Arroyo Seco Foundation, et al. v. County of Los Angeles, et al., BS171826

Tentative decision on petition for writ of mandate: granted

Petitioners Arroyo Seco Foundation and Pasadena Audobon Society seek a writ of mandate to compel Respondents County of Los Angeles, County of Los Angeles Board of Supervisors ("Board"), County of Los Angeles Department of Public Works, and Los Angeles County Flood Control District (collectively, "District") to set aside the November 7, 2017 certification of the Recirculated Portions of the Final Environmental Impact Report ("RFEIR") for the Devil's Gate Reservoir Sediment Removal and Management Project ("Project"), and all Project approvals.

The court has read and considered the moving papers, opposition, and reply, and renders the following tentative decision.

A. Statement of the Case

1. The Petition

Petitioners commenced this proceeding on December 7, 2017. The operative pleading is the verified First Amended Petition ("FAP") and Complaint for Injunctive and Declaratory relief, filed on May 4, 2018, which alleges causes of action for violations of CEQA and seeks injunctive and declaratory relief. The verified Petition alleges in pertinent part as follows.

The Project is a massive sediment removal project which proposes to excavate 1.7 million cubic yards ("mcy") of sediment that has accumulated behind Devil's Gate Dam ("Dam") since the 2009 Station Fire. The Dam supports the Devil's Gate Reservoir ("Reservoir"), a water storage reservoir located in Hahamongna Watershed Park ("Park"), in the upper portion of the Arroyo Seco Watershed within the City of Pasadena ("Pasadena"). The Reservoir is used for water collection, fish and wildlife protection and flood control. In addition to removing accumulated sediment, the Project will establish a reservoir pool at the face of the Dam, create a new reservoir configuration designed to store accumulated storm water and groundwater recharge, and establish a 50-acre permanent maintenance area.

The Project's excavation and construction activities will take place for nine months a year, over a four to five-year period, and will require the use of up to 425 on-road sediment removal dump truck trips per day during that time. Project-related activities will permanently destroy over 60 acres of sensitive riparian habitat within the Park. Overall, the Project footprint will occupy approximately 76 acres of the 330-acre Park.

Relying on the 2014 FEIR, the District originally proposed and approved a 2.4 mcy version of the Project in 2014. The 2014 FEIR concluded that the habitat loss caused by the Project would have significant impacts on sensitive wildlife and plant species, but that those impacts would be reduced to less than significant levels with the incorporation of the FEIR's eight biological mitigation measures.

Petitioners challenged the District's original 2014 Project approvals in Arroyo Seco Foundation et al. v. County of Los Angeles et al., LASC Case Number BS152771 ("Arroyo Seco I"). On April 19, 2017, the court issued a judgment in Arroyo Seco I, finding that Mitigation Measures Biology ("MM BIO") 6, 7, and 8 failed to provide substantial evidence supporting the

FE1R's conclusion that a 1:1 mitigation ratio would reduce the impacts to less than significant levels. The judgment also found that Mitigation Measure Air Quality ("MM AQ") 1 failed to include enforceable terms to ensure that NOx emissions would be reduced to less than significant levels. The court issued a writ of mandate on May 17, 2017 directing the District to rectify its CEQA violations.

The District prepared a draft RFEIR in response to the writ and released it for public comment in July 2017. Petitioners submitted extensive written comments in response to the RDEIR, including expert comments which documented significant deficiencies in the RDEIR's analysis and mitigation of the Project's potentially significant impacts.

The District released the final RFEIR in October 2017. Both the draft and final RFEIR continued to analyze the originally approved 2.4 mcy Project and contained only a narrow set of revisions. The RFEIR also added new terms that deferred development of a Habitat Restoration Plan and future development of adaptive management measures which the RFEIR assumed, without conducting a site-specific analysis of biological impacts, would result in successful mitigation of impacts to sensitive riparian habitat and sensitive species.

On November 7, 2017, the Board conducted a public hearing on the Project and the RFEIR. At the hearing, Supervisor Kathryn Barger made a motion ("Barger Motion") to reduce the Project's size to 1.7 mcy, while maintaining the same Project footprint as the original Project ("Reduced Project").

In response to the Barger Motion, Petitioners and other members of the public raised concerns during oral public comments about the need for further CEQA review to consider the substantial changes proposed by the Reduced Project, including whether it would allow for a reduced Project footprint that would reduce the Project's significant impacts from habitat removal, and whether the reduced-size Project could reduce significant air pollution and traffic generated by the haul trucks that would be used during the Project's sediment removal phase.

At the close of the hearing, the District voted to approve the Reduced-Size Project. The District's approval of the reduced-size Project constituted a substantial change in the Project that significantly altered the Project description. The RFEIR failed to analyze this revised version of the Project and failed to consider whether the reduced-size Project offered new or additional mitigation measures or alternatives which would further reduce the Project's significant impacts.

By omitting any analysis of the reduced-size Project, the RFEIR also failed to address new information which has become available since the original 2014 FEIR certification, including new information demonstrating that the Project will result in significant air quality emissions and public health effects that vastly exceed the impacts identified in the 2014 FEIR.

As a result of these deficiencies, the RFEIR failed to adequately disclose and mitigate the Project's new and potentially significant impacts on biological resources, including endangered and special-status bird and plant species, and the Project's significant, unmitigated air quality impacts which far exceeded the emissions that were originally analyzed and mitigated in the FEIR.

The Board failed to require any revisions to the RFEIR prior to approving the Reduced Size Project and approved the Reduced Project in reliance on the existing RFEIR.

Respondents abused their discretion and failed to proceed in the manner required by law in modifying and certifying a legally deficient RFEIR that failed to analyze the modified Project's impacts and changed circumstances surrounding its approval, by failing to consider new information which demonstrated that the Project would have new and more severe impacts that

previously analyzed, in adopting findings that the majority of the Project's significant impacts would be reduced to less than significant levels with mitigation and that remaining impacts were acceptable due to overriding considerations, and in determining that the Mitigation Monitoring and Reporting Program ("MMRP") was adequate where it fails to mitigate all of the Project's potentially significant impacts.

2. Course of Proceedings

On April 23, 2018, Respondents demurred to the verified Petition and Complaint. On May 4, 2018, Petitioners filed the FAP and the demurrer was taken off calendar.

B. Standard of Review

A party may seek to set aside an agency decision for failure to comply with CEQA by petitioning for either a writ of administrative mandamus (CCP §1094.5) or of traditional mandamus. CCP §1085. A petition for administrative mandamus is appropriate when the party seeks review of a "determination, finding, or decision of a public agency, made as a result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in a public agency, on the grounds of noncompliance with [CEQA]." Public Resources ("Pub. Res.") Code §21168. This is generally referred to as an "adjudicatory" or "quasi-judicial" decision. Western States Petroleum Assn. v. Superior Court, ("Western States") (1995) 9 Cal.4th 559, 566-67. A petition for traditional mandamus is appropriate in all other actions "to attack, review, set aside, void or annul a determination, finding, or decision of a public agency on the grounds of noncompliance with [CEQA]." Where an agency is exercising a quasi-legislative function, it is properly viewed as a petition for traditional mandamus. Id. at 567; Pub. Res. Code §21168.5.

At issue is Petitioners' CEQA challenge to a quasi-adjudicative action taken by the District in approving the Project and certifying the RFEIR. This procedural setting, where a hearing was required, is governed by administrative mandamus. In determining whether to grant a petition in a CEQA case, the court decides whether there was a prejudicial abuse of discretion. Public entities abuse their discretion if their actions or decisions do not substantially comply with the requirements of CEQA. Sierra Club v. West Side Irrigation District, (2005) 128 Cal.App.4th 690, 698. 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. Western States, *supra*, 9 Cal.4th at 568; Pub. Res. Code §21168.5. "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(a).

Whether substantial evidence exists is a question of law. *See* California School Employees Association v. DMV, (1988) 203 Cal.App.3d 634, 644. Argument, speculation, and unsubstantiated opinion or narrative will not suffice. Guidelines, 15384(a), (b).[1] An EIR may not

[1]As an aid to carrying out the statute, the State Resources Agency has issued regulations called "Guidelines for the California Environmental Quality Act" ("Guidelines"), contained in Code of Regulations, Title 14, Division 6, Chapter 3, beginning at section 15000.

be overturned simply because the record reveals a "disagreement among experts." Cadiz Land Co. v. Rail Cycle, (2000) 83 Cal.App.4th 74, 97.

The 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. Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova, ("Vineyard") (2007) 40 Ca1.4th 412, 435. Challenges to an agency's failure to proceed in the manner required by CEQA, such as the failure to address a subject required to be covered in an EIR or to disclose information about a project's environmental effects, are subject to a less deferential standard than challenges to an agency's substantive factual conclusions. Id. at 435. In reviewing these claims, the court must "determine de novo whether the agency has employed the correct procedures, 'scrupulously enforc[ing] all legislatively mandated CEQA requirements'." Id.

Petitioners' claim that the RFEIR should have been recirculated, or that a supplemental or subsequent EIR should have been prepared, is governed by the substantial evidence standard. Laurel Heights Improvement Association v. Regents of the University of California, ("Laurel Heights II") (1993) 6 Cal.4th 1112, 1135; Friends of College of San Mateo Gardens v. San Mateo County Community College District, ("San Mateo Gardens") (2016) 1 Cal.5th 13 937, 953. Petitioners' claim that the RFEIR failed to analyze the impacts of mitigation measures also is governed by the substantial evidence standard. Save Our Peninsula Community v. Monterey County Board of Supervisors, ("Save Our Peninsula") (2001) 87 16 Cal.App.4th 99, 130; Sacramento Old City Association v. City Council, (1991) 229 Cal.App.3d 1011, 1019. Petitioners' claim that the RFEIR improperly deferred mitigation performance standards is a failure to proceed in a manner required by law. Sierra Club et al v. County of Fresno, ("County of Fresno") (2018) 6 Cal.5th 502, 516.

C. CEQA

The purpose of CEQA (Pub. Res. Code §21000 *et seq.*), is to maintain a quality environment for the people of California both now and in the future. Pub. Res. Code §21000(a). "[T]he overriding purpose of CEQA is to ensure that agencies regulating activities that may affect the quality of the environment give primary consideration to preventing environmental damage." Save Our Peninsula Committee v. Monterey County Board of Supervisors, (2001) 87 Cal.App.4th 99, 117. CEQA must be interpreted "so as to afford the fullest, broadest protection to the environment within reasonable scope of the statutory language." Friends of Mammoth v. Board of Supervisors, (1972) 8 Cal.3d 247, 259.

The Legislature chose to accomplish its environmental goals through public environmental review processes designed to assist agencies in identifying and disclosing both environmental effects and feasible alternatives and mitigations. Pub. Res. Code §21002. Public agencies must regulate both public and private projects so that "major consideration is given to preventing environmental damage, while providing a decent home and satisfying living environment for every Californian." Pub. Res. Code §21000(g).

The EIR is the "heart" of CEQA, providing agencies with in-depth review of projects with potentially significant environmental effects. Laurel Heights II, *supra*, 6 Cal.4th at 1123. An EIR describes the project and its environmental setting, identifies the potential environmental impacts of the project, and identifies and analyzes mitigation measures and alternatives that may reduce significant environmental impacts. Id. Using the EIR's objective analysis, agencies "shall

mitigate or avoid the significant effects on the environment... whenever it is feasible to do so. Pub. Res. Code §21002.1. The EIR serves to "demonstrate to an apprehensive citizenry that the agency has in fact analyzed and considered the ecological implications of its actions." No Oil, Inc. v. City of Los Angeles, (1974) 13 Cal.3d 68, 86. It is not required to be perfect, merely that it be a good faith effort at full disclosure. Kings County Farm Bureau v. City of Hanford, (1990) 221 Cal.App.3d 692, 711-12. A reviewing court passes only on its sufficiency as an informational document and not the correctness of its environmental conclusions. Laurel Heights Improvement Association v. Regents of the University of California, ("Laurel Heights I") (1988) 47 Cal.3d 376, 392.

All EIRs must cover the same general content. Guidelines §§ 15120-32. An EIR should be prepared with a sufficient degree of analysis to provide decision-makers with information which enables them to make a decision which intelligently takes account of environmental consequences. The environmental effects need not be exhaustively reviewed, but the EIR's sufficiency is viewed in the light of what is reasonably feasible. Guidelines §15151. The level of specificity of an EIR is determined by the nature of the project and the "rule of reason." Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners, (1993) 18 Cal.App.4th 729, 741-42. The degree of specificity "will correspond to the degree of specificity involved in the underlying activity which is described in the EIR." Guidelines §15146. The ultimate decision whether to approve a project is a nullity if based upon an EIR that does not provide decision-makers, and the public, with the information about the project required by CEQA. Santiago County Water District v. County of Orange, (1981) 118 Cal.App.3d 818, 829.

D. Statement of Facts[2]

1. Background

[2] The District requests judicial notice of (1) the court reporter's transcript from the February 14, 2017 hearing in Arroyo Seco I (Ex. A), (2) the court reporter's transcript from the March 23, 2017 hearing on supplemental briefing in Arroyo Seco I (Ex. B), (3) the court reporter's transcript from the April 13, 2017 hearing on the order to show cause re: judgment in Arroyo Seco I (Ex. C), (4) the writ of mandate in Arroyo Seco I (Ex. D), (5) the Return in Arroyo Seco I (Ex. E), (6) the County's motion to discharge the writ in Arroyo Seco I (Ex. F), (7) the court's tentative ruling on the motion in Arroyo Seco I, (Ex. G), (8) the court's order discharging the writ in Arroyo Seco I, (Ex. H), (9) the reporter's transcript from the hearing on the County's motion to discharge the writ in Arroyo Seco I, (Ex. I), (10) portions of Petitioners' opposition to the County's motion to discharge the writ in Arroyo Seco I, (Ex. J), (11) Petitioners' notice of appeal in Arroyo Seco I, (Ex. K), (12) the Devil's Gate Sediment Removal and Management Project Final Habitat Restoration Plan, prepared by the County and approved by the California Department of Fish and Wildlife on November 16, 2018 (Ex. L), and (13) portions of Petitioners' opening brief in Arroyo Seco I (Ex. M).

The court records (Exs. D-H, J, K, M) are judicially noticed. Evid. Code §452(d). The existence of these documents, but not the truth of their contents, is judicially noticed. Sosinsky v. Grant, (1992) 6 Cal.App.4th 1548, 1551. The court cannot judicially notice a reporter's transcript from another lawsuit (Exs. A-C, I), and the requests are denied. The Final Habitat Restoration Plan is an official agency act and the request is granted. Evid. Code §452(c).

The Project is a sediment removal project which, as approved in 2014, proposed to excavate 2.4 million cubic yards ("mcy") of sediment that has accumulated behind Devil's Gate Dam ("Dam") since the 2009 Station Fire. SAR 59507. The Dam supports the Devil's Gate Reservoir ("Reservoir"), a water storage reservoir located in Hahamongna Watershed Park ("Park"), in the upper portion of the Arroyo Seco Watershed within the City of Pasadena ("Pasadena"). Pasadena is the underlying land owner of the Reservoir and the District has a flood control and water conservation easement. SAR 59508. As a result of sediment inflows following the 2009 Station Fire, the Reservoir no longer has the capacity to safely contain another major debris event, and the outlet works are at risk of becoming clogged and inoperable. SAR 59508. The Project's purpose is to remove sediment in the Reservoir that has significantly reducing its capacity to hold back floodwater. SAR 33-4, 59507.

2. <u>The FEIR</u>

The FEIR identified the Project's Goals and Objectives as follows:

> "1. Reducing flood risk to the communities downstream of the reservoir adjacent to the Arroyo Seco by restoring reservoir capacity for flood control and future sediment inflow events;
>
> 2. Supporting sustainability by establishing a reservoir configuration more suitable for routine maintenance activities, including reservoir management;
>
> 3. Removing sediment in front of the dam to facilitate an operational reservoir pool to reduce the possibility of plugging the outlet works with sediment or debris during subsequent storm events;
>
> 4. Removing sediment placed at Johnson Field during the Devil's Gate Reservoir;
>
> 5. Supporting dam safety by removing sediment accumulated in the reservoir in a timely manner to ensure the ability to empty the reservoir in the event of a dam safety concern; and
>
> 6. Delivering the sediment to placement or reuse facilities that are already prepared and designated to accept such material without native vegetation and habitat removal." 33-34..

The District established a required design capacity of two Design Debris Events, which is defined as the predicted amount of sediment that can flow into the Reservoir after the undeveloped portion of the tributary watershed is completely burned and a 50-year design storm event occurs after four years of watershed recovery. SAR 65. The District required a two Design Debris Event capacity to ensure that the Reservoir always has sufficient capacity to maintain the downstream flood protection. SAR 65.

The FEIR concluded that the Project would have significant and unmitigable impacts on aesthetics as well as traffic/transportation. SAR 40. The Project also would have significant air quality, biological resources, cultural resources, land use and planning, and noise impacts that

could be mitigated to less than significant levels. SAR 40.

a. Air Quality Mitigation Measures

The FEIR concluded that the Project would have emissions of NOx exceeding the SCAQMD Daily Regional Threshold during sediment removal which was a potentially significant impact. AR 414.

Mitigation measures MM AQ-1 and MM AQ-2 require the use of sediment removal dump trucks that meet EPA's emission standards for Model Year 2007 or later, and the use of off-road equipment meeting EPA's emission standards for Tier 3 equipment, respectively. SAR 414. These mitigation measures are intended to reduce the Project's NOx emissions to less than significant levels. SAR 414.

b. Biological Resources Mitigation Measures

The FEIR concluded that the Project would have significant impacts on biological resources, including sensitive wildlife and plant species and jurisdictional waters, but that those impacts could be mitigated to less than significant levels through five mitigation measures. AR SAR 420. Mitigation measures MM BIO-6 through BIO-8 are intended to mitigate the impact to plant species by providing for a 1:1 restoration ratio. SAR 426-27.

MM BIO-6 requires the 1:1 Restoration of Riversidean Alluvial Fan Sage Scrub habitat at a 1:1 ratio by acreage, with areas being mapped by aerial photographs. SAR 426.

MM BIO-7 requires a qualified biologist to conduct a tree survey within 90 days prior to ground-disturbing activities to identify trees that will be removed or potentially affected by the Project and trees that can be avoided. The District will replace trees that cannot be avoided at a 1:1 ratio. SAR 427.

MM BIO-8 requires the District to implement a combination of onsite and offsite habitat restoration, enhancement, and exotic removal for impacted sensitive habitat and jurisdictional waters. Restoration/enhancement shall include use of willow cuttings and exotic species removal. Non-native, weedy habitats within the basin shall be utilized whenever possible as mitigation sites. This mitigation measure shall be monitored for success for five years following implementation. SAR 427.

c. Alternatives Analysis

The FEIR reviewed six alternatives. Alternative 1 Configuration B proposed to remove 2.8 mcy of sediment via excavation. Alternative 2 Configuration C proposed to remove 4 mcy of sediment via excavation. Alternative 3 Configuration D, the environmentally preferred alternative, proposed to remove 2.4 mcy of sediment via excavation. Alternative 4 proposed to remove 2.9 mcy of sediment via sluicing. Alternative 5 proposed to remove 2.9 mcy of sediment via excavation using an alternative haul route. The FEIR also considered a "No Project" alternative. SAR 50.

All of the alternatives -- with the exception of the statutorily required No Project alternative -- proposed to restore the capacity for approximately two Design Debris Events. SAR 50. The FEIR determined Alternative 3, Configuration D to be the environmentally superior alternative "due to the reduction in sediment removal and reservoir management areas and associated activities." SAR 485–89, 498, 503-04, 530, 532, 534-35, 537.

d. The Pasadena Alternative

The FEIR rejected an alternative proposed by Pasadena ("Pasadena Alternative"), which was based on Pasadena's 2003 Hahamongna Watershed Park Master Plan ("Park Master Plan"). The Park Master Plan noted that, as of 2003, the District required a minimum capacity of 1,400-acre feet, "equal to the deposition from one major debris event". AR 24487, 24584. The Park Master Plan proposed grading and configuration for the Park that would accommodate 1,900 acre-feet of storage capacity to "achieve a balance between flood management, water conservation, habitat restoration, and recreation." AR 24487, 24583-85, 24591.

Pasadena noted that the Project's size was inconsistent with the Park Master Plan, which was adopted after extensive County participation, and which has a goal of preserving, restoring, and enhancing native habitats. SAR 1471. The Project and its alternatives would remove between 2.4 and 4.0 mcy with an affected area of 76 to 120 acres. AR 1472. As of 2003, the sediment removal required for compliance with the Park Master Plan was approximately 800,000 cy. AR 1471-72. The Project's footprint would have a greater impact to native vegetation and habitat than envisioned by the Park Master Plan. AR 1472. The Pasadena Alternative proposed the removal of 1.1 mcy of sediment (establishing a Dam sediment capacity of 2.5 mcy), removing a maximum of 220,000 cy per year, modifying the Project's footprint so there would be "no excavation in the westside stream channel" to preserve riparian habitat on the west side of the Basin, limiting truck trips to no more than 120 per day, and mitigating sensitive habitat -- such as riparian and alluvial habitat -- at a rate of 5:1. SAR 60654–57.

In rejecting the Pasadena Alternative, the FEIR's response to comments noted that the Park Master Plan was prepared in 2003, which was before the 2009 Station Fire. AR 1505. Following that fire, approximately 1.3 mcy flowed into the Reservoir after just two average storm seasons, increasing the amount of sediment requiring removal. AR 1505. The District is required by law to provide flood protection and water conservation within its boundaries. AR 1505. The District has determined that a storage design capacity of two Design Debris Events is the standard acceptable risk. AR 1505. For the Dam and Reservoir, the required capacity is 4 mcy (two Design Debris Events) below the spillway elevation of 1040 feet. AR 1505. Alternative 3, Configuration 3 affects the least amount of habitat of all alternatives while still achieving Project objectives. AR 1506. To further reduce the Project's footprint, the District added Option 2 to this alternative which reduces the footprint of 120 to 70 acres. AR 1506. In addition, the maintenance areas would be smaller, allowing for habitat to reestablish and wildlife to move. AR 1506. Additionally, the ultimate mitigation for impacts to wetlands would be negotiated with CDFW and the United States Army Corp of Engineers, and a detailed restoration plan would be prepared for their approval. AR 1506.

3. The 2014 Project Approval and FEIR Certification

On November 12, 2014, the Board approved the Project, adopting the environmentally preferred Alternative 3, Configuration D, Option 2 in conjunction with Alternative 5 (haul route), certifying the FEIR, and making a Statement of Overriding Considerations concerning the Project's significant and unavoidable impacts to transportation/traffic as well as aesthetics and other related findings. AR 17710, 17748-50. The Project as approved would remove 2.4 mcy of sediment from 69 acres within the Reservoir over a three to five-year period. SAR 59507.

4. Arroyo Seco I

On December 11, 2014, Petitioners filed Arroyo Seco I, which challenged the FEIR and Project approvals. SAR 7866.

On April 19, 2017, the court issued a judgment and writ of mandate ordering the District to (1) set aside the certification of portions of the FEIR, (2) take action to (a) provide substantial evidence to support the 1:1 mitigation ratio in MM BIO-6 through MM BIO-8, (b) confirm that the MM BIO-1 through MM BIO-8 would be applied as mitigation to the Water Conservation Project, and (c) modify MM AQ-1 to require the use of Model Year 2010 sediment removal dump trucks as opposed to Model Year 2007 and correspondingly amend the Project's Mitigation Monitoring and Reporting Program ("Monitoring Program") with the changes to MM AQ-1. SAR 7866-67; 59508-9; Resp. RJN Ex. D. The court held that the rest of the FEIR complied with CEQA and did not require recirculation. SAR 7867.

5. The RFEIR

On July 24, 2017, the District issued the RFEIR and revised Monitoring Program for public comment. SAR 59507.

In accordance with the court's order, these documents expanded the MM BIO measures to clarify the habitat monitoring and management obligations required to ensure successful mitigation at a 1:1 ratio. SAR 7870-79.

Specifically, MM BIO-6 and MM BIO-8 were modified to require the development of performance standards based upon surveys, mapping of areas to be enhanced or restored, and the selection of offsite reference sites by which mitigation will be measured. SAR 7873, 7876. A site-specific Habitat Restoration Plan will be prepared for the restoration which shall include identified guidelines and specifications. SAR 7873-74, 7876-77. An as-built plan will be prepared after the installation of plant and seed materials to document the acreage and plant community on the mitigation sites to demonstrate the 1:1 ratio of sensitive habitats has been achieved. SAR 7874, 7877. The mitigation sites shall be monitored until the performance standards have been met. SAR 7874, 7877. If the monitoring shows that the mitigation sites are not making measurable progress towards meeting the performance standards, adaptive management measures will be followed, including corrective regrading, soil amendments, replanting of mitigation habitat, installation of different plant species, and barrier installation and trail closures at the mitigation site. SAR 7874-75, 7878. If the mitigation sites do not achieve the performance standards after implementation of adaptive management measures, the required mitigation will be implemented at alternative sites chosen based on the same methodology and monitored until the performance standards are achieved. SAR 7875. Funding shall be ensured to meet all of these requirements. SAR 7875.

The RFEIR also modified MM AQ-1 to require the use of the Model Year 2010 or later trucks instead of Model Year 2007 trucks. SAR 7870.

Finally, the RFEIR's cumulative impacts analysis clarified that the Project's MM BIO measures would apply to the District's Water Conservation Project, should it go foward. SAR 7915-16, 59507.

6. The RFEIR's Response to Comments

Environmental Scientists Matthew F. Hagemann ("Hagemann"), Paul Rosenfeld ("Rosenfeld"), and Hadley Nolan ("Nolan") commented on the RFEIR, raising various concerns regarding air quality impacts. SAR 8138-52, 8524, 8534, 8551. They concluded that the Project "has the potential to cause the Project's NOx emissions to exceed South Coast Air Quality Management District ("SCAQMD") thresholds using Model Year 2010 trucks" and that the RFEIR's conclusion that "the Project's construction-related NOx emissions would be reduced from approximately 378 poundes per day to just 82 pounds per day emissions through the use of Model Year 2010 hauling trucks is unsupported." SAR 8145. The scientists relied on "new evidence" that Model Year 2010 hauling trucks will actually result in less effective NOx reductions than previously assumed. AR 8141. An analysis by the University of California Riverside's Center for environmental Research and Technology ("CE-CERT"), prepared for SCAQMD, provides evidence that the use of Model Year 2010 trucks will result in higher NOx emissions than previously assumed by the District. AR 8139. These studies, prepared between 2013 and 2017, conducted real-time, in-use studies of truck emissions to measure NOx and other air pollutant emissions. AR 8139, fn. 2, 3; AR 8141. *See* SAR 10290-10784. MM AQ-1 requires Model Year 2010 trucks, and will result in NOx emissions five to 18 times higher than assumed in the RFEIR. AR 8141. Consequently, the scientists opined that "the air quality impacts from the Project's 425 daily hauling truck trips will not be adequately mitigated." SAR 8145. In addition, the scientists concluded that the RFEIR underestimates the Project's health impacts and would expose persons around the Project to cancer risks far in excess of regulatory thresholds of significance. SAR 8151.

The District released its Response to Comments in October of 2017. SAR 8014. The District responded to the concerns raised by Hagemann, Rosenfeld, and Nolan by stating that the issues were not raised in litigation concerning the adequacy of the EIR and were therefore not a subject of the court's ruling. The court stated: "I don't think that any additional analysis required (*sic.*) on the truck issue. That's just a change of wording that had support for it in the EIR to begin with." AR 8153. As such, the District concluded it was not necessary to address the comments concerning air quality and health risks from the Project's usage of trucks. SAR 8153-54.

7. <u>The Board's Hearing</u>

On November 7, 2017, the Board conducted a noticed public hearing to consider the RFEIR. SAR 60454. District staff drafted a report recommending that the Board, acting as the District's governing body, (1) void and set aside those portions of the FEIR which have been revised by the new RFEIR as instructed by the court, (2) certify that the RFEIR has been completed in compliance with CEQA, (3) adopt the revisions to the Monitoring Program, finding that it is adequately designed to ensure compliance with the Project's mitigation measures. SAR 59505.

The staff report further recommended that the Board grant the Chief Engineer of the District authority to proceed with the Project. SAR 59505-06. The report justified its recommendations by noting that the District had fully complied with the court's order by revising and recirculating the sections of the RFEIR and Monitoring Program. SAR 59507.

At the hearing, District staff gave a presentation summarizing the Project and staff's recommendations. SAR 60455-59.

Supervisor Kathryn Barger then presented the Barger Motion. SAR 3-4, 60466. Supervisor Barger stated that she "recognized that the recommendation originally proposed...may seem a bit ambitious and unnecessary." SAR 60466. She moved, *inter alia.* to reduce the

maximum total volume of sediment removed during the Project by 700,000 cy, while maintaining the proposed footprint. SAR 60466-67. Instead of the proposed removal of a maximum of 2.4 mcy, a maximum of 1.7 mcy would be removed. SAR 3, 60466-67. The Barger Motion also sought that the Board find that the reduced Project would have the same or reduced environmental impacts as detailed in a November 7, 2017 Memorandum from ECORP Consulting. SAR 60468.[3]

The ECORP memorandum stated that this modification would reduce the initial sediment removal phase of the Project by one year and result in reduced impacts to air quality, biological resources, greenhouse gases, recreation/public services, and transportation and traffic from those that were initially anticipated. SAR 61261. Impacts to aesthetics, cultural resources, geology and soils, hydrology and water quality, land use and planning, mineral resources, noise/vibration, and utilities would be similar to those initially anticipated. SAR 61261. The ECORP memorandum did not address Project objectives, only environmental impacts, of a reduced Project. SAR 61253-61.

During public comment, several individuals spoke in support of the Barger Motion. Pasadena Mayor Terry Tornek stated that Pasadena had asked that the amount of material removed be reduced from 2.4 mcy to 1.1 mcy. The Barger Motion reduced the material removed to 1.7 mcy, which was "a tremendous gesture." AR 60469. Pasadena also had asked that the number of truck trips be reduced from 400 to 200 per day. AR 60469. "[T]he Supervisors' modifications as suggested...go a long way towards satisfying the City of Pasadena's requests." SAR 60470.

Petitioners' counsel Mitchell Tsai, Esq. stated: "We applaud Kathryn Barger's amendments. We believe that's a step in the right direction, but still reiterate [Petitioners'] objections to the Project." SAR 60487.

Tim Brick, Managing Director of the Arroyo Seco Foundation, opined that the amendments "move in the right direction," but expressed concerns for the "severe inadequacies of the mitigation program" and "you need to do more." SAR 60488.

The Board unanimously voted to adopt the staff recommendations with the amendments proposed by the Barger Motion. SAR 60567.

8. The Writ Discharge

On November 8, 2017, the District filed its Return and a motion to discharge the writ. RJN, Exs. E-F. On December 5, 2017, the court discharged the writ, concluding that the RFEIR provided substantial evidence that biological resource impacts will be less than significant with implementation of MM BIO-6 and -8. RJN, Ex. H, p.11-12. The court also found that the RFEIR provided that Model Year 2010 or later trucks would be used, which complied with the writ. Petitioners' argument that studies prepared for SCAQMD indicated that NOx emissions from Model Year 2010 (and later) trucks are higher than assumed in the original 2007 EPA certification standard was an attempt to re-litigate the Petition. Id., p.11. The court further found that the RFEIR confirmed that MM BIO-1 through -8 would apply to the Water Conservation Project. Id.

[3] Although Petitioners argue that the Barger Motion reduced the Project's duration to four years, the court found no such limiting provision. SAR 3-4, 60466-67. The ECORP memorandum merely stated that the reduction in sediment removal would reduce the Project by approximately one year. SAR 61261.

E. Analysis[4]

Petitioners argue that (1) the reduced size of the Project resulting from the Barger Motion was significant new information requiring revision and recirculation of the RFEIR or a subsequent/supplemental EIR, (2) new information concerning NOx emissions from Model Year 2010 trucks also should have triggered additional environmental review, (3) the RFEIR fails to analyze the environmental effects of the MM BIO-6 and -8 measures and (4) the RFEIR unlawfully defers development of the MM BIO-6 and -8 performance standards.

The threshold decision in evaluating Petitioners' arguments concerning the RFEIR's deficiencies is to determine the legal standard by which they should be evaluated. If the RFEIR fails to address a subject required to be covered in an EIR, that would be a failure to proceed in the manner required by law. *See* Vineyard, *supra*, 40 Cal.4th at 435. Petitioners' argument that the reduced size of the Project is new information requiring revision and recirculation of the RFEIR, or preparation of a supplemental or subsequent EIR, is governed by the substantial evidence standard. *See* San Mateo Gardens, *supra,* 1 Cal.5th at 937, 953. Petitioners' claims that the RFEIR failed to analyze the impacts of its mitigation measures is also governed by the substantial evidence standard of review. *See* Save Our Peninsula, *supra*, 16 Cal.App.4th at 131. The RFEIR's alleged improper deferral of mitigation performance standards is a failure to proceed in a manner required by law evaluated by the court *de novo*. Sierra Club et al v. County of Fresno, ("County of Fresno") (2018) 6 Cal.5th 502, 516.

2. The Reduced Project Size As Significant New Information Requiring Revision and Recirculation

A lead agency is required to recirculate an EIR and consult anew when "significant new information" – defined as including changes in the project -- is added to the EIR after public notice but before certification. Pub. Res. Code §21092.1; Guidelines §15088.5.

"New information" includes "changes in the project or environmental setting as well as additional data or other information", but new information added to an EIR is not significant unless it "deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect (including a feasible project alternative) that the project's proponents have declined to implement." Guidelines §15088.5(a). Examples of significant new information requiring recirculation include "new significant environmental impacts from the project or from a new mitigation measure," "substantial increase in the severity of an environmental impact," "feasible project alternative or mitigation measure considerably different from others previously analyzed" as well as when "the draft EIR was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded." Guidelines §15088.5(a) (emphasis added).

If significant new information is brought to the agency's attention prior to certification, the agency is required to revise and recirculate that information as part of the EIR. Cadiz Land Co. v.

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[4] The District objects to page nine, lines 12-15, of Petitioners' reply brief. Evidentiary objections cannot be made to a brief's argument. Nonetheless, the court has not considered the objected to portion of the reply because (a) the court declined to permit an *amicus* brief and the argument is unsupported, and (b) it relies on evidence presented for the first time in reply. *See* Regency Outdoor Advertising v. Carolina Lances, Inc., (1995) 31 Cal.App.4th 1323, 1333.

Rail Cycle, (2000) 83 Cal.App.4th 74, 95 (new expert report disclosing potentially significant impacts to groundwater supply required revision and recirculation of the EIR for purposes of informing the public and agencies of the volume of groundwater at risk).

A subsequent or supplemental EIR is required where an EIR has been prepared and certified, and (a) substantial changes are proposed in the project that will require major revisions of the EIR, (b) substantial changes have occurred with respect to the circumstances under which the project is being undertaken which require major revisions in the EIR, or (c) new information of substantial importance, which was not known and could not have been known in the exercise of reasonable diligence at the time the EIR was prepared and certified, becomes available. Pub. Res. Code §21166; Guidelines §§ 15162, 15163. New information requires a subsequent or supplemental EIR when (A) the project will have one or more significant effects not discussed in the previous EIR, (B) significant effects previously examined will become substantially more severe than anticipated or mitigation measures, or (C) alternatives previously found not feasible would in fact be feasible and would substantially reduce one or more significant effects of the projects, but the project proponents declined to adopt it. Guidelines §15162(a)(3)(B), (C).

Whether the new information requires revision and recirculation, or a subsequent/supplemental EIR, depends on timing. If an EIR has not been certified when the agency learns of the new information, then revision and recirculation is required. Pub. Res. Code §21092.1; Guidelines §15088.5. If an EIR has been certified and the project approved when the agency receives new information, then a subsequent/supplemental EIR is required. Pub. Res. Code §21166; Guidelines §§ 15162, 15163. Laurel Heights II, *supra,* 6 Cal.4th at 1129. This timing is consistent with Pub. Res. Code section 21167.2, which provides that, if an EIR is certified and no lawsuit challenges it, then the EIR shall be conclusively presumed to comply with CEQA "unless the provisions of section 21166 are applicable." In other words, a supplemental/subsequent EIR is the only way to provide additional environmental review to a final EIR.

In this case, the court's judgment only required the District to void and set aside certain portions of the FEIR, take corrective action, and then certify that the recirculated portions of the RFEIR were completed in compliance with CEQA. Resp. RJN Exs. D, E. The Board did so. This means that those portions of the FEIR that were not required to be recirculated now are final and conclusively presumed to comply with CEQA. Pub Res. Code §21167.2. The Pasadena Alternative was presented to and rejected by the District as part of the initial environmental review process. By certifying the FEIR and approving the Project, the Board concluded that the Pasadena Alternative was properly rejected.

When the Board more recently reduced the Project and approved the RFEIR, the Board necessarily concluded that the Pasadena Alternative was not new information constituting a feasible alternative requiring recirculation and additional public comment. *See* Western Place Citizens for an Agric. & Rural Env. v. County of Placer, (2006) 144 Cal.App.4th 890, 906 (substantial evidence supported county's conclusion that revised phasing crated no new impacts). This decision is not final because Petitioners have challenged it. Therefore, if the District is required to conduct further environmental review, it would be through further revision and recirculation of the RFEIR, not through a subsequent/supplemental EIR.

Petitioners correctly argue that at the November 7, 2017 hearing the Board, acting as governing body of the District, abandoned the Project design requirement that the Reservoir must have a two Design Debris Event capacity to ensure that it will provide sufficient downstream flood

protection. SAR 65. The FEIR had considered five alternatives (besides the No Project alternative), requiring the removal of between 2.784 and 4.0 mcy of sediment in order to reach, sometimes approximately, the two Design Debris Event requirement. SAR 50. For the November 7 hearing, a graph of historical Dam capacity showed the Dam's lowered spillway, its 4.0 mcy overall capacity, and the approximately 2.7 mcy of sediment in the Reservoir. SAR 60679. the District Director's briefing sheet expressly noted the Project's two Design Debris Event requirement. SAR 60679.

In introducing her motion Supervisor Barger stated that the removal of 2.4 mcy of sediment from the Basin "may seem a bit ambitious and may be unnecessary." SAR 60466. The Board then voted to reduce from 2.4 mcy to 1.7 mcy the amount of sediment removal, which would create an overall capacity of 3.0 mcy behind the Dam. Pet. Op. Br. at 13.

Petitioners correctly conclude that this reduction of Reservoir capacity to 3.0 mcy is the equivalent of 1.5 Design Debris Events. Yet, the Board adopted the reduced Project without any explanation or analysis how the reduction of sediment removal by 700,000 cy and of its duration by one year could meet the Project objective of a two Design Debris Event capacity (4.0 mcy). Petitioners note that the District had rejected the Pasadena Alternative as infeasible since it did not create a minimum of two Design Debris Events. SAR 1505-06.

Petitioners further argue that the reduced Project rejected reducing the number of truck trips per day (425) or the amount of habitat set to be cleared despite the obvious implication that a reduction in the overall amount of sediment removal would enable an opportunity to reduce the traffic and aesthetic impacts that the FEIR declared significant and unavoidable. SAR 60172, 660246-50 (Statement of Overriding Considerations). Pet. Op. Br. at 14. At the hearing, members of the public continued to express concern regarding the duration of the Project, the number of trucks per day, and the habitat that would be removed by the Project. SAR 60478-92. The District even admitted that the reduced Project made it feasible to reduce the number of truck trips per day. SAR 60498 (Director of the County Department of Public Works: "[O]ne of the things we will want to look at with the reduction in the total amount is whether we spread the amount. The time we do the Project."). SAR 60498. Pet. Op. Br. at 14-15.

Petitioners conclude that the District's decision to deviate from its two Design Debris Event standard opened the Project up to the Pasadena Alternative, which proposed removing merely 1.1 mcy of sediment over a period of five years, reducing the Project's footprint to avoid wetlands on the west side of the Basin, and capping truck trips to 120 per day. The Board's last-minute adoption of the reduced Project constituted new, significant information requiring the recirculation of the RFEIR to re-evaluate the Pasadena Alternative. *See* South County Citizens for Smart Growth v County of Nevada, (2013) 221 Cal.App.4th 316, 330 (recirculation required when all elements of Guidelines section 15088.5(a)(3) are met). Pet. Op. Br. at 14-15.

The court agrees. The reduced Project is not the same Project that was certified in the FEIR and mostly upheld by the court in Arroyo Seco I because its principal objective, reducing flood risk through a two Design Debris Event Reservoir capacity, will not be met. The District expressly required a two Design Debris Event capacity to ensure that the Reservoir always has sufficient capacity to maintain the downstream flood protection. SAR 65. Under the reduced Project, the Reservoir capacity will be only approximately 1.5 Design Debris Events. This does not meet the Project objective.

The District has no evidence or explanation why the Board abandoned the important two

Design Debris Event objective. The ECORP memorandum relied upon to support the Barger Motion addressed only the environmental impacts of a reduced Project; it did not address the two Design Debris Event objective. SAR 61253-61. Consequently, the reduced Project is, in fact, a different project than was approved in the FEIR and discussed in the RFEIR. When an agency modifies a project, it runs the risk that the supporting evidence and documentation will not support it. *Compare* West Chandler Boulevard Neighborhood Assn. v. City of Los Angeles, (2011) 198 Cal.App.4th 1506, 1519-20 (city council's approval of materially different proposal than addressed by zoning administrator violated zoning appeal ordinance).

Had any party sought mandamus on the ground that the RFEIR no longer supports the reduced Project because the Project's principal objective of flood protection will no longer be met, the court would have granted it and set aside the RFEIR. Petitioners do not seek this broad remedy. They contend only that the reduced Project opens the door to recirculation and reconsideration of the Pasadena Alternative.

They are correct. The Pasadena Alternative surely would improve the Project's footprint, better protect habitat, and reduce truck trips. AR 1472. The District rejected the Pasadena Alternative solely because it was inconsistent with the two Design Debris Event objective. The FEIR's response to comments noted that the Park Master Plan was prepared in 2003, which was before the 2009 Station Fire. AR 1505. Following that fire, the amount of sediment in the Reservoir greatly increased. AR 1505. The District is required by law to provide flood protection within its boundaries, and it determined that a storage design capacity of two Design Debris Events is the standard acceptable risk. AR 1505. Alternative 3, Configuration 3 affects the least amount of habitat of all alternatives while still achieving Project objectives, whereas the Pasadena Alternative did not. AR 1506.

The FEIR's explanation for rejection of the Pasadena Alternative no longer is viable. The reduced Project supports only 1.5 Design Debris Events, not two. The Pasadena Alternative would remove 1.1 mcy of sediment. According to the Graph of Historical Reservoir Capacity, this would take the sediment level from 2.7 to 1.6 mcy, establishing a Reservoir capacity of 2.4 mcy, which would be 1.2 Design Debris Events. *See* AR 60702. Is a Reservoir capacity of 1.2 Design Debris Events consistent with a Project objective that permits 1.5 Design Debris Events? The answer is unknown because the District has not stated what the revised capacity objective is. The District is required to answer the question in re-evaluating the Pasadena Alternative.

a. Exhaustion of Administrative Remedies

The District argues that Petitioners failed to exhaust their administrative remedies that a new CEQA document, such as a supplemental/subsequent EIR, is required. Opp. at 8-9. The District notes that exhaustion of administrative remedies is a jurisdictional prerequisite to a lawsuit challenging a CEQA determination. Pub. Res. Code §21177(a) ("[a]n action shall not be brought. . . unless the alleged grounds for noncompliance with [CEQA] were presented to the agency orally or in writing."). Each issue must be raised with sufficient specificity to enable an agency to respond and potentially avoid the need for litigation. Coalition for Student Action v. County of Fullerton, (1984) 153 Cal.App.3d 1194, 1198. The District argues that Petitioners' representatives spoke in favor of the reduced Project. Neither they, nor anyone else, stated that a supplemental/subsequent CEQA document was required. SAR 60454-501. While Petitioners submitted comments on the RFEIR, including that mitigation will not reduce air quality impacts,

the comments did not state that a supplemental or subsequent EIR was required, instead just that the District should recirculate the RFEIR. SAR 61144-45, 61150. The District contends that Petitioners are barred from raising these claims now. Opp. at 9.

Petitioners reply that they sufficiently exhausted this claim. "Less specificity is required to preserve an issue for appeal in an administrative proceeding than in a judicial proceeding." Santa Clarita Organization for Planning the Environment v. City of Santa Clarita, (2011) 197 Cal. App. 4th 1042, 1051. The District falsely claims that Petitioners representative spoke in favor of the Project. In fact, Petitioners' representative reiterated Petitioners' objections to the RFEIR. SAR 60487. One member of Petitioners' organization also objected to the reduced Project's failure to reduce the Project's footprint and mitigation program and continued to urge the District to consider the Pasadena Alternative. SAR 60489-90.

This is sufficient to exhaust administrative remedies. Petitioners were not required to assert the legal vehicle – revision and recirculation or supplemental/subsequent EIR -- by which the Pasadena Alternative should be considered. As discussed, the difference between these two remedies lies is the timing of EIR certification. In any event, the District admits that Petitioners sought recirculation of the RFEIR, which is the remedy the court will impose. Opp. at 9.

b. *Res Judicata*

The District next argues that Petitioners' claims regarding the adequacy of the alternatives studied are barred by the doctrine of *res judicata* because they were litigated in Arroyo Seco I.

The District argues that it was not required to revisit issues other than those required by the writ, which was limited to specific issues. The District contends that it should not have to reconsider every comment submitted in 2014 with regard to options for the Project and recirculation of the RFEIR simply because the Board adopted the reduced Project. "CEQA does not handcuff decisionmakers...If [the agency were required to make a blanket approval]..., the informational value of the document would be sacrificed. Decisionmakers should have the flexibility to implement that portion of a project which satisfies their environmental concerns." Dusek v. Redevelopment Agency, (1985) 173 Cal.App.3d 1029, 1041. According to the District, Petitioners are pushing this specious claim because they want the District to pursue a Project with fewer truck trips and a reduced footprint. But that alternative was not adopted. Instead, with Petitioners support, the Board reduced one element of the approved Project, after confirming the reduction would not have new or more severe environmental impacts and could actually reduce Project impacts. SAR 60566-67. Opp. at 10-11.

"Res judicata bars all []objections to the partially recirculated EIR certification and project approval, except from those issues arising from the partially recirculated EIR [], because the remaining issues were litigated and resolved, or could have been litigated and resolved, in connection with the first petition, and the writ of mandate did not require the County to revisit issues other than [the ones mandated in the writ]." Ione Valley Land, Air, and Water Defense Alliance, LLC v. County of Amador, ("Ione Valley") (2019) 33 Cal.App.5th 165, 171.

Res judicata bars relitigating a cause of action previously adjudicated in another proceeding between the same parties or parties in privity with them. Citizens for Open Government v. City of Lodi, (2012) 205 Cal.App.4th 296, 324. *Res judicata* applies if the decision in the prior proceeding is final, on the merits, and the present proceeding is on the same cause of action as the prior proceeding. Id. *Res judicata* bars the litigation not only of issues that were

actually litigated but also issues that could have been litigated. Id. "Causes of action are considered the same if based on the same primary right. A claim in the present proceeding is based on the same primary right if based on the same conditions and facts in existence when the original action was filed. Ione Valley, *supra,* 33 Cal. App. 5th at 171.

The short answer to the District's argument is that the Board changed the Project. The Board was entitled to do so, but it did so at the risk that its environmental documentation would be inadequate. In reducing the Project, the Board opened it to a new challenge by any party. Petitioners challenge the District's failure to consider the Pasadena Alternative as a feasible alternative. They correctly argue that this challenge is not based on the same "primary right" litigated in Arroyo Seco I. *See* Ione Valley, *supra*, 33 Cal. App. 5th at 171 (citation omitted). Reply at 3-4.

In a related argument, the District contends that Petitioners' assertion that the reduced Project requires the Pasadena Alternative to be treated as feasible is just another late challenge to the adequacy of the range of EIR alternatives, a topic litigated in Arroyo Seco I and barred by *res judicata.* The writ in Arroyo Seco I did not require the District to recirculate the FEIR's alternatives analysis, as this court found the alternatives analysis satisfied CEQA. Resp. RJN, Exs. D; C. Petitioners did not appeal and the FEIR's alternatives analysis is final and beyond challenge. Opp. at 11.

This argument is a red herring. As Petitioners note (Reply at 5), they are not arguing that the District failed to consider an adequate range of alternatives. They argue that the District's last-minute project modification and approval was significant new information which triggered the need to consider feasible alternatives in a revised and recirculated RFEIR. It is not the range of alternatives to which Petitioners object, but rather the reason for rejecting the proposed Pasadena Alternative. This contention is not barred by *res judicata.*

c. Feasible Project Alternative

The District notes that recirculation is required only when "significant new information" shows that a "feasible project alternative" that is "considerably different from others previously analyzed would clearly lessen the environmental impacts of the project but the project's proponents decline to adopt it." Guidelines §15028.5(a)(3); South County Citizens for Smart Growth v. County of Nevada, ("South County Citizens") (2013) 221 Cal.App.4th 316, 330-32. The District contends that Petitioners have not met their burden to demonstrate with "reasoned analysis" supported by substantial evidence in the record that the elements of Guidelines section 15028.5(a)(3) have been met. *See* id. Opp. at 11-12.

The District correctly notes that Petitioners' argument rests on a premise that the removal of only 1.1 mcy would be feasible. The District contends that this premise rests on two unsupported assumptions: (a) removal of 1.7 mcy would not allow the Reservoir to hold two Design Debris Events, and (b) removal of only 1.1 mcy of sediment would still achieve the Project objective of reducing the flood risk to the communities downstream of the Reservoir. SAR 33. Opp. at 12.

As to the first point, the District is simply wrong. The record shows that the FEIR considered a capacity of 4 mcy is the equivalent of two Design Debris Events, meaning that a Design Debris Event consists of 2 mcy of Reservoir capacity. AR 1505. Therefore, the removal of 1.7 mcy of sediment would not achieve a two Design Debris Event capacity.

As to the second point, it is true that Petitioners have not shown that the removal of 1.1 mcy of sediment would achieve the Project objective of downstream flood protection. But that is because the design necessary to meet Project objective now is unknown. The objective used to include a capacity of two Design Debris Events, but the Board's approval of the reduced Project shows that a Reservoir capacity of 1.5 Design Debris Events may do. Would the Pasadena Alternative, which would permit 1.5 Design Debris Events, also be adequate? The answer is unknown. This is an issue that must be considered by the Board, and on which the public must have an opportunity to comment.

The District also argues that, while "the Pasadena Alternative is considerably different from other alternatives previously analyzed in the RFEIR", Petitioners fail to show why the Pasadena Alternative is considerably different than the reduced Project -- other than to observe that it would have a smaller fingerprint "to avoid wetlands," would limit "truck trips," and remove less sediment. Petitioners fail to disclose that the District did not adopt Pasadena's suggestion because the selected Alternative 3, Configuration D, was already "based" on the Pasadena Alternative. AR 1506. It is well-established that an EIR need not include multiple variations on the alternatives it considers. Saltonstall v. City of Sacramento, (2015) 234 Cal.App.4th 549, 577. Opp. at 12-13. Petitioners contend that because the Pasadena Alternative has a smaller footprint and fewer truck trips it would "obvious[ly]" reduce significant and unavoidable traffic and aesthetic impacts. But Petitioners do not discuss the significant and unavoidable impacts or point to any substantial evidence that Pasadena's suggestion would substantially reduce those impacts to below a level of significance. Opp. at 13.

The court does not agree. The Pasadena Alternative noted that the Project and its alternatives would remove between 2.4 and 4.0 mcy with an affected area of 76 to 120 acres. AR 1472. The Project's footprint would have a greater impact to native vegetation and habitat than envisioned by the Park Master Plan. AR 1472. The Pasadena Alternative proposed the removal of 1.1 mcy of sediment (establishing a Reservoir capacity of 2.5 mcy), removing a maximum of 220,000 cy per year, modifying the Project's footprint so there would be "no excavation in the westside stream channel" to preserve riparian habitat on the west side of the Basin, limiting truck trips to no more than 120 per day, and mitigating sensitive habitat -- such as riparian and alluvial habitat -- at a rate of 5:1. SAR 60654–57. This is considerably different than the reduced Project, which reduced the volume of sediment removed to 1.7 mcy, but maintained the Project footprint and truck trips. SAR 60466-67. As Petitioners argue, the Pasadena Alternative would alleviate the Project's significant and unavoidable traffic/transportation impacts and aesthetics by reducing the number of trucks and Project footprint. SAR 1470-72. The court has no idea whether this is consistent with Project objectives, and therefore its feasibility is unknown. But the reason why its feasibility is unknown lies in the Board's willingness to overlook Project design requirements for the downstream flood control objective without any explanation.

d. Public Opportunity to Comment

The District argues that Petitioners are wrong that the Reduced Project is significant new information requiring recirculation because it deprived the public of the opportunity to comment on the County's decision under Spring Valley Lake Assn. v. City of Victorville, ("Spring Valley") (2016) 248 Cal.App.4th 91, 108-09. According to the District, Petitioners cannot point to any evidence that reducing sediment removal would trigger recirculation under Guidelines section

15088.5(a)(1) or (2). ECORP's 11-page memorandum is substantial evidence that the reduced Project creates no new, and could actually reduce, environmental impacts. SAR 61253-61. The record shows that the sediment removal reduction would shorten the Project "by approximately one year," reducing "impacts to air quality, biological resources, greenhouse gases, recreation/public services, and transportation and traffic." SAR 61261. Recirculation is not required when, if anything, changes to a project will result in fewer impacts. See Western Place Citizens for an Agric. & Rural Env. v. County of Placer, (2006) 144 Cal.App.4th 890, 904. Opp. at 13. Opp. at 13.

Clearly, the Board's conclusion that the reduced Project would not increase environmental impacts is supported by substantial evidence, as embodied in the ECORP memorandum. But Petitioners are correct this fact is not dispositive because at this point the Project's objectives are unknown and the Pasadena Alternative may be feasible. The public was entitled to comment on this issue. The Spring Valley court defined "significant new information" broadly by holding that even omission of information from a draft EIR deprived the public of a meaningful opportunity to review and comment upon the significant new information. 248 Cal. App. 4th at 108 (city's revisions to air quality analysis in final EIR included information omitted from draft EIR that constituted significant new information on which the public did not have a meaningful opportunity to comment and recirculation was required). The District omitted all information pertaining to the reduced Project's objectives and deprived the public of a meaningful opportunity to comment on the reduced amount of sediment removal and the potential alternatives available as a result. Guidelines § 15088.5(a). Reply at 6.

In conclusion, the Board's modification to the Project which no longer met a principal Project objective was new, significant information requiring consideration of the Pasadena Alternative. This was significant new information concerning a "feasible project alternative...considerably different from others previously analyzed." Guidelines §15088.5(a). By not revising and recirculating the RFEIR, the District deprived the public of "a meaningful opportunity to comment on" the reduced amount of sediment removal required for the Project and the potential alternatives available as a result. Spring Valley, *supra,* 248 Cal.App.4th at 108-09.

3. New Information Concerning NOx Emissions from Model Year 2010 Trucks as a Trigger for Additional Environmental Review

Petitioners contend that the District was required to recirculate the RFEIR in light of new information that the Model Year 2010 trucks, required as part of MM AQ-1, emit five to 18 times greater NOx than the District originally believed when it certified the FEIR in 2014. SAR 8138-54. The CE-CERT studies prepared for SCQAMD (SAR 10290-91 (Nov. 2016 Johnson Study); SAR10359-60 (Feb. 2017 Durbin Study)), indicate that "[a]though the 2010 certification standards were designed to reduce NOx emissions, the in-use NOx emissions are actually much higher than certification standards." SAR 10295. Based on the CE-CERT studies, environmental scientists Hagemann, Rosenfeld, and Nolan opined that the RFEIR's conclusion that "the Project's construction-related NOx emissions would be reduced from approximately 378 lbs/day to just 82 lbs/day emissions through the use of Model Year 2010 hauling trucks is unsupported". SAR 8145. They argued that the Project "has the potential to cause the Project's NOx emissions to exceed SCAQMD thresholds using MY2010 trucks", and that "the air quality impacts from the Project's 425 daily hauling truck trips will not be adequately mitigated." SAR 8145. In addition, Hagemann,

Rosenfeld, and Nolan concluded that the RFEIR underestimated the project's health impacts from diesel particulate matter would expose people around the project to cancer risks far in excess of regulatory thresholds of significance. SAR 8151. The District ignored this information, asserting that it was not legally required to address it. SAR 8153-54. Pet. Op. Br. at 16.

Petitioners argue that the District was required to analyze this new data concerning in use emissions from Model Year 2010 trucks as it constitutes significant new information of a new environmental impact, as well as evidence of a substantial increase in the severity of the Project's air quality impacts, that would not be mitigated by the Project requiring at minimum Model Year 2010 Year Trucks. Guidelines § 15088.5(a). As a result, Petitioners contend that the District was required to revise and recirculate the RFEIR. Pet. Op. Br. at 17.

The District responds that Petitioners' air quality argument is barred by *res judicata*. "*Res judicata* bars all [] objections to the partially recirculated EIR certification and project approval, except from those issues arising from the partially recirculated EIR..." Ione Valley, *supra*, 33 Cal.App.4th at 170. This court in Arroyo Seco I upheld the adequacy of the FEIR's air quality analysis and of MM AQ-1, and the District was not required to reconsider these issues in the RFEIR. *See* Resp. RJN Ex. G. Opp. at 14. The court's writ did not find fault with the FEIR's analysis of Project air quality impacts; it merely required that the District state the model year of the trucks. The court's writ only ordered clarification for MM AQ-1 as follows: "LACFCD shall require all construction contractors during the sediment removal phase of the Proposed Project to use only sediment removal dump trucks that meet EPA's emission standards for Model Year 2010. Model Year 2007 or later." Resp. RJN, Ex. D, pp. 2-3. The RFEIR performed this task (SAR 7867, 7882), and Petitioners are barred from re-litigating issues that were not required to be recirculated by the court. Opp. at 14.

The court in Arroyo Seco I only required that the District state in MM AQ-1 that Model Year 2010 or later trucks would be used in construction and that all other aspects of the air quality analysis and MM AQ-1 provisions are final. The District rejected the CE-CERT studies and the comments of Petitioners' experts on the basis that it was not legally required to address them in the RFEIR. SAR 8153-54. The District was correct. The portions of the FEIR pertaining to air quality remained certified after Arroyo Seco I with the exception of a requirement in MM AQ-1 concerning use of 2010 model year or later trucks. The adequacy of using such trucks to mitigate air impacts was final and conclusively presumed to comply with CEQA. Pub Res. Code §21167.2.

This does not mean, however, that the District need not conduct further environmental review of MM AQ-1. It means only that the District has no obligation to revise and recirculate the RFEIR on any ground other than to state that model year 2010 or later trucks would be used. Yet, if Petitioners or anyone else presents sufficient new information requiring additional environmental review, a supplemental/subsequent EIR could be required.

A subsequent or supplemental EIR is required where an EIR has been prepared and certified, and (a) substantial changes are proposed in the project that will require major revisions of the EIR, (b) substantial changes have occurred with respect to the circumstances under which the project is being undertaken which require major revisions in the EIR, or (c) new information of substantial importance, which was not known and could not have been known in the exercise of reasonable diligence at the time the EIR was prepared and certified, becomes available. Pub. Res. Code §21166; Guidelines §§ 15162, 15163. New information requires a subsequent or supplemental EIR when (A) the project will have one or more significant effects not discussed in

the previous EIR, (B) significant effects previously examined will become substantially more severe than anticipated, or (C) alternatives previously found not feasible would in fact be feasible and would substantially reduce one or more significant effects of the projects, but the project proponents declined to adopt it. Guidelines §15162(a)(3)(B), (C).

Addressing the District's *res judicata* argument, Petitioners are not seeking to re-litigate issues addressed in Arroyo Seco I – including the adequacy of the FEIR's air quality analysis. Rather, they contend that new information made available after the FEIR was certified and was final now requires additional environmental review. Both Citizens for Open Government, *supra*, 205 Cal.App.4th at 325, and Ione Valley, *supra*, 33 Cal..App.5th at 171, recognize that *res judicata* does not bar situations where new conditions and facts give rise to new claims not based on the same primary right. Otherwise, there would never be a need for a subsequent/supplemental EIR under Pub. Res. Code section 2116 and Guidelines section and 15162.[5]

The question is whether the CE-CERT studies, prepared for SCAQMD and providing evidence that the use of Model Year 2010 trucks will result in higher NOx emissions than previously assumed by the District, meet the test for "new information of substantial importance"? In analyzing this issue, the court will assume that the CE-CERT evidence is of substantial importance. The Project involves 425 truck trips per day during excavation activities, for an estimated nine months a year, six days a week, for four or five years. SAR 8138. Under these circumstances, the Project's construction air quality impacts could be substantially important. Petitioners' environmental scientists concluded that (a) the RFEIR's conclusion that "the Project's construction-related NOx emissions would be reduced from approximately 378 lbs/day to just 82 lbs/day emissions through the use of Model Year 2010 hauling trucks is unsupported", (b) the Project "has the potential to cause the Project's NOx emissions to exceed SCAQMD thresholds using MY2010 trucks", and (c) "the air quality impacts from the Project's 425 daily hauling truck trips will not be adequately mitigated." SAR 8145.

Given that the CE-CERT study information may be substantially important, is it sufficient to overcome the finality of the FEIR's air quality analysis and the conclusive presumption that the analysis complies with CEQA? Pub Res. Code §21167.2. The answer is no because the information could have been presented in the exercise of due diligence in the Arroyo Seco I challenge to the FEIR. The Board certified the FEIR and approved the Project on November 12, 2014. The CE-CERT studies were prepared between 2013 and 2017. AR 8139, fn. 2, 3.[6] Examination of the February 2017 Durbin CE-CERT study reveals that it is a final report and an in-use emissions testing study was published and available in September 2013. SAR 8139, n.2, 3 (Miller, Wayne, et al. (September 2013) "In-Use Emissions Testing and Demonstration of Retrofit Technology for Control of On-Road Heavy-Duty Engines").

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[5] The District further argues that Petitioners' supposed new information is not new because the court previously addressed this argument in ruling on the motion to discharge the writ. Opp. at 15. Petitioners correctly note (Replly at 9) that the court's December 5, 2017 ruling declined to rule on Petitioner's air quality claim in discharging the writ: "[T]he modification ordered by the Writ [to modify MM AQ-1 to require Model Year 2010 or later trucks] . . . is all that is at issue in this motion." Resp. RJN Ex. G, p. 11.

[6] Petitioners filed Arroyo Seco I, which challenged the FEIR and Project approvals, on December 11, 2014. The court issued the judgment in Arroyo Seco I on April 19, 2017.

Thus, Petitioners have not met the test that the CE-CERT study information was not known and could not have been known in the exercise of reasonable diligence at the time the EIR was prepared and certified. Pub. Res. Code §21166; Guidelines §§ 15162, 15163. The February 2017 study was not available, but the September 2013 study had been available for over a year before the Board certified the FEIR in November 2014. Petitioners have not shown that this study did not contain sufficient information to raise their claim that Model Year 2010 trucks will result in higher NOx emissions than previously assumed by the District. Since Hagemann, Rosenfeld, and Nolan based their opinions on the CE-CERT studies, these opinions should have been proffered after the September 2013 study and before the November 2014 FEIR certification as well.[7]

No additional environmental review is required for NOx emissions from Model Year 2010 and later trucks.

4. The Environmental Impacts of, and Unlawful Deferral of Performance Standards for, MM BIO-6 and -8

a. Collateral Estoppel

The District argues that collateral estoppel precludes Petitioners from re-litigating the adequacy of MM BIO-6 and -8. The District argues that Petitioners challenged the adequacy of MMs BIO-6 and -8 when they opposed the County's Motion to Discharge the Writ and this court rejected their arguments and discharged the writ. RJN, Ex. J (Opp. to motion to discharge writ), p. 2. In granting discharge of the writ, the court ruled that "substantial evidence [] supports the RFEIR's conclusion that the biological resource impacts will be reduced to less than significant levels" by MM BIO-6 and -8. Resp. RJN Ex. G, p.13. Further, the court upheld the adequacy of the District's inclusion of the Habitat Restoration Plan in MM BIO-6 and -8:

> "Thus, although the Habitat Restoration Plan does not provide a direct justification for imposition of a 1:1 mitigation ratio, the robustness and detail of these measures provide indirect evidence that the imposition of a 1:1 mitigation ratio is appropriate because measures of accountability and security are firmly in place." Resp. RJN, Ex. G, p.10.

The District contends that Petitioners are barred by collateral estoppel from contesting the adequacy of MM BIO-6 and -8. Petitioners do not get to file round after round of litigation, each time citing to a different paragraph of the comment letters of their retained expert, Cashen. Furthermore, as the court stated: "[T]he [District's] point that disagreement among experts does not render an EIR inadequate is well-taken, permitting the [District] to favor certain expert biological's opinions over [Scott] Cashen's contrary ones." Ex. G, p. 11. Opp. at 16.

Collateral estoppel is one of two aspects of *res judicata*. In its narrowest form, *res judicata* "precludes parties or their privies from re-litigating a cause of action [finally resolved in a prior proceeding]." Teitelbaum Furs, Inc. v. Dominion Ins. Co., Ltd., (1962) 58 Cal. 2d 601, 604. *Res judicata* also includes a broader principle, collateral estoppel, under which an issue necessarily

[7] Petitioners' additional argument about cancer risk (SAR 8151) is not based on any new information and is foreclosed by the conclusive presumption that the FEIR's health risk analysis complies with CEQA. Pub. Res. Code §21167.2.

decided in a prior action may be conclusively determined as against the parties or their privies in a subsequent lawsuit on a different cause of action. Id. Because the estoppel need not be mutual, it is not necessary that the earlier and later proceedings involved the identical parties or their privies. Only the party against whom the doctrine is invoked must be bound by the prior proceeding. Lucido v. Superior Court, (1990) 51 Cal. 3d 335, 341. Collateral estoppel applies to bar re-litigation of an issue if (1) the issue is identical to an issue litigated in the first action; (2) the issue was actually litigated and necessarily decided in the first action; (3) the party in the second action was a party or one in privity to a party in the first action; and (4) the decision in the first action was on the merits. McCutchen v. City of Montclair, (1999) 73 Cal. App. 4th 1138, 1145.

Petitioners correctly reply that the "identical issue" element for collateral estoppel addresses whether "'identical factual allegations' are at stake in the two proceedings, not whether the ultimate issues or dispositions are the same." Lucido v. Superior Court, (1990) 51 Cal.3d 335, 342. Reply at 9-10. The issues in the District's motion to discharge the writ and Petitioners' instant deferred mitigation issue are separate issues. The court's ruling on the motion to discharge was limited to whether the District complied with the writ by presenting substantial evidence supporting the 1:1 mitigation ratio in MM BIO-6, -7, and -8. Resp. RJN Ex. G, p. 14; Ex. D, p.1. In contrast, Petitioners' mitigation claims arise from the changes made in the RFEIR "to clarify the extensive habitat monitoring and management obligations required to ensure successful mitigation at a 1:1 ratio." Opp. at 6. The issue whether substantial evidence supported the 1:1 mitigation ratio decided in the motion to discharge is different from the issues raised now whether those changes impermissibly fail to analyze the environmental impacts of that mitigation, or whether mitigation has been improperly deferred by failing to identify performance standards.

Petitioners are not barred by collateral estoppel from arguing that the RFEIR failed to analyze MM BIO-6 and -8's environmental impacts and that it improperly deferred mitigation performance standards.

b. Environmental Impacts of MM BIO-6 and -8

Mitigation measures themselves may cause significant environmental impacts. If a mitigation measure would cause one or more significant impacts distinct from the significant effects caused by the project, the effect of the mitigation measure shall be discussed, but in less detail than the significant effects of the project. Guideline §15126.4(a)(1)(D); Save Our Peninsula, *supra*, 89 Cal.App.4th at 131.

In Save Our Peninsula, the court held that, in addition to failing to discuss the details and feasibility of offsite water credits to mitigate the significant water impacts of increased pumping for the project's 117 new residences in the Carmel Valley – the water shortage was a matter of public concern -- the county failed to analyze the direct and indirect impacts which might result from implementation of the mitigation measure, including the growth-inducing effects of mitigating the project's increased pumping with off-site pumping reduction, including the loss of agricultural lands. Id. at 131, 143.

The RFEIR's revision to MM BIO-6 and -8 calls for adaptive management measures, including corrective regrading, if the mitigation measures do not demonstrate measurable progress towards achieving the required performance standards. SAR 8052. The revisions state that it is not clear if the re-grading would extend into areas not previously included in the measure, nor how substantial it might be. SAR 8052. Re-grading could "adversely impact City recreational, utility

and service uses within the [P]ark by changing things like slope, surface conditions or drainage patterns, thereby generating significant environmental effects." SAR 8052. Pet. Op. Br. at 17.

Biologist Scott Cashen ("Cashen") noted that efforts to create mitigation habitat can have their own significant impacts:

> "The habitat creation, restoration, and enhancement activities proposed as ...mitigation may require grading, mechanical equipment, and use of herbicides. In addition, these activities would likely involve extensive removal of non-native trees, shrubs, and other vegetation with properties that prevent erosion. These activities may result in mortality of special-status plants and animals; loss of habitat; disruption of essential breeding, foraging, and sheltering activities; and other significant impacts to sensitive biological resources. As a result, the compensatory mitigation proposed in the RFEIR may have significant direct and indirect effects on biological resources at the mitigation sites." SAR 10784. Pet. Op. Br. at 17-18.

Petitioners argue that the District was required, and failed, to discuss the potentially significant impacts MM BIO-6 and -8 would have on the environment. Petitioners contend that the RFEIR fails to discuss the potential impacts of corrective re-grading or provide substantial evidence that implementation of adaptive management measures as part of MM BIO-6 and -8 would not result in significant environmental impacts of their own. The RFEIR merely notes that corrective re-grading would be "limited to areas within the boundaries of the actual mitigation sites" and that re-grading plans "would be developed in a manner that would not be expected to adversely impact City recreational, utility and service uses within the park by changing things like slope, surface conditions or drainage patterns." SAR 8065. Pet. Op. Br. at 18.

Petitioners contend that this response is inadequate and fails to meet the District's CEQA obligation to provide an adequate informational document supported by substantial evidence. The RFEIR does not explain how the District will ensure that adaptive management measures such as re-grading will not have significant impacts on the slope, surface conditions, or drainage patterns at mitigation sites, and entirely ignores the fact that MM BIO-6 and -8 contemplate both on-site and off-site mitigation sites. SAR 7873, 7876 (mitigation site locations will be on-site, off-site within Arroyo Seco subwatershed, and off-site within the greater Los Angeles River watershed). Petitioners argue that the RFEIR should be revised and recirculated to disclose and analyze the environmental impacts of creating mitigation habitat and subsequent restoration effort necessary if the mitigation habitat fails. Pet. Op. Br. at 18.

The District responds (Opp. at 16) that the adaptive management measures are restricted to mitigation sites. AR 8065. The County was directed in 2014 to "[w]ork with the permitting agencies and stakeholders to restore habitat in the project area that is consistent with the Hahamongna [Park] Master Plan", and the Park Master Plan explains in its Conceptual Grading Plan how impacts to recreational uses will be avoided, and in its Recreation Trails section the recreational uses and potential impacts from habitat creation. AR 24591, 24622.

Petitioners reply (Reply at 11) that restricting adaptive management measures to mitigation sites and conducting habitat restoration consistently with the Park Master Plan have little significance for the issue whether MM BIO-6 and -8's revised habitat mitigation measures are

likely to have their own significant impacts. Reply at 11. The Park Master Plan's Conceptual Grading Plan does not address or otherwise propose to mitigate the potentially significant environmental impacts of the corrective re-grading that would be required for adaptive management measures. Reply at 11.

The restriction of adaptive management to the mitigation sites has some bearing on the adaptive management issue. Re-grading would not occur in pristine areas, but rather in mitigation sites already disturbed. Compliance with the Park Master Plan for habitat restoration also has some bearing on the environmental impacts of mitigation, although Petitioners are correct that the Conceptual Grading Plan does not expressly address re-grading environmental impacts.

More important, however, the District is correct that Petitioners' concern about environmental impacts from adaptive management -- which is based on Cashen's opinion that "the compensatory mitigation proposed in the RFEIR may have significant direct and indirect effects on biological resources at the mitigation sites" (SAR 10784) -- is not specific and asks for impossible speculation about what adaptive management measures might be undertaken. By definition, adaptive management occurs only if mitigation efforts fail. *See* SAR 7906, 7908. To some extent, the RFEIR analyzed the environmental impacts of adaptive mitigation measures, stating that "[i]f corrective re-grading is determined to be necessary, it would be limited to areas within the boundaries of the actual mitigation sites. Any plans for re-grading would be developed in a manner that would not be expected to adversely impact City recreational, utility, and service uses within the park by changing such things as slope, surface conditions, or drainage patterns." SAR 8065. The RFEIR could not do much more. Additionally, CDFW now has approved the Habitat Restoration Plan, which is binding on the County and provides that the District must take corrective measures in the event of site failure in habitat restoration. Resp. RJN, Ex. L, pp. 89-92.[8] Opp. at 16-17.

Petitioners reply that the RFEIR fails to explain how the District will avoid impacts to recreational, utility, and service uses within the Park by changing slope, surface conditions, or drainage patterns, and fails to make a binding commitment that its re-grading plans would be designed not to do so. County of Fresno, *supra*, 6 Cal.5th at 516 (EIR's discussion of environmental impacts should reasonably set forth sufficient information for public and decision-makers to consider). Reply at 11.

This argument ignores the fact that less detail is required for the environmental impacts of

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[8] The RFEIR required the Habitat Restoration Plan:

> "Prior to the implementation of any vegetation removal associated with the Project, a Habitat Restoration Plan [] describing the restoration activities and the performance standards established to determine the success of the restoration activities, must be prepared and approved by CDFW as a Trustee Agency with jurisdiction over natural resources affected by the Project (State CEQA Guidelines, Section 15386) and pursuant to CDFW's authority as a Responsible Agency under CEQA Guidelines Section 15381 over those aspects of the proposed project that come under the purview of the California Endangered Species Act (CESA) (Fish and Game Code, Section 2050 et seq.) and Fish and Game Code Section 1600 et seq." SAR 8032.

mitigation measures than for the significant effects of the project. Guideline §15126.4(a)(1)(D). Petitioners' argument also fails to provide specificity, ignores the speculation that would be required to comply, and ignores the binding nature of the Habitat Restoration Plan.

The RFEIR did not fail to address the environmental impacts of MM BIO-6 and -8.

c. Deferral of Development of Performance Standards

Mitigation measures adopted into an EIR are required to describe what actions that will be taken to reduce or avoid an environmental impact. Guidelines §15126.4(a)(1)(B). "Formulation of mitigation measures should not be deferred until some future time...[but] 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." Id.

The courts have discussed this exception to the general rule against deferral of mitigation measures where the performance criteria are identified and described in the EIR. Sacramento Old City Ass'n v. City Council, ("SOCO") (1991) 229 Cal.App.3d 1011. While details of mitigation measure may be deferred, the agency is required to commit itself to eventually devising measures that will satisfy specific performance criteria or standards adopted at the time of project approval. Id. at 1028-29. Pet. Op. Br. at 18-19.

The reasoning behind this rule is that, if the success of mitigation remains uncertain, the agency cannot reasonably determine that the project's environmental effects will be reduced to less than significant. Sundstrom v. County of Mendicino, (1988) 202 Cal.App.3d 296, 306-08. Deferral of environmental assessment after project approval violates CEQA policy that impacts must be identified before project momentum reduces the agency's flexibility to change its course of action. Id. However, where a statement of overriding considerations states that significant impacts will be unmitigable regardless of the proposed mitigation measures, it is permissible to commit to mitigation subject to performance standards that will be set in the future. Fairview Neighbors v. County of Ventura, (1999) 70 Cal.App.4th 238, 244 (habitat management plan would prepared in the future, and biologist would set the performance standards). The reason is that the impacts will still be significant and unmitigable even when the mitigation measures are implemented, and the agency has decided to approve the project knowing that fact. Id.

Impermissible deferral can occur when an EIR calls for mitigation measures to be created based on future studies or where it describes mitigation measures in general terms, but the agency fails to commit itself to specific performance standards. Preserve Wild Santee v. City of Santee, ("Preserve the Wild Santee") (2012) 210 Cal.App.4th 260, 281 (EIR recognized that vegetation management was key in mitigating project impacts on endangered butterfly, but draft habitat plan failed to provide standards or guidelines regarding proper vegetation management to maintain the butterfly's habitat); San Joaquin Raptor Rescue Center v. County of Merced ("San Joaquin Raptor") (2007) 149 Cal.App.4th 645, 671 669, 671 (EIR's analysis of mitigation measures regarding vernal pools and burrowing owl habitats failed to provide and commit to specific criterion or standard of performance, deferring to future protocol studies and management plan that "will likely include such options as periodic mowing, rotational grazing, and weed abatement."). Pet. Op. Br. at 19.

Petitioners argue that the RFEIR expressly defers the development of performance standards for the Project's mitigation habitat because it merely states that "select offsite reference sites.... will be used to establish the necessary performance standards." SAR 7873-74, 7877. Pet.

Op. Br. at 19. Petitioners argue that, as in Preserve the Wild Santee and San Joaquin Raptor, the RFEIR fails to provide and commit to a specific criterion or standard of performance for the habitat mitigation measures. The RFEIR's bare description -- which leaves room for wide variation in the amount and richness of non-native and native species cover -- is similar to the general description mitigation management activities in San Joaquin Raptor, *supra*, 149 Cal.App.4th at 669. Without identifying the specific performance standard that MM BIO-6 and -8 will be required to meet, the RFEIR fails to provide substantial evidence or adequate information for the public whether these habitat mitigation measures would mitigate the Project's impact to riparian and other sensitive vegetation communities to less than significant levels. Pet. Op. Br. at 19-20. Further, the RFEIR fails to explain why it was necessary to defer the formulation of the biological mitigation measures. *See* San Joaquin Raptor, *supra*, 149 Cal.App.4th at 670. Pet. Op. Br. at 20.

The District responds that MM BIO-6 and -8 establish appropriate future actions to ensure mitigation. The RFEIR explains that MM BIO-6 and-8 ensure that performance standards for the habitat at the mitigation sites will be established based on comparisons to undisturbed habitat at reference sites. SAR 8040, 7873, 7876 ("The reference sites will be used to establish the necessary performance standards to which the mitigation site will be assured"). These performance standards must be achieved for the mitigation to be deemed successful, even if it takes longer than the required monitoring period of five years. SAR 8040.

The methods to develop performance standards from the reference sites are documented in the RFEIR and incorporated into MM BI0-6 and -8. SAR 7891. Established methodologies (*e.g.*, transects, quadrats, or other applicable methods) will be used to conduct quantitative monitoring of the reference sites to calculate percent cover of native/nonnative/invasive plant species and to evaluate native plant species richness by the number of different plant species, structural patch richness, and wildlife use. SAR 7891. The specific values for each parameter will be determined at the reference sites for each of the target habitats and success of the restoration and enhancement sites will be measured against the values obtained for each of the parameters at the reference sites. SAR 7891. Opp. at 18-19.

The RFEIR further commits the District to developing the Habitat Restoration Plan, which will describe the types of habitats to be restored or enhanced, the methods for doing so, performance standards for determining success, monitoring requirements an, reporting requirements, long-term management and protection of the mitigation sites. SAR 8040. According to the District, this is consistent with CEQA case law that permits deferral of the specifics for a habitat restoration plan so long as further action is contingent upon meeting all identified performance criteria. SAR 8040-41. Opp. at 18-19. *See* SOCO, *supra,* 229 Cal.App.3d at 1029-30 (commitment to and list of options to mitigate parking impacts was sufficient). While Petitioners argue that the RFEIR should have explained why it was necessary to defer formulation of performance standards, the RFEIR's Master Response 5 explains that precise details of the Habitat Restoration Plan cannot be determined because they will have to be finalized in consultation with, and approved by, CDFW. SAR 8041. Opp. at 19.

The District points out that the Habitat Restoration Plan now has been prepared, approved by CDFW, and is binding on the District. Resp. RJN Ex. L, p. 4. Consistent with the RFEIR, the Habitat Restoration Plan requires development of performance standards for habitat at the mitigation sites based on comparisons to reference sites. Resp. RJN Ex. L, pp. 80-81. The Habitat Restoration Plan states that the performance standards will be measured annually. Ex. L, p. 75.

The Plan defines each criterion and reiterates that reference sites will be used to define the performance targets. Ex. L, p9. 79-81. The performance criteria will be patch richness (riparian only), percent cover of native and non-native plant species, native plant species richness, and wildlife use monitoring. Ex. L, p. 75-77. The Plan sets forth the specific percentage or standard for each performance criterion. Ex. L, pp. 75-77.

The District relies on Defend the Bay v. City of Irvine, ("Defend the Bay") (2004) 119 Cal.App.4th 1261, in which the court found no improper deferral of mitigation when future investigations and consultation with regulatory agencies were required. Id. at 1275. An agency may defer defining the specifics of mitigation measures if it "commits itself to mitigation and lists the alternatives to be considered, analyzed, and possibly incorporated in the mitigation plan." Ibid. It may also commit to mitigation and submit to the existing performance guidelines and approval by another agency. Ibid. (citing Endangered Habitats League v. County of Orange, (2005) 131 Cal.App.4th 777, 794). An agency may also defer identifying a mitigation site pending the results of further studies. California Native Plant Society v. City of Rancho Cordova, ("California Native Plant") (2009) 172 Cal.App.4th 603, 622 (mitigation measure requiring preservation/enhancement of replacement habitat not required to identify specific mitigation site). Opp. at 18.

Petitioners implicitly admit that the Habitat Restoration Plan contains just the type of performance criteria required by CEQA. *See* Ex. L, pp. 75-77. Petitioners argue that the RFEIR's commitment to develop performance standards remains insufficient because CEQA expressly prohibits agencies from deferring the development of performance standards. Reply at 12. Petitioners further argue that the RFEIR's Master Response 4, which notes that the Project will be required to develop performance standards with CDFW, fails to meet CEQA's legal requirements. The mere fact that CDFW had to approve the Habitat Restoration Plan does not mean that the District could not have proposed a performance standard for mitigation habitat in the RFEIR. The need to consult with or obtain approval of another agency is an insufficient reason not to state performance standards. San Joaquin Raptor, *supra*, 149 Cal. App. 4th at 671 (mitigation measure that required preservation of grassland area as recommended by CDFG and the California Burrowing Owl Consortium" was insufficient due to a lack of performance standards). Reply at 12.

Petitioners distinguish Defend the Bay as a case where mitigation measures at issue were found to be properly deferred because they had "specific performance criteria articulated at the time of project approval" and required approval from USFWS and CDFW. 119 Cal.App.4th at 1275-76. Reply at 11-12. Petitioners add that the RFEIR's Master Response 5 does not adequately explain why a performance standard for mitigation habitat could not have been proposed as part of the Project's RFEIR. This is underscored by the fact that the District created a Draft Habitat Mitigation and Monitoring Plan, complete with performance standards, well before the RFEIR was recirculated. SAR 59283, 59288, 59403-04. Reply at 12.

Given that performance standards approved by CDFW have been adopted, Petitioners' argument lies in the District's failure to present any proposed standards to the public for opportunity to comment, and to the Board for informed decision-making, prior to approval of the reduced Project. This is a CEQA violation, and the RFEIR's improper deferral of mitigation performance standards is a failure to proceed in a manner required by law. County of Fresno, *supra*, 6 Cal.5th at 516.

F. Conclusion

The Petition is granted. The Board's modification to the reduced Project, which prevented it from meeting a principal Project objective, was new, significant information requiring consideration of the Pasadena Alternative as a feasible project alternative that is considerably different from others previously analyzed. *See* Guidelines §15088.5(a). By not revising and recirculating the RFEIR, the District also deprived the public of "a meaningful opportunity to comment on" the reduced amount of sediment removal required for the Project and the potential alternatives available as a result. Spring Valley, *supra,* 248 Cal.App.4th at 108-09. The RFEIR's improper deferral of mitigation performance standards for MM BIO-6 and -8 was a failure to proceed in a manner required by law. County of Fresno, *supra,* 6 Cal.5th at 516.

A writ shall issue to compel the Board to set aside the reduced Project approval and RFEIR certification, take action to revise and recirculate the RFEIR to address the Pasadena Alternative and to permit public comment on mitigation performance standards before approving the reduced Project.

Petitioner's counsel is ordered to prepare a proposed judgment and writ of mandate, serve them on the District's counsel for approval as to form, wait ten days after service for any objections, meet and confer if there are objections, and then submit the proposed judgment and writ along with a declaration stating the existence/non-existence of any unresolved objections. An OSC re: judgment is set for July 25, 2019 at 9:30 a.m.