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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

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OUTFITTER PROPERTIES, LLC & ROCKY  
SPRINGS RANCH, LLC,  
  
Plaintiffs and Appellants,

v.

STATE WATER RESOURCES CONTROL BOARD et  
al.,  
  
Defendants and Respondents.

C064470  
  
(Super. Ct. Nos.  
06CS01520 & 07CS00462)

Plaintiffs Outfitter Properties, LLC and Rocky Springs Ranch, LLC, the owners of Oasis Springs Lodge and Rocky Springs Ranch, appeal from the denial of their consolidated petition for writ of mandate, seeking to overturn a project subject to the California Environmental Quality Act.<sup>1</sup>

Plaintiffs contend the trial court incorrectly concluded certain CEQA contentions were barred by plaintiffs' failure to

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<sup>1</sup> Public Resources Code section 21000, et seq., "CEQA".

exhaust administrative remedies with the State Water Resources Control Board (Board), and incorrectly rejected their CEQA contentions on the merits. Plaintiffs also contend a project funding approval by the Department of Fish and Game (DFG) improperly gives funds to Pacific Gas and Electric Company (PG&E) which could be used to condemn property, in violation of Proposition 50.<sup>2</sup> We disagree and shall affirm.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

A number of parties worked for a long time to create the "Battle Creek Salmon and Steelhead Restoration Project" (project) to partially repair habitat for Chinook salmon and steelhead trout<sup>3</sup> that had been damaged by hydroelectric dams.

Battle Creek, a tributary to the Sacramento River, receives its water from the slopes of Mount Lassen. It is the site of hydroelectric facilities dating back over a century, now owned by PG&E and operated under a license issued by the Federal Energy Regulatory Commission (FERC). Battle Creek is located in a rugged area, and originates in part from water percolating through volcanic soils, rather than from snow melt, and therefore maintains a relatively consistent temperature and stable, drought-resistant, flow level. This is ideal for steelhead trout and both spring- and winter-run Chinook salmon, which are anadromous, meaning they return to their native stream

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<sup>2</sup> The "Water Security, Clean Drinking Water, Coastal and Beach Protection Act of 2002." (Wat. Code, § 79500, et seq.)

<sup>3</sup> *Oncorhynchus tshawytscha* and *O. mykiss*, respectively.

reach to spawn.<sup>4</sup> PG&E's facilities reduce stream flows, change water temperature, mix waters from different streams-- confounding the fish as to the correct stream to follow when returning to spawn--and block the fish from access to portions of their native stream habitats.

The United States Bureau of Reclamation (Reclamation) and United States Fish and Wildlife Service (FWS) entered into agreements with PG&E and DFG to try to restore the anadromous fish habitats. By 1997, the "Battle Creek Working Group" had been formed to develop a plan to restore the Battle Creek watershed.<sup>5</sup>

In 1999, DFG, Reclamation, FWS, PG&E, plus the federal Marine Fisheries Service (MFS), signed an "Agreement in Principle" outlining a restoration project, known broadly as the "5 dam removal alternative," which included a "Water Acquisition Fund" and an "Adaptive Management Fund" to implement the project. They then signed a memorandum of understanding (MOU) outlining the project, and acknowledging that alternatives to the 5-dam proposal would be subjected to environmental review, at both the federal and state level, before any final commitment was made. The MOU places PG&E in charge of "the operation,

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<sup>4</sup> The terrain and stable water flow are also what made Battle Creek desirable for hydropower when local copper mining became profitable in the late 19th Century. (See Reynolds and Scott, *Battle Creek Hydroelectric System* (1980) pp. 7-24.)

<sup>5</sup> Many state and federal agencies and non-governmental organizations joined the group, which later became the Greater Battle Creek Watershed Working Group.

maintenance, and replacement of all physical modifications to its facilities under this MOU on Battle Creek" and vests PG&E with "lead responsibility for real estate requirements and transactions[.]"

A joint state-federal environmental review was conducted, with the Board as the "lead" agency and DFG as a "responsible" agency under CEQA, and Reclamation and FERC as the corresponding federal agencies under the National Environmental Policy Act (NEPA). The project's modifications to PG&E's hydroelectric facilities require FERC approval in the form of a license amendment. The Board was designated the lead agency because FERC requires a water quality certification under federal law before it can grant PG&E's license amendment. DFG was designated as a responsible agency because of its funding authority.<sup>6</sup>

Draft and supplemental EIRs were released for public comment, and the final EIR was released on July 29, 2005. The

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<sup>6</sup> DFG's later findings state it has "general authority to fund fish and wildlife preservation, restoration, and enhancement projects and, as the state implementing agency for the CALFED Bay Delta Program Ecosystem Restoration Program element, specific authority to approve funding for projects under Proposition 50[.]"

The Environmental Impact Report (EIR) describes the CALFED Bay-Delta Program as "a cooperative effort of 24 state and federal agencies with regulatory and management responsibilities in the San Francisco Bay/Sacramento-San Joaquin Delta (Bay-Delta) to develop and implement a long term comprehensive plan to restore ecological health and improve water management for beneficial uses of the Bay-Delta system." (See *In re Bay-Delta etc.* (2008) 43 Cal.4th 1143, 1152-1160.)

stated project goals are to restore about 42 miles of anadromous habitat on Battle Creek, and about 6 miles on its tributaries, while minimizing the loss of clean, renewable hydropower. Several alternatives were evaluated, including a "no action" alternative and alternatives that called for removing different combinations of dams, or no dams, but the original 5-dam alternative was ultimately deemed best suited to the goals of the restoration project. Further, selecting a different alternative would require a new MOU with PG&E, which raised the possibility PG&E would either refuse or be unable to complete the required work before a 2026 FERC relicensing process.

The 5-dam removal alternative is complex, and some details are deemed by FERC to be "Critical Energy Infrastructure Information" or "CEII" and are restricted due to antiterrorism concerns. For purposes of this appeal it is not necessary to describe the alternative in exhaustive detail. It is enough to know that the existing facilities move water via canals to and from various powerhouses. One problem is that water from North Battle Creek is diverted and then discharged into South Battle Creek. This mixing of water can create olfactory confusion for the fish, causing them to take the wrong fork and miss their natal spawning reach. A second problem is that the dams create physical barriers that block fish from natural spawning reaches.

The plan calls for removing five dams and adding new fish ladders to allow the fish to access more habitats, and for building new "tailrace connectors" to keep the discharge water from mixing between the forks. However, the plan reduces the

water usable for the powerhouses, triggering the need for an FERC license amendment.

On September 19, 2006, the Board's Executive Director certified the final EIR. The resolution finds some project impacts cannot be mitigated to a less-than-significant level; however, the resolution did not adopt a statement of overriding considerations.

No Board review of the Executive Director's decision was sought. On October 18, 2006, plaintiffs filed their first writ petition, challenging the EIR certification on the ground it was made by the Executive Director, not the Board itself, and also challenging the merits of the certification.<sup>7</sup>

On March 14, 2007, DFG approved conditional Proposition 50 funding. DFG's findings divided project implementation into two phases. Phase 1 comprised work on the North Fork of Battle Creek, and Phase 2 comprised work on the South Fork of Battle Creek. DFG found Phase 1 could be completed independently of Phase 2 and still provide significant environmental benefits. DFG adopted a statement of overriding considerations, finding project impacts were significant but unavoidable. Such impacts included "reducing the scenic quality at the Oasis Springs

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<sup>7</sup> The EIR describes Rocky Springs Ranch, near Inskip Diversion Dam, as a place for "hunting, fishing, residential, recreational, and grazing activities," and Oasis Springs Lodge, near the same dam, as a "fly-fishing lodge and dude ranch." Respondents assert they are the same place. The record suggests they are under common ownership, but are distinct entities. It is not disputed that the project will adversely impact plaintiffs.

Lodge" and "impacts to recreational opportunities at Oasis Springs Lodge from construction activities at Inskip Diversion Dam." Contrary to plaintiffs' current trout stocking practices, when "the South Fork of Battle Creek is considered 'anadromous waters' non-resident trout can no longer be stocked." However, DFG found that over time "increased fish population could benefit recreational industries by providing more abundant and larger trout, which would result in higher catch rates."

Project phasing was needed due to the separation of the proposed worksites "along the North and South Forks of Battle Creek and the potential for delays pending PG&E's resolution of access issues at its Inskip Diversion Dam facility." DFG found plaintiffs refused to allow access to facilitate planning, making any additional mitigation measures infeasible. DFG also found the Board was required to approve a water quality certification, and noted that PG&E needed to secure "all necessary access rights from the appropriate landowner(s)" as to each phase.<sup>8</sup>

DFG issued a Notice of Determination (NOD) regarding the conditional funding approval, statement of overriding considerations, and phasing of the project.

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<sup>8</sup> We note that the record shows on May 22, 2009, PG&E sued plaintiffs and others, alleging they had impaired access to areas affected by the project. (*PG&E v. Outfitter Properties, LLC, et al.*, Tehama Co. Super. Ct. No. CI62110.)

On April 12, 2007, plaintiffs filed their second writ petition, and on September 26, 2008, the trial court consolidated their two petitions.

The trial court implicitly granted requests by the parties for judicial notice of documents evidencing two significant later events, as follows:

(1) On December 12, 2008, the Board issued a water quality certification, as required by the Federal Clean Water Act (33 U.S.C. § 1341(a)(1)) and adopted CEQA findings and a statement of overriding considerations. There were three "unavoidable significant adverse impacts" to plaintiffs based on construction activities, namely, visual impacts, noise impacts, and "short-term significant adverse recreational impacts (1-6 years)."<sup>9</sup>

(2) On August 25, 2009, FERC issued an order amending the license for PG&E's hydroelectric facilities.

The trial court denied the consolidated writ petition, and plaintiffs timely filed this appeal.

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<sup>9</sup> The Board found that "Two of the three impacts are not permanent, and there remains the opportunity to collaborate on further measures to reduce the longer visual impact." The Board also found that "by asserting an alleged legal right to bar persons from the property for the purpose of evaluating mitigation refinements, Outfitters Properties has made such further refinements technically infeasible. Additional mitigation measures may be developed and implemented in consultation with the landowners . . . if the landowners avail themselves of the opportunity."

## DISCUSSION

### I

#### *CEQA Claims*

##### *A. Exhaustion of Remedies*

The trial court first found CEQA claims against the Board were barred by plaintiff's failure to exhaust administrative remedies, specifically, that plaintiffs could have but did not seek Board review of the decision of the Executive Director to certify the EIR. The trial court also addressed all CEQA claims on the merits.

The parties initially buried their discussion of exhaustion deep within their voluminous briefs. We requested supplemental briefing on exhaustion, directing the parties to specific items of legislative history. However, we now find it more efficient to address all CEQA claims on the merits.<sup>10</sup>

##### *B. Designation of Lead Agency*

Plaintiffs contend that DFG, not the Board, should have been designated as the lead agency. The trial court rejected this contention, finding the Board "is the State agency with the

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<sup>10</sup> We note exhaustion generally applies where a party has not invoked a *clearly defined* administrative remedy. (*Rosenfield v. Malcolm* (1967) 65 Cal.2d 559, 566-568; *Tahoe Vista Concerned Citizens v. County of Placer* (2000) 81 Cal.App.4th 577, 590 ["reasonable administrative remedy"].) The Attorney General declined to defend the trial court's rationale that Water Code section 1126, subdivision (b) governed this case. In declining to reach the issue, we do not mean to imply disagreement with the trial court. However, we recommend the Board examine its regulations and Water Code section 1126, subdivision (b), to ensure parties have a *clearly defined* administrative remedy in future cases involving CEQA claims.

broadest jurisdiction over the Project" and also finding any error "did not preclude informed decision-making or informed public participation."<sup>11</sup>

Plaintiffs concede the following: Because the project alters PG&E's hydropower facilities, a FERC license amendment is required. A FERC license amendment cannot be granted absent a water quality certification. The Board, not DFG, had the authority to issue the certification FERC required.

Plaintiffs view the Board's authority as "limited" to the water quality certification, and note that the Board did not sign the MOU.<sup>12</sup> In contrast, plaintiffs contend DFG: 1) signed the MOU; 2) helped design the project; 3) will be responsible for carrying the project out; and 4) wields the power to authorize necessary funding.

Under CEQA, "'Lead agency' means the public agency which has the principal responsibility for carrying out or approving a project which may have a significant effect upon the environment." (Pub. Resources Code, § 21067.) "Usually, this

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<sup>11</sup> There is a procedure by which agencies and some project applicants can challenge the designation of lead agency. (Pub. Resources Code, § 21165; see Remy et al., *Guide to CEQA* (11th ed. 2006) pp. 55-56 (Remy).) Plaintiffs lacked standing to invoke that procedure.

<sup>12</sup> Plaintiffs concede the Board, though not a signatory to the MOU, was designated by the MOU as part of the management team, which was to "make all final decisions regarding planning, permitting, and construction activities of the Restoration Project through the Consensus process." The Board is also on the "technical" team, "a cooperative group established to address technical issues arising as a result of implementing the Restoration Project."

is the agency with the broadest governmental powers." (*City of Sacramento v. State Water Resources Control Bd.* (1992) 2 Cal.App.4th 960, 971 (*City of Sacramento*)). A responsible agency is "a public agency, other than the lead agency, which has responsibility for carrying out or approving a project." (Pub. Resources Code, § 21069.)

We credit plaintiffs' point that DFG was responsible for "carrying out" the project. However, as a lead agency is the agency with the "principal responsibility for carrying out or approving" a project (Pub. Resources Code, § 21067, emphasis added), the plain language of the statute confers lead agency designation on an agency that bears potentially no responsibility "for carrying out" a project, as long as that agency has "principal responsibility" for "approving" the project--which the Board has.<sup>13</sup>

The Board has the power to regulate beneficial uses of water, including "power generation" "and preservation and enhancement of fish, wildlife, and other aquatic resources or

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<sup>13</sup> Plaintiffs point to a regulation stating in part: "If the project will be carried out by a public agency, that agency shall be the lead agency even if the project would be located within the jurisdiction of another public agency." (Cal. Code Regs., tit. 14, § 15051, subd. (a).) First, this regulation clearly addresses potential *geographical* conflicts between agencies. Further, "A regulation may interpret or make specific a statutory scheme, but it cannot impede the force of the statute." (*Sheyko v. Saenz* (2003) 112 Cal.App.4th 675, 687 (*Sheyko*)). As discussed *ante*, Public Resources Code section 21067 allows lead agency designation for an agency with principal responsibility for project approval. A regulation cannot legally restrict the code section.

preserves." (Wat. Code, §§ 13000, 13001, 13050, subd. (f).) The DFG has authority over fish and wildlife resources and related funding. (See Fish & G. Code, §§ 700, 1501, 1600.) Although the project goal is to benefit fish, in the context of a project that alters hydropower generation, DFG carries the slimmer portfolio, because the Board has authority over fish and hydropower, and DFG has authority over fish, including funding authority, but lacks any authority over hydropower.

Accordingly, we agree with the trial court's conclusion that plaintiffs have not demonstrated that the decision to designate the Board as the "lead" CEQA agency was in error.

In the reply brief, plaintiffs refer to the FERC license amendment approval as a "small component . . . of an otherwise large project." Even if we were to view that component as "small," which we do not, it was *essential* to the project.<sup>14</sup>

Plaintiffs cite two of our prior cases to support the contention the Board was wrongly designated as the lead agency here. Both of these cases are factually inapposite.

*Planning & Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892 (*PCL*), involved the "Monterey Agreement," which required amendments to State Water Project (SWP) water supply contracts between the Department of Water Resources (DWR) and 29 contracting agencies. The parties

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<sup>14</sup> "For want of a nail the shoe is lost, for want of a shoe the horse is lost, for want of a horse the rider is lost." (G. Herbert, *Jacula Prudentum* (1651), as quoted in Bartlett's Familiar Quotations (16th ed. 1992) p. 244, col. (b).)

agreed that a local water contracting agency would be the lead agency. We held that because the project involved *state* water resources and SWP contracts administered by DWR, which had primary responsibility for negotiating the contract amendments, DWR should have been the lead agency. (*PCL, supra*, 83 Cal.App.4th at pp. 906-907.) We did not hold this *necessarily* tainted the CEQA process; we held the EIR prepared by the contracting agency was defective because it did not consider a "no project" alternative. (*Id.* at pp. 907, 910-920.) We did not hold that the agency which implements a project must be the lead agency.

Plaintiffs also contend "the appointment of the wrong lead agency required reversal" in *City of Sacramento, supra*, 2 Cal.App.4th at page 960. In that case, the trial court issued a writ of mandate, concluding a regional water board had a duty to comply with CEQA regarding pesticide discharges into water. (*City of Sacramento, supra*, at p. 968.) We held the Department of Food and Agriculture (DFA) had broader authority regarding pesticides, and the petitioners had not shown CEQA violations by the DFA, therefore the trial court erred by requiring CEQA review by a regional water board. (*Id.* at pp. 973, 978.) Thus, contrary to plaintiffs' argument, *City of Sacramento* was not a case where the "wrong" agency conducted CEQA review.

Thus, neither of the cases relied on by plaintiffs support their contention that the Board should not have been designated as the lead agency in this case for CEQA purposes.

As a separate reason for upholding the trial court's ruling, respondents contend the relevant public agencies agreed in the MOU that the Board should be the lead agency, and point to a regulation stating that where two or more agencies have "a substantial claim to be the lead agency, the public agencies may by agreement designate an agency as the lead agency."

(Cal. Code Regs., tit. 14, § 15051, subd. (d).)<sup>15</sup>

Plaintiffs contend the MOU cannot be a valid interagency agreement designating the Board as the lead agency, because the Board was not a signatory to the MOU. We disagree. Although the Board did not *sign* the MOU, the Board was designated as part of the management team (see fn. 12, *ante*) and accepted its status as the lead agency. The regulation does not specify the form of an agreement designating a lead agency. Viewing the record in its entirety, we agree with respondents that there was a valid interagency agreement designating the Board as lead agency.

Finally, plaintiffs fail to explain how designating the Board as lead agency resulted in prejudice. (See *Fall River Wild Trout Foundation v. County of Shasta* (1999) 70 Cal.App.4th 482, 491-493; *Rural Landowners Assn. v. City Council* (1983) 143 Cal.App.3d 1013, 1023 [where "failure to comply with the law

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<sup>15</sup> Plaintiffs contend this issue was not raised in the trial court, and therefore is forfeited on appeal. We disagree. The terms of the MOU are not disputed, and their legal effect presents a pure question of law, and a matter of public interest, which we elect to consider. (See 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 406, pp. 464-465.)

results in a subversion of the purposes of CEQA by omitting information from the environmental review process, the error is prejudicial"].)<sup>16</sup> Although plaintiffs point to their other CEQA claims, none hinges on the purported mistaken designation of the Board as lead agency. Plaintiffs assert "the misclassification of the lead agency is the reason" for "incongruity" between the EIR's review and the later decision to phase the project (discussed at Part C, *post*). But plaintiffs do not explain *why* the purported incongruity was *caused by* designating the Board as lead agency. When an appellant fails to tender a developed argument for prejudice, the point will be deemed forfeited. (See *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 105-106.) In the absence of evidence, we will not presume that DFG's status as merely a responsible agency, as opposed to lead agency, impaired its ability to apply its expertise on fish and wildlife matters to the project.

Accordingly, we conclude that the trial court correctly rejected plaintiffs' contentions regarding designation of the Board as lead agency for CEQA purposes.

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<sup>16</sup> In the reply brief, plaintiffs contend we held in *PCL*, *supra*, 183 Cal.App.4th 892, the improper designation of a lead agency to be per se reversible error. We generally treat contentions first raised in the reply brief as forfeited. (*People v. Baniqued* (2000) 85 Cal.App.4th 13, 29; *Utz v. Aureguy* (1952) 109 Cal.App.2d 803, 807-808.) Further, plaintiffs misinterpret *PCL*, as we have already explained.

### *C. Project Phasing*

The EIR studied a unified project, but the project was later bifurcated, and subsequently further phased. Plaintiffs contend the EIR did not study the effects of implementing the project in phases, including considering alternatives, ensuring mitigation measures are employed, and studying new effects caused by phasing, and assert that the project as originally envisioned and studied will never be completed.

The trial court concluded that plaintiffs failed to show the changes to project implementation caused any significant changes to the project itself, and therefore no supplemental environmental review was necessary. We agree.

DFG's project bifurcation findings were in part as follows:

"Due to the physical separation of the nine facility sites and appurtenant structures along the North and South Forks of Battle Creek and the potential for delays pending PG&E's resolution of access issues<sup>17</sup> at its Inskip Diversion Dam facility on the middle South Fork of Battle Creek, these modifications will be contracted in two phases. Although Phase 1 may begin before, or simultaneously with, Phase 2, each of the anticipated contracting phases has independent ecological and environmental benefits. Moreover, DFG has determined that the whole of the action was analyzed in the Final [EIR] and contracting in phases does not create any new potentially significant impacts or alter the levels of significance of impacts previously analyzed in the Final [EIR]."

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<sup>17</sup> As indicated earlier (fns. 8 & 9, *ante*), the mention of "access" issues referred at least in part to disputes with plaintiffs, who consistently maintain that they are "not willing to sell or otherwise provide access over their properties for implementation of the Project."

DFG's findings included maps and supporting information explaining the details of bifurcation.

Phasing alternatives were then discussed in a document dated August 29, 2006, before the Board certified the EIR, although it does not appear that document had yet been publicized. Additionally, phasing was discussed before DFG issued its NOD. The reason for phasing was "to realize the majority of the environmental benefits of the Project while allowing additional time, if necessary for resolution of the landowner issues on the middle South Fork." Further project phasing was later adopted in connection with the Board's water quality certification, dividing Phase 1 into Phase 1A and Phase 1B (PG&E's FERC license application covered only Phase 1A), which plaintiffs characterize as a "trifurcation" of the project.

The trial court addressed this development as follows:

"Because [plaintiffs] have not challenged the validity of [the Board's] findings regarding the water quality certification, and because the decision to complete the Project in phases was made after the EIR was certified, [citation] only the post-EIR change to Phases 1 and 2 is at issue here. Nevertheless, it bears mention that [the Board's] water quality certification includes findings regarding the change to include Phases 1A and 1B."

Plaintiffs never amended their petition to challenge the phasing of the project. However, respondents do not dispute that such change to project implementation occurred. Because the facts about phasing are undisputed and present legal issues, we address phasing in this opinion. (See *Redevelopment Agency*

*v. City of Berkeley* (1978) 80 Cal.App.3d 158, 167; see also *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 125, fn. 5 (*Save Tara*) [treating CEQA petition as if amended to address a later agreement in the record].)

Plaintiffs contend phasing of the project undermined the CEQA goals of public input and transparent decisionmaking. (See *Western Placer Citizens for an Agricultural & Rural Environment v. County of Placer* (2006) 144 Cal.App.4th 890, 898 (*Western Placer*) [EIR's "'purpose is to inform the public and its responsible officials of the environmental consequences of their decisions *before* they are made'"].) As plaintiffs note, we long ago emphasized, "An accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR." (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 193 (*County of Inyo*)).

In considering the definition of "project," we said:

"In most cases the scope and character of the proposed activity will be clear; when they are not, they can be discerned only in the light of CEQA's policy to 'ensure that the long-term protection of the environment shall be the guiding criterion in public decisions.' [Citation.] The CEQA Guidelines flesh out the 'project' concept by referring to it as 'the whole of an action, which has a potential for resulting in a physical change in the environment, directly or ultimately[.]'" (*County of Inyo, supra*, 71 Cal.App.3d at p. 192.)

Plaintiffs contend phasing has caused new, unstudied, problems, and that funding issues mean the project as a whole may never be finished. But, as we will explain, plaintiffs have not shown changes in *implementation* have changed the "'whole'"

project, in the “‘long-term[.]’” (*County of Inyo, supra*, 71 Cal.App.3d at p. 192.) Therefore they have not demonstrated that further environmental review was authorized.

Public Resources Code section 21166 provides:

“When an environmental impact report has been prepared for a project pursuant to this division, no subsequent or supplemental environmental impact report shall be required by the lead agency or by any responsible agency, unless one or more of the following events occurs:

“(a) Substantial changes are proposed in the project which will require major revisions of the environmental impact report.

“(b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report.

“(c) New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available.”<sup>18</sup>

We have emphasized that this statute “represents a shift in the applicable policy considerations. The low threshold for requiring the preparation of an EIR in the first instance is no longer applicable; instead, agencies are prohibited from requiring further environmental review unless the stated conditions are met.” (*Friends of Davis v. City of Davis* (2000) 83 Cal.App.4th 1004, 1017-1018 (*Friends of Davis*).)

The challenger bears “the burden of proving substantial evidence does not support [respondents’] decision not to revise

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<sup>18</sup> A CEQA regulation cited by plaintiffs (Cal. Code Regs., tit. 14, § 15162) largely reiterates the statute and is not significant for this purposes of this argument.

and recirculate" an EIR after phasing the project. (*Western Placer, supra*, 144 Cal.App.4th at p. 903.) "The reviewing court upholds an agency's decision not to require [a further EIR] if the administrative record as a whole contains substantial evidence to support the determination that the changes in the project or its circumstances were not so substantial as to require major modifications of the EIR. [Citation.] This deferential standard is a reflection of the fact that in-depth review has already occurred." (*Santa Teresa Citizen Action Group v. City of San Jose* (2003) 114 Cal.App.4th 689, 703; see *Bowman v. City of Petaluma* (1986) 185 Cal.App.3d 1065, 1075.)

"Phase 1A" is the only portion of the project that is now going forward. Generally speaking, this phase will allow fish greater access to the North Fork of Battle Creek, but water from that fork will still discharge into the South Fork of Battle Creek, and there is no change to fish access on the South Fork.<sup>19</sup>

As the trial court noted, the Board's water quality certification explains the phasing decision in some detail, and provides that the current water quality certification includes only Phase 1, which has since been split into Phases 1A and 1B. PG&E's FERC license amendment application addresses only Phase 1A, not Phase 1B, and Phase 2 will require both a FERC license amendment and a water quality certification.

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<sup>19</sup> This signals to us that completion of Phase 1A will not, in and of itself, impair plaintiffs' properties or businesses. Respondents, however, do not assert that plaintiffs therefore lack standing to attack project phasing.

The FERC license amendment order also details the specifics of Phase 1A, consistent with the Board's certification. In part it requires PG&E "to provide appropriate flows . . . below Coleman Dam, to minimize adverse affects on holding spring-run Chinook salmon that are falsely attracted in to South Fork Battle Creek as a result of a PG&E operations outage/mixing. The plan is to cover the interim period between the issuance of the amended license and the completion of all elements of Phase 2 of the Restoration Project." The FERC order also states that "Phase 1A will restore approximately 13 miles of habitat" and "can be made to meet the habitat improvement goals of the Restoration Project without excessive loss of renewable electric generation."

As we will explain, phasing does not physically change the project. Thus, plaintiffs' contention that the public had no input into the phasing decision itself is not persuasive. The schedules for *implementing* projects commonly change, but, as the trial court properly concluded, post-EIR CEQA review is authorized only in narrow cases.

Plaintiffs make two arguments to show that phasing results in a physical change to the project. Neither persuades.

Before considering those two arguments, we observe: "Before the impacts of a project can be assessed and mitigation measures considered, an EIR must describe the existing environment. It is only against this baseline that any significant environmental effects can be determined." (*County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th

931, 952; see *Fat v. County of Sacramento* (2002) 97 Cal.App.4th 1270, 1277; Cal. Code Regs., tit. 14, § 15125, subd. (a).)

As plaintiffs acknowledge, for CEQA purposes the baseline consists of the PG&E hydropower facilities and environs as they existed when the CEQA process began, not at the point where any particular project phase is completed. Therefore the fact that Phase 1A does not solve a particular problem, such as "mixing" of water, does not mean that problem was *caused* by phasing; rather, "mixing" was a baseline condition.

Plaintiffs first point to a discussion in the August 29, 2006, document discussing phasing that was considered before the Board certified the EIR. Plaintiffs observe that Alternative A in that document proposed to remove the Coleman Diversion Dam, which they contend will have deleterious effects on fish, in part by causing harmful fluctuations in water temperature. However, Phase 1A as ultimately approved *does not* remove the Coleman Diversion Dam: That dam will not be removed until Phase 2. Because the alternative in the 2006 document did not become part of Phase 1A, we reject plaintiffs' contention that it shows any relevant change to the project, or somehow skewed the CEQA review process.<sup>20</sup>

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<sup>20</sup> Plaintiffs imply Alternatives B and C create "uncertainties" in the project description and they "direct the Court to the Administrative Record," without illuminating their position through analysis. We ordinarily disregard points asserted without analysis (*In re Marriage of Nichols* (1994) 27 Cal.App.4th 661, 672, fn. 3 (*Nichols*)), and do so here.

Plaintiffs' second asserted physical change caused by project phasing is based on a feature *outside* the project area and outside respondents' control. A barrier exists above the Coleman National Fish Hatchery, operated by FWS, but it does not bar all fish from passing above it. This is below the Battle Creek fork; therefore, the water at that point is "mixed," consisting of water from both forks. The EIR explains that the hatchery's barrier weir helps "collect brood stock" and serves to monitor fish movement, separates "spring-run and fall-run salmon to maintain or manipulate stock identity; prevent[s] fish from reaching habitat with insufficient flow and large, unscreened diversions; and prevent[s] overpopulation of habitat by large numbers of adult fall-run hatchery Chinook salmon." Although the weir blocks fish, it "is not completely effective" and "is being redesigned" to improve its ability to block fish. The EIR also explains that the "present configuration and future operational strategy of the . . . barrier dam are currently under investigation by a multiagency team assembled by the [Battle Creek Working Group]. The physical structure and operational strategy of the barrier weir will be modified, as necessary, to accommodate the Restoration Project. . . . In general, the barrier weir and associated upstream fish ladder or other conveyance facilities will be operated in a manner such that passage opportunity for natural origin salmonids will be achieved in Battle Creek."

The "Cumulative Impacts" portion of the EIR states in part that, "In anticipation of Restoration Project implementation,

management of the hatchery's fish barrier weir and upstream ladder will be modified to accommodate the movement of naturally produced salmon and steelhead so they can access the best stream reaches at the right times. Each modification proposed for the [hatchery] would benefit salmonids at the hatchery and potentially the populations in Battle Creek as well."

Plaintiffs observe the proposed tailrace connectors to divert "mixed" discharge water from South Fork powerhouses are not part of Phase 1A. Plaintiffs then argue that "the problem of false attraction and unnatural mixing of North and South Fork waters will continue to occur at the same time anadromous fish are being reintroduced to partially restored stretches of Battle Creek above the Barrier Weir. The Barrier Weir will be opened to allow 'passage opportunity for natural origin salmonids' which will occur after Phase 1A is constructed and before Phase 1B and 2 can (if ever) be completed."

This contention does not show a physical change to the project. Nothing in the EIR suggests that significant modifications to the barrier weir will be made blindly, without considering whether such modifications will exacerbate the impact on fish of mixing waters. The EIR indicates the opposite, in part stating: "The physical structure and operational strategy of the barrier weir will be modified, as necessary, to accommodate the Restoration Project. Future operations of the barrier weir will be adapted to integrate with restoration activities in Battle Creek." The EIR also states: "Each modification proposed for the [hatchery] would benefit

salmonids at the hatchery and potentially the populations in Battle Creek as well." Nothing suggests that FWS has a specific timetable for specific changes to the barrier or its operation that are somehow *harmful*, rather than "integrat[ed] with restoration activities" as described in the EIR. Accordingly, plaintiffs have not demonstrated that phasing project implementation results in any physical changes to the project that would warrant further environmental review.<sup>21</sup>

Plaintiffs also contend phasing skewed the consideration of project alternatives. However, so far as this record shows, the project is still planned to be completed, although, like many other projects dependent on public financing, the current economic conditions will undoubtedly cause delays. Plaintiffs assert that, *had the public known* only Phase 1A would be completed in the immediate future, the assessment of project alternatives would have been different. However, they present nothing but speculation in purported support of this claim.

Plaintiffs also contend project mitigation measures have been rendered illusory by funding shortfalls. Again, plaintiffs' contention rests on speculation. Nothing in the

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<sup>21</sup> Plaintiffs purport to rely in part on our opinion in *Western Placer, supra*, 144 Cal.App.4th 890, where we held the record supported a decision not to conduct further environmental review after a plan for project implementation was changed in a way found to be "more environmentally sensitive[.]" (*Western Placer, supra*, at p. 906.) Their reliance is misplaced--the holding in *Western Placer* supports the decision *not* to conduct further review in this case, where no physical project changes were made and the Board found each segmented phase had "independent ecological and environmental benefits."

administrative record, or materials judicially noticed by the trial court, show that the project as a whole has been abandoned or that necessary mitigation measures will not be implemented as the relevant portion of the project causing impacts is completed. It is plaintiffs' burden to show error based on the record, not respondents' burden to refute speculations about the future. (See *Cleary v. County of Stanislaus* (1981) 118 Cal.App.3d 348, 360; *Estate of Palmer* (1956) 145 Cal.App.2d 428, 431.)

We conclude plaintiffs have not carried their burden to demonstrate any aspect of project phasing that triggered a new environmental review or impaired the efficacy of planned mitigation measures, or otherwise supports any basis for relief.

D. *Statement of Overriding Considerations*

Plaintiffs contend the Board failed to adopt a statement of overriding considerations when (through its Executive Director) it certified the EIR in 2006, and that the statement the Board adopted in connection with the water quality certification in 2008 is infirm. The trial court found no statement of overriding considerations was necessary at the time the EIR was certified, because the Board "did not, at that time, approve any 'project' within the meaning of CEQA."

Plaintiffs assert the project was "approved" when the EIR was certified, because subsequent to certification the FERC license amendment application was filed, and project phasing and funding decisions were made, therefore the project must have

been preapproved or all such actions were premature.<sup>22</sup> We disagree.

When a project will have significant unmitigated adverse effects, the agency approving the project must state "specific reasons to support its action based on the final EIR and/or other information in the record." [Citation.] These reasons constitute the statement of overriding considerations, which is intended to demonstrate the balance struck by the body in weighing the 'benefits of a proposed project against its unavoidable environmental risks.'" (*Sierra Club v. Contra Costa County* (1992) 10 Cal.App.4th 1212, 1222; see Cal. Code Regs., tit. 14, § 15093, subd. (b) [the agency's statement "shall be supported by substantial evidence in the record"].)

For CEQA purposes, "approval" is defined as follows:

"(a) 'Approval' means the decision by a public agency which commits the agency to a definite course of action in regard to a project intended to be carried out by any person. The exact date of approval of any project is a matter determined by each public agency according to its rules, regulations, and ordinances. Legislative action in regard to a project often constitutes approval.

"(b) With private projects, approval occurs upon the earliest commitment to issue or the issuance by the public agency of a discretionary contract, grant, subsidy, loan, or other form of financial assistance, lease, permit, license, certificate, or other entitlement for use of the project." (Cal. Code Regs., tit. 14, § 15352, subs. (a) & (b).)

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<sup>22</sup> Plaintiffs note in connection with this argument that they have challenged one funding decision in a separate case now pending in this court. (*Outfitter Properties, LLC, et al. v. Wildlife Conservation Board, et al.* (C065100).)

Plaintiffs, in part pointing to the second paragraph of the above definition of "approval," argue the funding commitments made after EIR certification show project approval.

But the project in this case cannot be deemed a private project. Further, a "project" for CEQA purposes "means the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment" and "refers to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies. The term 'project' does not mean each separate governmental approval." (Cal. Code Regs., tit. 14, § 15378, subds. (a) & (c); see *Friends of Davis, supra*, 83 Cal.App.4th at p. 1016.)

The project called for the removal of five dams and changes to ancillary facilities. The project could not begin on the ground until the CEQA process was complete. That does not mean ancillary activity, such as funding approvals, could not begin, because those activities had no potential to cause direct or indirect physical changes to the environment. (Cf. Cal. Code Regs., tit. 14, § 15378, subd. (a).) Accordingly, we reject plaintiffs' contention that the statement of overriding considerations had to be filed when the EIR was certified, because certification did not equate to project approval.

Plaintiffs also contend that the statement of overriding considerations adopted in 2008, in connection with the water quality certification, was infirm. Arguably, the point is not

preserved because plaintiffs did not amend their consolidated petition to encompass any challenge to the water quality certification. In any event, the purported infirmity with the statement of overriding considerations is that "there is no evidence in the record discussing the environmental impacts from phasing with no guarantee that later phases would, if ever, be completed." We have already concluded plaintiffs have not demonstrated that phasing of project implementation has changed the project itself, and that their claim the project will never be funded is speculative. Accordingly, we reject their attack on the merits of the statement of overriding considerations.

*E. Approval before CEQA Review*

Plaintiffs next contend the project was effectively approved before CEQA review was conducted. Because the 5-dam option was described in the Agreement in Principle and the MOU, and was the only project to which PG&E had committed, plaintiffs characterize the entire course of environmental review as meaningless, because the outcome--selection of the 5-dam alternative over all other alternatives--was predetermined.

The trial court concluded the execution of the MOU was not a project approval, because although the 5-dam alternative was preferred, the MOU itself was conditioned on CEQA approval, and none of the later ancillary activities foreclosed consideration of alternatives. We agree.<sup>23</sup>

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<sup>23</sup> Respondents revive their trial court claim that plaintiffs waited too long to attack the MOU on CEQA grounds. We do not

The rule we must apply in considering plaintiffs' claim was set forth by our Supreme Court in *Save Tara, supra*, 45 Cal.4th 116, which intricately addressed when a project is deemed "approved" other than by means of a formal CEQA approval. *Save Tara* emphasized "(1) that CEQA not be interpreted to require an EIR before the project is well enough defined to allow for meaningful environmental evaluation; and (2) that CEQA not be interpreted as allowing an EIR to be delayed beyond the time when it can, as a practical matter, serve its intended function of informing and guiding decision makers." (*Save Tara, supra*, 45 Cal.4th at p. 130.)

*Save Tara* rejected the view that a condition to conduct CEQA review insulates an agreement from the claim that the agreement *itself* is subject to CEQA review. (*Save Tara, supra*, 45 Cal.4th at p. 132.) After distinguishing two decisions of this court,<sup>24</sup> *Save Tara* rejected a proposed rule that "any development agreement, no matter how definite and detailed, even if accompanied by substantial financial assistance from the agency and other strong indications of agency commitment to the project, falls short of approval so long as it leaves final CEQA decisions to the agency's future discretion." (*Id.* at p. 134.) *Save Tara* warned that "postponing environmental analysis can

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construe plaintiffs' argument regarding predetermination as an attack on the MOU as such.

<sup>24</sup> *Stand Tall on Principles v. Shasta Union High Sch. Dist.* (1991) 235 Cal.App.3d 772 and *Concerned McCloud Citizens v. McCloud Community Services Dist.* (2007) 147 Cal.App.4th 181.

permit 'bureaucratic and financial momentum' to build irresistibly behind a proposed project, 'thus providing a strong incentive to ignore environmental concerns.'" (*Id.* at p. 135.)

Accordingly:

"A public entity that, in theory, retains legal discretion to reject a proposed project may, by executing a detailed and definite agreement with the private developer and by lending its political and financial assistance to the project, have as a practical matter committed itself to the project. When an agency has not only expressed its inclination to favor a project, but has increased the political stakes by publicly defending it over objections, putting its official weight behind it, devoting substantial public resources to it, and announcing a detailed agreement to go forward with the project, the agency will not be easily deterred from taking whatever steps remain toward the project's final approval." (*Save Tara, supra*, 45 Cal.4th at p. 135; see *id.* at p. 136 ["Rather than a 'document of accountability' [citation], the EIR may appear, under these circumstances, a document of post hoc rationalization"].)

However, *Save Tara* also rejected the view that "once a private project had been described in sufficient detail, any public-private agreement related to the project would require CEQA review." (*Save Tara, supra*, 45 Cal.4th at p. 136.) "'If having high esteem for a project before preparing an environmental impact statement (EIR) nullifies the process, few public projects would withstand judicial scrutiny, since it is inevitable that the agency proposing a project will be favorably disposed toward it.'" (*Id.* at pp. 136-137.)

*Save Tara* struck a middle course, stating in part:

"[W]e apply the general principle that before conducting CEQA review, agencies must not 'take any action' that significantly furthers a project 'in a manner that

forecloses alternatives or mitigation measures that would ordinarily be part of CEQA review of that public project.' (Cal. Code Regs., tit. 14, § 15004, subd. (b)(2)(B); accord, *McCloud*, supra, 147 Cal.App.4th at p. 196 [ ] [agreement not project approval because, inter alia, it 'did not restrict the District's discretion to consider any and all mitigation measures, including the "no project" alternative']; *Citizens for Responsible Government* [v. *City of Albany* (1997) 56 Cal.App.4th 1199, 1221] [development agreement was project approval because it limited city's power "to consider the full range of alternatives and mitigation measures required by CEQA"].)

"In applying this principle to conditional development agreements, courts should look not only to the terms of the agreement but to the surrounding circumstances to determine whether, as a practical matter, the agency has committed itself to the project as a whole or to any particular features, so as to effectively preclude any alternatives or mitigation measures that CEQA would otherwise require to be considered, including the alternative of not going forward with the project. [Citation.] In this analysis, the contract's conditioning of final approval on CEQA compliance is relevant but not determinative." (*Save Tara*, supra, 45 Cal.4th at pp. 138-139.)

Following *Save Tara*, the court in *Cedar Fair, L.P. v. City of Santa Clara* (2011) 194 Cal.App.4th 1150 (*Cedar Fair*), rejected the view that a "term sheet" setting forth details of a proposed stadium project required CEQA review, in part because "although the term sheet is extremely detailed, it expressly binds the parties to only continue negotiating in good faith." (*Cedar Fair*, supra, 194 Cal.App.4th at p. 1171.) A different court held a tax to fund projects was not a project approval "because it is a mechanism for funding proposed projects that may be modified or not implemented depending upon a number of factors, including CEQA environmental review." (*Sustainable Transportation Advocates of Santa Barbara v. Santa Barbara*

*County Assn. of Governments* (2009) 179 Cal.App.4th 113, 123 (*Santa Barbara*); see also *City of Santee v. County of San Diego* (2010) 186 Cal.App.4th 55, 59 ["siting agreement did not as a practical matter preclude any alternatives, mitigation measures, or the alternative of not going forward"]; *Parchester Village Neighborhood Council v. City of Richmond* (2010) 182 Cal.App.4th 305, 316 (*Parchester*) ["the MSA is best understood as a mechanism for funding proposed projects that may be modified or not implemented at all depending upon a number of factors, including CEQA environmental review"].)

Based on the test established in *Save Tara*, and in light of subsequent cases applying the test, we reject plaintiffs' contention that the Agreement in Principle or MOU or both precluded sincere consideration of project alternatives.

Although the MOU focused on the 5-dam removal alternative, the MOU required CEQA review and the subsequent EIR exhaustively discussed no-dam, 3-dam, 5-dam, and 6-dam removal alternatives, testing each against the project objectives of minimizing loss of hydropower while maximizing habitat improvement.<sup>25</sup> (See *Federation of Hillside & Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1264 [EIR "must consider a

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<sup>25</sup> The EIR eliminated the 8-dam alternative, in part stating it was "consistently more costly and provides only slightly more habitat benefits for anadromous fish" and although the 5-dam removal would "result in an approximately 30% reduction in energy production," the 8-dam alternative "would result in more than a 50% reduction[.]" Although plaintiffs assert the elimination of this alternative was "premature," they do not analyze the point. We deem it forfeited.

range of alternatives sufficient to permit the agency to evaluate the project and make an informed decision, and to meaningfully inform the public" ].) Plaintiffs do not develop their attack on the *merits* of the selection of the 5-dam alternative, and therefore make no persuasive claim that the EIR failed to present a fair analysis of the consequences of the choice to be made.

Further, as respondents point out, the fact that the Board, the lead agency, was not a signatory to the MOU, also cuts against plaintiffs' argument that the Board rubber-stamped the 5-dam removal alternative discussed therein.<sup>26</sup>

Plaintiffs raise five subpoints in an effort to demonstrate that bureaucratic and financial momentum effectively precluded sincere consideration of project alternatives. We discuss these five subpoints seriatim.

**1) "The Agreement in Principle . . . Shows a Financial Commitment to the 5-Dam Removal Alternative."**

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<sup>26</sup> The Board was on the management and technical teams mentioned in the MOU. (See fn. 12, *ante*.) In the reply brief, plaintiffs correctly contend the Board was aware of the Agreement in Principle and MOU, then state the Board "was aware that the Project was the only alternative agreed to by the parties and the only one financially committed to. These facts were used as a basis to reject economically and environmentally superior alternatives." This is followed by a string-cite to pages of the administrative record, with no explanation what alternatives are meant, why they were superior, or how the Board erred. We decline to make the plaintiffs' arguments for them. (*Nichols, supra*, 27 Cal.App.4th at p. 672, fn. 3.)

Plaintiffs point to the 1999 Agreement in Principle, which was not itself conditioned on CEQA compliance and discussed only the 5-dam alternative, and contend the Water Acquisition Fund and Adaptive Management Fund protocols were tailored to that alternative, the only one agreed to by PG&E. But the MOU functioned as a superseding document, which plaintiffs concede "expands the commitments" from the Agreement in Principle including, for example, by adding the condition of CEQA compliance, and the MOU provides that in the event of a dispute between it and the Agreement in Principle, "the provisions of this MOU shall govern." Therefore, the fact that the prior Agreement in Principle itself did not specify CEQA compliance is irrelevant.

Plaintiffs assert that *not* selecting the 5-dam alternative would mean "the State will have wasted all or part of its financial contribution to PG&E." They contend respondents will have to pay PG&E for instream flow reductions, to compensate for "foregone energy production" until the project is completed, and assert: "If some non-Project alternative was adopted, then the aforementioned amounts invested in anticipation of completion of the Project would have been wasted."

But the record shows the increased instream flow releases had been occurring at least since 1998, that the releases "benefit fish and wildlife resources," and that PG&E was always to be compensated for the ensuing loss of water; further, the program would be monitored and flexibly administered in the future. Because the fish in question are a public resource, the

cost of those interim measures would not have been wasted, even if no project were ever completed. Therefore, we disagree that such payments effectively foreclosed consideration of alternatives.<sup>27</sup>

**2) "The MOU Reveals a Contractual and Financial Commitment to Construct the 5-Dam Removal Alternative and No Other Alternative."**

The MOU stated in part:

"The Parties understand and agree that the implementation of any and all activities . . . pursuant to this MOU, with the exception of initial consultations and planning activities, are contingent upon compliance with NEPA and CEQA. The Parties anticipate that activities described in this MOU will be identified in any NEPA/CEQA document as an alternative, but also acknowledge that other alternatives will be considered in the NEPA/CEQA process prior to the time that a final decision or an irreversible commitment of resources or funds is made toward any one alternative."

This language is relevant to the question of whether the 5-dam alternative effectively had been preselected. (*Save Tara, supra*, 45 Cal.4th at pp. 138-139.) It clearly states to the contrary.

Plaintiffs find significance in the phrase "activities

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<sup>27</sup> Indeed, a letter dated May 14, 2001, cited by plaintiffs, signed by FWS, MFS and DFG, refers to a three-year agreement entered into *prior* to the 1998 agreement, and states the agreements "were put in place until a long-term restoration agreement for the hydroelectric project can be implemented through the environmental regulatory process, including [NEPA] and [CEQA] compliance and a hydropower license amendment[.]" This tends to undermine plaintiffs' claim the parties were locked into one alternative due to financial considerations resulting from instream flow agreements.

. . . pursuant to this MOU," and assert this means no other alternative would survive the CEQA process. But the MOU was aimed at restoring habitat, therefore "activities . . . pursuant to this MOU" more reasonably means whatever project was ultimately chosen to do so. Plaintiffs reiterate their argument about instream flow payments and the fact an alternative other than the 5-dam alternative would require a new MOU, which the parties might not complete before the 2026 FERC relicensing process. Plaintiffs also assert the fact that Respondents agreed to pay for the EIR process "for the Restoration Project" means it was committed to the 5-dam alternative. Plaintiffs also assert the State cannot condemn PG&E's facilities and water rights in the event PG&E declined to agree to another alternative.<sup>28</sup>

But plaintiffs have never explained how *else* the parties could have proceeded--apart from the underlying implication that *no* project should have been proposed. The record shows that the process used was transparent about the preference for the 5-dam alternative already agreed to by PG&E. The administrative record shows other alternatives were considered. We do not read the MOU as argued by plaintiffs.

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<sup>28</sup> Plaintiffs do not contend respondents lack condemnation *power*, only that they lack *money* to condemn PG&E's property, because Proposition 50 money cannot be used for condemnation, a point we discuss in more detail in Part II, *post*.

**3. "The MOU and EIR Defined Project Objectives so Narrowly that they Effectively Precluded Consideration and Possible Acceptance of Other Alternatives."**

The project objectives were minimizing the loss of hydropower and restoring "self-sustaining populations" of anadromous fish. Plaintiffs complain that the 8-dam alternative was excluded from consideration for failing the former objective, and the 3-dam alternative was rejected because it did not restore enough habitat.<sup>29</sup> They contend "the extremely narrow Project objectives . . . limits the ability to consider and possibly accept alternatives developed through the CEQA environmental review process." In the reply brief, they string-cite pages of the administrative record, without analysis, to support the claim that the twin objectives of the project "handicapped" the Board into approving the 5-dam alternative. They fail to provide any analysis supporting their assertion that other alternatives were wrongly excluded. Accordingly, the point is forfeited. (*Nichols, supra*, 27 Cal.App.4th at p. 672, fn. 3.)

CEQA involves balancing competing interests--in this case, fish habitat versus hydropower production. Plaintiffs have not shown the stated goals in the MOU were manipulated to ensure adoption of the 5-dam alternative.

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<sup>29</sup> We have already described the problem with the 8-dam alternative. (See fn. 25, *ante*.) In part, the EIR states the 3-dam alternative would not provide as much "additional spawning and rearing habitat" as the 5-dam alternative.

Plaintiffs liken this case to *Save Tara*, where city officials made public statements indicating project alternatives were not feasible, tending to show a decision had already been made in advance of CEQA review. (*Save Tara, supra*, 45 Cal.4th at pp. 125, 141-142.) But they have not shown any similar limiting statements were made here.<sup>30</sup> Nor have they demonstrated, by coherent argument based on evidence in the record, how the rejection of any alternative was improper.

Accordingly, we reject the claim that the project goals thwarted sincere environmental review of all alternatives.

**4) "The MOU's Amendment and Termination Provisions Limited the Ability of the State to Consider Mitigation Measures and Alternatives to the 5-Dam . . . Alternative."**

Plaintiffs contend the MOU could not be amended, and could not be terminated absent consensus, except in specific cases not including selection of an alternative to the 5-dam alternative, and contend this is "further evidence that the State made a predetermination to construct the 5-dam removal alternative before engaging in CEQA review." "[T]he MOU's termination provision does not allow an off-ramp for DFG in the event a non-Project alternative is selected." Therefore, the argument goes,

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<sup>30</sup> In the trial court plaintiffs pointed to an Ecosystem Restoration Subcommittee Meeting on January 15, 2004, where one member stated the MOU locked the agencies "into a pre-determined solution" and another stated financing problems left "no room for negotiation" on alternatives. But this subcommittee did not control the EIR process. (See *Save Tara, supra*, 45 Cal.4th at p. 142, fn. 13 ["expressions of enthusiasm for a project by an agency's staff members should not be confused with official approval of a project"].)

the MOU "contractually committed" the parties to the 5-dam removal alternative. We are not persuaded.

It is true that in the MOU, PG&E had committed itself only to the 5-dam alternative, and the MOU precluded *unilateral* changes that would compel PG&E to accept another alternative. But the MOU did not preclude PG&E from agreeing to another project reached by consensus. All plaintiffs have shown is that the 5-dam alternative was the preferred alternative, not that the MOU precluded sincere study of other alternatives. Nothing in the termination and amendment provisions of the MOU advances plaintiffs' claims.

**5) "The Timeline of Events After the EIR was Certified and Before the [Board] Claims it Determined to Implement the 5-Dam Removal Alternative is Further Evidence that Approval of the Project was Predetermined."**

Plaintiffs point to events after the 2006 certification of the EIR, such as the NOD by DFG in March 2007, various funding implementation decisions, and the FERC license amendment application submitted in July 2008, and assert these actions, taken before the Board approved the project in December 2008 show the 5-dam alternative was predetermined.

However, as these events took place *after* the certification of the EIR, which thoroughly discussed the no dam, 3-dam, 5-dam, and 6-dam removal alternatives, they reflect only that the parties were preparing for whatever project was ultimately approved. (See, e.g., *Santa Barbara*, *supra*, 179 Cal.App.4th at p. 123; *Parchester*, *supra*, 182 Cal.App.4th at p. 316.) There is

no indication that the Board failed in its duty to review the EIR, sincerely consider the alternatives, and adopt the 5-dam removal alternative with a statement of overriding considerations, explaining why that was the proper choice.

Plaintiffs' five points, individually and collectively, do not persuade us that the CEQA process was a sham to cover the predetermined selection of the 5-dam alternative. "[V]iewed in light of all the circumstances" (*Save Tara, supra*, 45 Cal.4th at p. 132), plaintiffs have not explained--nor can we see--how else the project review should have been conducted, given the reality that PG&E could not be forced to agree to any other selection. Nor have the plaintiffs shown the thorough CEQA review that was conducted was tainted or failed to inform the public and relevant decisionmakers about all reasonable options.

F. *Delegation to Executive Director*

Plaintiffs contend the Board improperly delegated the power to certify the EIR to its Executive Director.<sup>31</sup> They argue a regulation granting the Executive Director authority to issue a water quality certification does not encompass the separate authority to certify an EIR.<sup>32</sup> They overlook the scope of

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<sup>31</sup> Because the Board later adopted the statement of overriding considerations necessary to complete CEQA review, it is not clear how any delegation error would be prejudicial. Further, this makes more puzzling plaintiffs' failure to seek review of the Executive Director's decision by the Board itself. (See Part I-A, *ante*.) In any event, we find no error.

<sup>32</sup> "The executive director . . . is authorized to take all actions connected with applications for certification, including

delegation provided by the Water Code generally, under which we hold the Executive Director can certify an EIR.

The Board, located "in the California Environmental Protection Agency[,]" consists of five members appointed by the Governor. (Wat. Code, § 175.)

Water Code section 186 provides in pertinent part:

"(a) The board shall have any powers, and may employ such legal counsel and other personnel and assistance, that may be necessary or convenient for the exercise of its duties authorized by law.

"(b) For the purpose of administration, the board shall organize itself, with the approval of the Governor, in the manner it deems necessary properly to segregate and conduct the work of the board. . . ."

Water Code section 7 provides: "Whenever a power is granted to, or a duty is imposed upon, a public officer, the power may be exercised or the duty may be performed by a deputy of the officer or by a person authorized, pursuant to law, by the officer, unless this code expressly provides otherwise." Pursuant to this statutory authority, the Board may employ personnel necessary for the exercise of its duties and may delegate the powers granted to it by law "unless [the Water Code] expressly provides otherwise."<sup>33</sup>

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issuance and denial of certification." (Cal. Code Regs., tit. 23, § 3838, subd. (a).)

<sup>33</sup> The parties do not describe *how* the Board delegated authority to the Executive Director. (Cf. *Delegation of Authority to the Executive Director*, State Water Resources Control Bd. Resolution 2002-0104 (May 16, 2002) [Executive Director has "authority to conduct and supervise" Board activities].) But plaintiffs do not contend the Board did not *purport* to delegate CEQA authority to the Executive Director; rather, they contend the purported delegation was legally infirm.

Plaintiffs have not pointed to any *Water Code* provision that supports their contention that it was improper for the Board to delegate authority to its Executive Director here. Instead, they point to regulations that refer to "Board" actions pertaining to CEQA review, and argue these regulations show such actions cannot be delegated. (See, e.g., Cal. Code Regs., tit. 23, §§ 3722, 3762.) But the mere mention of the Board's *name* in a statute or regulation granting the power cannot mean that *Water Code* section 7 precludes it from delegating this power or duty, otherwise the exception "unless [the *Water Code*] expressly provides otherwise" would be mere surplusage. (See *Dix v. Superior Court* (1991) 53 Cal.3d 442, 459 ["we avoid statutory constructions that render particular provisions superfluous"].) A statute or regulation must first confer the power on the Board, which is then free to delegate the power unless the *Water Code* "expressly" provides otherwise.

Further, although plaintiffs argue to the contrary, CEQA itself permits such delegation:

"The [CEQA regulations] require that prior to approval of a project, the lead agency (in this case the Department [of Parks and Recreation]) shall certify: '(1) The final EIR has been completed in compliance with CEQA; [¶] (2) The final EIR was presented to the *decisionmaking body* of the lead agency, and that the *decisionmaking body* reviewed and considered the information contained in the final EIR prior to approving the project; and [¶] (3) The final EIR reflects the lead agency's independent judgment and analysis.' ([Cal. Code Regs., tit. 14,] § 15090, subd. (a), italics added.) The notice of determination, signed by Deputy Director Berry, contained the appropriate certifications. In its answer to the petition, the Department admitted Deputy Director Berry was the person authorized by the Department to certify the EIR. EMCA argues Deputy Director Berry simply cannot be the legal

'decision maker' because he is not a decisionmaking body, but merely an unelected official 'with no accountability to the public.'

"[CEQA regulations] section 15356 specifically defines the 'decision-making body' as 'any *person* or group of people within a public agency permitted by law to approve or disapprove the project at issue.' (Italics added.) The Department does not have an elected body that acts as its decision maker. Rather, the Department is controlled by an executive officer (the Director), who is appointed by the Governor subject to confirmation by the Senate. . . . Because the Department acts through the Director, or his or her designee [citation], then a fortiori the Director, or his or her designee, is the 'decision-making body' within the meaning of CEQA." (*El Morro Community Assn. v. California Dept. of Parks & Recreation* (2004) 122 Cal.App.4th 1341, 1349-1350 (*El Morro*); cf. *California Oak Foundation v. Regents of University of California* (2010) 188 Cal.App.4th 227, 289-292.)

Plaintiffs' reliance on *Kleist v. City of Glendale* (1976) 56 Cal.App.3d 770 (*Kleist*), is misplaced. There, a city ordinance delegated CEQA decisionmaking to a board, but provided no mechanism for review of the decision by the elected city council. (*Kleist, supra*, 56 Cal.App.3d at p. 775.) This was improper as there was no provision for the city council to delegate such review. (*Kleist, supra*, at p. 779.) However, as we have explained, in this case there is explicit statutory authority for delegation, unlike in *Kleist*, namely, Water Code section 7, and the appointed Board properly acted through its Executive Director. (See *El Morro, supra*, 122 Cal.App.4th at pp. 1349-1350.)

Accordingly, we reject plaintiffs' contention that the Board improperly delegated authority to its Executive Director.<sup>34</sup>

G. *Adequacy of DFG's Findings*

Plaintiffs contend DFG made inadequate findings and abused its authority by approving a phased project. Plaintiffs contend DFG "hijacked the Project and approved a new segmented project that was not considered or analyzed as a Project alternative in the EIR."

Our prior conclusion that phasing project implementation did not change the physical character of the project disposes of this argument, and we see no need to repeat ourselves.

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<sup>34</sup> There is another point worth mentioning. "Prior to approving a project" the lead agency must certify three things, namely, (1) the final EIR was "completed in compliance with CEQA[,]" (2) "the decisionmaking body reviewed and considered" the information therein, and (3) the final EIR "reflects the lead agency's independent judgment and analysis." (Cal. Code Regs., tit. 14, § 15090, subd. (a).) A regulation states the "decisionmaking body" shall not delegate "Reviewing and considering a final EIR . . . prior to approving a project." (*Id.*, § 15025, subd. (b)(1).) As a leading treatise notes, this does not explicitly prohibit delegating the making of the first and third findings. (Remy, *supra*, at p. 376.) The Executive Director made the first and third findings, and stated she had "reviewed the information [in the final EIR] and will consider it" in deciding to issue *the water quality certification*, but did not purport to review and consider the final EIR before *approving the project*. As indicated earlier (Part I-D, *ante*), project approval was when the Board itself issued the statement of overriding considerations. However, the parties have not briefed this point.

II

*Proposition 50 Claims*

Plaintiffs contend DFG funneled Proposition 50 money to PG&E without specifying that the money cannot be used to condemn property rights. As stated earlier (fn. 17, *ante*), plaintiffs decline to sell real property interests or allow access over their property for the project.

Water Code section 79554, part of Proposition 50, provides: "All real property acquired with money appropriated or granted pursuant to subdivision (e) or (f) of Section 79550 shall be acquired from willing sellers." The referenced subdivisions set forth amounts available for appropriation "for the balanced implementation of the CALFED Bay-Delta Program" including "for ecosystem restoration program implementation" and "watershed program implementation." (Wat. Code, § 79550, subs. (e) & (f).) The California Bay-Delta Authority Act of 2002 provided that DFG, FWS and the MFS "are the implementing agencies for the ecosystem restoration program element. If interests in land, water, or other real property are acquired, those interests shall be acquired from willing sellers by means of entering into voluntary agreements." (Wat. Code, § 79441, subd. (c).)

The trial court found as follows:

"It is not sufficient for [plaintiffs] to allege that Proposition 50 funds 'may' be used for involuntary land acquisition. Proposition 50 does not require DFG to impose a condition that funds not be used for involuntary property acquisitions. To show a violation of Proposition 50, [plaintiffs] must show that Proposition 50 funds are being or will be used to acquire real property from unwilling

sellers. There is no evidence there that Proposition 50 funds have been, are being, or will be used for involuntary property acquisitions. Thus, [plaintiffs] have failed to show a violation of Proposition 50."

As they did in the trial court, plaintiffs assert it was improper for DFG to approve funds for PG&E's use without explicitly stating in the approving documents those funds could not be used to buy property from unwilling sellers. Plaintiffs assert that condemnation is anticipated by the project documents, and therefore the omission of any Proposition 50 restriction is somehow ominous.

Plaintiffs correctly contend that the MOU grants PG&E "lead responsibility" for acquiring real property rights for the project. It appears DFG allocated \$67 million to the project, including \$51.7 million from Proposition 50, conditioned in part on PG&E's acquisition of "all necessary access rights from appropriate landowner(s)." Of those funds, it appears that \$300,000 was allocated for construction easements, including "payments to each landowner for temporary easements on their properties, and costs associated with abandoning easements for decommissioned features and acquiring additional rights-of-way where new project features are placed on private lands." But plaintiffs have not pointed to any document showing Proposition 50 funds would be used to *condemn* property rights, as opposed to compensating "willing sellers" for easements.

Plaintiffs observe that PG&E has the power to condemn.<sup>35</sup> They contend PG&E was given some Proposition 50 funds for the project and "PG&E may utilize the money for . . . funding condemnation and other involuntary real property acquisitions." This *speculates* that PG&E will divert Proposition 50 funds for an unlawful purpose, but there is no *evidence* PG&E plans to do so, and if it tried, it could be enjoined from doing so. There are many legal restrictions on the use of public funds, but this does not mean that all such restrictions must be specified in documents allocating those funds. (Cf. *Sheyko, supra*, 112 Cal.App.4th 675, 695 ["We see no reason to uphold part of a judgment ordering an agency to stop doing what it has not done and concedes it cannot do"].)

Plaintiffs also assert that Proposition 50 funds were funneled through Reclamation and thence to PG&E for the purpose of allowing PG&E to use the funds improperly. This is not correct. As respondents explain, part of Proposition 50 speaks of funds that may be appropriated for "grants to local public agencies, local water districts, and nonprofit organizations for acquisition from willing sellers of land and water resources[.]" (Wat. Code, § 79544.) During the funding process, a concern was raised that giving money directly to PG&E, which is not a "nonprofit organization[.]" might be improper. To eliminate any

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<sup>35</sup> "An electrical corporation may condemn any property necessary for the construction and maintenance of its electric plant." (Pub. Util. Code, § 612; see *Barham v. Southern Cal. Edison Co.* (1999) 74 Cal.App.4th 744, 752-753.)

uncertainty on this point, some money was given to Reclamation, the project manager, which could disburse the funds to PG&E to enable it to acquire property interests, as PG&E was obligated to do by the MOU. However, this did not free the money from the "willing sellers" restriction of Proposition 50.

Nor have plaintiffs shown any attempt to use this money in derogation of Proposition 50. Plaintiffs point to references to possible condemnation in the record.<sup>36</sup> However, nothing they point to suggests that *Proposition 50* funds would be used.

Plaintiffs have also consistently contended that any project that receives Proposition 50 funds cannot involve condemnation.<sup>37</sup> They argue the "willing sellers" provision should be construed broadly, and argue the parties to the project cannot do indirectly what they cannot do directly. (See *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1446.)

We disagree. Water Code section 79554 provides that property "acquired with money *appropriated or granted pursuant to subdivision (e) or (f) of Section 79550* shall be acquired from willing sellers." (Emphasis added.) It does not speak of

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<sup>36</sup> For example, in an e-mail string dated May 8, 2006, DFG personnel discuss "separating out the north and south fork construction schedules based upon the expectation that condemnation or litigation may slow the work on the south fork." The anticipated "condemnation or litigation" apparently pertains to plaintiffs' property.

<sup>37</sup> For example, by letter dated July 18, 2005, addressed to the California Bay-Delta Authority, plaintiffs asserted the project would require partial condemnation of their property interests and protested that using Proposition 50 money for the project would *indirectly* foster forced condemnation.

a "project" being subject to the "willing sellers" limitation. To hold that receipt of Proposition 50 money means an entire project is subject to the "willing sellers" limitation would import into the statute concepts currently absent therefrom--an invitation by plaintiffs which we decline to accept. "In the construction of a statute . . . the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted[.]" (Code Civ. Proc., § 1858; see *Trackman v. Kenney* (2010) 187 Cal.App.4th 175, 184-185.)

Accordingly, we conclude plaintiffs' Proposition 50 contentions lack merit.

**DISPOSITION**

The judgment is affirmed. Plaintiffs shall pay respondents' costs of on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (a)(2).)

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DUARTE, J.

We concur:

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HULL, Acting P. J.

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ROBIE, J.

