportation management ordinance to provide for more ****494** stringent mitigation requirements. Because the new ordinance was not yet in effect, the City was concerned traffic and parking impacts would not be adequately mitigated by the existing transportation ordinance. In response to this mitigation "gap," the City imposed additional requirements on office tower projects, specifically designed to mitigate downtown parking and traffic impacts not fully mitigated by the existing ordinance. At two meetings in 1988 the proposal was debated, and a list of mitigation measures required for project approval was drawn up. Included in these mitigation measures was the creation of a downtown transportation mitigation pool, requiring each project to be assessed a fee of 75 cents per square foot of office space. The fee is to be

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paid to the City prior to issuance of a building permit, and is to be used for the expansion and improvement of the downtown transportation system. Another mitigation measure requires applicants for building permits to file transportation management plans outlining compliance with the City's current trip reduction ordinance.

These subsequent measures, taken by the City, and reflected in the administrative record, provide substantial evidence in support of the finding that "[t]he City will require preparation of a Transportation Management Plan ... to reduce project related traffic and parking impacts."

As for satellite parking, the City discussed a shuttle service as an alternative means of bringing patrons to the expanded center. The City considered use of existing light rail parking areas for satellite parking, noting such use was contingent on the availability of light rail seats and spaces in light rail lots. The City estimates use of satellite lots would reduce demand by 350 parking spaces.

The EIR also suggested parking and traffic impacts could be lessened through the use of advertising, passes or subsidies aimed at encouraging potential patrons to carpool or use transit services. Specifically, the EIR considered "[d]esignating existing parking for [car] pools, increasing parking rates or subsidizing transit utilization." The development scenario for the eastern expansion of the center, advises promoting rapid transit use by office tenants and increasing rapid transit capacity to achieve a goal of 30% transit utilization by office tenants. The scenario indicates such usage would result in a reduction in parking demand by 720 spaces.

We find the EIR, in its consideration, discussion and analysis of the various proposed mitigation measures has complied with CEQA's findings requirement. Substantial evidence in the record supports the City's finding ***1037** that "[c]hanges or alterations have been required in, or incorporated into, such project which mitigate or avoid the significant environmental effects thereof as identified in the completed environmental impact report" (Pub. Resources Code, § 21081.)

We distinguish the findings in the present case from those we found insufficient in *Citizens for Quality Growth v. City of Mount Shasta* (1988) 198 Cal.App.3d 433, 243 Cal.Rptr. 727. *Citizens for Quality Growth* involved a general plan amendment and rezone allowing the industrial and commercial use of sensitive wetlands. The city failed to issue findings regarding both mitigation measures and project alternatives. The city attempted to justify its failure to make findings on the feasibility of twenty-one mitigation measures set forth in the EIR by arguing that adoption of such measures would be premature until the developer had submitted a specific development plan. (*Id.* at p. 442, 243 Cal.Rptr. 727.) We disagreed noting "While detailed mitigation measures may not be possible before a specific development plan is proposed, general mitigation measures may be adopted and are in fact suggested in the EIR." (*Id.* at p. 442, 243 Cal.Rptr. 727.) In the present case, the City set forth general mitigation measures regarding traffic and parking, and adopted findings regarding these mitigation measures.[FN17]

FN17. In *Citizens for Quality Growth,* the City also argued that passing references to mitigation measures in the resolution certifying the EIR and the statement of overriding considerations constituted an "implicit finding" effectively adopting the mitigation measures. We rejected the City's argument and found such an "implicit finding" does not satisfy CEQA's requirement of express findings. (*Id.* at pp. 441–442, 243 Cal.Rptr. 727.)

****495** 2. *Findings Regarding the Merrium Apartments*

[11] Plaintiffs also contend the EIR's findings with respect to mitigation for demolition of the Merrium Apartments are legally deficient. Plaintiffs characterize the EIR's mitigation measures as "vague and conclusory" promises to remedy the impact of the loss of housing in the future.

In its findings, under the heading "Historic Preservation and Cultural Resources" the EIR states, in part: "The City Council has determined the project site selected (East Alternative) could cause the following potentially significant effects on historic preservation and cultural resources: [¶] (1) Demolition of the Merrium Apartments (a priority structure) if relocation is found to be infeasible)." The City further stated as a mitigation measure, "The City will

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make every reasonable effort to relocate the Merrium Apartment building to another site." The EIR went on to state: "The City Council further finds that if relocation of the Merrium Apartment building is not feasible, relocation housing will be caused to be constructed. No other ***1038** mitigation measures suggested in the EIR are feasible due to overriding social and economic considerations [detailed in another section]." FN18

FN18. The EIR set forth the following mitigation measures: "The project's direct impact on the Merrium Apartment building, a Priority Structure, could be mitigated by:

"retaining the existing structure;

"retaining the facade only;

"relocating the building to another site; or

"relocating the facade to another site.

"Retention of the existing structure would not

significantly reduce the Convention Center space since the apartment building sits on a relatively small parcel (80'X80'). Of the various historical buildings on the alternative sites, the Merrium Apartment building is by far the tallest and most intensively used. For this reason, it is the structure least likely to be dwarfed by new construction. Retention of the building is impractical from a space programming standpoint, however, since the Expansion needs large expanses of contiguous space. Additionally, vehicular access to the Merrium would be restricted by the Expansion and the building would be isolated from adjoining buildings.

"Retention of the facade would be impractical unless the proposed Expansion were to be at least five stories tall. As current plans call for a much shorter structure, this measure is infeasible. Relocation of the building's facade would be nearly impossible from a technical standpoint and impractical in terms of finding another structure to which it might be attached.

"Relocation of the five-story reinforced concrete building to another site may be technically infeasible. However, the City should thoroughly investigate the technical and economic feasibility of relocating the Merrium Apartments to a suitable site in the downtown area."

Under the heading "Housing," the EIR again acknowledged the impact of demolition of the Merrium Apartments and set forth as a mitigation measure the following: "The City will establish an aggressive program to locate appropriate replacement housing in the Central City for tenants displaced from the Merrium Apartments. The City will also cause replacement housing to be built, if the relocation of the Merrium Apartment building is found to be infeasible."

The City points out it commissioned two studies on the Merrium. The first, a study of historical structures in downtown Sacramento, was summarized in the EIR, and integrated into the cumulative impact analysis for historic structures included in the EIR.FN19 The EIR also utilized this study in its discussion of comparative impacts each of the four alternative expansion proposals would have on historic structures.

FN19. The Merrium Apartments have been designated as a priority structure on the City's official register. This register recognizes two levels of historic significance of structures: essential and priority. Essential structures are considered irreplaceable; priority structures are considered significant, but may be removed under unusual and compelling circumstances.

The City commissioned a second study in accordance with the EIR's recommendation that the City thoroughly investigate the technical and economic feasibility of relocating the Merrium. This study, entitled the "Turner Study," concluded relocation would cost approximately $3.7 million. The study found, "Unfortunately, the combination****496** of building to ***1039** building clearances, safety factors, existing underground vaults, and the presence of 'non-removable' trees prohibit any relocation off its

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current block in one section." The study considered consulting reports from a structural engineer, a building mover specialist, a building code specialist, a soils engineer, a toxic materials specialist, and a building construction specialist. Ultimately the study concluded relocation of the building in two sections was not feasible due to the significantly high stresses such a relocation would put on the structure.

The City also took further steps to mitigate the loss of the Merrium's 41 apartment units. The EIR recommended the following mitigation measures to alleviate the impact on downtown Sacramento housing: (1) establish an aggressive program to locate appropriate replacement housing for the Merrium's displaced tenants; (2) provide monetary relocation benefits for displaced tenants ($500 for fixed moving costs, with possible reimbursement for reasonable higher moving costs and compensation for rent differential up to $4,000 or 25% of the individual's income).

To address the first mitigation measure, the City adopted a requirement of replacement housing in downtown Sacramento as a condition for approval of the center expansion. Subsequently, the City approved a replacement housing project, located two blocks from the Merrium. This project adds 51 units to the area. At the same time, the City moved to contract with the Sacramento Housing and Redevelopment Agency to provide a budget of $400,000 for relocation assistance for Merrium tenants. The City also passed a resolution to purchase the Merrium for $1.3 million.

Our review of the record before us reveals the mitigation measures and the findings concerning the loss of the Merrium are both adequate under the requirements of CEQA and are supported by substantial evidence in the record. As our Supreme Court recently summarized "The wisdom of approving this or any development project, a delicate task which requires a balancing of interests, is necessarily left to the sound discretion of the local officials and their constituents who are responsible for such decisions. The law as we interpret and apply it simply requires that those decisions be informed, and therefore balanced. Concurrently, we caution that rules regulating the protection of the environment must not be subverted into an instrument for the oppression and delay of social, economic, or recreational development and advancement." (*Citizens of Goleta Valley v. Board of Supervisors*, supra, 52 Cal.3d at p. 576, 276 Cal.Rptr. 410, 801 P.2d 1161.)

DISPOSITION

The judgment is affirmed. Defendants to recover costs on appeal.

PUGLIA, P.J., concurs.

***1040** SIMS, Associate Justice, dissenting.

I respectfully dissent.

There is no substantial evidence showing that parking needs, which will be inexorably generated by the massive convention center project, can be mitigated without construction of additional parking facilities. Therefore, construction of additional parking facilities is a direct, inevitable effect of the project, a conclusion which (given the size and location of the project) should come as no surprise to anyone. Yet no environmental consideration was given to the inevitable effects of constructing additional parking facilities.

The EIR did not pretend there were no parking problems. Rather, the EIR acknowledged serious parking problems and proposed a "menu" of mitigation measures to meet the demand for 2,621 spaces. The question is whether there was substantial evidence, as required by CEQA, supporting the City Council's conclusion that the documented adverse environmental impacts of parking had been mitigated to a point of insubstantiality. The only mitigation measures that are relevant are those expressly found and adopted by the City Council:

1. Promote regional/national conventions;

2. Provide satellite parking;

****497** 3. Promote alternative transportation modes for attendees;

4. Promote alternative transportation modes for existing area employees and visitors;

5. Construct additional parking.

Even assuming the parking reduction measures

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adopted by the City Council are supported by substantial evidence showing a reduction of parking problems to insignificance, the possible adverse effects of some of the mitigation measures (construction/expansion of additional parking, satellite parking, and promotion of national/regional conventions) should have been considered in the EIR. (Guidelines §§ 15064, subd. (d); [FN1] 15126, subd. (c).[FN2])

FN1. Section 15064, subdivision (d) provides: "In evaluating the significance of the environmental effect of a project, the lead agency shall consider both primary or direct and secondary or indirect consequences. [¶] (1) Primary consequences are immediately related to the project such as the dust, noise, and traffic of heavy equipment that would result from construction of a sewage treatment plant and possible odors from operation of the plant. [¶] (2) Secondary consequences are related more to effects of the primary consequences than to the project itself and may be several steps removed from the project in a chain of cause and effect. For example, the construction of a new sewage treatment plant may facilitate population growth in the service area due to the increase in sewage treatment capacity and may lead to an increase in air pollution."

FN2. Section 15126, subdivision (c), entitled "Environmental Impact," provides: "Mitigation Measures Proposed to Minimize the Significant Effects. Describe measures which could minimize significant adverse impacts, including where relevant, inefficient and unnecessary consumption of energy. The discussion of mitigation measures shall distinguish between the measures which are proposed by project proponents to be included in the project and other measures that are not included but could reasonably be expected to reduce adverse impacts if required as conditions of approving the project. This discussion shall identify mitigation measures for each significant environmental effect identified in the EIR. Where several measures are available to mitigate an impact, each should be discussed and the basis for selecting a particular measure should be identified if one has been selected. Energy conservation measures, as well as other appropriate mitigation measures, shall be discussed when relevant. Examples of energy conservation measures are provided in Appendix F. *If a mitigation measure would cause one or more significant effects in addition to those that would be caused by the project as proposed, the effects of the mitigation measure shall be discussed but in less detail than the significant effects of the project as proposed.* (*Stevens v. City of Glendale*, 125 Cal.App.3d 986 [178 Cal.Rptr. 367].)" (Emphasis added.)

***1041** Here, the effects of the mitigation measures were not discussed at all. There is no discussion of possible adverse effects of building additional parking facilities or expanding existing facilities. The City does not argue that it sufficiently discussed the adverse impacts of mitigation measures. Rather, the City's position is that it was not possible or necessary to do so at this stage, because until a definite site was set, the City could not determine which mitigation measure would be selected or the size/location of new or expanded parking facilities.

The City's argument is not valid. Based on the evidence before the City Council, it was clear that the fifth option (construct additional parking) would have to be chosen, because the other four mitigation measures combined are insufficient to meet the parking demand. Thus, disregarding the option of constructing new parking, the City's projections show that only 1,070 spaces can be provided by two of the remaining four mitigation measures: promotion of alternative transportation for office workers (720 spaces) and the provision of satellite parking (350 spaces). Apart from the problem that these figures are unsupported by any evidence, the City is still left with an unmet demand of more than 1,500 parking spaces. There do not appear to be any specific figures in the EIR for the projected success of the other two mitigation measures: promoting alternative transportation for convention center attendees and promoting regional/national conventions.[FN3] Therefore, construction of additional spaces is not merely an option but is a reasonably foreseeable and significant action that should have been addressed****498** in the EIR in accordance with the Guidelines and the requirement that the EIR "must include an analysis of the environmental effects of future expansion or other action

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if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects." ***1042**(*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 396, 253 Cal.Rptr. 426, 764 P.2d 278.)

FN3. The promotion of regional/national conventions itself creates significant consequences, because the EIR states this measure "would probably" require more hotel accommodations in order to make it viable.

As to construction of new parking spaces, the EIR describes a Downtown Sacramento Parking Study (Wilbur Smith Assn. 1/88), which involves proposals to expand and develop three specific parking structures that would provide a total of 2,172 spaces.[FN4] However, there is no discussion of the environmental effects of these proposals. Moreover, it does not appear that that study was prepared in connection with the convention center expansion, because the EIR states that at least two of those projects would be available to the general public but "could be designated for Convention Center use."

FN4. The EIR says the Downtown Sacramento Parking Study notes a proposal to expand Lot E (12th and I St.) to provide 381 spaces; expand the East End Garage (I St. between 10th and 11th) to provide 1,058 spaces; and develop Lot C (14th and H St.) to provide 733 spaces. In addition, the Hyatt Hotel is intended to provide some public parking. "This additional parking was not included in the demand analysis."

On the record before us, the City's conclusion in the EIR that the spaces identified in the Downtown Sacramento Parking Study "could be designated for convention center use" is nothing more than "Mere uncorroborated opinion," which does not constitute substantial evidence. (Guidelines § 15384.)

The majority correctly conclude the trial court erroneously considered a subsequent outline of a draft EIR that was not before the City at the time the convention center expansion was approved. A court's task is to determine "whether substantial evidence supports *the agency's determination.* [Citations.]" (*Laurel Heights,* supra, 47 Cal.3d at p. 392, fn. 5, 253 Cal.Rptr. 426, 764 P.2d 278, emphasis added.) Because the draft outline of a supplemental EIR has never been presented to the City Council, it cannot constitute evidence supporting the council's determination.[FN5] The document is simply a preliminary draft document, never circulated for public comment nor certified, which was lodged in the administrative record in an attempt to shore up what the City Council already did.[FN6]

FN5. At oral argument, the City asserted consideration of this document was sanctioned by the decision of our Supreme Court in *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 276 Cal.Rptr. 410, 801 P.2d 1161. I find nothing in the case supporting the City's view.

FN6. In any event, the document does not help the City's case. As with the EIR, the numbers reflecting parking availability are unsupported by substantial evidence and indeed contradict the numbers in the EIR. Thus, the document refers to the Downtown Sacramento Parking Study cited in the EIR but gives different numbers. Whereas the EIR says the three parking proposals listed in the study will provide a total of 2,172 spaces, the document says the same three proposals will create 1,669 spaces. Another contradiction is that the EIR says satellite lots will provide 350 spaces, but the document places the number at 1,300. The document fails to explain how it arrives at its figure. The document further states that elimination of monthly permits in Lots C and E will free up 647 spaces. I fail to see how the elimination of permits will create any new spaces or reduce demand.

The only specific information that the document adds to the EIR is that 600 spaces will be built underneath the convention center expansion site.

***1043** The Traffic Management Plan does not help. It merely describes the kinds of efforts that may be made to promote alternative transportation for employees—carpooling, transit pass subsidies—but

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does not show how the parking needs identified in the EIR will be solved.

The record fails to contain any substantial evidence showing that the convention center expansion can be accomplished without construction of additional parking facilities. Yet, the City has failed to consider the environmental effects of the inevitable construction of parking spaces that will be **499 required by the convention center expansion. This case sets a dangerous precedent because it allows proponents of major projects to defer a consideration of the environmental effects of constructing inevitably necessary parking structures. Once the project is approved, it can then be presented as a *fait accompli* in connection with the later environmental review of parking structures. "[T]he later the environmental review process begins, the more bureaucratic and financial momentum there is behind a proposed project, thus providing a strong incentive to ignore environmental concerns that could be dealt with more easily at an early stage of the project." (*Laurel Heights,* supra, 47 Cal.3d at p. 395, 253 Cal.Rptr. 426, 764 P.2d 278.) Here, proponents of parking structures will be able to say, "Well, we've *got* the convention center, so what do we do with all the cars if we don't build the structures?" In my view, this is not what CEQA has in mind when it requires environmental review of all reasonably foreseeable consequences of a project. (*Id.* at p. 396, 253 Cal.Rptr. 426, 764 P.2d 278.)

On the record before us, the judgment should be reversed.

Cal.App. 3 Dist.,1991.
Sacramento Old City Assn. v. City Council
229 Cal.App.3d 1011, 280 Cal.Rptr. 478

END OF DOCUMENT

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Exhibit I

TITLE 14 CAL. CODE REGS 15126.4(a)(1)(B)

(d) Growth-Inducing Impact of the Proposed Project. Discuss the ways in which the proposed project could foster economic or population growth, or the construction of additional housing, either directly or indirectly, in the surrounding environment. Included in this are projects which would remove obstacles to population growth (a major expansion of a waste water treatment plant might, for example, allow for more construction in service areas). Increases in the population may tax existing community service facilities, requiring construction of new facilities that could cause significant environmental effects. Also discuss the characteristic of some projects which may encourage and facilitate other activities that could significantly affect the environment, either individually or cumulatively. It must not be assumed that growth in any area is necessarily beneficial, detrimental, or of little significance to the environment.

Note: Authority cited: Sections 21083, 21083.05, Public Resources Code. Reference: Sections 21002, 21003, and 21100, Public Resources Code; *Citizens of Goleta Valley v. Board of Supervisors*, (1990) 52 Cal.3d 553; *Laurel Heights Improvement Association v. Regents of the University of California*, (1988) 47 Cal.3d 376; *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359; and *Laurel Heights Improvement Association v. Regents of the University of California* (1993) 6 Cal.4th 1112; *Goleta Union School Dist. v. Regents of the Univ. of Calif* (1995) 37 Cal. App.4th 1025.

15126.4 CONSIDERATION AND DISCUSSION OF MITIGATION MEASURES PROPOSED TO MINIMIZE SIGNIFICANT EFFECTS.

(a) Mitigation Measures in General.

(1) An EIR shall describe feasible measures which could minimize significant adverse impacts, including where relevant, inefficient and unnecessary consumption of energy.

(A) The discussion of mitigation measures shall distinguish between the measures which are proposed by project proponents to be included in the project and other measures proposed by the lead, responsible or trustee agency or other persons which are not included but the lead agency determines could reasonably be expected to reduce adverse impacts if required as conditions of approving the project. This discussion shall identify mitigation measures for each significant environmental effect identified in the EIR.

(B) Where several measures are available to mitigate an impact, each should be discussed and the basis for selecting a particular measure should be identified. Formulation of mitigation measures should not be deferred until some future time. However, measures may specify performance standards which would mitigate the significant effect of the project and which may be accomplished in more than one specified way.

(C) Energy conservation measures, as well as other appropriate mitigation measures, shall be discussed when relevant. Examples of energy conservation measures are provided in Appendix F.

(D) If a mitigation measure would cause one or more significant effects in addition to those that would be caused by the project as proposed, the effects of the mitigation measure shall be discussed but in less detail than the significant effects of the project as proposed. (*Stevens v. City of Glendale* (1981) 125 Cal.App.3d 986.)

(2) Mitigation measures must be fully enforceable through permit conditions, agreements, or other legally binding instruments. In the case of the adoption of a plan, policy, regulation, or other public project, mitigation measures can be incorporated into the plan, policy, regulation, or project design.

(3) Mitigation measures are not required for effects which are not found to be significant.

(4) Mitigation measures must be consistent with all applicable constitutional requirements, including the following:

Exhibit J

CALIFORNIA NATIVE PLANT SOCIETY V. CITY OF RANCHO CORDOVA, 172 CAL. APP. 4th 603, 622 (2009)

Court of Appeal, Third District, California.
CALIFORNIA NATIVE PLANT SOCIETY, Plaintiff and Appellant,
v.
CITY OF RANCHO CORDOVA et al., Defendants and Appellants;
Jaeger Road 530, LLC, Real Party in Interest and Appellant.

No. C057018.
March 24, 2009.
Rehearing Denied April 13, 2009.
Review Denied July 15, 2009.[FN*]

FN* Kennard and Werdegar, JJ., are of the opinion that the petition should be granted.

Background: Non-profit environmental organization brought action for writ of mandamus, alleging that city's and city council's approval of development violated the California Environmental Quality Act (CEQA) and the Planning and Zoning Law. The Superior Court, Sacramento County, No. 06CS01311,Patrick Marlette, J., entered judgment for organization. City and developer appealed, and organization cross-appealed.

Holdings: The Court of Appeal, Third District Robie, J., held that:
(1) organization failed to exhaust administrative remedies on issues of whether city was required to recirculate draft environmental impact report (EIR) after adding new mitigation measure and whether the city's handling of proposed off-site mitigation made the EIR deficient;
(2) city's failure to identify a specific proposed mitigation site was not an improper deferral of mitigation measures;
(3) evidence that federal agencies disagreed with city was insufficient to carry burden of showing a lack of substantial evidence to support city's finding that mitigation measures would reduce project's adverse environmental effects;
(4) organization failed to exhaust administrative remedies with respect to challenges to project EIR's reliance on and incorporation of other EIR's discussion and analysis of long-term water supply impacts and impacts on river;
(5) organization failed to exhaust administrative remedies with respect to contention that city violated CEQA when it approved project with amended mitigation measures drawn from other EIR;
(6) city reasonably could have determined that it engaged in "consultation" with federal Fish and Wildlife Service as required by general plan; and
(7) project's mitigation measures were not designed "in coordination with" the federal Fish and Wildlife Service and the California Department of Fish and Game as required by city's general plan.

Reversed with instructions.

West Headnotes

[1] Environmental Law 149E ⚷665

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek665 k. Exhaustion of administrative remedies. Most Cited Cases

Exhaustion of administrative remedies is a jurisdictional prerequisite to maintenance of a California Environmental Quality Act (CEQA) action. West's Ann.Cal.Pub.Res.Code § 21177.

[2] Administrative Law and Procedure 15A ⚷229

15A Administrative Law and Procedure
15AIII Judicial Remedies Prior to or Pending Administrative Proceedings
15Ak229 k. Exhaustion of administrative remedies. Most Cited Cases

The purpose of the rule of exhaustion of administrative remedies is to provide an administrative agency with the opportunity to decide matters in its area of expertise prior to judicial review; the decisionmaking body is entitled to learn the contentions of interested parties before litigation is instituted.

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[3] Environmental Law 149E ⚷665

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek665 k. Exhaustion of administrative remedies. Most Cited Cases

To exhaust administrative remedies under the California Environmental Quality Act (CEQA), more is required than generalized environmental comments at public hearings. West's Ann.Cal.Pub.Res.Code § 21177.

[4] Administrative Law and Procedure 15A ⚷669.1

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(A) In General
15Ak669 Preservation of Questions Before Administrative Agency
15Ak669.1 k. In general. Most Cited Cases

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; to hold such parties to knowledge of the technical rules of evidence and to the penalty of waiver for failure to make a timely and specific objection would be unfair to them.

[5] Environmental Law 149E ⚷665

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek665 k. Exhaustion of administrative remedies. Most Cited Cases

Environmental organization which brought California Environmental Quality Act (CEQA) action to challenge development project failed to exhaust administrative remedies on issues of whether city was required to recirculate draft environmental impact report (EIR) after adding new mitigation measure and whether the city's handling of proposed off-site mitigation made the EIR deficient in its description of the project, in its description of the environmental background of the project, or in the sense that the project was being improperly "piecemealed," and thus issues were not properly preserved for review. West's Ann.Cal.Pub.Res.Code § 21177(a).

[6] Environmental Law 149E ⚷604(2)

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek598 Adequacy of Statement, Consideration, or Compliance
149Ek604 Particular Projects
149Ek604(2) k. Land use in general. Most Cited Cases

City's failure to identify a specific proposed mitigation site was not an improper deferral of mitigation measures for development project under the California Environmental Quality Act (CEQA); city determined that the project would have a habitat loss impact and identified the preservation or creation of replacement off-site habitat, in a specific ration, as the specific measure to mitigate that impact, and city merely deferred as to the details of exactly how mitigation would be achieved pending completion of a future study. West's Ann.Cal.Pub.Res.Code § 21000 et seq.; 14 CCR § 15126.4.
See Cal. Jur. 3d, Pollution and Conservation Laws, § 544; 12 Witkin, Summary of Cal. Law (10th ed. 2005) Real Property, § 842; 9 Miller & Starr, Cal. Real Estate (3d ed. 2001) § 25A:17.

[7] Environmental Law 149E ⚷615

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek612 Evidence
149Ek615 k. Weight and sufficiency. Most Cited Cases

Evidence that federal agencies disagreed with city's evidence and conclusions was insufficient to carry nonprofit organization's burden of showing a lack of substantial evidence to support city's finding that mitigation measures would sufficiently reduce development project's adverse environmental effects as required under the California Environmental Quality Act (CEQA). West's Ann.Cal.Pub.Res.Code § 21081; 14 CCR § 15091.

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[8] Environmental Law 149E ⚷614

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek612 Evidence
149Ek614 k. Presumptions, inferences, and burden of proof. Most Cited Cases

The burden is on the party challenging an environmental impact report (EIR) to show it is inadequate. West's Ann.Cal.Pub.Res.Code § 21081; 14 CCR § 15091.

[9] Environmental Law 149E ⚷665

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek665 k. Exhaustion of administrative remedies. Most Cited Cases

Environmental organization failed to exhaust administrative remedies with respect to challenges to development project environmental impact report's (EIR's) reliance on and incorporation of other project EIR's discussion and analysis of long-term water supply impacts and impacts on river from development, and thus court lacked authority to invalidate project EIR based on its alleged failure to disclose project's potential impact on salmon in river; city did not incorporate other EIR's comments into project EIR, and city's alleged "notice" of deficiencies in the other EIR was insufficient to satisfy the exhaustion doctrine, and Environmental Protection Agency document regarding groundwater supply which drew information from other project's EIR did not criticize the contents of that EIR. West's Ann.Cal.Pub.Res.Code § 21177.

[10] Environmental Law 149E ⚷665

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek665 k. Exhaustion of administrative remedies. Most Cited Cases

To satisfy the exhaustion requirement, objections a party seeks to raise in a California Environmental Quality Act (CEQA) action must have been made known in some fashion, however unsophisticated, in the administrative proceeding; otherwise, the agency would have no opportunity to respond to the objections prior to judicial review—which is the essence of the exhaustion doctrine. West's Ann.Cal.Pub.Res.Code § 21177.

[11] Environmental Law 149E ⚷665

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek665 k. Exhaustion of administrative remedies. Most Cited Cases

Environmental organization failed to exhaust administrative remedies with respect to contention that city violated the California Environmental Quality Act (CEQA) when it approved development project and the project's environmental impact report (EIR), which relied on another project's EIR but included amended mitigation measures from those implemented for that other project to allow certain required actions to be delayed so that they would have to be taken only prior to approval of any improvement plans or grading permits; comments on the project's EIR did not mention other project's mitigation measures or suggest that city violated CEQA by amending those mitigation measures, and city did not have notice of any alleged problem with its amendments, let alone specific notice of assertion that it violated CEQA by amending the mitigation measures. West's Ann.Cal.Pub.Res.Code § 21177.

[12] Zoning and Planning 414 ⚷1044

414 Zoning and Planning
414II Validity of Zoning Regulations
414II(A) In General
414k1044 k. Conformity of regulations to comprehensive or general plan. Most Cited Cases
(Formerly 414k30)

The propriety of virtually any local decision affecting land use and development depends upon consistency with the applicable general plan and its elements. West's Ann.Cal.Gov.Code § 65300.

[13] Zoning and Planning 414 ⚷1625

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review

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414X(C)1 In General
414k1625 k. Permits, certificates, and approvals in general. Most Cited Cases
(Formerly 414k606)

Correct standard of review of issue of whether development project was consistent with city's general plan was whether city's finding of consistency with the general plan was reasonable based on the evidence in the record. West's Ann.Cal.Gov.Code §§ 65300, 66473.5.

[14] Zoning and Planning 414 ⚷1044

414 Zoning and Planning
414II Validity of Zoning Regulations
414II(A) In General
414k1044 k. Conformity of regulations to comprehensive or general plan. Most Cited Cases
(Formerly 414k30)

A project is "consistent" with the general plan when, considering all its aspects, it will further the objectives and policies of the general plan and not obstruct their attainment. West's Ann.Cal.Gov.Code § 66473.5.

[15] Zoning and Planning 414 ⚷1044

414 Zoning and Planning
414II Validity of Zoning Regulations
414II(A) In General
414k1044 k. Conformity of regulations to comprehensive or general plan. Most Cited Cases
(Formerly 414k30)

A given project need not be in perfect conformity with each and every general plan policy. West's Ann.Cal.Gov.Code § 66473.5.

[16] Zoning and Planning 414 ⚷1383(1)

414 Zoning and Planning
414VIII Permits, Certificates, and Approvals
414VIII(A) In General
414k1379 Maps, Plats, and Plans; Subdivisions
414k1383 Grounds for Grant or Denial; Conformity to Regulations
414k1383(1) k. In general. Most Cited Cases
(Formerly 414k381.5)

To be consistent with the general plan, a subdivision development must be compatible with the objectives, policies, general land uses and programs specified in the general plan. West's Ann.Cal.Gov.Code § 66473.5.

[17] Zoning and Planning 414 ⚷1044

414 Zoning and Planning
414II Validity of Zoning Regulations
414II(A) In General
414k1044 k. Conformity of regulations to comprehensive or general plan. Most Cited Cases
(Formerly 414k30)

Zoning and Planning 414 ⚷1625

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)1 In General
414k1625 k. Permits, certificates, and approvals in general. Most Cited Cases
(Formerly 414k606)

Once a general plan is in place, it is the province of elected city officials to examine the specifics of a proposed project to determine whether it would be in harmony with the policies stated in the plan; it is, emphatically, not the role of the courts to micromanage these development decisions. West's Ann.Cal.Gov.Code §§ 65300, 66473.5.

[18] Environmental Law 149E ⚷551

149E Environmental Law
149EXI Plants and Wildlife
149Ek548 Evidence
149Ek551 k. Weight and sufficiency. Most Cited Cases

Zoning and Planning 414 ⚷1383(5)

414 Zoning and Planning
414VIII Permits, Certificates, and Approvals
414VIII(A) In General
414k1379 Maps, Plats, and Plans; Subdivi-

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sions
414k1383 Grounds for Grant or Denial; Conformity to Regulations
414k1383(5) k. Other particular considerations. Most Cited Cases
(Formerly 414k381.5)

Evidence that federal Fish and Wildlife Service viewed as insufficient the interconnectivity between development project's preserved on-site habitat and adjacent habitat was insufficient to carry nonprofit organization's burden of showing that city's contrary conclusion was unreasonable based on all the evidence before city at the time of its determination that, consistent with city's general plan, the preserved habitat had interconnections with other habitat areas sufficient to maintain the viability of the preserved habitat to support the shrimp. West's Ann.Cal.Gov.Code § 66473.5.

[19] Environmental Law 149E 537

149E Environmental Law
149EXI Plants and Wildlife
149Ek535 Public Plans, Projects, and Approvals; Agency Action
149Ek537 k. Consultation. Most Cited Cases

Zoning and Planning 414 1416

414 Zoning and Planning
414VIII Permits, Certificates, and Approvals
414VIII(B) Proceedings on Permits, Certificates, or Approvals
414k1415 Report or Recommendation of Board or Officer
414k1416 k. In general. Most Cited Cases
(Formerly 414k438)

City reasonably could have determined that, by soliciting and considering comments from the federal Fish and Wildlife Service, it engaged in "consultation" with the Service required by its general plan and thus that development project, which included an approximately 90–acre open space/wetland preserve that encompassed 5.61 acres of habitat for vernal pool fairy and tadpole shrimp, was consistent with general plan, which required that preserved habitats "have interconnections with other habitat areas" and that "the determination of the design and size of the 'interconnections' shall be made by the City, as recommended by a qualified professional, and will include consultation with the California Department of Fish and Game and U.S. Fish and Wildlife Service." West's Ann.Cal.Gov.Code § 66473.5.

[20] Environmental Law 149E 536

149E Environmental Law
149EXI Plants and Wildlife
149Ek535 Public Plans, Projects, and Approvals; Agency Action
149Ek536 k. In general. Most Cited Cases

Zoning and Planning 414 1383(5)

414 Zoning and Planning
414VIII Permits, Certificates, and Approvals
414VIII(A) In General
414k1379 Maps, Plats, and Plans; Subdivisions
414k1383 Grounds for Grant or Denial; Conformity to Regulations
414k1383(5) k. Other particular considerations. Most Cited Cases
(Formerly 414k381.5)

Evidence that federal Fish and Wildlife Service and other agencies had informed city that environmental mitigation measures proposed in development project's environmental impact report (EIR) and adopted by city were inadequate to ensure the project would not "contribute to the decline of the affected species populations in the region to the extent that their decline would impact the viability of the regional population," as required by city's general plan, did not demonstrate that city could not have reasonably determined, based on all the evidence before it, that the mitigation measures would prevent the project from impacting the viability of the regional populations of vernal pool fairy and tadpole shrimp, and thus evidence was insufficient to carry environmental organization's burden of showing that the project was inconsistent with the general plan. West's Ann.Cal.Gov.Code § 66473.5.

[21] Environmental Law 149E 536

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149E Environmental Law
149EXI Plants and Wildlife
149Ek535 Public Plans, Projects, and Approvals; Agency Action
149Ek536 k. In general. Most Cited Cases

Environmental Law 149E ⚷604(2)

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek598 Adequacy of Statement, Consideration, or Compliance
149Ek604 Particular Projects
149Ek604(2) k. Land use in general. Most Cited Cases

Development project's environmental impact report (EIR) mitigation measures were not designed "in coordination with" the federal Fish and Wildlife Service and the California Department of Fish and Game as required by city's general plan, as city merely solicited and rejected input from the agencies, and thus project was not consistent with the general plan. West's Ann.Cal.Gov.Code § 66473.5.

****575** Kenyon Yeates,Charity Kenyon, J. William Yeates, Jason R. Flanders, Sacramento; Lippe Gaffney Wagner and Keith G. Wagner, Sacramento, for Defendant and Appellant.

Meyers, Nave, Riback, Silver & Wilson, Adam U. Lindgren, Sacramento, Julia L. Bond and Edward Grutzmacher, Oakland, for Defendants and Appellants.

Remy, Thomas, Moose and Manley, James G. Moose, Sabrina V. Teller, Sacramento, and Jason W. Holder for Real Party in Interest and Appellant.

ROBIE, J.

607** In this mandamus action brought by plaintiff California Native Plant Society (the Society), the trial court directed defendants City of Rancho Cordova and Rancho Cordova City Council (jointly the City) to set aside two resolutions and two ordinances relating to a residential and commercial development project known as the Preserve at Sunridge (the Project). The trial court found the City's certification of the environmental impact report (EIR) for the Project and approval of the Project violated the California Environmental Quality Act (CEQA; Pub. Resources Code, [FN1] § 21000 et seq.): (1) "by ****576** improperly deferring mitigation of impacts on vernal pool and wetland habitat and associated animal species"; (2) because the "findings [in the EIR] that impacts on vernal pool and wetland habitat and associated animal species had been mitigated to less than significant levels [we]re not supported by substantial evidence"; and (3) "because the EIR failed to disclose the potentially significant impact of the water supply plans for the project on fish migration in the Cosumnes River." The trial court also found the approval of the Project violated the Planning and Zoning Law (608**Gov.Code, § 65000 et seq.) because the Project was "not consistent with, and d[id] not comply with, mandatory requirements of [the City]'s General Plan regarding interconnection of preserved habitat areas that support special-status plant and animal species, and regarding mitigation on such species to ensure that the project does not contribute to the decline of the affected species population."

FN1. All further statutory references are to the Public Resources Code unless otherwise indicated. We will refer to the CEQA statutes in the format CEQA, section _____.

On the appeal by the City and real party in interest Jaeger Road 530 LLC (Jaeger) and the cross-appeal by the Society, we will conclude the trial court did not err in finding the approval of the Project violated the Planning and Zoning Law because, as we will explain, the City's general plan required the City to design mitigation for impacts of the Project on special-status species in coordination with the United States Fish and Wildlife Service (the Service), which the City did not do. The trial court did err, however, in finding the City violated CEQA in preparing the EIR and approving the Project. Accordingly, we will reverse the judgment and instruct the trial court to enter a new and different judgment consistent with our decision.

FACTUAL AND PROCEDURAL BACKGROUND

The Project

The Project involves the development of an approximately 530–acre site in the southeastern portion of the City that is to include "single-family residential, multi-family residential, commercial and office uses, a neighborhood park, an elementary school, detention/water quality basins, an open space/wetland

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preserve, pedestrian facilities, bikeways, parkways, and drainage corridors." The Project site lies in the center of a master planned community known as Sunrise Douglas, which was the subject of a community plan (the Sunrise Douglas Community Plan) approved by Sacramento County. (See *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 421–422, 53 Cal.Rptr.3d 821, 150 P.3d 709 (*Vineyard*).)

The Project site "is located within the Laguna Formation Geological Formation in the Southeastern Sacramento Valley Vernal Pool Region." Vernal pools are "seasonally inundated shallow depressions underlain by an impermeable layer of soil, generally hardpan or bedrock.... The pools are inundated with water for various periods of times [*sic*] depending on the depression depth, extent and duration of rainfall, and ambient temperatures." "The vernal pools on the site are classified as northern hardpan vernal pools" and they "support a variety of invertebrate species that are adapted to seasonal inundation and climatic regime associated by this habitat...."

***609** A large "unnamed ephemeral drainage" way that is "a headwater tributary to Morrison Creek" runs through the Project site.[FN2] "This drainage typically functions in ****577** the collection and transport of stormwater and convey flows during and immediately after storm events." "Depressional areas occur within the reach of the drainage where water pools and remains after the primary channel is dried. These depressional areas support vernal pool and seasonal wetland vegetation in the spring" and provide habitats for two species of vernal pool crustaceans—vernal pool fairy shrimp and vernal pool tadpole shrimp—that are listed as threatened and endangered (respectively) under the federal Endangered Species Act.[FN3] Vernal pool tadpole shrimp were actually "observed in some of the deeper on-site pools during ... surveys" in 2002 and 2005, and vernal pool fairy shrimp "have been documented within vernal pools in the immediate project vicinity."

FN2. Commonly the papers connected with the Project refer to this tributary *as* Morrison Creek.

FN3. Both species of vernal pool shrimp subsist in three habitat types found in the Project area—vernal pool, depressional seasonal wetland, and riverine seasonal wetland—while the vernal pool tadpole shrimp also subsists in a fourth habitat type—ephemeral drainage.

> "These crustaceans ... hatch from hard-shelled eggs after winter rains fill the pools, and are present as adults for only one to four months. As the pools dry, the shrimp reproduce and die, leaving eggs for the following year. Widespread agricultural and urban development has reduced the number of vernal pools in the valley, and is the primary cause of these species' endangerment."

The Federal Agencies' "Conceptual–Level Strategy "

In the spring of 2004, three federal agencies—the Service, the U.S. Environmental Protection Agency (USEPA), and the U.S. Army Corps of Engineers (the Corps)—"met to formulate a conceptual-level strategy for avoiding, minimizing, and preserving aquatic resource habitat in the Sunrise–Douglas Community Plan Area." According to the agencies' strategy document, these meetings resulted in the identification of "preserve areas" within the Sunrise Douglas Community Plan area that were "predicated on ten principles and standards that would be followed by developers and planners as each element of the overall development proceeds." Further, the agencies' strategy document provided that "[t]he mapped boundaries [of these preserve areas were] the smallest that would be acceptable to the Agencies...." The document also provided as follows: "The conceptual level strategy should be used by developers and planners to design and plan projects in the [Sunrise Douglas Community Plan area]. The Agencies will use the strategy to aid in the review of proposed development and evaluate the probable individual and cumulative effects on aquatic resources and sensitive species." [FN4]

FN4. Jaeger requests that we take judicial notice of a "joint rule" adopted by the Corps and USEPA in April 2008 regarding "Compensatory Mitigation for Losses of Aquatic Resources." In Jaeger's view, "The Joint Rule ... tends to prove ... that the mitigation measures for impacts to wetlands described in the EIR and adopted by the City may ultimately be acceptable to the Corps and the

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EPA." As this point, even if true, has no bearing on our decision, we deny the request for judicial notice.

***610** *The Notices Of Preparation And Initial Comments*

In September 2004, the City issued notice of its intent to prepare an EIR for the Project. In response, the Service submitted a comment letter. The Service referred extensively to the conceptual-level strategy document it had developed earlier that year in conjunction with USEPA and the Corps, then stated as follows: "Based on our review of the proposal submitted by the project proponent, the project design for the [Project] is not consistent with our ****578** conceptual-level strategy document and the map. The proposal would result in significant impacts to, and loss of, vernal pool tadpole shrimp [and] vernal pool fairy shrimp ... and the habitats they depend on (grasslands, wetlands and vernal pools). In addition, the proposal would result in the realignment of Morrison Creek for much of its length in the project site. This action will result in significant changes and impacts to the overall hydrology of the area which will, in turn, adversely impact endangered species habitat. We strongly recommend that the ... [P]roject, and all future projects, in the [Sunrise Douglas Community Plan area] be designed consistent with the strategy discussed here."

The Draft EIR

The City released the draft EIR for comment in October 2005. In its assessment of impacts on biological resources, the draft EIR noted the Project would "result in the direct loss of 14.1 acres of vernal pool fairy shrimp habitat" and "15.65 acres of vernal pool tadpole shrimp habitat." [FN5] The draft EIR deemed the loss of this habitat significant. The draft EIR further provided that these direct impacts would be mitigated "in such a manner that there will be no net loss of habitat (acreage and function) for these species in the Laguna Formation following implementation of the project." To achieve this and thereby reduce the impact of the Project to less than significant, the applicant would be required to "complete and implement a habitat mitigation and monitoring plan that will compensate for the loss of acreage, function and value of the impacted resources." (This mitigation requirement is referred to as mitigation measure 4.9.1b.) Generally, the plan would require the applicant to preserve two acres of existing habitat or create one acre of new habitat for each acre of habitat impacted by the Project. The plan would have to include "[t]arget areas for creation, restoration and preservation," "[a] complete biological assessment of the existing resources on the target areas," ***611** "[s]pecific creation and restoration plans for each target area," and "[p]erformance standards for success that will illustrate that the compensation ratios are met."

FN5. The draft EIR also noted the Project would result in the long-term preservation of 5.61 acres of habitat for both species.

In addition to noting the direct loss of habitat for both species of vernal pool shrimp, the draft EIR also noted the Project would have indirect adverse effects on the habitat for these species, both "in the on-site preserve and adjacent off-site habitat areas," which would be significant.[FN6] Specifically, "Alternation of current inundation and desiccation regimes due to altered hydrology [resulting from the creation of impervious surfaces and the redirection of stormwater flows] could substantially alter the characteristics of vernal pool habitat, resulting in [the] loss or degradation of [that] habitat." To mitigate these indirect effects, the applicant would be required (among other things) to adhere to the same 2–1/1–1 preservation/creation requirement under the same mitigation and monitoring plan imposed to mitigate the direct loss of habitat from the Project. (This mitigation requirement is referred to as mitigation measure 4.9.2a.)

FN6. The "on-site preserve" is an approximately 90–acre open space/wetland preserve located in the southwest portion of the Project site, which would apparently include the 5.61 acres of habitat for the vernal pool fairy shrimp and tadpole shrimp to be preserved as part of the Project.

The draft EIR noted the Project would result in a significant impact to the northern****579** hardpan vernal pool community, consisting of a direct loss of 10.46 acres of such pools as well as indirect effects on such pools. The draft EIR noted that implementation of several already-identified mitigation measures, including 4.9.1b and 4.9.2a, would reduce the impact to less than significant.

The draft EIR also noted the Project would result

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in a significant impact due to the loss of 15.65 acres of "waters of the US." [FN7] This impact was to be mitigated by "plans for the creation of jurisdictional waters at a mitigation ratio no less than 1:1 acres of created waters to each acre filled." This mitigation measure (4.9.5a) could be satisfied by the vernal pool and seasonal wetland mitigation pursuant to mitigation measure 4.9.1b.

FN7. The phrase "waters of the US" (sometimes "jurisdictional waters") refers to "wetlands and other water bodies that fall under the jurisdiction of the United States Army Corps of Engineers."

Comments On The Draft EIR

The Service submitted a comment letter on the draft EIR directing the City's attention back to the Service's letter of October 2004 in response to the notice of preparation of the EIR. The Service noted that with respect to the vernal pool fairy and tadpole shrimp (and two special-status species of ***612** grass), "we cannot discern any changes to the proposal which would reduce impacts to these species, thus our previous comments are pertinent."

In its own comment letter on the draft EIR, the Society asserted the mitigation and monitoring plan proposed as mitigation measure 4.9.1b would "also have environmental impacts but these are not addressed in the DEIR. Additionally, committing to the preparation of a document does not constitute mitigation. In order for the public to be fully informed of the environmental consequences (both positive and negative) of this proposed project, the DEIR should identify the proposed mitigation site and discuss the environmental impacts associated with the proposed mitigation and monitoring plan." The Society also asserted its belief "that creation of artificial vernal pools within an existing intact vernal pool grassland ecosystem is actually a negative environmental impact upon that natural system. Additionally, we are concerned that creation or restoration of mitigation vernal pools could have significant negative impacts upon the ecosystem as a whole." The Society offered a similar comment to mitigation measure 4.9.5a.

The Final EIR And Approval Of The Project

In response to the Society's comments, the City added a new mitigation measure (4.9.2c) in the final EIR. The purpose of this new measure was to "address[ ] the potential impacts of the proposed off-site creation activities" so as to "ensure that the biological impacts are reduced to less than significant." Among other things, this new measure required the applicant to submit a wetland "Avoidance/Mitigation Plan," which would include "[t]he location of the proposed vernal pool and seasonal wetland habitat site(s) ... to be created to ensure no net loss in wetland habitat acreage, values and functions," "a monitoring plan to assess whether the compensation wetlands are functioning as intended," and "a maintenance plan for the wetland preservation/mitigation areas describing the measures to be implemented to assure that they are maintained as wetland habitat in perpetuity."

In July 2006, the City adopted resolutions certifying the EIR for the Project ****580** and approving an amendment to certain mitigation measures in the Sunrise Douglas Community Plan. The City specifically found the Project was consistent with its new general plan.

In August 2006, the City adopted a resolution approving a tentative subdivision map for the Project, an ordinance amending the zoning for the area of the Project, and an ordinance approving the development agreement between the City and Jaeger. The City specifically found the tentative map, the rezoning, and the development agreement were consistent with the City's general plan.

***613** *Proceedings In The Trial Court*

In September 2006, the Society filed a petition for writ of mandate alleging violation of CEQA. In November, the Society filed an amended petition alleging violations of CEQA and the Planning and Zoning Law. Later, the Society filed a second amended petition that contained four causes of action asserting violations of CEQA and one cause of action asserting violation of the Planning and Zoning Law.

The Society's arguments in support of its petition, and the City's responses to those arguments, will be described in detail in the discussion to come. For now, suffice it to say that while the trial court rejected some of the Society's arguments and found some were not preserved for review by the exhaustion of administrative remedies, the court nonetheless granted judgment in favor of the Society, finding that the City's approval of the Project and certification of the EIR violated CEQA and that the approval of the

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Project also violated the Planning and Zoning Law. The City and Jaeger filed a timely appeal, and the Society filed a timely cross-appeal.[FN8]

FN8. Following the completion of briefing, the Society filed a motion to "strike new evidence and argument presented for first time in" the City's and Jaeger's reply briefs or for permission to file a surreply. Because it does not appear any of the "new evidence and argument" about which the Society complains was material to our decision, the Society's motion is denied.

DISCUSSION

I

CEQA Issues

A

Standard And Scope Of Review

In CEQA cases a court decides whether "the agency has not proceeded in a manner required by law" and "the act or decision is supported by substantial evidence in the light of the whole record." (CEQA, §§ 21168, 21168.5; see *Neighbors of Cavitt Ranch v. County of Placer* (2003) 106 Cal.App.4th 1092, 1099–1100, 131 Cal.Rptr.2d 379.) "The agency is the finder of fact and we must indulge all reasonable inferences from the evidence that would support the agency's determinations and resolve all conflicts in the evidence in favor ***614** of the agency's decision." (*Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 117, 104 Cal.Rptr.2d 326.) Accordingly, the burden is on the challenger. (*Barthelemy v. Chino Basin Mun. Water Dist.* (1995) 38 Cal.App.4th 1609, 1617, 45 Cal.Rptr.2d 688.) "The appellate court reviews the agency's action, not the trial court's decision; in that sense appellate judicial review under CEQA is de novo." (*Vineyard, supra,* 40 Cal.4th at p. 427, 53 Cal.Rptr.3d 821, 150 P.3d 709.)

B

Off-site Mitigation

In the trial court, the Society argued the EIR violated CEQA because it "failed to ****581** describe ... where off-site vernal pool and wetland creation may occur, or how such activities may affect these undescribed off-site environments." The Society contended that by failing to identify where the off-site mitigation might occur, the EIR: (1) failed to establish an accurate, stable, and finite description of the Project; and (2) failed to describe the environment that might be affected by the off-site mitigation. The Society also contended the new mitigation measure (4.9.2c) added in the final EIR "unlawfully segments, or 'piecemeals,' environmental review for the 'whole' of the ... project." In addition, the Society contended the City had "unlawfully deferred development and adoption of mitigation measures until after project approval" by failing to describe where the off-site mitigation might occur and failing to analyze or disclose the impacts of that mitigation. Finally, the Society contended the City had violated CEQA by failing to recirculate the draft EIR after adding the new mitigation measure.

The Society also argued the City's finding, that the vernal pool and seasonal wetland mitigation measures provided for in the EIR would reduce the impact of the Project on these habitats to less than significant, was not supported by the evidence.

In its opposition, the City argued (among other things) that the Society had failed to exhaust its administrative remedies because it had failed to raise any of these arguments in the administrative proceedings.

The trial court determined the Society's letter commenting on the draft EIR was sufficient to exhaust administrative remedies on two of the arguments relating to off-site mitigation: (1) "whether mitigation of impacts on vernal pools, wetlands, and associated animal species, improperly [were] deferred" ***615** and (2) "whether the finding that proposed off-site mitigation measures would reduce the impacts on vernal pools to a 'less than significant level' was supported by substantial evidence." The court further concluded, however, that administrative remedies had not been exhausted on the issues of whether the City was required to recirculate the draft EIR after adding the new mitigation measure and whether the City's "handling of proposed off-site mitigation made the EIR deficient in its description of the project, in its description of the environmental background of the project, or in the sense that the project was being improperly 'piecemealed.' "

On the merits of the issues the trial court found were properly raised, the court agreed with the Society. The court concluded the "proposed mitigation plan for addressing the loss of vernal pool and wet-

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lands habitat on the project site ... suffers from flaws in two areas which prevent it from complying with the rules for acceptable deferred mitigation." First, "the mitigation plan does not identify any particular locations in the Laguna Formation Area at which replacement vernal pools and wetlands may be constructed, or give any reasonable assurance, or even expectation, that such locations can and will be acquired and used for such purposes." Second, "the mitigation plan lacks appropriate standards and criteria applicable to its goal of replacing lost habitat with functioning new vernal pools and wetlands.... The mitigation plan as it stands thus lacks the kind of specific performance criteria that are necessary for proper deferred mitigation." As a consequence of its finding of improper deferred mitigation measures, the trial court also concluded the City's "findings that impacts have been reduced to the level of 'less than significant' based on those measures are not supported by substantial evidence."

****582** On appeal, the City and Jaeger contend the trial court erred in concluding the City improperly deferred mitigation and that substantial evidence does not support the City's finding that off-site mitigation will reduce the impact of the Project on the vernal pool and seasonal wetland habitats to less than significant.

In its cross-appeal, the Society asserts the trial court erred in concluding administrative remedies were not exhausted on the Society's four other arguments relating to off-site mitigation.

We begin with the exhaustion issue.

1. *Exhaustion Of Administrative Remedies*

[1] " 'Exhaustion of administrative remedies is a jurisdictional prerequisite to maintenance of a CEQA action.' [Citation.] Subdivision (a) of CEQA ***616** section 21177 sets forth the exhaustion requirement [the trial court applied] here. That requirement is satisfied if 'the alleged grounds for noncompliance with [CEQA] were presented ... by any person during the public comment period provided by [CEQA] or prior to the close of the public hearing on the project before the issuance of the notice of determination.' " (*State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 791–792, 39 Cal.Rptr.3d 189, fn. & italics omitted.)

[2] "The purpose of the rule of exhaustion of administrative remedies is to provide an administrative agency with the opportunity to decide matters in its area of expertise prior to judicial review. [Citation.] The decisionmaking body ' "is entitled to learn the contentions of interested parties before litigation is instituted." ' " (*Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 384, 110 Cal.Rptr.2d 579.)

[3][4] To exhaust administrative remedies, "[m]ore is obviously required" than "generalized environmental comments at public hearings." (*Coalition for Student Action v. City of Fullerton* (1984) 153 Cal.App.3d 1194, 1197, 200 Cal.Rptr. 855.) "On the other hand, less specificity is required to preserve an issue for appeal in an administrative proceeding than in a judicial proceeding. This is because ' "[i]n administrative proceedings, [parties] generally are not represented by counsel. To hold such parties to knowledge of the technical rules of evidence and to the penalty of waiver for failure to make a timely and specific objection would be unfair to them." [Citation.] It is no hardship, however, to require a layman to make known what facts are contested.' " (*Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 163, 217 Cal.Rptr. 893.)

[5] In reaching its conclusion that administrative remedies were not exhausted on the Society's four other arguments relating to off-site mitigation, the trial court offered this explanation:

"[The Society]'s comments [did not] alert [the City] to the contention that its handling of proposed off-site mitigation made the EIR deficient in its description of the project, in its description of the environmental background of the project, or in the sense that the project was being improperly 'piecemealed'. These claimed deficiencies are more than merely alternative legal theories arising from the allegation that off-site mitigation was being deferred improperly or would not actually reduce the impact of the project on vernal pools to 'less than significant'; they are also separate factual issues that, if accepted and acted upon, would have required restructuring and rewriting sections of the EIR entirely distinct from those addressing the mitigation measures at issue here. ****583** Nothing in [the Society]'s comments made that clear in a way that would have given [the City] the

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opportunity to address the issue prior to approval of the project.

***617** "Finally, nothing in [the Society]'s comments alerted [the City] to the contention that it was required to recirculate the Draft EIR because significant new information regarding the environmental impacts of the proposed off-site mitigation measures, and a corresponding new mitigation measure to address them, allegedly had been added after circulation of the Draft EIR. Of course, [the Society's comment] letter could not have addressed these issues, because the new environmental impact and the new mitigation measures ... related to off-site mitigation were announced in the responses to [the Society]'s comment.... But [the Society] still could have addressed the issue prior to [the City]'s final decision to certify the Final EIR and approve the project. No evidence is cited that it did so."

The trial court's analysis of the exhaustion issue is well-reasoned and persuasive, and nothing in the Society's argument on appeal convinces us the trial court erred. The core of the Society's comments on the draft EIR was that the mitigation measures proposed in the EIR to reduce the impact of the Project on the vernal pool and seasonal wetland habitats were inadequate because the EIR did not "identify the proposed mitigation site and discuss the environmental impacts associated with the proposed mitigation and monitoring plan" and "committing to the preparation of a document does not constitute mitigation." Nothing in these comments called into question the description of the Project or its environmental background or suggested the Project was being improperly "piecemealed." Also, the Society still has not cited any evidence that it ever attempted to raise in the administrative proceedings the issue of recirculation of the EIR.

On appeal, the Society attempts to draw support for its challenge to the trial court's conclusions on the exhaustion issue from two cases, but neither case is helpful to the Society. In *Save Our Residential Environment v. City of West Hollywood* (1992) 9 Cal.App.4th 1745, 12 Cal.Rptr.2d 308 (*SORE*), a nonprofit association of property owners and residents (SORE) challenged the adequacy of an EIR relating to a five-story residential care facility for senior citizens to be built in the City of West Hollywood. (*Id.* at p. 1748, 12 Cal.Rptr.2d 308.) The ultimate issue was "whether the EIR for the Project was required to examine alternative sites outside the territorial limits of the City, since the EIR found no feasible alternative sites within the City." (*Ibid.*) The City contended SORE had not exhausted its administrative remedies on that issue because "SORE did not specifically object to the legal adequacy of the EIR's alternative site analysis." (*Id.* at p. 1750, 12 Cal.Rptr.2d 308.) The appellate court rejected that argument, concluding "that SORE's objections to the Project, while not identifying the precise legal inadequacy upon which the trial court's ruling ***618** ultimately rested, fairly apprised the City and Rossmoor [the developer] that SORE believed the environmental impacts of developing the Project on the Rossmoor site would be deleterious to the surrounding community." (*Ibid.*)

Given that the appellate court in *SORE* failed to identify what SORE's actual "objections to the Project" were, the *SORE* case is of little assistance here, as we cannot determine exactly what comments the court found were sufficient to exhaust administrative remedies on the adequacy of the EIR's alternative site analysis and thus cannot extrapolate from the facts of that case a legal principle we can apply to ****584** the facts of this case. Without that detail, *SORE* at best stands for the proposition that complaints a project will be deleterious to the surrounding community may be sufficient to exhaust administrative remedies on the EIR's failure to adequately examine alternative sites. But the Society fails to explain how that proposition has any bearing here. The Society's comments that the EIR here did not "identify the proposed mitigation site and discuss the environmental impacts associated with the proposed mitigation and monitoring plan" and that "committing to the preparation of a document does not constitute mitigation" did not fairly apprise the City that the draft EIR was inadequate in its description of the Project and its environmental background, that environmental review of the Project was being improperly "piecemealed," or that the EIR would need to be recirculated.

In the second case the Society cites— *East Peninsula Ed. Council, Inc. v. Palos Verdes Peninsula Unified School Dist.* (1989) 210 Cal.App.3d 155, 258 Cal.Rptr. 147—a school district, in determining that its decision to close a high school and transfer the students to other schools was exempt from CEQA,

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failed to consider "all physical changes caused by the transfer, including the cumulative impacts of the transfer and related past and reasonably foreseeable future closings and transfers" and instead considered "only ... specified physical changes at the receptor schools." (*East Peninsula,* at pp. 159, 162, 165, 258 Cal.Rptr. 147.) On appeal, the district asserted that the plaintiff had failed to exhaust administrative remedies on the issue of cumulative impacts, but the appellate court disagreed, concluding various comments were sufficient to alert the school district "to the fact that its method of analysis was faulty and should be expanded to include analysis of long-term impacts, traffic and safety." (*Id.* at p. 176, 258 Cal.Rptr. 147.) The specific comments mentioned in the appellate opinion are set forth in the following footnote.[FN9]

> FN9. One person wrote in a letter, " 'Have you prepared an Environmental Impact Report? Due to the increased traffic and smog, etc., isn't this legally required?' " Another person stated at a hearing, " 'I think what you need to do is look at a long term solid based analysis that projects the impacts in the long term.' " At the same meeting, another person complained that " 'nowhere have you mentioned in your criteria the most basic concern of many Peninsula parents and that is traffic and safety.' " (*East Peninsula Ed. Council, Inc. v. Palos Verdes Peninsula Unified School Dist., supra,* 210 Cal.App.3d at p. 176, 258 Cal.Rptr. 147.)

***619** Like the *SORE* case, *East Peninsula* is of little assistance to the Society here. While the comments in *East Peninsula* fairly apprised the school district of the need to address cumulative impacts of the school closure and transfer, including impacts to traffic and safety, the comments of the Society here did not fairly apprise the City that the draft EIR was inadequate in its description of the Project and its environmental background, that environmental review of the Project was being improperly "piecemealed," or that the EIR would need to be recirculated.

For the foregoing reasons, we agree with the trial court that the Society did not exhaust its administrative remedies on the four other arguments relating to off-site mitigation. Accordingly, we turn to our analysis of the two arguments the trial court concluded were raised in the administrative proceeding.

2. *Improper Deferral Of Mitigation*

[6] As we have noted, the Society argued in the trial court that by failing to describe where the off-site mitigation ****585** might occur and failing to analyze or disclose the impacts of that mitigation, the City had "unlawfully deferred development and adoption of mitigation measures until after project approval." In support of this argument, the Society relied on *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1394–1395, 43 Cal.Rptr.2d 170, which in turn discussed two earlier cases involving claims of improperly deferred mitigation: ***Sundstrom v. County of Mendocino* (1988) 202 Cal.App. 3d 296, 248 Cal.Rptr. 352** and *Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 280 Cal.Rptr. 478 (*SOCA*). We begin our discussion of this issue with an analysis of this trio of cases.

Sundstrom involved the granting of a use permit for a private sewage treatment plant based on a negative declaration. (***Sundstrom v. County of Mendocino, supra,* 202 Cal.App. 3d at pp. 301– 303, 248 Cal.Rptr. 352.**) The use permit included conditions requiring the applicant to obtain hydrological studies analyzing the effect of the project on " ' **adjacent sewage disposal systems and surface and ground water hydrology,**' " as well " ' **soil stability, erosion, sediment transport, and the flooding of downslope properties**' " and (implicitly) requiring the applicant to mitigate any such effects the studies identified. (***Id.* at p. 306, 248 Cal.Rptr. 352.**)

On appeal from the denial of a petition for a writ of mandate requiring the preparation of an EIR, Division One of the First Appellate District concluded, "**The requirement that the applicant adopt mitigation measures recommended in a future study is in direct conflict with the *620 guidelines implementing CEQA.... [¶] By deferring environmental assessment to a future date, the conditions run counter to that policy of CEQA which requires environmental review at the earliest feasible stage in the planning process.... [¶] It is also clear that the conditions improperly delegate the County's legal responsibility to assess environmental impact by**

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directing the applicant himself to conduct the hydrological studies subject to the approval of the planning commission staff." (***Sundstrom v. County of Mendocino, supra,* 202 Cal.App. 3d at pp. 303, 306– 307, 248 Cal.Rptr. 352.**)

SOCA involved a challenge to the adequacy of an EIR addressing the mitigation of traffic and parking impacts of the expansion of the downtown Sacramento Convention Center complex and the construction of a nearby office tower. (*SOCA, supra,* 229 Cal.App.3d at p. 1015, 280 Cal.Rptr. 478.) The EIR determined that, "under the worst case scenario, ... parking spaces would ... be needed for 2,621 cars." (*Id.* at p. 1020, 280 Cal.Rptr. 478.) The plaintiffs complained the EIR was "defective because the City failed to describe and examine 'true' mitigation measures and failed to analyze the potential environmental impacts of implementing such measures." (*Id.* at p. 1026, 280 Cal.Rptr. 478.) More specifically, the plaintiffs complained the EIR contained "no specific mitigation measures for the parking impacts, but instead offer[ed] a list of 'seven general measures of the sort that might be included in [the City's] unformulated "Transportation Management Plan." ' " (*Ibid.,* italics omitted.) In support of their argument, the plaintiffs relied on *Sundstrom.* (*SOCA,* at p. 1027, 280 Cal.Rptr. 478.)

On appeal from the denial of a petition for a writ of mandate, this court found ***Sundstrom*** distinguishable and concluded the "proposed mitigation measures satisfied CEQA." (*SOCA, supra,* 229 Cal.App.3d at p. 1030, 280 Cal.Rptr. 478.) The court explained that "in ***Sundstrom*** the county had determined, before the required studies were even performed, that ****586** the project would not have a significant impact on the environment. In contrast, the City in the present case acknowledged traffic and parking have the potential, particularly under the worst case scenario, of causing serious environmental problems. The City did not minimize or ignore the impacts in reliance on some future parking study. [¶] Moreover, the county in ***Sundstrom*** approved the project without considering or addressing any mitigation measures. In the present case, the City has set forth a list of alternatives to be considered in the formulation of a transportation management plan, a plan the City itself, not the developer, will prepare. [¶] ... [¶] ... [T]he range of alternatives includes scheduling changes for the expanded center's activities, satellite parking locations; public transit, carpooling; and construction of new parking or expanded use of existing parking." (*SOCA,* at pp. 1028–1030, 280 Cal.Rptr. 478, italics omitted.) Moreover, the City had "committed itself to mitigating the impacts of parking and traffic" and had "approved funds for a major study of downtown transportation." (*Id.* at p. 1029, 280 Cal.Rptr. 478.)

621** *Gentry* involved the approval of a residential development based on a mitigated negative declaration. (*Gentry v. City of Murrieta, supra,* 36 Cal.App.4th at p. 1367, 43 Cal.Rptr.2d 170.) Among other things, the plaintiff complained, "some conditions [placed on the project] improperly deferred the determination of appropriate mitigation into the future." (*Id.* at p. 1393, 43 Cal.Rptr.2d 170.) On appeal from the denial of a petition for a writ of mandate, Division Two of the Fourth Appellate District concluded most of the challenged conditions did *not* improperly defer mitigation. (*Id.* at pp. 1359, 1394–1396, 43 Cal.Rptr.2d 170.) The only condition the court found "improperly defer[red] the formulation of mitigation" was a condition that allowed the developer "to obtain a biological report regarding the Stephens' kangaroo rat" and "comply with any recommendations in the report." (*Id.* at p. 1396, 43 Cal.Rptr.2d 170.) The *Gentry* court concluded this condition was "on all fours with the condition in ***Sundstrom which required the applicant to comply with any recommendations of a report that had yet to be performed." (*Gentry,* at p. 1396, 43 Cal.Rptr.2d 170.)

The principles of deferred mitigation expressed in *Sundstrom, SOCA,* and *Gentry* are succinctly summarized in the California Code of Regulations, title 14, section 15126.4, subd. (a)(1)(B),[FN10] which provides that "[f]ormulation of mitigation measures should not be deferred until some future time. However, measures may specify performance standards which would mitigate the significant effect of the project and which may be accomplished in more than one specified way."

FN10. Hereafter, we will refer to the CEQA Guidelines (Cal.Code Regs., tit. 14, § 15000 et seq.) in the format CEQA Guidelines, section _____.

Unlike the trial court, we do not agree with the

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Society that the City violated the principles expressed in *Sundstrom, SOCA,* and *Gentry* regarding improper deferral of mitigation. ***Sundstrom*** and *Gentry* stand for the proposition that it is improper to defer the formulation of mitigation measures until after project approval; instead, the determination of whether a project will have significant environmental impacts, and the formulation of measures to mitigate those impacts, must occur *before* the project is approved. On the other hand, *SOCA* stands for the proposition that when a public agency has evaluated the potentially significant impacts of a project and has identified measures that will mitigate those impacts, the agency does not have to ****587** commit to any particular mitigation measure in the EIR, as long as it commits to mitigating the significant impacts of the project. Moreover, under *SOCA,* the details of exactly how mitigation will be achieved under the identified measures can be deferred pending completion of a future study.

***622** The City satisfied these requirements here. The City did not defer a determination of whether the Project would have a significant impact on the vernal pool and seasonal wetland habitats or defer the identification of measures calculated to mitigate that impact. Rather, the City determined the impact the Project would have—habitat loss—and identified a specific measure to mitigate that impact—preservation or creation of replacement habitat off site in a specific ratio to the habitat lost as a result of the Project. While it is true the City did not identify any specific proposed mitigation site, there is nothing in *Sundstrom, SOCA,* or *Gentry* that required it to do so. Just as the City of Sacramento in *SOCA* did not have to choose in the EIR exactly which of the mitigation measures it had identified would ultimately be used to mitigate the impact of the convention center project on downtown parking, the City here did not have to identify exactly where in the Laguna Formation Area any offsite mitigation site would be located. In both instances, the agency was entitled to rely on the results of a future study to fix the exact details of the implementation of the mitigation measures the agency identified in the EIR.

In accepting the Society's argument that the City improperly deferred mitigation relating to the loss of vernal pool and seasonal wetland habitat, the trial court expressed its belief that "in order to be valid, a proposed mitigation measure that is intended to be carried out at some time after project approval must be sufficiently detailed that the public and the approving agency may make an informed decision about whether it will actually work as advertised, and that it must be realistically foreseeable that the measure will actually be carried out as outlined. If the success of a proposed mitigation measure is uncertain, the approving agency cannot reasonably determine that significant effects will be mitigated below the level of significance. [Citation.] And if there is no information at hand demonstrating that a proposed mitigation solution can or will be carried out, the approving agency does not have meaningful information reasonably justifying an expectation of compliance with the condition."

We agree with the City that, in part, these comments evidence a confusion of two distinct CEQA concepts: (1) whether the agency has improperly deferred the formulation of mitigation measures; and (2) whether the mitigation measures the agency has formulated are *feasible.* A mitigation measure is feasible if it is "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." (CEQA, § 21061.1.) Under this definition, concerns about whether a specific mitigation measure "will actually work as advertised," whether it "can ... be carried out," and whether its "success ... is uncertain" go to the *feasibility* of the mitigation measure, ***623** not to whether its formulation has been improperly deferred. Similarly, concerns about whether it is "realistically foreseeable that [a mitigation] measure will actually be carried out as outlined" do not raise an issue of improper deferral. If the agency has identified one or more mitigation measures and has committed to mitigating the impact those measures address, then the principles forbidding deferral of mitigation are not implicated.

****588** In its challenge to the EIR in the trial court (as well as in its comments on the EIR), the Society did not argue that the off-site mitigation measures the City proposed were not feasible or that the City had not fully committed to implementing those measures. Instead, as the trial court described it, the issue the Society raised was "whether mitigation of impacts on vernal pools, wetlands, and associated animal species, improperly were deferred." Under the case law on which the Society relied, the answer to

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that question is "no."

The Society argues that regardless of *Sundstrom, SOCA,* and *Gentry,* the City improperly deferred mitigation of the loss of vernal pool and seasonal wetland habitat in violation of principles the California Supreme Court recently set out in *Vineyard.* We are not persuaded.

Vineyard involved the EIR relating to the Sunrise Douglas Community Plan, which contemplates the development of a master planned community (of which the Project here is a part) with "more than 22,000 residential units, housing as many as 60,000 people, together with schools and parks, as well as office and commercial uses occupying 480 acres of land." (*Vineyard, supra,* 40 Cal.4th at pp. 421–422, 53 Cal.Rptr.3d 821, 150 P.3d 709.) The primary issue the Supreme Court addressed on review was the adequacy of the EIR's water supply analysis. (*Id.* at pp. 427–447, 53 Cal.Rptr.3d 821, 150 P.3d 709.) The plaintiffs in *Vineyard* complained the EIR was "deficient in that it 'fail [ed] to identify the actual source of most of the water needed to fill the project's long-term demand,' an analytical gap that 'serve[d] to obscure the undisclosed environmental impacts of the project.' " (*Id.* at p. 427, 53 Cal.Rptr.3d 821, 150 P.3d 709.) As the Supreme Court put it, "The principal disputed issue [wa]s how firmly future water supplies for a proposed project must be identified or, to put the question in reverse, what level of uncertainty regarding the availability of water supplies can be tolerated in an EIR for a land use plan." (*Id.* at p. 428, 53 Cal.Rptr.3d 821, 150 P.3d 709.)

In addressing this issue, the Supreme Court discussed "several [Court of Appeal] decisions [that] specifically addressed the sufficiency of an EIR's analysis of future water supplies" and from which the Supreme Court distilled "certain principles for analytical adequacy under CEQA" of an ***624** "analysis of future water supplies." (*Vineyard, supra,* 40 Cal.4th at pp. 428–430, 53 Cal.Rptr.3d 821, 150 P.3d 709.) One of the cases the Supreme Court discussed was *Stanislaus Natural Heritage Project v. County of Stanislaus* (1996) 48 Cal.App.4th 182, 55 Cal.Rptr.2d 625. As relevant here, the Supreme Court offered this summary of the *Stanislaus* decision: "Before approving a specific plan for an entire development, the decision makers must be informed of the intended source or sources of water for the project, 'what the impact will be if supplied from a particular source or possible sources and if that impact is adverse how it will be addressed.' [Citation.] CEQA, the court recognized, permits the environmental analysis for long-term, multipart projects to be 'tiered,' so that the broad overall impacts analyzed in an EIR at the first-tier programmatic level need not be reassessed as each of the project's subsequent, narrower phases is approved, but tiering 'is not a device for deferring the identification of significant environmental impacts that the adoption of a specific plan can be expected to cause.' [Citation.] Nor can the unanalyzed impacts of unknown water sources be mitigated by providing that if water proves unavailable, the project's future phases will not be built: 'While it might be argued that not building a portion of the project is the ultimate mitigation,****589** it must be borne in mind that the EIR must address the project and assumes the project will be built.' " *Vineyard,* at p. 429, 53 Cal.Rptr.3d 821, 150 P.3d 709, quoting *Stanislaus Natural Heritage Project v. County of Stanislaus, supra,* 48 Cal.App.4th at pp. 199, 206, 55 Cal.Rptr.2d 625, (fn. omitted.)

Without further discussing the *Vineyard* decision, the Society sets out the Supreme Court's summary of the *Stanislaus* decision and relies on that summary to argue that "[t]he Supreme Court ruled in *Vineyard* that a failure to identify and disclose with specificity 1) likely sources of off-site environmental resources that may be required to fully implement a proposed project, and 2) how the use of those resources in furtherance of the Project may, in turn, result in significant, adverse environmental effects, constitutes a violation of CEQA's mandatory procedures."

This argument is deficient for several reasons. First, the portion of the *Vineyard* case the Society quotes does not contain any *holding* or *ruling* by the Supreme Court; rather, it contains the Supreme Court's summary of an earlier Court of Appeal decision. Furthermore, the Society makes no attempt to show that the Supreme Court's ruling in *Vineyard* was consistent with its summary of the *Stanislaus* decision. Second, even if we assume such consistency, the Society makes no attempt to show or explain why the reasoning in *Vineyard* and *Stanislaus*—both of which dealt specifically with the sufficiency of an EIR's analysis of future water supplies—can or should ***625** be extended to the sufficiency of an

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EIR's formulation of mitigation measures involving off-site habitat replacement. Because the Society's abbreviated discussion of *Vineyard* does not include any attempt to identify the underlying principles that drove either the *Vineyard* decision or the *Stanislaus* decision, we cannot discern whether those principles compel an extension of the holding of those cases from the water supply context to the off-site mitigation context.

In summary, the Society has failed to persuade us that the *Vineyard* decision on the adequacy of an EIR's analysis of future water supplies supplants or in any way alters the principles of deferred mitigation set forth in *Sundstrom, SOCA,* and *Gentry.* And because we have concluded already that the EIR here did not violate those principles, we likewise conclude the trial court erred when it determined otherwise.

The question remains, however, whether the trial court's ultimate ruling regarding the EIR as it relates to the issue of off-site mitigation can nonetheless be sustained on the alternate ground the trial court decided the Society had properly raised in the administrative proceedings, namely, "whether the finding that proposed off-site mitigation measures would reduce the impacts on vernal pools to a 'less than significant level' was supported by substantial evidence." We turn our attention to that issue.

3. *Sufficiency Of The Evidence*

[7] Under CEQA, "If the agency decides to approve a project despite its significant adverse impacts, the agency must issue findings which specifically state how the agency has responded to the significant impacts identified in the EIR." (*SOCA, supra,* 229 Cal.App.3d at p. 1034, 280 Cal.Rptr. 478; CEQA, § 21081; CEQA Guidelines, § 15091.) One such finding is that "[c]hanges or alterations have been required in, or incorporated into, the project which mitigate or avoid the significant effects on the environment." (CEQA, § 21081, subd. (a)(1); CEQA Guidelines, § 15091, subd. (a)(1).) Any such finding must be supported by substantial****590** evidence in the record. (CEQA Guidelines, § 15091, subd. (b).)

Here, the Society argued in the trial court that "the evidence in the certified record of proceedings does not support the City's findings that the project's potentially significant, adverse environmental effects will be reduced to 'less than significant' levels." More specifically, the Society argued the City's finding of mitigation was not supported by the evidence in the record because "[t]he state and federal agencies with the requisite expertise, and jurisdiction ***626** by law, over these resources (USFWS, USACE, USEPA and CDFG) [FN11] reviewed and commented (several times) on the mitigation measures proposed in the EIR and adopted in the City's findings" and "unanimously informed the City that, in their professional judgment, and based on their expertise and the facts before them, adoption of the EIR's proposed mitigation measures, would 'result in significant impacts to, and loss of' listed species and the habitats upon which they depend." The Society repeats these arguments nearly verbatim in its brief on appeal.

FN11. USFWS is the Service, USACE is the Corps, and CDFG is the California Department of Fish and Game.

[8] Pointing out that other agencies disagreed with the City's finding that its chosen mitigation measures would reduce the adverse impacts of the Project on the vernal pool and seasonal wetland habitats to less than significant does not show there was insufficient evidence in the record to support the City's finding. As we have noted, the burden is on the party challenging the EIR to show it is inadequate. (*Barthelemy v. Chino Basin Mun. Water Dist., supra,* 38 Cal.App.4th at p. 1617, 45 Cal.Rptr.2d 688.) Given that "[s]ubstantial evidence challenges [under CEQA] are resolved much as substantial evidence claims in any other setting" (*County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 945, 91 Cal.Rptr.2d 66), the burden was on the Society to *affirmatively show* there was no substantial evidence in the record to support the City's findings, and the Society could not carry that burden by simply pointing to portions of the administrative record that favored its position. (See, e.g., *People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573–1574, 43 Cal.Rptr.3d 741 [apply rules of substantial evidence review in criminal case].) Rather, the Society needed to set forth in its challenge to the EIR all of the evidence material to the City's finding, then show that that evidence could not reasonably support the finding. (See *id.* at p. 1574, 43 Cal.Rptr.3d 741.) The Society did not do this.

As the City points out, "The main premise of [the Society's] argument is ... that the federal agencies

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disagree with the City's evidence and conclusions and have a different vision for the area.... [T]his disagreement does not constitute a basis for overturning the City's decision." We would add only this: Pointing to evidence of a disagreement with other agencies is not enough to carry the burden of showing a lack of substantial evidence to support the City's finding. Thus, the Society's challenge to the sufficiency of the evidence fails.

***627** C

Incorporation Of The Sunrise Douglas Community Plan EIR

The EIR here noted that "the City, through incorporation by reference, is using the Master EIR [i.e., the EIR for the Sunrise Douglas Community Plan] in a ****591** manner similar to what would be accomplished through tiering: relying largely on existing information about broad, area wide or regional issues and impacts, while updating that information where necessary and focusing on site specific issues not addressed previously."

When this action was commenced in the trial court in September 2006, the *Vineyard* case, which involved challenges to the Sunrise Douglas Community Plan EIR, was pending in the California Supreme Court. Anticipating that the Supreme Court's ruling in *Vineyard* might have a bearing on the validity of the EIR here, the Society asserted generally in its statement of issues (CEQA, § 21167.8, subd. (f)) in January 2007 that the City's approval of the Project "must be set aside because the [EIR] incorporates and relies upon analysis and conclusions in the overlying Sunrise Douglas Community Plan EIR that may be invalidated by the Supreme Court."

After the *Vineyard* decision came out in February 2007, the Society included more specific arguments in its opening brief (filed in March 2007) based on that decision. Specifically, the Society argued the Project EIR had incorporated the "discussion and analysis" in "two key portions of the [Sunrise Douglas Community Plan] EIR": specifically, "long-term water supply impacts" and "impacts to the Cosumnes River." The Society contended that because the Supreme Court had invalidated the Sunrise Douglas Community Plan EIR for failure to adequately consider these impacts, the Project EIR had to be invalidated on this basis as well.

In its opposition, the City argued that administrative remedies had not been exhausted on this issue because "the record does not disclose so much as a statement of concern over the EIR's water supply analysis or over potential impacts on the Cosumnes River *by anyone* during the administrative proceedings," let alone any "claim that the EIR was defective because it improperly incorporated or relied too extensively upon the [Sunrise Douglas Community Plan] EIR."

The trial court first observed that "[t]he essence of the exhaustion doctrine is notice" and thus "[t]he key issue here ... is whether [the City] had notice that the [Project] EIR ... was questionable insofar as it relied upon portions of the EIR for the [Sunrise Douglas Community Plan] that were in litigation and might eventually be ruled invalid." The court relied on the fact that when ***628** the City certified the Project EIR and approved the Project, the action involving the validity of the Sunrise Douglas Community Plan EIR was already pending before the California Supreme Court and the City was a party to that action. In the trial court's view, by virtue of these facts the City "had actual notice that, to the extent that the [Project] EIR expressly relied upon portions of the earlier EIR that were the subject of litigation, such reliance was questionable" and the City "had the opportunity to avoid any problems arising out of such reliance before approving the [Project] and its EIR." Thus, the court found, "the purpose of the exhaustion doctrine has been served in this case."

On the merits, the trial court determined the EIR was not invalid based on its discussion of long-term water supply impacts of the Project because "the discussion of cumulative water supply impacts in the project EIR does not appear to be based on the discussion of that issue in the [Sunrise Douglas Community Plan] EIR" and because the "contribution [of the Project] to the impacts of long-term water supplies might even be described as essentially nonexistent."

****592** The trial court reached a different conclusion, however, with respect to impacts on the Cosumnes River. The court noted that the Supreme Court had invalidated the Sunrise Douglas Community Plan EIR in part because the final EIR had disclosed for the first time a potentially substantial new impact on salmon in the Cosumnes River. (*Vineyard,*

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supra, 40 Cal.4th at p. 449, 53 Cal.Rptr.3d 821, 150 P.3d 709.) The Supreme Court concluded in *Vineyard* that the Sunrise Douglas Community Plan EIR had to be recirculated for public comment on this issue. (*Ibid.*) The trial court here noted that the Project EIR did "not include the disclosure of the potential impact on the Cosumnes River that appeared in the [Sunrise Douglas Community Plan] EIR" and thus "suffers from the same defect that was found in the *Vineyard* ... case, that of failing to disclose this impact to the public for comment." Thus, the court directed the issuance of a writ of mandate "to require the Draft EIR to be revised and recirculated with regard to this issue."

On appeal, the City and Jaeger contend the trial court erred in determining that the Society was not required to exhaust administrative remedies on its arguments related to the Project EIR's reliance on the Sunrise Douglas Community Plan EIR. In the alternative, they contend the court erred in invalidating the Project EIR based on its failure to disclose the potential impact of the Project on the salmon in the Cosumnes River because, based in part on information that was not available when the Sunrise Douglas Community Plan EIR was prepared, there was substantial evidence in the record that the Project would not have any such impact.

***629** For its part, in its cross-appeal, the Society contends the trial court erred in determining the EIR was not invalid based on its discussion of long-term water supply impacts of the Project.

Once again, we begin our discussion with the exhaustion issue. As will be seen, since the exhaustion issue is dispositive of these challenges to the EIR, we need not reach either side's arguments on the merits of the challenges related to the Project EIR's reliance on the Sunrise Douglas Community Plan EIR.

[9] We have explained the fundamental principles of the exhaustion doctrine already. What is most important in applying that doctrine here is the language of subdivision (a) of CEQA section 21177, which expressly provides that "[n]o action or proceeding may be brought pursuant to Section 21167 unless the alleged grounds for noncompliance with this division were presented to the public agency orally or in writing by any person during the public comment period provided by this division or prior to the close of the public hearing on the project before the issuance of the notice of determination." By its plain language, this statute requires that the alleged grounds for noncompliance with CEQA a party seeks to raise in a CEQA action must have been presented to the public agency by someone during the administrative proceeding.

[10] The purpose of the exhaustion doctrine is to ensure the administrative agency "will have had an opportunity to act and render the litigation unnecessary." (*Resource Defense Fund v. Local Agency Formation Com.* (1987) 191 Cal.App.3d 886, 894, 236 Cal.Rptr. 794.) That is why CEQA section 21177 requires someone to have presented to the administrative agency in the administrative proceeding the alleged ground for noncompliance with CEQA that a litigant later seeks to raise in a CEQA action—so the agency knows about the claimed problem and has an opportunity to fix it before legal action is ****593** commenced. 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]. Otherwise, the [agency] would have no opportunity to respond to the objections prior to judicial review—which is the 'essence of the exhaustion doctrine.' " (*Park Area Neighbors v. Town of Fairfax* (1994) 29 Cal.App.4th 1442, 1449, 35 Cal.Rptr.2d 334.)

Here, in the trial court the Society challenged the Project EIR's reliance on and incorporation of the Sunrise Douglas Community Plan EIR's discussion and analysis of "long-term water supply impacts" and "impacts to the Cosumnes River," which the Supreme Court found were inadequate in *Vineyard.* To satisfy the exhaustion doctrine, someone had to have raised ***630** these challenges—or something like them at least—in front of the City during the administrative proceeding. That did not happen.

To the extent the Society relies on the Project EIR's incorporation by reference of the Sunrise Douglas Community Plan EIR and the fact that the administrative record includes a copy of the latter EIR to satisfy the exhaustion doctrine, that reliance is misplaced. The Society offers no authority for its argument that, by incorporating the analyses of "long-term water supply" and "impacts to biological

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resources in the Cosumnes River" from the Sunrise Douglas Community Plan EIR into the Project EIR, "The City, by definition, incorporated the objections that were raised to the adequacy of" these analyses in comments on the Sunrise Douglas Community Plan EIR. The suggestion that an agency must treat as a comment on a current EIR any comment received on an earlier EIR that the current EIR relies on or incorporates by reference has no support in the law, as far as we can determine, presumably because an agency is entitled to know exactly what objections members of the public have to the current EIR. If one of those objections is that the current EIR incorporates a faulty or insufficient analysis from an earlier EIR, then the agency is entitled to notice of this objection, so that it can correct the deficiency or explain why it believes there is no deficiency. An objector cannot simply sit back and wait for the earlier EIR to be invalidated, then belatedly assert after the administrative proceeding is complete (as happened here) that the current EIR is defective because it relied on the earlier EIR that has now been invalidated.

Nor is it sufficient, as the Society suggests, that the agency had "notice" of the alleged deficiencies in the earlier EIR at the time it relied on that EIR in preparing the current EIR. If the Legislature had wanted mere "notice" to be the applicable standard, it could have written CEQA section 21177 to provide for that. Instead, the Legislature incorporated into that section a traditional exhaustion requirement, which demands that any deficiency a litigant seeks to raise in a CEQA action must have been raised before the agency in the administrative proceeding.

Here, the Society points to only one purported "comment" on the Project presented to the City during the administrative proceeding to satisfy the exhaustion doctrine. As we will explain, the Society has failed to show that that "comment" raised the issues the Society sought to raise in the trial court and therefore the Society has failed to show the exhaustion doctrine was satisfied by this "comment."

According to the Society, USEPA, "in commenting on the Project, ... objected to the Project's reliance on 'conjunctive use' and the City's proposal to use groundwater from the North Vineyard well field ****594** to meet long-term ***631** water supply." The "comment" the Society refers to is a paragraph entitled "Groundwater Supply" that appears in a document entitled "Detailed USEPA Concerns" that was an attachment to a letter dated December 7, 2001 from USEPA to a district engineer for the Corps relating to another project in the Sunrise Douglas Community Plan area. This earlier letter was submitted to the City in connection with this Project in October 2004 when USEPA attached the letter to its response to the notice of preparation for the Project EIR.

In the "Groundwater Supply" paragraph, the "Detailed USEPA Concerns" document drew information from the Sunrise Douglas Community Plan EIR about the water supply for the Sunrise Douglas Community Plan area. The document noted that "[t]he FEIR's water supply plan proposes sole reliance on groundwater to meet the demands generated in the short-term by anticipated build-out within the Specific Plan area,[FN12] with reliance on 'conjunctive use' to meet demands that grow over the long-term. Initially, it appears that groundwater will be drawn from a well field in the North Vineyard area, and the proposed project would draw groundwater from the Elk Grove area aquifer—an aquifer where overdraft already appears to be a serious problem. We expect that further draw-down of this aquifer will have severe, adverse impacts on the aquatic resources of the Cosumnes River watershed and, therefore, the Bay/Delta ecosystem."

FN12. The "Specific Plan" refers to "the SunRidge Specific Plan," which "detail[ed] the proposed development of a substantial portion of the [Sunrise Douglas] project—2,600 acres" of the "more than 6,000 ... acres" encompassed in the Sunrise Douglas project as a whole. (*Vineyard, supra,* 40 Cal.4th at pp. 421–422, 53 Cal.Rptr.3d 821, 150 P.3d 709.) The Sunrise Douglas Community Plan area EIR addressed the likely environmental consequences of *both* plans. (*Id.* at p. 422, 53 Cal.Rptr.3d 821, 150 P.3d 709.)

Unfortunately, the Society's argument based on this paragraph is abbreviated—amounting to little more than a reference to where the material appears in the administrative record, accompanied by a mischaracterization of the material as an "object[ion to] ... the City's proposal to use groundwater from the North Vineyard well field to meet long-term water

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supply." Because it does not develop its argument, the Society fails to explain how USEPA's supplying this earlier document to the City in response to the notice of preparation of the Project EIR satisfied the exhaustion doctrine with respect to the arguments the Society ultimately sought to pursue here, specifically, arguments regarding the propriety of the Project EIR's reliance on the faulty discussion and analysis of "long-term water supply impacts" and "impacts to the Cosumnes River" in the Sunrise Douglas Community Plan EIR. For our part, we note that nothing in this material even purported to criticize the contents of the Sunrise Douglas Community Plan EIR, let alone the incorporation of that EIR into the Project EIR. Thus, we are at a loss to understand how it could have satisfied the exhaustion requirement with respect to the Society's arguments.

***632** The Society relies on *Friends of the Santa Clara River v. Castaic Lake Water Agency* (2002) 95 Cal.App.4th 1373, 116 Cal.Rptr.2d 54 to support its contention that the Project EIR has to be invalidated because of its incorporation by reference of material in the Sunrise Douglas Community Plan EIR that the Supreme Court found inadequate in *Vineyard.* That reliance is misplaced.

In *Friends,* Division Four of the Second Appellate District concluded a tiered EIR was invalid because the prior EIR from ****595** which it was tiered had been decertified as the result of an opinion by this court (*Planning & Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 100 Cal.Rptr.2d 173) finding the prior EIR inadequate and because CEQA "authorizes tiering [only] where the previous EIR was certified." (*Friends of the Santa Clara River v. Castaic Lake Water Agency, supra,* 95 Cal.App.4th at pp. 1375–1376, 1384, 1387, 116 Cal.Rptr.2d 54; CEQA, § 21094, subd. (a).) What is significant about *Friends* here is that the case from this court decertifying the prior EIR was not decided until the challenge to the EIR in the *Friends* case was on appeal. (*Friends of the Santa Clara River,* at p. 1375, 116 Cal.Rptr.2d 54.)

To the extent the Society, by relying on *Friends,* means to imply that the exhaustion requirement did not have to be met here because, as in *Friends,* the grounds for invalidating the EIR arose from another case that was not decided until after the administrative proceedings were complete, we reject that argument. First, *Friends* did not address the exhaustion doctrine, and "cases, of course, are not authority for propositions not there considered." (*People v. Ceballos* (1974) 12 Cal.3d 470, 481, 116 Cal.Rptr. 233, 526 P.2d 241.) Second, had the exhaustion issue been raised in *Friends,* it would have been true that the defect there—decertification of the prior EIR—could not have been raised in the administrative proceeding because the prior EIR was not decertified until even after the trial court proceedings concerning the tiered EIR had concluded and the matter was on appeal. Whether recognition of an impossibility exception to the exhaustion requirement might have been justified under those circumstances is a question we need not answer here because the circumstances in this case are markedly different. The Society does not seek to invalidate the Project EIR simply because the Sunrise Douglas Community Plan EIR was invalidated; rather, the Society seeks to invalidate the Project EIR because it allegedly incorporated faulty analysis and discussion from the earlier EIR. But nothing prevented the Society from presenting this argument to the City during the administrative proceedings on the Project EIR. It is true the Society would not have had the benefit of the *Vineyard* decision in arguing the analysis and discussion in the earlier EIR was faulty, but the Society could have made that argument nevertheless based ***633** on the very same reasoning and authorities used by the parties who eventually prevailed in *Vineyard.* Thus, even assuming recognition of an impossibility exception to the exhaustion requirement might be appropriate in certain circumstances, no such circumstances exist here.

Under the circumstances of this case, we conclude the trial court erred in determining the exhaustion doctrine was satisfied with respect to the Society's complaints about the Project EIR's reliance on the Sunrise Douglas Community Plan EIR. Because this issue was not exhausted at the administrative level, the trial court had no authority to consider it and thus erred in invalidating the Project EIR based on its alleged failure to disclose the potential impact of the Project on the salmon in the Cosumnes River.[FN13]

FN13. The Society has requested that we take judicial notice of the judgment and peremptory writ of mandate issued by the trial court following the appeal in the *Vineyard* case. Because we have concluded the Society's challenge to the EIR here based on the

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City's reliance on the Sunrise Douglas Community Plan EIR was not preserved for review by the exhaustion of administrative remedies, what has happened to the Sunrise Douglas Community Plan EIR on remand from the Supreme Court in the *Vineyard* case is of no consequence to our decision. Accordingly, we deny the Society's request for judicial notice.

****596** D

Compliance With And Amendment Of Mitigation Measures From The Sunrise Douglas Community Plan EIR

[11] The Sunrise Douglas Community Plan included a mitigation measure (BR–2) that required any future project proponent to "submit a wetland delineation for the proposed development area, and a detailed plan which describes the specific methods to be implemented to avoid and/or mitigate any project impacts upon wetlands" "[i]n conjunction with the filing and processing of applications for future development entitlements (such as tentative subdivision maps or development plans)." The Sunrise Douglas Community Plan also contained another mitigation measure (BR–4) that required project applicants to obtain various necessary permits from other agencies "[p]rior to approval of any future development projects (such as tentative subdivision maps, development plans, improvements plans)."

The Project applicants here proposed to change those mitigation measures to allow the required actions to be delayed so that they would have to be taken only "[p]rior to approval of any improvement plans or grading permits." The City approved the change and amended the Sunrise Douglas Community Plan accordingly along with its approval of the Project.

In the trial court, the Society argued the City violated CEQA by approving the Project without requiring compliance with mitigation measures BR–2 and ***634** BR–4 in their unamended form. Essentially the Society's argument was that CEQA did not allow the City to amend the mitigation measures once they were final. In its opposition, the City argued (among other things) that neither the Society nor any other party had raised this issue in the administrative proceedings. The trial court agreed that administrative remedies had not been exhausted on this issue. In reaching this conclusion, the court determined the Society's comments were not sufficient to preserve the issue, and specifically noted that the Society had "not cited any evidence in the record demonstrating that any other party raise th[is] issue[ ] in a manner that could preserve [it] for judicial review."

In its cross-appeal, the Society asserts the trial court erred on this point. In support of its argument, the Society does not rely on any comment it made in the administrative proceeding. Instead, the Society identifies (for the first time) comments made by USEPA and the Service that it claims were sufficient to satisfy the exhaustion doctrine. As the City points out, however, the comments on which the Society relies do not mention mitigation measures BR–2 and BR–4, nor do those comments tend to suggest in any manner that the City violated CEQA by amending those mitigation measures.

The Society asserts that "[b]ased on these comments, the City was on notice that the Project did not meet the relevant agenc[ies'] permitting requirements, as mandated by ... mitigation measures BR–2 and BR–4." But even if this is true, it does not assist the Society on the exhaustion issue. Assuming the City could determine, based on these comments, that the two federal agencies did not believe their permitting requirements would be met by the Project, such information would not have given the City notice of any alleged problem with its amendment of mitigation measures BR–2 and BR–4, let alone notice of the specific assertion the Society later sought to raise in the trial court—that the City violated CEQA by amending the mitigation****597** measures. As we have previously observed, CEQA section 21177 requires that someone must have presented the alleged ground of noncompliance with CEQA to the agency during the administrative proceeding. That did not happen here with respect to the Society's complaints about the amendment of mitigation measures BR–2 and BR–4. Accordingly, the trial court correctly determined that administrative remedies were not exhausted on this issue.

In summary, we conclude the trial court erred in finding the City violated CEQA in its certification of the Project EIR and approval of the Project. The Society failed to establish any such violation on which administrative remedies were exhausted. Accordingly, the trial court should have ruled in favor of the

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City and Jaeger on the first four causes of action in the Society's second amended petition and erred in doing otherwise.

***635** II

The Project's Consistency With The City's General Plan

In the trial court, the Society argued the approval of the Project had to be set aside because the Project was "inconsistent with, or will frustrate the implementation of, the City['s] ... General Plan." In support of this argument, the Society invoked the following provisions from the natural resources element of the plan:

Policy NR.1.1 provides that the City will "[p]rotect rare, threatened, and endangered species and their habitats in accordance with State and federal law." To effectuate this policy, Action NR.1.1.2 provides the City will "[r]eview projects through the entitlement process and CEQA analysis to ensure that they comply with this policy if the site contains unique habitat, creeks, and/or wooded corridors." Action NR.1.1.3 provides that "[a]s part of the consideration of development applications for individual Planning Areas containing habitats that support special-status plant and animal species that are planned to be preserved, the City shall require that these preserved habitats have interconnections with other habitat areas in order to maintain the viability of the preserved habitat to support the special-status species identified. The determination of the design and size of the 'interconnections' shall be made by the City, as recommended by a qualified professional, and will include consultation with the California Department of Fish and Game and U.S. Fish and Wildlife Service."

Policy NR.1.7 provides that "[p]rior to project approval the City shall require a biological resources evaluation for private and public development projects in areas identified to contain or possibly contain listed plant and/or wildlife species based upon the City's biological resource mapping provided in the General Plan EIR or other technical materials." To implement this policy, Action NR.1.7.1 provides that "[f]or those areas in which special-status species are found or likely to occur or where the presence of species can be reasonably inferred, the City *shall* require mitigation of impacts to those species that *ensure* that the project does not contribute to the decline of the affected species populations in the region to the extent that their decline would impact the viability of the regional population. Mitigation *shall* be designed by the City *in coordination with* the U.S. Fish and Wildlife Service (USFWS) and the California Department of Fish and Game (CDFG), and shall emphasize a multi-species approach to the maximum extent feasible. This may include development or participation in a habitat conservation plan."

****598** Based on the foregoing provisions, the Society argued the Project was inconsistent with the City's general plan because the City did not coordinate with the Service in designing mitigation for the impacts of the Project on ***636** special-status species. The Society noted the Service had "objected repeatedly to the biological resource mitigation measures proposed in the EIR and adopted by the City." The Society also argued the City's mitigation measures were inadequate to ensure the Project would not impact the viability of regional populations of special-status species because the Service and other agencies had "unanimously informed the City that the mitigation measures proposed in the EIR and adopted by the City *are not* adequate to support such a finding." Finally, the Society argued approval of the Project was inconsistent with the general plan provision requiring interconnection of habitat preserves determined in consultation with the Service "because the federal agencies have set forth, with specificity, the minimum habitat connectivity required *within* and *across* the [Sunrise Douglas Community Plan] area required to 'maintain the viability of the preserved habitat to support the special-status species identified' " and "because implementation of this project will *destroy* the central hub of connectivity for the wetland and vernal pool habitats in the [Sunrise Douglas Community Plan] area." In making this argument, the Society again emphasized the position taken by the Service and other agencies in opposition to the Project.

The trial court agreed with the Society, concluding that "the project is not consistent with, and does not comply with, mandatory requirements of [the City]'s General Plan regarding interconnection of preserved habitat areas that support special-status plant and animal species, and regarding mitigation of impacts on such species to ensure that the project does not contribute to the decline of the affected species population, i.e., there is no substantial evidence

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to support a finding that the project is consistent with, and complies with, such mandatory requirements of the General Plan."

[12] "Every county and city must adopt a 'comprehensive, long-term general plan for the physical development of the county or city....' (Gov.Code, § 65300.) 'The general plan has been aptly described as the "constitution for all future developments" within the city or county.... "[T]he propriety of virtually any local decision affecting land use and development depends upon consistency with the applicable general plan and its elements" [statutorily required elements include land use, circulation, housing, conservation, open space and noise].' [Citations.] 'The consistency doctrine has been described as "the linchpin of California's land use and development laws; it is the principle which infuse[s] the concept of planned growth with the force of law." ...' " (*Families Unafraid to Uphold Rural etc. County v. Board of Supervisors* (1998) 62 Cal.App.4th 1332, 1336, 74 Cal.Rptr.2d 1 (*FUTURE*).)

Specifically with reference to development projects like the one here involving a subdivision, the Planning and Zoning Law provides that "[n]o ***637** local agency shall approve a tentative map, or a parcel map for which a tentative map was not required, unless the legislative body finds that the proposed subdivision, together with the provisions for its design and improvement, is consistent with the general plan...." (Gov.Code, § 66473.5.)

[13] On appeal, the City first contends the "trial court erred by using the incorrect standard of review" in assessing the Society's argument that the Project is inconsistent with the City's general plan. ****599** According to the City, "the trial court here mistakenly applied CEQA's 'substantial evidence' test," when "[t]he proper analysis ... 'is whether the decision is arbitrary, capricious, *entirely lacking in evidentiary support,* unlawful, or procedurally unfair.' "

The City's argument fails for two reasons. First, because we—like the trial court—review the agency's decision, not the trial court's decision, it does not matter what standard of review the trial court used because we will use the correct standard in any event. Second, there is no difference between the two standards of review, at least when it comes to determining whether the agency's finding of consistency with the general plan has the requisite evidentiary support in the record. Division Three of the Fourth Appellate District explained this very point in the decision on which the City relies— *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 32 Cal.Rptr.3d 177. There, the court explained that "[w]e review decisions regarding consistency with a general plan under the arbitrary and capricious standard. These are quasi-legislative acts reviewed by ordinary mandamus, and the inquiry is whether the decision is arbitrary, capricious, entirely lacking in evidentiary support, unlawful, or procedurally unfair. [Citations.] Under this standard, we defer to an agency's factual finding of consistency unless no reasonable person could have reached the same conclusion on the evidence before it." (*Id.* at p. 782, 32 Cal.Rptr.3d 177.) In a footnote, however, the court also explained as follows: "We note some cases review consistency with a general plan under the abuse of discretion standard applicable to administrative mandamus, inquiring if the agency has proceeded as required by law and the decision is supported by substantial evidence. Under the substantial evidence prong, a common formulation asks if a reasonable person could have reached the same conclusion on the evidence. [Citation.] Since this is the same test used under the arbitrary and capricious standard for factual findings, for purposes of this case we see no inconsistency." (*Id.* at p. 782, fn. 3, 32 Cal.Rptr.3d 177.) We agree with this analysis. Thus, the question for us—just like it was for the trial court—is whether the City's finding of consistency with the general plan was reasonable based on the evidence in the record.

[14][15][16] "A project is consistent with the general plan ' "if, considering all its aspects, it will further the objectives and policies of the general plan and not ***638** obstruct their attainment." ' [Citation.] A given project need not be in perfect conformity with each and every general plan policy. [Citation.] To be consistent, a subdivision development must be 'compatible with' the objectives, policies, general land uses and programs specified in the general plan." (*FUTURE, supra,* 62 Cal.App.4th at p. 1336, 74 Cal.Rptr.2d 1.)

[17] In addressing the Society's claims of inconsistency between the Project and the City's general plan, it is important to keep in mind the deferential nature of our review. It is not for us to substitute our judgment for that of a local agency in making a de-

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termination of consistency; rather, the agency's determination "comes to this court with a strong presumption of regularity." (*Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 717, 29 Cal.Rptr.2d 182.) "Once a general plan is in place, it is the province of elected city officials to examine the specifics of a proposed project to determine whether it would be 'in harmony' with the policies stated in the plan. [Citation.]****600** It is, emphatically, *not* the role of the courts to micromanage these development decisions." (*Id.* at p. 719, 29 Cal.Rptr.2d 182.) Thus, as long as the City reasonably could have made a determination of consistency, the City's decision must be upheld, regardless of whether *we* would have made that determination in the first instance.

We begin with the claimed inconsistency of the Project with Action NR.1.1.3. No one disputes the Project site "contain[s] habitats that support special-status plant and animal species that are planned to be preserved." As we have noted, the Project includes an approximately 90–acre open space/wetland preserve located in the southwest portion of the Project site that apparently encompasses 5.61 acres of habitat for the vernal pool fairy and tadpole shrimp that are to be preserved as part of the Project. The question remaining with regard to Action NR.1.1.3 is whether the City could have reasonably determined that this preserved habitat has "interconnections with other habitat areas in order to maintain the viability of the preserved habitat to support the special-status species identified" and that the City's "determination of the design and size of the 'interconnections' " "include[d] consultation with the ... Service." The Society argued the answer to this question was "no," but we are not persuaded.

Essentially the Society's position was that the interconnection between the habitat to be preserved on-site and adjacent habitat areas was insufficient to maintain the viability of the preserved habitat to support the vernal pool fairy and tadpole shrimp because the design of the Project was inconsistent with the federal agencies' conceptual-level strategy for the Sunrise Douglas Community Plan area as a whole. In the Society's view, because the conceptual-level strategy "set forth ... the minimum habitat connectivity" the federal agencies concluded was acceptable, the Project could not provide ***639** the interconnectivity required by the City's general plan because of the Project's inconsistency with what the federal agencies deemed necessary.

[18] As we have previously observed, however, in responding to the Society's substantial evidence argument under CEQA, showing evidence of a disagreement between the City and other agencies is not enough to carry the burden of showing a lack of substantial evidence to support the City's finding. Here, where the essential question is one of reasonableness, the Society—as the party challenging the City's determination—bore the burden of showing that the City's determination was unreasonable. In other words, the Society had to show why, based on all of the evidence in the record, the City could not have reasonably determined that the interconnectivity it was requiring between the habitat to be preserved on-site and adjacent habitat areas would be sufficient to maintain the viability of the preserved on-site habitat to support the vernal pool fairy and tadpole shrimp. To carry this burden, it was not enough for the Society to simply point to the fact that the Service and other agencies viewed the interconnectivity as insufficient for this purpose; the Society had to show that the City's contrary conclusion *was not reasonable* based on *all* the evidence before the City at the time of its determination. The Society did not do this. Accordingly, the Society failed to carry its burden on this point.

[19] To the extent the Society's claim of inconsistency between the Project and Action NR.1.1.3 in the City's general plan rested on the suggestion that the City's "determination of the design and size of the 'interconnections' " did not "include[ ] consultation with the ... Service," the ****601** claim fails on that ground as well. The question is whether the City reasonably could have decided, in approving the Project, that its determination regarding interconnectivity included the "consultation" with the Service required by the general plan. One of the meanings of the word "consult" is to "to ask the advice or opinion of." (Merriam–Webster's Collegiate Dict., (11th ed.2006) p. 268, col. 1.) Here, it is undisputed that the City solicited public comment on the Project and that the City received and responded to comments from the Service on the Project. Given the meaning of the word "consult" we have noted, the City reasonably could have determined that by soliciting and considering comments from the Service, it engaged in the "consultation" with the Service required by the gen-

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eral plan. Accordingly, the Society's claim of inconsistency between the Project and Action NR.1.1.3 in the City's general plan fails.

[20] That brings us to the claim of inconsistency with Action NR.1.7.1. No one disputes the Project site is an area "in which special status species are found or likely to occur or where the presence of species can be reasonably inferred." Thus, under this general plan provision, the City had to "require ***640** mitigation of impacts to those species that *ensure* that the project does not contribute to the decline of the affected species populations in the region to the extent that their decline would impact the viability of the regional population." In addition, the required mitigation was to "be designed by the City *in coordination with* the U.S. Fish and Wildlife Service (USFWS) and the California Department of Fish and Game (CDFG)."

Did the City "require mitigation of impacts" to the special-status species found or likely to occur on the Project site? Unquestionably it did; the mitigation measures the City required have been discussed extensively above. That left two questions for the City in determining whether the Project was consistent with Action NR.1.7.1: (1) was the required mitigation sufficient to ensure the Project did "not contribute to the decline of the affected species populations in the region to the extent that their decline would impact the viability of the regional population," and (2) was the required mitigation "designed ... in coordination with the U.S. Fish and Wildlife Service (USFWS) and the California Department of Fish and Game (CDFG)"?

In arguing the Project was inconsistent with Action NR.1.7.1 because the City's mitigation measures were insufficient to ensure the Project would not "contribute to the decline of the affected species populations in the region to the extent that their decline would impact the viability of the regional population," the Society asserted the Service and other agencies had "unanimously informed the City that the mitigation measures proposed in the EIR and adopted by the City *are not* adequate to support such a finding." As we have observed, however, showing evidence of a disagreement between the City and other agencies is not enough to carry the Society's burden in attacking the City's finding of consistency. To carry its burden of showing that the Project was inconsistent with the City's general plan in this regard, the Society had to show, based on *all* the evidence before the City regarding the mitigation measures the City required, that the City could not have reasonably determined those measures would prevent the Project from impacting the viability of the regional populations of vernal pool fairy and tadpole shrimp. Merely pointing to what other agencies thought on this point was not enough to carry that burden. Accordingly, this aspect of the Society's claim that the Project is inconsistent with ****602** Action NR.1.7.1 in the City's general plan fails.

[21] That leaves us with the Society's challenge to the consistency of the Project with the provision in Action NR.1.7.1 that required the mitigation to be "designed ... 'in coordination with' the U.S. Fish and Wildlife Service (USFWS) and the California Department of Fish and Game (CDFG)." According to the Society, "The City did not coordinate with [the Service]. It approved the Project over [the Service's] repeated objections that the proposed biological resource mitigation measures were inadequate."

***641** In response, the City argues this provision in the general plan was satisfied because the Service was "consulted and [its] views made known during the EIR process." The City argues that to "coordinate" means "to 'negotiate with others in order to work together effectively,' " nd "[t]he City satisfied its obligation of trying to work together with [the Service]" by "solicit[ing], carefully consider[ing], and respond[ing] to comments from [the Service]."

The definition of "coordinate" the City cites is a valid one (see New Oxford Dict. (2001) p. 378, col. 2), but we believe that even under this definition the concept of "coordination" means more than *trying* to work together with someone else. Even under the City's definition of the word, "coordination" means negotiating with others *in order to work together effectively.* To "coordinate" is "to bring into a common action, movement, or condition"; it is synonymous with "harmonize." (Merriam–Webster's Collegiate Dict., *supra,* at p. 275, col. 1.) Indeed, the very dictionary the City cites for the definition of the word "coordinate" defines the word "coordination" as "cooperative effort resulting in an effective relationship." (New Oxford Dict., *supra,* at p. 378, col. 3.)

Although the City suggests "coordination" is

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synonymous with "consultation"—and therefore the City satisfied its "coordination" obligation under the general plan at the same time it satisfied its "consultation" obligation under the plan—that is not true. While the City could "consult" with the Service by soliciting and considering the Service's comments on the draft EIR, the City could not "coordinate" with the Service by simply doing those things. The City may be correct in asserting that "[c]onsultation is not a synonym for 'agreement,' " but Action NR.1.7.1 required more than "consultation" with the Service; it required "coordination," and by definition "coordination" implies some measure of cooperation that is not achieved merely by asking for and considering input or *trying* to work together. Had the City intended the obligation under Action NR.1.7.1 to be one of mere "consultation," it could have used that word, as it did in Action NR.1.1.3. The fact that it did not do so supports the conclusion that the City intended "coordination" to have a different meaning than "consultation," consistent with the dictionary definitions of those words.

That the word "coordination," as used in the City's general plan, implies a measure of cooperation is apparent not only from the dictionary definition of the word, but also from the context in which the word is used in the plan. Essentially, the plan provides that when development projects will occur in areas where special-status species are found or likely to occur, the City will require mitigation for the impacts of development on those species, and the mitigation will be designed in coordination with the Service. Cooperation is important in this context—particularly with regard to this Project—because, ***642** as the City admitted in its response to the Service's comments on the draft EIR, "If the ****603** City approves the project, the applicants still need to obtain Clean Water Act permits from the Corps ..., which will consult with the ... Service, pursuant to Section 7 of the Endangered Species Act, as part of its process of considering those permits." Because the Service will have a role in the issuance of later permits for the Project, "coordination" between the City and the Service in designing mitigation for the impacts of the Project on special-status species like the vernal pool fairy and tadpole shrimp serves the laudable purpose of minimizing the chance the City will approve the Project, only to have later permits for the Project denied because of the Service's disapproval of the mitigation measures the City imposed on the Project in the absence of "coordination" with the Service.

Unlike the City, we do not read this "coordination" requirement as "requir[ing] the City to *subordinate* itself to state and federal agencies by implementing their comments and taking their direction." At the same time, however, we cannot reasonably deem this "coordination" requirement satisfied by the mere solicitation and rejection of input from the agencies with which the City is required to coordinate the design of mitigation measures for the Project. Although our standard of review on the interpretation of the general plan is highly deferential, "deference is not abdication." (*People v. McDonald* (1984) 37 Cal.3d 351, 377, 208 Cal.Rptr. 236, 690 P.2d 709.) Because we conclude the City's interpretation of the word "coordination" in this context is unreasonable, deference to the City's interpretation of its general plan in this instance is unwarranted. Thus, we conclude the trial court ultimately did not err in determining the City violated the Planning and Zoning Law because the Project is inconsistent with Action NR.1.7.1 in the City's general plan.

III

Conclusion

For the reasons stated above, the trial court erred in concluding the certification of the Project EIR and the approval of the Project violated CEQA. The trial court did not err in concluding the approval of the Project violated the Planning and Zoning Law, but the only valid basis for this conclusion is that the City could not have reasonably determined the mitigation for impacts of the Project on the vernal pool fairy and tadpole shrimp was designed "in coordination" with the Service. Because our conclusion will require the trial court to direct the issuance of a different writ of mandate to the City, the present judgment in favor of the Society must be reversed. We leave it to the trial court in the first instance to determine the terms of the judgment to be entered on remand consistent with this opinion.

***643** DISPOSITION

The judgment is reversed and the trial court is instructed to enter, consistent with this opinion, a new and different judgment granting in part and denying in part the Society's petition for writ of mandate. The parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a).)

We concur: NICHOLSON, Acting P.J., and HULL, J.

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Cal.App. 3 Dist.,2009.
California Native Plant Soc. v. City of Rancho Cordova
172 Cal.App.4th 603, 91 Cal.Rptr.3d 571, 09 Cal. Daily Op. Serv. 3689, 2009 Daily Journal D.A.R. 4381

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Exhibit K

ENDANGERED HABITATS LEAGUE, INC. V. COUNTY OF ORANGE, 131 CAL. APP. 4th 777, 794 (2005)

Court of Appeal, Fourth District, Division 3, California.
ENDANGERED HABITATS LEAGUE, INC., et al., Plaintiffs and Appellants,
v.
COUNTY OF ORANGE et al., Defendants and Respondents;
Rutter Development Company, Inc., Real Party in Interest.

No. G034416.
June 29, 2005.
Rehearing Denied July 29, 2005.
Review Denied Oct. 12, 2005.

Background: Environmental groups filed petitions for writs of mandate to compel county to set aside its approval of development project and certification of environmental impact report (EIR) for development project, and cases were consolidated. The Superior Court, Orange County, Ronald L. Bauer, J., denied petitions. Groups appealed.

Holdings: The Court of Appeal, Bedsworth, J., held that:
(1) project was inconsistent with county's general plan in that it would cause impermissible increase in traffic;
(2) plan amendment was also inconsistent with general plan in allowing balancing of plan requirements, rather than compliance with requirements which were mandatory;
(3) EIR was insufficient in applying incorrect standard relating to "significant environmental impacts" under California Environmental Quality Act (CEQA); and
(4) EIR was insufficient in improperly deferring analysis and mitigation of construction noise and related impacts.

Reversed and remanded.

West Headnotes

[1] Zoning and Planning 414 1383(2)

414 Zoning and Planning
414VIII Permits, Certificates, and Approvals
414VIII(A) In General
414k1379 Maps, Plats, and Plans; Subdivisions
414k1383 Grounds for Grant or Denial; Conformity to Regulations
414k1383(2) k. Streets and roads; traffic considerations. Most Cited Cases
(Formerly 414k381.5)

Development project was inconsistent with county's general plan in that it would cause impermissible increase in traffic; growth management element of plan established policies for traffic improvement and public facilities needed for orderly growth and development, as measured by specified method of traffic analysis, according to which method impact of project would be unacceptable, and county's reliance on different method of traffic analysis, according to which impact would be much less, was unacceptable form of analysis under general plan.

[2] Zoning and Planning 414 1631

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)1 In General
414k1627 Arbitrary, Capricious, or Unreasonable Action
414k1631 k. Decisions of boards or officers in general. Most Cited Cases
(Formerly 414k610)

The appellate court reviews decisions regarding consistency with a general plan under the arbitrary and capricious standard, deferring to an agency's fact finding of consistency unless no reasonable person could have reached the same conclusion on the evidence before it.

[3] Zoning and Planning 414 1044

414 Zoning and Planning
414II Validity of Zoning Regulations
414II(A) In General
414k1044 k. Conformity of regulations to

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comprehensive or general plan. Most Cited Cases
(Formerly 414k30)

Zoning and Planning 414 ⚷1220

414 Zoning and Planning
414V Construction, Operation, and Effect
414V(A) In General
414k1220 k. Comprehensive or general plan. Most Cited Cases
(Formerly 414k30)

The general plan functions as a constitution for all future developments, and land use decisions must be consistent with the general plan and its elements.

[4] Zoning and Planning 414 ⚷1044

414 Zoning and Planning
414II Validity of Zoning Regulations
414II(A) In General
414k1044 k. Conformity of regulations to comprehensive or general plan. Most Cited Cases
(Formerly 414k30)

A project is consistent with the general plan if, considering all its aspects, it will further the objectives and policies of the general plan and not obstruct their attainment.

[5] Zoning and Planning 414 ⚷1044

414 Zoning and Planning
414II Validity of Zoning Regulations
414II(A) In General
414k1044 k. Conformity of regulations to comprehensive or general plan. Most Cited Cases
(Formerly 414k30)

A project's perfect conformity with a general plan is not required, but a project must be compatible with the objectives and policies of the general plan.

[6] Zoning and Planning 414 ⚷1044

414 Zoning and Planning
414II Validity of Zoning Regulations
414II(A) In General
414k1044 k. Conformity of regulations to comprehensive or general plan. Most Cited Cases
(Formerly 414k30)

A project is inconsistent with a general plan if it conflicts with a general plan policy that is fundamental, mandatory, and clear.

[7] Zoning and Planning 414 ⚷1160

414 Zoning and Planning
414III Modification or Amendment; Rezoning
414III(A) In General
414k1158 Particular Uses or Restrictions
414k1160 k. Changes to comprehensive or general plan. Most Cited Cases
(Formerly 414k167.1)

Plan amendment incorporated by county in its approval of development project was inconsistent with general plan in allowing balancing of plan requirements, rather than compliance with those plan requirements which were mandatory; amendment relaxed open space standards for tree preservation and grading, whereas mandatory provisions in plan specified more stringent tree preservation and grading standards.

[8] Environmental Law 149E ⚷604(2)

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek598 Adequacy of Statement, Consideration, or Compliance
149Ek604 Particular Projects
149Ek604(2) k. Land use in general. Most Cited Cases

Environmental impact report (EIR) which was certified by county for development project was insufficient in applying incorrect standard relating to "significant environmental impacts" under California Environmental Quality Act (CEQA); under CEQA and CEQA Guidelines, EIR must identify and discuss all significant environmental impacts, defined as substantial, or potentially substantial, adverse changes in environment, whereas this EIR restricted definition much more narrowly to effects that would cause reduction of plant or animal communities below statewide or regional self–perpetuating levels, or render a species threatened or endangered. West's

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Ann.Cal.Pub.Res.Code § 21068; 14 CCR §§ 15065(a), 15126(a).
See 4 Witkin, Summary of Cal. Law (9th ed. 1990) Real Property, § 60; Annot., Validity, Construction, And Application of Statutes Requiring Assessment of Environmental Information Prior to Grants of Entitlements for Private Land Use (1977) 76 A.L.R.3d 388.

[9] Environmental Law 149E 604(2)

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek598 Adequacy of Statement, Consideration, or Compliance
149Ek604 Particular Projects
149Ek604(2) k. Land use in general. Most Cited Cases

Environmental impact report (EIR) which was certified by county for development project was insufficient in improperly deferring analysis and mitigation of construction noise and related impacts; EIR merely provided for acoustical analysis, but omitted any criteria or alternatives in mitigation of noise impacts.

[10] Environmental Law 149E 604(2)

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek598 Adequacy of Statement, Consideration, or Compliance
149Ek604 Particular Projects
149Ek604(2) k. Land use in general. Most Cited Cases

Deferral of mitigation measures was permissible in environmental impact report (EIR), which was certified by county for development project, for dirt hauling, drainage, fuel modification, gnatcatcher habitat, tree restoration, and water quality impacts, even though final mitigation measures were not adopted, given firm commitment and standards for mitigation specified in EIR.

****179** Johnson & Sedlack and Raymond W. Johnson, Temecula; Snell & Wilmer and Richard A. Derevan, Irvine, for Plaintiffs and Appellants.

Benjamin P. DeMayo, County Counsel and Jack W. Golden, Deputy County Counsel, for Defendants and Respondents.

Law Offices of William D. Ross, William D. Ross, Diane C. DeFelice, Los Angeles, and Kypros G. Hostetter for Real Party in Interest.

***780** OPINION

BEDSWORTH, J.

This is an appeal from a judgment that denied petitions for a peremptory writ of mandate to compel the County of Orange to set aside various approvals for a development project, along with other relief. The appellants are Endangered Habitats League, Sierra Club, Rural Canyons Conservation Fund, Sea and Sage Audubon, Inc., California Native Plant Society, California Oak Foundation, and Ray Chandos (collectively Endangered Habitats League). Rutter Development Corporation, Inc. (Rutter) is the developer.

***781** Endangered Habitats League argues the project is inconsistent with the county's general plan, and an environmental impact report (EIR) fails to provide sufficient information to make an informed decision on the project. We agree and reverse.

* * *

The project at issue consists of two adjacent but non-contiguous sites in the Santa Ana Mountains, located near the intersection of Santiago Canyon Road and Live Oak Canyon Road. One is named Saddle Creek and the other Saddle Crest. They lie within the geographical area covered by the Foothill/Trabuco Specific Plan (specific plan).

****180** On January 28, 2003, the Orange County Board of Supervisors (Board or Board of Supervisors) approved area plans for the two sites (AP 99–03 for Saddle Creek and AP 99–07 for Saddle Crest).[FN1] It adopted Resolution 030–030, certifying the EIR as complying with the requirements of the California Environmental Quality Act (CEQA). (Pub. Res.Code, § 21000 et seq.) It also adopted Resolution 03–031, which found the project was consistent with the county's general plan. That resolution also found an amendment to the specific plan complied with CEQA, and approved the amendment (referred to in county terminology as a zone change). The actual amendment of the specific plan was made by Ordinance 03–009, passed at the same time. These actions followed.

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FN1. The area plans had been previously approved by the Orange County Planning Commission in a decision appealed by both Endangered Habitats and Rutter. The Board of Supervisors denied both appeals and upheld the planning commission.

Three separate petitions were filed seeking writs of both ordinary and administrative mandamus. (Code Civ. Proc., §§ 1085, 1094.5.) Since they raised similar questions of law and fact, the matters were consolidated. [FN2] The specifics of the land use plans involved and the EIR will be set out in the course of our discussion, along with the details of Endangered Habitats' ***782** arguments. The trial judge denied each of the petitions and entered judgment on all for the county and Rutter.

FN2. The three writ petitions are as follows: (1) *Endangered Habitats League, Inc., Sierra Club, Rural Canyons Conservation Fund, Sea and Sage Audubon Society, Inc., California Native Plant Society, and California Oak Foundation v. County of Orange et al.* (Super. Ct. Orange County, 2004, No. 03CC00065); (2) *Ray Chandos v. County of Orange et al.* (Super. Ct. Orange County, 2004, No. 03CC00070); and (3) *Ray Chandos v. County of Orange et al.* (Super. Ct. Orange County, 2004, No. 03CC00563).

The Endangered Habitats and first Chandos petitions sought a writ of mandate to set aside the various project approvals and certification of the EIR. The second Chandos petition requested a writ of mandate to set aside approval of final subdivision maps for the two sites, on much the same grounds as the earlier project approvals were attacked. The parties stipulated to consolidate the three actions because of similar questions of law and fact, and the cases were ordered consolidated for all purposes including trial.

I

[1] Endangered Habitats argues the project is inconsistent with the county's general plan because it will cause an impermissible increase in traffic on Santiago Canyon Road. We agree.

[2] We review decisions regarding consistency with a general plan under the arbitrary and capricious standard. These are quasi-legislative acts reviewed by ordinary mandamus, and the inquiry is whether the decision is arbitrary, capricious, entirely lacking in evidentiary support, unlawful, or procedurally unfair. (*Corona–Norco Unified School Dist. v. City of Corona* (1993) 17 Cal.App.4th 985, 992, 21 Cal.Rptr.2d 803 [zone change]; *Mitchell v. County of Orange* (1985) 165 Cal.App.3d 1185, 1191–1192, 211 Cal.Rptr. 563 [specific plan].) Under this standard, we defer to an agency's factual finding of consistency unless no reasonable person could have reached the same conclusion on the evidence before it. (*Id.* at p. 1338, 211 Cal.Rptr. 563.) [FN3]

FN3. We note some cases review consistency with a general plan under the abuse of discretion standard applicable to administrative mandamus, inquiring if the agency has proceeded as required by law and the decision is supported by substantial evidence. Under the substantial evidence prong, a common formulation asks if a reasonable person could have reached the same conclusion on the evidence. (See, e.g., *Families Unafraid To Uphold Rural etc. County v. Board of Supervisors* (1998) 62 Cal.App.4th 1332, 1338, 74 Cal.Rptr.2d 1.) Since this is the same test used under the arbitrary and capricious standard for factual findings, for purposes of this case we see no inconsistency.

****181** [3][4][5][6] All counties and cities must adopt a general plan for the physical development of their land. (Gov.Code, § 65300.) The general plan functions as a " 'constitution for all future developments,' " and land use decisions must be consistent with the general plan and its elements. (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 570, 276 Cal.Rptr. 410, 801 P.2d 1161.) A "project is consistent with the general plan if, considering all its aspects, it will further the objectives and policies of the general plan and not obstruct their attainment. [Citation.]" (*Corona–Norco Unified School Dist. v. City of Corona, supra,* 17 Cal.App.4th at p. 994, 21 Cal.Rptr.2d 803.) Perfect conformity is not required, but a project must be compatible with the objectives and policies of the general plan. (*Families Unafraid to Uphold Rural Etc. County v. Board of*

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Supervisors, supra, 62 Cal.App.4th at p. 1336, 74 Cal.Rptr.2d 1.) A project is inconsistent if it conflicts with a general plan policy that is fundamental, mandatory, and clear. (*Id.* at pp. 1341–1342, 74 Cal.Rptr.2d 1.)

The growth management element of the county's general plan establishes policies for traffic improvement and public facilities needed for orderly ***783** growth and development. Its declared purpose is, in part, "to mandate that growth and development be based upon the County's ability to provide an adequate circulation system...." A "traffic level of service policy" addresses the need for highway improvements when development increases traffic. County policy is that improvements must be made within a stated time after issuance of various permits so as to achieve level of service (LOS) D at intersections, and LOS C on Santiago Canyon Road. Here is the relevant language: "LOS C shall ... be maintained on Santiago Canyon Road links until such time as uninterrupted segments of roadway (i.e., no major intersections) are reduced to less than three miles." This policy requires compliance to be evaluated according to the county's Transportation Implementation Manual, which in turn provides that traffic analysis on Santiago Canyon Road "shall" use the methods described in the Highway Capacity Manual (HCM).

At issue is the approval of the area plans for the two sites that compose the project. The EIR reveals that under the HCM method, the project would cause the LOS on Santiago Canyon Road to fall to D/E in 2005 and to E by 2020. Under a different analysis, called the V/C method (for volume/capacity ratio), the results are acceptable—LOS B in both 2005 and 2020. The EIR concludes "the V/C methodology is considered more representative of actual conditions," and, relying on it, finds no significant impacts on Santiago Canyon Road.

The Board of Supervisors acknowledged the problem under the HCM method and likewise solved it by relying on the V/C analysis. In findings of fact in support of the EIR, the Board determined project impacts on transportation and circulation would be reduced to insignificance after mitigation. But the explanation for this finding reveals the Board's action was based upon uncritical adoption of the EIR's use of the V/C method: "Both short-range and long-range project and cumulative impacts to Santiago Canyon Road would be less than significant under the updated V/C analysis method. Existing and future LOS for this arterial exceed LOS 'C' and are therefore unacceptable ****182** ... under the HCM methodology. The V/C methodology is considered more representative of actual conditions.... Project impacts to Santiago Canyon Road, therefore, are considered less than significant."

It is clear the project is inconsistent with the general plan's traffic service level policy. The general plan requires LOS C as determined under the HCM method, and the project does not comply. That it does so under the V/C method is of no import, since the general plan is unambiguous in demanding the evaluation be made by the HCM method. The approval of the area plans, AP 99–03 (Saddle Creek) and AP 99–07 (Saddle Crest), must be set aside.

Rutter's several arguments for consistency are all based on misreadings—and misrepresentations—of the record. It contends the EIR establishes the ***784** Santiago Canyon Road "intersection" will operate at an acceptable level of service. That is misleading. The issue is the level of service on Santiago Canyon Road, not one intersection along it. So this does not show consistency.

Rutter argues the HCM method was used because the EIR considers it along with the V/C method. This is semantic sleight of hand. Both the EIR and the Board of Supervisors relied on the V/C method to find traffic levels acceptable, after acknowledging they were not under the HCM method. You do not "use" something by disregarding it.

Equally disingenuous is an argument that the V/C method was not used because it is not mentioned in sections of the EIR setting out thresholds of significance and mitigation measures. But neither has anything to do with measuring levels of service before or after the project. Any suggestion that the V/C method was not used in the EIR is frivolous.

A bolder argument seems to say the Board of Supervisors did not rely on the V/C method, and all that happened was "clumsy wording of the Board's findings that mention 'the V/C method.' " That flat out misrepresents the record. Here is what the Board said explaining why there was no significant impact on Santiago Canyon Road: "The V/C methodology is

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considered more representative of actual conditions.... Project impacts to Santiago Canyon Road, therefore, are considered less than significant." So it is crystal clear that the Board of Supervisors relied on the V/C method, and the V/C method alone, in approving the project.

Finally, Rutter asserts that required mitigation measures will bring Santiago Canyon Road up to HCM service level C. We cannot agree.

The mitigation measures in question are contributions to two road improvement programs for Santiago Canyon Road. One is the Santiago Canyon Road Major Thoroughfare and Bridge Fee Program. The other is a supplemental program to fund improvements to Santiago Canyon Road. The EIR states that "upon implementation" of these mitigation measures (along with others not relevant here), "impacts to transportation and circulation will be less than significant." The findings of fact adopted by the Board of Supervisors in approving the EIR essentially state the same thing.

The problem we have is that the EIR does not state mitigated impacts will be less than significant under the required HCM method. Since the EIR uses the V/C method to analyze traffic impacts initially, we cannot reasonably assume the statement about mitigated impacts now referrs to the HCM method.

***785** Moreover, the record citations offered by Rutter do not back up the claim that ****183** contributions to the fee programs will result in LOS C on Santiago Canyon Road. They show only the existence of "a fee program ... to fund future improvements to Santiago Canyon Road," along with a study to identify the needed improvements. This falls short of a mitigation measure that requires improving the road to HCM level C. A fee-based mitigation program is sufficient under CEQA if there is evidence that mitigation will actually occur (*Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 140–141, 104 Cal.Rptr.2d 326 [planned improvements included passing lane on one road segment and description of 12 proposed improvements for another stretch of highway].) But even where a developer's contribution to roadway improvements is reasonable, a fee program is insufficient mitigation where, even with that contribution, a county will not have sufficient funds to mitigate effects on traffic. (*Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 364, 110 Cal.Rptr.2d 579.) Since there is no evidence here of what improvements will be funded by the fee programs, nor that it will achieve HCM service level C, we cannot find the mitigated project is consistent with the general plan. The inescapable conclusion is the project conflicts with the general plan because of the impact it will have on traffic along Santiago Canyon Road.

II

[7] Endangered Habitats contends the specific plan amendment is inconsistent with the general plan in two other ways. First, it changes the rules to allow balancing of specific plan requirements, rather than compliance with all of them. Second, it exempts the project from otherwise mandatory specific plan requirements. We agree these are also fatal inconsistencies.

The growth management element of the general plan is again at issue. A policy entitled "transition areas for rural communities" provides, in relevant part: "New development within the ... Foothill–Trabuco Specific Plan planning area [ ] shall be rural in character and *shall comply with the policies of [that] plan* in order to maintain a buffer between urban development and the Cleveland National Forest."

The specific plan does not identify any "policies." [FN4] It does, however, distinguish between mandatory and permissive provisions. A "consistency checklist" in the appendix explains that " 'shall' indicates a mandatory ***786** [r]egulation to which there are no exceptions, while 'should' indicates a non-mandatory [g]uideline." The checklist states projects must be consistent with all applicable regulations, but the planning commission may approve deviations from the guidelines if it finds "the project is in *overall* compliance with the Guidelines and consistent with the Goals and Objectives of the Specific Plan."

FN4. The specific plan is divided into five sections—an introduction, specific plan components, land use regulations, development and design guidelines, and an appendix. The introduction includes subsections on goals and objectives, but not policies.

The specific plan amendment begins with the

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balancing provision: "In analyzing and considering applications for development and use within the Specific Plan area, the Director of Planning and Development Services, Planning Commission and Board of Supervisors shall not give precedence to one provision of the Specific Plan over another but shall balance consideration of Specific Plan development goals and policies so as to further overall Specific****184** Plan goals and policies while not hindering their attainment."

The amendment goes on to enact new regulations on tree preservation, grading, and open space that apply only to this project. For example, in the case of oak woodlands, the amendment provides: "For the Saddle Creek and Saddle Crest Area Plan areas ... the following shall apply." The new regulations follow. Then this: "Consistency with [the new regulations] shall exempt the Saddle Creek and Saddle Crest Area Plan areas from [the existing oak woodland regulations] herein and shall be regarded as satisfactorily preserving and protecting the oak woodlands on the subject properties."

The original tree preservation regulations required that oaks over 5 inches in trunk diameter, and sycamores over 35 inches, be transplanted unless the tree was "in poor health and would not survive transplantation." In that event, the tree was to be replaced according to a table that specified the size and number of replacement trees required. Under the amendment, oaks and sycamores may be replaced if they are "in poor health *or* would not likely survive transportation, *or* [were] determined to be infeasible for transportation as certified by an arborist...." (Emphasis added.) FN5

FN5. The regulations concerning tree replacement are found in the resources overlay component for oak woodlands, which are mandatory (§ II(C)(3)), and in the landscaping regulations (§ III(E)(1)).

Grading standards in the specific plan set out the maximum volume of earth that may be moved and maximum permitted changes to slope and elevation of sites. They state each project "shall preserve a minimum of sixty-six (66) percent of the site in permanent, natural open space...." Alternative grading standards permit approval of increased grading, slope, and elevation changes, but there is a trade-off: "The Alternative Grading ***787** Standards shall result in seventy (70) percent or more of the project site being preserved in *natural open space.*" (Emphasis added.) FN6

FN6. Grading standards are found in the land use regulations for the Upper Aliso Residential District, where the project is located. (§ III(D)(8)(h), (i)). The alternative grading standards appear in another section of the land use regulations that cover specific plan procedures. (§ III(G)(2)(d).)

The amendment relaxes the open space prerequisite for use of the alternative grading standards and, under the relaxed standard, it approves alternative grading. The new standard is: "The Saddle Creek and Saddle Crest Grading standard shall result in seventy (70) percent or more of each [site] ... being preserved in *permanent open space.*" (Emphasis added.) According to the EIR, uses allowed in "permanent open space" include "natural undisturbed open space," "river rock walls," unpaved "emergency utility easements," "remedial grading," FN7 "fuel modification," FN8 and tree transplanting.

FN7. Remedial grading is defined to include removal and re-compacting soil to prepare a building site and access, slope stabilization and drain installation to minimize erosion, and excavation for buttresses to reduce landslide potential.

FN8. Fuel modification involves removal of particularly flammable vegetation and replacement with more fire resistant varieties, and a fuel modification plan must be incorporated as a component of a required landscaping plan.

A

Endangered Habitats argues the amendment allows specific plan regulations to be balanced, and this conflicts with the general plan policy that new development must ****185** comply with all specific plan policies. It is right.

Preliminarily, we note the parties assume the specific plan policies are reflected in its mandatory provisions, the regulations. Without discussing the absence of any stated policies in the specific plan, they treat the general plan's direction regarding specific

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plan policies as applying to the latter's regulations. For purposes of this case, and this case only, we will assume that is correct.

The county's consistency finding recites the specific plan amendment (referred to as a zone change) is consistent with the general plan without explanation.[FN9] The evidence before the Board when it made the finding was a staff report on the amendment and the testimony of Brian Speegle, assistant director of planning, given at the public hearing held to consider the approvals and resolutions for the project.

FN9. The signed resolution that appears in the record does not include any explanation for the consistency finding. We note Rutter's brief cites more detailed findings attached as appendices to unsigned copies of two planning commission resolutions dated December 18, 2002 (Nos. 02–14 and 02–15), but these drafts from the planning commission resolutions are not probative of anything.

***788** The staff report says the amendment allows for balancing of specific plan goals and objectives, since they cannot all be satisfied in every project. "In staff's view, this has been the process that is typically used at both the general and the specific levels of planning.... [T]he language proposed for addition ... makes explicit what has been the practice. It would strengthen the F/TSP, although it does not represent a major change in approach to analyzing projects."

At the hearing, Speegle went further. Referring to the balancing provision, he said "there's a general amendment ... that would be applied throughout the specific plan area, and it explicitly permits a balancing of the competing policies *or requirements* of the specific plan so that inconsistency with one policy does not automatically disqualify a project from consideration." (Emphasis added.) A little later, he put it this way: "[T]he specific plan already explicitly provides for some balancing of development and design guidelines, for example ... the planning commission [can] find a project is in overall compliance with the guidelines without the project being consistent with each and every guideline. [¶] The specific plan amendment would extend this balancing to all specific plan policies *and regulations.*" (Emphasis added.)

We cannot uphold the consistency finding, since it is not one a reasonable person could reach on this evidence. The staff report said the amendment applies only to balancing goals and policies, already the practice, yet it acknowledged the amendment *would* change the approval practice (the amendment does not represent "a major change" in approach). And, of course, if the amendment merely confirmed the extant practice, why was it needed? Speegle was much more direct when he said the amendment allows specific plan "requirements" and "regulations" to be balanced. As assistant planning director, presumably he was as well versed as anyone on the amendment, and no one got up to correct or challenge him. It may be that no balancing of regulations was intended, and the amendment might be clarified on that point. But as it stands, the balancing provision is inconsistent with the general plan.

Rutter contends Speegle's interpretation of the balancing amendment was an unfortunate and inadvertent misstatement, and ****186** every other discussion of the issue in the record states only goals and policies are to be balanced. We are not persuaded. Speegle never said he spoke carelessly or corrected his statements. As for the record, the developer points to the staff report, several places where the amendment is quoted or paraphrased, and an after-the-fact November 18, 2003 letter from its lawyer to the Board of Supervisors regarding a then-upcoming hearing on tract maps for the two sites. Of these, only the staff report is relevant, and it does not support the consistency finding. As we have said, that finding cannot be sustained.

***789** B

Endangered Habitats contends the amendment's new regulations for this project are also inconsistent with the general plan, because they relax specific plan regulations otherwise applicable to the project. Right again.

The amendment gives the developer an unacceptable freebie. In effect, it exempts this project from specific plan regulations on tree preservation, grading, and open space, and substitutes new regulations that are less stringent. This, of course, directly contradicts the general plan policy that all new development must comply with all specific plan policies. Consistency requires more than incantation, and a county cannot articulate a policy in its general plan and then approve a conflicting project. (*Napa Citizens for Honest Gov-*

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ernment v. Napa County Bd. of Supervisors, supra, 91 Cal.App.4th at pp. 379–380, 110 Cal.Rptr.2d 579.) Since no reasonable person could have made the consistency finding on the record before us, it must be set aside as arbitrary and capricious. (*Families Unafraid to Uphold Rural Etc. County v. Board of Supervisors, supra,* 62 Cal.App.4th at p. 1338, 74 Cal.Rptr.2d 1.)

Rutter contends the consistency finding must be upheld because it is entitled to great weight and deference. But the developer makes no attempt to grapple with the evidence or provide us with a citation to something—anything—that reasonably supports the finding. Since no evidence in support of the finding has been identified, we cannot defer to it.

Rutter argues there is no inconsistency because the specific plan amendment need not comply with all specific plan policies, or all specific plan guidelines. The first point contends the general plan never says "all" specific plan policies must be met, so a conflict with some is acceptable. We cannot agree. The general plan states specific plan "policies" must be met, and that *means* all of them. The second argument is that the specific plan consistency checklist says a project need not be consistent with each and every *guideline.* That is true. The guidelines are permissive. But the checklist is unequivocal that projects must be consistent with all applicable *regulations,* which are mandatory. In the absence of that kind of consistency, these textual arguments are to no avail.

The developer relies on *Corona–Norco Unified School Dist. v. City of Corona, supra,* 17 Cal.App.4th at page 994, 21 Cal.Rptr.2d 803, for the proposition that a specific plan need not comply with all general plan goals and policies, provided it furthers them and does not obstruct their attainment. That is an accurate statement of the law, but Rutter makes no attempt to show how it is met here. In any event, the case is distinguishable. In *Corona–Norco,* a school district challenged approval of a city zoning change that permitted new residential ***790** development, arguing the failure to include conditions to assure adequate schools was inconsistent with the general plan. The court held approval of the zoning amendment was not arbitrary ****187** or capricious. It explained the general plan did not contain any specific, mandatory requirement that projects guarantee adequate school facilities, and there was no evidence existing schools would not suffice. (*Id.* at pp. 996–997, 21 Cal.Rptr.2d 803.) Here, the general plan *does* articulate a specific and mandatory policy, and it has not been met, so *Corona–Norco* is of no avail.

Equally misplaced is citation of *Napa Citizens for Honest Government v. Napa County Bd. of Supervisors, supra,* 91 Cal.App.4th 342, 110 Cal.Rptr.2d 579, for the proposition that specific plan amendments to benefit one project are well supported by case law. But that decision did not involve an amendment to allow one project to go forward, but rather an update of an entire specific plan for an airport industrial area. (*Id.* at pp. 353–353, 110 Cal.Rptr.2d 579.) Amending a specific plan for the entire area it covers is different from the present project-specific amendment.

Finally, Rutter argues there is no inconsistency because the amended regulations really do not make any important change to the specific plan. It insists the amended tree regulations promote an environmentally superior project, grading satisfies the alternative grading standards, and the amended open space requirement is essentially the same as the original. We cannot agree.

As to the amended tree regulations, whether this project is environmentally superior—in the developer's view—has no bearing on the issue at hand, which is consistency with the general plan. If the project does not comply with the general plan, neither we nor the developer can justify its approval on the basis that it appeals to *us.*

The project qualifies for alternative grading only because the threshold for it was changed. Under the changed standard, alternative grading standards could be invoked upon a showing of sufficient "permanent open space," rather than "natural open space." Rutter argues the two are the same, but they are not. There is a vast difference between "permanent open space" approved in the amended regulation and "natural open space" required by the original. It is true, as Rutter points out, that "natural" is not defined in the specific plan. But it has a recognized meaning—"produced or existing in nature; not artificial or manufactured" (Webster's New World Dict. (4th college ed.2002) p. 959), or "occurring in conformity with the ordinary course of nature." (Webster's 3d New Internat. Dict. (1981) p. 1506.) Many of the uses permitted in permanent open space are artificial and do not occur in the ordinary course of nature, such as rock walls,

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easements, remedial grading, fuel modification, and tree planting. It is obvious that alternative grading ***791** would not be permitted under the specific plan, because the "permanent" open space allowed by the amendment does not qualify as "natural" open space required under the specific plan. Since the amendment materially loosened the three regulations at issue, it is inconsistent with the general plan.[FN10]

FN10. In light of our holding that the specific plan amendment is inconsistent with the general plan, we do not reach Endangered Habitats' alternative argument that it also amounts to an impermissible de facto amendment of the general plan.

C

Endangered Habitats alternatively argues the specific plan amendment is invalid because it applies only to this project. This question turns on the interpretation of a statute that provides "the legislative ****188** body may amend all or part of an adopted general plan." (Gov.Code, § 65358, subd. (a).) A specific plan may be amended in the same manner as a general plan. (Gov.Code, § 65453.)

Endangered Habitats contends an element of a plan may be changed for the entire geographical area, but a change in generally applicable requirements that affects only part of the area is impermissible. Conceding it cannot find any authority on point, Endangered Habitats asserts a specific plan would be meaningless if it could be changed for each project that comes along. Rutter responds the argument was not raised below, it fails for lack of authority and, in any event, the plain meaning of "in part" includes a site-specific amendment.

We decline to consider the argument because the issue was not raised below at the administrative level. (See *A Local & Regional Monitor v. City of Los Angeles* (1993) 16 Cal.App.4th 630, 648, 20 Cal.Rptr.2d 228 [argument that EIR inconsistent with general plan waived because not raised below].) Endangered Habitats' contention it was brought up is not supported by the record. While numerous speakers at hearings before the Board of Supervisors and the Planning Commission asked them not to relax the specific plan, and some explained the amendment would render the specific plan internally inconsistent, no one broached the present statutory argument. On this record, the issue was waived.

III

[8] Endangered Habitats next argues the EIR is insufficient because it uses an incorrect legal standard, improperly defers mitigation, fails to consider a significant impact, and fails to consider the specific plan amendment balancing provision. We conclude the legal standard and deferral of mitigation are improper, so the EIR is inadequate and must be set aside.

***792** We review agency actions under CEQA to determine if there was a prejudicial abuse of discretion, which exists if the agency has not proceeded in a manner required by law or if its decision is not supported by substantial evidence. It is not our role to decide the correctness of an EIR's environmental conclusions, but only its sufficiency as an informational document. (*Citizens of Goleta Valley v. Board of Supervisors, supra,* 52 Cal.3d at p. 564, 276 Cal.Rptr. 410, 801 P.2d 1161.) "The court must uphold an EIR if there is any substantial evidence in the record to support the agency's decision that the EIR is adequate and complies with CEQA. [Citation.] [¶] CEQA requires an EIR to reflect a good faith effort at full disclosure; it does not mandate perfection, nor does it require an analysis to be exhaustive. [Citation.]" (*Dry Creek Citizens Coalition v. County of Tulare* (1999) 70 Cal.App.4th 20, 26, 82 Cal.Rptr.2d 398.)

A

The legal standard argument is that the EIR uses the wrong test for the threshold of significance of impacts on biological resources. It seems to.

An EIR must identify and discuss "all significant effects on the environment" of a proposed project (Pub. Resources Code, § 21100, subd. (b)(1); CEQA Guidelines (Guidelines) § 15126(a).[FN11]) A significant environmental effect is "a substantial, or potentially substantial, adverse change in the environment." (Pub. Resources Code, § 21068.) A project has a significant effect****189** on the environment if, among other things, it substantially reduces the habitat of a fish or wildlife species, causes a fish or wildlife population to drop below self-sustaining levels, threatens to eliminate a plant or animal community, or reduces the number or restricts the range of an endangered, rare, or threatened species. (Guidelines, § 15065(a).) [FN12]

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FN11. The CEQA Guidelines are regulations adopted to implement CEQA, codified at California Code of Regulations, title 14, chapter 3, sections 15000–15387.

FN12. Our statement in *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1273–1274, 15 Cal.Rptr.3d 176, that a project is deemed to have a significant impact on the environment as a matter of law if it reduced the habitat of a wildlife species, or reduces the number or range of an endangered, rare, or threatened species, was not intended as an exhaustive list of the components of "significant impact," but rather a compilation of the effects which rendered *that* particular EIR inadequate. It cites Guidelines section 15065, which lays out additional mandatory findings of significance. In this case, we again quote but some of the findings listed in that regulation, namely, those relevant to this case.

The instant EIR sets out "thresholds of significance" used to determine whether the project caused significant environmental impacts on biological resources. Its test is that a significant impact would be identified there is a "substantial effect" on enumerated biological resources.[FN13] This is qualified by ***793** the following definition: "*Substantial effect* means significant loss or harm of a magnitude which ... 1) would cause species or a native plant [or] animal community to drop below self-perpetuating levels on a statewide or regional basis; or, 2) would cause a species to become threatened or endangered."

FN13. The EIR provides an impact is significant if there is a substantial effect on the following: a species or native plant or animal community; a sensitive habitat; a critical, limited resource used by a threatened or endangered species; or the movement of a fish or wildlife species. A significant impact would also be identified if there is a direct loss of "individuals" of threatened or endangered species, or if the project is determined to be in "substantial conflict with adopted plans and policies (with respect to biological resources)."

The standard used in the EIR is therefore impermissibly lenient. The definition of substantial effect effectively limits significant environmental impact to reducing plant or animal communities below statewide or regional self-perpetuating levels, or making a species threatened or endangered. The proper standard, set out above, is considerably broader. The use of an erroneous legal standard is a failure to proceed in the manner required by law that requires reversal. (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 88, 118 Cal.Rptr. 34, 529 P.2d 66.)

Rutter argues that focusing on the definition of substantial effect is misleading, because the listed criteria are broader and state a proper legal standard. It is wrong. The EIR states an impact would be significant *only* if it results in a "substantial effect" on the listed criteria. The definition is a limiting factor, and it amounts to an improper legal standard for identifying significant environmental impacts.

B

[9] On deferred mitigation, Endangered Habitats contends the EIR improperly defers analysis and mitigation of eleven project impacts. It is correct as to one.

"Deferral of the specifics of mitigation is permissible where the local entity commits itself to mitigation and lists the alternatives to be considered, analyzed and possibly incorporated in the mitigation plan. [Citation.] On the other hand, an agency goes too far when it simply requires a project applicant to obtain a biological report and then comply with any recommendations that may be made in the report. [Citation.]" ****190**(*Defend the Bay v. City of Irvine, supra,* 119 Cal.App.4th at p. 1275, 15 Cal.Rptr.3d 176.) If mitigation is feasible but impractical at the time of a general plan or zoning amendment, it is sufficient to articulate specific performance criteria and make further approvals contingent on finding a way to meet them. (*Id.* at pp. 1275–1276, 15 Cal.Rptr.3d 176.)

The only problem we see is mitigation of construction interference from noise, supply depots, and vehicle staging areas. The EIR provides that before ***794** a grading permit is issued, the developer must submit an acoustical analysis describing the "exterior noise environment" and "preliminary mitigation measures, if required." Before a building permit may be issued, another acoustical report must be submitted

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to demonstrate structures have been designed to meet "exterior and interior noise standards" satisfactory to the manager of the county's building permit division. That individual must also be satisfied the developer will place supply stockpiles and vehicle staging areas "as far [away] as practicable." This is inadequate. No criteria or alternatives to be considered are set out. Rather, this mitigation measure does no more than require a report be prepared and followed, or allow approval by a county department without setting any standards.

[10] The remaining mitigation measures challenged by Endangered Habitats are sufficient, since they commit to mitigation and set out standards for a plan to follow. We consider each in turn.

Dirt hauling. During construction, there will be traffic disruption when dirt is hauled away from the sites. The EIR adequately says a construction vehicle plan must be developed and approved prior to issuing grading permits. It provides the plan must assure public safety, restrict the number of daily trips and limit or avoid them during peak hours, set up clearly marked no passing zones, and use "flaggers" at site entrances.

Drainage. Endangered Habitats contends mitigation of impacts on the drainage system is deferred because a study to determine the project's effect on existing drainage facilities is postponed. But the EIR states that impacts on hydrology and drainage are less than significant before mitigation, as well as after it, so we cannot see how waiting for this study makes any difference.

Fuel modification plans. Prior to the issuance of a grading permit, a fuel modification plan must be prepared. The plan has to comply with Orange County Fire Authority guidelines for such plans, and it must be approved by the Orange County Fire Authority. This is not improper deferral since, once again, there is a commitment to mitigate and adequate criteria to determine if the plan to be submitted is adequate.

Gnatcatcher habitat. The EIR states there will be impacts on the gnatcatcher from construction activities, apparently referring to the removal of its habitat in coastal sage scrub and scrub-chaparral ecozone. According to Endangered Habitats, mitigation is deferred because these impacts will be addressed sometime in the future. But the EIR sets out the possibilities—on-site or off-site preservation of similar habitat at a ratio of at least two to one, or one of several possible habitat loss permits from relevant agencies. We believe this enumeration of alternative mitigation measures saves the provision from improper deferral.

***795** *Replanting of trees.* One mitigation measure for the loss of trees is replanting new ones off site. The EIR allows the developer to seek approval for off-site replanting in the future, and it abandons this mitigation measure if approval cannot be ****191** obtained. But the EIR also says its finding of adequate mitigation does not rely on this mitigation measure, so there is no improper deferral here.

Tree restoration. Another mitigation measure for tree loss requires a tree restoration, maintenance, and monitoring plan to be prepared and approved prior to issuing grading permits. It provides the plan must "detail" long-term maintenance and monitoring, include requirements for replanting procedures, and include a contract with a certified arborist for at least 10 years. The arborist must make reports throughout the year and must be given decision-making power over tree care and maintenance. We find these standards sufficient.

Water quality issues. The problem is contaminated runoff from the project. A regional water quality control plan limits the pollutants that may be discharged into local waters. It also requires the county to develop its own plan to reduce pollutants from new development. At the time the EIR was prepared, the county's plan was being undated.

The EIR requires the developer to prepare a project water quality plan to reduce discharge into storm water runoff. It must incorporate "best management practices," which are a series of four traps and filters to remove various pollutants (one for trash, a second for biological matter, a third for nutrients and microbial contaminants, and a fourth to deal with fossil contaminants such as oil, grease, and hydrocarbons).

Endangered Habitats argues mitigation of runoff problems is improperly deferred based on four statements in the EIR. These concern water quality in general, fuel modification zones, Aliso Creek, and covenants, conditions, and restrictions (CC & R's).

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The first statement appears in a prefatory section entitled "proposed water quality improvements." It says "[t]o the extent feasible and in accordance with County codes policies and practices, project design features shall be implemented to reduce runoff from the site." The other statements appear in the EIR's ensuing discussion of the project design features and other conditions imposed to reduce runoff. As to fuel modification zones and Aliso Creek, the EIR says the best management practices and irrigation practices "will be implemented" and incorporated in the final water quality management program to reduce runoff. The EIR also requires the developer to prepare CC & R's that impose water quality restrictions on homeowner. Endangered Habitats does not find fault with the content of the CC & R's, but with the fact that it does not have to be prepared until some unspecified time in the future.

***796** There is no improper deferral on these issues. The general statement regarding proposed water quality improvements just describes what is to follow, and it is the later enumerated design features that count. The design features for fuel modification and Aliso Creek are adequate, since they require use of clearly identified standards in the form of the "best management practices." Nor is deferring *preparation* of CC & R's a problem where the content is laid out and concededly adequate. So while final mitigation measures have not been adopted in these areas, deferral is permissible because the EIR commits to it and lists standards to be incorporated in the mitigation plan. The net result is the EIR improperly defers mitigation in only one area—construction noise and related impacts.

C

Endangered Habitats also faults the EIR for not identifying the traffic increase ****192** on Santiago Canyon Road as a significant environmental effect, and either adopting mitigation measures or finding mitigation is infeasible. We agree.

As we have explained, the EIR's conclusion of no significant impact on Santiago Canyon Road cannot be sustained, since it sidesteps the HCM method of analysis required by the general plan. Nor can we sustain the conclusion that contributions to road improvement fee programs are adequate mitigation, for there is no evidence the mitigation will take place. So the EIR is inadequate for failing to identify and discuss the impact of increased traffic on Santiago Canyon Road.

D

Finally, Endangered Habitats argues the EIR should have analyzed the impact of the balancing provision. The argument goes like this: Because the provision allows trading-off regulations, it will have an impact on the environment as some regulations are forfeited in favor of others.

We need not reach this point. It is moot in light of our holding that the balancing provision is inconsistent with the general plan, which will require us to direct issuance of the writ of mandate to set it aside.

In fine, approval of this project was flawed. Since the project and the specific plan amendment are both inconsistent with the general plan, and the EIR is inadequate, the petitions for a writ of mandate should have been granted.

***797** The judgment appealed from is reversed. The matter is remanded to the trial court with directions to enter a writ of mandate to compel the Orange County Board of Supervisors to vacate approval of area plans AP 99–03 and AP 99–07, Resolution 03–030 certifying the EIR, Resolution 03–031 approving the specific plan amendment, and Ordinance 03–009 enacting the specific plan amendment. In addition, the trial court shall consider the additional requests for relief sought in the petitions in light of our holding that the writs must be granted. Appellants are entitled to costs on appeal.

WE CONCUR: RYLAARSDAM, Acting P.J., and MOORE, J.

Cal.App. 4 Dist.,2005.
Endangered Habitats League, Inc. v. County of Orange
131 Cal.App.4th 777, 32 Cal.Rptr.3d 177, 35 Envtl. L. Rep. 20,158, 05 Cal. Daily Op. Serv. 6710

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Exhibit L

DEFEND THE BAY V. CITY OF IRVINE, 119 CAL. APP. 4th 1261, 1274-76 (2004)

Court of Appeal, Fourth District, Division 3, California.
DEFEND THE BAY, Plaintiff and Appellant,
v.
CITY OF IRVINE et al., Defendant and Respondent;
The Irvine Company, Real Party in Interest and Respondent.

No. G032062.
June 29, 2004.

Background: Environmental group filed petition for writ of mandate to compel city to rescind its approval of environmental impact report (EIR) for large–scale development. The Superior Court, Orange County, No. 02CC00176,C. Robert Jameson, J., denied petition. Environmental group appealed.

Holdings: The Court of Appeal, Bedsworth, J., held that:
(1) sufficient evidence supported conclusion in EIR that job–to–housing ratio would not be adversely affected;
(2) sufficient evidence supported conclusion that mitigation of impact on agriculture was infeasible; and
(3) sufficient evidence supported conclusion that proposed mitigation measures would reduce biological impact of project to insignificant level.

Affirmed.

West Headnotes

[1] Environmental Law 149E 689

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek677 Scope of Inquiry on Review of Administrative Decision
149Ek689 k. Assessments and Impact Statements. Most Cited Cases

The reviewing court must uphold an environmental impact report (EIR) if there is any substantial evidence in the record to support the agency's decision that the EIR is adequate and complies with the California Environmental Quality Act (CEQA), which requires an EIR to reflect a good faith effort at full disclosure, but neither mandates perfection, nor requires an analysis to be exhaustive. West's Ann.Cal.Pub.Res.Code § 21000 et seq.

[2] Environmental Law 149E 673

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek673 k. Pleading, Petition, or Application. Most Cited Cases

Environmental Law 149E 689

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek677 Scope of Inquiry on Review of Administrative Decision
149Ek689 k. Assessments and Impact Statements. Most Cited Cases

An appellant challenging an environmental impact report (EIR) for insufficient evidence must lay out the evidence favorable to the other side and show why it is lacking, and a reviewing court will not independently review the record to make up for the appellant's failure to carry his burden.

[3] Environmental Law 149E 615

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek612 Evidence
149Ek615 k. Weight and Sufficiency. Most Cited Cases

Conclusion in environmental impact report (EIR) that large–scale development project would not adversely impact housing or employment growth was supported by substantial evidence, despite EIR's estimate that project would create more jobs than housing units, at ratio of 1:44; given existing job–housing ratio of 3:29 in area, project would have positive impact on overall ratio, and project would also add

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needed low and moderate income housing.
See 4 Witkin, Summary of Cal. Law (9th ed. 1990) Real Property, § 60.

[4] Environmental Law 149E ⚷604(2)

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek598 Adequacy of Statement, Consideration, or Compliance
149Ek604 Particular Projects
149Ek604(2) k. Land Use in General. Most Cited Cases

Conclusion in environmental impact report (EIR) that it was not feasible to mitigate agricultural impact of large–scale development project was supported by substantial evidence; large scale on–site agricultural mitigation was not economically viable, and would prevent city from improving its housing imbalance, given increasing land, water, and labor prices in area, environmental regulation, higher property taxes, and growing urbanization, and off–site mitigation was infeasible as there was no comparable land planned for agricultural use in general plan. West's Ann.Cal.Pub.Res.Code § 21061.1.

[5] Evidence 157 ⚷43(3)

157 Evidence
157I Judicial Notice
157k43 Judicial Proceedings and Records
157k43(3) k. Records and Decisions in Other Actions or Proceedings. Most Cited Cases

Court of Appeal would take judicial notice, in mandamus proceeding in which environmental group challenged city's approval of environmental impact report (EIR) for large–scale development, of judgment in different case involving city's application of mitigation measures to another project.

[6] Environmental Law 149E ⚷604(2)

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek598 Adequacy of Statement, Consideration, or Compliance
149Ek604 Particular Projects
149Ek604(2) k. Land Use in General. Most Cited Cases

Sufficient evidence supported conclusion in environmental impact report (EIR) that proposed mitigation measures would reduce biological impact of large–scale development project to insignificant level; requirement that potential landowner consult and cooperate with local conservation agencies, conduct surveys during breeding season, obtain permits, and adopt seven itemized avoidance measures in coordination with such agencies, and city's commitment to mitigation plan should habitats be found in project area, provided sufficient protection for endangered species of bird, species of lily which was conditionally covered species under regional conservation plan, and species of toad which was "sensitive" species requiring evaluation. West's Ann.Cal.Fish & G. Code § 2800 et seq.

[7] Evidence 157 ⚷13

157 Evidence
157I Judicial Notice
157k13 k. Phenomena of Animal and Vegetable Life. Most Cited Cases

Court of Appeal would not take judicial notice, in mandamus proceeding in which environmental group challenged city's approval of environmental impact report (EIR) for large–scale development, of fact that developer's environmental consultant conducted surveys for certain species of toad, which was classified "sensitive," found none, and the city accepted consultant's report as complying with mitigation measures for that animal, as such documents were not relevant since they were not part of the record upon which the EIR was approved.

[8] Mandamus 250 ⚷187.9(2)

250 Mandamus
250III Jurisdiction, Proceedings, and Relief
250k187 Appeal and Error
250k187.9 Review
250k187.9(2) k. Questions Considered. Most Cited Cases

Court of Appeal would entertain environmental group's appeal from trial court's denial of petition for writ of mandate to compel city to rescind its approval of environmental impact report (EIR) for large–scale

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development, despite mootness, where issue raised in appeal as to whether a public entity can approve a development project that creates more jobs than housing was a matter of public interest that was likely to recur, and parties refused to reveal terms of settlement that mooted appeal.

****178 *1264** Johnson & Cross, Kevin K. Johnson and Jared Phil Hanson, San Diego, for Plaintiff and Appellant.

Rutan & Tucker, Robert S. Bower and Jeffrey T. Melching, Costa Mesa, for Defendant and Respondent.

Latham & Watkins, Christopher W. Garrett, Amy G. Nefouse and Daniel P. Brunton, San Diego, for Real Party in Interest and Respondent.

***1265** OPINION

BEDSWORTH, J.

Defend the Bay appeals from a judgment that denied its petition for a peremptory writ of mandate to compel the City of Irvine (the City) to rescind its approval of an environmental impact report (EIR). It argues there is insufficient evidence to support conclusions regarding impacts in three areas—housing, agricultural resources, and biological resources. We disagree, and so affirm.

* * *

At issue is the City's plan for development of the Northern Sphere, a 7,743–acre site northeast of the former Marine Corps Air Station at El Toro. On June 4, 2002, the city council adopted a resolution certifying a final program EIR that authorized a General Plan amendment and zone change for the Northern Sphere. The instant writ petition followed.

The details of the EIR, and Defend the Bay's challenges, will be set out in the course of our discussion. Essentially, Defend the Bay alleges the City abused its discretion by not proceeding according to law, and further complains the City's decision is not supported by substantial evidence. The trial judge found the City had complied with the requirements of the California Environmental Quality Act (CEQA) (Pub. Res.Code § 21000 et seq.), and its actions were supported by the evidence.[FN1]

FN1. All subsequent statutory references are to the Public Resources Code unless otherwise indicated.

[1] We review CEQA decisions to determine if they are supported by substantial evidence in the record as a whole (§ 21168), and whether the agency abused its discretion by failing to proceed in a manner required by law. In this case, as in most, those questions revolve around the EIR. (§ 21168.5.) "An EIR is an informational document which provides detailed information to the public and to responsible officials about significant environmental effects of a proposed project. [Citations.] It must contain substantial evidence on those effects and a reasonable range of alternatives, but the decision whether or not to approve a project is up to the agency. [Citations.]" ****179***Goleta Union School Dist. v. Regents of University of California* (1995) 37 Cal.App.4th 1025, 1030, 44 Cal.Rptr.2d 110.) Review is confined to whether an EIR is sufficient as an informational document. "The court must uphold an EIR if there is any substantial evidence in the record to support the agency's decision that the EIR is adequate and complies with CEQA. [Citation.] [¶] CEQA requires an EIR to reflect a good faith effort at full disclosure; it does not mandate perfection, nor does it require an analysis to be exhaustive." (*Dry Creek Citizens Coalition v. County of Tulare* (1999) 70 Cal.App.4th 20, 26, 82 Cal.Rptr.2d 398.)

[2] ***1266** As with all substantial evidence challenges, an appellant challenging an EIR for insufficient evidence must lay out the evidence favorable to the other side and show why it is lacking. Failure to do so is fatal. A reviewing court will not independently review the record to make up for appellant's failure to carry his burden. (*Markley v. City Council* (1982) 131 Cal.App.3d 656, 673, 182 Cal.Rptr. 659.)

I

[3] Defend the Bay makes a series of arguments based on the EIR's estimate that the project will create more jobs than housing units—17,667 jobs and 12,350 housing units, for a jobs to housing ratio of 1.44. It regards that ratio as adverse, noting the City already has more jobs than housing (the ratio was 3.29 in 2000).

A

Defend the Bay first contends there is insuffi-

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cient evidence to support the EIR's conclusion the project will not have a significant adverse impact on housing or employment growth. It reasons the ratio of 1.44 exacerbates the housing shortage, so it cannot be regarded as insignificant. A related argument is that the cumulative impact of the housing shortfall is even greater when other projects are considered, and again the EIR fails to acknowledge this adverse impact. We are not persuaded.

In determining whether there are significant environmental impacts, the lead agency must consider direct, and reasonably foreseeable indirect, "physical changes in the environment." (CEQA Guidelines, Cal.Code Regs., tit. 14, ch. 3, § 15064(d).) [FN2] A "significant effect on the environment" is one that has both a substantial and adverse impact on physical conditions within the area affected by the project. (Guidelines, § 15382.) If a project will create jobs and bring people into the area, the EIR must discuss the resulting housing needs, but not in minute detail. It is enough to identify the housing required and its probable location. (*Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 367, 370–371, 110 Cal.Rptr.2d 579.)

FN2. The CEQA Guidelines (Guidelines), regulations adopted to implement CEQA, are codified at California Code of Regulations, title 14, chapter 3, sections 15000–15387.

An EIR must discuss cumulative impacts of a project when they are considerable. (Guidelines, § 15130(a).) Cumulative impacts are defined as two or more effects which, considered together, are "considerable or which compound or increase other environmental impacts." (*Id.,* § 15355.) The ***1267** cumulative impact from several projects is composed of the incremental environmental impact of the project at hand added to others that are closely related. "Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time." (*Id.,* § 15355(b).)

****180** Section 4.11 of the EIR deals with population and housing. It concludes the project impact on housing will be substantial but not adverse. The EIR explains the project will add low and moderate income housing, which is required by state "Fair–Share" housing law and a City affordable housing mandate. It will also add housing in "job-rich" Irvine and "contributes to a more balanced jobs/housing ratio." The calculus resulting in a conclusion the job/housing ratio will be improved is that with a current 3.29 figure, the 1.44 ratio for the project will bring down the City's overall ratio of jobs to housing. As to where the excess workers might be housed, the EIR explains: "The proposed project's employment component would ... help balance considerable future housing growth slated for ... south Orange County. [T]he south county areas are expected to remain housing rich through 2025, with a jobs/housing ratio of 1.05 [in one area] and 1.28 [in another]."

The EIR examines cumulative housing impacts of three different scenarios for development of other areas of the City. Taken together, the other proposed or planned development would also create more jobs than housing. So the cumulative impact of the Northern Sphere project is to push up the jobs to housing ratio. Apparently, without the Northern Sphere, the other projects have a ratio in the range of 7.5 to 8.2. Counting in the Northern Sphere, the combined figure for the proposed/planned projects drops to 3.8 to 4.0. The EIR concludes the cumulative housing impact is substantial but not adverse. The reasons give are the same as in the case of the Northern Sphere alone: "The proposed project's housing responds to city, regional, and state plans and policies which encourage more affordable housing, particularly in jobs-rich areas such as Irvine." The project also has a positive impact on the jobs to housing ratio.

The evidence supports the no-adverse-impact conclusion for the current project. Needed housing will be added, the city-wide imbalance of more jobs than housing will be ameliorated, and the shortfall in housing within the city will be made up by plentiful housing in adjacent communities. Whether we would agree that more jobs than housing is an adverse impact is not the question, and it is not our function to second-guess the City's decision. Rather, our role is to determine if the conclusion reached by the City has support in the record. It does.

Defend the Bay's view that a 1.44 jobs to housing ratio is adverse is a dissenting position. Implicit in this argument is the assumption that any ***1268** project that creates more jobs than housing has a significant adverse impact. But reasonable minds can

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differ about whether a lower jobs-to-housing ratio than that of the City ameliorates the problem or whether a ratio over .99 exacerbates it. That does not mean the City's conclusion lacks support in the record.

The same is true of the cumulative impacts, where the evidence also supports the conclusion of no adverse impact. There are benefits, the City decided they outweigh the detriments, and that is a choice it is entitled to make, within reason. So here, too, the EIR is sufficient.

B

Defend the Bay argues the project is inconsistent with the City's General Plan—a significant environmental impact which must be addressed in the EIR. But we cannot discern the claimed inconsistency.

Section 4.9 of the EIR deals with land use and planning impacts of the project. It considers whether the project is consistent with the land use elements of the ****181** City's General Plan. At issue is Objective A–4, entitled "Balanced Land Uses: Manage growth to ensure balanced residential and nonresidential development throughout the City." A detailed analysis is set out. The EIR concludes "the project provides a balanced set of land uses that addresses the housing, employment, circulation and open space objectives of Land Use Element Objective A–4."

Section 4.11 of the EIR (population and housing) lists the policies contained in the housing element of the General Plan. Policy C–1(e), "Balanced Land Use," includes this statement: "2000–2005 Objectives: Strive to improve the City's jobs-to-housing relationship, including matching type and price of housing to need generated by employment." There is also Objective C–8: "Balanced Employment/Residential Growth:" "Provide a range of housing opportunities to allow persons working in Irvine to also reside in the City."

Defend the Bay sees an inconsistency here because the project creates more jobs than housing and adds to the City's housing shortage. Thus, it says, there is no balance between jobs and housing. This is semantic manipulation. We are not dealing with assaying of minerals here. Balance does not require ***1269** equivalence, but rather a weighing of pros and cons to achieve an acceptable mix. The general plan requires the City to "strive to improve" the jobs-housing relationship. This project clearly does so. That Defend the Bay would strike a different balance than the City does not mean the project is inconsistent with the policies at issue. There is no significant environmental impact that would require discussion in the EIR.

C

Finally, Defend the Bay argues the EIR's analysis of alternatives to the project, and the Statement of Overriding Considerations adopted by the City, are legally insufficient because neither recognizes the project will create a housing imbalance. We disagree. A housing "imbalance" already exists; this project ameliorates it. That might not satisfy Defend the Bay; it might not have satisfied another city council. But it satisfied this one, and their decision is within the law. No legal authority is cited, and it seems to us Defend the Bay is again asking that we arrogate to ourselves a policy decision which is properly the mandate of the City. We cannot.

II

[4] Defend the Bay also challenges two aspects of the project's impact on agricultural resources. First, it contends there is insufficient evidence to support the EIR's conclusion it is not feasible to mitigate the impact of developing 3,100 acres of agricultural land (out of the 7,743 acre project). Second, it argues the EIR fails to discuss the impact of amending a portion of the City's General Plan dealing with agriculture. Neither point is persuasive.

The EIR addresses agricultural resources in section 4.2. It states the conversion of 3,100 acres of prime farmland is a "significant unavoidable adverse impact." To mitigate this impact, both on-site and off-site retention of agriculture were considered, but rejected as infeasible.

Under CEQA, "feasible" means "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." (§ 21061.1) On-site agricultural use was considered infeasible in the long term for several reasons. To begin with, large scale agriculture will not be economically viable in the long run in Orange County, ****182** because of increasing land prices and environmental regulation, higher water and labor costs,

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higher property taxes, competition from other parts of the state and foreign countries, and growing ***1270** urbanization. In addition, reducing the development site "would impede the City from achieving its General Plan goals and objectives for housing and improving the existing jobs/housing imbalance in the City in a fiscally sound manner." The goals and objectives in question, according to the City Council's findings of fact approving the EIR, are "provision of sufficient housing units to meet the City's identified housing needs, improvement of the existing job/housing imbalance, preservation of areas for biological habitat and open space, and the need to achieve 'fiscal balance' as the City builds out."

Off-site mitigation was also found infeasible. The EIR explains there is no other comparable land planned for agriculture in the General Plan. Placing agricultural restrictions on new parcels is a possibility, but it would face the same problems as on-site mitigation—lack of economic viability and conflict with General Plan goals for housing, biological habitat/open space, and fiscal balance.

A

Defend the Bay argues the conclusion that mitigation is not feasible is unsupportable. It contends the City's reasons for rejecting on-site mitigation are primarily economic-suggesting this is impermissible-and other reasons given by the City are wrong. As to off-site mitigation, Defend the Bay argues the City failed to consider the possibility of converting non-agricultural lands to agricultural use as a means of mitigating the present loss. We do not see it this way.

As to on-site mitigation, Defend the Bay's position is another instance of a policy disagreement with the City. But that does not vitiate the EIR's conclusions. Economic factors may be taken into consideration in determining what is feasible. (§ 21061.1.) So there is nothing impermissible in the City's finding that on-site agriculture is not feasible in the long term because it will not be economically viable.

Defend the Bay's main argument is the high value of the land does not make agriculture infeasible; water and labor costs, competition, and environmental regulation are irrelevant because the land is already in agricultural production; and urbanization has been caused by the City and the landowner. We note the first is an opinion, the second says nothing about the future prospects for large-scale agriculture, and the third, encroaching urbanization, is a fact regardless of its cause. At bottom, this is another area where Defend ***1271** the Bay disagrees with the City, a reasonable and principled position, but not one which in any way demonstrates a lack of evidentiary support for the City's conclusions.[FN3]

FN3. A related point is that the absence of agricultural tax abatements on the land does not make agriculture uses uneconomical, since prior abatements were given up by the landowner in anticipation of development. Even if true, a point on which we express no opinion, there is ample other evidence to support the conclusions regarding on-site mitigation.

The environmental organization contends this court previously held the financial benefits of development do not render agricultural uses infeasible, but that is a misrepresentation. The supporting citation is to the superior court minute order below, denying the instant writ petition. That is not a decision of this court, nor is it of any precedential value.

Defend the Bay also assails the EIR's finding that on-site mitigation would prevent the City from improving its housing imbalance. The EIR's reasoning is that retaining on-site agriculture would mean ****183** fewer new housing units, which otherwise would bring down the city wide jobs-to-housing ratio. Defend the Bay's position here, as in the case of housing impacts, is simply that the entire project exacerbates the housing imbalance rather than reducing it, because it adds more jobs than housing. As we have said, while that is one way to view the project, it is not the only way, and it does not mean the City's finding lacks support in the record. Since we conclude the reasons set out in section 4.2 of the EIR support the conclusion that on-site mitigation is not feasible, we do not consider Defend the Bay's additional arguments that reasons given in other parts of the EIR are insufficient.

With respect to off-site mitigation, Defend the Bay argues it is irrelevant that no suitable land within the city is currently planned for agriculture. It contends land could be sought elsewhere within the city's

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sphere of influence or the county, and such land need not now be zoned for agriculture. Again, we are not convinced.

This argument ignores the fact the City also rejected off-site mitigation because any new agricultural uses would face the same problems as on-site mitigation: the negative economics of long-term agriculture, and the conflict between agriculture and the General Plan. That is sufficient evidence to support the conclusion that off-site mitigation is not feasible.

[5] Defend the Bay points out the City did preserve 300 acres of off-site land in various locations for "metro-farming." This, it contends, demonstrates that off-site mitigation is possible, although the 300 acres is insignificant and insufficient. But the economic viability of small patches of farming in ***1272** scattered locations says nothing about the prospects for the long-term, large scale endeavors Defend the Bay would like to see, so this fact does not make its case,[FN4] and we can find no others that do.

FN4. The City moves for judicial notice of a judgment in a case involving a different project, arguing the judgment approved the same mitigation measures adopted here. The judgment states, among other things, that "[t]he City's measures for preservation of agricultural land in other areas of the City, including the Agricultural Legacy Program, are found to be sufficient by this Court." The motion is unopposed, and it is granted. That said, we hasten to add that the relevance of the judgment in question is not clear, since we are not told if the "Agricultural Legacy Program" is the same one Defend the Bay assails, nor why satisfaction of requirements on another project bears on this one.

B

Defend the Bay contends the EIR fails to discuss adequately the impact of amending Objective L–10 of the General Plan. This, it says, deprived the public of the opportunity to review and comment on the proposed amendment, which amounts to a failure to proceed in a manner required by law. We think not.

Objective L–10 deals with agriculture. The prior version read as follows: "Protect and preserve agriculture as a viable land use within areas designated agriculture ...." The amendment changes that to: "Encourage the maintenance of agriculture in undeveloped areas of the City until the time of development, and [ ] in areas not available for development."

The EIR discusses the proposed change in several places. In responses to comments received on the draft EIR, the final EIR discusses the proposed amendment of Objective L–10. Referring to an appendix that sets out the text of the old and new provisions, side by side, the response states the proposal makes two key changes: agriculture is no longer the sole appropriate land use, and emphasis is shifted from retention of agriculture as ****184** open space to retention of smaller-scale agricultural components for their heritage value.

Section 4.9 (Land Use and Planning) states that the General Plan provides, in Objective L–10, for protecting and preserving agriculture as a viable land use. It notes Policy (a) of Objective L–10 provides for maintenance of agriculture in areas so designated "*until the time of development.*" (Emphasis added.) It continues: "The project would result in the conversion of approximately 3,100 acres of Prime Farmland, Farmland of Statewide Importance, and Unique Farmland to non-agricultural uses. ...." The discussion concludes "the City must now establish ... what its future commitment to agricultural uses will be. The General Plan amendment that is part of the project will accomplish these necessary revisions to Objective L–10."

***1273** Defend the Bay faults this analysis as "buried" in the wrong section of the EIR (Land Use and Planning rather than Agricultural Resources), and it argues the analysis fails to give any details or consider the "fundamental nature of the policy shift" involved. Neither point is convincing. The wrong place argument, unsupported by any authority, is trivial in this context. The relevant inquiry is what is said. The details of the amendment *are* set out, and the nature of the proposed change is made clear in language that leaves little doubt of the magnitude and significance of the change. No authority is cited for the suggestion that "fundamental policy shifts" require more, and we see no reason to create such authority. It may be that there will be instances in which the placement of an analysis, combined with minimizing or obfuscating language, might vitiate its ef-

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fectiveness, but this is most definitely not that case. The discussion of the amendment to Objective L–10 is prominent and frank.

A related argument is that the discussion in question first appeared in the final EIR, after the public comment period closed, so there was no opportunity for public evaluation and opposition. This, too, is wide of the mark. The inclusion of new material in a final EIR is not fatal, since the final version must respond to comments on the draft EIR, with the result that "the final EIR will almost always contain information not included in the draft EIR." (*Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1124, 26 Cal.Rptr.2d 231, 864 P.2d 502.) What matters is whether "significant new information" is added after the public comment period closes. If so, the final EIR must be recirculated for public comment. (§ 21092.1; *Laurel Heights Improvement Assn. v. Regents of University of California, supra,* 6 Cal.4th at p. 1129–1130, 26 Cal.Rptr.2d 231, 864 P.2d 502.) Here, there is no claim the additions to the final EIR amounted to significant new information. The net result is that challenges to the project's impact on agricultural resources are of no avail.

III

[6] The final issue concerns impacts on biological resources. Defend the Bay argues the EIR improperly defers mitigation of significant impacts to three species, so the conclusion of "no significant impact on biological resources" is not supported by the record. We do not see it that way.

Any project that substantially reduces the habitat of a wildlife species, or reduces the number or range of an endangered, rare or threatened species, ***1274** is deemed to have a significant impact on the environment as a matter of law. (Guidelines, § 15065(a).) For these purposes, species ****185** include both animals and plants. (Guidelines, § 15380(a).)

In addition, a regional conservation plan that includes the City of Irvine and Orange County imposes further requirements. Pursuant to the Natural Community Conservation Planning Act of 1991 (Fish & G.Code, § 2800 et seq.), the Natural Communities Conservation Plan and Habitat Conservation Plan (NCCP/HCP) was adopted. It provides, among other things, that if "conditionally covered" species will be affected by a project, the United States Fish and Wildlife Service (USFWS) and the California Department of Fish and Game (CDFG) must be consulted, and a specific mitigation plan must be developed that satisfies the NCCP/HCP. Where species not conditionally covered are impacted, a permit must be obtained from the USFWS.

At issue are the Least Bell's Vireo (a bird), the Foothill Mariposa Lily, and the Western Spadefoot Toad. The vireo is an endangered species and conditionally covered, the lily is conditionally covered, and the toad is a "sensitive" species that apparently required evaluation. The EIR concludes that with proposed mitigation measures, the biological impacts of the project will be reduced to a level of insignificance.

According to the EIR, the Least Bell's Vireo habitat would be impacted by the project. The required mitigation turns on classification of that habitat. If the habitat is an area of "lesser long term conservation value," a special mitigation plan must be adopted in consultation with USFWS and CDFG. On the other hand, if the area has "long term conservation value," a permit is required from USFWS, absent which the impact on the bird would be significant. According to the EIR, the available data puts the area in the lesser conservation value category, but final determination is to be made by USFWS and CDFG.

Mitigation measures are provided. Prior to the approval of a tentative tract map, the landowner must: consult with the USFWS and CDFG; conduct surveys during the breeding season to determine if the birds are in fact present in the habitat area; obtain a determination regarding the long-term value of the habitat area; obtain permits from the USFWS and CDFG; and coordinate avoidance measures with those agencies in ways that are required to include seven listed items.

***1275** Two colonies of the Foothill Mariposa Lily would be affected by the project, consisting of 28 individual plants. The EIR states the City is required to mitigate this impact under the NCCP/HCP, and it describes the latter's requirements: (1) design modifications that minimize impact to the habitat; (2) conduct "an evaluation of salvage, restoration, [ ]enhancement, [ ] management of other conserved mariposa lily, or other mitigation techniques ... to offset

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impacts;" (3) provide monitoring and management "consistent with Chapter 5 of the NCCP/HCP;" and (4) coordinate with USFWS and CDFG, and obtain USFWS approval. However, the actual mitigation plan is not set out in the EIR.

[7] The EIR reports the Western Spadefoot Toad was not found in the project area, but there is suitable habitat that would support the creature, so surveys must be conducted in potential breeding pools prior to issuing grading permits. If the toad is found in the project area, a mitigation plan must be prepared in consultation with USFWS and CDFG. It is to include the construction of breeding pools satisfactory to these agencies on nearby protected lands. Since there are existing populations of the toad within the regional conservation area covered by the NCCP/****186** HCP, the EIR concludes any impact on this animal would be less than significant.[FN5]

FN5. The Irvine Company requests that we take judicial notice of the fact its environmental consultant conducted surveys for the Western Spadefoot Toad during the spring of 2003, found none, and the City accepted the consultant's report as complying with the mitigation measures for that animal. Defend the Bay opposes the motion, arguing the documents are not relevant since they were not part of the record upon which the EIR was approved. We agree, and deny the Irvine Company's motion for judicial notice.

A

Defend the Bay first argues the failure to obtain a determination of the long-term conservation value of the vireo's habitat constitutes improper deferral of mitigation. Deferral of the specifics of mitigation is permissible where the local entity commits itself to mitigation and lists the alternatives to be considered, analyzed and possibly incorporated in the mitigation plan. (*Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1028–1030, 280 Cal.Rptr. 478.) On the other hand, an agency goes too far when it simply requires a project applicant to obtain a biological report and then comply with any recommendations that may be made in the report. (*Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1396–1397, 43 Cal.Rptr.2d 170.)

As explained in *Sacramento Old City Assn. v. City Council, supra,* 229 Cal.App.3d 1011, 280 Cal.Rptr. 478, "for the kinds of impacts for which mitigation is known to be feasible, but where practical considerations prohibit devising such ***1276** measures early in the planning process (e.g., at the general plan amendment or rezone state), the agency can commit itself to eventually devising measures that will satisfy specific performance criteria articulated at the time of project approval. Where future action to carry a project forward is contingent on devising means to satisfy such criteria, the agency should be able to rely on its commitment as evidence that significant impacts will in fact be mitigated. [Citations.]' " (*Id.* at pp. 1028–1029, 280 Cal.Rptr. 478.)

On this basis, we find there is no improper deferral of mitigation regarding the Least Bell's Vireo. Regardless of which category the habitat falls into, prior to approval of a tentative tract map, the developer is required to consult with the USFWS and CDFG, obtain permits, and adopt seven itemized avoidance measures in coordination with the aforementioned agencies. The EIR was prepared at the beginning of the planning process, for a General Plan amendment and zoning change, the City has committed to mitigation, and it has specified the criteria to be met. That is sufficient at this early stage of the planning process. (*Sacramento Old City Assn. v. City Council, supra,* 229 Cal.App.3d at pp. 1028–1030, 280 Cal.Rptr. 478.) The record supports the conclusion that impacts to the vireo, after mitigation, will be insignificant.

B

Defend the Bay contends the EIR does not mitigate significant adverse impacts to the Foothill Mariposa Lily because no mitigation plan is set out or approved, and future mitigation is inadequate. Here again, however, while there is deferred mitigation, it is not improper. The City is required to mitigate impacts to the lily under the NCCP/HCP, the EIR commits the City to such mitigation, and it lists what will be required in the mitigation plan. That is enough. (*Sacramento Old City Assn. v. City Council, supra,* 229 Cal.App.3d at pp. 1028–1030, 280 Cal.Rptr. 478.)

****187** The only case cited by Defend the Bay on this point is distinguishable. *Citizens for Quality Growth v. City of Mt. Shasta* (1988) 198 Cal.App.3d 433, 442, fn. 8, 243 Cal.Rptr. 727, held certification

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of an EIR was invalid because the city council did not make any findings adopting the mitigation measures set out in the EIR. But here, there is no claim that the City failed to make the findings necessary to properly adopt the present EIR, so we cannot see the relevance of the case cited. The record adequately supports the EIR's conclusion that impacts to the lily will be insignificant after mitigation.

C

Finally, the challenge regarding the Western Spadefoot Toad is that no timetable has been set for the surveys to search for the animal, and there is no ***1277** attempt to avoid impacts where feasible. Defend the Bay again argues this is improper deferral of mitigation.

But the City has committed to mitigation if the toad is found in the project area, and it has a plan—to build satisfactory breeding pools on nearby protected land. That is sufficient. As for the timetable issue, the EIR requires the surveys to be undertaken prior to issuing any grading permits. In effect, that is a timetable, and no reason is suggested why it is inadequate, so this argument goes nowhere.

Two other arguments regarding the toad are no more persuasive. Defend the Bay contends the EIR was required to find the project impact on the creature significant because it is an "endangered, rare or threatened species." (Guidelines, § 15065.) But it does not point to any evidence of this designation. To the contrary, the record characterizes the toad as a "sensitive" species and a California species of "special concern" and there is no suggestion that is the same thing. We assume the different labels were attached for a reason and Defend the Bay does not address the issue.

The environmental organization also argues the City violated a rule that comments from sister agencies must be responded to with a good faith, reasoned analysis. (*Berkeley Keep Jets Over the Bay Com. v. Board of Port Cmrs.* (2001) 91 Cal.App.4th 1344, 1367, 111 Cal.Rptr.2d 598.) It says the EIR ignored recommendations from the USFWS and CDGF that impacts to the toad be avoided and unavoidable impacts be mitigated. But we do not find any evidence of this. The agencies did make those recommendations. But to implement them, all they suggested was that surveys of breeding habitat be conducted during the breeding season, and impacts to breeding pools be mitigated be creating comparable new ones in coordination with the agencies. The EIR adopts both suggestions—the surveys must be conducted, during the breeding season, and if the toad is found, new breeding pools must be constructed satisfactory to the agencies in question. So there is nothing amiss here.

[8] In fine, no grounds have been shown that would require us to issue a writ of mandate to direct the City to rescind approval of the EIR for the Northern ***1278** Sphere project. Accordingly, the judgment appealed from is affirmed. Respondent is entitled to costs on appeal.[FN6]

FN6. After oral argument, the parties filed a stipulation to dismiss the appeal. Dismissal is discretionary once the record on appeal has been filed (Cal. Rules of Court, rule 20(c)(2)), and the court has inherent power to retain a matter that presents important issues of continuing interest, even though technically moot. (*City of Morgan Hill v. Brown* (1999) 71 Cal.App.4th 1114, 1121 fn. 5, 84 Cal.Rptr.2d 361.) We deem this such a case. The significance of the jobs/housing ratio of a project appears to be a novel issue. Whether a public entity can approve a development project that creates more jobs than housing is a matter of public interest and likely to recur.

We are also troubled by the parties' refusal to reveal the terms of the settlement. We invited them to submit letter briefs on whether this appeal involves important issues of continuing interest. Our order directed any party responding to attach a copy of the settlement documents to its brief. Defend the Bay did not respond. The other parties did. No one provided the settlement documents.

According to The Irvine Company, the settlement agreement is confidential; and Defend the Bay refused to consent to disclosure. The City claims it is not a party to the settlement, which did not require it to change the "land use approvals" for the project. But that is misleading. The City's letter brief reveals it did change the

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project, two months after oral argument. At the request of The Irvine Company, the City converted 227 acres of the project from medical/science to residential use by amending the general plan and making a zoning change. The net effect was to reduce the jobs/housing ratio to less than the one-to-one ratio sought by Defend the Bay.

Under these circumstances, we are unable to determine the nature of the settlement and confronted with important issues we expect to be of continuing importance, we conclude decision of the case is required.

WE CONCUR: SILLS, P.J., and RYLAARSDAM, J.

Cal.App. 4 Dist.,2004.
Defend the Bay v. City of Irvine
119 Cal.App.4th 1261, 15 Cal.Rptr.3d 176, 34 Envtl. L. Rep. 20,040, 04 Cal. Daily Op. Serv. 5877, 2004 Daily Journal D.A.R. 7965

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Exhibit M

CITY OF SAN DIEGO BIOLOGICAL GUIDELINES EXCERPTS (PAGES 14 AND 16)

on the location of the mitigation site. The Mitigation Element will consist of a discussion of the amount (i.e. quantity) and the type (i.e. method) of mitigation.

The following guidelines are provided to achieve consistency and equity among projects. Mitigation for specific projects may differ depending on site-specific conditions as supported by the project-level analysis.

a. Mitigation for Wetlands Impacts. The ESL regulations require that impacts to wetlands be avoided. Unavoidable impacts should be minimized to the maximum extent practicable, and mitigated as follows:

As part of the project-specific environmental review pursuant to CEQA, all unavoidable wetlands impacts (both temporary and permanent) will need to be analyzed and mitigation will be required in accordance with **Table 2**; mitigation should be based on the impacted type of wetland habitat. Mitigation should prevent any net loss of wetland functions and values of the impacted wetland.

The following provides an operational definition of the four types of activities that constitute wetland mitigation under the ESL regulations:

Wetland creation is an activity that results in the formation of new wetlands in an upland area. An example is excavation of uplands adjacent to existing wetlands and the establishment of native wetland vegetation.

Wetland restoration is an activity that re-establishes the habitat functions of a former wetland. An example is the excavation of agricultural fill from historic wetlands and the re-establishment of native wetland vegetation.

Wetland enhancement is an activity that improves the self-sustaining habitat functions of an existing wetland. An example is removal of exotic species from existing riparian habitat.

Wetland enhancement and wetland acquisition focus on the preservation or the improvement of existing wetland habitat and function, and do not result in an increase in wetland area; therefore, a net loss of wetland may result. As such, acquisition and/or enhancement of existing wetlands may be considered as partial mitigation only, for any balance of the remaining mitigation requirement after restoration or creation if wetland acreage is provided at a minimum of a 1:1 ratio. For permanent wetland impacts that are unavoidable and minimized to the maximum extent feasible, mitigation shall consist of creation of new, in-kind habitat to the fullest extent possible and at the appropriate ratios. In addition, unavoidable impacts to wetlands located within the Coastal Overlay Zone shall be mitigated on-site, if feasible. If on-site mitigation in not feasible, then mitigation shall occur within the same watershed. All mitigation for unavoidable wetland impacts within the Coastal Overlay Zone, shall occur within the Coastal Overlay Zone.

For example, satisfaction of the mitigation requirement may be considered for a 3:1 mitigation ratio, with two parts consisting of acquisition and/or enhancement of existing acres, and one part restoration or creation.

Restoration of illegally filled historic wetland areas will not be considered for mitigation, and may result in code enforcement actions and/or may require restoration as a condition of project approval. All restoration proposals should evaluate the reason for the historic wetland loss (e.g. placement of fill, changes in upstream or groundwater hydrology), the approximate date of the loss, and to the maximum extent possible, provide a determination as to whether the historic loss was legally conducted based upon the regulatory requirements at the time of the loss and the property ownership at the time of the loss.

The mitigation ratios, set forth in **Table 2**, in combination with the requirements for no-net-loss of functions and values and in-kind mitigation, are adequate to achieve the conservation goals of the City's MSCP Subarea Plan for wetland habitats and the covered species which utilize those habitats.

Wetland mitigation required as part of any federal (404) or state (1601/1603) wetland permit will supersede and will not be in addition to any mitigation identified in the CEQA document for those wetland areas covered under any federal or state wetland permit.

Wetland habitat outside the jurisdiction of the federal and state permits will be mitigated in accordance with the CEQA document.

Exhibit N

OAKLAND HERITAGE ALLIANCE V. CITY OF OAKLAND, 195 CAL. APP. 4th 884, 910 (2011)

C

Court of Appeal, First District, Division 4, California.
OAKLAND HERITAGE ALLIANCE, Plaintiff and Appellant,
v.
CITY OF OAKLAND, Defendant and Respondent; Oakland Harbor Partners et al., Real Parties in Interest and Respondents.

No. A126558.
May 19, 2011.

Background: Heritage group filed petition for writ of mandate challenging city's certification of environmental impact report (EIR) under the California Environmental Quality Act (CEQA) for proposed development. The Superior Court, Alameda County, No. RG06280345,Jo-Lynne Q. Lee, J., granted the petition, but, after city revised the EIR and certified it as revised, discharged the writ. Heritage group appealed.

Holdings: The Court of Appeal, Rivera, J., held that:
(1) EIR's seismic effect specification substantially complied with CEQA Guideline;
(2) Court would review for substantial evidence city's determination that development's seismic impacts were less than significant after mitigation;
(3) evidence was sufficient to support city's determination that revised mitigation measures reduced seismic effects to a less than significant level; and
(4) EIR did not improperly defer mitigation of seismic impacts on development.

Affirmed.

West Headnotes

[1] Environmental Law 149E 666

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek666 k. Preservation of error in administrative proceeding. Most Cited Cases

Heritage group failed to allege in earlier stages of proceedings that revised environmental impact report (EIR), which provided that project would have a significant seismic damage effect if conditions were "so unfavorable that they could not be overcome by special design using reasonable construction and maintenance practices," was improper because it set a higher significance threshold than found in California Environmental Quality Act (CEQA) guidelines, and thus issue was not preserved for appellate review. West's Ann.Cal.Pub.Res.Code § 21000; 14 CCR § 15387.

[2] Environmental Law 149E 604(2)

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek598 Adequacy of Statement, Consideration, or Compliance
149Ek604 Particular Projects
149Ek604(2) k. Land use in general. Most Cited Cases

Revised environmental impact report's (EIR) specification that a project would have a significant seismic effect if it would expose people or structures to "substantial risk of loss, injury, or death" substantially complied with language of California Environmental Quality Act (CEQA) Guideline asking whether a project would "expose people or structures to potential substantial adverse effects, including the risk of loss, injury, or death involving," assuming such compliance was necessary. 14 CCR § 15064.7.

[3] Environmental Law 149E 589

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek584 Necessity for Preparation of Statement, Consideration of Factors, or Other Compliance with Requirements
149Ek589 k. Significance in general. Most Cited Cases

California Environmental Quality Act (CEQA) Guidelines encouraging public agencies to develop and publish thresholds of significance, and providing that such thresholds adopted for general use in the

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agency's environmental review process must be adopted by ordinance, resolution, rule, or regulation after a public review process, do not require a public agency to adopt significance thresholds, nor do they forbid an agency to rely on standards developed for a particular project. West's Ann.Cal.Pub.Res.Code § 21000; 14 CCR § 15064.7(a, b).

[4] Environmental Law 149E 708

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek704 Further Review of Administrative Decision
149Ek708 k. Scope of review. Most Cited Cases

Court of Appeal would review for substantial evidence, rather than de novo, city's determination in environmental impact report (EIR) issued under California Environmental Quality Act (CEQA) that seismic impacts on development were less than significant after mitigation; EIR did not improperly ignore risks, but rather provided that risks were mitigated, and whether mitigations were in fact sufficient was a factual question subject to review for substantial evidence. West's Ann.Cal.Pub.Res.Code § 21168.5; 14 CCR §§ 15064(b), 15384(a).

[5] Environmental Law 149E 689

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek677 Scope of Inquiry on Review of Administrative Decision
149Ek689 k. Assessments and impact statements. Most Cited Cases

Courts are not to determine whether the ultimate conclusions of an environmental impact report (EIR) issued under the California Environmental Quality Act (CEQA) are correct, but only whether they are supported by substantial evidence in the record and whether the EIR is sufficient as an information document. West's Ann.Cal.Pub.Res.Code § 21168.5.

[6] Environmental Law 149E 689

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek677 Scope of Inquiry on Review of Administrative Decision
149Ek689 k. Assessments and impact statements. Most Cited Cases

The substantial evidence standard is applied to conclusions, findings and determinations in an environmental impact report (EIR) issued under the California Environmental Quality Act (CEQA), and also applies to challenges to the scope of an EIR's analysis of a topic, the methodology used for studying an impact and the reliability or accuracy of the data upon which the EIR relied because these types of challenges involve factual questions. West's Ann.Cal.Pub.Res.Code § 21168.5; 14 CCR § 15384.

[7] Environmental Law 149E 689

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek677 Scope of Inquiry on Review of Administrative Decision
149Ek689 k. Assessments and impact statements. Most Cited Cases

The substantial evidence standard applies to factual disputes in an environmental impact report (EIR) issued under the California Environmental Quality Act (CEQA) over whether adverse effects have been mitigated or could be better mitigated. 14 CCR § 15384; West's Ann.Cal.Pub.Res.Code § 21168.5.

[8] Environmental Law 149E 689

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek677 Scope of Inquiry on Review of Administrative Decision
149Ek689 k. Assessments and impact statements. Most Cited Cases

Where a claim is predominantly one of improper procedure rather than a dispute over the facts, the court reviews the agency's action de novo, scrupulously enforcing all legislatively mandated California Environmental Quality Act (CEQA) requirements. West's Ann.Cal.Pub.Res.Code § 21168.5.

[9] Environmental Law 149E 689

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149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek677 Scope of Inquiry on Review of Administrative Decision
149Ek689 k. Assessments and impact statements. Most Cited Cases

The court may not set aside an agency's approval of an environmental impact report (EIR) issued under California Environmental Quality Act (CEQA) on the ground that an opposite conclusion would have been equally or more reasonable. West's Ann.Cal.Pub.Res.Code § 21168.5.

[10] Administrative Law and Procedure 15A ⚷462

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(D) Hearings and Adjudications
15Ak458 Evidence
15Ak462 k. Weight and sufficiency. Most Cited Cases

A public agency may choose between differing expert opinions.

[11] Administrative Law and Procedure 15A ⚷462

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(D) Hearings and Adjudications
15Ak458 Evidence
15Ak462 k. Weight and sufficiency. Most Cited Cases

An agency may rely upon the opinion of its staff in reaching decisions, and the opinion of staff has been recognized as constituting substantial evidence.

[12] Environmental Law 149E ⚷604(2)

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek598 Adequacy of Statement, Consideration, or Compliance
149Ek604 Particular Projects
149Ek604(2) k. Land use in general. Most Cited Cases

Evidence was sufficient to support city's determination in environmental impact report (EIR) issued under the California Environmental Quality Act (CEQA) that revised mitigation measures for proposed development reduced seismic effects of ground shaking, liquefaction, and settlement to a less than significant level; EIR included an extensive discussion of Building Code requirements intended to promote structural safety in the event of an earthquake, geotechnical investigation evaluated seismic considerations and concluded that site "can be developed as planned," and investigation noted that, to the extent that site-specific, design-level investigations for each parcel revealed the need for mitigation, any recommendations had to be included in the final design of each structure. West's Ann.Cal.Pub.Res.Code § 21000; 14 CCR § 15064.

[13] Environmental Law 149E ⚷604(2)

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek598 Adequacy of Statement, Consideration, or Compliance
149Ek604 Particular Projects
149Ek604(2) k. Land use in general. Most Cited Cases

Environmental impact report (EIR) issued under California Environmental Quality Act (CEQA) did not improperly defer mitigation of seismic effects on proposed development, although city deferred as to precisely how mitigation would be achieved, where building code and city regulations required investigation and recommendations to avoid seismic hazards, EIR and geotechnical investigation provided evidence that mitigation was feasible and discussed a range of mitigation measures that were standard, accepted, and proven engineering practices, mitigation measure listed further possible methods to reduce the risk of liquefaction, and mitigation measures required compliance with all geotechnical mitigations contained in site-specific geotechnical investigations in the plans submitted for all relevant construction permits. 14 CCR § 15064; West's Ann.Cal.Pub.Res.Code § 21000.
See Cal. Jur. 3d, Pollution and Conservation Laws, § 544; 9 Miller & Starr, Cal. Real Estate (3d ed. 2001) §

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25A:17; 12 Witkin, Summary of Cal. Law (10th ed. 2005) Real Property, § 842.

[14] Environmental Law 149E ⚷610

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek610 k. Time requirements. Most Cited Cases

It is improper to defer the formulation of mitigation measures under California Environmental Quality Act (CEQA) until after project approval; instead, the determination of whether a project will have significant environmental impacts, and the formulation of measures to mitigate those impacts, must occur before the project is approved. West's Ann.Cal.Pub.Res.Code § 21000.

[15] Environmental Law 149E ⚷602

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek598 Adequacy of Statement, Consideration, or Compliance
149Ek602 k. Mitigation measures. Most Cited Cases

When a public agency has evaluated the potentially significant impacts of a project and has identified measures that will mitigate those impacts, the agency does not have to commit to any particular mitigation measure in the environmental impact report (EIR) issued under the California Environmental Quality Act (CEQA), as long as it commits to mitigating the significant impacts of the project; moreover, the details of exactly how mitigation will be achieved under the identified measures can be deferred pending completion of a future study. West's Ann.Cal.Pub.Res.Code § 21000.

[16] Environmental Law 149E ⚷602

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek598 Adequacy of Statement, Consideration, or Compliance
149Ek602 k. Mitigation measures. Most Cited Cases

For the kinds of environmental impacts for which mitigation is known to be feasible, but where practical considerations prohibit devising such measures early in the planning process, the agency can commit itself to eventually devising measures that will satisfy specific performance criteria articulated at the time of project approval under the California Environmental Quality Act (CEQA); where future action to carry a project forward is contingent on devising means to satisfy such criteria, the agency should be able to rely on its commitment as evidence that significant impacts will in fact be mitigated. West's Ann.Cal.Pub.Res.Code § 21000.

[17] Environmental Law 149E ⚷602

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek598 Adequacy of Statement, Consideration, or Compliance
149Ek602 k. Mitigation measures. Most Cited Cases

A condition requiring compliance with regulations is a common and reasonable mitigation measure under the California Environmental Quality Act (CEQA), and may be proper where it is reasonable to expect compliance. West's Ann.Cal.Pub.Res.Code § 21000.

****758** Arthur D. Levy, San Francisco, for Appellant.

John A. Russo, City Attorney, Barbara Parker, Assistant City Attorney, Heather B. Lee, Supervising Deputy City Attorney, Kevin D. Siegel, Deputy City Attorney, for Respondents.

David P. Bonaccorsi, Paul B. Campos, for Real Parties in Interest and Respondent.

RIVERA, J.

***887** Oakland Harbor Partners, LLC, Signature Properties, Inc., and Reynolds & Brown (collectively Real Parties) are the proponents of a project proposed to be built along Oakland's estuary. The City of Oakland (the City) certified an environmental impact report (EIR) for the project. Oakland Heritage Alliance (the Alliance) challenged this action, and the trial court granted its petition for writ of mandate, finding, among other things, that the EIR's discussion of the project's seismic risks was inadequate. The City

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revised the EIR and certified it as revised. The trial court then discharged the writ.

The Alliance challenges this action on appeal, contending the City's treatment of seismic impacts did not meet the requirements of the California Environmental Quality Act (CEQA), (Pub. Resources Code, FN1 § 21000 et seq.). We shall affirm the order discharging the writ.

FN1. All statutory references are to the Public Resources Code.

I. BACKGROUND

Real Parties proposed a project to develop approximately 64 acres along the Oakland Estuary and the Embarcadero, converting a maritime and ***888** industrial area into residential, retail/commercial, open space, and marina uses (the "project" or the "Oak to Ninth Project"). Building heights would range from six to 24 stories.

In its discussion of seismicity, the EIR noted that the project site was approximately three and one-half miles from the Hayward Fault Zone and 15 and one-half miles from the San Andreas Fault Zone, both active fault zones capable of generating major earthquakes, and that other ****759** faults were also capable of producing significant ground shaking at the project site. The EIR identified various seismic hazards; of particular relevance here were the potential for strong ground shaking and liquefaction.

In its discussion of ground shaking, the EIR noted that the 1906 San Francisco earthquake, produced by the San Andreas Fault Zone, had an estimated magnitude of 7.9 and produced strong to violent shaking intensities, and that the 1989 Loma Prieta earthquake, generated by the same fault zone, produced strong shaking intensities. The EIR described the Modified Mercalli (MM) Intensity Scale for the intensity of earthquakes. The highest intensity value is MM–XII. An event with an intensity value of MM–X is described thus: "Some well-built wooden structures destroyed; most masonry and frame structures destroyed with foundations; ground badly cracked. Rails bent. Landslides considerable from riverbanks and steep slopes. Shifted sand and mud. Water splashed (slopped) over banks." In an earthquake with an intensity value of MM–IX, damage in specially designed structures would be "considerable," and it would be "great" in "substantial buildings, with partial collapse"; well-designed frame structures would be thrown out of plumb; and buildings would be shifted off foundations. At a level of MM–VIII, damage to specially designed structures would be slight, and to "ordinary substantial buildings" would be "considerable." At level MM–VII, damage in buildings of good design and construction would be "negligible," and in "well-built ordinary structures" would be slight to moderate.FN2 The intensity of the 1906 San Francisco earthquake was level VIII to IX; that of the 1989 Loma Prieta earthquake was level VIII. The EIR noted that the presence of artificial fill and bay mud in the project area could intensify the effects of ground shaking during an earthquake.

FN2. With an earthquake with an intensity of MM–XI, "[f]ew, if any, (masonry) structures remain standing. Bridges destroyed. Broad fissures in ground. Underground pipelines completely out of service. Earth slumps and land slips in soft ground. Rails bent greatly." With an event with an intensity value of MM–XII: "Damage [is] total. Practically all works of construction are damaged greatly or destroyed. Waves seen on ground surface. Lines of sight and level are distorted. Objects are thrown upward into the air."

Liquefaction occurs when saturated soil is transformed from a solid to a liquefied state, particularly as the result of an earthquake. Ground failure ***889** caused by liquefaction can damage roads, pipelines, underground cables, and buildings with shallow foundations. The project site is located within a Seismic Hazard Zone for liquefaction, as designated by the California Geological Survey (CGS).

The EIR identified several seismic impacts of the project. The two at issue here are impacts F.1 and F.2. The EIR described impact F.1 in this manner: "In the event of a major earthquake in the region, seismic ground shaking could potentially injure people and cause collapse or structural damage to proposed structures." This impact was designated as "[p]otentially [s]ignificant." The EIR's discussion of this impact noted that an earthquake in the Bay Area could produce ground accelerations at the project site ranging from strong (MM–VII) to very violent intensity (MM–X), with a possible intensity of MM–X as a result of a 7.1 earthquake on the Hayward fault. Such

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an earthquake "would cause considerable structural damage, even in well-designed structures." Based on a master plan-level geotechnical investigation, the EIR recommended as a mitigation measure: "A site-specific, design level geotechnical investigation****760** for each site area (which is typical for any large development project) shall be required as part of this project. Each investigation shall include an analysis of expected ground motions at the site from known active faults. The analyses shall be in accordance with applicable City ordinances and policies and consistent with the most recent version of the California Building Code, which requires structural design that can accommodate ground accelerations expected from known active faults. In addition, the investigations shall determine final design parameters for the walls, foundations, foundation slabs, and surrounding related improvements (utilities, roadways, parking lots and sidewalks). The investigations shall be reviewed and approved by a registered geotechnical engineer. All recommendations by the project engineer and geotechnical engineer shall be included in the final design. Recommendations that are applicable to foundation design, earthwork, and site preparation that were prepared prior to or during the project design phase, shall be incorporated in the project. The final seismic considerations for the site shall be submitted to and approved of by the City of Oakland Building Services Division prior to the commencement of the project." After mitigation, the EIR concluded this impact would be less than significant.

The EIR also identified Impact F.2: "In the event of a major earthquake in the region, seismic ground shaking could potentially expose people and property to liquefaction and earthquake-induced settlement." This impact was likewise considered potentially significant. According to the EIR, the geotechnical investigation had identified a potential for liquefaction at the site and had recommended specific foundation types and pile specifications to mitigate the adverse effects of liquefaction. The EIR recommended the following ***890** mitigation measure: "Prepare an updated site specific, design level geotechnical investigation for each building site to consider the particular project designs and provide site specific engineering recommendations for mitigation of liquefiable soils. Liquefiable soils under the conditions described in the geotechnical report shall be mitigated using various proven methods to reduce the risk of liquefaction. Liquefaction mitigation measures include subsurface soil improvement, deep foundations, structural slabs, and soil cover. Site improvement methods to address potential liquefaction include dynamic compaction, compaction grouting, jet grouting, and vibroflotation can [*sic*] significantly reduce the risk of liquefaction. Deep foundations extending below the liquefiable layers can be designed to support structures despite the occurrence of liquefaction. Structural slabs are designed to span across areas of non-support, such as in the case of liquefaction or settlement. The presence of a sufficiently thick, engineered fill layer over liquefiable soil can reduce the potential for damage at the ground surface due to liquefaction by helping to bridge across isolated liquefaction zones. Other methods of mitigating potential liquefaction hazards suggested in the *California Geological Survey's (CGS) Geology Guidelines for Evaluating and Mitigating Seismic Hazards (CGS Special Publication 117, 1997*) include edge containment structures (berms, dikes[,] sea walls, retaining structures, compacted soil zones), removal or treatment of liquefiable soils, modification of site geometry, lowering the groundwater table, in-situ ground densification, deep foundations, reinforced shallow foundations, and structural design that can accommodate predicted displacements [citation]. [¶] These measures****761** shall be evaluated during the site specific geotechnical investigation and the most effective, practical and economical methods should become part of the project. Prior to incorporation into the project, geotechnical engineering recommendations regarding the mitigation and reduction of liquefaction for each site shall be reviewed for compliance with the CGS Geology Guidelines. The purpose of these guidelines is to protect the public safety from seismic effects such as liquefaction." With this mitigation measure, the EIR concluded the impact of liquefaction would be less than significant.

The City certified the EIR, adopted mitigation measures F.1 and F.2, and, with modifications not relevant here, approved the project.

The Alliance filed a petition for writ of mandate alleging numerous violations of CEQA. Among them, the Alliance alleged the City had violated CEQA by certifying the EIR and adopting CEQA findings although the mitigation measures would not reduce the effects of ground shaking, liquefaction, and earthquake-induced settlement to a less than significant level.

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The trial court granted in part and denied in part the petition for writ of mandate. On the seismic risk findings, the court found the EIR contained no ***891** meaningful analysis to support the findings that the risks of ground shaking and liquefaction would be reduced to a less than significant level, and the findings were not supported by substantial evidence in the record. According to the trial court, neither the impact statements nor the mitigation measures established which mitigation techniques would actually be used and how they would reduce the impacts of a major earthquake. Mitigation measure F.1 stated that the *analysis* for expected ground motions would be consistent with the California Building Code (Building Code), but did not require that the measures finally approved would meet or exceed the structural design requirements set forth in the Building Code. Measure F.2 did not require that the final design and engineering specifications for the buildings would meet a particular standard or that any of the methodologies mentioned in the mitigation measure to reduce liquefaction impacts *would* be used at the site; nor was there an analysis of how the mitigation measure would reduce the impact to a less than significant level. The court concluded that the geotechnical report, which had been prepared by Treadwell & Rollo, did not provide the necessary analysis to allow the City to conclude that the mitigation measures would reduce the effects of a major earthquake to a less than significant level. Moreover, the court stated, "the measure [did] not commit the City to implementing any particular building technique, to follow any specified standard (other than Building Code requirements), or incorporate the recommendations made by Treadwell & Rollo." The trial court directed the City to void its certification of the EIR, CEQA findings and statement of overriding considerations, and the approval of the project, and remanded the matter to the City.

In response to the trial court's order, the City revised the EIR.[FN3] Like the earlier version of the EIR, the Revised EIR stated that under CEQA, a project would have a significant seismic effect if it would: "Expose people or structures to geologic hazards, soils, and/or seismic conditions so ****762** unfavorable that they could not be overcome by special design using reasonable construction and maintenance practices. Specifically, [¶] Expose people or structures to substantial risk of loss, injury, or death involving: [¶]—Rupture of a known earthquake fault ...; [¶]—Strong seismic ground shaking; [¶]—Seismic-related ground failure, including liquefaction, lateral spreading, subsidence, collapse; or [¶]—Landslides[.]" According to the Revised EIR, "[t]he significance criteria do not require elimination of the potential for structural damage from seismic hazards. Instead, the criteria require an evaluation of whether the seismic conditions on a site can be overcome through engineering design solutions that will reduce to less than significant the substantial risk of exposing people or structures to loss, injury or death. ***892** State and local code requirements ensure buildings are designed and constructed in a manner that, although the buildings may sustain damage during a major earthquake, will reduce the substantial risk that buildings will collapse resulting in a potential for injury or death. As discussed below, the potentially significant seismic impacts on the Oak to Ninth project site could be reduced to less than significant through conformance to existing state laws, City ordinances, and application of accepted, proven construction engineering practices."

FN3. The City prepared and circulated "Revisions to the Analysis in the Oak to Ninth Project EIR" (Revisions). We shall refer to the EIR as revised by the Revisions as the "Revised EIR."

The Revised EIR included an extensive discussion of the mandates of various state and City laws bearing upon seismic safety, including the Seismic Hazards Mapping Act (§ 2690 et seq.), the Building Code (which is found in title 24 of the California Code of Regulations), and various City ordinances.

The Revised EIR explained that for certain large projects, like the proposed Oak to Ninth Project, the applicant conducts a preliminary or " 'Master Plan' " geotechnical investigation to determine overall engineering feasibility and to inform the preliminary designs. At this stage, geotechnical engineers "acquire a broad understanding of the site conditions while delimiting areas on the site that are especially favorable for development or could be problematic from a soils engineering perspective." This level of investigation is not sufficient to generate the " 'design-level' " data needed to make final grading or structural designs. The Revised EIR explained that it was not effective to conduct a design-level investigation at this stage because the project could change considerably during

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environmental review. However, according to the Revised EIR, this type of preliminary geotechnical study in most cases provides enough detail to evaluate whether geologic or seismic impacts exist and whether mitigation would be necessary. The geotechnical investigation discussed in the Revised EIR is not a final site-specific, design-level study, but rather "determine[d] project feasibility in light of the site geotechnical conditions and identifie[d] areas of development opportunity and areas of development constraint."

The Revisions revised mitigation measures F.1 and F.2. As revised, measure F.1, for seismic ground shaking, provided that before the issuance of a building permit for any portion of the project site, the project sponsor "shall" submit a "site-specific, design level geotechnical investigation" for each parcel, which would comply with all applicable state and local code requirements, and "a) Include an analysis of the expected ground motions at the site from known active faults using accepted methodologies; [¶] b) Determine structural design requirements as prescribed by the most current version of the California Building Code, including applicable City amendments, to ensure that structures can withstand ground accelerations expected ****763** from known active faults; [¶] c) Determine the final design parameters for walls, ***893** foundations, foundation slabs, utilities, roadways, parking lots, sidewalks, and other surrounding related improvements." The measure required project plans for foundation design, earthwork, and site preparation to incorporate all of the mitigations in the site-specific investigations. In addition, the project structural engineer must "review the site specific investigations, provide any additional necessary mitigation to meet Building Code requirements, and incorporate all applicable mitigations from the investigation in[to] the structural design plans and shall ensure that all structural plans for the project meet current Building Code requirements." Additionally, a registered geotechnical engineer must "review each site-specific geotechnical investigation, approve the final report, and require compliance with all geotechnical mitigations contained in the investigation in the plans submitted for the grading, foundation, structural, infrastructure and all other relevant construction permits." Finally, the City Building Services Division "shall review all project plans" for the relevant permits "to ensure compliance with the applicable geotechnical investigation and other applicable Code requirements." With this mitigation, the Revised EIR concluded the impact of seismic ground shaking would be reduced to a less than significant level.

Revised mitigation measure F.2, for liquefaction and earthquake-induced settlement, likewise required the project sponsor to submit a site-specific, design-level geotechnical investigation, which would comply with all applicable state and local code requirements. The investigation would also: "a) Provide site specific engineering requirements for mitigation of liquefiable soils; [¶] b) Specify liquefaction mitigations that shall use proven methods, generally accepted by registered engineers, to reduce the risk of liquefaction to a less than significant level such as: [¶]—subsurface soil improvement, [¶]—deep foundations extending below the liquefiable layers, [¶]—structural slabs designed to span across areas of non-support, [¶]—soil cover sufficiently thick over liquefaction soil to bridge liquefaction zones, [¶]—dynamic compaction, [¶]—compaction grouting, [¶]—jet grouting, [and] [¶]—mitigation for liquefaction hazards suggested in the [CGS] Guidelines for Evaluating and Mitigating Seismic Hazards (CGS Special Publication 117, 1997), including edge containment structures (berms, dikes, sea walls, retaining structures, compacted soil zones), removal or treatment of liquefiable soils, modification of site geometry, lowering the groundwater table, in-situ ground densification, deep foundations, reinforced shallow foundations, and structural design that can withstand predicted displacements." This measure also required the geotechnical investigation to evaluate these mitigations and identify the most effective and practicable mitigation methods for inclusion in the project plans and to have the identified mitigations reviewed to ensure compliance with CGS Geology Guidelines related to protection of public safety from liquefaction; that project plans for foundation design, earthwork, ***894** and site preparation incorporate all mitigations in the site-specific investigations; that the project structural engineer review the site-specific investigations, provide any additional mitigation necessary to meet Building Code requirements, incorporate all applicable mitigations from the investigations in the structural design plans, and ensure that all structural plans meet current Building Code requirements; that the City's registered geotechnical engineer review each site-specific geotechnical investigation, approve the final report, and require that the plans for grading, foundation, structural, infrastructure, and ****764** other relevant construction permits comply with all geotechnical mitigations contained in the

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investigation; and that the City Building Services Division review all project plans for grading, foundations, structural, infrastructure, and all other relevant construction permits to ensure compliance with the applicable requirements of the geotechnical investigation, as well as other applicable code requirements. After this mitigation, the Revised EIR concluded that the impact of liquefaction and earthquake-induced settlement would be less than significant.

The Alliance submitted a comment letter taking the position that revised mitigation measures F.1 and F.2 failed to reduce seismic impacts to a less than significant level. In particular, the Alliance argued that building codes provide for a " 'life safety' " performance standard, under which building occupants would not be crushed by a collapse of a building in even a severe earthquake, but that buildings might be rendered uninhabitable. According to the Alliance, higher performance standards are already mandated in California for schools, hospitals, police, and emergency response buildings, and such standards could be specified for this project, though at a higher cost than " 'code' performance standards."

Prior to a public hearing on the Revised EIR, the Alliance submitted further correspondence regarding its concerns about the Revised EIR's analysis of seismic impacts. The correspondence included a letter by a geotechnical consultant, Alan Kropp. Kropp had reviewed the Project Description and the Geology, Soils and Seismicity sections of the Draft and Revised EIR for the project. He had formed the opinion that it was insufficient for the revised EIR to "simply rely[ ] on the Building Code for the subsequent structural design of the facilities." According to Kropp, "Building Code provisions for earthquake resistive design are generally only intended to avoid building collapse and loss of life in a large earthquake. Major building damage, which may even necessitate the building be demolished after the earthquake, is an acceptable outcome of a code-based design." Kropp suggested that it would be appropriate instead for the project to use a ***895** "performance-based design approach." [FN4] Furthermore, according to Kropp, it was not clear that the impacts of a large earthquake on other parts of the project, such as new streets, parks, utility corridors, and other non-building elements, would be mitigated even if structures were well designed.

FN4. An attached April 2008, newsletter from the National Earthquake Hazards Reduction Program noted that in recent years a "performance-based approach to design and construction" had emerged, under which "individual buildings or classes of structures can be designed to perform at levels commensurate with applicable hazards, risks, and risk tolerances." The newsletter stated, "As it relates to seismic design, this approach has been termed Performance–Based Seismic Design (PBSD). Development of PBSD began in the mid–1990s, largely for use in evaluating and upgrading existing buildings." The Federal Emergency Management Agency (FEMA) had been leading efforts to develop a "new generation of PBSD procedures," and had completed a report (FEMA 461) describing laboratory testing protocols that could be used to determine the "fragility functions" of various building systems and components. According to the newsletter, "[f]ragility functions express in mathematical terms the likelihood that a component will sustain a specified level of damage when exposed to a specified level of demand (e.g., force, acceleration, displacement).... [¶] Next-generation PBSD procedures are being developed so that building stakeholders can reliably know, before choosing from among design options, how those options will affect seismic performance." The protocols in FEMA 461 were intended as "interim methods that will be finalized over time as they are used and evaluated by researchers nationwide."

****765** After the public hearing, the City approved the Revisions and recertified the EIR as revised by the Revisions and responses to comments. In doing so, it found that revised mitigation measures F.1 and F.2 reduced the effects of ground shaking, liquefaction, and settlement to a less than significant level.

The City and Real Parties moved the trial court for an order discharging the writ and terminating the suspension of the project approvals. The trial court granted the motion. In doing so, it concluded the EIR as revised did not improperly defer mitigation of seismic effects, finding "the statutory scheme described in the Revised EIR—designed to address the

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evaluation and mitigation of earthquake-related impacts—does provide a sufficient standard of performance under CEQA. Further, the Revised EIR commits the City to mediation [*sic*] of seismic impacts by compliance with this statutory scheme (and other specified requirements stated in the mitigation measures), and thus the Revised EIR does not improperly defer mitigation in violation of CEQA." The court also found that substantial evidence supported the City's finding that the mitigation would reduce seismic impacts to a less than significant level. This timely appeal ensued.

II. DISCUSSION

A. Earthquake Damage to Structures

The Alliance contends the City violated CEQA by failing to evaluate the risk of seismic damage to structures as an adverse impact of the project.

[1] ***896** Under the significance criteria for seismic-related impacts in the Revised EIR, "[a] project would have a significant effect if it would: [¶] Expose people or structures to geologic hazards, soils, and/or seismic conditions *so unfavorable that they could not be overcome by special design using reasonable construction and maintenance practices.* Specifically, [¶] Expose people or structures to substantial risk of loss, injury, or death involving: [¶]—Rupture of a known earthquake fault ...; [¶]—Strong seismic ground shaking; [¶]—Seismic-related ground failure, including liquefaction, lateral spreading, subsidence, collapse; or [¶]—Landslides[.]" (Italics added.) The Alliance first contends that the italicized language quoted above is improper because it sets a higher significance threshold than that found in Appendix G of the CEQA Guidelines.[FN5] THE ALLIANCE APPEArs To argue that a public agency may depart from the CEQA Guidelines only if it adopts a significance standard by ordinance or rule after a public hearing process.

FN5. The CEQA Guidelines (Cal.Code Regs., tit. 14, § 15000 et seq.) implement the provisions of CEQA. (*Jones v. Regents of University of California* (2010) 183 Cal.App.4th 818, 822, fn. 3, 108 Cal.Rptr.3d 6 (*Jones*).) Appendix G of the CEQA Guidelines is an "Environmental Checklist Form" that may be used in determining whether a project could have a significant effect on the environment and whether it is necessary to prepare a negative declaration or an EIR. (Cal.Code Regs., tit. 14, § 15063, subd. (f).) The "Geology and Soils" section of Appendix G asks in pertinent part, "Would the project: [¶] a) Expose people or structures to potential substantial adverse effects, including the risk of loss, injury, or death involving" rupture of a known earthquake fault, strong seismic ground shaking, seismic-related ground failure, including liquefaction, or landslides. (Cal.Code Regs., tit. 14, § 15387, subd. (VI).)

It does not appear that this issue was raised at any earlier stage of the proceedings, and it has therefore not been preserved for appellate review. (See ****766***Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1199, 22 Cal.Rptr.3d 203.) In any case, we reject this contention on the merits.

[2][3] The Alliance relies on section 15064.7 of the CEQA Guidelines, which encourages public agencies to develop and publish thresholds of significance, and provides that such thresholds adopted for general use in the agency's environmental review process must be adopted by ordinance, resolution, rule, or regulation after a public review process. (Cal.Code Regs., tit. 14, § 15064.7, subds. (a) & (b).) This regulation does not *require* a public agency to adopt such significance thresholds, however, and it does not forbid an agency to rely on standards developed for a particular project. Furthermore, even if the City were required to use the CEQA Guidelines' significance criteria, the threshold of significance used for the project was effectively coextensive with the CEQA Guidelines. The Revised EIR specifies that a project would have a significant seismic effect if it would expose ***897** people or structures to "substantial risk of loss, injury, or death," which is, in substance, the language of Appendix G, advocated by the Alliance.[FN6]

FN6. The significance criterion set forth in Appendix G asks whether the project would "[e]xpose people or structures to potential substantial adverse effects including risk of loss, injury, or death" from seismic activity.

We also reject the Alliance's contention that the Revised EIR "sidestep[ed]" mitigation of earthquake

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damage to structures. According to the Alliance, although Appendix G, and the significance standard set out in the Revised EIR, treat as significant an effect that would expose people *or structures* to substantial risk of loss, injury, or death involving seismic events, the City did not consider damage to buildings in its analysis of seismic effects. The Alliance points out that in its comments on the Revisions, it argued that building codes provide for a " 'life safety' " performance standard, which the Alliance claimed, "discourage design and construction to higher performance standards, such as immediate reoccupancy." According to the Alliance's comment letter, " 'Life safety' means that in an earthquake of likely intensity and duration, even a severe one, building occupants would not be crushed by the collapse of the building, or by debris falling from the building. Life safety contemplates that the structure and/or critical systems of a building may nevertheless be severely damaged, rendering it uninhabitable." The City responded that "[t]he standard of significance for potential seismic impacts is the exposure of people or structures 'to substantial risk of loss, injury or death.' Compliance with the stringent life safety requirements of state law will reduce to a less-than-significant level the substantial risk of building loss and injury or death. [The Alliance] recognizes this effect of the building codes by stating, ' "Life safety["] means that in an earthquake of likely intensity and duration, even a severe one, building occupants would not be crushed by the collapse of the building or by debris falling from the building.' This result meets the significance criterion of substantially reducing the risk ... that occupants would be injured or killed. There is no CEQA requirement to avoid repair to structures or to ensure that all buildings can be occupied immediately after an earthquake." The Alliance contends the City failed to proceed in the manner required by law "by avoiding—and therefore failing to analyze and evaluate—mitigation of structural damage impacts."

[4][5] The parties disagree on whether we should review this claim de novo or whether we should determine only whether there is substantial evidence to support ****767** the City's determination that the seismic impacts of the project are less than significant after mitigation. " 'In reviewing an agency's compliance with CEQA in the course of its legislative or quasi-legislative actions, the courts' inquiry "shall extend only to whether there was a prejudicial abuse of discretion." (Pub. Resources Code, § 21168.5.) Such an abuse is established "if the agency has not proceeded in a manner required by law or if the ***898** determination or decision is not supported by substantial evidence." [Citations.]' " (*Jones, supra,* 183 Cal.App.4th at p. 824, 108 Cal.Rptr.3d 6.) " 'Courts are "not to determine whether the EIR's ultimate conclusions are correct but only whether they are supported by substantial evidence in the record and whether the EIR is sufficient as an information document." [Citation.]' [Citations.]" (*San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 653, 57 Cal.Rptr.3d 663 (*San Joaquin Raptor*).)

[6][7][8] " 'The substantial evidence standard is applied to conclusions, findings and determinations. It also applies to challenges to the scope of an EIR's analysis of a topic, the methodology used for studying an impact and the reliability or accuracy of the data upon which the EIR relied because these types of challenges involve factual questions.' [Citation.] Substantial evidence is defined in the CEQA Guidelines [fn. omitted] as 'enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.' (Cal.Code Regs., tit. 14, § 15384, subd. (a).)" (*San Joaquin Raptor, supra,* 149 Cal.App.4th at p. 654, 57 Cal.Rptr.3d 663.) It also applies to "factual dispute[s] over 'whether adverse effects have been mitigated or could be better mitigated[.]' " (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435, 53 Cal.Rptr.3d 821, 150 P.3d 709; see also *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 131, 84 Cal.Rptr.3d 614, 194 P.3d 344.) Where a claim is predominantly one of improper procedure rather than a dispute over the facts, however, we review the agency's action de novo, " 'scrupulously enforc[ing] all legislatively mandated CEQA requirements [.]' [Citation]." (*Ibid.*) FN7

FN7. " 'An appellate court's review of the administrative record for legal error and substantial evidence in a CEQA case, as in other mandamus cases, is the same as the trial court's: the appellate court reviews the agency's action, not the trial court's decision; in that sense appellate judicial review under CEQA is de novo. [Citations.]' [Citation.]" (*Jones, supra,* 183 Cal.App.4th at p. 824, 108 Cal.Rptr.3d 6.)

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We do not read the Revised EIR as ignoring impacts to structures. Mitigation measure F.1 required the investigation for each development parcel to "[d]etermine structural design requirements as prescribed by the most current version of the California Building Code, including applicable City amendments, *to ensure that structures can withstand ground accelerations expected from known active faults,*" and mitigation measure F.2 required the project sponsor to submit a site-specific, design-level geotechnical investigation that would use proven methods to reduce the risks associated with liquefaction to a less than significant level, and listed a number of possible methods, including subsurface soil improvement, deep foundations, and structural slabs. Whether these mitigations were in fact *sufficient* to reduce ***899** seismic risks to a less than significant level is a factual question subject to review for substantial evidence.

We do not accept the premise implicit in the Alliance's argument, that under ****768** CEQA, as a matter of law, seismic impacts are significant unless buildings could be repaired and ready for occupancy after a major earthquake. Nothing in CEQA, the cases interpreting it, or common sense compels such a conclusion. A less than significant impact does not necessarily mean no impact at all. (See *National Parks & Conservation Assn. v. County of Riverside* (1999) 71 Cal.App.4th 1341, 1359, 84 Cal.Rptr.2d 563; Cal.Code Regs., tit. 14, § 15064, subd. (b).) As the Modified Mercalli intensity scale makes clear, an earthquake of the highest intensity values could result in destruction of even well-built structures. Nothing in the record suggests that feasible design standards would necessarily protect against building damage in such an earthquake. In the circumstances, the question of what design standards to use is properly a policy question for the City; and the question of whether seismic impacts can be, or have been, mitigated to a less than significant level is properly treated as one of fact.

We are not persuaded otherwise by the Alliance's reliance on *Berkeley Keep Jets Over the Bay Com. v. Board of Port Cmrs.* (2001) 91 Cal.App.4th 1344, 111 Cal.Rptr.2d 598 (*Berkeley Jets*). The petitioners there contended that an EIR for an expansion of the Oakland Airport failed to address the impacts of noise resulting from increased nighttime air cargo operations. (*Id.* at pp. 1349–1350, 1372, 111 Cal.Rptr.2d 598.) The EIR used a significance standard based on the Community Noise Equivalent Level (CNEL), the 24–hour average sound level, in decibels, obtained from the accumulation of all sound sources, with an additional weighting of sound levels during evening and nighttime hours. (*Id.* at p. 1373, 111 Cal.Rptr.2d 598.) A standard of 65 CNEL was used as the threshold for treating aircraft noise as significant, regardless of the change in noise that might be caused in quiet neighborhoods as a result of the project. (*Id.* at pp. 1373, 1381, 111 Cal.Rptr.2d 598.) The petitioners claimed that the EIR should have included an analysis of the project's impact on the sleep of nearby residents. (*Id.* at p. 1377, 111 Cal.Rptr.2d 598.) Division Two of the First Appellate District agreed with the petitioners, pointing out that the EIR's analysis lacked "any meaningful analysis of existing ambient noise levels, the number of additional nighttime flights that will occur under the [airport expansion], the frequency of those flights, to what degree single overflights will create noise levels over and above the existing ambient noise level at a given location, and the community reaction to aircraft noise, including sleep disturbance." (*Id.* at pp. 1381–1382, 111 Cal.Rptr.2d 598.) Noting that the CEQA Guidelines had adopted a "site-sensitive threshold of significance for noise" (*id.* at p. 1380, 111 Cal.Rptr.2d 598), the court concluded that the potential noise impacts of increased nighttime flights required further study (*id.* at p. 1382, 111 Cal.Rptr.2d 598). *Berkeley Jets* does not assist the Alliance. Unlike the general significance standard utilized in *Berkeley Jets,* the significance criteria here ***900** are based not on a static, bright-line rule, but on an evaluation of conditions on the project site, and require additional parcel-specific investigation and recommendations for each structure to be built.

B. Substantial Evidence

[9][10][11] We next consider whether substantial evidence supports the City's finding that seismic impacts have been mitigated to a less than significant level. The Alliance argues that the Revised EIR requires only "code compliance and 'good practice,' " and that the evidence does not show that code compliance would mitigate structural damage to a less than significant level. In evaluating this contention, we ****769** bear in mind that we "may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable. [Citation.] A court's task is not to weigh conflicting evidence and determine who has the better argument when the dispute is whether adverse effects

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have been mitigated or could be better mitigated. We have neither the resources nor scientific expertise to engage in such analysis, even if the statutorily prescribed standard of review permitted us to do so." (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 393, 253 Cal.Rptr. 426, 764 P.2d 278.) Moreover, "a public agency may choose between differing expert opinions. [Citations.] An agency may also rely upon the opinion of its staff in reaching decisions, and the opinion of staff has been recognized as constituting substantial evidence. [Citation]." (*Browning–Ferris Industries v. City Council* (1986) 181 Cal.App.3d 852, 866, 226 Cal.Rptr. 575 (*Browning–Ferris*).)

1. The Revisions to the EIR and Supporting Evidence

According to the Revised EIR, "[s]tate and local code requirements ensure buildings are designed and constructed in a manner that, although the buildings may sustain damage during a major earthquake, will reduce the substantial risk that buildings will collapse resulting in a potential for injury or death." Because the project is in a liquefaction zone, it must comply with the Seismic Hazards Mapping Act and the guidelines for evaluating and mitigating liquefaction hazards prescribed under CGS Special Publication 117, which contains the "methods and procedures" for evaluating seismic hazards related to ground shaking and determining mitigation methods that "the State Mining and Geology Board, the Seismic Hazard Mapping Act Advisory Committee, and its Working Groups have determined are currently representative of quality practice." Furthermore, under California Code of Regulations, title 14, section 3724, a regulation promulgated under the Seismic Hazards Mapping Act, a project may be approved only when its seismic hazards have been evaluated in a geotechnical report prepared by a registered civil engineer or certified engineering geologist, and appropriate mitigation measures proposed.

901** The Revised EIR included an extensive discussion of the requirements of the Building Code. As the Revised EIR explained, the 2007 version of the Building Code, which was in effect at the time the Revised EIR was prepared, required the preparation of a foundation and soil report if certain conditions existed, including questionable soils, expansive soils, or the use of pile and pier foundations.[FN8] (Cal.Code Regs., tit. 24, §§ 1802.1, 1802.2, 1802.2.1, 1802.2.2, & 1802.2.4.) Where a structure was in certain "seismic design categories," the Building Code established requirements for the soils investigation, including a determination of the lateral pressure on basement and retaining walls due to earthquake motions, as well as an assessment of the potential consequences of any liquefaction and soil strength loss, based on an evaluation of peak ground acceleration as determined from a site-specific study. The assessment must address mitigation measures, including ground stabilization, selection of appropriate foundation type and depths, and selection of appropriate structural systems. (Cal.Code Regs., tit. 24, § 1802.2.7.) Moreover, as the Revised EIR noted, the Building*770** Code required geologic and earthquake engineering reports for all proposed construction, prepared by a California-certified engineering geologist in consultation with a California-registered geotechnical engineer, the purpose of which was to "identify geologic and seismic conditions that may require project mitigations." (Cal.Code Regs., tit. 24, §§ 1802.7.1 & 1802.7.2.) The report must "contain data which provide an assessment of the nature of the site and potential for earthquake damage based on appropriate investigations of the regional and site geology, project foundation conditions and the potential seismic shaking at the site." (Cal.Code Regs., tit. 24, §§ 1802.7.2.) The Building Code also required a geotechnical report, which would "provide completed evaluations of the foundation conditions of the site and the potential geologic/seismic hazards affecting the site," and must include "site-specific evaluations of design criteria related to the nature and extent of foundation materials, groundwater conditions, liquefaction potential, settlement potential and slope stability, ... contain the results of the analysis of problem areas identified in the engineering geologic report," and "incorporate estimates of the characteristics of site ground motion provided in the engineering geologic report." (Cal.Code Regs., tit. 24, § 1802.8.)[FN9]

FN8. The 2007 Building Code was in effect when the Revised EIR was prepared. Unless otherwise noted, citations to the Building Code will be to the 2007 version of the code.

FN9. The 2007 version of the Building Code contained a number of other pertinent provisions. As the Revised EIR noted, section 1802.7.1 required the engineering geologic report to include "[g]round-motion parameters, as required by Section 1613...." Section

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1613.1 of the 2007 Building Code, in the "Structural Design" chapter, provides that, with certain exceptions, "[e]very structure, and portion thereof, ... shall be designed and constructed to resist the effects of earthquake motions...." The ensuing sections contain technical site class definitions (Cal.Code Regs., tit. 24, Table 1613.5.2), site coefficients and adjusted maximum considered earthquake spectral response acceleration parameters (Cal.Code Regs., tit. 24, § 1613.5.3), site classifications for seismic design (Cal.Code Regs., tit. 24, § 1613.5.5), and standards for determining seismic design category (Cal.Code Regs., tit. 24, § 1613.5.6).

***902** The City's ordinances required developers to file reports identifying soil conditions that might create hazards and identifying measures to avoid such hazards and to prevent grading from creating unstable slopes. Other City ordinances required preliminary soil reports identifying any characteristics of the soil that could cause hazards and recommending measures to avoid the hazards. If the preliminary report indicated the presence of soil problems that could lead to structural damage, a soil investigation must be made after grading by a registered civil engineer, and a report must be submitted recommending corrective action to prevent structural damage to each proposed structure.

According to the Revised EIR, the preparers of the EIR relied on the Draft Geotechnical Investigation prepared for the Oak to Ninth District Master Plan in 2002 by Treadwell & Rollo (Geotechnical Investigation).[FN10] The Geotechnical Investigation was "not a final site-specific, design-level geotechnical study, rather, it determine[d] project feasibility in light of the site geotechnical conditions and identifie[d] areas of development opportunity and areas of development constraint." It considered the potential for "strong ground shaking, ground rupture, liquefaction, lateral spreading, and differential compaction," and identified areas that could present ground failure hazards beneath project structures during an earthquake. The Geotechnical Investigation concluded that deep foundations systems would be required for all substantial structures in the ****771** proposed project. The Revised EIR reported that the Geotechnical Investigation included numerous requirements for installing these foundations, depending on the specifics of the final project design, and that all of the remedial methods and design measures were "standard, accepted and proven engineering practices used throughout the Bay Area to overcome unfavorable soil conditions." These methods included "dewatering requirements, installation of wick drains through any dredged fill, specifications for the size and strength of pile foundations, preliminary lateral load capacities for piles, specifications for pile installation and indicator piles, monitoring requirements for pile installation, ... site grading requirements including soil moisture content and fill material requirements, requirements for conditioned Bay Mud, utility trench backfill requirements, landscaping limitations, slab on grade construction requirements, trenching and excavation requirements, seismic design requirements for structural designs, ... and materials requirements to avoid soil corrosivity." In addition, site-specific investigations would be required before final project design, and remedial methods adjusted as necessary. These site-specific investigations would be used for final design of the foundation systems for each structure, which must ***903** take into consideration the "engineering properties beneath the proposed structure and the projected loads (weight of the structure)." The site-specific investigations would "more precisely determine the depth of the artificial fill and Bay Muds at each building site, which influences the distribution of deep foundation piles. In addition, site-specific information would specify exact design coefficients that are needed by structural engineers to determine the type and sizing of structural building materials."

FN10. The Geotechnical Investigation is included in the record.

According to the Revised EIR, all the methods suggested in Mitigation Measures F.1 and F.2 were "standard engineering approaches, which are accepted in the geotechnical engineering community and proven on sites throughout California." Moreover, CGS Special Publication 117, Guidelines for Evaluating and Mitigating Seismic Hazards in California, contained "guidelines for mitigation measures developed by experienced geotechnical practitioners based on extensive research about effective geotechnical solutions."

2. Substantial Evidence Supports the City's Findings

[12] The Alliance contends this evidence is in-

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sufficient to support the City's findings that revised mitigation measures F.1 and F.2 reduced the effects of ground shaking, liquefaction, and settlement to a less than significant level.

We are guided in our analysis by *Tracy First v. City of Tracy* (2009) 177 Cal.App.4th 912, 99 Cal.Rptr.3d 621 (*Tracy First*). As pertinent here, the court in *Tracy First* considered whether an EIR had adequately studied the energy impacts of a new store. (*Id.* at pp. 916, 930, 99 Cal.Rptr.3d 621.) Section 21100, subdivision (b)(3) required an EIR to include a statement concerning mitigation measures, including " 'measures to reduce the wasteful, inefficient, and unnecessary consumption of energy.' " (*Tracy First,* 177 Cal.App.4th at p. 930, 99 Cal.Rptr.3d 621.) The EIR's analysis of energy issues included a discussion of the environmental setting, the regulatory framework applicable to energy resources, the standards for determining whether there was a significant energy impact, and a discussion of the energy impact of the project. It concluded mitigation was not required because there was no significant energy impact. (*Id.* at pp. 930–931, 99 Cal.Rptr.3d 621.) Tracy ****772** First challenged the project, arguing that it was improper for the City of Tracy to rely on state building standards in determining whether an energy impact was significant. (*Id.* at p. 933, 99 Cal.Rptr.3d 621.) The Court of Appeal disagreed, saying, "[t]he California Building Energy Efficiency Standards [found in title 24 of the California Code of Regulations] are meant to promote energy efficiency, as the name implies. In other words, they 'reduce the wasteful, inefficient, and unnecessary consumption of energy.' (§ 21100, subd. (b)(3).)" (*Tracy First,* 177 Cal.App.4th at pp. 933–934, 99 Cal.Rptr.3d 621.)

***904** Similarly here, the relevant provisions of the Building Code are intended to promote structural safety in the event of an earthquake. (See Cal.Code Regs., tit. 24, § 1613.1) Moreover, the Geotechnical Investigation evaluated the seismic considerations at the project site and concluded that " [f]rom a geotechnical standpoint, ... the site can be developed as planned." The Geotechnical Investigation noted the geotechnical concerns at the site, such as the presence of compressible weak bay mud, the potential for settlement, and the potential for strong ground shaking and liquefaction, and made recommendations regarding foundation support and seismic design, among other things. To the extent the site-specific, design-level investigations for each development parcel reveal the need for mitigation, any recommendations must be included in the final design of each structure.[FN11] We agree with the City that compliance with the Building Code, and the other regulatory provisions, in conjunction with the detailed Geotechnical Investigation, provided substantial evidence that the mitigation measures would reduce seismic impacts to a less than significant level. We will not interfere either with the City's findings or with its policy decision to rely on the relevant codes and ordinances.

FN11. According to the Revised EIR, registered geotechnical engineers are required to "comply with the [Building Code] and local codes while applying standard engineering practice and the appropriate standard of care for the particular region in California, which, in the case of the proposed project, [is] the San Francisco Bay Area."

The Alliance relies on *Californians for Alternatives to Toxics v. Department of Food & Agriculture* (2005) 136 Cal.App.4th 1, 16–20, 38 Cal.Rptr.3d 638, to argue that compliance with regulations is not a substitute for compliance with CEQA's mitigation requirements. There, this division concluded that an EIR prepared by the Department of Food and Agriculture (DFA) did not adequately analyze the environmental effects of the use of pesticides to eradicate a pest that threatened vineyards where it relied exclusively on a regulatory program of another agency, the Department of Pesticide Regulation (DPR): "[S]ole reliance on DPR's registration of pesticides and its regulatory program, including safety regulations for employees handling pesticides [citation], is inadequate to address environmental concerns under CEQA. DFA is responsible for analyzing the environmental impacts of proposed pesticide use under the [pest control plan], notwithstanding that DPR must also register pesticides before they can be used in this state. DPR's registration does not and cannot account for specific uses of pesticides in the [pest control plan], such as the specific chemicals used, their amounts and frequency of use, specific sensitive areas targeted for application, and the like." (*Id.* at p. 16, 38 Cal.Rptr.3d 638.) Here, on the other hand, the site-specific seismic and soil investigation and mitigation *do* account for the specific conditions on the project site.

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905** In support of its argument, the Alliance points to the evidence it submitted, particularly*773** the letter from Kropp suggesting it would be appropriate to use a "performance-based design approach" such as that outlined in the April 2008, newsletter from the National Earthquake Hazards Reduction Program. In doing so, the Alliance essentially asks us to substitute our judgment for that of the City. This we may not do. (See *Better Alternatives for Neighborhoods v. Heyman* (1989) 212 Cal.App.3d 663, 672, 260 Cal.Rptr. 758; see also *Browning–Ferris, supra,* 181 Cal.App.3d at pp. 865–866, 226 Cal.Rptr. 575 [sufficient evidence supported city's approval of EIR, although project opponent had submitted contrary evidence]; *Association for Protection etc. Values v. City of Ukiah* (1991) 2 Cal.App.4th 720, 734–735, 3 Cal.Rptr.2d 488 [evidence submitted by project opponent regarding soil stability raised issue of construction technique that was satisfactorily addressed by standard building code requirements].)

Two other points about the evidence the Alliance submitted are also pertinent. First, as we have noted, even the newsletter the Alliance submitted shows that performance-based seismic design guidelines are still being developed. This evidence does not show that standards currently exist that would increase the seismic safety of the project. Even if it were appropriate for us to reweigh the evidence, we would not be persuaded by the Alliance's contention. Particularly in light of the preliminary nature of the performance-based guidelines the Alliance advocates, the choice of seismic construction standards is properly treated as a policy decision. Second, the evidence the Alliance submitted also indicates structures designed in conformity with current seismic design codes can be expected to resist minor earthquakes without damage, resist moderate earthquakes without structural damage, and resist major earthquakes without collapse, but possibly with some structural damage; even in a major earthquake, however, the structural damage would be reparable. This evidence undercuts the Alliance's argument that the codes' standards are inadequate to protect structures from the effects of earthquakes. We see no abuse of discretion in a conclusion that conformity with the current building standards, as discussed and elaborated in the Revised EIR, in conjunction with the other requirements specified in the Revised EIR, adequately mitigated the seismic impacts of the project.[FN12]

FN12. The Alliance draws our attention to the recent case of *California Oak Foundation v. Regents of University of California* (2010) 188 Cal.App.4th 227, 115 Cal.Rptr.3d 631 (*California Oak*), which considered, in pertinent part, whether an EIR had adequately described the baseline geological conditions of a project that included an athlete center and parking structure to be built in a delineated Alquist–Priolo earthquake fault zone. (*Id.* at pp. 241, 264, 115 Cal.Rptr.3d 631; see § 2621 et seq.) Division Three of the First Appellate District rejected an argument that the EIR's description of baseline geological conditions was inaccurate or incomplete. In doing so, it noted that the EIR disclosed that the structures would be in a delineated fault zone, but not atop a known active fault, and that the EIR identified as a " 'significant and unavoidable' " impact the fact that people or structures could be exposed to potentially substantial adverse seismic effects. (*California Oak, supra,* 188 Cal.App.4th at p. 264, 115 Cal.Rptr.3d 631.) Although the EIR for the projects in *California Oak* found seismic impacts significant and unavoidable, we are not persuaded that on *this* record—where, for example, the project is not located in an Alquist–Priolo fault zone—such impacts have not been mitigated to a less than significant level.

***906 C. Deferred Mitigation**

[13] The Alliance contends the City improperly deferred mitigation of the seismic effects of the project. According to ****774** the Alliance, the EIR leaves to the future the formulation of mitigation measures for seismic impacts, and fails to set objective performance standards for such mitigation.

[14][15][16] "[I]t is improper to defer the formulation of mitigation measures until after project approval; instead, the determination of whether a project will have significant environmental impacts, and the formulation of measures to mitigate those impacts, must occur *before* the project is approved." (*California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 621, 91 Cal.Rptr.3d 571 (*CNPS*), citing *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 248

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Cal.Rptr. 352 (*Sundstrom*) and *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 43 Cal.Rptr.2d 170 (*Gentry*).) However, "when a public agency has evaluated the potentially significant impacts of a project and has identified measures that will mitigate those impacts, the agency does not have to commit to any particular mitigation measure in the EIR, as long as it commits to mitigating the significant impacts of the project. Moreover, ... the details of exactly how mitigation will be achieved under the identified measures can be deferred pending completion of a future study." (*CNPS,* 172 Cal.App.4th at p. 621, 91 Cal.Rptr.3d 571, citing *Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 280 Cal.Rptr. 478 (*SOCA*).) As explained in *SOCA,* " 'for [the] kinds of impacts for which mitigation is known to be feasible, but where practical considerations prohibit devising such measures early in the planning process ..., the agency can commit itself to eventually devising measures that will satisfy specific performance criteria articulated at the time of project approval. Where future action to carry a project forward is contingent on devising means to satisfy such criteria, the agency should be able to rely on its commitment as evidence that significant impacts will in fact be mitigated. [Citations.]' " (*SOCA,* 229 Cal.App.3d at pp. 1028–1029, 280 Cal.Rptr. 478.)

[17] Furthermore, a condition requiring compliance with regulations is a common and reasonable mitigation measure, and may be proper where it is reasonable to expect compliance. (*Sundstrom, supra,* 202 Cal.App.3d 296, 308–309, 248 Cal.Rptr. 352; see also *Gentry, supra,* 36 Cal.App.4th at p. 1395–1396, 43 Cal.Rptr.2d 170 [no improper deferral of mitigation where condition required applicant to submit improvement plans, grading plans, and a final map for approval, plans that would be "subject to a host of specific performance criteria imposed by ***907** various ordinances, codes, and standards, as well as other mitigation conditions"].) Thus, in *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1274–1276, 15 Cal.Rptr.3d 176, the court considered whether mitigation of the effects of a project on a species of lily had been improperly deferred where, under an adopted conservation plan, the landowner was required to design modifications to minimize impact on the lily's habitat; "conduct 'an evaluation of salvage, restoration, [ ]enhancement, [ ] management of other conserved mariposa lily, or other mitigation techniques ... to offset impacts;' " provide monitoring and management consistent with the conservation plan; and coordinate with the United States Fish and Wildlife Service (USFWS) and the California Department of Fish and Game, and obtain USFWS approval. The Court of Appeal recognized that this constituted deferred mitigation, but concluded it was not improper: the city was required to mitigate impacts to the lily under the conservation plan, the EIR committed the city to such mitigation, and it listed what would be required in the mitigation plan. ****775** The court concluded: "That is enough." (*Id.* at p. 1276, 15 Cal.Rptr.3d 176.)

Applying these standards, we conclude the City did not improperly defer mitigation. The Revised EIR discussed the statutes and regulations aimed at increasing seismic safety. It explained that the Seismic Hazards Mapping Act establishes a statewide public safety standard for mitigation of earthquake hazards, and that the minimum level of mitigation for a project "should reduce the risk of ground failure during an earthquake to a level that does not cause the collapse of a building intended for human occupancy," though generally not to a level of no ground failure to all. Moreover, the Building Code establishes standards for seismic safety in the design and construction of buildings, and includes "significant building design and construction criteria that have been tailored for California earthquake conditions." It "provides standards that must be met to safeguard life or limb, health, property, and public welfare by regulating and controlling the design, construction, quality of materials, use and occupancy, location, and maintenance of all buildings and structures within its jurisdiction."

The Revised EIR reported that chapter 18 of the Building Code "specifies the required level of soil investigation." It contains requirements applicable to buildings and foundations, which take into consideration "reduction of potential seismic hazards." The project site included soils that were vulnerable to liquefaction, as well as more "competent" soils. Under the Building Code, the investigation of soils vulnerable to liquefaction must include "[a] determination of lateral pressure on basement and retaining walls due to earthquake motions, [¶] ... [and][a]n assessment of potential consequences of any liquefaction and soil strength loss, including estimation of differential settlement, lateral movement or reduction in foundation soil-bearing capacity, and shall address mitigation measures." (Cal.Code Regs., tit. 24, § 1802.2.7.) As the Revised EIR noted, those measures could include

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"ground stabilization, ***908** selection of appropriate foundation type and depths, selection of appropriate structural systems to accommodate anticipated displacements or any combination of these measures." (Cal.Code Regs., tit. 24, § 1802.2.7, ¶ 2.) The Building Code also required geologic and earthquake engineering reports for all proposed construction, which must include a geologic investigation, evaluation of known active and potentially active faults, ground motion parameters, evaluation of slope stability at or near the site, and the liquefaction and settlement potential of the earth materials in the foundation. (Cal.Code Regs., tit. 24, § 1802.7.) The geotechnical report, to be prepared by a registered geotechnical engineer, must also include evaluation of the foundation conditions of the site and the potential geologic and seismic hazards affecting the site, and site-specific evaluations of design criteria related to conditions at the site. (Cal.Code Regs., tit. 24, § 1802.8.1)

The Revised EIR also described the City's building ordinances aimed at mitigating seismic and other geologic hazards. Among other things, those ordinances required developers to file soil reports, prepared by a state-registered civil engineer, indicating any soil characteristics that might create hazards and identifying measures to avoid soil hazards. According to the Revised EIR, the City's Municipal Code also required the subdivider to file with the City Engineer a preliminary soil report, prepared by a registered civil engineer, specifying what measures were necessary so any proposed grading would result in reasonably stable slopes, stating whether critically expansive soils were ****776** present, indicating whether any other soil characteristics might create hazards or problems, and recommending what measures were necessary to avoid those hazards or problems. In addition, before the subdivision improvements were accepted, the civil engineer must certify that the grading work was done in accordance with the recommendations in the preliminary report, that the slopes were reasonably stable against sliding, and that adequate measures had been taken to prevent erosion. The certificate must also state the magnitude of the settlements that were likely to occur, the allowable loads or bearing pressures which might be imposed, that compaction was adequate for the uses proposed for the property, and any limitations which should be imposed on the development of the property because of soil conditions, including the designation of areas that are unsafe for building. Moreover, if the preliminary report indicated the presence of soil problems that would lead to structural damage, a registered civil engineer must make a soil investigation of each lot after grading, and submit a report "recommending corrective action which is likely to prevent structural damage to each structure proposed to be constructed in the subdivision."

The Revised EIR also discussed the responsibilities of the engineers and building officials and the processes to ensure that site investigations, grading, and construction are completed in accordance with the laws designed to protect the public and property from the effects of earthquake shaking and ***909** ground failure. As a registered professional, the geotechnical engineer "is required to comply with the Building Code and local codes while applying standard engineering practice and the appropriate standard of care for the particular region in California" and "to conduct a thorough investigation and provide recommendations to remedy unfavorable geologic and seismic conditions." The geotechnical engineer is responsible for investigating the underlying soils, "and, if necessary, developing remedies to improve soil conditions based on standard, accepted, and proven engineering practices." The geotechnical investigation must test and characterize the soil and bedrock conditions and determine their response to seismic ground shaking. Based on those conditions, the report "includes methods and materials for all aspects of the site development, including the site preparation, building foundations, structural design, utilities, sidewalks and roadways, to remedy any geotechnical conditions related to seismic impacts." After reviewing the geotechnical investigation and recommendations, the City Building Department engineers "impose permit requirements based on the geotechnical recommendations and [Building Code] provisions." The geotechnical recommendations and other requirements of the Building Code are also used in preparing grading plans, foundation designs, and structural designs.

The Revised EIR explained that the preparers of the EIR relied on the Geotechnical Investigation, which "determine[d] project feasibility in light of the site geotechnical conditions and identifie[d] areas of development opportunity and areas of development constraint." According to the Revised EIR: "The geotechnical investigation included 12 test borings, 34 cone penetrations [to determine strength characteristics of the soil], and laboratory testing of soil samples. Seismic considerations examined in the geotechnical

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investigation included strong ground shaking, ground rupture, liquefaction, lateral spreading, and differential compaction. The geotechnical investigation identified areas that could present significant ground failure hazards beneath proposed structures during an earthquake, which include[[**777 [ ], the presence of undocumented artificial fills and soft compressible Bay Muds. Based on the data collected and engineering analysis, the geotechnical investigation determined the estimated settlement that could be expected across the site. Specifically, the geotechnical investigation determined that deep foundation systems would be required for the foundation of all substantial structures in the proposed project and surface foundation systems would not be adequate for any structures, other than very small non-habitable structures. The geotechnical investigation also determined that deep foundation systems would be necessary to anchor the foundations of project buildings into more solid materials which are found at depths below the Bay Mud." (Footnotes omitted.) According to the Revised EIR, the Geotechnical Investigation included "[n]umerous requirements for installing these foundations," as well as other measures (discussed above), which were "accepted and proven engineering ***910** practices used throughout the Bay Area to overcome unfavorable soil conditions." However, subsequent site-specific investigations would also be required before final project design, which would include more detailed evaluations for the foundation systems needed for individual structures and would identify which measures would be most appropriate for each specific area.

The Revised EIR concluded that "[c]onsidering the rigorous investigation process required under the engineering standard of care, compliance with state laws and local ordinances, and regulatory agency technical reviews, the mitigation measures presented in F.1 and F.2 will reduce the risk of seismic hazards and ensure that impacts associated with development [of the] Oak to Ninth Project area would remain less than significant." It is in light of this background discussion that we evaluate whether mitigation measure F.1, for seismic ground shaking, and F.2, for liquefaction and earthquake-induced settlement, impermissibly defer mitigation of seismic impacts.

These mitigation measures appear to us to fall squarely within the rule of *CNPS* that "when a public agency has evaluated the potentially significant impacts of a project and has identified measures that will mitigate those impacts," and has committed to mitigating those impacts, the agency may defer precisely how mitigation will be achieved under the identified measures pending further study. (*CNPS, supra,* 172 Cal.App.4th at p. 621, 91 Cal.Rptr.3d 571.) The Building Code and City regulations require investigation and recommendations to avoid seismic hazards; in fact, under City ordinances, a registered civil engineer is required to recommend corrective action that is "*likely to prevent structural damage to each structure.*" (Italics added.) The EIR and the Geotechnical Investigation provide evidence that mitigation is feasible and discuss a range of mitigation measures, including the Geotechnical Investigation's recommendation of the use of deep foundation systems, as well as requirements for piles, site grading requirements, and seismic design requirements for structural designs, all of which the Revised EIR reported were standard, accepted, and proven engineering practices. In addition, Mitigation Measure F.2 lists further possible methods to reduce the risk of liquefaction. Finally, the mitigation measures required compliance with all geotechnical mitigations contained in the site-specific geotechnical investigations in the plans submitted for all relevant construction permits. As in *Gentry,* the plans are "subject to a host of specific performance criteria imposed by various ordinances, codes, and standards, as well as other mitigation conditions." ****778**(*Gentry, supra,* 36 Cal.App.4th at p. 1395, 43 Cal.Rptr.2d 170.) It is reasonable to expect that these environmental regulations will be followed. (See *Sundstrom, supra,* 202 Cal.App.3d at pp. 308–309, 248 Cal.Rptr. 352.)

This reasonable expectation distinguishes this case from those upon which the Alliance relies. The Alliance draws our attention to another portion of ***911** *Gentry,* in which the court concluded that one condition (among many that had been challenged) impermissibly deferred mitigation of the effects of a housing project. (*Gentry, supra,* 36 Cal.App.4th at pp. 1367, 1395–1397, 43 Cal.Rptr.2d 170.) That condition required the developer to comply with any existing ordinances protecting the Stephens' kangaroo rat; provided that the city could request that the developer obtain a biological report regarding the Stephens' kangaroo rat; and required the developer to comply with any recommendations in the report, if one was required. Unlike the situation here—and contrary to the rule of *CNPS* and *SOCA*—not only had the study not been made, but no possible mitigation measures

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had been developed, no performance standards had been set, and there was no reason to conclude either that the measures recommended in the study would be feasible or that they would mitigate the impacts. (See also *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1115, 1118–1119, 85 Cal.Rptr.3d 50 [mitigation of project's effects on water levels impermissibly deferred where no specific performance standard set and only effective mitigation alternative had not been studied or examined].)

Recently, this division considered deferred mitigation in *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 89–96, 108 Cal.Rptr.3d 478. The question there was whether an EIR for a project to permit Chevron Products Company (Chevron) to replace and upgrade certain manufacturing facilities at an oil refinery had improperly deferred identification of measures to mitigate the project's contribution to greenhouse gas emissions until after the EIR process. (*Id.* at pp. 75, 89–90, 108 Cal.Rptr.3d 478.) This court noted that the reason for the delay was the City of Richmond's reluctance to make a finding early in the EIR process that such emissions would create a significant effect: after initially declining to state conclusions about the extent of any impacts, the city published a new volume of the EIR considering the impact after "an outpouring of public comment." (*Id.* at pp. 90–91, 108 Cal.Rptr.3d 478.) The new volume of the EIR acknowledged that incremental increases in greenhouse gases would result in significant effects on global warming, and proposed mitigation measures for this impact. (*Id.* at p. 91, 108 Cal.Rptr.3d 478.) The "centerpiece of the mitigation plan," which the city council adopted when approving the project, was a measure requiring Chevron, within one year of approval of the conditional use permit, to submit to the city a plan for achieving complete reduction of greenhouse gas emissions. (*Ibid.*) Chevron would be required to hire an expert to conduct an inventory of greenhouse gas emissions and identify potential emission reduction opportunities, and the EIR listed candidate mitigation measures, such as adding or improving heat exchangers; initiating carbon sequestration, capture, and export; replacing stationary diesel internal combustion engines; and reducing mobile emission sources. (*Id.* at p. 92, 108 Cal.Rptr.3d 478.) The court concluded this mitigation plan was deficient, noting that the EIR proposed only a general goal of no net increase in greenhouse gas emissions, and then "set[ ] out a handful of cursorily described mitigation ***912** measures for future consideration," with no effort to calculate what, if any, reductions in greenhouse****779** gas emissions would result from each measure. (*Id.* at p. 93, 108 Cal.Rptr.3d 478.) Indeed, the court continued, the measures were "nonexclusive, undefined, untested and of unknown efficacy." (*Ibid.*) Here, in contrast, the Revised EIR proposes compliance with a regulatory scheme designed to ensure seismic safety. Although final design of the structures, including seismic safety design, is deferred until a later date, the Revised EIR gives adequate assurance that seismic impacts will be mitigated through engineering methods known to be feasible and effective.

Accordingly, we conclude the Revised EIR does not impermissibly defer mitigation of seismic impacts.

III. DISPOSITION

The order granting the motion to discharge the writ is affirmed.

We concur: RUVOLO, P.J., and SEPULVEDA, J.

Cal.App. 1 Dist.,2011.
Oakland Heritage Alliance v. City of Oakland
195 Cal.App.4th 884, 124 Cal.Rptr.3d 755, 11 Cal. Daily Op. Serv. 6038, 2011 Daily Journal D.A.R. 7241

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Exhibit O

NATIONAL PARKS & CONSERVANCY ASSOCIATION V. COUNTY OF RIVERSIDE, 71 CAL. APP. 4th 1341, 1366 (1999)

71 Cal.App.4th 1341, 84 Cal.Rptr.2d 563, 1999 Daily Journal D.A.R. 4309
(Cite as: 71 Cal.App.4th 1341)

NATIONAL PARKS AND CONSERVATION ASSOCIATION et al., Plaintiffs and Respondents,
v.
COUNTY OF RIVERSIDE et al., Defendants and Appellants;
KAISER STEEL RESOURCES, INC., et al., Real Parties in Interest and Appellants. LAURENCE R. CHARPIED et al., Plaintiffs and Appellants,
v.
COUNTY OF RIVERSIDE et al., Defendants and Appellants; MINE RECLAMATION CORPORATION, INC., et al., Real Parties in Interest and Appellants.

No. D031056.

Court of Appeal, Fourth District, Division 1, California.
May 7, 1999.

SUMMARY

In 1994 the trial court issued related judgments granting petitions for writs of mandate that were brought by opponents of a landfill project that was to be located near a national park. After additional study, analysis, and a new environmental impact report (EIR), the county board of supervisors issued a decision that, with one exception, the project as mitigated would have no significant effect upon the environment. In 1998, after a hearing and reconsideration motion, the trial court found in its final order that there had been no adequate compliance with the requirements of the writ of mandate as to two particular items of study: the impact of the project on the wilderness experience at the park and the desert tortoise population. (Superior Court of San Diego County, Nos. 662907 and 663033, Judith McConnell, Judge.)

The Court of Appeal reversed the order with directions to overrule the objections and to enter an order discharging the writ previously issued. The court held that for purposes of analyzing the impact of the proposed landfill project on the national park's wilderness experience components, there was substantial evidence in the administrative record to support the manner in which the EIR and the county distinguished between wilderness and nonwilderness areas. The court also held that the trial court erred in finding, with respect to noise impact, that there was no support in the record for the conclusion that nonwilderness areas within the park should be treated differently from other areas within the park. The court further held that the trial court erred in finding there had been an inadequate analysis of all aspects of the wilderness experience component. The court held that the EIR contained an adequate assessment of the project's increase on the night lighting on the park. The court also held that the trial court erred in rejecting the EIR on the basis that it provided that the effect of the project would be less than significant regarding the impact of the landfill on the biological resources of the park. The court further held that the trial court erred in finding a lack of substantial evidence to support the EIR based on the finding that the impact of the project on the desert tortoise had been mitigated to a level of insignificance. The court finally held that the trial court erred in finding that the EIR was inadequate with respect to the desert tortoise habitat. (Opinion by Huffman, J., with Work, Acting P. J., and Haller, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Pollution and Conservation Laws § 2.9--California Environmental Quality Act--Proceedings--Judicial Review--Substantial Evidence Standard.

In applying the substantial evidence standard to a court's review of an agency's determinations under the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.), the reviewing court must resolve reasonable doubts in favor of the administrative finding and decision. The appellate court's role is precisely the same as the trial court's, and lower courts' findings are not conclusive on appeal.

(2) Pollution and Conservation Laws § 2.3--California Environmental Quality Act--Environmental Impact Reports--Sufficiency--Function of Court.

The substantiality of the evidence supporting an administrative decision is a question of law that is governed by the same evidentiary rules used to decide the substantiality of the evidence supporting findings of fact made in a trial court. The same rules apply

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when a court evaluates an administrative body's approval of an environmental impact report (EIR) under the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.). A court decides this question of law de novo. The court does not pass upon the correctness of the EIR's environmental conclusions, but only upon its sufficiency as an informative document. A court may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable. A court's task is not to weigh conflicting evidence and determine who has the better argument when the dispute is whether adverse effects have been mitigated or could be better mitigated. Courts have neither the resources nor scientific expertise to engage in such analysis, even if the statutorily prescribed standard of review permitted courts to do so. A court's limited function is consistent with the principle that the purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind.

(3) Pollution and Conservation Laws § 2.3--California Environmental Quality Act--Environmental Impact Reports--Sufficiency--Omission of Information.

Determinations in an environmental impact report (EIR) must be upheld if they are supported by substantial evidence; the mere presence of conflicting evidence in the administrative record does not invalidate them. A project opponent cannot obtain a more favorable standard of review by arguing that the EIR failed to disclose the conflicting evidence, and therefore the lead agency has not proceeded in a manner required by law; the project opponent must also show that the failure to disclose the conflicting evidence precluded informed decisionmaking or informed public participation. However, even in determining the prejudicial effect of the failure to disclose, a court must resolve any factual issues in favor of the lead agency, if supported by substantial evidence. Challenges to an EIR's adequacy usually involve questions such as the proper scope of the analysis, the appropriate methodology for studying an impact, the reliability or accuracy of data, the validity of technical opinions, and the feasibility of further studies. These determinations are ultimately based on factual issues. The question for a reviewing court should then be limited to whether the agency's reasons for proceeding as it did are supported by substantial evidence. The failure to include information in an EIR normally will rise to the level of a failure to proceed in the manner required by law only if the analysis in the EIR is clearly inadequate or unsupported.

(4a, 4b) Pollution and Conservation Laws § 2.3--California Environmental Quality Act--Environmental Impact Reports--Landfill Project Near National Park--Wilderness Versus Nonwilderness Areas.

For purposes of analyzing the impact of a proposed landfill project on a nearby national park's wilderness experience components, there was substantial evidence in the administrative record to support the manner in which the environmental impact report (EIR) and the county distinguished between wilderness and nonwilderness areas. Between the landfill site and the nearest park boundary were a major aqueduct, a pump station, utility and communication lines, roads, and an employee townsite. Certain areas within the park nearest the landfill site contained miles of electrical transmission lines, an aqueduct, and roads. Most of the park's visitor activity took place miles away, at the other end of the park. The park allowed various nonwilderness uses. The federal law creating the park and National Park Service management guidelines distinguished between wilderness and nonwilder ness park areas, and Department of the Interior maps reflected these distinctions.

[See 4 Witkin, Summary of Cal. Law (9th ed. 1987) Real Property, § 59 et seq.]

(5) Pollution and Conservation Laws § 1.4--California Environmental Quality Act--Administrative Guidelines.

Changes to the California Environmental Quality Act guidelines (Cal. Code Regs., tit. 14) act prospectively only.

(6) Pollution and Conservation Laws § 2.3--California Environmental Quality Act--Environmental Impact Reports--Landfill Project Near National Park-- Wilderness Versus Nonwilderness Areas--Noise Impact.

In reviewing an environmental impact report (EIR) on a proposed landfill project near a national park, the trial court erred in finding, with respect to noise impact, that there was no support in the record that nonwilderness areas within the park should be treated differently from other areas within the park. Since the significance of an activity may vary with the setting, the EIR's noise consultants used different thresholds of noise significance for different areas of the park, and residential noise standards were used in projecting noise levels in the parklands closest to the

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landfill site. Based on the residential standard, the EIR concluded the noise impact on the parklands would be insignificant. Within the park areas nearest to the landfill site were electrical transmission lines, an aqueduct, and roads. Absent more closely applicable standards, the county had a substantial basis for accepting the EIR's use of county residential noise standards for assessing noise impact. There is no requirement that all noise be mitigated to a level of inaudibility, particularly in nonwilderness parklands because the standards for assessing the impact of a project require careful judgment the public agency's part, based to the extent possible on scientific and factual data; these standards allow for a finding of an insignificant degree of impact, not necessarily a zero-impact requirement (Cal. Code Regs., tit. 14, § 15064, subd. (b)).

(7) Pollution and Conservation Laws § 2.3--California Environmental Quality Act--Environmental Impact Reports--Landfill Project Near National Park-- Wilderness Experience Component--Objective and Subjective Analysis.

In reviewing an environmental impact report (EIR) on a proposed landfill project near a national park, the trial court erred in finding there had been an inadequate analysis of all aspects of the wilderness experience component. The EIR stated that since it was difficult to measure subjective impacts of the project, some impact would have to be admitted. The county dealt with the issue by assuming there would be significant impact in this respect, and nevertheless made a finding that overriding considerations justified some such impact upon the wilderness experience component. Aesthetic issues are properly a subject of study in an EIR to assess the impact of a project. Similarly, National Park Service management guidelines analyze impacts by measuring such elements as view sheds, air quality, noise and odor. In the present case, however, it was difficult to discern how a comprehensive visitor use and perception study would have added useful information regarding the site's key physical conditions. The EIR acknowledged the potential subjective impacts of the project, and it examined every possible sensory impact on a park visitor, which might then result in the subjective responses that were recognized as reasonably possible or probable. From the general information and hard data given, the county could reasonably have drawn conclusions about the significance of these impacts. No more was required.

(8) Pollution and Conservation Laws § 2.3--California Environmental Quality Act--Environmental Impact Reports--Landfill Project Near National Park-- Additional Townsite Light.

An environmental impact report (EIR) on a proposed landfill project near a national park contained an adequate assessment of the project's impact on the night lighting on the park. An expert can make a judgment on existing evidence, without further study, that a particular condition will have no significant impact. The EIR set forth a realistic assessment of existing night lighting in the area and concluded that the projected expansion of the townsite as a result of the project would not make much difference. This was a reasonable conclusion in light of the already developed nature of the townsite.

(9) Pollution and Conservation Laws § 2.3--California Environmental Quality Act--Environmental Impact Reports--Landfill Project Near National Park--Impact of Landfill on Biological Resources.

The trial court erred in rejecting an environmental impact report (EIR) on a proposed landfill project near a national park, which EIR provided that the impact of the landfill on the biological resources of the park would be less than significant. Although several qualified experts rendered opinions about the ecological impacts of the project and reached differing conclusions, this difference of opinion among the experts was not a valid basis for rejecting the EIR. Also, while there was a difference of opinion among the experts as to whether additional studies would have been accurate or necessary, evaluation of speculative impacts is not required (Cal. Code Regs., tit. 14, § 15145). The sufficiency of an EIR is to be evaluated in light of what is reasonably feasible (Cal. Code Regs., tit. 14, § 15151). The alternative of years of further study could reasonably have been rejected as infeasible for economic or planning reasons. Effectively, the trial court selected among conflicting expert opinions and improperly substituted its own judgment for that of the county.

(10) Pollution and Conservation Laws § 2.3--California Environmental Quality Act--Environmental Impact Reports--Landfill Project Near National Park--Impact on Desert Tortoise--Fences.

The trial court erred in finding a lack of substantial evidence to support an environmental impact re-

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port (EIR) on a proposed landfill project near a national park, which provided that the impact of the project on the desert tortoise had been mitigated to a level of insignificance. The trial court referred specifically to the lack of a requirement of tortoise-proof fences along a 52-mile railroad track, but the issue of fencing was studied by the United States Fish and Wildlife Service, which concluded that creating such a barrier was not yet indicated because further study was necessary on migration patterns during operation of the project. Such a barrier could also have caused ill effects on the bighorn sheep in the area. The record contained evidence that there were significant pros and cons of a 52-mile fence along the railroad line. Where such unknowns exist, certain mitigation measures that are related to existing measures may be deferred in implementation where the other measures will mitigate known impacts to insignificance. On balance, the trial court effectively substituted its judgment on the fencing issue for those of the expert agencies and biologists in the field, and it had no adequate basis for doing so.

(11) Pollution and Conservation Laws § 2.3--California Environmental Quality Act--Environmental Impact Reports--Landfill Project Near National Park--Impact on Desert Tortoise--Tortoise Habitat.

The trial court erred in finding an environmental impact report (EIR) on a proposed landfill project near a national park to be inadequate with respect to the desert tortoise habitat. The trial court based its decision on the Desert Tortoise Recovery Plan (DTRP) issued by the United States Fish and Wildlife Service (USFWS), which provided for certain Desert Wilderness Management Areas (DWMA's) that included the park. However, the landfill site itself was not within that critical habitat designation. Under the DTRP, outside of the DWMA's, the desert tortoise was to be protected by the Endangered Species Act (ESA). When the USFWS issued its no jeopardy opinion, it was under the authority of the ESA. This indicated that existing mitigation measures for the landfill area (not within a DWMA) were sufficient in the experts' view, and the access routes that fell within the DWMA's did not bring the entire project within the protected sphere of the DTRP. In light of the record as a whole, the trial court misinterpreted the DTRP as prohibiting this project because it would operate within the general range of the desert tortoise habitat.

COUNSEL

Nugent & Newnham, Michael H. Fish; McClintock, Weston, Benshoof, Rochefort, Rubalcava & MacCuish, Steven W. Weston, John A. Henning, Jr.; Bruen & Gordon, Scott W. Gordon; William C. Katzenstein, County Counsel, Joe S. Rank, Assistant County Counsel, Katherine A. Lind and Jay G. Vickers, Deputy County Counsel, for Defendants and Appellants and for Real Parties in Interest and Appellants.

Gibson, Dunn & Crutcher, Floy E. Andrews, Jeffrey D. Dintzer, Patrick W. Dennis; Chatten-Brown and Associates, Jan Chatten-Brown, Kimberly E. Lewand and Douglas P. Carstens for Plaintiffs and Respondents.

HUFFMAN, J.

In September 1994, the superior court issued two related judgments granting petitions for writs of mandate that were brought by certain opponents of a landfill project, including the National Parks and Conservation Association and several other individuals and organizations (collectively the opponents). [FN1] The landfill project proponents include real parties in interest Kaiser Steel Resources, Inc., Kaiser Eagle Mountain, Inc., and Mine Reclamation Corporation, Inc. (MRC) (collectively appellants). The landfill project will be located within one and one-half miles of the ***1348** southeastern boundary of 794,000-acre Joshua Tree National Park (the Park). The petitions challenged the actions of the Board of Supervisors (the Board) of the County of Riverside (the County) in certifying the environmental impact report (EIR) prepared to analyze that project pursuant to the California Environmental Quality Act (CEQA). (Pub. Resources Code, [FN2] § 21000 et seq.; Code Civ. Proc., §§ 1085, 1094.5.)

FN1 The opponents include the National Parks and Conservation Association, the Eagle Mountain Landfill Opposition Coalition, the City of Coachella, and a number of individuals: Laurence R. Charpied and Donna J. Charpied, Steve W. Clute, Richard M. Marsh, and Daniel S. Roman.

FN2 All statutory references are to the Public Resources Code unless otherwise specified.

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In granting the opponents' petitions in 1994, the trial court ruled that a number of the opponents' challenges to the EIR had merit, but two particular challenges (not involved here) were unmeritorious. The opponents appealed those determinations, and in a published opinion this court affirmed the judgments in both cases. (*National Parks & Conservation Assn. v. County of Riverside* (1996) 42 Cal.App.4th 1505 [50 Cal.Rptr.2d 339] (*National Parks*).) The project proponents went back to the drawing board and completed three additional years' worth of study and analysis of the project's effect upon the surrounding environment, and produced a new EIR, which was then submitted to the County. Extensive public hearings were held and ultimately the Board issued a decision the project as mitigated would have no significant effect upon the environment, with the exception that a statement of overriding considerations was made as to the wilderness experience component (i.e., the effect of the project upon the experience of those visiting the Park).

The appellants then submitted the matter to the trial court as their return on the October 1994 writ. The opponents filed numerous objections to the return on the writ, and after a hearing and a reconsideration motion, the superior court found in its final order that there had been no adequate compliance with the requirements of the writ of mandate as to two particular items of study: The impacts of the project on the wilderness experience at the Park and on the desert tortoise population.

Appellants now assert in this court that contrary to the findings of the superior court, with respect to the impacts on the Park, substantial evidence supports the decision to approve the project and the EIR is more than sufficient in its analysis and as an informational document. (*Laurel Heights Improvement Assn.* v. *Regents of University of California* (1988) 47 Cal.3d 376, 392-393 [253 Cal.Rptr. 426, 764 P.2d 278] (*Laurel Heights I*).) Appellants also assert that substantial evidence supports the County's decision to approve the project in light of the studies made with respect to the desert tortoise population; they argue the trial court incorrectly substituted its judgment for those of the experts in the field and/or misinterpreted applicable law. We find appellants' arguments to be meritorious and reverse the ***1349** final order with directions that the trial court overrule the objections and discharge the writ previously issued.

Factual and Procedural Background

We reserve a detailed account of the facts for the discussion portion of this opinion. However, a basic outline is necessary to frame the issues. Attached as appendix A is a 1996 draft map of the project area with relation to the Park. (See fn. 6, *post.*) In our prior opinion in this case, the trial court's statement of decision describing the history of the project was quoted in pertinent part:

" 'The Eagle Mountain open pit iron ore mine was the location of extensive mining operations by Kaiser Steel Corporation from 1948 to 1983. The mine is located approximately 200 miles east of Los Angeles, 50 miles west of the Arizona border, 10 miles north of Desert Center, and approximately one and one half miles south of [the Park]. The mining operation resulted in the excavation of three large open pits; each[] one to two miles long. The mining operation ceased in 1983, and Kaiser has leased the mine site to the prospective operator of the landfill.

" '[MRC] plans to utilize the open pits left from the mining operation to create what all parties have agreed is the largest landfill in the country. The landfill footprint will encompass approximately 2,262 acres within a larger project area of 4,654 acres. The landfill will have the capacity to accept up to 20,000 tons per day of wastes for a minimum of 115 years." (*National Parks, supra,* 42 Cal.App.4th at pp. 1509-1510.)

The landfill will fill in areas left by the huge pits of the mining operations (farthest from the Park, to begin with) and will also fill in nearby canyons and hillsides which already contain the waste material from the mining operations. A six-inch layer of dirt and mine debris will be placed daily upon the fill material. In addition to the landfill, the project will include the operation of a 52-mile railroad line and the upgrading of a county road, both for purposes of bringing in the trash for processing. Also, an existing townsite in the area, an outgrowth of a previous company town run by the mining company, will be expanded to serve the workers at the landfill. Currently, the townsite has a few hundred residents and a privately run prison facility operates there, housing 500 prisoners.

The site of the landfill project is about one and

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one-half miles from the nearest Park boundary, as established in 1994 when the Park was converted from a national monument to a larger national park through the federal ***1350** California Desert Protection Act of 1994, which expanded the Park boundaries. (16 U.S.C. § 410aaa-21 et seq.) The areas between the site and this portion of the Park boundary include infrastructure such as an aqueduct, a pump station, utility and communication lines, roads, and another employee townsite. The proponents entered into an agreement with the federal Bureau of Land Management (BLM) for a land exchange, in which BLM will acquire wildlife habitat acreage and the proponents will acquire other disturbed mining lands in the nearby Eagle Mountains.

As set forth in our prior opinion, *National Parks, supra,* 42 Cal.App.4th 1505, once the initial EIR for the project was prepared, two sets of petitioners sought administrative mandamus, challenging the adequacy of the EIR. (See fn. 1, *ante.*) The trial court's 1994 ruling was in favor of the project proponents (appellants) on a number of the opponents' contentions. However, the trial court issued the writ, concluding the evidence was insufficient to support the conclusions drawn by the EIR in several other areas, including the topics involved here (desert tortoise habitat and the effects of the project on the wilderness experience at the Park). Further proceedings under CEQA were required and that judgment was affirmed on appeal, over the opponents' objections that more should have been required. (*National Parks, supra,* 42 Cal.App.4th at pp. 1520-1523.)

As alluded to above, from 1994 to 1997 further studies and analyses of the project's effect upon the surrounding environment were conducted on the designated topics. Those resulted in the preparation of a new EIR designed to address the court's concerns as expressed in the writ of mandate. The areas of analysis included not only the items which are the subject of this appeal (desert tortoise habitat and the effects of the project on the wilderness experience at the Park), but also cumulative impacts of the project and a related hydroelectric project, the proposed land exchange between the proponents and the BLM, landfill liner design, seismic issues and leachate protection.

As part of the preparation for the project, in 1996 the proponents entered into an agreement with the National Park Service (NPS) that provides for an environmental mitigation trust fund to purchase additional wildlife habitat over the life of the project. The proponents agreed to implement as necessary certain mitigation measures designed to protect the Park from unforeseen environmental impacts (such as air pollution and groundwater monitoring, and a program to monitor raven populations at the landfill). [FN3]

FN3 Ravens are of interest here because they scavenge trash that is not adequately covered and prey upon young desert tortoises.

After extensive public hearings from 1996 to 1997, the County approved the project, finding that, as mitigated, it would have no significant effect ***1351** upon the environment, with the exception that a statement of overriding considerations was issued as to the wilderness experience component. Appellants returned to the superior court, filing their supplemental return to the writ of mandate, which detailed the efforts made in preparing the EIR to comply with the court's directions to bring the project into compliance with CEQA.

The opponents filed numerous objections to the return on the writ, and the matters (now consolidated) went to hearing and to a reconsideration motion. The trial court made certain findings in its order after hearing, sustaining the opponents' objections about the degree of compliance with the requirements of the previously issued writ (discussed, *post*). In its final order, the court found, first, a lack of substantial evidence to support the EIR's finding that the impacts of the landfill project on the desert tortoise had been mitigated to a level of insignificance: "Specifically, tortoise-proof fences are not required along the railroad track, and the Desert Tortoise Recovery Plan (DTRP) [FN4] clearly recommends that no new landfills be constructed in desert tortoise habitat."

FN4 The Desert Tortoise Recovery Plan (DTRP) is a document issued in 1994 by the United States Fish and Wildlife Service (USFWS) (an agency of the federal Department of the Interior (DOI)), setting forth general recommendations to protect this form of wildlife. Other agencies which have studied the project's effect on the tortoise include the California Department of Fish and Game (CDFG), the BLM and its technical adviser, the National Biological Service.

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Second, the court in its final order sustained the objections to the finding of the EIR regarding impacts of the landfill project on the neighboring Park. The court found insufficient evidence to support the EIR's conclusion that impacts to the Park will be less than significant: "Specifically, the EIR fails to adequately analyze the impacts on the wilderness experience, noise impacts, light from the townsite, and the impact of the landfill on the biological resources of the [Park] as a complex and interrelated system, which the [NPS] describes as eutrophication." (All remaining areas of objection were overruled.)

Accordingly, the court ordered that the County set aside the certification of the EIR and other project approvals, with a subsequent EIR required to be prepared if the County further considered the project. All physical activity related to the development of the landfill project was suspended until compliance with CEQA was obtained. The trial court reserved jurisdiction over any further return on the writ.

Appellants filed timely notices of appeal of both the order after hearing and the final order as to both consolidated cases. The appeals were also consolidated. ***1352**

Discussion

I. Standards on Appeal

(1) On review, " 'In applying the substantial evidence standard, "the reviewing court must resolve reasonable doubts in favor of the administrative finding and decision." ' [Citation.] The appellate court's role 'is precisely the same as the trial court's,' and lower courts' findings are not 'conclusive on appeal.' [Citation.]" (*San Joaquin Raptor/Wildlife Rescue Center* v . *County of Stanislaus* (1994) 27 Cal.App.4th 713, 722 [32 Cal.Rptr.2d 704].) Although the opponents here make a feeble argument that we should defer to the lower court's discretion in ruling that the new EIR, which it had ordered prepared, remained inadequate, they can muster no authority to support such a view; that view is in any case contrary to the weight of authority on the proper standard of review, which is de novo. (*Laurel Heights I, supra,* 47 Cal.3d at pp. 392-393.)

The trial court's task in this case was to determine whether there had been adequate compliance with the previously issued writ. This amounted to a decision whether the County had prejudicially abused its discretion in approving the updated EIR and in issuing the related entitlements to proceed with the project. "Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." (§ 21168.5.) (2) In *Western States Petroleum Assn.* v . *Superior Court* (1995) 9 Cal.4th 559, 570-573 [38 Cal.Rptr.2d 139, 888 P.2d 1268] (*Western States*), the Supreme Court approved the view that the substantiality of the evidence supporting an administrative decision (there, a quasi-legislative one) is a question of law that is governed by the same evidentiary rules used to decide the substantiality of the evidence supporting findings of fact made in a trial court.

The same rules apply when the courts evaluate an administrative body's approval of an EIR. We decide this question of law de novo: "As a result of this standard, 'The court does not pass upon the correctness of the EIR's environmental conclusions, but only upon its sufficiency as an informative document.' [Citation.] [¶] ... [¶] A court may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable. [Citation.] A court's task is not to weigh conflicting evidence and determine who has the better argument when the dispute is whether adverse effects have been mitigated or could be better mitigated. We have neither the resources nor scientific expertise to engage in ***1353** such analysis, even if the statutorily prescribed standard of review permitted us to do so. Our limited function is consistent with the principle that 'The purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind....' [Ctiation.]" (*Laurel Heights I, supra,* 47 Cal.3d at pp. 392-393.)

(3) Here, as frequently occurs, the major disputes are over whether relevant information was omitted from the EIR. In *Barthelemy* v . *Chino Basin Mun. Water Dist.* (1995) 38 Cal.App.4th 1609, 1620-1621 [45 Cal.Rptr.2d 688] (*Barthelemy*), the court analyzed recent case law and came up with these conclusions on how to approach such arguments: "Determinations in an EIR must be upheld if they are supported by substantial evidence; the mere presence of conflicting evidence in the administrative record does not invalidate them. A project opponent cannot obtain a more

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favorable standard of review by arguing that the EIR failed to disclose the conflicting evidence, and therefore the lead agency has not proceeded in a manner required by law; the project opponent must *also* show that the failure to disclose the conflicting evidence precluded informed decisionmaking or informed public participation. [¶] However, *even in determining the prejudicial effect of the failure to disclose*, a court must resolve any factual issues in favor of the lead agency, if supported by substantial evidence. '*Challenges to an EIR's adequacy usually involve questions such as the proper scope of the analysis, the appropriate methodology for studying an impact, the reliability or accuracy of data, the validity of technical opinions, and the feasibility of further studies. These determinations are ultimately based on factual issues.... The question for a reviewing court should then be limited to whether the agency's reasons for proceeding as it did are supported by substantial evidence.*' [Citation.] The failure to include information in an EIR normally will rise to the level of a failure to proceed in the manner required by law only if the analysis in the EIR is clearly inadequate or unsupported. [Citation.]" (*Ibid.*, third italics added.)

Thus, our inquiry should be whether the County had substantial evidence to support its decision to approve the project and issue a statement of overriding considerations on the wilderness experience component. We disagree with appellants' argument in their reply brief that under section 21005, subdivision (c), [FN5] our review cannot address any deficiencies in the EIR other than those identified by the superior court in its final order (based ***1354** on appellants' theory that all other issues were impliedly decided in their favor, and the Legislature intended that all project problems be identified at the trial level). Such an approach would contravene the rules for conducting de novo review of the record that was before the County when the approval was issued. [FN6] Also, the issues are sufficiently interrelated here that the record must be considered as a whole. (*Western States, supra,* 9 Cal.4th at pp. 571-572; *Barthelemy, supra,* 38 Cal.App.4th at pp. 1619-1620; Cal. Code Regs., tit. 14, § 15384, subd. (a) [all references to the Guidelines shall refer to title 14 of the California Code of Regulations].)

FN5 In pertinent part, section 21005, subdivision (c) provides: "It is further the intent of the Legislature that any court, which finds, or, in the process of reviewing a previous court finding, finds, that a public agency has taken an action without compliance with this division, shall specifically address each of the alleged grounds for noncompliance."

FN6 Generally, evidence outside the administrative record is inadmissible to show that the agency has not proceeded in the manner required by law. (*Western States, supra,* 9 Cal.4th at pp. 565, 574-576.) Extrarecord evidence may be admissible if the proponent can show the evidence existed before the agency made its decision but it was impossible in the exercise of reasonable diligence to present it to the agency before the decision was made. (*Id.* at p. 578.) Extrarecord evidence also may be admissible if it pertains to the accuracy of the administrative record. (*Id.* at pp. 575-576, fn. 5; see *Barthelemy, supra,* 38 Cal.App.4th at pp. 1620-1621.) Appellants brought a motion to take additional evidence on appeal, i.e., a 1998 Park map and explanatory pages, on the ground that the opponents unfairly charged in their respondents' brief that appellants misrepresented the facts about Park boundaries vis-a-vis wilderness and nonwilderness area. Initially, we denied that motion without prejudice to reconsideration by the merits panel. We again deny the motion as we do not consider the additional map material enlightening on the issues on appeal; the County's decisions were made in 1997 on that record. As of November 1996, a Park representative admitted there were no more up-to-date maps issued by the DOI, and the 1996 maps were used in the EIR. Finally, the parties' dispute in their briefs over this issue fell within the scope of fair argument, and the motion need not be granted to clarify the parties' positions on the record, as requested.

With these standards in mind, we discuss appellants' specific arguments regarding the impacts of the project upon the Park and (last but not least) upon the local desert tortoise population.

II. Project Impacts: The Park

A. Introduction

In the 1994 writ, appellants were directed to fully

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analyze in a manner supported by substantial evidence the impact of the landfill project on the neighboring park "including, but not limited to, any negative impacts upon the natural peace and solitude, the clean air, the pristine desert (i.e., the 'wilderness experience')" offered by the Park. In its 1998 order after hearing, the court sustained the opponents' objections to the adequacy of the EIR to support its findings and those of the County. The court found insufficient ***1355** evidence on these points to support the EIR's conclusion that impacts to the Park will be less than significant: "Specifically, the EIR fails to adequately analyze the impacts on the wilderness experience, noise impacts, light from the townsite, and the impact of the landfill on the biological resources of the [Park] as a complex and interrelated system, which the National Park Service describes as eutrophication."

(4a) The new EIR prepared in response to the 1994 writ analyzed several components of the wilderness experience by distinguishing between wilderness and nonwilderness, or human-impacted, areas. Thus, the parties now debate on appeal whether there is substantial evidence support in the record for such a distinction, with respect to the "significance" of several categories: noise impacts, lighting, and the objective and subjective aspects of experiencing the wilderness. Both parties discuss the current version of Guidelines section 15064, "Determining the Significance of the Environmental Effects Caused by a Project," which reads in pertinent part as follows:

"(b) The determination of whether a project may have a significant effect on the environment calls for careful judgment on the part of the public agency involved, based to the extent possible on scientific and factual data. *An ironclad definition of significant effect is not always possible because the significance of an activity may vary with the setting. For example, an activity which may not be significant in an urban area may be significant in a rural area.*

. . . . . .

"(h)(1)(A) Except as otherwise required by Section 15065 ['Mandatory Findings of Significance'], a change in the environment is not a significant effect if the change complies with a standard that meets the definition in subsection [(h)] (3).

. . . . . .

"(C) ... [I]f the lead agency determines on the basis of substantial evidence in light of the whole record that a standard is inappropriate to determine the significance of an effect for a particular project, the lead agency shall determine whether the effect may be significant as otherwise required by this section, Section 15065, and the Guidelines.

. . . . . .

"(3) For the purposes of this subsection a 'standard' means a standard of general application that is all of the following: ***1356**

"(A) a quantitative, qualitative or performance requirement found in a statute, ordinance, resolution, rule, regulation, order, or other standard of general application;

"(B) adopted for the purpose of environmental protection;

"(C) adopted by a public agency through a public review process to implement, interpret, or make specific the law enforced or administered by the public agency;

"(D) one that governs the same environmental effect which the change in the environment is impacting; and,

"(E) one that governs within the jurisdiction where the project is located." (Italics added.)

The opponents interpret this guideline as defining all applicable standards of significance of environmental effects, i.e., that a standard of significance must be derived from a statute or a public agency's standard adopted for environmental protection purposes. The opponents thus rely on the federal Wilderness Act (16 U.S.C. § 1131 et seq.,) the 1916 National Park Service Organic Act (16 U.S.C. § 1 et seq.), the California Desert Protection Act of 1994 (16 U.S.C. § 410aaa-21 et seq.), and other environmental protection legislation. The opponents argue, "Together, these laws provide a standard of the significance against which impacts to Joshua Tree's wilderness experience should have been measured."

Appellants respond that the Guidelines do not define how standards of significance for environmental effects must be determined, but instead merely

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recognize that regulatory standards for a particular impact category, if complied with by a project, may support a finding by the public agency issuing the permit for the project that there are no significant impacts in that category. (See *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 306-309 [248 Cal.Rptr. 352].) Thus, appellants contend that the Guidelines section 15064, subdivision (h) does not require that every threshold of significance be based upon an adopted statutory performance standard. Substantively, they further argue that under Guidelines section 15064, subdivision (h)(2), the lead agency has the freedom under the Guidelines to develop a threshold of significance for a particular impact category at issue.

On a procedural note, appellants point out that as of the time of the County's decision (August-September 1997), subdivision (h) of Guidelines section 15064 did not yet list these sources of significance standards, but ***1357** merely provided that in marginal cases where experts disagree as to whether a project will have a significant effect on the environment, an EIR shall be prepared. The current version with the standards relied on by opponents does not appear in the sources until after September 1998, after the order on appeal was issued. (5) "[C]hanges to the Guidelines act prospectively only." (*Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1126, fn. 10 [26 Cal.Rptr.2d 231, 864 P.2d 502] (*Laurel Heights II*).) Accordingly, this subdivision of the Guidelines listing the sources of significance standards does not require a specific statutory basis for the standards applied here.

(4b) Further, appellants point to several items in the record that support the EIR's treatment, and the County's acceptance, of different thresholds of significance for impacts upon different areas of the Park, depending on its level of wilderness. Specifically, between the landfill site and the nearest Park boundary are found a major aqueduct, a pump station, utility and communication lines, roads, and another employee townsite. Certain areas within the Park nearest to the landfill site contain miles of electrical transmission lines, an aqueduct, and roads. The EIR commented that this evidence of human development was visible from within the nearby Eagle Mountain range. Most of the Park's visitor activity takes place miles away at the other end of the Park. The Park allows various nonwilderness uses in backcountry transition zones (an NPS term for nonwilderness) of the Park, such as rock climbing, horseback riding, bicycling, and four-wheel drive vehicle use. Appellants thus contend the opponents have no basis to seek a "zero-impact" standard for the Park, if that is what they are advocating.

When the Park boundaries were expanded by the Desert Protection Act in 1994, the chief sponsor of the bill, Senator Feinstein, wrote the Secretary of the Interior that the act was never intended to create a private de facto buffer zone around the Park for purposes of land use. The federal law creating the Park and the NPS management guidelines distinguish between wilderness and nonwilderness Park areas. The DOI maps reflect these distinctions.

We conclude that for purposes of analyzing the various "wilderness experience" components, there is substantial evidence in the record to support the approach taken by the EIR and the County, to distinguish the significance of impacts according to the scientific and factual data gathered about the nature of the land affected: wilderness or nonwilderness. (Guidelines, § 15064, subd. (b).) Moreover, the record does not support any claim that no impacts from the project, whether significant or not, whether in a wilderness area or not, should be allowable, merely because of the proximity of the project to the Park. ***1358**

B. Noise Impacts

As explained in Guidelines section 15064, subdivision (b), "an activity which may not be significant in an urban area may be significant in a rural area." Because the significance of an activity may vary with the setting, the EIR's noise consultants used different thresholds of noise significance for different areas of the Park. Residential noise standards were used in projecting noise levels in the parklands closest to the landfill site. That residential standard considers levels of 65 decibels or under to be insignificant, while the 3-decibels level is the level below which increases in noise levels are imperceptible to humans (and thus this standard was used for the wilderness areas). [FN7] The noise consultants for the EIR used County noise standards as the local regulations most immediately applicable to the project, and chose the more stringent standard applicable to family dwellings, as opposed to a looser standard for commercial/industrial areas. There were no available Park or federal noise standards that could be applied.

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FN7 The standard used for measurement is the "A" weighting scale, resembling human hearing. For purposes of comparison, 65 decibels is the sound of an electric typewriter from 10 feet away. Ten decibels is the sound of leaves rustling.

(6) Based on the use of the residential standard, the EIR concluded noise impacts as to parklands would be insignificant. This included project construction, vehicular traffic and train traffic. The opponents claim the mitigation measures imposed pursuant to this finding were inadequate, based on a stringent view of wilderness protection, and also because they failed to address such issues as effects on wildlife and on areas away from the townsite. The trial court's ruling as to noise impacts found there was no support in the record that nonwilderness areas within the Park should be treated any differently from other areas within the Park.

We respectfully disagree. We have discussed above the basis in the record for distinguishing between the Park wilderness and nonwilderness areas, such as NPS management guidelines and DOI maps that make distinctions between wilderness and nonwilderness Park areas. Within the Park areas nearest to the landfill site are found electrical transmission lines, an aqueduct and roads. The EIR commented that this evidence of human development was visible from within the nearby Eagle Mountain range. There is no authority to create a private de facto buffer zone around the Park for purposes of land use. Absent more closely applicable standards, it appears the County had a substantial basis for accepting the EIR's use of County ***1359** residential noise standards for assessing noise impacts. There is no requirement that all noise from the project be mitigated to a level of inaudibility, particularly as to nonwilderness parklands because, as we have discussed above, the standards for assessing impacts of a project require careful judgment on the part of the public agency involved, based to the extent possible on scientific and factual data; these standards allow for a finding of an insignificant degree of impact, not necessarily a zero impact. (Guidelines, § 15064, subd. (b).)

C. Wilderness Experience: Objective/Subjective Analysis

(7) The EIR stated that since it was difficult to measure subjective impacts of the project as to a sensitive park visitor, some impact would have to be admitted. The EIR thus divided wilderness considerations into two categories, wilderness experience (some significant impact found) and wilderness resources (no significant impact found). Extensive studies were made of the resources issues that were capable of quantitative measurements (noise, odor, litter, air quality, view and lighting impacts), while the subjective aspects of wilderness experience were mainly taken as assumptions of significant impacts that were difficult to measure. The County's approval of the project included a finding that overriding considerations justified some such impacts upon the wilderness experience component. The trial court criticized this approach, stating in the order after hearing: "By doing so, the EIR fails to give a complete picture of the effects of this project on the park. That a 'wilderness experience' analysis is possible is found in the record at A.R. 64-22412."

To review the trial court's conclusion that there was inadequate analysis of all aspects of the wilderness experience component, we look to the portion of the record on which it relied, in context with the remainder of the record. The court was specifically referring to a June 1995 NPS document identifying issues for the EIR. In that paper, the local NPS unit proposed that a comprehensive visitor use and perception study should be completed, with the results to be included in the EIR. The NPS document stated: "Such a study will quantify how the primitive wilderness of [the Park] and its values will be affected by the proposed landfill. This study will require on-site visitor interviews as well as the monitoring of selected wilderness access routes and trailheads. Faculty with expertise in social science at a university with a proven track record in this area of research (for example, George Wallace at Colorado State University) will be an appropriate contractor to complete the study." ***1360**

However, a March 1996 letter by NPS staff stated that the Park personnel had concluded that a Park management program, the Visitor Experience and Resource Protection process, would not be an appropriate process to be used in assessing impacts for the EIR. No other such types of studies were mentioned.

In December 1996, the NPS entered into the mitigation agreement with the landfill proponents to

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establish trust funds for future mitigation of unforeseen environmental impacts and to impose additional contractual obligations on the landfill operators; the agreement was not intended to supersede or circumvent the EIR. Rather, the agreement recited that it was intended to assure NPS that the project would be operating in consideration of protecting the purposes and values of the Park and would not derogate the values and purposes for which the Park was established by Congress. [FN8]

FN8 The parties acknowledge there was a significant difference of opinion about the Park's position on the project between the local and the Washington, D.C., NPS officials. Eventually, the Washington view prevailed, as indicated by the signing of the 1996 NPS agreement regarding future mitigation measures.

From this sequence of events, the most reasonable inference to be drawn is that the NPS's position was changing and evolving, and although the type of study referenced by the trial court might be possible, the most knowledgeable parties concluded that it was not required. [FN9] The Board dealt with the issue by assuming there would be significant impacts in this respect, and nevertheless made a finding that overriding considerations justified some such impacts upon the wilderness experience component. Thus, we turn to the remainder of the record to see if, as required, the complete picture of the effects of this project on the Park, through a wilderness experience analysis, was adequately studied, thus supporting the Board's action.

FN9 See Guidelines section 15384, defining substantial evidence: "(a) 'Substantial evidence' as used in these guidelines means enough relevant information *and reasonable inferences from this information* that a fair argument can be made to support a conclusion, even though other conclusions might also be reached. Whether a fair argument can be made that the project may have a significant effect on the environment is to be determined by examining the whole record before the lead agency. Argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment does not constitute substantial evidence. [¶] (b) Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts." (Italics added.)

Aesthetic issues are properly a subject of study in an EIR to assess the impacts of a project. (§§ 21060.5, 21100, subd. (d).) Similarly, NPS management guidelines analyze impacts by measuring such elements as view sheds, air quality, noise and odor. There is also a subjective component of ***1361** aesthetic issues, which the EIR acknowledged by noting that a park visitor's wilderness experience might be significantly impacted by the mere knowledge that a landfill was nearby, even if such were not perceptible by the senses. Appellants interpret the court's order as mandating that a "comprehensive visitor use and perception study" should be completed, and characterize this requirement as demanding a public opinion poll regarding the psychological feeling of the Park visitors vis-a-vis the project's impacts. Appellants refer to authority that has rejected claims that environmental analysis should include "psychological impacts" of a project (e.g., *City of Pasadena v. State of California* (1993) 14 Cal.App.4th 810, 831-834 [17 Cal.Rptr.2d 766], disapproved on another point in *Western States, supra*, 9 Cal.4th at p. 576, fn. 6; *Metropolitan Edison v. People vs. Nuclear Energy* (1983) 460 U.S. 766, 777 [103 S.Ct. 1556, 1562-1563, 75 L.Ed.2d 534]). Rather, CEQA analysis is directed toward identifying any substantial adverse changes in physical conditions (§§ 21060.5, 21100, subd. (d)), and any physical changes, not economic or social effects of a project. (Guidelines, § 15131, subd. (a).)

The opponents reply that an EIR can permissibly discuss interrelated physical and social effects of a project. (*Tongass Conservation Soc. v. Cheney* (D.C. Cir. 1991) 924 F.2d 1137, 1142-1144 [288 App.D.C. 180].) In *Goleta Union School Dist.* v. *Regents of University of California* (1995) 37 Cal.App.4th 1025, 1032 [44 Cal.Rptr.2d 110], the Court of Appeal concluded that an EIR was not required to consider potential classroom crowding in a school district, per se, as a significant effect on the environment, requiring mitigating measures by the project proponent. The court stated that although CEQA guidelines recognize that socio-economic effects of a project may cause

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physical changes that significantly affect the environment, the expansion of university facilities did not necessarily cause such physical effects in the form of drastically increased elementary school enrollment. (*Id.* at pp. 1032-1033, citing Guidelines, § 15064, subd. (f).)

Similarly, although the landfill project will admittedly have some measurable effects upon the physical conditions within the Park, it is difficult to see how a "comprehensive visitor use and perception study" would add useful information regarding the key physical conditions at the site. As the Supreme Court has cautioned: "A project opponent or reviewing court can always imagine some additional study or analysis that might provide helpful information. It is not for them to design the EIR." (*Laurel Heights I, supra*, 47 Cal.3d at p. 415.) The EIR acknowledges the potential subjective impacts of the project, even though it does not go much farther in defining them; however, its analysis goes the extra mile in examining every possible sensory impact on a Park visitor, which might then result in the subjective ***1362** responses that were recognized as reasonably possible or probable. From the general information and hard data given, the County could reasonably draw conclusions about the significance of these impacts. No more was required. (Guidelines, § 15384, subd. (a).)

D. Additional Townsite Light

As explained above, an existing townsite in the area, an outgrowth of the company town run by the mining company, will be expanded to serve the workers at the landfill. The townsite has only a few hundred residents now, and a privately run prison facility for 500 prisoners is located there. For security reasons, the prison is well illuminated at night and that light is visible for 30 to 40 miles around. The townsite and the pump station (aqueduct) also contribute light to the night sky. The project will increase night lighting within a two-mile radius around 10 percent. The nearest Park campground to the townsite is about 20 miles away; backpackers can travel in the immediate vicinity if they carry their own water.

(8) The opponents complain that the information in the EIR about night lighting only covers the townsite buildings and does not deal with such issues as increased car headlights, potential office or store development, or any analysis of cumulative light from the townsite combined with the landfill project (which can operate until 10:00 p.m.). They also complain that the lighting analysis does not fully account for the recent additions to parkland made by the California Desert Protection Act of 1994.

Appellants respond that in light of the existing prison illumination and townsite lighting (also the aqueduct pumping station), a full analysis is made of all major night light sources and any of the suggested additional items are only speculative in impact or create only de minimis impacts. (*Pala Band of Mission Indians v. County of San Diego* (1998) 68 Cal.App.4th 556, 577-578 [80 Cal.Rptr.2d 294].) They also argue that this issue was not specifically targeted in the administrative process and thus the opponents have waived any deficiency. (*Resource Defense Fund v. Local Agency Formation Com.* (1987) 191 Cal.App.3d 886, 894 [236 Cal.Rptr. 794].)

Case law provides that an expert can make a judgment on existing evidence, without further study, that a particular condition will have no significant impact. (*Laurel Heights II, supra*, 6 Cal.4th at p. 1140.) The EIR sets forth a realistic assessment of existing night lighting in the area and concludes that the projected expansion of the townsite will not make much ***1363** difference. This was a reasonable conclusion in light of the already developed nature of the townsite, and the County had an adequate basis for finding no significant impact in this particular respect.

E. Eutrophication (Nutrient Addition)

(9) In its ruling, the court found insufficient evidence to support the EIR's conclusion that impacts to the Park will be less than significant regarding "the impact of the landfill on the biological resources of the [P]ark as a complex and interrelated system, which the [NPS] describes as eutrophication." In 1995, the Park staff requested that as part of the EIR process, the involved agencies study the phenomenon of adding nutrients (trash) to the dry, harsh desert landscape, possibly causing insects and rats to proliferate, then starting the food chain going full tilt and upsetting the Park ecosystem. (This phenomenon is termed eutrophication after the similar effects of adding nutrients to lakes and upsetting their ecosystems.) The Park recommended such studies as computer modeling and animal tracking (trapping rats and insects at existing landfills, and inventorying animal feces to analyze whether human-generated trash was being transported) for several years to project the impact of the

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landfill, if it were to be built.

The EIR approached this problem in several ways, directed toward containment of the refuse: (1) The EIR proposed such measures as keeping incoming refuse in sealed containers until transported to a limited working area, creating litter fences, conducting a storm watch to avoid the scattering of materials by windstorms, and covering the waste with dirt and mining debris to avoid access by ravens. Similar measures have proved effective at other landfills. (2) The landfill will have a state-of-the-art liner and operations design as part of the system for confining the waste. (3) Studies were made of the Los Angeles experience with landfills, in which rats were fitted with radio transmitters and researchers found that daily landfill operations (bulldozing and compacting waste) kill rats. Other studies have shown that insects do not proliferate at landfills if daily cover is properly applied. (4) All ponds and water sources will be covered and the areas fenced to prevent access by predators such as ravens, coyotes, or kit foxes. (5) The proponents entered into the mitigation agreement with the NPS to provide for additional mitigation measures if necessary. (6) The EIR includes responses to comments, including the Park issues identification paper, stating that the lead agencies determined that existing data were available and sufficient to address impacts to biodiversity and ecosystem function. The ***1364** EIR addresses such possible impacts from the project as "habitat loss, additional nutrients originating directly or indirectly from landfill material (defined as 'eutrophication' by NPS), the introduction of exotic species, nitrate deposition, and global warming." The comments give the example that biodiversity could be affected by " 'changes in the relationship between species in the form of increases in predator/scavenger populations in response to increased food availability at the landfill site, and from increased road kills.' " These impacts and appropriate mitigation were discussed in the EIR.

Several qualified consulting biologists rendered opinions about the ecological impacts of the project, reaching differing conclusions. Dr. Kathy Freas found there would be no significant adverse ecosystem impacts to the Park in the vicinity of the project. Dr. Jerry Freilich and Dr. William Schlesinger opposed the project, opining that the proposed efforts to contain the refuse would likely be unsuccessful and pests would likely proliferate. Dr. Schlesinger called it "a big lab experiment." There was no data available on landfills where eutrophication had or had not occurred.

From this and other evidence, the County determined that the project's impacts on the Park would be less than significant regarding biological resources. We believe this conclusion was sufficiently supported by the record. First, the trial court did not have a valid basis to reject the EIR merely because there was a difference of opinion among experts. (*Fort Mojave Indian Tribe v. Department of Health Services* (1995) 38 Cal.App.4th 1574, 1600 [45 Cal.Rptr.2d 822], citing *Laurel Heights I, supra*, 47 Cal.3d at pp. 392-393.) Second, there was expert opinion that the type of studies suggested by NPS would not yield useful or essential data regarding nutrient addition to the desert, because the design of the landfill will in all probability contain all refuse sufficiently within the site so that no significant effects will occur in this respect. It is speculative whether the eutrophication effect will occur, but if it does the NPS agreement provides for environmental mitigation measures to deal with the problems. There was a difference of opinion among the experts as to whether additional studies, such as computer modeling, would be accurate or necessary. CEQA does not require evaluation of speculative impacts. (Guidelines, § 15145.)

The Guidelines also provide that the sufficiency of an EIR is to be evaluated in light of what is reasonably feasible. (Guidelines, § 15151.) The alternative of years of further study could reasonably be rejected as infeasible for economic or planning reasons. (*Chaparral Greens v. City of Chula Vista* (1996) 50 Cal.App.4th 1134, 1146, fn. 8 [58 Cal.Rptr.2d 152].) Even ***1365** though the opponents complain the 1996 NPS mitigation agreement was made on the information available at that time, which thus was not necessarily complete, the County could reasonably conclude it had sufficient overall information on which to reach its decision. Effectively, the trial court selected among conflicting expert opinion and substituted its own judgment for that of the County. This was incorrect. " 'The question for a reviewing court should then be limited to whether the agency's reasons for proceeding as it did are supported by substantial evidence.' [Citation.]" (*Barthelemy, supra*, 38 Cal.App.4th at p. 1620.)

In conclusion, as guided by the Supreme Court in

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Laurel Heights I, supra, 47 Cal.3d at page 422, we deem the County's approval decision to be supported by the record with regard to effects upon the Park, even if it does not specifically address all the variants on the issues that the opponents are arguing here: "That some items or types of evidence, however, are less than conclusive does not mean the evidence as a whole is not substantial. As we have explained in a related context, 'the reviewing court must resolve reasonable doubts in favor of the administrative findings and decision.' [Citation.] To paraphrase the Guidelines, a fair argument can be made to support the [County's] conclusion, even though other conclusions might also be reached. (Guidelines, § 15384, subd. (a).)" (*Laurel Heights I, supra,* 47 Cal.3d at p. 422.)

III. Project Impacts: The Desert Tortoise

Desert tortoises are a threatened (not endangered) species under federal and state law. (Endangered Species Act of 1973, 16 U.S.C. § 1531 et seq. (ESA); Cal. Endangered Species Act, Fish & G. Code, § 2050 et seq.) They inhabit the Park and the areas along the access roads and railroad line. In 1994, the USFWS established areas of critical habitat for the tortoises, including portions of the railroad line and the road areas. The landfill site itself is not a critical habitat area. Previously, in 1992, the USFWS evaluated potential impacts of the project, finding it would not put the desert tortoise population in jeopardy by interfering with its critical habitat due to the mitigation measures imposed. [FN10] This "no jeopardy opinion" was reaffirmed in 1993 and 1996. The CDFG studied the project in 1994 and concluded that ***1366** the project would not jeopardize the tortoise and the BLM land exchange would help it. We now turn to the two areas of concern identified in the trial court's ruling.

FN10 The mitigation measures imposed by the project were consistent with those that have been imposed for other projects in the general Southwest area, as determined from an independent consulting firm's study of those 234 projects. The main elements are a tortoise awareness program, a defined work zone, an on-site monitor, and fencing. The measures include having a biologist survey the railroad line before trains arrive and remove any tortoises on the tracks. The biologist will also monitor and relocate tortoises in burrows that are in harm's way. A three-year monitoring study will be performed to determine the best locations for culverts for tortoise crossings or fences that will keep tortoises off the tracks, while still avoiding any unnecessary fragmentation (socially and genetically) of the tortoise and bighorn sheep populations which live on either side of the line. Portions of the access roads will be fenced. The environmental trust fund for purchase of additional tortoise habitat (375 acres) is another such major measure.

A. Fences

(10) In its final order, the court found a lack of substantial evidence to support the EIR's, and the County's, finding that the impacts of the project on the desert tortoise had been mitigated to a level of insignificance, and referred specifically to the lack of a requirement of tortoise-proof fences along the railroad track. Appellants contend this ruling erroneously disregards the clear weight of expert opinion that such fencing is not required in the best interests of the tortoise population. The issue of fencing the 52-mile railroad line was studied by the USFWS, which concluded that creating such a barrier was not yet indicated because further study was necessary on migration patterns during operation of the project, which could lead to a policy of fencing only where necessary (as determined by the responsible agencies, CDFG, BLM, and USFWS). Such a barrier could also have ill effects on the bighorn sheep in the area, which have certain travel corridors.

The opponents question whether the proposed mitigation measures will really work, without a fully fenced railroad line. That is not the appropriate question. Rather, did the County have a sufficient basis in expert opinion and other evidence to conclude that the potential impacts of the project on the desert tortoise had been mitigated to a level of insignificance? Similarly, could the County reasonably conclude that further study was needed before a complete fencing requirement was imposed? The record contains evidence that there are significant pros and cons of a 52-mile fence along the railroad line. Where such unknowns exist, certain mitigation measures that are related to existing measures may be deferred in implementation where the other measures will mitigate known impacts to insignificance. (*Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1396-1397 [43 Cal.Rptr.2d 170].)

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On balance, it appears that the trial court effectively substituted its judgment on the fencing issue for those of the expert agencies and biologists ***1367** in the field. It had no adequate basis for doing so. (*Laurel Heights I, supra*, 47 Cal.3d at pp. 393, 409; *Western States, supra*, 9 Cal.4th at pp. 572-573; *Fort Mojave Indian Tribe v. Department of Health Services, supra*, 38 Cal.App.4th at pp. 1603-1604.)

B. DTRP: Tortoise Habitat

The trial court's ruling on this issue stated, "[T]he [DTRP] clearly recommends that no new landfills be constructed in desert tortoise habitat." The DTRP was issued in 1994 by the USFWS to set forth general recommendations to protect this creature throughout the Southwest. It creates 14 "Desert Wilderness Management Areas" (DWMA's) in which certain designated "recovery action" recommendations are proposed. One such DWMA is this general Park area (not including the landfill site). One of the 13 recovery action recommendations is: "Control use of landfills and sewage ponds by desert tortoise predators. [¶] Identify and clean up unauthorized dumps in DWMAs. Reduce or eliminate use of authorized landfills and sewage ponds in and near DWMAs by predators of desert tortoise (e.g., ravens & coyotes). *Allow no new landfills or sewage ponds within DWMAs.*" (Italics added.)

(11) The issue is whether the trial court correctly interpreted this recovery action as applying to desert tortoise "habitat," as opposed to smaller areas within the region, i.e., the identified "DWMA's." If this document interpretation is incorrect, then the trial court did not have a legitimate basis to find the EIR inadequate or the County's decision unsupported by substantial evidence. It is possible that the trial court was referring to "critical habitat" for the desert tortoise, as defined by USFWS regulations. However, the landfill site itself is not within that critical habitat designation, even though portions of the railroad and access road evidently are. Under the DTRP, outside of the DWMA's, the desert tortoise is to be protected by the ESA. When the USFWS issued its no jeopardy opinion, it was under the authority of the ESA. This indicates that existing mitigation measures for the landfill area (not within a DWMA) are sufficient in the experts' view, and the access routes that fall within the DWMA's do not bring the entire project within the protected sphere of the DTRP.

Again, the opponents cite to general concerns about the mitigation measures: Will more human presence in the area lead to more damage to tortoise habitat (from off-road vehicles, dogs, cats, etc.)? We need not decide this issue on that basis. Rather, in light of the record as a whole, we disagree with the trial court's interpretation of the DTRP as prohibiting this project ***1368** because it will operate within the general range of desert tortoise habitat. We conclude that substantial evidence exists in this respect to support the County's decision to approve the project as mitigated. (See fn. 10, *ante*; *Western States, supra,* 9 Cal.4th at pp. 572-573.)

Disposition

The order is reversed with directions to overrule the objections and enter an order discharging the writ previously issued. Each party to bear its own costs on appeal.

Work, Acting P. J., and Haller, J., concurred.

A petition for a rehearing was denied May 27, 1999, and the petitions of plantiffs and respondents and plaintiffs and appellants for review by the Supreme Court were denied July 21, 1999. Kennard, J., and Chin, J., were of the opinion that the petitions should be granted. ***1369**

***1370**

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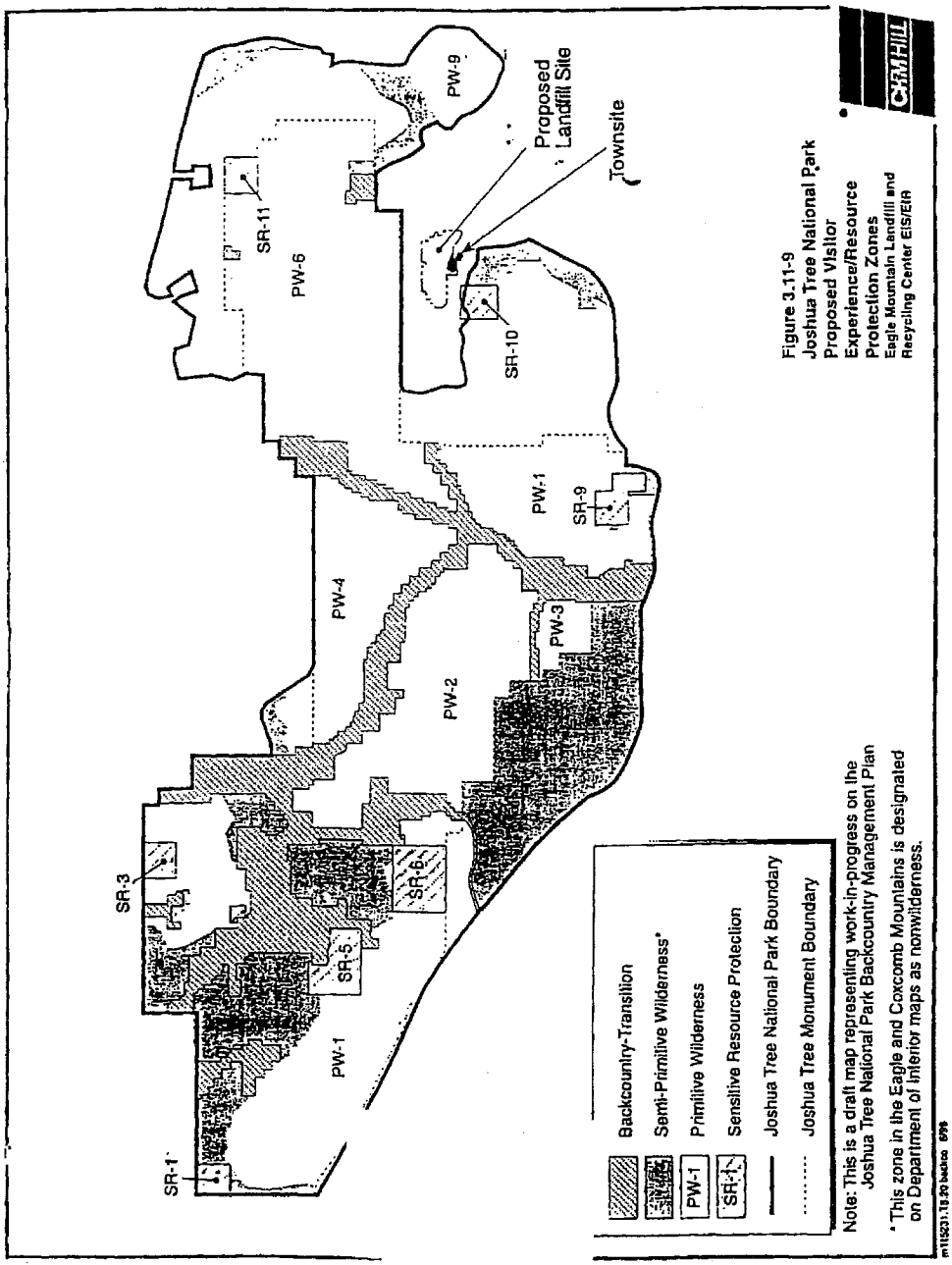
71 Cal.App.4th 1341, 84 Cal.Rptr.2d 563, 1999 Daily Journal D.A.R. 4309
(Cite as: 71 Cal.App.4th 1341)

APPENDIX A



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National Parks and Conservation Ass'n v. County of Riverside
71 Cal.App.4th 1341, 84 Cal.Rptr.2d 563, 1999 Daily Journal D.A.R. 4309

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Exhibit P

ASSOCIATION OF IRRITATED RESIDENTS V. COUNTY OF MADERA, 107 CAL. APP. 4th 1383, 1396, 133 CAL. RPTR. 2d 718, 729 (2003)

107 Cal.App.4th 1383, 133 Cal.Rptr.2d 718, 03 Cal. Daily Op. Serv. 3392, 2003 Daily Journal D.A.R. 4304
(Cite as: 107 Cal.App.4th 1383)

ASSOCIATION OF IRRITATED RESIDENTS et al., Plaintiffs and Appellants,
v.
COUNTY OF MADERA et al., Defendants and Respondents; DIAMOND H DAIRY et al., Real Parties in Interest.

No. F041012.

Court of Appeal, Fifth District, California.
Apr. 1, 2003.

SUMMARY

An environmental group and an association of concerned citizens filed a petition for a writ of mandate to overturn the county's certification of an environmental impact report (EIR) and issuance of a conditional use permit authorizing construction and operation of a dairy. The trial court denied plaintiffs' petition. (Superior Court of Madera County, No. CV12599, Charles A. Wieland, Judge.)

The Court of Appeal affirmed. The court held that the EIR was sufficient in its analysis of the dairy's impact on the San Joaquin kit fox, a special status animal. The biological field study of the site included in the EIR was sufficient, and a protocol level study in conformity with survey guidelines for sensitive species issued by the Department of Fish and Game was not necessary. Further, the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.) did not require the county to compel the dairy to obtain an incidental take permit under the Endangered Species Act. There was no quality natural habitat present on the site, no sensitive species or their sign was detected during the field survey, and there had been only one kit fox sighting, which was remote in time and location. The court also held that the EIR was sufficient in its analysis of a reduced-herd-size alternative, and that the county's rejection of this alternative was supported by substantial evidence of its economic infeasibility. Finally, the court held that the EIR was sufficient in its consideration of the potential cumulative impacts of development of the dairy industry on groundwater quality, since it adequately explained why nitrogen loading and health impacts were not likely cumulative impacts. (Opinion by Buckley, J., with Vartabedian, Acting P. J., and Levy, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Pollution and Conservation Laws § 2.9--California Environmental Quality Act--Proceedings--Judicial Review--Exhaustion of Administrative Remedies.

On appeal from the trial court's denial of a petition for a writ of mandate filed by an environmental group and an association of concerned citizens challenging the county's certification of an environmental impact report and issuance of a conditional use permit authorizing construction and operation of a dairy, plaintiffs had adequately exhausted their administrative remedies. All of the issues raised on appeal were presented by appellants to the county prior to issuance of the notice of determination. These issues were also among the many points that appellants litigated below. By these actions, appellants satisfied their obligation to exhaust administrative remedies and they preserved these issues for appellate review. Appellants could not be faulted for narrowing the focus of the litigation on appeal.

(2a, 2b) Pollution and Conservation Laws § 2.8--California Environmental Quality Act--Proceedings--Agency Findings and Project Approval--Sufficiency of Environmental Impact Report.

In reviewing challenges to the certification of an environmental impact report (EIR) or approval of a conditional use permit, the court must determine whether the lead agency abused its discretion by failing to proceed in a manner required by law or by making a determination or decision that was not supported by substantial evidence. Provided the EIR complies with the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.), the agency may approve the project even if it would create significant and unmitigable impacts on the environment. When assessing the legal sufficiency of an EIR, the reviewing court focuses on adequacy, completeness, and a good faith effort at full disclosure. The EIR must contain facts and analysis, not just the bare conclusions of the agency. An EIR must include detail sufficient to enable those who did not participate in its preparation to understand and to consider meaning-

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fully the issues raised by the proposed project. Analysis of environmental effects need not be exhaustive, but will be judged in light of what was reasonably feasible. When experts in a subject area dispute the conclusions reached by other experts whose studies were used in drafting the EIR, the EIR need only summarize the main points of disagreement and explain the agency's reasons for accepting one set of judgments instead of another. Substantial evidence is defined as enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.

(3a, 3b) Pollution and Conservation Laws § 2.9--California Environmental Quality Act--Proceedings--Judicial Review--Information Disclosure Requirements.

On appeal from a trial court's determination of a judicial challenge to the certification of an environmental impact report (EIR), the appellate court reviews the administrative record independently. The trial court's conclusions are not binding on the appellate court. Noncompliance with information disclosure requirements of the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.) is not per se reversible; prejudice must be shown. A prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process. An EIR is an educational tool not just for the decision maker, but for the public as well. It is for this reason that CEQA's investigatory and disclosure requirements must be carefully guarded. The EIR process protects not only the environment but also informed self-government. The existence of substantial evidence supporting the agency's ultimate decision on a disputed issue is not relevant when one is assessing a violation of the information disclosure provisions of CEQA.

(4) Pollution and Conservation Laws § 2.6--California Environmental Quality Act--Environmental Impact Reports--Contents and Sufficiency--Project's Impact on Special Status Animal.

In a mandate proceeding, in which an environmental group and an association of concerned citizens challenged the county's certification of an environmental impact report (EIR) and issuance of a conditional use permit authorizing construction and operation of a dairy, the trial court properly concluded that the EIR was sufficient in its analysis of the dairy's impact on the San Joaquin kit fox, a special status animal. The biological field study of the site included in the EIR was sufficient, and a protocol level study in conformity with survey guidelines for sensitive species issued by the Department of Fish and Game was not necessary. No quality natural habitat was present on the site, no sensitive species or their sign was detected during the field survey, and there had been only one kit fox sighting, which was remote in time and location. Further, CEQA did not require the county to compel the dairy to obtain an incidental take permit under the Endangered Species Act. Finally, the evidence showed that if the kit fox did utilize the dairy site, that utilization was limited to foraging in the alfalfa fields and using the perimeter of the site as a travel corridor. Under these circumstances, any adverse impacts on the foxes' behavior patterns could be mitigated to insignificant, since the dairy planned to retain all but 8.2 percent of the alfalfa fields, and dairy improvements would be set back from the perimeter, so as to, maintain a travel corridor for giant garter snakes, kit fox prey species, and kit foxes.
[See 4 Witkin, Summary of Cal. Law (9th ed. 1987) Real Property, § 61; West's Key Number Digest, Environmental Law ⚷615.]

(5) Pollution and Conservation Laws § 2.4--California Environmental Quality Act--Environmental Impact Reports--Contents and Sufficiency--Alternative Measures.

An environmental impact report must describe a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives. It must contain sufficient information about each alternative to allow meaningful evaluation, analysis, and comparison with the proposed project. The statutory requirements for consideration of alternatives must be judged against a rule of reason.

(6) Pollution and Conservation Laws § 2.6--California Environmental Quality Act--Environmental Impact Reports--Contents and Sufficiency--Alternative Measures.

In a mandate proceeding, in which an environmental group and an association of concerned citizens challenged the county's certification of an environmental impact report (EIR) and issuance of a condi-

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tional use permit authorizing construction and operation of a dairy, the trial court properly concluded that the EIR was sufficient in its analysis of a reduced-herd-size alternative. While the EIR explained that this alternative was environmentally superior to the proposed dairy because it offered proportionate reduction in air quality impacts and potential impacts on water quality, it also recognized that this alternative would not fully meet the project objective because a smaller herd would produce less milk and producing milk was the fundamental objective of the project. Further, the economic evidence the county relied on to reject the reduced-herd-size alternative was properly included in the EIR and properly submitted by the dairy at the hearing. This evidence included an economic analysis and a letter from the lender that was going to finance the dairy's construction, both of which indicated the economic infeasibility of the reduced-herd-size alternative. Accordingly, the county's rejection of the reduced-herd-size alternative was supported by substantial evidence. Economic viability is a factor that may be considered when assessing the feasibility of alternatives.

(7) Pollution and Conservation Laws § 2.6--California Environmental Quality Act--Environmental Impact Reports--Contents and Sufficiency--Cumulative Impacts on Groundwater.

In a mandate proceeding in which an environmental group and an association of concerned citizens challenged the county's certification of an environmental impact report (EIR) and issuance of a conditional use permit authorizing construction and operation of a dairy, the trial court properly concluded that the EIR was sufficient in its consideration of the potential cumulative impacts of development of the dairy industry on groundwater quality. Cumulative impact analysis assesses cumulative damage as a whole greater than the sum of its parts. This analysis should be guided by the standards of practicality and reasonableness. This EIR provided sufficient information for the public to evaluate the likely cumulative impacts. It adequately explained why nitrogen loading was not likely to be a cumulative problem, and it explained that potential health impacts from manure were more likely to affect the groundwater at the site, since there were no public water supplies within 10 miles of the site.

COUNSEL

Brent J. Newell, Luke W. Cole and Caroline Farrell for Plaintiffs and Appellants.

Herum Crabtree Brown, Steven A. Herum and Thomas H. Terpstra for Defendants and Respondents and for Real Parties in Interest.

BUCKLEY, J.

Introduction

Appellants Association of Irritated Residents (AIR) and Center on Race, Poverty and the Environment (CRPE) challenge the denial of their petition ***1388** for writ of mandate (the petition) which sought to overturn the certification of a final environmental impact report (FEIR) and issuance of a conditional use permit (CUP) authorizing construction and operation of the Diamond H Dairy (the dairy).

Appellants contend that respondents County of Madera and Board of Supervisors for the County of Madera (the County) violated the California Environmental Quality Act (CEQA). [FN1] Specifically, they argue that the FEIR did not sufficiently study whether the dairy would adversely impact the San Joaquin kit fox and that real parties in interest (Hooker) should have been required to obtain an incidental take permit from the United States Fish and Wildlife Service (the Service) as a mitigation measure. They also contend that the FEIR did not adequately analyze the reduced-herd-size alternative and that economic evidence concerning this alternative should not have been received at the hearing on the certification of the FEIR. Finally, they argue that the FEIR did not sufficiently consider the cumulative impacts on groundwater quality resulting from development of the dairy industry in the San Joaquin water basin. As will be explained below, none of these arguments is persuasive. The FEIR fulfilled its informational function; the County satisfied the obligations imposed by CEQA. Accordingly, we will affirm the denial of the petition for writ of mandate.

FN1 CEQA is codified at Public Resources Code section 21000 et seq. and is implemented in California Code of Regulations, title 14, section 15000 et seq. (CEQA Guidelines).

Unless otherwise specified, all statutory references are to the Public Resources Code.

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Factual and Procedural Background

Hooker applied for a CUP in July 1999 to construct the dairy on a 158-acre portion of a site consisting of approximately 1,925 acres of rural agricultural land southeast of Chowchilla (the dairy site). [FN2] The dairy site is located in the unincorporated area of Madera County, south of Avenue 18-1/2, west of Road 10, north of the Berenda Slough and east of the San Joaquin flood bypass. The dairy site is zoned for agricultural uses; a dairy is permitted in this zoning category and is consistent with the general plan. A portion of the dairy site is within a Williamson Act contracted agricultural preserve. The regulations for Williamson Act contracts allow dairies. The dairy site is currently being farmed in cotton, alfalfa, wheat and corn. The dairy site includes a small vineyard, an orchard, two permanent homes and two manufactured homes. Surrounding land uses are also agricultural. Alfalfa, cotton and corn are grown to the north, south and west. Almonds are grown to the east and north. ***1389**

FN2 There is a discrepancy in the record concerning the size of the dairy site. The draft environmental report (DEIR) states that it is 1,925 acres, while the initial study states that it is 1,943 acres and the environmental checklist states that it is 1,897 acres. We have assumed that the DEIR is correct.

The dairy will house a herd consisting of approximately 4,480 Holstein milk cows, 700 dry cows and 4,000 replacement heifers. The dairy will produce approximately 37,000 gallons of raw milk per day; processing will occur at an off-site creamery. The dairy will employ 20 people in three shifts. The owner/operator and two employees will live on site. The dairy complex will consist of eight 700-foot long freestall barns, a dairy barn, a hospital barn, commodity barns, corrals, other concrete and steel structures and hay and silage storage areas. A minimum of 14 parking spaces, a loading zone and service roads will be constructed. The facility will also include separation ponds and lagoons for waste product storage. The two manufactured homes will be removed and a new single family residence will be constructed. The dairy complex will occupy approximately 158 acres of the dairy site. The balance of the acreage will continue to be used for agricultural production; 635 acres of alfalfa and 1,000 acres of corn silage/oat silage (double cropped) or other crops with equal or greater capacity for nitrogen uptake will be grown.

An initial study was conducted. It concluded that, as mitigated, the dairy would have a less than significant impact on the environment. A mitigated negative declaration was approved by the planning commission and the board of supervisors (the board). CRPE appealed and on November 14, 2000, the board ordered preparation of an environmental impact report (EIR).

The DEIR was issued in February 2001. It concluded that the dairy would cause significant unavoidable adverse environmental effects on groundwater quality, air quality and odors.

CRPE filed a comment letter on April 11, 2001, raising, inter alia, the same issues asserted on appeal.

Public hearing concerning certification of the FEIR [FN3] was held on June 19, 2001. Appellants' representative spoke at the hearing. The board voted to certify the FEIR and to approve the CUP 99 to 29.

FN3 The FEIR consists of the DEIR, comments and the responses to the comments. (CEQA Guidelines, § 15132.)

The contents of the FEIR will be set forth as necessary, *post.*

Appellants filed the petition within the statutory period.

The dairy was constructed and began operating.

Appellants motioned for issuance of a stay or preliminary injunction. The motion was denied.

The petition was heard and denied on May 17, 2002. ***1390**

Discussion

I. *Exhaustion*

(1) We summarily reject the County's assertion that appellants did not exhaust their administrative remedies. All of the issues raised on appeal were presented by appellants to the County prior to issuance of the notice of determination. These issues were also among the many points that appellants litigated below. By these actions, appellants satisfied their obligation

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to exhaust administrative remedies and they preserved these issues for our review. (§ 21177, subds. (a), (b); *Cadiz Land Co. v. Rail Cycle* (2000) 83 Cal.App.4th 74, 107 [99 Cal.Rptr.2d 378] (*Cadiz*).) Appellants cannot be faulted for narrowing the focus of the litigation on appeal.

II. *Standard of Review*

(2a) In reviewing challenges to the certification of an EIR or approval of a CUP, the court must determine whether the lead agency abused its discretion by failing to proceed in a manner required by law or by making a determination or decision that is not supported by substantial evidence. (§ 21168.5; *Fairview Neighbors v. County of Ventura* (1999) 70 Cal.App.4th 238, 241-242 [82 Cal.Rptr.2d 436] (*Fairview*).) "Provided the EIR complies with CEQA, the [b]oard may approve the project even if it would create significant and unmitigable impacts on the environment." (70 Cal.App.4th at p. 242.) (3a) "The appellate court reviews the administrative record independently; the trial court's conclusions are not binding on it." (*Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1375-1376 [43 Cal.Rptr.2d 170].)

(2b) When assessing the legal sufficiency of an EIR, the reviewing court focuses on adequacy, completeness and a good faith effort at full disclosure. (*County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 954 [91 Cal.Rptr.2d 66] (*Amador*).) "The EIR must contain facts and analysis, not just the bare conclusions of the agency." (*Santiago Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 831 [173 Cal.Rptr. 602].) "An EIR must include detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project." (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 405 [253 Cal.Rptr. 426, 764 P.2d 278] (*Laurel Heights*).) Analysis of environmental effects need not be exhaustive, but will be judged in light of what was ***1391** reasonably feasible. When experts in a subject area dispute the conclusions reached by other experts whose studies were used in drafting the EIR, the EIR need only summarize the main points of disagreement and explain the agency's reasons for accepting one set of judgments instead of another. (CEQA Guidelines, § 15151; Remy et al., Guide to the Cal. Environmental Quality Act (10th ed. 1999) p. 353 (Guide to CEQA).)

A court's proper role in reviewing a challenged EIR is not to determine whether the EIR's ultimate conclusions are correct but only whether they are supported by substantial evidence in the record and whether the EIR is sufficient as an information document. (*Laurel Heights, supra*, 47 Cal.3d at p. 407.) Substantial evidence is defined as "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (CEQA Guidelines, § 15384, subd. (a); *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 722 [32 Cal.Rptr.2d 704] (*Raptor*).)

(3b) As frequently occurs, many of the disputes in this case center on the question whether relevant information was omitted from the FEIR. Noncompliance with CEQA's information disclosure requirements is not per se reversible; prejudice must be shown. (§ 21005, subd. (b).) This court has previously explained, "[a] prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process." (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712 [270 Cal.Rptr. 650] (*Farm Bureau*); see also *Raptor, supra*, 27 Cal.App.4th at p. 722.) Numerous authorities have followed and applied this prejudice standard. (See, e.g., *Cadiz, supra*, 83 Cal.App.4th at p. 95; *Fall River Wild Trout Foundation v. County of Shasta* (1999) 70 Cal.App.4th 482, 492 [82 Cal.Rptr.2d 705]; *Amador, supra*, 76 Cal.App.4th at p. 946; *Del Mar Terrace Conservancy, Inc. v. City Council* (1992) 10 Cal.App.4th 712, 730 [12 Cal.Rptr.2d 785].)

Recently, in *Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215 [32 Cal.Rptr.2d 19, 876 P.2d 505] (*Sierra Club*), our Supreme Court found that the omission of information about four old-growth dependent species on the project site from a timber harvest plan (the functional equivalent of an EIR; see *id.* at p. 1230) frustrated the purpose of the public comment provisions of the Forest Practice Act and made meaningful identification and assessment of the potentially significant environmental impacts of the harvest plan impossible. It declared that the board had not "proceed[ed] as ***1392** required by law" (*id.* at p. 1236) and that "[i]n these circumstances prejudice is presumed." (*Id.* at p. 1237.)

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The County calls attention to two recent cases that appear to deviate from this established prejudice standard, Barthelemy v. Chino Basin Mun. Water Dist. (1995) 38 Cal.App.4th 1609 [45 Cal.Rptr.2d 688] (*Barthelemy*), and National Parks & Conservation Assn. v. County of Riverside (1999) 71 Cal.App.4th 1341 [84 Cal.Rptr.2d 563] (*National Parks*), and urges us to follow their lead. To the extent that these cases reject the standard of review we applied in *Farm Bureau* and *Raptor*, by stating that claims that information has been omitted from an EIR essentially should be treated as inquiries whether there is "substantial evidence to support [the] decision to approve the project" (National Parks, supra, 71 Cal.App.4th at p. 1353; see also Barthelemy, supra, 38 Cal.App.4th at pp. 1620-1621), we find them unsound. These two decisions fail to acknowledge the important public informational purpose that EIR's serve. An EIR is an educational tool not just for the decisionmaker, but for the public as well. It is a document of accountability, "an 'environmental "alarm bell" whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.' " (Laurel Heights, supra, 47 Cal.3d at p. 392.) It is for this reason that CEQA's investigatory and disclosure requirements must be carefully guarded. "If CEQA is scrupulously followed, the public will know the basis on which its responsible officials either approve or reject environmentally significant action, and the public, being duly informed, can respond accordingly to action with which it disagrees. [Citations.] The EIR process protects not only the environment but also informed self-government." (Laurel Heights, supra, 47 Cal.3d at p. 392.) Moreover, these two decisions failed to take into account subdivision (a) of section 21005. This section provides that "noncompliance with the information disclosure provisions of this division which precludes relevant information from being presented to the public agency ... may constitute a prejudicial abuse of discretion ..., *regardless of whether a different outcome would have resulted if the public agency had complied with those provisions*." (*Ibid.*, italics added; see also Amador, supra, 76 Cal.App.4th at p. 946.) Thus, the existence of substantial evidence supporting the agency's ultimate decision on a disputed issue is not relevant when one is assessing a violation of the information disclosure provisions of CEQA. Accordingly, we continue to adhere to the standard of review set forth in Farm Bureau, supra, 221 Cal.App.3d 692, and Raptor, supra, 27 Cal.App.4th 713, and impliedly endorsed in Sierra Club, supra, 7 Cal 4th 1215. ***1393**

III. *Biological Resources-Kit Fox*

A. *Facts*

Before the County prepared the initial study, it sent the California State Department of Fish and Game (Fish and Game) a copy of Hooker's application for a CUP and requested its review and comment. Fish and Game responded in writing on August 13, 1999. In relevant part, it stated that it, "is not aware of any occurrences of listed or sensitive species on the Project site, however specific surveys have not been conducted to determine presence or absence of wildlife resources on the site." Fish and Game then wrote that, "it may be necessary for a qualified biologist" to determine the location and extent of sensitive resources and habitats on the project site.

Kimberly E. Duncan and Kacy L. O'Malley are biologists employed by Quad Knopf. Quad Knopf prepared the environmental documentation for this project. On February 24, 2000, they conducted a reconnaissance level biological field survey (the field survey) on the dairy site by driving the existing roadways and by walking portions of the alfalfa field perimeters to identify the potential presence of special status plant and animal species or their sign. Prior to conducting the field survey, the Natural Diversity Data Base (NDDB) maintained by Fish and Game was queried to determine whether sensitive species have been previously reported on or near the dairy site. The NDDB indicated that five special status animal species, four special status plant species, and two natural vegetation communities have been reported in areas near the proposed project locations. The special status animals included the Swainson's hawk, the blunt-nosed leopard lizard, the giant garter snake and the San Joaquin kit fox. The special status plants included the heartscale, the brittlescale and the lesser saltscale. The natural vegetation communities are the valley sacaton grassland and the valley sink scrub.

After conducting the field survey, Duncan prepared a report dated March 10, 2000, detailing the findings (the biological report). Duncan wrote that she did not observe any special status plant or animal species and that the dairy site does not support habitat for any special status species. She specifically noted that no kit foxes or their sign were observed on the dairy site. However, alfalfa fields on the dairy site can

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provide foraging habitat for raptor or carnivore species such as Swainson's hawk and the kit fox, provided suitable prey species such as ground squirrels, rats and mice are present. She observed ground squirrel burrows on the perimeter of the property and along the canal banks. Duncan concluded that if improvement ***1394** of the area in and along irrigation canals and the Chowchilla Canal is avoided and alfalfa fields remain to provide foraging areas, "no significant impacts to threatened or endangered species or their habitats are expected as a result of this project." Furthermore, implementation of the proposed dairy will not result in a significant impact to migratory corridors or nursery sites.

The biological resources section of the DEIR is based entirely on the biological report. It repeats the biological report virtually verbatim. The DEIR concluded that because alfalfa fields will remain on the dairy site and the closest distance between the proposed dairy facilities and the abandoned Chowchilla Canal is 200 feet, the impacts to threatened or endangered species and their habitats are less than significant with mitigation.

Fish and Game did not comment on the DEIR. However, CRPE and the Service each commented on this section of the DEIR. CRPE's comment stated that the DEIR's conclusion that biological resources would not be significantly impacted by the dairy lacks substantial evidence because the field study did not follow survey guidelines for sensitive species that were issued by Fish and Game to determine the presence of state listed species. It asserted that County was required to conduct a protocol level study that complied with the survey guidelines. CRPE attached a copy of the survey guidelines to its comment letter. The section of the survey guidelines discussing kit fox describes three different methods to detect the presence of kit fox; a field survey is not one of these methods. CRPE also attached a letter authored by George D. Noakes, regional manager of region 4, Fish and Game. The letter is dated May 8, 1990. It is addressed to an unnamed "Sensitive Species Surveyor." Therein, Noakes states that these standardized methodologies were developed to provide minimum acceptable standards for surveys designed to determine the presence of state listed species and that all project specific surveys conducted after June 15, 1990 should use these methodologies.

In its comment letter, the Service stated that the dairy site provides "foraging habitat and a travel corridor" for kit foxes. The dairy site has been identified in the Recovery Plan for Upland Species of the San Joaquin Valley (Recovery Plan) as an important linkage area for kit foxes migrating between populations. Therefore, the Service has concluded that construction of dairy facilities will result in "the take of at least 158 acres of kit fox habitat." The Service may issue an incidental take permit under the Endangered Species Act after the applicant completes a satisfactory conservation plan. The Service requested that the following mitigation measure be added to the FEIR: " 'Through consultation with [the Service], the applicant will ***1395** avoid and minimize project impacts to federally listed species and provide compensation for any loss of habitat associated with the construction of all [dairy improvements] that impede the movement of the kit fox.' "

The response to CRPE's comment acknowledged that the initial field work was completed for a mitigated negative declaration and was subsequently incorporated into the DEIR. It then stated that "during the field survey, no sign of threatened or endangered species was observed, nor was habitat typically associated with these species present. That was the basis for concluding that protocol surveys were not indicated at that time." It continued, "[r]egardless whether protocol studies were conducted, the fact remains that no quality natural habitat is present on the site." However, "no one is refuting the possibility that San Joaquin kit fox could utilize the area for foraging or possibly a corridor to other areas." Yet, the dairy is unlikely to adversely impact or result in a kit fox "take" for three reasons. First, the NDDB indicates only one recorded observance of a pair of kit foxes approximately eight miles south of the dairy site in 1990 in a large tract of native land. Second, the dairy will remove only approximately 8.2 percent of the site acreage from cultivation and this percentage is further reduced when compared to the remaining alfalfa and other agricultural fields in the area surrounding the dairy site. Finally, the applicant will have the responsibility of complying with all applicable laws pertaining to the protection of threatened or endangered species including, but not limited to, the California Endangered Species Act and the federal Endangered Species Act.

In relevant part, the response to the Service's

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comment states that the Recovery Plan is not site specific. "The issue is whether project activities, most of which constitute no change from existing agricultural conditions, would result in 'take' of San Joaquin kit fox within the meaning of the Endangered Species Act. Modification of habitat alone does not constitute 'take,' according to well-established legal precedent." Nonetheless, to ensure compliance with the Endangered Species Act, the following mitigation measure is added: "The applicant shall be responsible for compliance with the requirements of the Endangered Species Act, including obtaining an incidental take permit, if it is determined that 'take' will occur." [FN4]

FN4 The Service submitted a written response to the FEIR, dated June 21, 2002. However, the hearing to certify the FEIR had been held two days earlier, on June 19. The County did not respond to the Service's June 21 letter. This did not violate CEQA because the Service's June 21 letter was dated after closure of the public comment period and responses are not required to late comments. (CEQA Guidelines, § 15207.)

The board found the FEIR's analysis of biological resources to be adequate. It found that a protocol level study was not required due to the lack ***1396** of suitable habitat on the dairy site and the results of the NDDB query. It found that mitigation measure 3.3.1 will mitigate any impact on wildlife to insignificance.

B. *Discussion*

(4) Appellants argue that because County did not conduct a protocol level study following one of the three survey guideline methodologies, the record does not contain substantial evidence supporting the board's finding that the dairy will not have a substantial adverse impact on the kit fox. In other words, the field study is not substantial evidence. Implicit in this argument is the foundational assumption that CEQA compels compliance with the survey guidelines as a matter of law. We reject this argument because appellants' foundational premise is flawed. The survey guidelines are not codified in the Public Resources Code, the Fish and Game Code or the California Code of Regulations; they are not posted on the Web site maintained by Fish and Game (<www.dfg.ca.gov/org> [as of Apr. 1, 2003]). Appellants did not even proffer a foundation establishing that the survey guidelines are still in effect in western Madera County. Appellants also did not establish that the survey guidelines were meant to be applied in cases where a reconnaissance level study did not detect either quality natural habitat or any sign of the species. In addition, we find it notable that Fish and Game did not reference the survey guidelines when the agency responded to County's request for comment about this specific project in August 1999. Rather, Fish and Game simply stated that "a qualified biologist" may need to determine whether sensitive species were on the project site. Duncan and O'Malley, qualified biologists, did so. Moreover, Fish and Game did not comment on the DEIR and the Service did not challenge the propriety of the methodology utilized to survey for the presence of sensitive species in its comment. The County was not required to conduct a protocol level study merely because CRPE requested it in its comment. CEQA does not require a lead agency to conduct every recommended test and perform all recommended research to evaluate the impacts of a proposed project. The fact that additional studies might be helpful does not mean that they are required. (CEQA Guidelines, § 15204, subd. (a); *Cadiz, supra*, 83 Cal.App.4th at p. 102; *Society for California Archaeology v. County of Butte* (1977) 65 Cal.App.3d 832, 838-839 [135 Cal.Rptr. 679].) The agency has discretion to reject a proposal for additional testing or experimentation. (*Cadiz, supra*, 83 Cal.App.4th at p. 102.) The response to CRPE's comment adequately explains why a protocol level study in conformity with the survey guidelines was not conducted; no quality natural habitat was present on the site, no sensitive species or their sign was detected during the field survey ***1397** and the NDDB query showed only one kit fox sighting a decade ago and it was over eight miles south of the dairy site. For these many reasons, we conclude that appellants have not shown that CEQA required use of the survey guidelines in this instance. The biological report (which discusses the field survey, the NDDB query, and the conclusions Duncan reached from this data) constitutes substantial evidence supporting the determination reached in the FEIR and the finding adopted by the board that, as mitigated, the dairy will not significantly affect the kit fox.

Appellants also argue that CEQA required the County to compel Hooker to obtain an incidental take permit. Again, we disagree. CEQA neither requires a lead agency to reach a legal conclusion regarding "take" of an endangered species nor compels an agency to demand an applicant to obtain an incidental

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take permit from another agency. The finding that the dairy would not significantly impact biological resources did not limit the federal government's jurisdiction under the Endangered Species Act or impair its ability to enforce the provisions of this statute. It is not precluded from declaring that a "take" has occurred and requiring Hooker to obtain an incidental take permit. Mitigation measure 3.3.2 requiring Hooker to obtain an incidental take permit from the Service if the Service determines that kit fox "take" has occurred adequately ensures compliance with the provisions of the Endangered Species Act. The response to the Service's comment explains why County concluded that a "take" had not occurred and that the dairy would not adversely affect the kit fox. Disagreements on an issue do not compel invalidation of an EIR; the board was free to reject the Service's position on the "take" issue. When the evidence on an issue conflicts, the decisionmaker is "permitted to give more weight to some of the evidence and to favor the opinions and estimates of some of the experts over the others." (*Greenebaum v. City of Los Angeles* (1984) 153 Cal.App.3d 391, 413 [200 Cal.Rptr. 237] (*Greenebaum*).)

Finally, appellants argue that the FEIR did not sufficiently analyze whether the dairy would have a significant adverse effect on the kit fox. Again, we disagree. Contrary to the assertion of appellants, "an EIR need not include all information available on a subject." (*Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners* (1993) 18 Cal.App.4th 729, 748 [22 Cal.Rptr.2d 618] (*Boat Shop*).) Although the biological resources section of the FEIR is brief, it contains sufficient information and analysis to enable the public to discern the analytic route the agency traveled from evidence to action. The FEIR explains that the dairy site has been in agricultural cultivation for many years and does not contain quality natural habitat. No kit fox or their sign was observed on the dairy site. The NDDB query ***1398** revealed that there had only been one kit fox sighting in the vicinity since 1990 and this sighting occurred eight miles away in a large tract of native land. Thus, it is likely that kit foxes do not frequent the dairy site. If kit foxes do utilize the dairy site, they only forage in the alfalfa fields and use the Chowchilla Canal and field perimeters as a travel corridor. Furthermore, if kit foxes do utilize the dairy site, any adverse impacts on their behavior patterns can be mitigated to insignificant for two reasons. First, the dairy will retain all but 8.2 percent of the current alfalfa fields. Second, dairy improvements will be set back 200 feet from the Chowchilla Canal, which will maintain a travel corridor for giant garter snakes, kit fox prey species and kit foxes. [FN5] While there were differing opinions on the issue of whether the dairy would impact the kit fox and whether the mitigation measure would be effective, the board was entitled to choose to believe one side more than the other. (*Greenebaum, supra,* 153 Cal.App.3d at p. 413.) Appellants disagree with the analysis and conclusions reached in the FEIR. Yet, this does not render the FEIR legally insufficient. "CEQA simply requires that the public and public agencies be presented with adequate information to ensure that 'decisions be informed, and therefore balanced.' " (*Boat Shop, supra,* 18 Cal.App.4th at p. 748.) The information in the FEIR meets this standard.

FN5 This latter point about the travel corridor could have been better explained in the FEIR. However, EIR's are not judged on a standard of perfection but on a good faith effort at full disclosure. (CEQA Guidelines, § 15151; see, e.g., *Boat Shop, supra,* 18 Cal.App.4th at p. 749.)

We reject appellants' comparison of this case to *Sierra Club, supra,* 7 Cal.4th 1215. In *Sierra Club*, the lead agency refused to conduct any study of the four species at issue. Here, a biologist first queried the NDDB to identify possible sensitive species that may be present on the dairy site, then conducted a field study, after which she analyzed her findings and prepared a written report. The public had sufficient information to comment on and reach an informed conclusion concerning the dairy's possible effect on biological resources, including the kit fox. Thus, *Sierra Club* is inapposite.

IV. *Reduced Herd Alternative*

A. *Facts*

As one of the alternatives to the proposed dairy, the EIR analyzed a reduced herd consisting of 833 milking cows, with proportionate decreases in support stock to 130 dry cows and 744 heifers. The dairy facilities would be reduced proportionally to the herd size reduction. In the executive summary, the DEIR stated that the reduced-herd-size alternative would offer ***1399** a "roughly proportional reduction in air quality impacts and potential water quality impacts, while only partially meeting the project objective." The DEIR explained that adoption of this alternative

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would "reduce ozone precursor levels to less than 10 tons per year. However, methane, ammonia, hydrogen sulfide odor emissions, cumulative reactive organic gasses, cumulative PM10, and cumulative methane, ammonia, and hydrogen sulfide impacts would remain significant." Furthermore, "[t]he potential for water quality impacts would remain significant at both the project and cumulative level." "The reduced herd size alternative causes fewer air and water quality impacts than the proposed project, in proportion to the amount of reduction in such herd size, as described, and would be the environmentally superior alternative after the No Project Alternatives. However, to the extent of such herd size reduction, it does not achieve the project objective, and potential water quality impacts and air quality impacts would remain significant."

CRPE's comment letter asserted that the reduced-herd-size alternative can meet the project objective of producing high quality raw milk.

The response to CRPE's comment states that the DEIR concluded that the no project and the reduced-herd-size alternative both have fewer environmental impacts than the proposed dairy and are environmentally superior. However, economic feasibility is implicit in the project objective. The CUP application states that the dairy will be in the business of producing raw milk for an off-site processor. The response then states, "While a reduced herd size would unarguably reduce impacts and by doing so may meet the County's objectives, it might not achieve the applicant's business objectives of providing a livelihood for the owner/manager and his future employees. Additional information regarding project objectives and the reduced herd size alternative may be presented by the applicant at the public hearing on the [CUP]."

Foster Farms Dairy (Foster Farms) and Hillmar Cheese Company (Hillmar) submitted letters to the board urging approval of the dairy as proposed because demand for their products has increased dramatically in recent years and it is an ongoing challenge to maintain an adequate supply of high quality milk.

Greg Hooker testified at the hearing on the FEIR. He presented an economic analysis demonstrating a negative economic return on the reduced-herd size alternative. He also presented a letter from the lending institution that was financing construction of the dairy, Yosemite Farm Credit (the lender). The lender wrote that the reduced-herd-size alternative would not be ***1400** economically feasible because it would not "generate enough cash flow to service debt on the startup operation," and that it would not finance construction of the dairy if the reduced-herd-size alternative were adopted.

The board rejected the reduced-herd-size alternative because it found that it was not economically feasible and would not achieve the basic objective of the project. This finding was based on Greg Hooker's testimony, the economic analysis, the lender's letter and the letters submitted by Foster Farms and Hillmar.

B. *Discussion*

(5) An EIR must "describe a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives." (CEQA Guidelines, § 15126.6, subd. (a).) It must contain "sufficient information about each alternative to allow meaningful evaluation, analysis, and comparison with the proposed project." (CEQA Guidelines, § 15126.6, subd. (d).) "The statutory requirements for consideration of alternatives must be judged against a rule of reason." (*Foundation for San Francisco's Architectural Heritage v. City and County of San Francisco* (1980) 106 Cal.App.3d 893, 910 [165 Cal.Rptr. 401].)

(6) Appellants' challenge to the sufficiency of the FEIR's analysis of the reduced-herd-size alternative is unconvincing. The FEIR explained that this alternative was environmentally superior to the proposed dairy because it offered proportionate reduction in air quality impacts and potential impacts on water quality. However, it also recognized that this alternative would not fully meet the project objective because a smaller herd would produce less milk and producing milk is the fundamental objective of the project. It also recognized that the smaller herd size may not be economically viable, although it did not make a determination on this issue. This discussion is sufficient to permit meaningful evaluation of the reduced-herd-size alternative and comparison with the proposed dairy and thus complied with CEQA. Appellants' comparison to *Raptor, supra,* 27 Cal.App.4th 713 is unconvincing. In *Raptor*, the agency did not even identify a

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reasonable range of alternative sites or project alternatives. (*Id.* at p. 736.)

We reject as specious appellants' contention that the DEIR should have explicitly stated in its project objective that Hooker intended to produce milk ***1401** for an off-site processor *for profit*; it is assumed in a capitalistic society that one is motivated by a desire for economic return on one's labor and investment. The DEIR stated that the project under consideration was a dairy. A dairy is generally understood to be a profit-based business venture.

Appellants also argue that the economic evidence the board relied on to reject the reduced-herd-size alternative should have been included in the FEIR and that Hooker should not have been permitted to submit it at the hearing. We disagree. First, CEQA Guidelines section 15131 provides that economic data is not required to be included in an EIR. Second, section 21081.5 states that a finding of infeasibility shall be based "on substantial evidence in the record." Subdivision (e) of section 21167.6 provides that the record of the proceedings consists of many different types of materials, not just the EIR. It follows that presentation of economic evidence at the hearing was not improper.

Finally, the board's rejection of the reduced-herd-size alternative is supported by substantial evidence. Economic viability is a factor that may be considered when assessing the feasibility of alternatives. (CEQA Guidelines, § 15126.6, subd. (f)(1).) In *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 575, footnote 7 [276 Cal.Rptr. 410, 801 P.2d 1161] (*Goleta Valley*), the high court upheld the agency's determination that an alternative site was infeasible based on an economic analysis showing that the site could not support a version of the project large enough to be economically viable. Here, the lender's letter and the economic analysis constitute substantial evidence supporting the board's finding that the reduced-herd-size alternative is not economically feasible; elimination of all profit and loss of construction financing adequately proves that the reduced-herd-size alternative is not viable. (*Ibid.*; Guide to CEQA, *supra*, at p. 326.)

V. *Related Projects' Cumulative Effect on Groundwater Quality*

A. *Facts*

The initial discussion of water quality issues is contained in the body of the DEIR and in appendices H (a geological/hydrological report analyzing existing water conditions), I (nutrient management plan) and J (water quality impacts analysis). The most crucial mitigation measures recommended in the DEIR and the water quality impacts analysis are construction of clay-lined separation ponds and lagoons for waste product storage, groundwater and soil monitoring and use of the nutrient management plan. Implementation of ***1402** the nutrient management plan will balance the nitrogen and salinity levels of the soil. Dry manure will be scraped from corrals at least twice per year and spread on surrounding crop land. The irrigation system will have complete recovery capability. Yet, separation ponds and lagoons can leak and cause groundwater contamination. This contamination can be significant if nitrate levels exceed 45 milligrams per liter, "even though degradation did not extend laterally or downward to a sufficient extent to impact domestic well supplies." Furthermore, manure might be sold by the dairy for off-site usage and may be applied by the off-site user in a way that can cause excessive salt or nitrogen concentrations off-site. For these reasons, the dairy's effect on water quality is potentially significant despite mitigation.

Because the DEIR concluded that the dairy potentially could have an adverse effect on groundwater quality, CEQA required consideration of potential cumulative water quality impacts. Accordingly, the DEIR included a table of San Joaquin Valley dairy industry projections and a two-andone-half-page discussion of the water quality impacts associated with development of the dairy industry that could be cumulatively significant. The DEIR stated that while nitrogen contamination could "conceivably occur," this is unlikely because nitrogen loading is not necessarily cumulative due to the direction and rate of groundwater flow and recharge and interception. Furthermore, because of these same factors, only dairies within a mile or less from each other would possibly have a cumulative impact on groundwater quality. Separation between confined animal facilities and the requirements imposed by the Regional Water Quality Control Board further minimize the likelihood of cumulative water impacts. "In a small, closed, water basin with closely spaced dairies without effective mitigation measures, such a cumulative impact could occur. In a water basin the size of the San Joaquin Basin, with modern dairy facilities and operations, designed in accord with Regional Water Quality Control Board regulations, such a cumulative impact

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is theoretically possible, but must be deemed unlikely." For these reasons, cumulative impacts are probably limited to an increase in groundwater salinity.

CRPE's comment letter challenged the sufficiency of the DEIR's analysis of the dairy industry's potential cumulative impacts on groundwater quality and resultant diseases. It submitted, inter alia, a 1990 study entitled Dairies and their Relationship to Water Quality Problems in the Chino Basin, California (Chino Study).

The response stated that the DEIR had acknowledged that there is a limited potential for cumulative groundwater contamination due to dairy ***1403** development in the San Joaquin basin. However, adverse health impacts resulting from groundwater contamination are far more likely to occur at the project level than as cumulative impacts. The Chino Study is not relevant to the San Joaquin Valley because the animal unit concentration in the Chino basin was 7,260 milk cows per square mile; the projected concentration in the San Joaquin Valley is only 73 milk cows per square mile.

The board found the FEIR's cumulative impacts analysis to be adequate and CRPE's "evidence" irrelevant. It also found that the dairy may have a potentially significant impact on groundwater quality and it adopted a statement of overriding considerations. It adopted all of the mitigation measures identified in the DEIR relating to groundwater quality.

B. *Discussion*

(7) Appellants contend that the FEIR's discussion of related projects' cumulative effects on groundwater quality is insufficient because it "made only conclusory statements and assertions unsupported by facts or analysis." Once again, we are not persuaded. The FEIR's discussion of the potential cumulative impacts of related dairy projects on groundwater quality satisfies CEQA.

"The cumulative impact from several projects is the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and reasonable foreseeable probable future projects. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time." (CEQA Guidelines, § 15355, subd. (b).) "Cumulative impact analysis 'assesses cumulative damage as a whole greater than the sum of its parts.' " (Guide to CEQA, *supra*, at p. 465.) "Guidelines section 15130, subdivision (b) provides that '[t]he discussion of cumulative impacts shall reflect the severity of the impacts and their likelihood of occurrence, but the discussion need not provide as great detail as is provided of the effects attributable to the project alone. The discussion should be guided by the standards of practicality and reasonableness.' ... [A] good faith and reasonable disclosure of such impacts is sufficient." (*Fairview, supra,* 70 Cal.App.4th at p. 245.)

The FEIR provided sufficient information for the public to evaluate the likely impacts on groundwater quality in the San Joaquin basin resulting from development of the dairy industry. The conclusions concerning salinity and nitrogen loading are supported by adequate analysis and factual detail. The DEIR explained why nitrogen loading is not likely to be a cumulative ***1404** problem. The agency was not required to provide evidence supporting every fact contained in this section. The response answered CRPE's assertion that the DEIR had ignored the potential health impacts of groundwater contamination by replying that pathogens and bacteria from manure were more likely to affect the groundwater at a given project site rather than to have a synergistic effect on the groundwater supply, and by pointing out that there are no public water supplies within approximately 10 miles of the project site. It also explained why the Chino Study is not relevant to the San Joaquin Valley water basin. This discussion of cumulative impacts satisfies CEQA. (*Cadiz, supra,* 83 Cal.App.4th at p. 110; *Fairview, supra,* 70 Cal.App.4th at pp. 245-246; *Boat Shop, supra,* 18 Cal.App.4th at pp. 749-750.) Appellants' argument to the contrary is premised on the mistaken position that the cumulative impacts section of an EIR must be as detailed as the consideration of the proposed project itself. This is incorrect. (CEQA Guidelines, § 15130, subd. (b).) Recent decisions demonstrate that exhaustive analysis is not required. (*Cadiz, supra,* 83 Cal.App.4th at p. 110; *Fairview, supra*, 70 Cal.App.4th at pp. 745-746; *Boat Shop, supra,* 18 Cal.App.4th at pp. 749-750.)

Appellants' reliance on *Farm Bureau, supra,* 221 Cal.App.3d 692 is misplaced. The cumulative impacts section of the EIR in *Farm Bureau* did not contain a list of "the projects considered, no information regarding their expected impacts on groundwater re-

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sources and no analysis of the cumulative impacts. It merely assumes whatever impacts such projects may have will be mitigated by existing and planned water conservation efforts of governmental agencies in the area." (*Id.* at p. 729.) In contrast here, the FEIR contains a summary of dairy industry projections. It sets forth the possible cumulative impacts on groundwater resources and then analyzes the likelihood of the actual occurrence of such impacts.

Conclusion

This rebuke, originally issued by the Supreme Court in a case where appellants had mounted a lengthy effort to halt construction of a resort hotel on property that had a long history of industrial use, also applies here: "The wisdom of approving this or any other development project, a delicate task which requires a balancing of interests, is necessarily left to the sound discretion of the local officials and their constituents who are responsible for such decisions. The law as we interpret and apply it simply requires that those decisions be informed, and therefore balanced. Concurrently, we caution that rules regulating the protection of the environment must not be subverted into an instrument for the oppression and delay of social, economic, or recreational development and advancement." (*Goleta Valley, supra,* 52 Cal.3d at p. 576.) ***1405**

Disposition

The motion to augment the record is granted. The order denying the petition for writ of mandate is affirmed. Costs are awarded to respondents and real parties in interest.

Vartabedian, Acting P. J., and Levy, J., concurred.

Appellants' petition for review by the Supreme Court was denied July 23, 2003. Brown, J., did not participate therein. ***1406**

Cal.App.5.Dist.
Association of Irritated Residents v. County of Madera
107 Cal.App.4th 1383, 133 Cal.Rptr.2d 718, 03 Cal. Daily Op. Serv. 3392, 2003 Daily Journal D.A.R. 4304

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Exhibit Q

CALIFORNIA NATIVE PLANT SOCIETY V. CITY OF SANTA CRUZ, 177 CAL. APP. 4th 957, 982 (2009)

H

Court of Appeal, Sixth District, California.
CALIFORNIA NATIVE PLANT SOCIETY, et al., Plaintiffs and Appellants,
v.
CITY OF SANTA CRUZ, et al., Defendants and Respondents.

No. H032502.
Aug. 20, 2009.
As Modified on Denial of Rehearing Oct. 14, 2009.
Review Denied Dec. 17, 2009.

Background: Environmental groups filed petition for writ of mandate, alleging that city's approval of proposed trail-construction project violated the California Environmental Quality Act (CEQA). The Superior Court, Santa Cruz County, No. CV154966,Paul Burdick, J., denied the petition, and groups appealed.

Holdings: The Court of Appeal, McAdams, J., held that:
(1) city's environmental impact report (EIR) was legally sufficient;
(2) city's rejection of alternatives to project was not procedurally deficient;
(3) city could base rejection of alternatives on policy considerations; and
(4) substantial evidence supported city's rejection of alternatives.

Affirmed.

Mihara, Acting P.J., filed an opinion concurring in the judgment.

West Headnotes

[1] Environmental Law 149E 577

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek577 k. Duty of government bodies to consider environment in general. Most Cited Cases

California Environmental Quality Act (CEQA) contains a substantive mandate requiring public agencies to refrain from approving projects with significant environmental effects if there are feasible alternatives or mitigation measures that can substantially lessen or avoid those effects. West's Ann.Cal.Pub.Res.Code § 21000 et seq.

[2] Environmental Law 149E 577

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek577 k. Duty of government bodies to consider environment in general. Most Cited Cases

California Environmental Quality Act (CEQA) permits government agencies to approve projects that have an environmentally deleterious effect, but it also requires them to justify those choices in light of specific social or economic conditions. West's Ann.Cal.Pub.Res.Code § 21000 et seq.

[3] Environmental Law 149E 579

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek579 k. Purpose of assessments and statements. Most Cited Cases

The heart of the California Environmental Quality Act (CEQA) is the environmental impact report (EIR); the EIR, with all its specificity and complexity, is the mechanism prescribed by CEQA to force informed decision making and to expose the decision making process to public scrutiny. West's Ann.Cal.Pub.Res.Code § 21000 et seq.

[4] Environmental Law 149E 589

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek584 Necessity for Preparation of Statement, Consideration of Factors, or Other Compliance with Requirements
149Ek589 k. Significance in general. Most Cited Cases

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Environmental Law 149E ⚷600

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek598 Adequacy of Statement, Consideration, or Compliance
149Ek600 k. Consideration and disclosure of effects. Most Cited Cases

Under the California Environmental Quality Act (CEQA) a public agency must prepare an environmental impact report (EIR) or cause an EIR to be prepared for any project that it proposes to carry out or approve that may have a significant effect on the environment; the EIR must describe the proposed project and its environmental setting, state the objectives sought to be achieved, identify and analyze the significant effects on the environment, state how those impacts can be mitigated or avoided, and identify alternatives to the project, among other requirements. West's Ann.Cal.Pub.Res.Code § 21000 et seq.

[5] Environmental Law 149E ⚷599

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek598 Adequacy of Statement, Consideration, or Compliance
149Ek599 k. In general. Most Cited Cases

Because an environmental impact report (EIR), prepared by a public agency pursuant to the California Environmental Quality Act (CEQA), must be certified or rejected by public officials, it is a document of accountability. West's Ann.Cal.Pub.Res.Code § 21000 et seq.

[6] Environmental Law 149E ⚷599

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek598 Adequacy of Statement, Consideration, or Compliance
149Ek599 k. In general. Most Cited Cases

Under the California Environmental Quality Act (CEQA), technical perfection is not required of an environmental impact report (EIR) prepared by a public agency; courts have looked not for an exhaustive analysis but for adequacy, completeness and a good-faith effort at full disclosure. West's Ann.Cal.Pub.Res.Code § 21000 et seq.

[7] Environmental Law 149E ⚷599

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek598 Adequacy of Statement, Consideration, or Compliance
149Ek599 k. In general. Most Cited Cases

Given the key role of the environmental impact report (EIR) in carrying out the requirements of the California Environmental Quality Act (CEQA), the integrity of the process is dependent on the adequacy of the EIR. West's Ann.Cal.Pub.Res.Code § 21000 et seq.

[8] Environmental Law 149E ⚷601

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek598 Adequacy of Statement, Consideration, or Compliance
149Ek601 k. Consideration of alternatives. Most Cited Cases

Under the California Environmental Quality Act (CEQA) project alternatives, to be considered in analyzing the environmental impact of a proposed project, typically fall into one of two categories: on-site alternatives, which generally consist of different uses of the land under consideration; and off-site alternatives, which usually involve similar uses at different locations. West's Ann.Cal.Pub.Res.Code § 21061.

[9] Environmental Law 149E ⚷601

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek598 Adequacy of Statement, Consideration, or Compliance
149Ek601 k. Consideration of alternatives. Most Cited Cases

The California Environmental Quality Act (CEQA) establishes no categorical legal imperative as to the scope of alternatives to a proposed project that

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must be analyzed in an environmental impact report (EIR); each case must be evaluated on its facts, which in turn must be reviewed in light of the statutory purpose. West's Ann.Cal.Pub.Res.Code § 21061.

[10] Environmental Law 149E 601

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek598 Adequacy of Statement, Consideration, or Compliance
149Ek601 k. Consideration of alternatives. Most Cited Cases

Under the California Environmental Quality Act (CEQA), discussion in an environmental impact report of alternatives to a proposed project must contain analysis sufficient to allow informed decision making. West's Ann.Cal.Pub.Res.Code § 21061.

[11] Environmental Law 149E 601

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek598 Adequacy of Statement, Consideration, or Compliance
149Ek601 k. Consideration of alternatives. Most Cited Cases

Under the California Environmental Quality Act (CEQA), in considering alternatives to a proposed project in an environmental impact report (EIR), the government's power of eminent domain and access to public lands suggest that alternative sites may be more feasible, more often, when the developer is a public rather than a private agency. West's Ann.Cal.Pub.Res.Code § 21061; 14 CCR § 15364.

[12] Environmental Law 149E 601

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek598 Adequacy of Statement, Consideration, or Compliance
149Ek601 k. Consideration of alternatives. Most Cited Cases

In assessing alternatives to a proposed project under the California Environmental Quality Act (CEQA), the issue of feasibility arises at two different junctures: (1) in the assessment of alternatives in the environmental impact report (EIR) and (2) during the agency's later consideration of whether to approve the project. West's Ann.Cal.Pub.Res.Code § 21061; 14 CCR § 15364.

[13] Environmental Law 149E 577

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek577 k. Duty of government bodies to consider environment in general. Most Cited Cases

Under the California Environmental Quality Act (CEQA), a public agency is not required to favor environmental protection over other considerations, but it must disclose and carefully consider the environmental consequences of its actions, mitigate adverse environmental effects if feasible, explain the reasons for its actions, and afford the public and other affected agencies an opportunity to participate meaningfully in the environmental review process. West's Ann.Cal.Pub.Res.Code § 21000 et seq.

[14] Environmental Law 149E 601

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek598 Adequacy of Statement, Consideration, or Compliance
149Ek601 k. Consideration of alternatives. Most Cited Cases

A statement of overriding considerations is not a substitute for infeasibility findings required, pursuant to California Environmental Quality Act (CEQA), in a consideration of alternatives to a proposed project; rather, a statement of overriding considerations supplements those findings and supports an agency's determination to proceed with a project despite adverse environmental effects. West's Ann.Cal.Pub.Res.Code § 21081; 14 CCR § 15091.

[15] Environmental Law 149E 599

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek598 Adequacy of Statement, Consideration, or Compliance
149Ek599 k. In general. Most Cited Cases

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Under the California Environmental Quality Act (CEQA), while the mitigation and feasibility findings typically focus on the feasibility of specific proposed alternatives and mitigation measures regarding a proposed project, the statement of overriding considerations focuses on the larger, more general reasons for approving the project, such as the need to create new jobs, provide housing, generate taxes, and the like. West's Ann.Cal.Pub.Res.Code § 21081; 14 CCR § 15093.

[16] Environmental Law 149E 689

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek677 Scope of Inquiry on Review of Administrative Decision
149Ek689 k. Assessments and impact statements. Most Cited Cases

The override decision, by which an agency determines to proceed with a project because of overriding considerations despite environmental harm caused by the project, lies at the core of the lead agency's discretionary responsibility under the California Environmental Quality Act (CEQA) and is, for that reason, not lightly to be overturned. West's Ann.Cal.Pub.Res.Code § 21081; 14 CCR § 15093.

[17] Environmental Law 149E 600

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek598 Adequacy of Statement, Consideration, or Compliance
149Ek600 k. Consideration and disclosure of effects. Most Cited Cases

Override findings, by which an agency determines to proceed with a project because of overriding considerations despite environmental harm caused by the project, are sufficient if they demonstrate the balance struck by an agency in weighing the benefits of the proposed project against its unavoidable adverse impacts. West's Ann.Cal.Pub.Res.Code § 21081; 14 CCR § 15093.

[18] Mandamus 250 69

250 Mandamus
250II Subjects and Purposes of Relief
250II(B) Acts and Proceedings of Public Officers and Boards and Municipalities
250k69 k. Legislative powers. Most Cited Cases

Mandamus 250 70

250 Mandamus
250II Subjects and Purposes of Relief
250II(B) Acts and Proceedings of Public Officers and Boards and Municipalities
250k70 k. Judicial or quasi judicial powers and functions. Most Cited Cases

Quasi-legislative acts are ordinarily reviewed by traditional mandate, and quasi-judicial acts are reviewed by administrative mandate.

[19] Environmental Law 149E 689

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek677 Scope of Inquiry on Review of Administrative Decision
149Ek689 k. Assessments and impact statements. Most Cited Cases

Mandamus 250 172

250 Mandamus
250III Jurisdiction, Proceedings, and Relief
250k172 k. Scope of inquiry and powers of court. Most Cited Cases

Under the California Environmental Quality Act (CEQA) review of a quasi-judicial agency decision under administrative mandamus and review of a quasi-legislative agency decision under traditional mandamus share many of the same characteristics; there is no practical difference between the standards of review applied under traditional or administrative mandamus. West's Ann.Cal.Pub.Res.Code §§ 21168, 21168.5.

[20] Environmental Law 149E 689

149E Environmental Law
149EXIII Judicial Review or Intervention

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149Ek677 Scope of Inquiry on Review of Administrative Decision
149Ek689 k. Assessments and impact statements. Most Cited Cases

Environmental Law 149E ⚷708

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek704 Further Review of Administrative Decision
149Ek708 k. Scope of review. Most Cited Cases

In reviewing a quasi-legislative agency decision under the California Environmental Quality Act (CEQA), at both the trial and appellate level, the court examines the administrative record anew. West's Ann.Cal.Pub.Res.Code § 21168.5.

[21] Environmental Law 149E ⚷689

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek677 Scope of Inquiry on Review of Administrative Decision
149Ek689 k. Assessments and impact statements. Most Cited Cases

Mandamus 250 ⚷73(1)

250 Mandamus
250II Subjects and Purposes of Relief
250II(B) Acts and Proceedings of Public Officers and Boards and Municipalities
250k73 Specific Acts
250k73(1) k. In general. Most Cited Cases

An agency may abuse its discretion, so as to warrant reversal pursuant to mandamus review under the California Environmental Quality Act (CEQA), either by failing to proceed in the manner CEQA provides or by reaching factual conclusions unsupported by substantial evidence. West's Ann.Cal.Pub.Res.Code § 21168.5.

[22] Environmental Law 149E ⚷689

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek677 Scope of Inquiry on Review of Administrative Decision
149Ek689 k. Assessments and impact statements. Most Cited Cases

Mandamus 250 ⚷172

250 Mandamus
250III Jurisdiction, Proceedings, and Relief
250k172 k. Scope of inquiry and powers of court. Most Cited Cases

Pursuant to mandamus review of an agency decision under the California Environmental Quality Act (CEQA), judicial review of two types of error, failing to proceed in the manner CEQA provides or reaching factual conclusions unsupported by substantial evidence, differs significantly; for that reason, a reviewing court must adjust its scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of improper procedure or a dispute over the facts. West's Ann.Cal.Pub.Res.Code § 21168.5.

[23] Environmental Law 149E ⚷689

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek677 Scope of Inquiry on Review of Administrative Decision
149Ek689 k. Assessments and impact statements. Most Cited Cases

Courts must scrupulously enforce all legislatively mandated California Environmental Quality Act (CEQA) requirements. West's Ann.Cal.Pub.Res.Code § 21000 et seq.

[24] Environmental Law 149E ⚷689

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek677 Scope of Inquiry on Review of Administrative Decision
149Ek689 k. Assessments and impact statements. Most Cited Cases

Mandamus 250 ⚷172

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250 Mandamus
250III Jurisdiction, Proceedings, and Relief
250k172 k. Scope of inquiry and powers of court. Most Cited Cases

Pursuant to mandamus review of an agency decision under the California Environmental Quality Act (CEQA), compared with review for procedural error, a court accords greater deference to the agency's substantive factual conclusions; the court applies the highly deferential substantial evidence standard of review to such determinations. West's Ann.Cal.Pub.Res.Code § 21168.5.

[25] Environmental Law 149E ⚷689

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek677 Scope of Inquiry on Review of Administrative Decision
149Ek689 k. Assessments and impact statements. Most Cited Cases

Mandamus 250 ⚷168(2)

250 Mandamus
250III Jurisdiction, Proceedings, and Relief
250k168 Evidence
250k168(2) k. Presumptions and burden of proof. Most Cited Cases

Pursuant to mandamus review of an agency decision under the California Environmental Quality Act (CEQA), the agency is the finder of fact and the court must indulge all reasonable inferences from the evidence that would support the agency's determinations and resolve all conflicts in the evidence in favor of the agency's decision. West's Ann.Cal.Pub.Res.Code § 21168.5.

[26] Environmental Law 149E ⚷689

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek677 Scope of Inquiry on Review of Administrative Decision
149Ek689 k. Assessments and impact statements. Most Cited Cases

Mandamus 250 ⚷172

250 Mandamus
250III Jurisdiction, Proceedings, and Relief
250k172 k. Scope of inquiry and powers of court. Most Cited Cases

Deferential review standard of an agency's substantive factual conclusions, pursuant to mandamus review of an agency decision under the California Environmental Quality Act (CEQA), flows from the fact that the agency has the discretion to resolve factual issues and to make policy decisions. West's Ann.Cal.Pub.Res.Code § 21168.5.

[27] Environmental Law 149E ⚷604(2)

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek598 Adequacy of Statement, Consideration, or Compliance
149Ek604 Particular Projects
149Ek604(2) k. Land use in general. Most Cited Cases

Environmental impact report (EIR), concerning city's proposed construction of trails through a greenbelt zone, presented enough information and discussed alternatives so as to be legally sufficient under California Environmental Quality Act (CEQA), even though none of the alternatives included a trail complaint with Americans with Disabilities Act (ADA), which was one of ten project objectives, and failed to include an offsite trail alternative; every alternative discussed in EIR was not required to meet all project objectives, and EIR explained choice of alternatives and the reasons for excluding off-site alternatives. Americans with Disabilities Act of 1990 (ADA), § 2 et seq., 42 U.S.C.A. § 12101 et seq.; West's Ann.Cal.Pub.Res.Code § 21061; 14 CCR § 15126.6. *See Cal. Civil Practice (Thomson Reuters 2009) Environmental Litigation, § 8:19; 9 Miller & Starr, Cal. Real Estate (3d ed. 2001) § 25A:14; 12 Witkin, Summary of Cal. Law (10th ed. 2005) Real Property, § 844.*

[28] Environmental Law 149E ⚷689

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek677 Scope of Inquiry on Review of Administrative Decision

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149Ek689 k. Assessments and impact statements. Most Cited Cases

Mandamus 250 ⚷172

250 Mandamus
250III Jurisdiction, Proceedings, and Relief
250k172 k. Scope of inquiry and powers of court. Most Cited Cases

Pursuant to mandamus review of an agency decision under the California Environmental Quality Act (CEQA), an environmental impact report (EIR) will be found legally inadequate, and thus subject to independent review for procedural error, where it omits information that is both required by CEQA and necessary to informed discussion. West's Ann.Cal.Pub.Res.Code § 21168.5.

[29] Environmental Law 149E ⚷689

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek677 Scope of Inquiry on Review of Administrative Decision
149Ek689 k. Assessments and impact statements. Most Cited Cases

Mandamus 250 ⚷172

250 Mandamus
250III Jurisdiction, Proceedings, and Relief
250k172 k. Scope of inquiry and powers of court. Most Cited Cases

Pursuant to mandamus review of an agency decision under the California Environmental Quality Act (CEQA), omission of required information constitutes a failure to proceed in the manner required by law, so as to warrant de novo review of the decision by a court, where it precludes informed decision-making by the agency or informed participation by the public. West's Ann.Cal.Pub.Res.Code § 21168.5.

[30] Environmental Law 149E ⚷689

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek677 Scope of Inquiry on Review of Administrative Decision
149Ek689 k. Assessments and impact statements. Most Cited Cases

Mandamus 250 ⚷168(2)

250 Mandamus
250III Jurisdiction, Proceedings, and Relief
250k168 Evidence
250k168(2) k. Presumptions and burden of proof. Most Cited Cases

Pursuant to mandamus review of an agency decision under the California Environmental Quality Act (CEQA) where an environmental impact report (EIR) is challenged as being legally inadequate, a court presumes a public agency's decision to certify the EIR is correct, thereby imposing on a party challenging it the burden of establishing otherwise. West's Ann.Cal.Pub.Res.Code § 21168.5.

[31] Environmental Law 149E ⚷601

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek598 Adequacy of Statement, Consideration, or Compliance
149Ek601 k. Consideration of alternatives. Most Cited Cases

To be legally sufficient under the California Environmental Quality Act (CEQA), the consideration of project alternatives in an environmental impact report (EIR) must permit informed agency decision-making and informed public participation; CEQA requires enough of a variation to allow informed decision-making. West's Ann.Cal.Pub.Res.Code § 21061; 14 CCR § 15126.6.

[32] Environmental Law 149E ⚷689

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek677 Scope of Inquiry on Review of Administrative Decision
149Ek689 k. Assessments and impact statements. Most Cited Cases

Under the California Environmental Quality Act (CEQA), a court reviewing the legal sufficiency of an environmental impact report (EIR) judges the range

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of project alternatives in the EIR against a rule of reason; the selection will be upheld, unless the challenger demonstrates that the alternatives are manifestly unreasonable and that they do not contribute to a reasonable range of alternatives. West's Ann.Cal.Pub.Res.Code §§ 21061, 21168.5; 14 CCR § 15126.6.

[33] Environmental Law 149E 689

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek677 Scope of Inquiry on Review of Administrative Decision
149Ek689 k. Assessments and impact statements. Most Cited Cases

Feasibility analysis contained in city's environmental impact report (EIR) concerning proposed construction of trails in greenbelt zone would be reviewed for whether it was supported by substantial evidence, not de novo, since objectors made no claim that feasibility analysis rested on an erroneous legal standard. West's Ann.Cal.Pub.Res.Code § 21081.

[34] Environmental Law 149E 604(2)

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek598 Adequacy of Statement, Consideration, or Compliance
149Ek604 Particular Projects
149Ek604(2) k. Land use in general. Most Cited Cases

City's rejection of alternatives to proposed trail-construction project, based on infeasibility of alternatives, was not procedurally deficient under California Environmental Quality Act (CEQA), even though rejected alternatives had been identified in city's environmental impact report (EIR); it did not subvert the CEQA environmental review process for city to reject as infeasible alternatives identified in the EIR. West's Ann.Cal.Pub.Res.Code § 21081.

[35] Environmental Law 149E 604(2)

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek598 Adequacy of Statement, Consideration, or Compliance
149Ek604 Particular Projects
149Ek604(2) k. Land use in general. Most Cited Cases

City did not violate California Environmental Quality Act (CEQA) by rejecting, as infeasible, alternatives to proposed trail-construction project, based on considerations that alternatives failed to achieve project objectives of promoting transportation alternatives and access to city's open space for persons with disabilities; social policy considerations were permissible basis for city to reject alternatives. West's Ann.Cal.Pub.Res.Code § 21081.

[36] Environmental Law 149E 604(2)

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek598 Adequacy of Statement, Consideration, or Compliance
149Ek604 Particular Projects
149Ek604(2) k. Land use in general. Most Cited Cases

Substantial evidence supported city's finding that alternatives to proposed trail-construction project were infeasible due to alternatives' failure to achieve project's goals of promoting alternative transportation and access to city's open space to people with disabilities; extensive administrative record showed that city carefully considered alternatives' feasibility before rejecting them. West's Ann.Cal.Pub.Res.Code § 21081.

**577 Wittwer & Parkin, William P. Parkin, Jonathan Wittwer, Jennifer Bragar, Santa Cruz, CA, for Plaintiffs and Appellants.

Remy Thomas Moose & Manley, James G. Moose, Sacramento, Atchison, Barisone, Condotti & Kovacevich, John G. Barisone, Santa Cruz, for Defendants and Respondents.

McADAMS, J.

*967 This case arises under the California Environmental Quality Act (CEQA).[FN1]

FN1. Public Resources Code sections 21000 et seq.; further unspecified statutory refer-

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ences are to that Code.

Acting through its city council, respondent City of Santa Cruz approved a master plan for Arana Gulch, a city-owned greenbelt property. In approving that project, the City certified an environmental impact report (EIR). As acknowledged in the EIR and in findings made by the City, the project will have a significant effect on the habitat of the Santa Cruz tarplant due to the chosen alignment of a multiuse trail. The City nevertheless found that overriding considerations warranted approval.

Claiming CEQA violations, appellants California Native Plant Society and Friends of Arana Gulch petitioned the superior****578** court for a writ of mandate, naming as respondents the City and its city council. The court denied the petition. On appeal, appellants continue to press their claim that the City ***968** violated CEQA by failing to properly analyze feasible alternatives to the project, particularly an off-site location for the east-west multiuse trail.[FN2]

FN2. In the superior court, appellants also claimed CEQA violations based on the asserted failure (1) to delineate wetlands and (2) to analyze impacts to an environmentally sensitive habitat area (ESHA). In this court, appellants' CEQA claim rests solely on the alternatives analysis and related findings. We limit our analysis to that claim. (See, e.g., *Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 611, 107 Cal.Rptr.2d 489.)

We find no violation of CEQA's procedural mandates. We also find substantial evidence in the administrative record to support the City's actions. We therefore affirm the superior court judgment denying appellants' writ petition.

FACTUAL AND PROCEDURAL BACKGROUND

The Project

The project whose approval is challenged here is the Arana Gulch Master Plan. The master plan addresses both public uses and resource management for the site.

The Site

As described in the draft master plan, "Arana Gulch is a scenic natural area situated along the eastern boundary of Santa Cruz. This 67.7–acre City-owned property features unique natural resources such as coastal prairie, Santa Cruz tarplant, and riparian and wetland habitat areas of Arana Gulch Creek. Bounded by neighborhoods and the Santa Cruz Harbor, this refuge of open space—with rich biological diversity, sweeping vistas, and tranquility—is of great value to the people of Santa Cruz."

Planning Background

The draft master plan chronicles the planning process for Arana Gulch.

As that document explains, the master plan "evolved from planning efforts spanning over two decades." The impetus for those efforts was the 1979 approval by city voters of Measure O, which identified greenbelt parcels for preservation. Among the designated parcels was Arana Gulch, which was then in private ownership. In 1992, city voters approved Measure I, which "required preparation and adoption of a Greenbelt Master Plan." A greenbelt master plan planning and feasibility study was completed two years later.

***969** In 1994, the City purchased Arana Gulch, which then comprised 63 acres. Shortly after purchasing it, the City opened the property for public use. "Years prior to this purchase, the City had acquired a narrow strip of land in the central portion of the property, approximately 4.7 acres. This strip of land was originally intended for a roadway extension between Broadway Avenue and Brommer Street."

In 1997, the City Council approved the Arana Gulch Interim Management Plan. It "did not include any land use decisions, which were intended to be addressed at a future date in a long-term Master Plan."

"In late 2003, the City began the planning process for the *Arana Gulch Master Plan.* As an initial step, the Parks and Recreation Department sought direction from City Council regarding specific uses for Arana Gulch.[FN3] In October 2003, the ****579** Council directed that the following uses be included in the Draft Master Plan: resource enhancement and protection, a trail system that includes an east-west multi-use trail, interpretive displays and overlook areas."

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FN3. Various uses for the property had been proposed or recommended over the years. In the 1994 greenbelt planning study, the recommended uses for Arana Gulch were "protection of views, habitats, and watershed areas, nature preserve areas, trails (nature, hiking and bicycle), a playground, a sports field, picnic sites, a restroom, and small parking areas." The 1997 interim management plan noted "potential development scenarios within a portion of Arana Gulch, including the possibility of residential use to recover some of the acquisition cost." Use as a school site had been considered there as well.

The Arana Gulch draft master plan also summarizes the evolution of the proposed east-west multiuse pathway connecting Broadway Avenue and Brommer Street through Arana Gulch. "The *City's General Plan* (1992) and the *Greenbelt Master Plan* (1994) identified the concept of an east-west bicycle/pedestrian connection between the City and County of Santa Cruz. In 1995, an initial Scope of Work for this bicycle/pedestrian path connection was prepared. Since that time, the proposed pathway and alternative routes have undergone several rounds of environmental evaluation and review. [¶] In May 2003, the City Council certified the environmental document—*Broadway-Brommer Bicycle/Pedestrian Path connection Environmental Impact Report/Environmental Assessment*—but did not take action on the project itself." Instead, the City Council decided to proceed with the Arana Gulch master plan, specifically including an east-west multiuse trail.

Elements of the Master Plan

Elements of the project are described both in the draft master plan for Arana Gulch and in the EIR. The principal master plan components are (1) resource protection and enhancement and (2) public use, including trails.

***970** *Resource Management:* The draft master plan states that "a key goal is to preserve and restore coastal prairie habitat, particularly Santa Cruz tarplant populations." As one part of the plan for achieving that goal, "a long-term adaptive management program" for the Santa Cruz tarplant was developed, as detailed in an appendix to the master plan. Another part of the plan was "to close unauthorized trails that transect the areas with the highest tarplant populations." Additionally, the master plan "calls for the establishment of designated interpretive multi-use and pedestrian trails ... designed to minimize and avoid disruption to the higher density tarplant populations."

Public Use: As explained in the draft master plan: "An interpretive trail system is the focus of public use within Arana Gulch. The proposed trail system, totaling approximately 2 miles, would provide public access for pedestrians, wheelchair users, and bicyclists." More than two thirds of the system, "approximately 1.4 miles, would be limited to pedestrian use" (including leashed dogs), with the remainder devoted to multiuse trails "designed for pedestrian, bicycle, wheelchair, and on-leash dog use." "The multi-use trails would include Arana Meadow, Creek View, and Canyon Trails." They "would feature a hardened surface and gradient that is compliant with the Americans with Disabilities Act (ADA) requirements." Their width would not exceed eight feet, except as needed "to accommodate interpretive displays and nature viewing areas." The multiuse trails "would enable visitors of all abilities to experience and learn about the different habitat areas" and would "also provide key trail connections between adjoining neighborhoods and the coastline. ****580** Together, Canyon View and Creek View Trail would provide a continuous west-east trail connection through the Arana Gulch property and Upper Harbor."

Environmental Review

Preparation of the draft master plan for Arana Gulch and the draft environmental impact report took place concurrently.

The Draft EIR

The draft environmental impact report (DEIR) was "made available for public review on March 1, 2006." It comprises 240 pages, plus appendices.

Objectives: The DEIR lists 10 project objectives, divided into two categories. Four objectives are listed under the heading "Resource Protection and Enhancement," including this one: "Implement an adaptive management program to ensure the long-term viability of the Santa Cruz tarplant within ***971** Arana Gulch." FN4 Six objectives are listed under the

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heading "Public Use," including this one: "Provide trail connections through Arana Gulch that provide access from adjacent communities to the coastline and the Monterey Bay National Marine Sanctuary Trail. Provide multi-use trail connections that comply with Americans with Disabilities Act (ADA) requirements and provide pedestrian, wheelchair and bicycle access." FN5

FN4. The other objectives related to resources are: "Protect and enhance sensitive habitat areas, including coastal prairie, riparian woodland, and wetlands." "Educate the public about nature resource protection and enhancement through interpretive displays and programs." "Reduce sedimentation through: a) stabilization and restoration of eroded areas; b) trail improvements; and, c) other Best Management Practices."

FN5. The other objectives related to public use are: "Provide a trail system that allows public access within habitat areas in a manner that does not result in significant degradation of habitat values." "Provide areas for nature viewing and interpretive displays. Ensure that interpretive displays are designed to complement and blend with the natural environment." "To protect sensitive habitat, restrict dogs to on-leash use at all times on designated trails." "Close unauthorized, non-designated pathways." "Provide no new vehicle parking within the Arana Gulch boundaries, as there is adequate existing parking near entrances."

Proposed Project: In describing the project—the Arana Gulch master plan—the DEIR refers to that plan, provides a detailed summary of it, and attaches its table of contents as an appendix.

Impacts and Mitigation: The DEIR includes a chapter entitled "Environmental Setting, Impacts and Mitigation Measures." As relevant here, that chapter describes the biological resources of Arana Gulch, including the Santa Cruz tarplant. It summarizes the anticipated biological impact of the project on the tarplant habitat, along with proposed mitigation measures.

In terms of impacts, the DEIR notes that some of the trails proposed in the master plan "would pass through, or near the boundary of" four areas of Arana Gulch identified as historic tarplant habitat (Areas A, B, C, and D). The DEIR states: "Any routing of trail segments through historic Santa Cruz tarplant habitat would represent a direct loss of habitat for the species." In recent years, only small numbers of plants were observed in Areas B, C, and D. "It is assumed, however, that a seed bank may still be present throughout these historic areas of tarplant occurrence. Thus, with appropriate management measures, the species could potentially be restored to those areas from the dormant seed bank." The DEIR continues: "Loss of tarplant habitat would be relatively greater with the multi-use trails ... because****581** these trails would be 8 feet wide, as compared to the pedestrian-only trails which would be 18 to 24 inches wide. To the extent that these trails cannot be routed to avoid the tarplant habitat ..., this would be an impact that cannot be fully mitigated."

***972** To lessen these impacts, the DEIR identifies five mitigation measures, including these two: (a) "To the maximum extent feasible, all trail segments shall be aligned to avoid the mapped historic extent of the four Santa Cruz tarplant areas." (b) "The Santa Cruz Tarplant Management Program ... shall be fully implemented." But the report nevertheless observes: "The combination of the above measures would reduce this impact, but the impact would remain significant and unavoidable because it cannot be fully ensured that all tarplant habitat would be protected."

Alternatives: The DEIR has a chapter devoted to alternatives. It evaluates four alternatives: (1) the "No Project Alternative"; (2) the "Reduced Creek View Trail Alternative"; (3) the "Unpaved Trail System with Hagemann Gulch Bridge Alternative"; and (4) the "Unpaved Trail System without Hagemann Gulch Bridge Alternative." The DEIR summarizes the four alternatives as follows:

Alternative 1 "would keep the site in its existing condition. No Master Plan and no Santa Cruz Tarplant Adaptive Management Program would be adopted. Management actions would be limited and the *Arana Gulch Interim Management Plan* would remain in effect. No new trails would be developed on the site. This alternative would eliminate most of the project impacts but would not contribute to the achievement of any of the project proposals."

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Alternative 2 "would include the same trail system as the proposed project but would not include any trail segments within Port District property. Trail access to Arana Gulch would continue to be provided by the existing trail segment along the western edge of the dry storage area at the Upper Harbor. This alternative would include the long-term Santa Cruz Tarplant Adaptive Management Program."

Alternative 3 "would have the same trails as the proposed project except that no trails would be paved and no trails would comply with Americans with Disabilities (ADA) requirements. Due to unpaved surfaces and gradients, trails would not be accessible for wheelchairs and some types of street bicycles. Without funding for paved, multi-use trails, there would be uncertainty about funding and implementing the Santa Cruz Tarplant Adaptive Management Program."

Alternative 4 "would provide unpaved trails and would not include the Hagemann Gulch Bridge proposed by the project. This alternative would provide public access for pedestrians and some bicyclists but would not comply with ADA requirements. Since no bridge across Hagemann Gulch would be constructed, this alternative would not provide a new west entrance ***973** or east-west trail connection. As with Alternative 3, all trails would remain unpaved. Without funding for paved, multi-use trails, there would be uncertainty about funding and implementing the Santa Cruz Tarplant Adaptive Management Program."

Following this summary, the DEIR discusses the alternatives in greater depth. As part of that discussion, the DEIR includes two tables, one comparing the environmental impacts of the project alternatives after mitigation and another showing the relationship of the alternatives to project objectives.

****582** The DEIR concludes that Alternative 4 "would be the environmentally superior alternative, because it provides for the least amount of construction at the site. Thus, on-site resources such as Santa Cruz tarplant, wetlands, and other habitat would be least affected." But the DEIR also states: "This alternative would not meet the project objectives of providing ADA-compliant, multi-use trails and would not provide a new west entrance and connection to the Seabright neighborhood. Thus, access within Arana Gulch would be significantly limited compared to the proposed project. Additionally, funding may not be available for long-term resource management of the site, specifically the Santa Cruz Tarplant Adaptive Management Program."

Public Comments

During the public review period for the DEIR, numerous comments were received, including a letter from appellants. Appellants' letter enumerated 20 separate questions or criticisms; three pertain to the issues raised here.

As relevant to this appeal, appellants first complained that the project objectives were defined too narrowly, resulting "in a skewed alternatives analysis." According to appellants, since ADA-compliant multiuse trails are listed as a project objective, the alternatives should include such trails, "which are assumed to be an essential part of the Project." By excluding such a key component, appellants argued, "the alternatives analysis would be pointless."

In addition, appellants took issue with the DEIR's conclusion that "funding for tarplant management is uncertain for Alternatives 3 and 4." In their words: "This is clearly a ruse. The fact that there will still be development associated with these proposals means that mitigations will have to be proposed to mitigate for significant environmental impacts, including impacts to the tarplant."

Finally, appellants commented: "The Master Plan clearly includes the Broadway–Brommer Bicycle/Pedestrial Path Connection. Yet, the DEIR fails ***974** to address off-site alternatives for this connection. If this is a Project Objective as stated, then in order for the DEIR to be legally sufficient, it must address off-site alternatives for this connection."

The Final EIR

The final environmental report (FEIR) was presented in May 2006. As explained in its introduction, the FEIR is "prepared in the form of an addendum to the DEIR, responds to public comments on the DEIR, revises the DEIR as necessary, and provides a Mitigation Monitoring and Reporting Program for the project." In its response to public comments, the FEIR addresses each point raised by appellants, including the three mentioned above.

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As relevant here, the FEIR first responds to appellants' comment that the project objectives were unduly narrow and thus skewed the alternatives analysis. Concerning project objectives, the FEIR states: "The objectives outlined in the DEIR are not considered so narrow that they preclude the development of reasonable alternatives.... The objective of developing multi-use trails and trail connections allows a variety of means for such trails to be provided within Arana Gulch. For example, such objectives allow a multitude of alignments to be selected within the 67–acre property." Concerning alternatives, the FEIR states: "The four alternatives evaluated in Chapter 5 of the DEIR are considered to be a reasonable range of alternatives. While each alternative does not necessarily achieve all of the identified project objectives, the City's decision makers can easily select any of the alternatives ****583** other than the proposed project, and each alternative would still provide the City with a Master Plan for Arana Gulch. Only the 'No Project' alternative fails to achieve most of the identified project objectives which is quite common in CEQA documents."

Next, in a master response about funding for tarplant management (a point raised by appellants and others), the FEIR states: "The Santa Cruz Tarplant Adaptive Management Program ... must be funded by the City in order to fulfill the EIR mitigation measure requirements for the proposed project and Alternative 2. Funding of the Adaptive Management Program would not be required for the No Project and other alternatives; however, the City Council could still decide to fund the Adaptive Management Program, regardless of which alternative is selected. Because there would not be a requirement to fund it, the Draft EIR states that there is uncertainty regarding funding."

Third, the FEIR addresses the issue of an off-site alternative in another master response as follows: "An off-site alternative was not addressed because the proposed project is a Master Plan for the 67.7–acre Arana Gulch ***975** property. The off-site component of the multi-use trail [the Port District segment] is addressed as part of the proposed project because this is directly linked to the on-site trail and is required to be addressed by CEQA as part of the whole action.... Any off-site alternative that is outside the boundaries of Arana Gulch would not meet the intent of developing a Master Plan for Arana Gulch. [¶] ... [¶] Off-site alternatives for the bicycle trail were already addressed in the EIR/EA on the Broadway–Brommer Bicycle/Pedestrian Path Connection which is addressed [in] the DEIR."

On July 10, 2006, the City prepared an addendum to the FEIR to address typographical errors and an inadvertent omission.

Consideration by Advisory Bodies

The draft master plan identified two advisory bodies for the project: (1) the City's Parks and Recreation Commission, which was "the lead advisory body to the City Council for review of the *Arana Gulch Master Plan* and EIR" and (2) the City's Planning Commission, which had advisory responsibility "for the General Plan Amendments, rezoning, and annexation of County parcels."

On June 26, 2006, the Parks and Recreation Commission considered the Arana Gulch draft master plan and EIR. The hearing began with a staff report. The staff representative responded to commissioners' questions about the absence of off-site trail alternatives through Frederick Street Park.[FN6] The staff report was followed ****584** by public comment. After discussion among its members, the Commission voted four to two against recommending EIR certification to the City Council. By the same margin, the Commission also "recommended ... that the City Council reject the Arana Gulch Master Plan and direct staff to prepare a new Master Plan that does not include a bridge over Hagemann Gulch." The Commission's vote ran counter to the recommendation of its staff, which was to approve "the Arana Gulch Master Plan as presented to City Council."

FN6. The staff representative explained that "the project that was before the City Council for the previous ten years was a bicycle/pedestrian/wheelchair accessible path connecting the east and west. And it looked at different alternatives. Arana Gulch was just one of the routes. That was the project. It was a bicycle/pedestrian path project. [¶] The project before you today is a long-term Master Plan for a 67–acre area which is called Arana Gulch. So, therefore, the only alternatives that are included are alternatives within the Arana Gulch property." She also

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stated: "Frederick Street does not provide access for disabled people within Arana Gulch, and it does not provide a new west entrance to Arana Gulch."

During discussion by the Commission, the absence of off-site alternatives came up again. The staff representative stated: "It's confusing to explain. The project before you is Arana Gulch. The project is not an east-west pathway; therefore, what's in the EIR is alternatives that still provide a park master plan that do not include a paved east-west connection. So that is the means of this department providing an alternative."

***976** On July 6, 2006, the Planning Commission considered the Arana Gulch EIR together with proposed zoning and plan amendments that would be necessary in the event of approval of the Arana Gulch master plan. After a staff report, public comment, and discussion, the Planning Commission voted five to zero to recommend certification of the EIR and adoption of the necessary amendments to the local coastal plan and general plan.

Project Approval

On July 11, 2006, the City Council conducted a public meeting to consider approval of the Arana Gulch draft master plan. First, city staff members explained the project and the environmental review process. Those reports were followed by public comments. The City Council then discussed and voted on the Arana Gulch draft master plan.

Staff Reports: Reports were presented by Parks and Recreation Department staff, Planning Department staff, and the environmental consultant for the project. The environmental consultant confirmed that "the mitigation measures in the EIR will reduce potential environmental impacts to less than significant, except for the impact related to the historic Santa Cruz tar plant habitat." Nevertheless, she stated, "the majority of the tar plant habitat is protected." As the consultant explained: "Area A which has included the highest population historically and in recent years is completely avoided by the multiuse trails" but "the trails would pass nearby or through areas B, C and D" of the tarplant habitat. She further explained: "Because there may be tar plant seed bank within the footprint of the paved trails, the EIR took a conservative approach and defined the impact as significant and unavoidable. It should be noted that there is uncertainty about the location and viability of the seed bank." Nevertheless, the consultant advised, given the identified impact to tarplant habitat, "the City must adopt a Statement of Overriding Considerations in order to approve the Master Plan."

Speakers' Comments: Dozens of people spoke at the hearing, offering comments for or against the project or its components.

Speaking in favor of the inclusion of multiuse trails in the master plan, several people cited wheelchair accessibility. A number of individuals favored the multiuse trails based on the need for safe bicycle route alternatives. Still others spoke of the environmental benefits of promoting alternative transportation. Among those urging adoption of the EIR and master plan was the former executive director of the Regional Transportation Commission, who described the proposed multiuse trail as "the most critical bike and pedestrian path project in this county for this region."

Other members of the public spoke against the inclusion of paved trails through Arana Gulch, citing environmental and other concerns, including the ***977** need for protection of the Santa Cruz tarplant habitat. Representatives of appellants California Native Plant Society and Friends of Arana Gulch were among those speaking in opposition to project approval.

****585** *Council Discussion:* In discussing the motion to approve the master plan, several city council members spoke about the multiuse trails. Council member Coonerty stated that "the important issue for me here is about access." In his words, "we need to make public spaces available to—accessible to everybody. And that's an incredibly important value. And that includes ... our open spaces." Council member Madrigal agreed, saying: "I just think that our natural environment, our greenbelt should not be an exclusive area. And so whatever we can do to try and increase access to that, we should do that." According to council member Mathews: "We also take to heart the importance of providing transportation alternatives. No one can look at the situation and think we need only one east-west, or even two east-west bike routes. That's a major corridor and we need sev-

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eral good ones, and this can be one of them."

Council Action: By a vote of six to zero, the City Council adopted a resolution certifying the final environmental impact report for the Arana Gulch master plan. In a separate resolution, the City Council adopted Findings of Fact and a Statement of Overriding Considerations, which are contained in a 36–page exhibit. As relevant here, the Findings of Fact conclude that each of the alternatives analyzed in the EIR is infeasible for failure to satisfy project objectives and on policy grounds. In its Statement of Overriding Considerations, the City Council identified "economic, social, or other benefits that render acceptable the significant and unavoidable effect on the Santa Cruz tarplant" including improved access for people with disabilities and trail connections to coastal resources. The City Council also took other actions related to approval of the Arana Gulch master plan, including amending the local coastal plan and making zoning changes.

Trial Court Proceedings

On August 10, 2006, appellants filed a petition for writ of mandate in superior court. In January 2007, the administrative record was lodged with the court; it contains more than 8,700 pages. The following month, respondents answered the petition. The parties submitted extensive briefing, with the final brief filed by appellants in May 2007.

In September 2007, the court conducted a hearing on the petition. In October, the court issued a tentative decision in respondents' favor. Later that month, after appellants had responded to the tentative decision and respondents had submitted a proposed statement of decision, the court held another hearing. In November, the court filed a final decision denying the petition.

***978** In January 2008, the court issued its order and judgment denying the petition.

Appeal

Appellants brought this timely appeal. In this court, appellants assert CEQA violations based on the analysis of alternatives in the EIR and the subsequent infeasibility findings by the City Council.

LEGAL PRINCIPLES

As a framework for our discussion of the issues raised in this appeal, we begin by summarizing the principles of law that govern our analysis.

I. Environmental Protection Under CEQA

[1][2] "The Supreme Court has repeatedly observed that the Legislature intended CEQA to be interpreted to afford the fullest possible protection to the environment within the reasonable scope of the ****586** statutory language." (*Marin Mun. Water Dist. v. KG Land California Corp.* (1991) 235 Cal.App.3d 1652, 1660, 1 Cal.Rptr.2d 767 (*Marin Water*).) To further that purpose, "CEQA contains a 'substantive mandate' requiring public agencies to refrain from approving projects with significant environmental effects if 'there are *feasible* alternatives or *mitigation measures* ' that can substantially lessen or avoid those effects." (*County of San Diego v. Grossmont–Cuyamaca Community College Dist.* (2006) 141 Cal.App.4th 86, 98, 45 Cal.Rptr.3d 674.) CEQA nevertheless "permits government agencies to approve projects that have an environmentally deleterious effect, but [it] also requires them to justify those choices in light of specific social or economic conditions." (*Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1233, 32 Cal.Rptr.2d 19, 876 P.2d 505, citing § 21002.)

A. The Environmental Impact Report

[3] The "heart of CEQA" is the environmental impact report. (*Marin Water, supra,* 235 Cal.App.3d at p. 1660, 1 Cal.Rptr.2d 767; *Citizens for Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564, 276 Cal.Rptr. 410, 801 P.2d 1161 (*Goleta II*).) "The EIR, with all its specificity and complexity, is the mechanism prescribed by CEQA to force informed decision making and to expose the decision making process to public scrutiny." (*Planning & Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 910, 100 Cal.Rptr.2d 173 ***979**(*Planning &* http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2000525089*Conservation League*).) The requirements governing environmental impact reports are set forth in the statute and in CEQA Guidelines.[FN7]

FN7. The Guidelines are found in the California Code of Regulations, title 14, section 15000 et seq. As the California Supreme Court recently reaffirmed: "In interpreting CEQA, we accord the Guidelines great

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weight except where they are clearly unauthorized or erroneous." (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 427, 53 Cal.Rptr.3d 821, 150 P.3d 709, fn. 5 (*Vineyard*).)

[4] "A public agency must prepare an EIR or cause an EIR to be prepared for any project that it proposes to carry out or approve that may have a significant effect on the environment." (*Federation of Hillside and Canyon Associations v. City of Los Angeles* (2004) 126 Cal.App.4th 1180, 1197, 24 Cal.Rptr.3d 543 (*Federation II*).) "The EIR must describe the proposed project and its environmental setting, state the objectives sought to be achieved, identify and analyze the significant effects on the environment, state how those impacts can be mitigated or avoided, and identify alternatives to the project, among other requirements." (*Ibid.*)

[5] The process begins with notice to the public that the lead agency is preparing a draft EIR. (§ 21092; *Laurel Heights Improvement Assn. v. Regents of the University of California* (1988) 47 Cal.3d 376, 391, 253 Cal.Rptr. 426, 764 P.2d 278 (*Laurel Heights*).) After public review, "the draft EIR is evaluated in light of comments received." (*Laurel Heights,* at p. 391, 253 Cal.Rptr. 426, 764 P.2d 278.) "The lead agency then prepares a final EIR incorporating comments on the draft EIR and the agency's responses to significant environmental points raised in the review process." (*Ibid.*) "The lead agency must certify that the final EIR has been completed in compliance with CEQA and that the information in the final EIR was considered by the agency before approving the project." (*Ibid.*) An agency may utilize staff or "consultants to prepare the EIR" but it "must use its independent judgment" in considering the information. **587(*Mission Oaks Ranch, Ltd. v. County of Santa Barbara* (1998) 65 Cal.App.4th 713, 725, 77 Cal.Rptr.2d 1, disapproved on another point in *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123, fn. 10, 81 Cal.Rptr.2d 471, 969 P.2d 564; see Guidelines, § 15084, subds. (a), (d), (e).) "Because the EIR must be certified or rejected by public officials, it is a document of accountability." (*Laurel Heights,* at p. 392, 253 Cal.Rptr. 426, 764 P.2d 278; accord, *Sierra Club v. State Bd. of Forestry, supra,* 7 Cal.4th at p. 1229, 32 Cal.Rptr.2d 19, 876 P.2d 505.)

[6][7] " 'Technical perfection is not required; the courts have looked not for an exhaustive analysis but for adequacy, completeness and a good-faith effort at full disclosure.' " (*Concerned Citizens of South Central L.A. v. Los Angeles Unified School Dist.* (1994) 24 Cal.App.4th 826, 836, 29 Cal.Rptr.2d 492 (*Concerned Citizens*); see also, e.g., *Laurel Heights, supra,* 47 Cal.3d at pp. 406–407, 253 Cal.Rptr. 426, 764 P.2d 278.) Nevertheless, given the key role of the environmental impact report in carrying out ***980** CEQA's requirements, "the integrity of the process is dependent on the adequacy of the EIR." (*Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 117, 104 Cal.Rptr.2d 326 (*Save Our Peninsula*).)

B. Alternatives

"CEQA requires that an EIR, in addition to analyzing the environmental effects of a proposed project, also consider and analyze project alternatives that would reduce adverse environmental impacts." (*In re Bay–Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1163, 77 Cal.Rptr.3d 578, 184 P.3d 709 (*In re Bay–Delta*).) According to the Guidelines: "An EIR shall describe a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives." (Guidelines, § 15126.6, subd. (a).)

"The basic framework for analyzing the sufficiency of an EIR's description of alternatives is set forth" in the statute, in the CEQA Guidelines, and in *Goleta II, supra,* 52 Cal.3d 553, 276 Cal.Rptr. 410, 801 P.2d 1161. (*In re Bay–Delta, supra,* 43 Cal.4th at pp. 1162–1163, 77 Cal.Rptr.3d 578, 184 P.3d 709.) Under those authorities, the analysis of alternatives is evaluated against a rule of reason. (*Goleta II* at p. 565, 276 Cal.Rptr. 410, 801 P.2d 1161; Guidelines, § 15126.6, subds. (a), (f).)

1. Range of Alternatives

[8][9] Project alternatives "typically fall into one of two categories: on-site alternatives, which generally consist of different uses of the land under consideration; and off-site alternatives, which usually involve similar uses at different locations." (*Goleta II,*

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supra, 52 Cal.3d at p. 566, 276 Cal.Rptr. 410, 801 P.2d 1161.) But "CEQA establishes no categorical legal imperative as to the scope of alternatives to be analyzed in an EIR. Each case must be evaluated on its facts, which in turn must be reviewed in light of the statutory purpose." (*Ibid.*) "An EIR need not consider every conceivable alternative to a project." (Guidelines, § 15126.6, subd. (a); see *In re Bay-Delta, supra,* 43 Cal.4th at p. 1163, 77 Cal.Rptr.3d 578, 184 P.3d 709.) "Rather it must consider a reasonable range of potentially feasible alternatives that will foster informed decisionmaking and public participation." (Guidelines, § 15126.6, subd. (a).) No single factor "establishes a fixed limit on the ****588** scope of reasonable alternatives." (*Id.,* subd. (f)(1).)

2. Level of Analysis

[10] "An EIR's discussion of alternatives must contain analysis sufficient to allow informed decision making." ***981**(*Laurel Heights, supra,* 47 Cal.3d at p. 404, 253 Cal.Rptr. 426, 764 P.2d 278.) It also "must include detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project" thereby fostering "meaningful participation and criticism by the public." (*Id.* at p. 405, 253 Cal.Rptr. 426, 764 P.2d 278.) "As with the range of alternatives that must be discussed, the level of analysis is subject to a rule of reason." (*Id.* at p. 407, 253 Cal.Rptr. 426, 764 P.2d 278.)

C. Feasibility

"In determining the nature and scope of alternatives to be examined in an EIR, the Legislature has decreed that local agencies shall be guided by the doctrine of 'feasibility.' " (*Goleta II, supra,* 52 Cal.3d at p. 565, 276 Cal.Rptr. 410, 801 P.2d 1161.) "An EIR need not consider ... alternatives that are infeasible." (*In re Bay-Delta, supra,* 43 Cal.4th at p. 1163, 77 Cal.Rptr.3d 578, 184 P.3d 709; Guidelines, § 15126.6, subd. (a).) As statutorily defined, " 'Feasible' means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." (§ 21061.1; see also, Guidelines, § 15364 [same definition but with addition of "legal" factors].)

[11] "Among the factors that may be taken into account when addressing the feasibility of alternatives are site suitability, economic viability, availability of infrastructure, general plan consistency, other plans or regulatory limitations, jurisdictional boundaries (projects with a regionally significant impact should consider the regional context), and whether the proponent can reasonably acquire, control or otherwise have access to the alternative site (or the site is already owned by the proponent)." (Guidelines, § 15126.6, subd. (f)(1).) As to that last factor, "the government's power of eminent domain and access to public lands suggest that alternative sites may be more feasible, more often, when the developer is a public rather than a private agency." (*Goleta II, supra,* 52 Cal.3d at p. 574, 276 Cal.Rptr. 410, 801 P.2d 1161.)

[12] The issue of feasibility arises at two different junctures: (1) in the assessment of alternatives in the EIR and (2) during the agency's later consideration of whether to approve the project. (See *Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4th 477, 489, 14 Cal.Rptr.3d 308 (*Mira Mar*).) But "differing factors come into play at each stage." (1 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2d ed.2009) § 15.9, p. 740.) For the first phase—inclusion in the EIR—the standard is whether the alternative is *potentially* feasible. (*Mira Mar,* at p. 489, 14 Cal.Rptr.3d 308; Guidelines, § 15126.6, subd. (a).) By contrast, at the second phase—the final decision on project approval—the decision-making body evaluates whether the alternatives are *actually* feasible. (See Guidelines, § 15091, subd. (a)(3).) At that juncture, the decision-makers may reject as infeasible alternatives that were identified in the EIR as potentially feasible. (*Mira Mar,* at p. 489, 14 Cal.Rptr.3d 308.)

982** ***D. Approval Despite Environmental Impact

[13] Under CEQA, "a public agency is not required to favor environmental protection****589** over other considerations, but it must disclose and carefully consider the environmental consequences of its actions, mitigate adverse environmental effects if feasible, explain the reasons for its actions, and afford the public and other affected agencies an opportunity to participate meaningfully in the environmental review process." (*Federation II, supra,* 126 Cal.App.4th at p. 1198, 24 Cal.Rptr.3d 543.)

As relevant here, a project with significant environmental impacts may be approved only if the decision-making body finds (1) that identified mitigation

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measures and alternatives are infeasible and (2) that unavoidable impacts are acceptable because of overriding considerations. (§ 21081, subds.(a)(3), (b); Guidelines, §§ 15043, 15091, 15093; *Federation II, supra,* 126 Cal.App.4th at p. 1198, 24 Cal.Rptr.3d 543.)

1. Infeasibility Findings

Where an EIR has identified significant environmental effects that have not been mitigated or avoided, the agency may not approve the project unless it first finds that "[s]pecific economic, legal, social, technological, or other considerations ... make infeasible the mitigation measures or alternatives identified in the environmental impact report." (§ 21081, subd. (a)(3); Guidelines, § 15091, subd. (a)(3).) For these purposes, rejected alternatives must be "truly infeasible." (*City of Marina v. Board of Trustees of the California State University* (2006) 39 Cal.4th 341, 369, 46 Cal.Rptr.3d 355, 138 P.3d 692 (*Marina*).)

"The required findings constitute the principal means chosen by the Legislature to enforce the state's declared policy 'that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects....' " (*Marina, supra,* 39 Cal.4th at p. 350, 46 Cal.Rptr.3d 355, 138 P.3d 692, quoting § 21002.)

"If the agency finds certain alternatives to be infeasible, its analysis must explain in meaningful detail the reasons and facts supporting that conclusion. The analysis must be sufficiently specific to permit informed decision-making and public participation, but the requirement should not be construed unreasonably to defeat projects easily." (*Marin Water, supra,* 235 Cal.App.3d at p. 1664, 1 Cal.Rptr.2d 767.) The infeasibility findings must be supported by substantial evidence. (§ 21081.5; Guidelines, § 15091, subd. (b).)

***983** *2. Overriding Considerations*

Before approving a project with significant unavoidable environmental impacts, a public entity must make an express written determination that the project's benefits outweigh any potential environmental harm. (§ 21081, subd. (b); Guidelines, §§ 15043, 15093; *Marina, supra,* 39 Cal.4th at p. 350, 46 Cal.Rptr.3d 355, 138 P.3d 692.) As provided in section 21081, subdivision (b), the agency must find "that specific overriding economic, legal, social, technological, or other benefits of the project outweigh the significant effects on the environment." Such a determination "is known as a statement of overriding considerations." (*Federation II, supra,* 126 Cal.App.4th at p. 1198, 24 Cal.Rptr.3d 543, citing Guidelines, § 15093.)

[14][15] "A statement of overriding considerations is not a substitute for the [infeasibility] findings required by Public Resources Code section 21081, subdivision (a)." (*Federation II, supra,* 126 Cal.App.4th at p. 1201, 24 Cal.Rptr.3d 543; Guidelines, § 15091, subd. (f).) "Rather, a statement of overriding considerations supplements those findings and supports an agency's determination to proceed with ****590** a project despite adverse environmental effects." (*Federation II,* at p. 1201, 24 Cal.Rptr.3d 543.) It "is intended to demonstrate the balance struck by the body in weighing the 'benefits of a proposed project against its unavoidable environmental risks.' (Guidelines, § 15093, subds.(a) and (c).)" (*Sierra Club v. Contra Costa County* (1992) 10 Cal.App.4th 1212, 1222, 13 Cal.Rptr.2d 182.) "While the mitigation and feasibility findings typically focus on the feasibility of specific proposed alternatives and mitigation measures, the statement of overriding considerations focuses on the larger, more general reasons for approving the project, such as the need to create new jobs, provide housing, generate taxes, and the like." (*Concerned Citizens, supra,* 24 Cal.App.4th at p. 847, 29 Cal.Rptr.2d 492.)

[16][17] The override decision "lies at the core of the lead agency's discretionary responsibility under CEQA and is, for that reason, not lightly to be overturned." (*Marina, supra,* 39 Cal.4th at p. 368, 46 Cal.Rptr.3d 355, 138 P.3d 692.) Override findings are sufficient if they "demonstrate the balance struck" by an agency in "weighing the benefits of the proposed project against its unavoidable adverse impacts." (*Concerned Citizens, supra,* 24 Cal.App.4th at p. 849, 29 Cal.Rptr.2d 492.) Additionally, "a statement of overriding considerations must be supported by substantial evidence contained in 'the final EIR and/or other information in the record.' (Guidelines, § 15093, subd. (b).)" (*Sierra Club v. Contra Costa County, supra,* 10 Cal.App.4th at p. 1223, 13 Cal.Rptr.2d 182.)

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***984 II. Judicial Review**

A. Mandamus Proceedings

[18][19] "Quasi-legislative acts are ordinarily reviewed by traditional mandate, and quasi-judicial acts are reviewed by administrative mandate." (*Friends of the Old Trees v. Department of Forestry & Fire Protection* (1997) 52 Cal.App.4th 1383, 1389, 61 Cal.Rptr.2d 297; see also, e.g., *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 566–567, 38 Cal.Rptr.2d 139, 888 P.2d 1268 (*Western States*).) "Review under administrative mandamus (§ 21168) and review under traditional mandamus (§ 21168.5) share many of the same characteristics. There is no practical difference between the standards of review applied under traditional or administrative mandamus." (*Friends of the Old Trees v. Department of Forestry & Fire Protection,* at p. 1389, 61 Cal.Rptr.2d 297.)

B. Review Standards

[20] Under CEQA, courts review quasi-legislative agency decisions for an abuse of discretion. (§ 21168.5.) At both the trial and appellate level, the court examines the administrative record anew. (*Vineyard, supra,* 40 Cal.4th at p. 427, 53 Cal.Rptr.3d 821, 150 P.3d 709.)

[21][22] An "agency may abuse its discretion under CEQA either by failing to proceed in the manner CEQA provides or by reaching factual conclusions unsupported by substantial evidence." (*Vineyard, supra,* 40 Cal.4th at p. 435, 53 Cal.Rptr.3d 821, 150 P.3d 709, citing § 21168.5.) "Judicial review of these two types of error differs significantly" however. (*Vineyard,* at p. 435, 53 Cal.Rptr.3d 821, 150 P.3d 709.) For that reason, "a reviewing court must adjust its scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of improper procedure or a dispute over the facts." (*Ibid.*)

1. Procedural Claims

[23] Courts must "scrupulously enforce all legislatively mandated CEQA requirements."****591** (*Goleta II, supra,* 52 Cal.3d at p. 564, 276 Cal.Rptr. 410, 801 P.2d 1161.) To do so, "we determine de novo whether the agency has employed the correct procedures" in taking the challenged action. (*Vineyard, supra,* 40 Cal.4th at p. 435, 53 Cal.Rptr.3d 821, 150 P.3d 709.)

2. Substantive Claims

[24][25][26] Compared with review for procedural error, "we accord greater deference to the agency's substantive factual conclusions." (*Vineyard, supra,* 40 Cal.4th at p. 435, 53 Cal.Rptr.3d 821, 150 P.3d 709.) We apply "the highly deferential substantial evidence standard of ***985** review in Public Resources Code section 21168.5" to such determinations. (*Western States, supra,* 9 Cal.4th at p. 572, 38 Cal.Rptr.2d 139, 888 P.2d 1268.) "The agency is the finder of fact and we must indulge all reasonable inferences from the evidence that would support the agency's determinations and resolve all conflicts in the evidence in favor of the agency's decision." (*Save Our Peninsula, supra,* 87 Cal.App.4th at p. 117, 104 Cal.Rptr.2d 326.) That deferential review standard flows from the fact that "the agency has the discretion to resolve factual issues and to make policy decisions." (*Id.* at p. 120, 104 Cal.Rptr.2d 326.)

The CEQA Guidelines define substantial evidence as "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (Guidelines, § 15384, subd. (a).)

CONTENTIONS

According to appellants, "the City Council adopted a Statement of Overriding Considerations approving the Project with significant and unavoidable impacts despite the fact that there are feasible alternatives. These actions violated CEQA and sandbagged the public because it was already told there were feasible alternatives." Moreover, appellants assert, the City was required to consider an offsite alternative for the ADA-compliant multiuse trail, since it was a key objective of the project. By failing to do so, appellants maintain, the City did not foster the informed decision-making and public participation that CEQA requires.

The City disagrees. Asserting the existence of substantial evidence in the administrative record as a whole, the City defends the alternatives considered in the EIR, as well as its ultimate determinations of infeasibility and overriding considerations.

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ANALYSIS

In essence, appellants attack and we therefore evaluate (1) the range of alternatives analyzed in the EIR, and (2) the City Council's findings that the alternatives were infeasible. As explained below, appellants' contentions are based on erroneous factual and legal assumptions. First, concerning the project alternatives, appellants' arguments are predicated on the misapprehension that the east-west multiuse path was such an important project objective that it must be treated as the project itself. Second, concerning feasibility, appellants are mistaken in their view that the inclusion of potentially feasible alternatives in the EIR precluded the City Council's subsequent finding of infeasibility. They also err in asserting that the alternatives are not truly ***986** infeasible. Finally, concerning both areas of inquiry, appellants misstate the applicable review standard.

I. Project Alternatives

[27] In their bid for reversal of the project approval, appellants argue that the ****592** alternatives analysis in the EIR is legally inadequate for failure to include any proposals with an ADA-compliant trail. Appellants also urge error in the exclusion of offsite alternatives to the multiuse trail.

A. Review Standard

In pressing their argument concerning the alternatives analysis, appellants urge de novo review, claiming an abuse of discretion under the procedural prong of section 21168.5. Asserting that the City did not proceed in the manner required by law in analyzing alternatives, appellants characterize this CEQA challenge as "primarily the type" involving procedural error by the agency. (See *Vineyard, supra,* 40 Cal.4th at p. 435, 53 Cal.Rptr.3d 821, 150 P.3d 709.)

[28] An EIR will be found legally inadequate—and subject to independent review for procedural error—where it omits information that is both required by CEQA and necessary to informed discussion. (See, e.g., *Save Our Peninsula, supra,* 87 Cal.App.4th at p. 118, 104 Cal.Rptr.2d 326; *Planning & Conservation League, supra,* 83 Cal.App.4th at p. 911, 100 Cal.Rptr.2d 173.) An instructive example of this type of error is provided in *Sierra Club v. State Bd. of Forestry, supra,* 7 Cal.4th 1215, 32 Cal.Rptr.2d 19, 876 P.2d 505. There, the "record contained no site-specific data regarding the presence of four old-growth-dependent species," and it reflected the agencies' failure to make "site-specific recommendations regarding mitigation measures." (*Sierra Club v. State Bd. of Forestry,* at p. 1236, 32 Cal.Rptr.2d 19, 876 P.2d 505.) Under those circumstances, the "absence of any information regarding the presence of the four old-growth-dependent species on the site ... made any meaningful assessment of the potentially significant environment impacts of timber harvesting and the development of site-specific mitigation measures impossible." (*Id.* at pp. 1236–1237, 32 Cal.Rptr.2d 19, 876 P.2d 505.) "In evaluating and approving the timber harvest plan in the absence of such data and recommendations the board failed to proceed in the manner prescribed by CEQA." (*Id.* at p. 1236, 32 Cal.Rptr.2d 19, 876 P.2d 505.)

On the other hand, it "frequently occurs" that "the major disputes are over whether relevant information was omitted from the EIR." (*National Parks & Conservation Assn. v. County of Riverside* (1999) 71 Cal.App.4th at 1341, 1353, 84 Cal.Rptr.2d 563 (*National Parks*).) Many CEQA challenges thus concern the amount or type of information contained in the EIR, the scope of the analysis, or the choice of methodology. These are factual determinations. ***987**(*Barthelemy v. Chino Basin Mun. Water Dist.* (1995) 38 Cal.App.4th 1609, 1620, 45 Cal.Rptr.2d 688.) "A project opponent cannot obtain a more favorable standard of review by arguing that the EIR failed to disclose the conflicting evidence, and therefore the lead agency has not proceeded in a manner required by law; the project opponent must *also* show that the failure to disclose the conflicting evidence precluded informed decisionmaking or informed public participation." (*Ibid.;* accord, *National Parks,* at p. 1353, 84 Cal.Rptr.2d 563; but see, *Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1392, 133 Cal.Rptr.2d 718; see generally, Remy et al., Guide to California Environmental Quality Act (11th ed.2007) pp. 826–828.)

[29] To sum up, the omission of required information constitutes a failure to proceed in the manner required by law where it precludes informed decision-making by the agency or informed participation by the public. ****593**(*Sierra Club v. State Bd. of Forestry, supra,* 7 Cal.4th at p. 1236, 32 Cal.Rptr.2d 19, 876 P.2d 505.) We review such procedural violations de novo. (*Vineyard, supra,* 40 Cal.4th at p. 435, 53 Cal.Rptr.3d 821, 150 P.3d 709.) By contrast, we review an agency's substantive factual or policy deter-

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minations for substantial evidence. (*Ibid.;* see also, e.g., *Goleta II, supra,* 52 Cal.3d at pp. 566–567, 276 Cal.Rptr. 410, 801 P.2d 1161 [substantial evidence supported agency's conclusion that none of the proffered alternative sites "merited extended discussion in the EIR"].)

In this case, appellants contend that the City's choice of alternatives resulted in an analysis that was "merely perfunctory," thereby precluding informed decision-making and public participation. But appellants do not tether that claim to any specific informational or procedural requirement of CEQA. (Cf. *Planning & Conservation League, supra,* 83 Cal.App.4th at pp. 898, 916, 100 Cal.Rptr.2d 173 [EIR failed to discuss the required "no project" alternative].) And as noted above, "CEQA establishes no categorical legal imperative as to the scope of alternatives to be analyzed in an EIR." (*Goleta II, supra,* 52 Cal.3d at p. 566, 276 Cal.Rptr. 410, 801 P.2d 1161.)

In any event, we cannot assess appellants' claim without reviewing the evidence in the administrative record. In examining the evidence here, we are not limited to the EIR itself. (*Goleta II, supra,* 52 Cal.3d at p. 569, 276 Cal.Rptr. 410, 801 P.2d 1161.) Given the circumstances of this case, we "may consult the [entire] administrative record to assess the sufficiency of the range of alternatives discussed in [the] EIR." (*Ibid.*)

[30] In undertaking our review, we bear in mind that it is appellants' burden to demonstrate that the alternatives analysis is deficient. "Where an EIR is challenged as being legally inadequate, a court presumes a public agency's decision to certify the EIR is correct, thereby imposing on a party challenging it the burden of establishing otherwise." (*Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 530, 78 Cal.Rptr.3d 1.)

988 *B. Background

As explained above, the master plan calls for paved, multiuse, ADA-compliant trails through Arana Gulch, including an east-west trail that connects Broadway Avenue and Brommer Street by extending onto adjacent Port District property at the Upper Harbor.

The EIR analyzed four alternatives to the project: Alternative 1, no project; Alternative 2, no trail segments on Port District property; Alternative 3, no paved trails; and Alternative 4, no paved trails and no bridge over Hagemann Gulch. Of these, only Alternative 2 "would include implementation of the Santa Cruz Tarplant Adaptive Management Program as mitigation for paved, multi-use trails." The other alternatives would require some form of tarplant management, but funding for the formal adaptive management program could not be guaranteed. No off-site alternatives for the multiuse trails were included.

C. Discussion

We address each of appellants' challenges to the project alternatives in turn. First, we discuss appellants' contentions about the range of alternatives selected. Next, we analyze their arguments about the exclusion of off-site trail alternatives. As to each, we carefully scrutinize whether the City complied with CEQA's procedural mandates. We then consider whether substantial evidence supports the decisions made.

****594** *1. Selection of Alternatives for Discussion in the EIR*

[31][32] To be legally sufficient, the consideration of project alternatives in an EIR must permit informed agency decision-making and informed public participation. (*Laurel Heights, supra,* 47 Cal.3d at pp. 404–405, 253 Cal.Rptr. 426, 764 P.2d 278; Guidelines, § 15126.6, subds. (a), (f).) What CEQA requires is "enough of a variation to allow informed decision-making." (*Mann v. Community Redevelopment Agency* (1991) 233 Cal.App.3d 1143, 1151, 285 Cal.Rptr. 9.) We judge the range of project alternatives in the EIR against "a rule of reason." (*Laurel Heights* at p. 407, 253 Cal.Rptr. 426, 764 P.2d 278.) The selection will be upheld, unless the challenger demonstrates "that the alternatives are manifestly unreasonable and that they do not contribute to a reasonable range of alternatives." (*Federation of Hillside and Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1265, 100 Cal.Rptr.2d 301 (*Federation I*).)

***989** *a. The City's Compliance with CEQA's Informational Mandates*

Appellants challenge the range of alternatives in the EIR as skewed, given the project objectives, particularly the objective relating to multiuse trails. [FN8] (See *Planning & Conservation League, supra,* 83

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Cal.App.4th at p. 918, 100 Cal.Rptr.2d 173 [alternatives must be evaluated "in relation to the objectives of the project"].) In appellants' words, "if the City is of the opinion that the Master Plan must, as a matter of policy, contain an ADA compliant path, then the alternatives must also include ADA compliant paths." They also complain that "the City hid from the public its desire to have an ADA compliant trail."

> FN8. That project objective is: "Provide trail connections through Arana Gulch that provide access from adjacent communities to the coastline and the Monterey Bay National Marine Sanctuary Trail. Provide multi-use trail connections that comply with Americans with Disabilities Act (ADA) requirements and provide pedestrian, wheelchair and bicycle access."

At the outset, we question several key factual premises underlying appellants' arguments.

The first is appellants' assumption that the City considered an ADA-compliant path "an absolutely necessary component" of the master plan. That assumption is not borne out by the record. As stated in the FEIR, "the City's decision makers can easily select any of the alternatives rather than the proposed project, and each alternative would still provide the City with a Master Plan for Arana Gulch." An ADA-compliant east-west connection is just one objective of the project, out of a total of 10. As respondents observe: "Nothing in the objectives preordained that the proposed Project had to be approved in the precise form described in the Draft EIR." (Cf. *Sierra Club v. City of Orange, supra,* 163 Cal.App.4th at p. 533, 78 Cal.Rptr.3d 1 [agency has flexibility to implement only part of a project].) In initial planning for the Arana Gulch master plan, the City Council did direct the inclusion of an east-west multiuse trail in the project; however, it did not dictate the alignment or any other specific attributes of the trail. Nor did the City commit itself to approving the proposed master plan or to selecting a particular trail. (See, e.g., *Concerned McCloud Citizens v. McCloud Community Services Dist.* (2007) 147 Cal.App.4th 181, 192–193, 54 Cal.Rptr.3d 1; *City of Vernon v. Board of Harbor Comrs.* (1998) 63 Cal.App.4th 677, 688, 74 Cal.Rptr.2d 497, disapproved on another point in **595*Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 131, fn. 10, 84 Cal.Rptr.3d 614, 194 P.3d 344.) The fact that the City approved the project as proposed does not prove, ipso facto, that an ADA-compliant trail was an indispensable component of the master plan.

The second questionable premise is appellants' assertion that "only the proposed project includes ADA compliant trails." To the contrary, as stated in the DEIR, Alternative 2 would "provide ADA-compliant north-south and ***990** east-west trail connections, as would the proposed project." That alternative "would meet all project objectives except the objective to provide an ADA-compliant trail through the Port District property." Notably, however, without the Port District trail segment, there would be no continuous, paved, east-west connection. We therefore assume that appellants' complaint is not specifically directed to the lack of an alternative to ADA-compliant trails within Arana Gulch, but rather to the absence of an alternative that also accomplishes a complete east-west paved connection. Some statements in appellants' opening brief seem to suggest that that is their real complaint. And appellants' reply brief expresses the point somewhat more directly, saying: "All the alternatives fail to meet the primary objective of providing the east-west bike link or ADA compliant paths."

A third factual error is appellants' assertion that City somehow hid its desire for an ADA compliant trail. The record belies that assertion. Not only is such a trail included in the project objectives, but it is also discussed in the master plan.

Beyond the question of factual support for the premises underlying appellants' argument, we are not persuaded by the argument itself, which posits that CEQA's informational mandates were violated by the absence of an alternative with an ADA-compliant trail connection. In our view, the EIR in this case does not omit any required information necessary to informed decision-making and public participation concerning this issue.

The DEIR discusses multiuse trails, including a long-debated proposal for an east-west path for bicyclists and pedestrians connecting Broadway Avenue and Brommer Street. On this topic, the DEIR notes the existence of "earlier environmental studies for the project site" including the Brommer–Broadway EIR, which the City certified in 2003. The

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draft master plan for Arana Gulch itself explains that "the proposed pathway and alternative routes have undergone several rounds of environmental evaluation and review." On the same topic of multiuse trails and connections, the FEIR includes and responds to comments provided by appellants and others. As stated in the pertinent responses, the project objectives of "developing multi-use trails and trail connections ... allow a multitude of alignments to be selected within the 67–acre property."

Taken together, this information satisfies CEQA's informational requirements. It alerts the public and the decision-making body to the potential for trail alignments other than those shown in the project or in the alternatives. It tells them that other alignments were considered in prior review processes. It provides the public and decision-makers with enough information to compare the project's merits with a reasonable body of current alternatives.

***991** *b. The City's Substantive Determinations in Selecting Alternatives*

As appellants point out, the alternatives discussed in an EIR need not *fully* accomplish all of the project objectives. As provided in the Guidelines: "The range of potential alternatives to the proposed project shall include those that could feasibly accomplish *most of the basic objectives of* *****596*** *the project* and could avoid or substantially lessen one or more of the significant effects." (Guideline, § 15126.6, subd. (c), italics added.) Thus, "the discussion of alternatives shall focus on alternatives to the project or its location which are capable of avoiding or substantially lessening any significant effects of the project, even if these alternatives would impede to some degree the attainment of the project objectives, or would be more costly." (*Id.,* subd. (b).) "The CEQA Guidelines make clear that the project objectives should drive the agency's selection of alternatives for analysis and approval." (Remy et al., Guide to California Environmental Quality Act, *supra,* at p. 588.)

Contrary to appellants' assertions, however, there is no legal requirement that the alternatives selected must satisfy *every key objective* of the project. This concept finds expression in CEQA case authority. One example is *Mira Mar, supra,* 119 Cal.App.4th 477, 14 Cal.Rptr.3d 308. In that case, the court rejected the project opponents' contention that the alternatives in the EIR failed to "satisfy CEQA's requirements that an EIR meet basic project objectives and avoid or substantially reduce the project's environmental alternatives." (*Id.* at p. 488, 14 Cal.Rptr.3d 308.) There, "the primary objective of the project [was] to provide high-density housing consistent with existing planning goals" but there were other objectives as well, including sensitive development of a vacant area. (*Id.* at p. 489, 14 Cal.Rptr.3d 308.) As the court observed, two reduced density alternatives did "not meet the primary development objective of providing high-density housing," but they did "satisfy all the secondary project objectives. This is sufficient because alternatives need not satisfy all project objections, they must merely meet 'most' of them. (CEQA Guidelines, § 15126.6, subd. (a).)" (*Ibid.*) Another example of this principle is found in *Association of Irritated Residents v. County of Madera, supra,* 107 Cal.App.4th 1383, 133 Cal.Rptr.2d 718. There, the EIR for a dairy proposal included a "reduced-herd-size alternative" that "was environmentally superior to the proposed dairy because it offered proportionate reduction in air quality impacts and potential impacts on water quality. However, ... this alternative would not fully meet the project objective because a smaller herd would produce less milk and producing milk is the fundamental objective of the project." (*Id.* at p. 1400, 133 Cal.Rptr.2d 718.) Evaluation of the reduced-herd-size alternative nevertheless "complied with CEQA." (*Ibid.*)

That same principle applies here. In this case, each alternative meets some of the 10 project objectives. As shown in a matrix in the FEIR, Alternative 2 meets nine of the 10 objectives, Alternative 3 meets seven, and Alternative 4 ***992** meets six; even the no-project alternative (Alternative 1) meets two of the 10 project objectives. Ranking the relative importance of the various objectives in the overall context of the project was a policy decision entrusted to the City Council. The Council's ultimate determination that a multiuse east-west connector was a key objective of the project does not undermine the legitimacy of the EIR's alternatives analysis.

2. Failure to Analyze an Off–Site Trail Alternative in the EIR

Appellants assert: "Because an offsite alternative east-west bike path can completely avoid significant and unavoidable impacts to the Santa Cruz tarplant, alternative locations must be discussed in the EIR."

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a. The City's Compliance with CEQA's Informational Mandates

"Whether an EIR must consider the availability of alternative sites to a given **597 project depends upon the particular facts of the case," with "the ultimate objective being whether a discussion of alternatives 'fosters informed decision-making and informed public participation.' " (*Save Our Residential Environment v. City of West Hollywood* (1992) 9 Cal.App.4th 1745, 1751, 12 Cal.Rptr.2d 308.) In assessing the claim that exclusion of off-site alternatives renders the EIR defective, the question is whether the range of alternatives "is unreasonable in the absence of the omitted alternatives." (1 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act, *supra,* § 15.17, p. 747.)

In appellants' comments on the draft environmental impact report, they argued that "in order for the DEIR to be legally sufficient, it must address off-site alternatives for [the Broadway–Brommer Bicycle/Pedestrian] connection." The FEIR responded with a two-pronged explanation, which first cited the nature of the project as a master plan for this particular property, Arana Gulch, and which also referred to the prior environmental evaluation of off-site trail alternatives.

Judged on a purely informational basis, the explanation provided in the response was adequate. "In keeping with the statute and guidelines, an adequate EIR must respond to specific suggestions for mitigating a significant environmental impact unless the suggested mitigation is facially infeasible." (*Los Angeles Unified School Dist. v. City of Los Angeles* (1997) 58 Cal.App.4th 1019, 1029, 68 Cal.Rptr.2d 367.) "While the response need not be exhaustive, it should evince good faith and a reasoned analysis." (*Ibid.*) That was done here. The referenced information adequately informed the public and the decision-making body about the existence of off-site alternatives for the bicycle/pedestrian connection and the reasons for excluding them from the analysis. *993(*Sierra Club v. City of Orange, supra,* 163 Cal.App.4th at p. 547, 78 Cal.Rptr.3d 1 [upholding EIR that briefly explained elimination of three possible alternatives]; *Save Our Residential Environment v. City of West Hollywood, supra,* 9 Cal.App.4th at p. 1754, 12 Cal.Rptr.2d 308 [upholding EIR that briefly "stated its reasons for concluding that no alternative sites to the project were feasible"].)

b. The City's Substantive Determination to Exclude Off–Site Alternatives

Turning next to appellants' substantive challenges to the exclusion of an off-site trail alternative, we reject those challenges on three grounds.

First, there is no rule requiring an EIR to explore off-site project alternatives in every case. As stated in the Guidelines: "An EIR shall describe a range of reasonable alternatives to the project, *or to the location of the project,* which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives." (Guidelines, § 15126.6, subd. (a), italics added.) As this implies, "an agency may evaluate on-site alternatives, off-site alternatives, or both." (*Mira Mar, supra,* 119 Cal.App.4th at p. 491, 14 Cal.Rptr.3d 308.) The Guidelines thus do not require analysis of off-site alternatives in every case. Nor does any statutory provision in CEQA "expressly require a discussion of alternative project locations." (*Ibid.,* citing §§ 21001, subd. (g), 21002.1, subd. (a), 21061.)

Second, this case involves the question of an off-site alternative for a *component* of the project, not for the project itself. "The pertinent statute and EIR guidelines require that an EIR describe alternatives to the proposed *project.*" **598(*Big Rock Mesas Property Owners Assn. v. Board of Supervisors* (1977) 73 Cal.App.3d 218, 227, 139 Cal.Rptr. 445.) That requirement is "applicable only to the project as a whole, not to the various facets thereof, such as grading and access roads." (*Ibid.;* see also, *A Local & Regional Monitor v. City of Los Angeles* (1993) 16 Cal.App.4th 630, 642, fn. 8, 20 Cal.Rptr.2d 228 ["the statutes do not require alternatives to various facets of the project"]; *Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners* (1993) 18 Cal.App.4th 729, 745, 22 Cal.Rptr.2d 618 ["the form of property ownership of a project is not an alternative to the project, but is simply an ancillary facet of a project"].)

Appellants attempt to distinguish those authorities on the ground that they "concern whether alternatives must consider various 'facets' of a project, not whether alternatives must include project objectives. A 'key objective' is not a mere 'ancillary facet' of a

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Project." We find no merit in that position. To the extent that appellants are restating their argument that the alternatives analysis was skewed in light of project objectives, we reject the argument for the ***994** reasons explained above. To the extent that appellants are attempting to elevate the multiuse trail objective to the status of a whole project, that attempt must fail. As defined in the Guidelines, a project "means the whole of an action" and "refers to the activity which is being approved...." (Guideline § 15378, subds. (a), (c).) Here, the activity for which approval was sought was the master plan itself. Whatever its importance as a project objective, the multiuse trail is simply one component of a whole project—the Arana Gulch master plan.

Our third and final reason for rejecting appellants' substantive claims is that substantial evidence in the administrative record as a whole supports the decision to exclude off-site trail alternatives, which had been the subject of extensive prior consideration. The City had explored many locations for an east-west connection in a long process that culminated in the Broadway–Brommer EIR.[FN9] As noted in the City Council Agenda Report for May 2003, the Broadway–Brommer EIR itself analyzed three alternatives. In addition, "Staff was also requested to prepare a preliminary evaluation of a Frederick ****599** Street Park option for the desired connection." [FN10]

FN9. For example, according to a March 1997 letter from the City to the California Department of Transportation concerning the Broadway–Broadway connection project: "Eight alternatives (including variations) are proposed including No Build." In July 1997, four "proposed new alternatives" were put forth by the Greenbelt Committee, all connecting to Frederick Park. An August 1997 status report on the Broadway–Brommer connection project observes: "Several alternative alignments have been identified and studied. These alternatives connect by either linking through the Port District to a neighborhood park, Frederick Park, or through an open-space, meadow area, known as Arana Gulch and adjacent to the Port District. The alternatives have generated much discussion among local neighborhood groups, bicycle groups and citizen advisory groups. There continues to be lively discussion on which bicycle/pedestrian alternative should be constructed to connect Broadway to Brommer Street/Seventh Avenue. The various alignments all have different constraints that must be addressed including wetlands, historic structures, endangered plant species and parking impacts. [¶] The complexities of these issues and the various interest groups involved with each have made forming a decision a difficult problem." A map accompanying the status report depicts seven alternative routes.

In November 1999, the Broadway–Brommer draft environmental impact report/environmental assessment was presented. In an executive summary, that report noted that "potential areas of controversy" included alternative alignments. In addition to the three alternatives that it analyzed, the EIR/EA described nine other alternative alignments that had been eliminated.

FN10. The May 2003 City Council Agenda Report also notes: "Several Frederick Street Park options were considered in the original alternatives evaluation." An attached table compared "those alternatives to the option considered the environmentally preferred option in the EIR analysis and recommended by staff and the City Transportation Commission." That table reflected several drawbacks to a Frederick Street alternative, including potentially significant impacts on visual and biological resources as well as parking impacts and traffic safety issues.

The City Council did not take action on the Broadway–Brommer EIR in 2003, nor did it formally incorporate that earlier environmental review into the Arana Gulch EIR in 2006. Nevertheless, as respondents point out, "the ***995** City had the benefit of this analysis when it prepared the EIR for the Arana Gulch Master Plan." As in *Goleta II,* the City had "already undertaken study of the environmental suitability of alternative sites...." (*Goleta II, supra,* 52 Cal.3d at p. 573, 276 Cal.Rptr. 410, 801 P.2d 1161 [agency could rely on alternatives explored in its local coastal plan when approving site-specific project].) As explained by commentators, "the agen-

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cy should determine whether alternative locations have been sufficiently analyzed in a previous document. When a previous document has evaluated a range of reasonable alternatives for projects with the same basic purpose, the EIR may rely on that document if relevant circumstances have not changed." (1 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act, *supra,* § 15.28, p. 757, citing Guidelines, § 15126.6, subd. (f)(2)(C), and *Goleta II, supra,* 52 Cal.3d at p. 573, 276 Cal.Rptr. 410, 801 P.2d 1161.) In this case, although the two projects are different, the specific component of the Arana Gulch master plan at issue here—the east-west multiuse connection—shares some purposes in common with the earlier Broadway–Brommer connection project. Given the exhaustive review of that earlier project, we cannot say that it was "manifestly unreasonable" for the City to decline to revisit the previously rejected alternative path locations. (*Federation I, supra,* 83 Cal.App.4th at p. 1265, 100 Cal.Rptr.2d 301.) Nor do we agree that the range of alternatives was "unreasonable in the absence of the omitted alternatives." (1 Kostka & Zischke, *supra,* § 15.17, p. 747.)

3. Summary of Conclusions

We find no violation of CEQA's informational mandates in the alternatives analysis. The EIR presented sufficient information to explain the choice of alternatives and the reasons for excluding off-site alternatives for the multiuse trail. The information "did not preclude informed decisionmaking or informed public participation and thus did not constitute a prejudicial abuse of discretion." (*Mira Mar, supra,* 119 Cal.App.4th at p. 491, 14 Cal.Rptr.3d 308.)

As to the City's substantive decisions concerning which alternatives to analyze and which to omit, we find sufficient evidence in the administrative record as a whole to support those determinations. Judged against the rule of reason that governs our review, a reasonable range of alternatives was selected for analysis in the environmental impact report; "no more was required." (*Marin Water, supra,* 235 Cal.App.3d at p. 1666, 1 Cal.Rptr.2d 767.) Nor was there any need to consider an off-site alternative for the multiuse trail, which was merely a component of the larger project. (*Big Rock Mesas Property Owners Assn. v. Board of Supervisors, supra,* 73 Cal.App.3d at p. 227, 139 Cal.Rptr. 445.)

****600 *996 II. Feasibility Analysis**

Pursuant to CEQA's "substantive mandate," an agency may not approve a proposed project if feasible alternatives exist that would substantially lessen its significant environmental effects. (§ 21081; *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 134, 65 Cal.Rptr.2d 580, 939 P.2d 1280.) In this case, the City found that the four alternatives identified in the EIR were infeasible on policy grounds.

Appellants challenge the City's infeasibility findings on both procedural and substantive grounds. Procedurally, the gist of appellants' argument is that the same feasibility standards apply both to the EIR and to project approval. They assert that the City "created an artificial construct to approve the Master Plan" because the EIR told the public "that there are indeed feasible alternatives" but then "the City Council, at the eleventh hour, contradicted those conclusions and made findings that there were no [feasible] alternatives to the Master Plan that would avoid the impact to the tarplant." Substantively, appellants contend that alternatives were not truly infeasible. Instead, they assert, the City Council rejected the alternatives because they did not satisfy the City's preference for a multiuse trail.

A. Review Standard

[33] Arguing for de novo review, appellants contend that feasibility findings present a question of law under the California Supreme Court's recent decision in *Marina, supra,* 39 Cal.4th 341, 46 Cal.Rptr.3d 355, 138 P.3d 692. The *Marina* decision does not support appellants' argument.

In *Marina,* the high court entertained a challenge by the Fort Ord Reuse Authority (FORA) to an EIR for California State University, Monterey Bay (CSUMB), prepared by the University's Board of Trustees (Trustees). (*Marina, supra,* 39 Cal.4th at p. 345, 46 Cal.Rptr.3d 355, 138 P.3d 692.) The question before the court was "whether the Trustees ... properly certified the EIR for CSUMB and, on that basis, approved the Master Plan." (*Id.* at p. 355, 46 Cal.Rptr.3d 355, 138 P.3d 692.) Answering that question in the negative, the court agreed with FORA that "the Trustees' decision must be vacated because three findings critical to their decision depend on an *erroneous legal assumption* ...." (*Ibid.,* italics added.) The findings were (1) that mitigation was infeasible,

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(2) that mitigation was "not the Trustees' responsibility" and (3) "that overriding considerations justify certifying the EIR and approving the Master Plan despite the remaining unmitigated effects." (*Ibid.*)

***997** The court observed that the abuse of discretion standard ordinarily "would command much deference to factual and environmental conclusions in the EIR based on conflicting evidence" but found that "no such conclusions" were at issue there. (*Marina, supra,* 39 Cal.4th at p. 355, 46 Cal.Rptr.3d 355, 138 P.3d 692.) Instead, the Trustees' findings were based on the erroneous legal assumption "that voluntary mitigation payments are impermissible." (*Id.* at p. 356, 46 Cal.Rptr.3d 355, 138 P.3d 692; *id.* at pp. 362, 363, 46 Cal.Rptr.3d 355, 138 P.3d 692.)

As the court explained, the Trustees' incorrect legal assumption was "an *error of law* invalidating their finding that voluntary mitigation payments to FORA do not represent a feasible method of mitigating CSU's off-campus environmental effects." (*Marina, supra,* 39 Cal.4th at p. 365, 46 Cal.Rptr.3d 355, 138 P.3d 692, italics added.) The court reaffirmed earlier precedent holding that "an agency's 'use of an erroneous legal standard constitutes a failure****601** to proceed in a manner required by law' ...." (*Id.* at pp. 365–366, 46 Cal.Rptr.3d 355, 138 P.3d 692.) Here, by contrast, appellants make no claim that the challenged decision rests on an erroneous legal standard.

Because they are free of legal error, the infeasibility findings made here are entitled to great deference. (Cf. *Marina, supra,* 39 Cal.4th at p. 368, 46 Cal.Rptr.3d 355, 138 P.3d 692.) They "are presumed correct. The parties seeking mandamus bear the burden of proving otherwise, and the reviewing court must resolve reasonable doubts in favor of the administrative findings and determination." (*Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490, 1497, 19 Cal.Rptr.3d 1.) We thus review the City's infeasibility findings for substantial evidence. (*Goleta II, supra,* 52 Cal.3d at p. 559, 276 Cal.Rptr. 410, 801 P.2d 1161 [agency's decision "to reject the alternatives as infeasible was supported by substantial and tenable evidence"].) Our review encompasses the entire administrative record of the proceedings. (*Sierra Club v. County of Napa,* at p. 1503, 19 Cal.Rptr.3d 1.)

B. Background

The City Council adopted Findings of Fact that address the feasibility of project alternatives. Excerpts are set forth in the margin.[FN11] Although the ***998** Findings of Fact deny the need to address the question of feasibility, they do so anyway.[FN12]

FN11. According to the Findings of Fact: (1) Alternative 1, the No Project alternative, "would not meet the objectives of the Project, and is undesirable from a policy standpoint." (2) "The failure of Alternative 2 to provide an ADA—compliant trail through [Port District] property renders the alternative infeasible within the meaning of CEQA, as the City Council, acting in its legislative capacity, concludes that the alternative would not meet a key objective of the Project, and is undesirable from a policy standpoint." (3) "The failure of Alternative 3 to provide an ADA—compliant public access and certain funding for an Adaptive Management Program renders the alternative infeasible within the meaning of CEQA, as the City Council, acting in its legislative capacity, concludes that the alternative would not meet a key objective of the Project, and is undesirable from a policy standpoint." (4) "The failure of Alternative 4 to provide ... ADA-compliant trails, nature viewing areas, and interpretive displays, as well as its failure to provide certain funding for an Adaptive Management Program, renders the alternative infeasible within the meaning of CEQA, as the City Council, acting in its legislative capacity, concludes that the alternative would not meet a key objective of the Project, and is undesirable from a policy standpoint."

FN12. Citing CEQA case law, the Findings conclude that "because adopted mitigation measures will avoid all significant effects but one, and that one significant effect—on the Santa Cruz tarplant—can be 'substantially lessened' through adopted mitigation, the City Council has no obligation, in these findings, to address the feasibility of any of the alternatives set forth in the EIR for the Project. Even so, however, the City Council, in the interests of full disclosure, neverthe-

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> less explains why, in its considered judgment, no such alternative is 'feasible' within the meaning of CEQA." (See 2 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act, *supra,* § 17.32, p. 828 [noting uncertainty in the law about "what level of impacts remaining after mitigation will trigger the requirement for a statement of overriding considerations"]; Remy et al., Guide to California Environmental Quality Act, *supra,* pp. 400–402 [same].)

The Findings of Fact conclude that each of the four alternatives fails to meet certain project objectives and thus "is undesirable from a policy standpoint." The Findings of Fact support each such infeasibility determination by citation to two cases, *Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 715, 29 Cal.Rptr.2d 182 (*Sequoyah Hills*); and ****602***City of Del Mar v. City of San Diego* (1982) 133 Cal.App.3d 401, 417, 183 Cal.Rptr. 898 (*Del Mar*). As characterized in the Findings of Fact, the *Sequoyah Hills* case holds that "decision makers may reject as 'infeasible' an alternative that does not fully satisfy the objectives associated with a proposed project" while the *Del Mar* decision stands for the proposition that "the concept of ' "feasibility" under CEQA encompasses "desirability" to the extent that desirability is based on a reasonable balancing of the relevant economic, environmental, social, and technological factors[.]' "

C. Discussion

As noted above, appellants raise both procedural and substantive challenges to the infeasibility findings. We address each in turn.

1. Procedural Challenge to the Infeasibility Findings

[34] Appellants' procedural challenge is based on the premise that the same feasibility standards apply both to the EIR and to project approval. In appellants' words: "The City cannot in a public process [the EIR] tell the public that there are feasible alternatives, and then at the end of the process [project approval] make a contrary conclusion."

The premise of appellants' argument is fundamentally flawed. As stated earlier, the issue of feasibility emerges at two distinct points in the administrative review process: first, in the EIR, and next, during project approval. ***999** (*Mira Mar, supra,* 119 Cal.App.4th at p. 489, 14 Cal.Rptr.3d 308; 1 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act, *supra,* § 15.9, p. 740; Remy et al., Guide to California Environmental Quality Act, *supra,* p. 563.) Significantly, different considerations and even different participants may come into play at each of the two phases, as the following discussion illustrates.

a. The EIR: Potentially Feasible Alternatives

When assessing feasibility in connection with the alternatives analysis in the EIR, the question is whether the alternative is *potentially* feasible. (*Mira Mar, supra,* 119 Cal.App.4th at p. 489, 14 Cal.Rptr.3d 308; Guidelines, § 15126.6, subd. (a).) A number of "factors that may be taken into account when addressing the feasibility of alternatives" are listed in the Guidelines. (Guidelines, § 15126.6, subd. (f)(1).) Although the EIR must reflect the agency's independent judgment, its preparation may be delegated to agency staff, outside consultants, or even the project proponent. (Guidelines, §§ 15025, subd. (a)(3), 15084, subds. (a), (d), (e); *Mission Oaks Ranch, Ltd. v. County of Santa Barbara, supra,* 65 Cal.App.4th at p. 725, 77 Cal.Rptr.2d 1.)

While it is up to the EIR preparer to identify alternatives as potentially feasible, the decision-making body "may or may not reject those alternatives as being infeasible" when it comes to project approval. (*Sierra Club v. County of Napa, supra,* 121 Cal.App.4th at p. 1504, 19 Cal.Rptr.3d 1.) Rejection by the decision-makers does not undermine the validity of the EIR's alternatives analysis. (*Mira Mar, supra,* 119 Cal.App.4th at p. 489, 14 Cal.Rptr.3d 308 [dismissing the argument that the "alternatives should not have been included" in the EIR "because the City ultimately rejected them as not feasible"].) Like mitigation measures, potentially feasible alternatives "are suggestions which may or may not be adopted by the decisionmakers." (*No Slo Transit, Inc. v. City of Long Beach* (1987) 197 Cal.App.3d 241, 256, 242 Cal.Rptr. 760; accord, ****603***Native Sun/Lyon Communities v. City of Escondido* (1993) 15 Cal.App.4th 892, 908, 19 Cal.Rptr.2d 344, questioned on another point in *Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 698, 107 Cal.Rptr.2d 149, 23 P.3d 43.)

b. Project Approval: Ultimate Determination of Feasibility

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When it comes time to decide on project approval, the public agency's decision-making body evaluates whether the alternatives are *actually* feasible. (*Mira Mar, supra,* 119 Cal.App.4th at p. 489, 14 Cal.Rptr.3d 308; Guidelines, § 15091, subd. (a)(3).) While staff may draft the necessary findings, the decision-making body is responsible for the ultimate determination of feasibility, which cannot be delegated. (Guidelines, § 15025, subd. (b)(2); see *id.,* § 15091, subd. (a)(3).)

***1000** At this final stage of project approval, the agency considers whether "[s]pecific economic, legal, social, technological, or other considerations ... make infeasible the mitigation measures or alternatives identified in the environmental impact report." (§ 21081, subd. (a)(3).) Broader considerations of policy thus come into play when the decisionmaking body is considering actual feasibility than when the EIR preparer is assessing potential feasibility of the alternatives.

c. Application to this Case

As the foregoing discussion makes clear, it does not subvert the CEQA environmental review process for the ultimate decision-maker to reject as infeasible alternatives identified in the EIR. Thus, there is no merit in appellants' assertion that the City's actions in doing so "thwart public accountability in the CEQA process and make a mockery of environmental review." To the contrary, "it is the *public agency* that bears the responsibility for the decisions that must be made before a project can go forward, including determinations of feasibility and whether the benefits of a project outweigh the significant effects the project will have on the environment." (*Sierra Club v. County of Napa, supra,* 121 Cal.App.4th at p. 1503, 19 Cal.Rptr.3d 1.) That is exactly what was done here.

2. Appellants' Substantive Challenge to the City's Infeasibility Findings

Appellants insist that the City Council's reasons for finding the alternatives infeasible have "nothing to do with" the relevant factors listed in section 21081, subdivision (a)(3). Appellants thus contend that alternatives identified in the EIR were not "truly infeasible."

The City disagrees, asserting: "The City Council was legally justified in rejecting environmentally superior alternatives as 'infeasible' on the basis of its determination that the alternatives were undesirable from a policy standpoint because they failed to achieve what the Council regarded as primary objectives of the Master Plan." The City further asserts that substantial evidence supports its infeasibility findings.

We agree with the City on both counts.

***1001** *a. Permissible Considerations*

[35] In finding the alternatives infeasible on policy grounds, the City relied on *Del Mar, supra,* 133 Cal.App.3d 401, 183 Cal.Rptr. 898. In that case, the court concluded that the actions of respondent City of San Diego were "a rational accommodation of the social, economic and environmental****604** interests with which the city must concern itself." (*Id.* at p. 404, 183 Cal.Rptr. 898.) The court found that San Diego properly "considered and reasonably rejected the project alternatives suggested by Del Mar as infeasible in view of the social and economic realities in the region." (*Id.* at p. 417, 183 Cal.Rptr. 898.) In doing so, the court stated, San Diego assessed the alternatives' feasibility, which "involves a balancing of various 'economic, environmental, social, and technological factors.' " (*Ibid.,* quoting § 21061.1 [statutory definition of "feasibility"].) As the court explained: "In this sense, 'feasibility' under CEQA encompasses 'desirability' to the extent that desirability is based on a reasonable balancing of the relevant economic, environmental, social, and technological factors." (*Ibid.*) The court therefore concluded "that San Diego did not abuse its discretion under CEQA in rejecting various project alternatives as infeasible." (*Ibid.*)

Here, the City's infeasibility findings likewise are based on policy considerations, particularly the City's interest in promoting transportation alternatives as well as access to its open space for persons with disabilities. Such policy considerations are permissible under the relevant statute, which calls for a determination that "economic, legal, *social,* technological, *or other considerations* ... make infeasible the mitigation measures or alternatives identified in the environmental impact report." (§ 21081, subd. (a)(3), italics added.) Under this authority, an alternative that "is impractical or undesirable from a policy standpoint" may be rejected as infeasible. (2 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act, *supra,* § 17.29, p. 824.) Additionally, an

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alternative "may be found infeasible on the ground it is inconsistent with the project objectives as long as the finding is supported by substantial evidence in the record." (*Id.,* § 17.30, p. 825.)

Appellants nevertheless attack the infeasibility determination in this case, asserting that the City "rejected the alternatives simply because they did not like them, not because they were truly infeasible." (Italics omitted.) As we see it, however, appellants' assertion represents nothing more than a "policy disagreement with the City." (*Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1270, 15 Cal.Rptr.3d 176.) In making its infeasibility findings, the City determined "how the numerous competing and necessarily conflicting interests should be resolved." (*Del Mar, supra,* 133 Cal.App.3d at p. 407, 183 Cal.Rptr. 898.) At bottom, appellants' disagreement is "with the nature of the balance struck between those interests." (*Ibid.*) This is not a case involving straightforward questions of legal or economic infeasibility. (See, e.g., ***1002***Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App.4th 587, 601, 54 Cal.Rptr.3d 366 [no economic infeasibility]; *id.* at p. 602, 54 Cal.Rptr.3d 366 [no legal infeasibility].) Arguably, such cases may present brighter lines for judicial review. Whether or not that is so, this much is clear: it is wholly improper for us to "arrogate to ourselves a policy decision which is properly the mandate of the City." (*Defend the Bay v. City of Irvine,* at p. 1269, 15 Cal.Rptr.3d 176.) In this case, the City's determination was consistent with permissible statutory factors. (§ 21081, subd. (a)(3) ["social ... or other considerations"].) And it was justified under relevant case law, including *Del Mar, supra,* 133 Cal.App.3d 401, 183 Cal.Rptr. 898.

Appellants question the continued validity of *Del Mar* following the decision in *Marina, supra,* 39 Cal.4th 341, 46 Cal.Rptr.3d 355, 138 P.3d 692. As the high court stated there, "CEQA does not authorize****605** an agency to proceed with a project that will have significant, unmitigated effects on the environment, based simply on a weighing of those effects against the project's benefits, unless the measures necessary to mitigate those effects are truly infeasible." (*Id.* at pp. 368–369, 46 Cal.Rptr.3d 355, 138 P.3d 692.) Appellants argue that this statement in *Marina* effectively overrules earlier precedent, including *Del Mar.* As appellants see it, *Marina* disapproves the "balancing" of statutory factors envisioned by that earlier case. (*Del Mar, supra,* 133 Cal.App.3d at p. 417, 183 Cal.Rptr. 898.)

We reject appellants' reading of *Marina.* In our view, the quoted statement from that case simply recognizes the two distinct steps involved in approving a project with environmental impacts. The agency must first make a finding of infeasibility. (§ 21081, subd. (a); Guidelines, § 15091, subd. (a)(3).) This determination necessarily entails an evaluative process, since statutory "considerations" are involved. (§ 21081, subd. (a)(3).) In this first step, the positive and negative aspects of each alternative are evaluated. (*Concerned Citizens, supra,* 24 Cal.App.4th at p. 847, 29 Cal.Rptr.2d 492.) This determination must be made before the agency can take up the question of overriding considerations. (§ 21081, subd. (b); Guidelines, § 15093.) Thus, unless and until the agency has taken the first step, it may not proceed to the second step, which *does* involve "weighing [environmental] effects against the project's benefits...." (*Marina, supra,* 39 Cal.4th at p. 368, 46 Cal.Rptr.3d 355, 138 P.3d 692.) The thrust of the quoted statement from *Marina* is to capture that distinction between the two steps in the process. That conclusion finds support in this passage from *Marina:* "If we agreed with the Trustees that mitigation were infeasible for the reasons given in the findings, ... we would give much deference to the Trustees' weighing of the project's benefits against the remaining environmental effects." (*Ibid.*) It is also noteworthy that the court expressly permitted the Trustees to revisit their determination and to find "mitigation to be infeasible for reasons other than those ... rejected." (*Id.* at p. 369, 46 Cal.Rptr.3d 355, 138 P.3d 692.) In sum, nothing in *Marina* casts doubt on the continuing vitality of *Del Mar.*

***1003** Nor are we persuaded by appellants' attempts to distinguish *Del Mar, supra,* 133 Cal.App.3d 401, 183 Cal.Rptr. 898. In appellants' words: "Arguably, in *Del Mar* there was no alternative to the City's 'desire' to grow to accommodate housing for the region. *Del Mar,* at 416–417, 183 Cal.Rptr. 898. In the case at bar, however, the Respondents' desire for an east-west bike connection and ADA compliant paths can be accommodated by altering trail alignments." Appellants' proffered basis for distinction is nonexistent. As stated in *Del Mar,* the subject approvals were challenged on the very ground

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that "San Diego failed to implement *feasible mitigation measures and alternatives* which would have reduced the adverse environmental impacts of the project." (*Del Mar,* at p. 416, 183 Cal.Rptr. 898, italics added.) There, as here, the challenger was claiming that feasible alternatives existed. We thus find no basis for distinguishing the *Del Mar case,* which constitutes persuasive legal authority in support of the City's determinations.

In sum, we conclude, the City relied on appropriate considerations in determining that the alternatives analyzed in the EIR were infeasible.

b. Substantial Evidence

[36] Appellants mount no direct attack on the evidentiary basis for the feasibility ****606** findings. Instead, their bid for reversal is based solely on the assertion that the alternatives were not truly infeasible. As they put it: "There was no legal or economic infeasibility. It was simply a preference." Again, this is nothing more than a "policy disagreement with the City." (*Defend the Bay, supra,* 119 Cal.App.4th at p. 1270, 15 Cal.Rptr.3d 176.) But that disagreement is "not one which in any way demonstrates a lack of evidentiary support for the City's conclusions." (*Id.* at p. 1271, 15 Cal.Rptr.3d 176.)

In any event, substantial evidence supports the City's infeasibility findings. Evidence for such findings may be contained anywhere in the administrative record. (*Association of Irritated Residents v. County of Madera, supra,* 107 Cal.App.4th at p. 1401, 133 Cal.Rptr.2d 718.) The extensive record in this case reflects careful consideration of the alternatives' feasibility, with the City's policy choices backed by substantial evidence. The ultimate decision to proceed with the project "is a discretionary one, and will be upheld so long as it is based upon findings supported by" substantial evidence. (*Towards Responsibility in Planning v. City Council* (1988) 200 Cal.App.3d 671, 684, 246 Cal.Rptr. 317.) Under that standard, and on this record, the City's decision must be upheld.

DISPOSITION

The judgment of the superior court is affirmed.

I CONCUR: DUFFY, J.

***1004** MIHARA, Acting P.J., Concurring in the Judgment.

Although I agree with the result reached in the majority opinion, I write separately to explain why I find appellants' contentions unavailing.

I. Background

Arana Gulch is a parcel of more than 60 acres of real property owned by the City of Santa Cruz (the City). The project proposed by the City is the Arana Gulch Master Plan (the Plan). The Plan is designed to serve two sets of key objectives. The City wants to protect the natural resources and sensitive habitat in Arana Gulch while providing a high level of public access that will permit the City to educate not only pedestrian visitors but also disabled visitors about resource protection through interpretive displays and programs. To provide the highest level of public access to Arana Gulch, the Plan proposes the creation of a trail system that will include a multi-use, paved, ADA-compliant [FN1], east-west through trail that will connect the adjacent communities and allow for pedestrian, wheelchair, and bicycle access.

FN1. ADA stands for the Americans with Disabilities Act.

The City's Environmental Impact Report (EIR) for the Plan concludes that the proposed multi-use trail could have a significant impact on biological resources, as it would pass through an area that possibly contains a seed bank for the Santa Cruz tarplant. The EIR identifies four possible alternatives to the proposed multi-use trail that might reduce or eliminate the Plan's significant impacts. Alternative 1 is no project, and it would accomplish none of the project objectives. Alternative 2 is similar to the proposed project, but the multi-use trail would not travel through the Port District property, thereby providing a reduced level of public access. Alternative 2 *would not* reduce the impact of the proposed project on the Santa Cruz tarplant. Alternative 3 is similar to the proposed project, but the east-west ****607** through trail would be unpaved, thereby precluding access for the disabled. Alternative 3 *would* reduce the impact of the proposed project on the Santa Cruz tarplant, and it was identified in the EIR as the environmentally superior alternative. Alternative 4 would provide for a trail system, but there would be no paved trails and no east-west connector trail. Alternative 4 would preclude access for the disabled and provide a reduced level of public access for the non-disabled.

The City Council certified the EIR, and it re-

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jected the four alternatives identified in the EIR on the grounds that none of the alternatives would satisfy all of the "key objective[s]" of the project.

II. Discussion

" 'We may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable. Our ***1005** limited function is consistent with the principle that [t]he purpose of CEQA [California Environmental Quality Act] is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind. CEQA does not, indeed cannot, guarantee that these decisions will always be those which favor environmental considerations. We may not, in sum, substitute our judgment for that of the people and their local representatives. We can and must, however, scrupulously enforce all legislatively mandated CEQA requirements.' " (*Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4th 1336, 1350, 46 Cal.Rptr.3d 902 (*Preservation Action Council*).)

"Judicial review of an agency's decision to certify an EIR and approve a project 'shall extend only to whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence.' [Citations.] Thus, we consider only whether the City failed to comply with CEQA or made determinations that were not supported by substantial evidence." (*Preservation Action Council, supra,* 141 Cal.App.4th at p. 1352, 46 Cal.Rptr.3d 902.)

A. Reasonable Range of Alternatives

Appellants contend that the EIR failed to set forth a reasonable range of alternatives because none of the alternatives fully satisfied the City's "key objective[s]," which included providing an ADA-compliant trail. In appellants' view, the failure of the EIR to include an alternative that met *all* of the City's "key objective[s]" "created a false choice between an ADA trail and avoiding significant impacts to tarplant."

" 'CEQA establishes no categorical legal imperative as to the scope of alternatives to be analyzed in an EIR. Each case must be evaluated on its facts, which in turn must be reviewed in light of the statutory purpose.... [A]n EIR for any project subject to CEQA review must consider a reasonable range of alternatives to the project, *or to the location of the project,* which: (1) offer substantial environmental advantages over the project proposal (Pub. Resources Code, § 21002); and (2) may be "feasibly accomplished in a successful manner" considering the economic, environmental, social and technological factors involved.' " (*Preservation Action Council, supra,* 141 Cal.App.4th at p. 1350, 46 Cal.Rptr.3d 902.)

Appellants' contention lacks merit. First, although appellants claim that the EIR does not include an alternative that provides for an ADA-compliant trail, Alternative 2 in fact provides for an ADA-compliant trail. Second, CEQA (Cal. Environmental Quality Act; ****608**Pub. Resources Code, § 21000 et seq.) neither explicitly nor implicitly requires that an EIR identify a single ***1006** alternative that meets *all* of the project's key objectives *and* is environmentally superior. Indeed, it may be impossible to identify such an alternative to a project where the circumstances dictate that the key objectives cannot be met without some significant environmental impact. Appellants do not point to anything in the administrative record which indicates that an environmentally superior alternative *exists* that would satisfy *all* of the Plan's key objectives. Finally, the EIR did not "create a false choice" between disabled access and environmental impact on the Santa Cruz tarplant. By discussing a range of alternatives which included alternatives that met some of the Plan's key objectives with reduced environmental impact, the EIR presented the City Council with a reasonable range of choices that allowed the City Council to weigh the importance of each of the Plan's key objectives against the environmental impact associated with those objectives. CEQA does not require more of the EIR's range of alternatives.

Appellants also argue that the City was required to consider *off-site* alternatives for an east-west bike path, and they imply that the EIR was required to contain a discussion of such alternatives. The administrative record demonstrates that the City has over many years considered a number of possible off-site routes for an east-west bike path. Appellants ignore the fact that the project under consideration by the City here was not an east-west bike path but a master plan for Arana Gulch. While an off-site route for the bike path might have eliminated the need for a bike

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path through Arana Gulch, it would not have changed the need for disabled access or the City's desire to provide the highest level of public access to Arana Gulch by providing an east-west through connector trail. Some of the alternatives considered in the EIR would have omitted an east-west connector through Arana Gulch. Had one of those alternatives been selected, any east-west bike path would necessarily have had to be off-site. Under these circumstances, the EIR provided sufficient information to the public about alternatives to avoid the environmental consequences of the Plan, and the administrative record provided ample information to inform the City's legislative decision regarding the relative importance of the bike path objective of the Plan.

B. Feasibility of Alternatives

Appellants contend that the City's findings that the alternatives were not feasible were erroneous because they were inconsistent with the EIR's inclusion of these alternatives as potentially feasible alternatives.

An EIR "must consider a reasonable range of *potentially feasible alternatives* that will foster informed decisionmaking and public participation." (Cal.Code Regs., tit. 14 (CEQA Guidelines), § 15126.6, subd. (a), italics added; *Preservation Action Council, supra,* 141 Cal.App.4th at pp. 1350–1351, 46 Cal.Rptr.3d 902.) ***1007** When the legislative body certifies the EIR, it has made a determination that the EIR contains the required consideration of *potentially feasible* alternatives. After the certification of the EIR, the legislative body makes a separate determination whether "[s]pecific economic, legal, social, technological, or other considerations ... *make infeasible* the mitigation measures or alternatives identified in the environmental impact report" and whether "specific overriding economic, legal, social, technological, or other benefits of the project outweigh the significant effects on the environment." (Pub. Resources Code, § 21081, italics added.)

****609** Thus, while the certification of the EIR is a determination that the EIR adequately discusses *potentially feasible* alternatives, CEQA explicitly permits the legislative body to make a post-certification determination that these potentially feasible alternatives are *not actually feasible,* so long as the legislative body makes the requisite findings citing specific reasons for its infeasibility determination. There is no inconsistency between the City's certification of an EIR that discusses potentially feasible alternatives and the City's determination that those alternatives are not actually feasible.

Appellants argue that the City based its infeasibility determination on *impermissible considerations.* This argument falters on the fact that CEQA expressly permits such a determination to be based on "other considerations" (Pub. Resources Code, § 21081, subd. (a)(3)), and we review the City's determination solely for substantial evidence to support those considerations *(Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App.4th 587, 596, 54 Cal.Rptr.3d 366). Here, the record contains substantial evidence to support the City's determination that the alternatives were infeasible because they would fail to satisfy the Plan's key objectives. None of the alternatives would provide a trail that could not only be accessed by the disabled, but would also provide an east-west connector that would ensure the highest level of public access to Arana Gulch and complete a bicycle corridor that would encourage alternative transportation. The City's desire to fulfill the Plan's key objectives could not possibly be deemed an *impermissible* consideration, and it plainly fell within CEQA's authorization that an infeasibility finding may be based on "other considerations."

CEQA did not require the City to choose the environmentally superior alternative. It simply required the City to *consider* environmentally superior alternatives, *explain* the considerations that led it to conclude that those alternatives were infeasible, *weigh* those ***1008** considerations against the environmental harm that the Plan would cause, and *make findings* that the benefits of those considerations outweighed the harm. Here, the City considered environmentally superior alternatives, explained the considerations that led it to conclude that those alternatives were infeasible, weighed those considerations against the environmental impact of the Plan, and made findings that these considerations outweighed the environmental impact. The City fully complied with CEQA.

III. Conclusion

I agree that the judgment should be affirmed.

Cal.App. 6 Dist.,2009.
California Native Plant Soc. v. City of Santa Cruz
177 Cal.App.4th 957, 99 Cal.Rptr.3d 572, 09 Cal.

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Daily Op. Serv. 12,039, 2009 Daily Journal D.A.R.
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Exhibit R

LETTER FROM REGIONAL WATER QUALITY CONTROL BOARD DATED 9/22/04

NLB/PAR/JH/DB/

California Regional Water Quality Control Board
San Diego Region

Terry Tamminen
Secretary for Environmental Protection

9174 Sky Park Court, Suite 100, San Diego, California 92123-4340
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Arnold Schwarzenegger
Governor

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CITY OF POWAY
CITY MANAGERS OFFICE

September 22, 2004

Mr. James Bowersox
City Manager
City of Poway
P.O. Box 789
Poway, California 92074-0789

In reply refer to:
WPS:10-5013:baczs

SUBJECT: DIRECTIVE REGARDING CHANNEL MAINTENANCE ACTIVITIES

Dear Mr. Bowersox:

The California Regional Water Quality Control Board, San Diego (Regional Board) has recently become aware of several instances where various jurisdictions have conducted maintenance activities within waters of the State without appropriate authorization. The reported maintenance activities typically include dredging and/or removal of wetland vegetation, and are conducted as "emergency" or preventative actions.

Maintenance or other activities that can result in a discharge of waste to a waters of the State may not be conducted without the appropriate permits (e.g., section 401 Water Quality Certification and/or Waste Discharge Requirements) from the Regional Board and other resource agencies (e.g., U.S. Army Corps of Engineers, California Department of Fish and Game, U.S. Fish and Wildlife Service). If an emergency situation actually occurs, coverage under the U.S. Army Corps of Engineers Regional General Permit No. 63 for Repair and Protection Activities in Emergency Situations (RGP No. 63) must be obtained prior to starting the work. In order to ensure prompt processing of a request for coverage under RGP No. 63, concurrent notification to the Regional Board (Attachment 1) is highly recommended . A copy of RGP No. 63 can be found at http://www.spl.usace.army.mil/. If the proposed action does not qualify as an emergency activity under RGP No. 63, project-specific permit(s) must be obtained prior to implementing the project. Please note that the Regional Board does not issue an "after-the-fact" permit for channel maintenance activities.

We are conducting an assessment of the full nature and extent of on-going and proposed maintenance activities within waters of the State in this Region. This assessment will include an analysis of the subsequent impacts to water quality and beneficial uses, and identify the appropriate permitting mechanism for maintenance activities. To complete this task and pursuant to California Water Code sections 13267 and 13383, the Regional Board hereby directs you to submit a Required Technical Report (RTR) no later than 5:00 pm, **January 31, 2005**. Based on the information in your technical report, we will determine if a region-wide, jurisdictional-specific, or project-specific permitting approach is necessary and appropriate for maintenance activities.

The RTR shall include, but not be limited to, the following:

Identification of all sites within your jurisdiction where maintenance dredging and/or maintenance of waters of the State have occurred from 2002 to the present. Maintenance includes any activity that results in soil disturbance (e.g., removal of vegetation) or the discharge of waste (e.g., placement of riprap). Waters of the State are defined in the California Water Code section 13050(e) and can include channels, ditches, creeks, streams, or rivers. For each site, include the following:

a) Specific location of maintenance activity, date(s) of maintenance activity, type of maintenance (e.g., vegetation removal, dredging, etc.) volume of material removed for dredging actions, plant community(ies) present prior to the maintenance activity, and location where dredged materials were disposed.
b) Channel type (e.g., fully concrete-lined, concrete slopes with natural bottom; natural slopes with concrete v-ditch in bottom; riprap slopes, natural slopes and bed, etc.).
c) A discussion and description, by specific site, of mitigation which was conducted to offset impacts from the maintenance activity.
d) Copies of certified CEQA documents for each site and maintenance activity.
e) Copies of authorizations (e.g., waste discharge requirements, section 401 water quality certification, emergency notification, etc.) for the maintenance activity.
f) Map(s) depicting the area of impacts at an appropriate scale.

Where applicable, all responses shall provide documentation that plans and reports required under this directive are prepared under the direction of appropriately qualified professionals. California Business and Professions Code Sections 6735, 7835, and 7835.1 require that engineering and geologic evaluations and judgments be performed by or under the direction of registered professionals. A statement of qualifications and registration numbers of the responsible lead professionals shall be included in all plans and reports submitted by the Discharger. The lead professional shall affix their registration stamp to the report, plan, or document.

All documents submitted to the Regional Board shall include the following signed certification:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowing violations.

The heading portion of this letter includes a Regional Board code number noted after "In reply refer to:" In order to assist us in the processing of your correspondence please include this code number in the heading or subject line portion of all correspondence and reports to the Regional Board pertaining to this matter.

If you have questions regarding this letter, please contact Ms. Stacey Baczkowski at 858-637-5594 or baczs@rb9.swrcb.ca.gov.

Respectfully,

John H. Robertus
Executive Officer
San Diego Regional Water Quality Control Board

cc: State Water Resources Control Board; Mr. Oscar Balaguer
U.S. Army Corps of Engineers; Mr. Robert Smith
U.S. Fish and Wildlife Service; Carlsbad Office
California Department of Fish and Game; Mr. Don Chadwick

Certified Return Receipt 70041160000709500972

ATTACHMENT 1
NOTIFICATION FOR COVERAGE UNDER RGP NO. 63

1. The name, address, and telephone number of:
   a. The applicant and
   b. The applicant's agent (if an agent is submitting the notification).
2. Complete identification of all federal licenses/permits being sought for, or applying to, the proposed activity, including:
   a. Federal agency.
   b. Type (e.g., RGP No. 63).
   c. File number(s) assigned by the federal agency(ies), if available.
3. A complete project description including:
   a. The purpose and final goal of the entire activity.
   b. Address (including city and county), assessor's parcel number, and, if available, the longitude and latitude of the project site.
   c. Name(s) of any receiving water body(ies) that may receive a discharge.
   d. Type(s) of receiving water body(ies) (e.g., at a minimum: river/streambed, lake/reservoir, ocean/estuary/bay, riparian area, or wetland type).
   e. For each water body type reported under subsection (3)(c) of this section, the total estimated quantity of waters and the types of discharge material(s) that may temporarily or permanently impact the waters of the State. Fill discharges shall be reported in acres. Fill discharges for channels, shorelines, riparian corridors, and other linear habitat shall also be reported in linear feet. Dredge discharges shall be reported in cubic yards.
   f. A check in the amount specified in 23 CCR section 2200(a)(2)(vii), made out to each Regional Board to which the "Notification" is submitted.

The "Notification" must be signed by the applicant and must include a statement that the submitted information is complete and accurate.

CITY OF POWAY

MICKEY CAFAGNA, Mayor
DON HIGGINSON, Deputy Mayor
BOB EMERY, Councilmember
JAY GOLDBY, Councilmember
BETTY REXFORD, Councilmember

December 15, 2004

John H. Robertus, Executive Officer
San Diego Regional Water Quality Control Board
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4340

Attn: Stacey Baczkowski, Senior Environmental Scientist

IN REPLY TO: WPS: 10-5013:baczs

Dear Mr. Robertus:

On December 7, 2004, staff representatives from 17 cities, including the County of San Diego, met and formed the Regional Channel Maintenance Workgroup. The Workgroup consists of the cities of Carlsbad, Coronado, Chula Vista, Del Mar, El Cajon, Encinitas, Escondido, Imperial Beach, La Mesa, Lemon Grove, National City, Oceanside, Poway, San Diego, San Marcos, Santee, Solana Beach, Vista, and the County of San Diego. The Workgroup met to discuss the Regional Water Quality Control Board directive letter dated September 22, 2004, regarding channel maintenance activities and the preparation of a Required Technical Report.

During this meeting the Workgroup determined that all the jurisdictions recognize the balance between meeting the goals of water quality and habitat conservation while performing necessary channel maintenance and flood control work. The Workgroup is supportive of a regional permit in accordance with all applicable agencies to allow channel maintenance, and would like to collaborate with the Regional Board on the proposed channel maintenance permit.

City of Poway staff is currently sorting through the over 2,000 work orders for Channel Maintenance activities from the past several years in order to obtain the requested information for the Technical Report. However, the City of Poway is also committed to the recently formed Workgroup and its regional collaboration, and would like to respectfully request, along with the Channel Maintenance Workgroup, a 90-day extension on the due date of January 31, 2005, for the Required Technical Report. As you know, City staff is also working on preparing

City Hall Located at 13325 Civic Center Drive
Mailing Address: P.O. Box 789, Poway, California 92074-0789 • (858) 668-4400
FAX 668-1200

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California Regional Water Quality Control Board
San Diego Region

Terry Tamminen
Secretary for Environmental Protection

9174 Sky Park Court, Suite 100, San Diego, California 92123-4340
(858) 467-2952 • Fax (858) 571-6972
http://www.waterboards.ca.gov

Arnold Schwarzenegger
Governor

December 22, 2004

Mr. James Bowersox
City Manager
City of Poway
P.O. Box 789
Poway, California 92074-0789

In reply refer to:
WPS:10-5013:baczs

Dear Mr. Bowersox:

SUBJECT: CHANNEL MAINTENANCE ACTIVITIES

We have received your request for a 90-day time extension for the submittal of a required technical report pursuant to our September 22, 2004, California Water Code (CWC) § 13267 directive. Because we consider four months more than sufficient time to prepare the Required Technical Report, you should submit information about your channel maintenance activities by the January 31, 2005 deadline specified in the directive. Please note that the directive is not part of a municipal storm water permit requirement and the formation of a workgroup was neither expected nor necessary to respond to the directive. Furthermore, regional collaboration is not necessary for an individual city to inform us of their channel maintenance activities.

Based on information received from the City of San Diego and our knowledge of channel maintenance activities within the region, removal of trash and debris (e.g., sofas, shopping carts) by hand crews, inspections, and the cutting and removal of vegetation by hand is not considered a discharge, or threatened discharge, of waste. Channel maintenance activities that include mechanized sediment, vegetation, trash, and debris removal, and graffiti removal with chemicals and/or power washing equipment may result in the discharge of waste to waters of the State. Other channel maintenance activities may also result in the discharge of wastes to waters of the State. Following our review of the January 31, 2005 response, we will inform you if there are other channel maintenance activities that require Waste Discharge Requirements.

You are responsible for obtaining Waste Discharge Requirements or coverage under a waiver from the Regional Board prior to conducting channel maintenance activities that may result in a discharge of waste. Continuing these activities without authorization from the Regional Board will be considered a violation and the Regional Board will take enforcement action as appropriate.

The heading portion of this letter includes a Regional Board code number noted after "In reply refer to:" In order to assist us in the processing of your correspondence please include this code number in the heading or subject line portion of all correspondence and reports to the Regional Board pertaining to this matter. If you have any questions regarding this letter, or the Required

Technical Report, please contact Ms. Stacey Baczkowski at 858-637-5594 or sbaczkowski@waterboards.ca.gov.

Respectfully,

John H. Robertus
Executive Officer
San Diego Regional Water Quality Control Board

cc: City of Poway; Mr. Dan Cannon

California Regional Water Quality Control Board
San Diego Region

Terry Tamminen
Secretary for Environmental Protection

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Arnold Schwarzenegger
Governor

April 12, 2005

Mr. James Bowersox
City Manager
City of Poway
P.O. Box 789
Poway, California 92074-0789

In reply refer to:
WPS:10-5013:baczs

Dear Mr. Bowersox:

SUBJECT: RESPONSE TO CHANNEL MAINTENANCE DIRECTIVE

We have received and reviewed your January 31, 2005, response to our September 22, 2004 directive regarding channel maintenance activities. The City of Poway (City) reported that channel maintenance activities include removal of trash, debris, vegetation, and sediment from natural and concrete-lined channels by hand and with the use of heavy equipment. Based on the reported types of channels present and the maintenance methods, the City will need to obtain waste discharge requirements prior to conducting future channel maintenance activities. According to Ms. Robin Miller of your staff, the City will be pursuing programmatic authorization for channel maintenance activities. An Application/Report of Waste Discharge can be found at: http://www.swrcb.ca.gov/sbforms/form200.pdf.

Key items to include in your Application/Report of Waste Discharge include (1) identification of specific channel maintenance activities by location, method, and frequency; (2) discussion of dredge material disposal, staging areas, and best management practices; (3) a current inventory of waters of the state and plant communities within each channel; (4) identification of mitigation sites and conceptual mitigation plans; (5) discussion of hydrological criteria that will trigger the need for maintenance; and (6) certified California Environmental Quality Act (CEQA) document.

The Regional Board had discussed the possibility of issuing a single waste discharge requirement to be used by all jurisdictions. Different cleaning methods and frequencies, wide variability among channel types, and compliance with CEQA would be impractical and inappropriate to address in one authorization.

The heading portion of this letter includes a Regional Board code number noted after "In reply refer to:" In order to assist us in the processing of your correspondence please include this code number in the heading or subject line portion of all correspondence and reports to the Regional Board pertaining to this matter.

If you have any questions regarding this letter or the Report of Waste Discharge, please contact Ms. Stacey Baczkowski at 858-637-5594 or sbaczkowski@waterboards.ca.gov.

Respectfully,

John H. Robertus
Executive Officer
San Diego Regional Water Quality Control Board

cc: City of Poway; Mr. James Howell

Exhibit S

REGIONAL CHANNEL MAINTENANCE WORK PLAN EXCERPTS (PAGES 1-5)

1.0 INTRODUCTION

This Work Plan has been prepared to guide the development of packages and descriptions of processes that will summarize what members of the Regional Channel Maintenance (RCM) Workgroup will need to consider, analyze, and prepare when they pursue programmatic approvals from the resource agencies for citywide channel maintenance activities. This section of the Work Plan provides an introduction and further description of the purpose of the packages and processes that will prepared, the benefits of obtaining programmatic authorizations from the resource agencies, regulatory background information specific to programmatic approvals, and a summary of the personnel and roles for the technical specialists who will conduct the work described in this Work Plan.

1.1 Purpose of the RGP Process/Package

Since the mid-1990s, the Los Angeles District of the U.S. Army Corps of Engineers (Corps) has issued several Regional General Permits (RGPs) that have authorized various municipalities to conduct routine maintenance on flood control facilities that would affect jurisdictional waters, including wetlands, for the purpose of maintaining existing infrastructures and preventing flooding. The Regional Water Quality Control Board (RWQCB), California Department of Fish and Game (CDFG), and the U.S. Fish and Wildlife Service (USFWS) also have issued comparable programmatic approvals to authorize these routine activities. These RGPs and programmatic approvals have established an expedited procedure to authorize activities that are similar in nature and must be repeated as needed, in some cases at hundreds of locations throughout the applicant's jurisdiction.

In September 2004, the County of San Diego, and all 18 cities within the county, received letters entitled "Directive Regarding Channel Maintenance Activities" from the RWQCB that mandated the submittal of a Required Technical Report (RTR) pertaining to channel maintenance activities and practices. Subsequently, all of the cities and the County met to discuss the RTR and channel maintenance throughout the region, whereby, the RCM Workgroup was formed. The RTR submitted to the RWQCB by the City of Poway included a list of over 2,000 channel sites that had been maintained between 2002 and 2004. Based on similar submittals by many of the RCM Workgroup members, the RWQCB determined that all of these municipalities must obtain permits prior to conducting further channel maintenance activities.

All jurisdictions within the RCM Workgroup face the same challenges of meeting goals of water quality and habitat conservation while performing necessary channel maintenance and flood

control work. Based on meetings between the RCM Workgroup and staff from the RWQCB, CDFG, and the Corps, the Workgroup determined that an RGP from the Corps would provide the most comprehensive permit. As needed, additional agency-specific programmatic approvals would be sought. Until these approvals are issued by the resource agencies, the RCM Workgroup members cannot proceed with many of the routine maintenance activities that would need to occur within jurisdictional resources unless project-specific permits are obtained.

The RCM Workgroup's goal is to develop packages and describe processes that will guide each Workgroup member through the steps required for applying for an RGP from the Corps and comparable approvals from the other resource agencies. Specifically, packages will be developed, including forms, instructions, and, where relevant, standardized approaches and components that will streamline many of the permit requirements (e.g., mitigation, operational protocols, and annual reporting requirements). Clarifying and streamlining the process and requirements associated with these permits, and illustrating the benefits to be gained, will aid City Managers and City Council/Board Members in reviewing and approving requests to apply for these permits from their own Public Works divisions.

1.2 Programmatic vs. Individual Permits

Individually, or in smaller groups, channel maintenance activities, including minor repair, could be authorized by the Corps and other agencies under existing 404 general permits (e.g., 404 Nationwide Permit (NWP) #3 for *Maintenance*, NWP #13 for *Bank Stabilization*, NWP #18 for *Minor Discharges*, NWP #19 for *Minor Dredging*, NWP #31 for *Maintenance of Existing Flood Control Facilities*, NWP #43 for *Stormwater Management Facilities*) or other standard approval processes (e.g., the CDFG Streambed Alteration Agreement); however, there are several benefits to obtaining programmatic approvals for repeated, routine activities. These benefits include the following:

- Pre-authorizes similar activities at numerous locations
- Replaces case-by-case applications/authorization
- Offers flexibility to accommodate in the future additional sites that meet established criteria
- Increases efficiency in conducting routine activities
- Establishes consistent approach for avoiding and minimizing impacts to regulated environmental resources
- Provides comprehensive approach for mitigation

- Allows an extended authorization period
- Reduces demand on the resource agencies
- Increases level of regulatory independence for the applicant
- Decreases long-term costs, i.e., one programmatic review, process, and associated fees, vs. numerous case-by-case costs

Because so many RCM Workgroup members will pursue programmatic authorizations from the resource agencies, additional benefits may include the following:

- Co-use of mitigation sites
- Co-ownership of mitigation banks within regional watersheds
- Clear and consistent definition of regulated channel maintenance activities subject to programmatic permits

The specific regulations that pertain to the programmatic permits and other authorizations that the RCM Workgroup members will seek are summarized below.

U.S. Army Corps of Engineers Section 404 Permit

Section 404(e) of the Clean Water Act (CWA) authorizes the Corps to issue general permits on a state, regional, or nationwide basis. All permits authorized by the Corps under Section 404(e) must be reviewed every 5 years. This section of the CWA specifically states that the Secretary of the Army, acting through the Chief of Engineers, may:

> "…after notice of opportunity for public hearing, issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effects on the environment."

The RGPs that the RCM Workgroup members will individually pursue, following the guidelines and using the templates that will be prepared under this contract, are a type of general 404 permit. Reference to an RGP or Section 404 permit, as used below, are interchangeable.

Other authorizations or approvals must be obtained before the Corps can issue an RGP. Authorizations/approvals applicable to an RGP for channel maintenance include the following:

- Water quality certification – Applicant must obtain an individual certification, or waiver.
- Coastal zone management – Applicant must obtain an individual state coastal zone management consistency concurrence, or waiver.
- Endangered species – No activity that is likely to jeopardize the continued existence of federally listed species, species proposed for listing, or the critical habitat of any such species, can be permitted. If an activity might affect such species, the requirements of the federal Endangered Species Act (i.e., informal or formal consultation requirements) must be satisfied.
- Mitigation – Discharges into wetlands must be minimized or avoided to the maximum extent practicable, unless the Corps has approved a compensation mitigation plan for the specific activity(ies).

Regional Water Quality Control Board 401 Water Quality Certification

Section 401 of the CWA requires that any person applying for a federal permit or license, which may result in a discharge of pollutants into waters of the U.S., must obtain a state water quality certification (401 Certification) that specifies activity-based compliance requirements (applicable water quality standards, limitations, and restrictions). No license or permit may be issued by a federal agency until certification required by Section 401 has been granted. Although the California Code of Regulations does not include specifications for applying water quality certification on a programmatic level, the RWQCB has issued 401 Certification in conjunction with RGPs.

California Coastal Commission, Coastal Zone Management Consistency Statement

The California Coastal Act (CCA) and the federal Coastal Zone Management Act (CZMA) regulate wetlands within California's coastal zone. The California Coastal Commission (CCC) has jurisdiction over all wetlands within the coastal zone. Under the CCA, a "wetland" means lands within the coastal zone that may be covered periodically or permanently with shallow water and includes saltwater marshes, freshwater marshes, open or closed brackish water marshes, swamps, mudflats, and fens (Ca. Pub. Res. Code Section 30121).

The CCA does not include specifications for obtaining coastal zone management consistency determinations on a programmatic level. However, certain activities may be exempt from a Coastal Development Permit (CDP) under Section 30610(d) of the CCA, which authorizes developments without a CDP for "[r]epair or maintenance activities that do not result in an addition to, or enlargement or expansion of, the object of those repair or maintenance activities" [Ca. Pub. Res. Code Section 30610(d)].

California Department of Fish and Game, Lake and Streambed Alteration Agreement

Sections 1600-1607 of the California Fish and Game Code regulate activities that would alter the flow, bed, channel, or bank of streams and lakes. The term stream, as defined under the jurisdiction of Sections 1600-1607, can include intermittent and ephemeral streams, rivers, creeks, dry washes, sloughs, blue-line streams (USGS maps), and watercourses with subsurface flows. Canals, aqueducts, irrigation ditches, and other means of water conveyance can also be considered streams if they support aquatic life, riparian vegetation, or stream-dependent terrestrial wildlife.

The CDFG requires a Streambed Alteration Agreement (SAA) for projects that would alter a stream or propose to use any material from a streambed. The SAA is subject to the California Environmental Quality Act (CEQA). Under Sections 1600-1607, the CDFG may issue a SAA for routine maintenance, which covers multiple routine maintenance projects that the applicant will complete at different time periods during the term of the SAA, and describes a procedure the applicant must follow for any maintenance project that the SAA covers.

In addition to the regulatory purview of the CDFG under Sections 1600-1607, the CDFG is the primary agency that administers the California Endangered Species Act (CESA) under Section 2081 of the California Fish and Game Code. The CESA provides protection for all species that are state-listed as threatened or endangered, fully protected, or Species of Special Concern. The CESA also regulates take of the state-listed species.

1.3 Project Personnel and Roles

The following project staff will be responsible for various project activities, deliverables, and coordination/management as described below.

San Diego Bay Council

A coalition of San Diego environmental organizations dedicated to protection and restoration of San Diego's Coastal water resources.

March 1, 2012

W13b

Chair Shallenberger
45 Fremont Street
Suite 2000
San Francisco, CA 94105-2219

Via Electronic Mail

Re: Appeal No. A-6-NOC-11-86 (City of San Diego Master Storm Water Maintenance Program)
March 7, 2012 Agenda Item 13.b.

Dear Chair Shallenberger and Honorable Commissioners:

Please accept these comments on behalf of the below members of San Diego Bay Council, a coalition of local nonprofit organizations dedicated to the protection and restoration of regional coastal waters and related environmental issues in the San Diego region. Member organizations representing numerous San Diegans, act through community involvement, regulatory participation, and legal action to ensure the protection and restoration of San Diego Bay, Mission Bay, and the region's inland and coastal waters.

Today we write in strong support of Commission staff's recommendation on the above-referenced item. The appeal of the City of San Diego (City)'s self-issued Coastal Development Permit (CDP) for a long-term maintenance program presents a substantial issue.[1] More importantly, the City's Master Storm Water System Maintenance Program (MSWSMP) does not comply with the resource protection provisions of the City's certified LCP. Specifically, impacts to sensitive biological resources and necessary mitigation measures and sites will not be identified until after the CDP is approved and issued. Moreover, the City has applied to the Army Corps of Engineers for an in lieu fee mitigation program that proposes invasive removal as mitigation for the proposed project. Though this program has not been approved, environmental groups have serious concerns that the proposed mitigation measures are merely an extension of the proposed program.

In addition to the biological impacts that have not been adequately analyzed and mitigated (by the very nature of the program and the deficient Environmental Impact Report), significant impacts to water quality in downstream receiving waters will also result due to the removal of vegetation that offers beneficial pollutant uptake. The removal of sediment will also increase flow velocity and potentially exacerbate flooding downstream of maintenance areas while carrying increased sediment and pollutant loads to receiving waters. The City's alternatives analysis is also seriously deficient, declaring low impact development and channel widening measures infeasible on a program-level, while such options require further evaluation at a project-level.

Also of serious concern is the long-term nature of the approved CDP. The City's long-term CDP ensures the Coastal Commission will not have an opportunity to review the City's project-specific analysis and mitigation measures when complete, nor will the public be able to bring any Coastal Act or LCP deficiencies to the Commission's attention via future appeals.

[1] "While the City's Master Storm Water System Maintenance Program is described as a 20 year program, the City did not include any special conditions pertaining to its expiration. Thus, as suggested by the appellants, the permit, as approved by the City, has no expiration date and thus, could continue in perpetuity." (Staff Report, page 10).

Letter in Support of STAFF Recomendation 67

San Diego Bay Council

A coalition of San Diego environmental organizations dedicated to protection and restoration of San Diego's Coastal water resources.

Other coastal cities in Southern California, and likely statewide are looking to the City as a model for channel maintenance programs. If the City is able to approve a deficient long-term program, it will set a terrible precedent in San Diego County and statewide.

In light of the significant impacts to biological resources and water quality that will result from the City's approval of the CDP, the Commission's divestiture of jurisdiction through a long-term (possibly indefinite) CDP, the deficient analysis completed to date, and the lack of compliance with LCP resource protection provisions, the San Diego Bay Council strongly urges the Commission to accept staff's recommendations on the appeal and the de novo hearing, and to deny the City's CDP. We thank you in advance for your consideration of these comments and look forward to testifying at the Commission hearing in Chula Vista.

Sincerely,

Signature on file

Marco Gonzalez
Coastal Environmental Rights Foundation

Signature on file

Gale Filter
San Diego Coastkeeper

Signature on file

James A. Peugh,
San Diego Audubon Society

Signature on file

David Grubb
Sierra Club

Signature on file

Nicole Capretz
Environmental Health Coalition

6B

Item 13.b

THE CITY OF SAN DIEGO
WETLANDS ADVISORY BOARD
600 B STREET, SUITE 800, MS 90BA
SAN DIEGO, CA 92101

W13b

CARY LOWE, PH.D., AICP, CHAIRMAN
TEL.: (619) 255-3078

July 28, 2011

Myra Herrmann, Environmental Planner
City of San Diego Development Services Center
1222 First Avenue, MS 501
San Diego, CA 92101

RECEIVED
MAR 02 2012
CALIFORNIA
COASTAL COMMISSION
SAN DIEGO COAST DISTRICT

Re: Master Storm Water System Maintenance Program
Recirculated Draft Program EIR

Dear Ms. Hermann:

On behalf of the City of San Diego Wetlands Advisory Board, I would like to offer comments on the Recirculated Draft Program Environmental Impact Report for the Master Storm Water System Maintenance Program. These comments are based on input from Board members with knowledge and experience in the field of wetland biology, and represent the consensus position of our Board. This letter supplements previous correspondence from our Board, dated April 17, 2009 and May 12, 2010, commenting on prior Draft EIR's for this program. We continue to support the proposed program, but believe that the Final EIR should address the issues described below.

Our comments relate both to program-level issues and to specific portions of the analysis and mitigation measures, as follows:

1. Annual Review. We are concerned that the program in question is complex and long-term, and therefore needs to be assessed on a regular basis to ensure that it is functioning in the most environmentally benign manner possible, consistent with the program requirements. A mitigation measure should be added, requiring that an annual public review and comment process be incorporated into the program. A report should be made to a regulatory agency such as the Regional Water Quality Control Board, for their review and comment, followed by a public hearing at which additional comments could be submitted. This would provide a regular opportunity to determine the effect of maintenance work under the program upon water quality, habitat value and wetlands mitigation in the preceding year and to assess plans for the following year. Such a process would have the goal of improving the Storm Water Division's maintenance practices. The annual public review would be used as a feedback mechanism to guide future planning and identify needed corrective action.

For example, for the annual review, the Storm Water Division could present water quality monitoring results from downstream of areas where substantial vegetation and/or soils

Letter of Comment 69

THE CITY OF SAN DIEGO

have been removed. The status of habitat value at maintenance sites from previous years' work, and the status of mitigation projects, also would be presented. The review would further present the plans for maintenance, monitoring and mitigation, and an analysis of alternatives being considered, for the upcoming years. In cases where the review discloses that maintenance work has degraded water quality or habitat value, or that wetlands mitigation measures have not been effective, corrective actions would be identified.

2. Relation to Other Programs. Operating this program in isolation increases the likelihood of undesirable impacts. The program should be a component of a comprehensive city-wide flood control plan that would include needed capital improvements, land use policies, and relocation of frequently flooding development. At minimum, a mitigation measure should be added, requiring coordination of this program with other flood control-related activities of the City, to minimize degradation of water quality and instead improve water quality wherever possible.

3. Maintenance Frequency. The Biological Resources Mitigation Measures should be supplemented with a measure requiring more frequent and routine clearing of areas which are particularly prone to overgrowth and/or areas that particularly attract sensitive species (which later would be harmed or killed in the course of less frequent clearing).

4. Seasonal Protections. Biological Resources Mitigation Measures 4.3.16 – 4.3.25 should be expanded to include a prohibition against clearing vegetation during the breeding seasons of any sensitive or listed animal species.

5. Scope of Surveys. The Biological Mitigation Measures should state clearly that surveys will be performed for both flora and fauna.

6. Mitigation Standards and Timing. The Wetland Mitigation Plan referenced in Biological Mitigation Measure 4.3.10 should be consistent with Multiple Species Conservation Plan mitigation ratios for Diegan coastal sage scrub and Coastal sage-chaparral scrub, including ensuring that mitigation occurring outside the impact area is at a ratio of not less than 2:1. Also, the Wetland Mitigation Plan should ensure that new, enhanced or restored wetlands are maintained and protected in perpetuity.

7. Incentives. Discussion of the Off-Site Runoff Reduction Alternative should include proposed incentives for achieving long-term solutions, e.g., on-site water recycling and reduced outdoor irrigation.

Thank you for the opportunity to comment on this document.

Sincerely,

Signature on File

Cary D. Lowe, Ph.D., AICP
Chairman

CDL/mb

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COASTAL COMMISSION
SAN DIEGO COAST DISTRICT

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