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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

CENTER FOR BIOLOGICAL DIVERSITY et
al.,

Plaintiffs and Appellants,

v.

KERN COUNTY et al.,

Defendants and Respondents;

TEJON MOUNTAIN VILLAGE, LLC et al.,

Real Parties in Interest.

F061908

(Super. Ct. No. S-1500-CV-268902)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Kenneth C. Twisselman II, Judge.

John Buse, Adam Keats, Matthew Vespa, Jonathan Evans, Jason A. Weiner, Caroline Farrell, Brent Newell, and Alegría De La Cruz for Plaintiffs and Appellants.

Theresa A. Goldner, County Counsel, Charles F. Collins, Deputy County Counsel for Defendants and Respondents.

Holland & Knight, Charles L. Coleman III and Jennifer L. Hernandez for Real Parties in Interest.

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This case presents a challenge under the California Environmental Quality Act (CEQA) to Kern County's approval of a development project known as Tejon Mountain Village. The project is a large housing and resort development beside Interstate 5 in the Tehachapi Mountains, just north of the Los Angeles County line. The developer is Tejon Mountain Village, LLC, an entity created by the owner of the land, Tejon Ranch Company. The challengers are four nonprofit organizations: Center for Biological Diversity, Wishtoyo Foundation, Tricounty Watchdogs, and Center on Race, Poverty & the Environment.

The superior court denied the challengers' petition for a writ of mandate to reverse the county's approval. In this appeal, the challengers argue that the environmental impact report (EIR) prepared by the county prior to project approval is deficient in its treatment of five topics: (1) air pollution; (2) water supply; (3) Native American cultural resources; (4) the California condor; and (5) the exclusion of a lake from the project boundaries. We disagree and affirm the judgment.

FACTUAL AND PROCEDURAL HISTORIES

Tejon Ranch Company (TRC) owns Tejon Ranch, a largely undeveloped 270,000-acre property in the southern San Joaquin Valley, the Tehachapi Mountains, and the Antelope Valley in Kern and Los Angeles Counties. Tejon Mountain Village (TMV) is one of a number of projects proposed by TRC and other developers which, if built, will bring urbanization to this mostly undeveloped area north and south of the border between Kern and Los Angeles counties near Interstate 5. TMV would include 3,450 homes (about 11,000 people at a rate of about 3.1 people per home). Centennial, another project proposed by TRC, is to be located in the northwest corner of the Antelope Valley a short distance east of Interstate 5, just south of the Los Angeles County line, and will include about 23,000 homes (about 71,000 people). San Emigdio, with about 20,000 homes (about 62,000 people), has been proposed by another developer for a location west of

Interstate 5 between Wheeler Ridge and Grapevine, about 10 to 15 miles north of TMV. Several hundred more homes and hundreds of thousands of square feet of commercial and industrial space have been proposed by other developers for the area within a six-mile radius around TMV. Close to Interstate 5, about 30 miles south of the project site, near Magic Mountain at the northwestern tip of the Los Angeles metropolitan area, the Newhall Ranch project, with about another 25,000 homes, has been proposed.

The 3,450 housing units at TMV, which the developer describes as vacation homes, will include single-family houses on large and small lots, as well as apartments, condominiums, and townhouses. The development will also include multiple hotels with a total of 750 rooms and 160,000 square feet of restaurant, retail, and other commercial development. In addition, there will be 350,000 square feet of buildings related to the following uses: two 18-hole golf courses, two helipads, equestrian facilities, riding and hiking trails, private community centers, an electrical substation, and water treatment and wastewater treatment plants. The project will be built in six phases over 17 years.

The project site is a 26,417-acre portion of Tejon Ranch immediately east of Interstate 5 in Kern County, adjacent to the Los Angeles County border. It is about 40 miles south of Bakersfield and 60 miles north of Los Angeles. All of the construction would take place in a 5,082-acre building area within a 7,867-acre “development envelope.” Eighty percent of the site, or 21,335 acres, will be preserved as rangeland or other open space.

The TMV project is part of TRC’s plan to develop parts of Tejon Ranch and preserve the rest. TRC entered into a private agreement on this subject, known as the Conservation and Land Use Agreement or Ranchwide Agreement, with several environmental conservation groups: the Sierra Club, the Natural Resources Defense Council, Audubon California, the Endangered Habitats League, and the Planning and Conservation League. Under this agreement, TRC will preserve 145,000 acres of the 270,000-acre ranch through dedications of conservation and other open-space easements.

The environmental conservation groups will have options to purchase easements on an additional 62,000 acres. TRC agreed to preserve as open space 33,000 more acres within project development sites. A total of 240,000 acres, about 89 percent of Tejon Ranch, would be preserved. In return, the environmental conservation groups agreed not to mount legal challenges to TMV, Centennial, and a third potential project. The challengers in the present case are not parties to the agreement.

The project required numerous approvals by Kern County, including certification of an EIR, adoption of a specific plan and a community plan, an amendment to the county's general plan, zoning changes, and termination of Williamson Act contracts. The county issued a notice of preparation of the EIR on September 30, 2005. The draft EIR was issued on May 27, 2009. On August 27, 2009, the county issued responses to comments and revisions to the draft EIR, which, together with the draft EIR itself, became the final EIR. The board of supervisors held a public hearing on the matter on October 5, 2009. The board voted unanimously to grant the requested approvals. It issued a notice of determination, stating that the project had been approved, on October 13, 2009.

The challengers filed a petition for a writ of mandate in the superior court on November 12, 2009. The Center for Biological Diversity is a national organization concerned with environmental issues, especially threats to wildlife. Wishtoyo Foundation is a Ventura County organization composed of Chumash Native Americans and devoted to their interests, including interests in environmental and cultural preservation. Tricounty Watchdogs is a local organization composed of residents of the mountain communities in Kern, Los Angeles, and Ventura Counties in the vicinity of the project site; it is concerned with development-related issues. The Center on Race, Poverty & the Environment has offices in San Francisco and Delano and is concerned with environmental hazards in low-income and minority communities. Their petition challenged the adequacy of the EIR and raised issues related to water supply and water

quality; climate change and greenhouse gas emissions; air quality; the California condor and other biological resources; Native American archaeological sites; traffic; and earthquake and wildfire hazards.

In a written order, the superior court noted that the challengers did not brief several issues raised in the petition; those issues were deemed forfeited. The court rejected the remaining issues and denied the petition.

DISCUSSION

I. Standards of review

If a CEQA petition challenges agency action that is quasi-adjudicatory in character, the trial court's role is only to determine whether the action is supported by substantial evidence in the record. (Pub. Resources Code, § 21168 et seq.)¹ If the agency action was quasi-legislative in character, the trial court reviews the action for an abuse of discretion. The agency abuses its discretion if it does not proceed in the manner required by law or if the decision is not supported by substantial evidence. (§ 21168.5.)

“Substantial evidence” is defined in the Guidelines for the Implementation of the California Environmental Quality Act (Cal. Code Regs., tit. 14, § 15000 et seq., hereafter Guidelines) as “enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.” (Guidelines, § 15384(a).) The formulations in sections 21158 and 21168.5 embody essentially the same standard of review. Both require the trial court to determine whether the agency acted in a manner contrary to law and whether its determinations were supported by substantial evidence, and neither permits the court to make its own factual findings. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392, fn. 5; *Burbank-Glendale-*

¹Subsequent statutory references are to the Public Resources Code unless indicated otherwise.

Pasadena Airport Authority v. Hensler (1991) 233 Cal.App.3d 577, 589-590.) The Court of Appeal reviews the trial court's decision de novo, applying the same standards to the agency's action as the trial court applies. (*Neighbors of Cavitt Ranch v. County of Placer* (2003) 106 Cal.App.4th 1092, 1100.)

II. Air quality

A. Air quality in the San Joaquin Valley Air Basin

The project is located almost entirely in the San Joaquin Valley Air Basin (SJVAB). The EIR's air quality discussion is directed primarily to impacts in that basin, but also includes references to impacts in the adjacent South Coast Air Basin (SCAB) and Mojave Desert Air Basin (MDAB). We will begin our discussion with the impacts in the SJVAB.

The challengers focus on three pollutants: reactive organic gases (ROGs), nitrogen oxides (NO_x), and particulate matter 10 microns in diameter or smaller (PM₁₀). ROGs and NO_x are ozone precursors, that is, chemicals that react to produce ozone when exposed to sunlight. Ozone and PM₁₀ are "criteria pollutants," pollutants for which ambient air quality standards have been established under both state and federal law. Ozone is beneficial in the upper atmosphere, where it absorbs ultraviolet radiation from the sun, but at ground level it is a key ingredient in urban smog and damages animal tissue, plant tissue, and many inanimate materials. Its effects are comparable to those of household bleach, and it has a harmful impact on human health, crops and natural ecosystems, among other things. NO_x by themselves, even before reacting to produce ozone, also have a wide range of negative health effects and environmental impacts. Through reactivity with other chemicals, NO_x produce acid rain, as well as ozone. Particulate matter is small liquid or solid particles floating in the air. It includes smoke, soot, dust, salt, acids, metals, and particles that form when gases in vehicle exhaust undergo chemical reactions in the air. PM₁₀ particles lodge in the lungs and cause respiratory and other illnesses. According to the EIR, "[p]remature deaths linked to

particulate matter are now at levels comparable to deaths from traffic accidents and second-hand smoke.”

The project will contribute these pollutants to the atmosphere, mainly by generating thousands of miles of vehicle trips during each year of its operation after it has been built and occupied. Additional operational emissions of these pollutants will come from fixed sources, such as gas appliances in the new houses. Construction of the project will also contribute emissions of them.

The EIR discusses these pollutants’ role in three environmental impacts, designated impacts 4.3-1 (“Conflict with or Obstruct Implementation of the Applicable Air Quality Plan”), 4.3-2 (“Result in Construction-Related Activities that Would Produce Ozone Precursors and PM₁₀ Emissions that Would Exceed Thresholds”), and 4.3-3 (“Result in Operations-Related Activities [that] Would Produce Ozone Precursors and PM₁₀ Emissions that Exceed Thresholds”).

Impact 4.3-1, “Conflict with or Obstruct Implementation of the Applicable Air Quality Plan,” involves the project’s effect on the ability of the San Joaquin Valley Air Pollution Control District (SJVAPCD) to achieve the pollution-reduction goals in its plans for PM₁₀ and ozone. The EIR concluded that the project’s impact in this regard would be less than significant for two reasons. First, the project proponent entered into a voluntary emission-reduction agreement (VERA) with the SJVAPCD in 2007. Second, mitigation measure 4.3-1 would require the project proponent to demonstrate at the time of issuance of building permits for each portion of the project that that portion would result in emissions of less than two tons per year of NO_x and two tons per year of PM₁₀. We will discuss these two items in turn.

A VERA, also called a development mitigation contract, is a developer’s agreement to pay mitigation fees to the SJVAPCD, in exchange for the SJVAPCD’s commitment to use the proceeds for offsite air quality mitigation projects to offset the project’s emissions. In this project’s VERA, the SJVAPCD promises to ensure that the

project “shall result in no net increase in air quality impacts” from NO_x, ROGs, and PM₁₀ emissions by entering into, funding, and enforcing agreements to fund offsite mitigation projects. The project proponent, in return, promises to pay the SJVAPCD the cost of these mitigation projects. The project proponent will pay either the cost of specific projects proposed by the proponent and approved by the SJVAPCD, or will pay a set number of dollars per ton of pollutants to be offset by projects to be identified by the SJVAPCD.²

In a letter to the SJVAPCD board recommending approval of the VERA, the SJVAPCD’s executive director wrote, “Given our experience in administering grants for emission reduction projects, with adequate funding, the District can bring about sufficient emission reductions from existing sources of emissions to fully and permanently mitigate the net air emissions from this development project.” The letter estimated that the fees collected from the project proponent to cover the cost of the mitigation projects, and the SJVAPCD’s administration of the projects, would be \$10,210,200.

The EIR asserts that the VERA “would reduce, to the extent scientifically validated, 100% of the NO_x, ROG, and PM₁₀ (as well as PM_{2.5}) emissions within the SJVAB.” The assertion that the VERA, if implemented, will offset all the project’s emissions of these pollutants in the SJVAB is repeated a number of times in the EIR. The VERA is not, however, labeled a mitigation measure by the EIR and is not included in the list summarizing the mitigation measures for air quality impacts.

²The briefs do not point us to an *executed* copy of the VERA in the record. Further, in describing the parties’ entry into the VERA, the draft EIR says the project proponent “decided to enter into a VERA with the SJVAPCD in advance of this Draft EIR” in December 2007; it never uses the words “entered into” or “executed” the VERA and does not provide a specific date of execution. Responses to comments in the final EIR, however, do state that the project proponent and the SJVAPCD entered into the VERA before the issuance of the draft EIR. The challengers do not contend that the VERA was never actually executed.

The EIR states that, to achieve its goals, the VERA would have to result in offsets of 51.5 tons of ROG_s per year, 44.2 tons of NO_x per year, and 51 tons of PM₁₀ per year. At the time of project approval, however, only one offsite emission-offset program had been approved by the SJVAPCD, involving the conversion of 10 pieces of diesel-powered agricultural equipment to electric power. This project was expected to produce offsets of 1.1 tons of ROG_s per year, 17.1 tons of NO_x per year, and 0.35 tons of PM₁₀ per year.

The EIR states that “two other offsite projects are currently being considered by the project applicant” These are a “biodiesel research facility” which would “produce up to 10 million gallons of biodiesel per year ... to be sold throughout the area,” and a “Container Trip Reduction Facility” that would “reduce the need for container trips by providing a trailer drop where containers that would otherwise be returned to their origin empty can be stored and reloaded in the San Joaquin Valley.” Together, these two projects would produce offsets in the SJVAB of 22.1 tons of ROG_s per year, 13 tons of NO_x per year, and 16.8 tons of PM₁₀ per year. The EIR does not say what action, if any, has been taken toward the development of these projects or whether the SJVAPCD is aware of them or considers them suitable. Adding the offsets from the approved project to the offsets from those only under consideration, the total reductions in the SJVAB are still only 23.2 tons of ROG_s per year, 30.1 tons of NO_x per year, and 17.1 tons of PM₁₀ per year. This would leave 28.3 tons of ROG_s, 14.1 tons of NO_x, and 33.9 tons of PM₁₀ to be offset by projects as yet unidentified.

Mitigation measure 4.3-1 is independent of the project’s VERA and appears to be based on the assumption that the VERA will not achieve the goal of zero net increase in NO_x, ROG, and PM₁₀ emissions. Its starting point is the SJVAPCD’s Rule 9510, which, according to the EIR, “states that development projects that result in less than 2.0 tons per year of NO_x and 2.0 tons per year of PM₁₀ thresholds are not determined to have a

significant impact.” Mitigation measure 4.3-1 aims only to satisfy this standard. It provides:

“Prior to issuance of any building permit, the applicant shall submit evidence, verified by the SJVAPCD, specific to any portion of site development, that the residential and/or commercial development has a total project construction and operations mitigated baseline below 2 tons per year for NO_x (total project construction and operations) and a mitigated baseline below 2 tons per year for PM₁₀ emissions (total project construction and operations) within the SJVAB. Required reductions can be achieved from any combination of project design, compliance with the ISR [indirect source rule], and/or a DMC [development mitigation contract] or VERA. If a DMC/VERA is utilized, a copy of the executed agreement and implementing reports shall be provided to the Planning Department to substantiate compliance. As there still could be unmitigated emissions of ROG under this mitigation measure, participation in any air mitigation program adopted by Kern County that provides equal or more effective mitigation than this mitigation measure can be utilized as a replacement for the requirements of this mitigation measure.”

The independent source rule is the SJVAPCD’s Rule 9510; “compliance” with it can include payment of mitigation fees. A development mitigation contract is the same thing as a VERA. Mitigation measure 4.3-1 includes no further discussion of how mitigation fees could be spent; what the terms of another VERA might be or how it could achieve anything not achieved by the existing VERA; what elements of “project design” might be adopted to reduce emissions; or what programs Kern County might adopt. Mitigation measure 4.3-1 appears to add little of substance to the EIR’s discussion of the existing VERA (except that it requires the project proponent to establish mitigation again at the time of issuance of each building permit). The bottom line is that both mitigation measure 4.3-1 and the existing VERA depend on payment of mitigation fees to the SJVAPCD, fees the SJVAPCD believes it will be able to spend on enough offsite projects to offset the project’s emissions, even though most of those projects have not yet been identified.

One difference between the VERA and mitigation measure 4.3-1 is that, while the VERA commits the project to zero net emissions of NO_x, ROGs, and PM₁₀, mitigation measure 4.3-1 allows two tons per year of NO_x and two tons per year of PM₁₀, and places no limit on the emission of ROGs. It is not altogether clear what the two-ton standard means. The qualifier “specific to any portion of site development” in the first sentence of mitigation measure 4.3-1 appears to imply that each portion of the project for which a separate building permit is issued will be allowed to emit two tons per year each of NO_x and PM₁₀. On the other hand, the parenthetical phrase “total project construction and operations,” which occurs twice in that sentence, could be read to imply that two tons per year is the limit for the entire project for each pollutant. In another place, one page away, the EIR states that mitigation measure 4.3-1 will require the project proponent “to ensure ... that each development phase reduce its PM₁₀ and NO_x emissions ... below the 2.0 tons per year level” Since the project is expected to have six phases, this seems to mean that mitigation measure 4.3-1 allows a total of 12 tons per year each of NO_x and PM₁₀—24 tons total.

As we have mentioned, the EIR concludes that impact 4.3-1 will be less than significant with mitigation. The relationship between the existing VERA and mitigation measure 4.3-1 is somewhat obscure, as we have said, but the less-than-significant finding is best interpreted as relying on both.

Impact 4.3-2, “Result in Construction-Related Activities that Would Produce Ozone Precursors and PM₁₀ Emissions that Would Exceed Thresholds,” is concerned with the short-term air quality impacts caused by the process of building the project. Construction would produce emissions of NO_x, ROGs, and PM₁₀ from construction equipment exhaust, dust, paint, asphalt paving, and exhaust from workers’ cars. In the peak construction year, without mitigation, these emissions would exceed a threshold, established by the SJVAPCD, of 10 tons per year each of NO_x and ROG, and 15 tons per

year of PM₁₀.³ Without mitigation, the emissions in the peak year would be 18.4 tons of ROGs, 119.3 tons of NO_x, and 238.9 tons of PM₁₀.

In its analysis of mitigation of this impact, the EIR begins by discussing the VERA and mitigation measure 4.3-1. It states that the VERA “would ensure that construction emissions of [NO_x, ROGs, and PM₁₀] are fully offset within the SJVAB” and that mitigation measure 4.3-1 “would ensure that project construction emissions of NO_x and PM₁₀ would not exceed 2 tons per year.” The EIR here also describes mitigation measures 4.3-2 through 4.3-5. These are on-site measures, including dust-control measures and use of lower-emission equipment, to reduce construction emissions.⁴

In its discussion of the magnitude of impact 4.3-2 after mitigation, the EIR includes a table that excludes the effects of the VERA and mitigation measure 4.3-1, indicating that, without those, the construction emissions of ROGs and NO_x would exceed the 10-ton threshold, but PM₁₀ emissions would not exceed the 15-ton threshold. The EIR notes that mitigation measure 4.3-1 would bring NO_x and PM₁₀, but not ROGs, down to two tons per year, so only the impact of ROG emissions would be significant and unavoidable. Finally, the EIR states that the VERA would bring the emissions of all three pollutants down to zero, but “consistent with Section 15091(a)(2) of the CEQA Guidelines, lead agencies may not rely upon mitigation that is within the responsibility or

³The relationship between these thresholds and the two-ton threshold discussed above is not made clear in the EIR. The 10- and 15-ton thresholds are found in the SJVAPCD’s Guide for Assessing and Mitigating Air Quality Impacts (GAMAQI) and are meant to identify the point at which an impact is significant, triggering the requirement to prepare an EIR. The two-ton threshold from SJVAPCD’s Rule 9510, however, is also intended to be used to determine when a project’s impact is significant.

⁴Mitigation measure 4.3-2 requires detailed dust-control measures during construction. Mitigation measure 4.3-3 requires compliance with dust control rules of the SJVAPCD. Mitigation measure 4.3-4 requires the developer to compel contractors to use equipment with lower-emission engines. Mitigation measure 4.3-5 requires the use of building materials with lower emissions and recycling of waste and unused building materials.

jurisdiction of another public agency. Because implementation of the VERA is within the jurisdiction of the SJVAPCD, for purposes of this Draft EIR, the VERA is not considered full mitigation for the project's ROG impacts." The EIR then concludes that, with respect to ROGs only, impact 4.3-2 is significant and unavoidable.

Impact 4.3-3, "Result in Operations-Related Activities [that] Would Produce Ozone Precursors and PM₁₀ Emissions that Exceed Thresholds," is concerned with "on-road vehicle travel" generated by the project, which would cause emissions of the three pollutants, and emissions from "area sources such as onsite landscaping equipment emissions; natural gas combustion (to facilitate cooking and heating); fireplace use; operation of miscellaneous sources for the hotel, spa, and restaurants; operation of a new gas station; and use of consumer products." Again applying the thresholds of 10 tons per year each of NO_x and ROGs and 15 tons per year of PM₁₀, the EIR states that the emissions of all three pollutants would exceed these thresholds without mitigation. Each year at full build-out, 115.4 tons of ROGs, 102.1 tons of NO_x, and 230.3 tons of PM₁₀ would be emitted.

In its analysis of mitigation of this impact, the EIR again begins by discussing the VERA and mitigation measure 4.3-1. "The VERA would ensure that operational emissions of these pollutants within the SJVAB are fully offset," the EIR states. Mitigation measure 4.3-1 "would ensure that project operational emissions of NO_x and PM₁₀ do not exceed 2 tons per year within the SJVAB." The EIR then describes mitigation measures 4.3-6 through 4.3-14, which are methods of reducing emissions from electricity generation for the project and from vehicle use.⁵

⁵Mitigation measure 4.3-6 requires incorporation of energy-efficient design features in structures, use of solar energy, and implementation of water conservation measures. Mitigation measure 4.3-7 requires a transit connection at the project site to be made available to local and regional transit operators. Mitigation measure 4.3-8 requires use of alternative fuel technologies in community service vehicles. Mitigation measure 4.3-9 requires inclusion of high-speed communications technology to encourage

In its discussion of the magnitude of impact 4.3-3 after mitigation, the EIR again presents a table that excludes the effects of the VERA and mitigation measure 4.3-1, indicating that, without those, the operational emissions of ROG_s and NO_x would exceed the 10-ton threshold and PM₁₀ emissions would exceed the 15-ton threshold. The EIR notes that mitigation measure 4.3-1 would bring NO_x and PM₁₀, but not ROG_s, down to two tons per year within the SJVAB, so only the impact of ROG emissions would be significant and unavoidable. Finally, the EIR repeats that the VERA would bring the net emissions of all three pollutants down to zero within the SJVAB, but “[b]ecause implementation of the VERA is within the jurisdiction of the SJVAPCD ... the VERA is not considered full mitigation for the project’s ROG impacts,” and therefore with respect to ROG_s only in the SJVAB, impact 4.3-3 is significant and unavoidable.

This disavowal of the VERA in the analysis of impacts 4.3-2 and 4.3-3 is puzzling. There is no apparent reason why the VERA is disavowed but mitigation measure 4.3-1, which also depends primarily on the payment of mitigation fees to the SJVAPCD, is not. There also is no apparent reason why the VERA is disavowed in the analysis of impacts 4.3-2 and 4.3-3, but is relied on to show that impact 4.3-1 will be mitigated to an insignificant level. Finally, the provision of the Guidelines the EIR cites is not really an obstacle to the use of the VERA as a mitigation measure. We will return to this point later.

When it approved the project, the county certified a statement of overriding considerations (SOC) that included discussion of these air quality impacts. An SOC is required whenever an agency approves a project based on an EIR that finds significant environmental impacts that cannot be reduced to an insignificant level by feasible

telecommuting. Mitigation measures 4.3-10 and 4.3-11 require commercial areas to be designed to be accessible by pedestrians, bicyclists, and community electric vehicles and require bike racks in commercial areas. Mitigation measures 4.3-12, 4.3-13, and 4.3-14 require designated parking for park-and-ride commuters, carpoolers, and alternative fuel vehicles.

mitigation measures. (§ 21081, subd. (b).) It is a statement in writing, supported by substantial evidence in the record, of “specific economic, legal, social, technological, or other benefits” of the proposed project that “outweigh the unavoidable adverse environmental effects.” (Guidelines, § 15093, subd. (a).) Notes in the Guidelines describe this as a “balancing statement” setting forth the agency’s “views on the ultimate balancing of the merits of approving the project despite the environmental damage.” (Guidelines, discussion following § 15093.)

This project’s SOC stated that the air quality impact, among others, could not feasibly be mitigated to an insignificant level. It found that the project’s unavoidable impacts were acceptable “in light of the social, legal, economic, environmental, technological and other” benefits of the project. Benefits described in the SOC include increased tax revenue for the county, funding of various community programs by the project proponent, increased public access and recreational opportunities in the project area, preservation of natural areas within the project area, and provision of needed housing.

The challengers argue that the precise formulation of the most important mitigation measures discussed in the EIR has been improperly delayed to the future. Specifically, the VERA depends on offsite mitigation projects that mostly have not been identified or approved. Similarly, mitigation measure 4.3-1 depends on VERAs or other fee mitigation approaches that have not been formulated, project design features that have not been described, and future county programs that have not been proposed.

This objection is to what has come to be known as the “deferral” of the making of mitigation plans to a point after project approval. (See Remy et. al., Guide to CEQA (2006 ed.) p. 551 (hereafter Remy).) “In general, an agency should not rely on a mitigation measure of unknown efficacy in concluding that a significant impact will be mitigated to a less than significant level.” (*Ibid.*) According to the Guidelines, “[m]itigation measures must be fully enforceable through permit conditions, agreements,

or other legally-binding instruments.” (Guidelines, § 15126.4, subd. (a)(2).) “Over the last several years, however, the courts have developed legal principles regarding the extent to which an agency, in concluding that a significant impact will be fully mitigated, can rely on a mitigation measure that defers some amount of environmental problem-solving until after project approval.” (Remy, *supra*, at p. 551.)

It appears to be agreed generally that “an agency goes too far when it simply requires a project applicant to obtain a biological report and then comply with any recommendations that may be made in the report,” for example. (*Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 793 (*Endangered Habitats*)). One of the situations where “[d]eferral of the specifics of mitigation is permissible,” however, is “where the local entity commits itself to mitigation and lists the alternatives to be considered, analyzed and possibly incorporated in the mitigation plan.” (*Ibid.*)

The cases analyzing the acceptability of deferred mitigation presuppose that a lead agency has found that an impact will be insignificant with mitigation. The challenge in those cases is to the agency’s finding that a mitigation measure would be sufficient to reduce the impact to an insignificant level even though the details of the mitigation measure were not known at the time of project approval. Here, by contrast, the county found that some of the air quality impacts will be significant and unavoidable, but still adopted mitigation measures to reduce the impacts.

It might be argued that the notion of improper deferral does not apply in a case in which the lead agency admits it cannot adequately mitigate the impact. Still, the EIR in this case asserts that, in the SJVAB, the emissions at least of NO_x and PM₁₀ *will* be mitigated to an insignificant level; only ROG emissions may not. Further, for purposes of impact 4.3-1, the EIR claims that all three pollutants will be mitigated to an insignificant level. Finally, the only reason the EIR gives for concluding that any of the pollutants will not be fully mitigated for purposes of any of the three impacts (4.3-1, 4.3-2 and 4.3-3) is

the unsupported view (to be discussed further below) that the Guidelines prohibit reliance on the VERA because another agency has the obligation of enforcing it; and this conclusion is asserted only after many repetitions of the claim that the VERA fully mitigates these impacts. In these ways, although the EIR does not actually declare that the project's emissions of all these pollutants will be mitigated to an insignificant level, it comes within a hairsbreadth of doing so. We will proceed on the assumption that if the EIR's findings are based on improperly deferred mitigation, then the county has failed to proceed in the matter required by law.

The challengers rely mainly on *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70 (*Richmond*), which involved modifications to an oil refinery. There, after conceding late in the environmental review process (i.e., in an addendum circulated four months after issuance of the final EIR) that the project's greenhouse gas emissions would be a significant impact, the city approved the project after finding that a mitigation measure would ensure no net increase in greenhouse gas emissions. (*Id.* at pp. 90-91.) The mitigation measure required the project proponent to hire an expert within one year after project approval to analyze the emissions and identify reduction opportunities. Several means of reduction the expert might end up identifying were listed. On the basis of the expert's recommendations, the project proponent was to draw up a plan for future approval by the city council. (*Id.* at pp. 91-92.)

The Court of Appeal held that deferral of the formulation of specific mitigation measures to a time after project approval is not appropriate unless “the lead agency: (1) undertook a complete analysis of the significance of the environmental impact, (2) proposed potential mitigation measures early in the planning process, and (3) articulated specific performance criteria that would ensure that adequate mitigation measures were eventually implemented.” (*Richmond, supra*, 184 Cal.App.4th at p. 95.) The court held that the city failed because it “delayed making a significance finding until late in the CEQA process, divulged little or no information about how it quantified the

Project’s greenhouse gas emissions, offered no assurance that the plan for how the Project’s greenhouse gas emissions would be mitigated to a net-zero standard was both feasible and efficacious, and created no objective criteria for measuring success.” (*Ibid.*)

The parties agree that *Richmond* provides the appropriate method of analysis here. There appears to be no dispute but that the EIR does, in fact, defer definite formulation of air-quality mitigation measures; instead, the parties disagree about whether the deferral is proper or improper. Their disagreement (so far as the SJVAB is concerned) focuses on whether the VERA and mitigation measure 4.3-1 offer assurance of feasible and efficacious potential means of reducing of emissions. The challengers say the EIR fails to identify the means by which the VERA and mitigation measure 4.3-1 will achieve the stated goal of reducing emissions to two tons per year. The county says the EIR’s discussion of the VERA and mitigation measure 4.3-1 is sufficient to provide the necessary assurance.

Before we can resolve this dispute, we must turn our attention to case law on the sufficiency of mitigation achieved through the payment of mitigation fees. The parties’ briefs contain little discussion of the authorities on this subject, but delving into them is unavoidable. The VERA is a mitigation fee agreement, and mitigation measure 4.3-1 depends mainly on potential future mitigation fee arrangements. Mitigation through fees may be “deferred” in the sense that an agency receiving mitigation fee payments may not know at the time of project approval exactly how it will spend the money. The cases on mitigation through fees shed light on when this kind of deferral—which is the kind at issue in this case—is proper and improper.

The practice of collecting fees to mitigate project impacts grew out of the need to apportion the cost of mitigation among multiple projects with a cumulative impact where the mitigation for all the projects consists of common measures that will benefit all the projects, such as road and highway improvements. The Guidelines expressly recognize

the legitimacy of this type of “fair share” fee as a form of mitigation. (Guidelines, § 15130, subd. (a)(3).)

The first case discussing this kind of mitigation in detail was *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99 (*Save Our Peninsula*). (See Remy, *supra*, at p. 559.) *Save Our Peninsula* involved a county’s approval of a housing development that would result in traffic impacts. (*Save Our Peninsula, supra*, at pp. 107-108, 135.) The EIR recommended, and the county approved, mitigation via payment of fees into existing county traffic impact fee programs. (*Id.* at p. 135.) The specific road construction projects for which the money would be used, and the timing of those projects, was to be determined by the county. (*Id.* at pp. 135-136.) The challengers argued that this mitigation was inadequate because it did not “identify the nature of specific improvements and their timing and how the improvements would mitigate the impact of the increased traffic.” The trial court agreed. (*Id.* at p. 138.)

The Court of Appeal reversed this part of the judgment. (*Save Our Peninsula, supra*, 87 Cal.App.4th at pp. 107, 143.) “Of course a commitment to pay fees without any evidence that mitigation will actually occur is inadequate,” it stated. (*Id.* at p. 140.) “Here, however, the collection of fees was not an idle act.” (*Ibid.*) Improvements to specific road segments had been planned. Improvements to others had been funded and scheduled, and yet others had actually been completed. (*Id.* at pp. 140-141.) “Thus with respect to the problem areas for traffic identified in the EIR, the evidence indicated that road improvement plans were in place and in some cases construction was proceeding.” (*Id.* at p. 141.) The appellate court was “not unsympathetic to concerns, voiced by the trial court, about the County’s failure to act in the past to implement road improvements,” but it did not believe “that CEQA requires that the EIR to set forth a time-specific schedule for the County to complete specified road improvements. All that is required by CEQA is that there be a reasonable plan for mitigation. [Citations.] Furthermore, we must presume and expect that the County will comply with its own ordinances, and spend

the fees it collects on the appropriate improvements to the affected road segments.”

(Ibid.)

Our Supreme Court cited *Save Our Peninsula* in its solution to a problem analogous to the problem of when mitigation fee payments are adequate. In *City of Marina v. Board of Trustees of California State University* (2006) 39 Cal.4th 341 (*City of Marina*), the California State University (CSU) trustees certified an EIR for the building of a new campus for CSU Monterey Bay at Fort Ord. (*Id.* at pp. 345, 348.) The project would have significant impacts on drainage, water supply, traffic, wastewater management and fire protection, all of which would require offsite infrastructure improvements. (*Id.* at pp. 349-351.) Fort Ord was managed by a state governmental entity called the Fort Ord Reuse Authority (FORA). (*Id.* at p. 346.) FORA had plans to implement the necessary improvements, for which it expected CSU to pay a share. (*Id.* at p. 351.) The trustees, however, refused to make any financial contribution, believing they were legally prevented from doing so and claiming the payments would not be a feasible form of mitigation in any event because the trustees could not guarantee that FORA would actually implement the improvements. (*Id.* at pp. 351, 363.)

The Supreme Court rejected the view that the trustees were legally barred from making the payments and went on to consider whether the payments would not be feasible mitigation because the lead agency could not guarantee that the money would be used to mitigate the impacts. (*City of Marina, supra*, 39 Cal.4th at pp. 359, 363.) The trustees’ position was that, although the planned infrastructure improvements would mitigate the impacts if built, there was no assurance that they would be built even if CSU made payments for its share to FORA, because additional payments would have to be made by others, and there was no guarantee that this would happen. (*Id.* at pp. 363-364.) The Supreme Court rejected this argument, holding that “[t]he presently identified, unavoidable uncertainties affecting the funding and implementation of the infrastructure improvements FORA has proposed ... do not render voluntary contributions to FORA by

the Trustees infeasible as a method of mitigating” the project’s impacts. (*Id.* at p. 364.) There was “no reason to doubt that FORA will meet its statutory obligation as the government of Fort Ord to prepare the base for civilian development by constructing whatever public capital facilities are necessary for that purpose.” (*Id.* at p. 365.) The Supreme Court then quoted the holding of *Save Our Peninsula* that CEQA does not require a time-specific schedule, but only a reasonable plan for mitigation. (*City of Marina, supra*, at p. 365.)

Friends of Lagoon Valley v. City of Vacaville (2007) 154 Cal.App.4th 807 (*Friends of Lagoon Valley*) applied the reasoning of *Save Our Peninsula* to uphold traffic mitigation fees. In that case, a city approved a development project that included commercial and residential construction. (*Friends of Lagoon Valley, supra*, at pp. 813-814.) Challengers claimed the project failed to conform to the city’s general plan because of increased traffic. (*Id.* at pp. 817-818.) To mitigate cumulative traffic impacts, the city required payment of fair-share impact fees to help fund improvements to a freeway and roads. (*Id.* at p. 818.) The appellate court rejected the challengers’ contention that the fee payments were inadequate mitigation because there was no guarantee that the improvements would be constructed in light of “the current funding situation of the state in general, and Caltrans in particular.” (*Id.* at pp. 818-819.) It was sufficient that the project “will contribute money to specific mitigation measures, which are described in the EIR addendum” and “the City and Caltrans will be cooperating to prepare a Project Study Report for the freeway ramp improvements described in the EIR.” (*Id.* at p. 819.)

We encountered a situation in which a mitigation fee scheme was inadequate in *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692 (*Kings County Farm Bureau*). A new power plant was proposed to supply electricity and steam to a tire factory. (*Id.* at p. 707.) The plant would consume ground water. (*Id.* at pp. 724-725.) The project proponent entered into a mitigation agreement with the Kings County Water District pursuant to which the proponent would contribute money to the water district’s

ground water recharge program. (*Id.* at p. 709.) In certifying the EIR, the city found that the project would have no significant effect on the environment. (*Id.* at p. 710.) The EIR contained no evaluation, however, of whether water would actually be available for ground water recharge as contemplated by the agreement. The record included a memo by the city’s public works director stating that ““money does not constitute water recharge”” and that the water district already had a large capital reserve because it could not find water on which to spend its money. (*Id.* at pp. 727-728.) We held that the EIR was inadequate. “To the extent the [mitigation fee] agreement was an independent basis for finding no significant impact, the failure to evaluate whether the agreement was feasible and to what extent water would be available for purchase was fatal to a meaningful evaluation by the city council and the public.” (*Id.* at p. 728.)

Another case in which impact fees were held inadequate is *Endangered Habitats*, *supra*, 131 Cal.App.4th 777. In that case, the EIR for a development project found that traffic added by the project would cause the level of service on a road to become unacceptable according to the traffic projection method required to be used by the county’s general plan. (*Id.* at p. 783.) The EIR called for payment into two traffic mitigation fee programs. (*Id.* at p. 784.) The Court of Appeal held that this mitigation was inadequate. The record showed only that the fee programs existed to fund future improvements to the road. It did not show what improvements would be funded or whether those improvements would achieve the level of service mandated by the general plan. (*Id.* at p. 785.)

Impact fees to mitigate traffic impacts from a shopping center project were held to be inadequate in *Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173. The EIR called for payment of \$611,214 for the project’s share of the cost of improvements to a freeway interchange. The appellate court concluded that it was undisputed that the correct figure was \$657,930 and that this amount was for phase I of the project only. Citing *Save Our Peninsula*, the court held that, in order to be sufficient

under CEQA, the mitigation measure would have to state the correct amount, require payment of a like percentage for improvements beyond phase I, and “make these fees part of a reasonable, enforceable plan or program that is sufficiently tied to the actual mitigation of the traffic impacts at issue” (*Anderson First, supra*, at p. 1189.)

These precedents supply support to both sides in the present case. In *Save Our Peninsula, supra*, 87 Cal.App.4th 99, the EIR did not say exactly what the future road improvements would be and left it to an agency to determine this. Here, similarly, the EIR describes only one approved offsite emission-offset project and two projects under consideration, and admits that, for the remaining emissions, no potential projects have been identified. The *Save Our Peninsula* court found that the lack of specificity was not fatal and that only a reasonable plan for mitigation was required. On the other hand, that court’s conclusion that a reasonable plan existed depended in part on a determination that the record (though not the EIR) showed that improvements had been identified and approved and construction had begun. Here, only a portion of the necessary offsets have even been suggested, and the county was forced to rely on the SJVAPCD’s assurance that additional projects will be found.

In *City of Marina, supra*, 39 Cal.4th 341, the uncertainty arose not from questions about what improvements would be constructed and when, but from a lack of knowledge of when and by whom the remaining costs would be paid and from the lead agency’s lack of power over the agency responsible for spending the mitigation fee funds. The Supreme Court held that these factors did not render the fee-based mitigation infeasible. In our case as well, the fee money will be spent by another agency, the SJVAPCD. *City of Marina* stands for the proposition that this alone does not defeat the mitigation measure. The uncertainty in *City of Marina* about where the remaining money will come from—which the Supreme Court also held not to be fatal—is somewhat analogous to the uncertainty in the present case about what the remaining offsite emission reduction projects will be.

In *Friends of Lagoon Valley*, *supra*, 154 Cal.App.4th 807, the fee-based mitigation for traffic was adequate despite uncertainty about additional funding because the project was to contribute money to fund specific road improvement measures described in the EIR, and the city and Caltrans were to cooperate in the future on a study to determine the details of freeway ramp improvements. In our case, the specific measures to offset the project's emissions are only partially known; the project proponent and the SJVAPCD are to work out more such measures in the future. Again, there are similarities and differences between the two cases. In both, some details of the mitigation to be funded by the fees are set out in the EIR and others are to be determined later. The proportions appear to be different: It seems that in *Friends of Lagoon Valley*, the road improvements were largely detailed in the EIR and the necessary freeway improvements were generally known in advance, with some of the specifics to be settled later. Here, most of the specifics remain to be settled.

Kings County Farm Bureau, *supra*, 221 Cal.App.3d 692, in which the fee mitigation was held inadequate, involved payment of money to a water district for ground water recharge without any discussion in the EIR of where the water district would buy the water. Our case is similar in part: There is discussion in the EIR of where some of the pollution offsets would come from (some of these approved, most only under consideration), but the EIR concedes that most of the amount needed is not accounted for by the measures identified so far. On the other hand, in *Kings County Farm Bureau*, there was nothing at all to support the view that the necessary water would be available. Here, there is evidence not only of some potential offset projects, but also of the SJVAPCD's affirmative belief, based on past experience, that it has the ability to find enough additional offset projects.

Endangered Habitats, *supra*, 131 Cal.App.4th 777, is similar to *Kings County Farm Bureau*. The problem in *Endangered Habitats* was that the record contained nothing showing what the road improvements would be or whether they would solve the

problems caused by the project. Here, there is some evidence of available and potentially available offset projects and of the agency's opinion that it can succeed, but the record also shows that it is presently unknown how a large portion of the need for offsets will be satisfied.

The question is close, but in light of all these authorities, we conclude the fee-based mitigation for NO_x, ROG_s, and PM₁₀ as discussed in impacts 4.3-1, 4.3-2, and 4.3-3 passes muster in this case. The VERA commits the SJVAPCD to locating and implementing means of offsetting all the project's emissions of these pollutants in the SJVAB and commits the project proponent to paying the cost of doing this. One offset project has been approved by SJVAPCD, two more have been proposed by the project proponent, and SJVAPCD's executive director wrote in a letter to his board that he was confident in the agency's ability to accomplish the necessary offsets. The lead agency, Kern County, will not control the implementation of the mitigation projects, but just as in *City of Marina, supra*, 39 Cal.4th at page 365, we must presume the responsible agency will carry out its acknowledged legal obligations.

We acknowledge that if this case were about traffic impacts, these precedents might call for a different result. There is considerable uncertainty here about what actual emissions-offset projects will be employed. The attitude in the prior cases, at least for traffic, has generally been that the measures to be paid for by mitigation fees can and should be identified in the record before project approval. We believe, however, that air pollution mitigation is different, at least for projects where the primary air quality impact comes from cars the project will attract. Many projects have air impacts because of car traffic they create, and in the typical situation, surely, onsite mitigation measures are not enough to offset those impacts. It is also probably typical that offsite emission reduction projects cannot be identified at the time of project approval to offset all the project's impacts, especially where, as here, the project will be built over a long period of time and offsite projects will have to be found among opportunities that arise over the years. If we

were to hold that a lead agency cannot rely on an air pollution control district's contractual commitment to use the fees to offset the pollution, and on its opinion, based on its experience and expertise, that it will be able to do so, project proponents and lead agencies will be discouraged from using fee-based mitigation for air pollution at all, even though no other mitigation may be available. They would instead be encouraged to find that, because specific offset projects are not in place at the time of project approval, fee mitigation is infeasible and therefore the impacts are unavoidable.

The EIR itself (but not the challengers' briefs) contains an argument that might be seen as defeating the VERA as a mitigation measure. This is the argument that Guidelines section 15091, subdivision (a)(2), forbids a lead agency to approve a project while relying on another agency to carry out a mitigation measure. The EIR says Guidelines section 15091, subdivision (a)(2), means that "lead agencies may not rely upon mitigation that is within the responsibility or jurisdiction of another public agency."

The reality is more complex. Section 21081 allows a lead agency to approve a project for which the EIR identifies a significant environmental impact only if the agency requires mitigation, finds mitigation infeasible, or finds that mitigation measures are "within the responsibility and jurisdiction of another public agency and have been, or can and should be, adopted by that other agency." Guidelines section 15091 further refines the findings a lead agency must make before relying on mitigation by another agency. The lead agency must find that mitigation measures "are within the responsibility and jurisdiction of another public agency *and not the agency making the finding*."

(Guidelines, § 15091, subd. (a)(2), italics added.) That section further provides: "The finding in subdivision (a)(2) shall not be made if the agency making the finding has concurrent jurisdiction with another agency to deal with identified" mitigation measures. (Guidelines, § 15091, subd. (c).) The Supreme Court has explained that a finding that another agency is responsible "is permissible only when the other agency said to have responsibility has *exclusive* responsibility." (*City of Marina, supra*, 39 Cal.4th at p. 366.)

“The Guidelines’ logical interpretation of CEQA on this point ‘avoids the problem of agencies deferring to each other, with the result that no agency deals with the problem....’ [Citation.]” (*Ibid.*) A leading treatise concludes from all this that, “[i]f the agencies have concurrent jurisdiction, the agency issuing the project approval should either impose the mitigation measure or reject it as infeasible.” (2 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2d ed. Jan. 2011 update) § 17.24, p. 821.)

The foregoing shows that the county misinterpreted Guidelines section 15091. Assuming the county shared jurisdiction with the SJVAPCD to require air pollution mitigation, that section required the county either to require the VERA as a mitigation measure as a condition of project approval or to reject it as infeasible. It did neither. Instead, it described it in terms that assumed it was feasible and at the same time did not formally impose it. To comply with Guidelines section 15091, the county should simply have stated that the project’s existing VERA was a mitigation measure required for project approval. The EIR therefore is wrong to say that the county cannot rely on the VERA because it is the SJVAPCD’s responsibility. It could rely on it and could impose it.

The fact that it failed to formally impose it does not, however, mean that the trial court should have held that the mitigation required by the EIR was inadequate. The VERA was already in place at the time of project approval, so it was not necessary to impose it as a condition of project approval. The EIR’s failure to formally include the VERA as a mitigation measure does not render the VERA unenforceable, since it is a contract enforceable by the SJVAPCD. We do not think Guidelines section 15091, subdivisions (a)(2) and (c), imply that, where another agency has *actually* imposed a mitigation measure enforceable by that agency, the lead agency must add additional enforcement powers of its own if it has concurrent jurisdiction. As *City of Marina, supra*, 39 Cal.4th at page 366, held, the point of these provisions is to avoid the problem of

agencies deferring to each other with the result that nothing is done. That problem does not arise here. The VERA is a commitment already made by the other agency.

Beyond this, the county does actually have some enforcement power with respect to the VERA. Mitigation measure 4.3-1 provides the county an opportunity to enforce it, at least for NO_x and PM₁₀. If the project proponent abandons the VERA and the SJVAPCD fails to enforce it, and the project proponent finds no other means of complying with the two-ton limit, the EIR calls for the county to refuse to issue building permits.

Our focus has been on the sufficiency of VERA, but these last remarks bring us finally to an evaluation of mitigation measure 4.3-1. That measure would be very weak on its own. It relies mainly on fee mitigation schemes, but says nothing at all about what offsite emission reduction projects the fees would be spent on. It mentions the possibility of design features being used to reduce emissions, but says nothing about what these features might be. It refers to potential new programs that might be adopted by Kern County, but there is no description of what these might be or how likely they are to come into existence. In conjunction with the existing project VERA, however, mitigation measure 4.3-1 has some substance, as what we have already said indicates. Since mitigation measure 4.3-1 contemplates the potential use of a VERA or other fee arrangement with the SJVAPCD as a means of satisfying the requirement to provide evidence of mitigation at the time of permit issuance, the existing project VERA could be used to carry out mitigation measure 4.3-1. In effect, mitigation measure 4.3-1 functions to give the county an opportunity to review the project's progress on securing offsite pollution offsets at the beginning of each phase, and to halt further building if it does not believe that the two-ton standard will be satisfied. In this way, mitigation measure 4.3-1 reinforces the VERA and becomes part of a workable mitigation scheme.

For all these reasons, we conclude that the fee-based mitigation in the EIR—the VERA and the fee-based aspects of mitigation measure 4.3-1—is “not an idle act” but is

instead “a reasonable plan for mitigation.” (*Save Our Peninsula, supra*, 87 Cal.App.4th at pp. 140-141.) Therefore, we agree with the county that these measures have not been improperly deferred.

B. Air quality in the MDAB and the SCAB

I. MDAB

Only a small portion of the project site lies in the MDAB, and there will be no construction on that portion. The challengers argue, however, that the EIR does not contain sufficient analysis or require sufficient mitigation for air quality impacts on the MDAB. This contention is based on the idea that, because the project is at the border between basins, it is probable that pollutants emitted at the project site will be transported by the wind into the MDAB. Further, because the EIR’s mitigation scheme depends primarily on offsite emission reduction projects administered through the SJVAPCD—projects that could be located anywhere within the SJVAB—there is no reason to believe the reductions will be focused near the border between the basins and, therefore, no assurance that emissions from the project site will not drift into the MDAB, even if there is full offset of the project’s emissions via projects located elsewhere. In other words, the SJVAB may receive the full benefit of the offsets even though some of the pollution is transferred to the MDAB, which may receive none of the benefits.

The EIR acknowledges that transport of pollutants from the SJVAB to the MDAB occurs. It states, however, that the project will not cause any transport of pollutants to the MDAB because the VERA requires full mitigation. For this reason, the EIR concludes, it is unnecessary to analyze the impact on the MDAB further.

In its brief, the county argues that any pollution that would have been transported into the MDAB otherwise will not be transported because of the offsets. “[T]he VERA will ensure that no net emissions of NO_x, ROG or PM are transported from the SJVAB to the MDAB as a result of the Project,” the county says. This assertion is not supported by the record and is not logical. Pollutants can be carried from the project into the MDAB

regardless of whether emissions are reduced by offset projects elsewhere. The challengers are right when they argue that there is no basis for a conclusion that offsets at unknown places within the SJVAB will prevent any pollution from the project from drifting to the MDAB.

Another argument the county makes is persuasive, however: “From an ambient air quality perspective, the important question is the *total* amount of a pollutant that ends up in a basin” If offsets at another location are an acceptable form of air quality mitigation in general, it cannot be the case that they are unacceptable any time pollution from the project can still have an impact in some location other than the location of the offsets. That is always a possibility with offsite mitigation. If the TMV project were in the center of the SJVAB instead of at the border, its emissions might have an impact in the center even though those emissions were fully offset by measures taken in other locations in the basin. If this is an acceptable state of affairs, we do not see how the project’s location at the border makes a difference. The very idea of offsite mitigation depends on the assumption that reductions in one location can compensate for emissions in another. The challengers have cited no authority to the contrary.

In a comment letter submitted to the county during the environmental review process, the challengers made their argument on this point in a slightly different way: “If the project proponents are going to rely so heavily on the purchase of [emissions offsets], they must at least have an enforceable obligation to buy them from within a reasonable radius of the occurrence of the impacts.” In other words, according to the challengers, it is not enough merely to pay the air pollution control district in which the project is located for offsets; it is also necessary to ensure that the offsets will be implemented in locations close to the project. The challengers did not cite any authority for this in their comment letter and cite none now.

The challengers also say the EIR is deficient because it does not contain a quantified analysis of the pollutants that will drift into the MDAB. That is, although the

EIR reports the quantity of pollutants that the project will generate, it does not say what portion will be transported from the project site to the nearby MDAB. This argument fails for reasons similar to those we have just discussed. The challengers have cited no authority for the view that whenever a lead agency uses offsite measures to mitigate a project's air quality impacts, a requirement is triggered to determine whether localized impacts will remain near the project site.

Certainly scenarios can be imagined in which offsite mitigation would be ineffective because impacts near the project site would remain. For *some* impacts, no doubt, offsite mitigation is not feasible because of this. For instance, it would make no sense to offset a noise impact at a project site by paying for a reduction in noise at some distant location. The challengers have not shown that we face that kind of situation here. They state that one of the pollutants at issue, PM₁₀, is a “localized” pollutant and cite evidence in the record for that description, but they do not explain exactly what this means, and they cite no authority for the view that if offsite mitigation is used for a “localized” pollutant, additional analysis and mitigation for the area near the project site is required.

In one of their reply briefs, the challengers make another argument. They say that, in addition to the pollution that will be carried from the project into the MDAB by the wind, the project also will cause emissions in the MDAB itself by generating vehicle traffic crossing between the two basins, especially traffic between TMV and Centennial.

The county filed a motion to strike portions of the reply brief, including this portion. The county argues that the issue of pollution generated within the MDAB by vehicle traffic arising from the project was not raised by anyone during the environmental review process and was not raised on appeal until the filing of the reply brief. Therefore, the county argues, the challengers have failed to exhaust administrative remedies with respect to this issue and have failed to give the county a fair opportunity to respond to the

issue in the appeal. The question of exhaustion of administrative remedies on this point was litigated in the trial court, which agreed with the county.

Before a petitioner can assert a CEQA violation against an agency in court, someone—not necessarily the petitioner—must raise the same issue before the agency in the administrative proceedings. (§ 21177, subd. (a).) The petitioner itself need only have raised *some* objection before the agency (§ 21177, subd. (b)); if it has, it may then litigate any issue raised before the agency by anyone. The claimed violation and the evidence on which it is based must have been raised by someone in the administrative forum.

(Barthelemy v. Chino Basin Mun. Water Dist. (1995) 38 Cal.App.4th 1609, 1620-1621.)

Even so, “less specificity is required to preserve an issue for appeal in an administrative proceeding than in a judicial proceeding,” since citizens are not expected to bring legal expertise to the administrative proceeding. *(Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo (1985) 172 Cal.App.3d 151, 163.)* Where there was no public hearing or other opportunity for the public to raise objections, the exhaustion requirement does not apply at all. (§ 21177, subd. (e).) The purpose of the exhaustion doctrine is to give the agency an opportunity to respond to specific objections before those objections are subjected to judicial review. *(Park Area Neighbors v. Town of Fairfax (1994) 29 Cal.App.4th 1442, 1449.)*

In their opposition to the motion to strike, the challengers contend that they did bring this issue to the county’s attention during the environmental review process. We have reviewed the portions of the administrative record cited by the challengers and conclude they did not raise the issue of vehicle emissions generated within the MDAB because of the project. The comments the challengers cite refer either to air pollution caused by the project and project-related traffic in general terms, or air pollution transported from the project into the MDAB by the wind. None refer specifically to air pollution emitted by project-generated traffic within the MDAB. We agree, therefore,

that administrative remedies were not exhausted on this issue and the issue cannot properly be raised in this appeal.

2. SCAB

The challengers' reply brief also contains a paragraph making brief references to the SCAB. This paragraph states: "The County further ignores the fact that the Project's emissions in the South Coast Air Basin, and Mojave [Desert] Air Basin are not offset. Mitigation Measure 4.3-1 only applies to emissions within the San Joaquin [Valley] Air Basin. [Citations.] Emissions transported to the Mojave Air District from vehicle emissions from the adjacent South Coast Air Basin or within the Mojave [Desert] Air Basin cannot be mitigated by the Project's deferred mitigation scheme that only applies to emissions in the San Joaquin [Valley] Air Basin."

These statements make two distinct points about the SCAB. First, the VERA and mitigation measure 4.3-1 do not apply to emissions from vehicle trips generated in the SCAB. The EIR acknowledges that much of the traffic-related pollution created by the project—in fact, the bulk of that pollution—will be generated by driving taking place in the SCAB. It states that 29 percent of the vehicle emissions would be emitted in the SJVAB and 71 percent in the SCAB. The VERA and mitigation measure 4.3-1 are designed to mitigate only the emissions emitted within the SJVAB. Because of this, the EIR concludes that the air quality impacts in the SCAB are significant and unavoidable, even though "all feasible mitigation measures suggested by the [South Coast Air Quality Management District] have been adopted" The EIR does not specify which mitigation measures those are.

These observations might be seen as forming the rudiments of an argument that the EIR is deficient because it does not adequately analyze, and does not require adequate mitigation of, the project's air quality impacts in the SCAB. The challengers' submissions fall far short, however, of being a sufficient appellate argument. Besides the sentences from the reply brief quoted above, the challengers' only presentation on this

point in their briefs is a footnote in which the matter is referred to obliquely and in which the SCAB is not directly mentioned.⁶ The challengers therefore have forfeited this issue by inadequate briefing. (*Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 366, fn. 2.)

The second point is that project-related vehicle emissions originating in the SCAB could be carried by the wind to the MDAB. The VERA and mitigation measure 4.3-1 would not offset this pollution because it is not emitted in and does not impact the SJVAB.

In its motion to strike, the county argues that this issue was not presented to the county during the environmental review process, was not raised in the trial court, and was not raised on appeal except in the reply brief. We agree that the issue was not presented during the county's environmental review process and, therefore, administrative remedies have not been exhausted. In their opposition to the motion, the challengers cite only the comment letters we have already discussed. None of these refer to transport of vehicle emissions from the SCAB to the MDAB. The issue therefore is not cognizable in this appeal.

Since we are ruling for the county on the merits of the exhaustion issue on the challengers' MDAB and SCAB issues, it is unnecessary to rule on the motion to strike on those points. The motion will be denied as moot on these issues.

III. Water supply

The challengers contend that the EIR's analysis of the project's water supply is inadequate for four reasons. We consider these in turn.

⁶This footnote states: "Even if the EIR only intends to apply measure 4.3-1 to the 29% of total Project's operational emissions the EIR claims occur within the San Joaquin Air Basin, not only does the EIR fail to clearly disclose this more limited mitigation obligation, but the identified mitigation would fall short of reaching this objective."

A. *Wastewater reclamation plant*

The water supply analysis in the EIR and in the water supply assessment (WSA) prepared by the Tejon Castac Water District (TCWD) relies in part on a wastewater reclamation plant that will be built as part of the project. According to the analysis, which covers a 20-year period, the project will require an average of 2,900 acre-feet of water per year at full build-out. Over the same period, other users of TCWD water will demand an average of 1,202 acre-feet per year, so the total demand for the district will be 4,102 acre-feet per year.

The analysis states that, based on a State Water Project Reliability Report, deliveries from the State Water Project (SWP) to TCWD will range between 3,325 and 3,483 acre-feet per year, assuming average-year conditions. The analysis further projects that 800 acre-feet of recycled water will be delivered in the average year by the wastewater reclamation plant to be built as part of the project, and an additional 358 acre-feet per year from reclamation facilities elsewhere in the district. These supply sources add up to between 4,483 and 4,641 acre-feet per year. With the project fully built out, therefore, the district would be operating at a surplus of 381 to 539 acre-feet per year.

The challengers contend that the analysis in the EIR and the district's WSA is inadequate because there is no guarantee that the project's wastewater reclamation facility will actually be built. They point out that the facility is treated in the EIR simply as a part of the project. It is not a mitigation measure, so the approval of the project is not conditioned on its construction. The facility is not required to be constructed first, and the project proponent was not required to post a bond guaranteeing its construction. Further, the EIR states that the plant will not be fully built when the project first begins operation; instead it will be "constructed in phases to match future project demand." In fact, in responses to comments, the final EIR explains that, in the early stages of occupancy, it will be "difficult to operate" a reclamation system because of low flows, and the project will have to dispose of wastewater on an "interim basis" for an unstated

length of time. Until the reclamation system is fully operating, the project will use SWP water for the uses to which reclaimed water will ultimately be devoted, such as golf course irrigation.

According to the challengers, these facts mean the case law on so-called “paper water” applies here, by analogy if not directly. “Paper water,” as discussed in the case law, means water deliveries that were once promised by the SWP but which the SWP has no realistic possibility of being able to deliver. Formerly, lead agencies relied on these promises to approve the water supply discussions in EIRs, but the courts put a stop to this practice. (See, e.g., *Planning & Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 914, fn. 7 [“Paper water always was an illusion.... [It] represents the unfulfilled dreams of those who, steeped in the water culture of the 1960’s, created the expectation that 4.23 [million acre-feet] of water could be delivered by a SWP built to capacity”].)

Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova (2007) 40 Cal.4th 412 (*Vineyard Area Citizens*) is the Supreme Court’s definitive opinion on speculative water supply sources. There, the lead agency approved a community plan and a specific plan for a mixed-use development. (*Id.* at p. 421.) The Supreme Court rejected the EIR’s analysis of the development’s long-term water supply. “[T]he future water supplies identified and analyzed must bear a likelihood of actually proving available; speculative sources and unrealistic allocations (‘paper water’) are insufficient bases for decisionmaking under CEQA. [Citation.] An EIR for a land use project must address the impacts of *likely* future water sources, and the EIR’s discussion must include a reasoned analysis of the circumstances affecting the likelihood of the water’s availability. [Citation.]” (*Id.* at p. 432.) The EIR failed this test. It identified water sources “in general terms,” but did not “clearly and coherently explain, using material properly stated or incorporated in the EIR, how the long-term demand is likely to be met with those sources, the environmental impacts of exploiting those sources, and how those

impacts are to be mitigated.” (*Id.* at p. 421.) The EIR provided “no consistent and coherent description” of either the future demand for water in the plan area or the potential supply to satisfy the demand. (*Id.* at p. 439.)

In the present case, there is no claim that SWP water will not be available. The challengers instead contend that the future existence of the wastewater reclamation facility is speculative, and that this creates a risk that the project will end up relying in part on scarce ground water to the detriment of neighbors, an impact the EIR does not analyze.

Real parties in interest Tejon Mountain Village, LLC, and TRC (real parties) argue that the EIR supplies the necessary assurance that the wastewater reclamation facility will be built. This assurance, they contend, is supplied by the fact that the project will need the wastewater treatment capacity provided by the plant in order to function. According to the mitigation monitoring program approved by the county, no certificate of occupancy will be issued for any portion of the development until that portion is connected to a means of disposing of wastewater. Further, the EIR does not merely speculate about a future facility. A certain amount of detail is provided. The specific plan approved by the county, attached to the EIR as an appendix, explains that the reclaimed water will be distributed by means of a separate nonpotable circulation system and used for outdoor irrigation. It includes a map showing the intended location of the plant within the project. Also attached to the EIR as an appendix is a water reuse plan, a 53-page report describing the types of technology to be used in the plant, the plant’s expected layout, the planned facilities for storing reclaimed water, the potential uses for reclaimed water, and the regulatory requirements for treating and using reclaimed water, among other things.

The challengers reply that the mere fact that the project will need a means of disposing of its wastewater does not guarantee that a wastewater *reclamation* facility will be built. There are many options for providing for sewage disposal, most of which do not produce usable reclaimed water. The challengers contend that the county has imposed no

requirements that would prevent the project proponent from failing to build the reclamation plant, leading to a need to make up a water shortfall, perhaps from ground water.

Before analyzing the parties' arguments, we summarize the standard of review applicable to this issue, as the Supreme Court stated in *Vineyard Area Citizens, supra*, 40 Cal.4th at page 435. "In evaluating an EIR for CEQA compliance, ... a reviewing court must adjust its scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of improper procedure or a dispute over the facts." If a challenger claims that the EIR omitted information mandated by CEQA, the question for the reviewing court is whether the omission was a failure to proceed in the manner required by law, a question we answer under the nondeferential de novo standard. If the challenger's claim is factual—for instance, that an impact will not be mitigated or not mitigated as much as it feasibly could be—then we review the agency's conclusion only to determine whether it is supported by substantial evidence. (*Vineyard Area Citizens, supra*, at p. 435.)

The de novo standard applies to one aspect of the question presented here: whether the EIR included the necessary discussion of what the project's water sources will be, what the likelihood is of water being available from those sources, and whether the sources will be sufficient to satisfy the project's demand. The EIR's treatment of the water reclamation facility is sufficient in this regard. The EIR and its appendices describe the proposed plant in detail, state the quantity of reclaimed water it will produce, and explain how this water fits into the project's overall water supply plan. In fact, the challengers express no doubt that the project will produce enough wastewater to allow 800 acre-feet to be reclaimed per year, no doubt about the feasibility of building a plant to reclaim that amount, and no doubt that this quantity will be sufficient for the outdoor irrigation purposes for which it is intended.

The challengers do contend there will be demand for the recycled water for the golf courses before the reclamation plant is built or fully built, but real parties sufficiently explain how this problem will be handled. The water reclamation facility will be built in stages as the project is built so that its capacity to treat water will correspond to the project's sewage output at each stage. To meet the outdoor irrigation demand in the meantime, the project will use SWP water. This will not create a water deficit for the project because its other demand for SWP water will be correspondingly less while the project remains unfinished. We conclude that in approving the EIR's discussion of the water reclamation plant and its role in the project's water supply, the county did not fail to proceed in the manner required by law.

The substantial evidence standard applies to another aspect of the issue in this case: the question of whether the plant will really be built. The record shows that the project will need means of treating wastewater and will also need water to irrigate its landscaping and golf courses. The reclamation plant described in the EIR will satisfy both needs at one stroke. The challengers' scenario—in which the EIR's reclamation facility is a decoy and the project proponents are really going to build sewage facilities that produce no usable water, and then make up the resulting shortfall with ground water—is not impossible. It is more probable, however, that the facility will be built as described. Given the record, the county's discretion extended to crediting the reclamation plan as real.

B. Water banks

Our discussion above about water supply and demand assumes a constant supply each year, but the EIR also contains several analyses of water supply in dry years when SWP deliveries are reduced. In these analyses, the project would draw water from water banks in which TCWD stores water. The EIR states that TCWD has agreed to maintain a reserve in its water banks equal to seven years of indoor water use by the project. For the built-out project, this would be 7,000 acre-feet of banked water. A mitigation measure

requires certification by TCWD, before issuance of each residential building permit, that a reserve sufficient to supply the indoor water demand for seven years for the portions developed so far is being held in the water banks for the project's exclusive benefit.

The EIR's first dry-year analysis assumes that single dry years will occur at five-year intervals over the 20-year span of the analysis. In each of these dry years, SWP deliveries to TCWD will be a small fraction of the average-year deliveries, about 300 to 400 acre-feet per year instead of about 3,300 to 3,500 acre-feet per year. To compensate, about 2,500 to 2,600 acre-feet will be extracted from water banks in each of the dry years.

Next, the EIR analyzes two multiple-dry-year scenarios. The first assumes a four-year drought based on the actual conditions in the period 1931 to 1934. SWP deliveries are reduced to about 1,300 acre-feet per year to about 2,100 acre-feet per year. Between 900 and 1,600 acre-feet are extracted from the water banks each year. By the end of the drought, the water bank reserve is reduced by about 5,000 acre-feet.

The second multiple-dry-year scenario assumes conditions from the drought of 1977 to 1982. In year one and year three of this scenario, SWP deliveries are close to the average-year deliveries, but in the remaining years, deliveries are reduced to about 400 from about 1,400 acre-feet. Between 1,600 and 2,600 acre-feet are extracted from the water banks in those years. By the end, the water bank reserve is reduced by about 7,000 acre-feet.

The TCWD's water bank holdings when the WSA was prepared were 29,728 acre-feet. The single-dry-year and multiple-dry-year analyses assumed lower starting points for the water bank holdings, but the balance does not fall below the required 7,000 acre-foot reserve under any of the scenarios.

The challengers contend that it is improper for an EIR to treat water banks as a "supply" of water: "The EIR's use of water banking as a significant source of water for a permanent housing development is novel, and raises legitimate and serious questions about the Project's long term water supply. A water bank is not truly a 'supply,' as it is

nothing more than a temporary storage facility for a finite amount of water, not a naturally replenishing aquifer, reservoir, spring, or river.” (Fn. omitted.) Real parties respond, “obviously, it is a supply”

On this point, the parties’ disagreement is merely semantic. The water banks are not a supply if a supply means a source that can be expected to continue providing water indefinitely. In that sense, the banks are simply a means of storing water that comes from some other supply. If, on the other hand, a source that can be relied on to replace another source for a limited time is a “supply,” then the water banks are a supply.

Regardless of the terminology, the facts are clear: The EIR relies on the water banks as a backup source for drought conditions, not as an independent source to satisfy ongoing demand. This use of water banks conflicts with nothing in CEQA.

The challengers also contend that the EIR “fail[s] to provide sufficient information regarding the source of water that will replenish the water banks.” Acknowledging that the TCWD’s water supply analysis states that the water banks will be replenished by SWP water during wetter years, the challengers say the EIR “offers insufficient details and no guarantees of replenishment beyond a 7-year reserve of potable water.”

As we have mentioned, the EIR and the WSA state that, with the project fully built, the TCWD will be operating in average years at a surplus of about 300 to 500 acre-feet per year. This surplus would be added to the water banks. Applying arithmetic, we can see that, even assuming no above-average years, this rate of surplus would enable the water banks to recover their former levels in about five to eight years after each single dry year. After a drought like the 1931-1934 drought, about 10 to 17 average years would bring the water banks back to their former level, and after a drought like that of 1977-1982, about 14 to 23 years would be required.

In their reply brief, the challengers point out that, although the water banks may have a balance above 20,000 acre-feet now, the EIR calls only for a reserve of 7,000 acre-feet. Therefore, they say, projections about how low the balances might go should use

7,000 acre-feet as the starting point. With that starting point, the 1931-1934 scenario would reduce the balance to 2,000 acre-feet, and the 1977-1982 scenario would reduce the balance to zero.

The challengers also point out that, in response to a public comment, the agency provided additional water-supply projections based on smaller predicted SWP deliveries in the final EIR. A comment letter by the Santa Clarita Organization for Planning and the Environment asserted that a biological opinion issued by the National Marine Fisheries Service (NMFS) claimed that SWP deliveries would have to be reduced, relative to the the SWP projections upon which the draft EIR relied, to avoid impacts to certain fish species. This opinion, issued on June 4, 2009, estimated that SWP deliveries would need to be reduced by seven percent. The discussion in the final EIR defends the county's reliance on the SWP's reliability report without adjustments for this biological opinion, saying that, "[u]ntil legal uncertainties regarding Delta fish protection measures are resolved, and the [Department of Water Resources] issues the next updated assessment of the SWP system, the current SWP reliability report remains the most comprehensive analysis of potential SWP system delivery levels available for CEQA purposes."

For the sake of argument, however, the final EIR also includes tables showing water supply analyses assuming a 15 percent reduction in SWP deliveries, "more than double the potential 7% SWP impact identified in" the biological opinion. Under this assumption, in average years, SWP deliveries would be reduced to about 2,800 to 3,000 acre-feet per year and there would be no surplus or a small deficit, so no water would be added to the water banks. In single dry years, SWP deliveries would be reduced to about 300 acre-feet per year, and about 2,600 or 2,700 acre-feet would be withdrawn from the water banks.

In the 1931-1934 drought scenario, SWP deliveries would be reduced to 1,100 to 1,800 acre-feet per year for four years in a row, and there would be water bank withdrawals of 1,200 to 1,800 acre-feet in each of those years. The final EIR states that

the water bank balances would never fall below 7,000 acre-feet in any of these scenarios, but the tables show that this conclusion is based on assumed starting balances of at least 15,000 acre-feet.⁷ The final EIR does not attempt to explain how the water banks could be replenished after dry years if the project would be operating at a break-even point or a small deficit in average years.

We conclude that the information in the EIR is sufficient. The draft EIR shows that, based on the SWP's projections, there is a likelihood that SWP water (together with reclaimed water) will be available in sufficient quantities to supply the project's demand in average years; that banked water will be available to cover reductions in SWP water in dry years; and that surplus SWP water will gradually replenish the banks in nondrought years.

The adjusted figures in the final EIR indicate that the water banks could go dry if the starting balances were only 7,000 acre-feet at the beginning of a drought, and leave unanswered the question of how the water banks would be replenished. Those figures, however, are robustly conservative, since they assume a reduction in SWP deliveries of 15 percent, not only the seven percent predicted in the NMFS's biological opinion of June 4, 2009. If the seven percent reduction had been used instead, some surplus in average years would have remained. In any event, the county had discretion to rely on the SWP's projections rather than the NMFS's biological opinion that conflicted with it. (See *Federation of Hillside & Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1259 [challenges to "the methodology for studying an impact" and "the reliability or accuracy of the data" relied on in EIR is reviewed deferentially, under substantial evidence standard].)

⁷In their motion to strike filed on December 8, 2011, the county and real parties argue that we should not consider the challengers' argument that the starting balances are unsupported. As will be seen, we hold that the EIR's analysis is sufficient even assuming the starting balances would be limited to the 7,000 acre-foot reserve. Therefore, we will deny this portion of the motion to strike as moot.

To be sure, the information presented does not “guarantee” that a drought could not deplete the reserve in the water banks or that successive droughts could not prevent the reserve from recovering in time to provide water needed by the project. The challengers have cited no authority, however, for the proposition that any such guarantee is required by CEQA. Instead, CEQA requires that “water supplies identified and analyzed must bear a likelihood of actually proving available,” and that “the EIR’s discussion must include a reasoned analysis of the circumstances affecting the likelihood of the water’s availability.” (*Vineyard Area Citizens, supra*, 40 Cal.4th at p. 432.)

We conclude the EIR satisfies the *Vineyard Area Citizens* standard. The county proceeded in the manner required by law when it decided what information to include in the EIR, and its finding of an adequate water supply is supported by substantial evidence.

Finally, the challengers argue that a violation of Water Code section 10910, subdivision (d)(1), occurred because TCWD did not attach to the WSA its SWP contracts or other proofs of entitlement to SWP deliveries. This contention lacks merit. Water Code section 10910, subdivision (d)(1), requires a water supply assessment to include “an *identification of any existing water supply entitlements, water rights, or water service contracts*” relevant to the project (italics added). Subdivision (d)(2) specifies that this “identification” includes “*information related to ... [¶] ... [w]ritten contracts or other proof of entitlement*” (italics added). There is no requirement to attach copies of contracts. In any event, in response to a public records request, the county added copies of TCWD’s SWP contracts to the administrative record.

In their reply brief, the challengers say the WSA and EIR not only lacked copies of the contracts but also lacked information “sufficient to prove an entitlement to an identified water supply ...” Yet they do not attempt to explain what is deficient about the EIR’s descriptions of TCWD’s entitlements to SWP water. The challengers also say “[i]t is insufficient that the contracts may have been included in the Administrative Record, with no context and no proof of consideration, for they were required to be included in

either the WSA or the EIR.” At this point the challengers cite three Guidelines—sections 15147, 15148 and 15150—but none of these state that water contracts must be included in the WSA or EIR. The arguments in the challengers’ reply brief are without merit.

C. *Twenty-year analysis period*

The WSA and the EIR’s water supply discussion is based on projections of water availability over a period extending 20 years into the future. The decision to use a 20-year period apparently was based on Water Code section 10910, subdivision (c)(3), which requires a water supply assessment to include “a discussion with regard to whether the public water system’s total projected water supplies available during normal, single dry, and multiple dry water years during a 20-year projection will meet the projected water demand associated with the proposed project”

The challengers contend that 20 years is not long enough for CEQA purposes. They rely on *Vineyard Area Citizens, supra*, 40 Cal.4th at page 431, which states that “an adequate environmental impact analysis for a large project, to be built and occupied over a number of years, cannot be limited to the water supply for the first stage or the first few years.” The challengers argue that 20 years is a “few” years. They also cite the *Vineyard Area Citizens* court’s statement that the EIR must analyze “the impacts of providing water to the entire proposed project,” (*ibid.*) and argue that this means the project’s entire *lifespan*.

There is no authority for the challengers’ view that 20 years is a “few” years under *Vineyard* or for their view that by “entire project” the *Vineyard* court meant the entire project for its entire lifetime. These views also are not supported by logic. The entire lifetime of a housing and commercial development is indefinite. Many people in California live and work in buildings built early in the last century. The suggestion that CEQA requires water supply-and-demand predictions extending 100 years and beyond is simply not plausible, for there is no reason to suppose that predictions about the remote

future would be reliable. Further, the challengers make no suggestions about what might be different after 20 years—why the water supply would be reduced or the demand increased—so they have supplied no reason to believe a longer analysis period would yield different conclusions. The challengers therefore have not established either that the county failed to proceed in the manner required by law in choosing a 20-year analysis period, or that the 20-year analysis is not substantial evidence to support the finding that the project will have an adequate water supply.

D. Proponent control of water district

As we have mentioned, the EIR’s water supply analysis is based on the WSA prepared by TCWD. As the public water system that will supply the project, TCWD was required to prepare a WSA by Water Code section 10910. By law, the members of the governing board of the district must be owners or representatives of owners of the land served by the district. (Wat. Code, § 34700.) The service area of TCWD consists of a portion of the project site (to be expanded to cover the entire project site) and an industrial area a short distance to the north on Interstate 5. This land belongs to TRC, and, as a result, all the directors of TCWD are employees of TRC. The fact that all the directors are TRC employees was not explicitly disclosed during the environmental review process until the board of supervisors meeting at which the project was approved, when a supervisor directly asked a witness about it.

The challengers submitted a comment letter criticizing the relationship between TCWD and the project proponent. “This relationship creates an innate conflict of interest for the reporting and disclosure of water supply issues,” the letter asserted. In its response to this comment, the EIR neither confirmed nor denied that all the directors were TRC employees, and merely asserted that TCWD abides by laws relating to conflicts of interest. After the comment period closed, the challengers submitted another letter criticizing the EIR for not disclosing the fact that TCWD was wholly controlled by the project proponent. “This relationship necessarily creates a kangaroo-court environment

that reliably rubber-stamps any Water Supply Document germane to development of Tejon Ranch. As such, these documents are 100% unreliable, and must be recognized as such by Kern County authorities,” the letter averred. In a response included in the administrative record (but not in the final EIR, which had already been prepared when the letter was submitted), the county pointed out that, “[l]ike all other California water districts with landowner voting (and other similar landowner voting districts such as water storage districts), board members are required to be district landowners, or representatives or designees of landowners in the district [citation].”

Now the challengers contend that, by omitting this information, the EIR “misled the public and decisionmakers into thinking that there was independent support for the EIR’s assessment of the Project’s water supply,” and therefore the EIR fails in its purpose as an informational document. More specifically, they say the omission of this fact contravenes Guidelines section 15151, which calls for “a good faith effort at full disclosure.” They deny that they are challenging the county’s factual conclusion that the WSA provided sufficient assurance of a reliable water supply, and insist that their contention is only that omitting the facts about the relationship between TRC and the TCWD board was a failure to proceed in the manner required by law.

As the challengers concede, there is no specific authority for the view that CEQA requires discussion of the affiliations of water district directors. Their argument is only that the public and the lead agency must have been misled because they would naturally assume, unless told otherwise, that a water district providing a WSA for a project is governed by a board that does not have ties with the project proponent. Given the laws on the composition of water districts’ governing boards, this argument is not persuasive. Districts like TCWD necessarily have these ties with landowners in their service areas, and it was no secret that the TRC, in addition to being the parent of the developer, was the owner of the land. Further, the challengers’ first comment letter pointing out the relationship was included in the final EIR, and while the county did not expressly confirm

it, any reader concerned about the matter would naturally have inferred from the lack of a denial that it was true. The EIR was not misleading on this point. We conclude that the county did not fail to proceed in the manner required by law.

IV. Native American cultural resources

The challengers argue that the EIR's discussion of Native American cultural resources, and other aspects of the county's environmental review process for these resources, are deficient in several respects. We begin with an account of the relevant facts.

The Tejon Ranch region has a long history of Native American habitation, beginning in prehistoric times before the arrival of Europeans and ending in the mid-20th century. The Kitanemuk, Interior Chumash, and Tataviam tribes are likely to have lived on or used the land at the project site. A Chumash village of about 100 inhabitants known as Kashtiq was located within the project site at the eastern end of Castac Lake; "Kashtiq" appears to be the etymological source of the present-day name "Castac." Kashtiq was occupied during the mission period (1769-1833) and probably earlier. It might have been abandoned in 1853.

The EIR says the Tejon Ranch region became a "multi-ethnic refuge for many Native Americans" during and after the mission period because of its relative remoteness from European Americans. In 1853, a short-lived multi-ethnic Indian reservation, called the Sebastian Reserve, was established at the site of Tejon Ranch. The several tribes interacted and intermarried. The community persisted until 1952 when an earthquake destroyed almost all the houses, which were of adobe. The present-day descendants of these inhabitants are known as the Tejon Indian Tribe.⁸

⁸Delia "Dee" Dominguez, a Native American who, as will be seen, was designated as one of those "most likely descended" from the inhabitants of the area (§ 5097.98), objected in a comment letter to the use of the term Tejon Tribe. She pointed out that the inhabitants of the area were of several distinct tribes, and stated that "the Ranch should not be allowed to rely on made-up tribes to cover their actions."

Before planning for the project began, the project site had never been surveyed for cultural resources. Eleven prehistoric archaeological sites had previously been discovered by accident during road building and fire suppression activities.

The project proponent conducted phase I field surveys from 2001 to 2003. Forty-two prehistoric and five historic archaeological sites were discovered, in addition to the 11 previously known, making a total of 58 archaeological sites inside the project boundaries. Twenty-five sites were inside the development envelope, but in areas where there would be no construction. This left 33 sites requiring further evaluation.

In 2005, the county contacted the Native American Heritage Commission (NAHC) to request a contact list of Native American tribal organizations in order to provide those organizations with an opportunity to comment on the project, as required by Government Code sections 65352.3 and 65352.4. The NAHC provided contacts at the Santa Rosa Rancheria, the Tule River Indian Tribe, and the Tejon Indian Tribe. The county sent a letter to each contact, providing a period of three months in which to respond. The county sent a similar letter to a fourth Native American representative in 2007. A letter from Gloria Morgan of the Tejon Indian Tribe accepting the offer of consultation is included in the record.

Phase II of the archaeological surveys, which took place in 2005, consisted of test excavations at these 33 sites. During phase II, Gloria Morgan and Kathy Van Meter of the Tejon Indian Tribe and Richard Angulo of the California Indian Council Foundation—Chumash—acted as Native American monitors and liaisons. For each site, the surveyors collected and analyzed representative samples of artifacts and other materials, determined the site's size and depth, and mapped and documented the site. The purpose was to determine the nature and significance of each cultural resource so that mitigation measures could be formulated.

The EIR states that, “[u]pon completion of the Phase II analysis, 11 of the 33 tested sites proved to lack integrity and significance and/or Phase II fieldwork resulted in

recovery of all extant resources.” The EIR notes that additional resources could be discovered at these sites during construction. Monitoring during grubbing⁹ and topsoil clearing were required as mitigation measures, in light of which the EIR concluded that the mitigated impact on these 11 sites would not be significant. This left 22 sites requiring further analysis and mitigation.

One of these sites is the village of Kashtiq.¹⁰ The most studied and possibly most important site within the project boundaries, Kashtiq was excavated in the early 1970’s . It was then located on a beach above Castac Lake and was about 77 meters long and 46 meters wide. Many artifacts both historic and prehistoric were found, including shell, seed and glass beads, stone tools, and arrowheads. When the project proponent’s archaeological surveyors examined the site, they found that it was partially under water because the lake level had risen, and partially under a road. The road construction took place in 2000 and measures were taken then to preserve the archaeological site: A “load-bearing geotextile surface” was placed over the site and fill placed over that, above which the road bed was built.¹¹

Another site is described as a “camp with human burials” about two meters underground.¹² When this site was found, the archaeological surveyors consulted with the NAHC, which designated Delia “Dee” Dominguez as a most likely descendant

⁹To “grub” is to “clear (ground) of roots and stumps by digging them up.” (Webster’s New World Dict. (2d college ed. 1982) p. 619, col. 1.)

¹⁰This site was designated by the project’s archaeologists as site CA-KER-307. Each site was given a “trinomial” designation in this form, with the letters at the beginning referring to California and Kern County.

¹¹Geotextile materials are “permeable fabrics which, when used in association with soil, have the ability to separate, filter, reinforce, protect or drain.” (Wikipedia entry “Geotextile” <<http://en.wikipedia.org/wiki/Geotextile>> [as of Apr. 20, 2012].)

¹²Its trinomial is CA-KER-6704.

(MLD) within the meaning of section 5097.98.¹³ Dominguez went to the site.¹⁴ At the board of supervisors meeting on October 5, 2009, Dominguez testified, “[W]hen ... I arrived there, an entire cemetery had been torn to bits, and there were remains laying all over the ground.” The EIR does not clearly explain how these remains were handled after their discovery, but its statement that the site is to be preserved in place seems to imply that the remains were put back in the ground where they were found. A comment letter submitted by Dominguez appears to confirm this, saying the excavation was filled in. Dominguez also remarked in her letter that she did not believe an archaeological or Native American monitor was present when the site was found, as the project proponent represented, because if a monitor had been present, the excavation (which involved a bulldozer) would have been halted before the site was so extensively impacted.

Fifteen additional sites are described as camps of various sizes, some prehistoric and some from historic times.¹⁵ Three more sites are “rock rings,” circular structures made of stacked stones that might have been used as granaries.¹⁶ The last two sites are

¹³As the EIR points out, discovery of human remains during excavation triggers a legal duty under Health and Safety Code section 7050.5 to notify the coroner, who is required to determine whether the remains are those of a Native American and, if they are, to contact the NAHC. Nothing we have seen in the EIR indicates that the coroner was actually notified when the remains were found at the project site. Instead, the discussion in the EIR seems to say that the project’s archaeologists contacted the NAHC directly.

¹⁴There is some ambiguity in the record about when this happened. The EIR implies that the site was discovered and Dominguez was contacted during the phase II surveys in 2005. Dominguez’s comment letter states that she visited the property in 2001 after TRC found the site during excavating activities for seismic testing.

¹⁵Their trinomials are CA-KER-127, -265, -4009, -4011, -4390, -6705, -6709H, -6716, -6722, -6725, -6726, -6727, -6742, -6744, and -6745.

¹⁶Their trinomials are CA-KER-6711, -6720, and -6739.

described as bedrock mortar or milling stations.¹⁷ These are depressions in rock surfaces that were used with pestles to grind food products, such as acorns.

The EIR proposed mitigation measures for these 22 sites. All of these involved “preservation in place,” which is the form of mitigation preferred for cultural resources by the Guidelines. (Guidelines, § 15126.4, subd. (b)(3)(A).) For 21 of these, one of three forms of preservation in place was proposed: (1) avoiding the resource or “staking and monitoring” it during grubbing and topsoil grading; (2) avoiding the resource or “capping” it and “staking and monitoring” it during grubbing and topsoil grading; and (3) imposing “deed restrictions or conservation easements” on the land where the resource is located. The 22d site, Kashtiq, was deemed to be already preserved in place by the placement of geotextile matting and fill, as we have mentioned. It is to be subject to monitoring only. In one instance, staking and monitoring is an alternative to possible phase III work to recover and remove archaeologically valuable data from the site. If the data-removal route is taken, that presumably would mean the remaining site would subsequently be destroyed by construction.¹⁸

¹⁷Their trinomials are CA-KER-6731 and -6737.

¹⁸In response to our invitation, the county submitted supplemental authorities on February 7, 2012. Citing *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48, 86-87 (*Madera Oversight*), the county avers that the law is now clear that preservation in place, not data recovery, is required for this site, CA-KER-6727. The county indicates that it has already made a decision to apply *Madera Oversight* and to require preservation in place for that site. It refers to a “written commitment” by real parties to comply with this requirement and suggests that no further proceedings are necessary to ensure compliance. As an alternative, the county suggests that we could enforce the requirement by ordering an interlocutory remand to the agency to alter the EIR. It cites *Voices of Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499, 525-535, as authorizing this type of remand. The challengers have not requested this type of relief, either in their original briefing or in response to our invitation to submit supplemental authorities. We conclude, therefore, that an interlocutory remand is unnecessary.

Capping means placing geotextile material over the site and covering it with fill. Staking means marking a buffer around the site, usually of 25 meters, with stakes, to keep construction activities away from the site, if any construction or grading activities are to take place within 100 meters. Monitoring means observation by archaeological “and/or” Native American monitors during any grading or grubbing within 100 meters. The option of “avoiding” instead of capping, staking, or monitoring appears to mean that construction activities might never come within 100 meters of some sites, in which case no mitigation other than avoidance would be undertaken.

Staking and monitoring (or avoidance) were the mitigation measures chosen for sites not expected to be directly affected by construction activities because of their locations. Nearby construction activities might require that care be taken (effectuated by the staking and monitoring), but those activities will not involve digging in or building on the archaeological sites themselves. Five sites are designated only for staking and monitoring (or avoidance). All of these are camps, including the camp with human burials.¹⁹

For nine sites (eight camps and a rock ring), capping, staking, and monitoring (or avoidance) were the mitigation measures imposed. In seven of these instances, the site is near a place where road improvements are planned, and the road bed and associated underground utilities will possibly be placed above the geotextile matting and fill under

¹⁹These are sites CA-KER-4390, -6704, -6727, -6742, and -6745. There is a discrepancy in the EIR about three other sites, CA-KER-127, -6720, and -6722. The table on page 4559 of volume 15 of the administrative record states that these three sites also are subject only to staking and monitoring (or avoidance). The narrative descriptions of the mitigation measures for these sites on pages 4563, 4564, and 4565, however, state that these sites may also be capped with geotextile matting and fill. We assume the narrative descriptions of the mitigation measures are correct, and that the table, which is merely a summary of those descriptions omitting all details, is in error.

which the sites will be buried. In the other two instances, residential or other construction might encroach on the site, above the geotextile matting and fill.²⁰

Nine sites are to be subjected to deed restrictions or conservation easements. These are sites that lie outside or mostly outside the area to be developed. Some are close to development areas, and for these, staking and monitoring also may be required. Two are partly within areas to be developed and may require capping. Four of these are camps, three are rock rings, and two are bedrock mortar stations.²¹ One site, the village of Kashtiq, will be subject only to monitoring, since it was previously capped.

Ms. Dominguez, the MLD who was consulted about the human burials, submitted a comment letter making several objections to the EIR and the county's handling of the issue of Native American cultural resources at the project site. First, she contended that the EIR failed to provide useful accounts of the cultural resources at the site. She stated that the identity of the archaeological sites was "hidden" by the use of the trinomial codes, and that the description of sites as camps or bedrock mortar stations was erroneous because the sites were "clearly of greater significance" and must have included "villages, settlements, and/or burial sites" She asserted that there were "many villages and sacred sites" around Castac Lake, that it was impossible to determine whether these were among those discussed in the draft EIR or were instead omitted, and that in evaluating the

²⁰These are sites CA-KER-127, -4011, -265, -6705, -6709H, -6716, -6720, -6722, and -6725. As noted in the previous footnote, there is a discrepancy in the EIR about three of these, CA-KER-127, -6720, and -6722.

²¹These are sites CA-KER-4009, -4011, -6711, -6720, -6726, -6731, -6737, -6739, and -6745. There is a discrepancy in the EIR about three of these. At volume 15, pages 4559 and 4560, sites CA-KER-6726, -6737, and -6739 are said to be subject only to staking and monitoring or to capping, staking, and monitoring. At volume 15, page 4565, the same sites are said to be subject also to deed restrictions or a conservation easement. Again, we assume the statements on page 4565 are correct, since they are part of the narrative description of mitigation measures, while the statements on pages 4559 and 4560 are only parts of a table summarizing the mitigation measures.

importance of the sites, the public should not be “forced to rely on the word of the Ranch, the very ranch that kicked the Indian People off in the first place.” Another commenter made the related objection that the EIR failed to disclose “precise locations” of the archaeological sites.

Next, Dominguez argued that the mitigation measures were inadequate. “In particular, the use of textile matting and fill in order to build *over* sacred sites is particularly troublesome,” she wrote. She also implied that the mitigation was improper because the sites to which the EIR applies it are not real, leaving the impacts to the real sites unaddressed: “Without independent analysis of these sites beyond the fictional group used by the Ranch, there is no way of knowing if the mitigation suggested is either appropriate or actually practiced.” After a number of other remarks, Dominguez concluded her letter by implying that the Native Americans who had monitored the archaeological field studies were not impartial: “I hope the Ranch will consult with other, non-biased Natives when conducting their research in the future.”

The county’s responses to these comments included a discussion of a map of the archaeological sites that had been prepared but not released to the public or to Native American representatives. The county pointed out that the EIR mentioned this map and required it to be provided to the Kern County Planning Department, but mandated that it otherwise be kept confidential. The county’s view was that Government Code section 6254, subdivision (r), exempts information regarding the locations of Native American archaeological sites from public disclosure because of the danger of vandalism, and that keeping the information secret would better protect the cultural resources.

A. Consultations with and disclosures to Native American representatives

The challengers argue in parts IV.B and C of their opening brief that the county failed to proceed in the manner required by law because it did not satisfy its duties to consult with and make disclosures to Native American representatives. We disagree.

The challengers' argument is based on the county's decision not to release the map showing the locations of the archaeological sites. They rely primarily on Guidelines section 15064.5, subdivision (b), and *Environmental Protection Information Center, Inc. v. Johnson* (1985) 170 Cal.App.3d 604, 628-630 (*EPIC*). The county cites Government Code sections 65352.3, subdivision (b), and 6254, subdivision (r), as support for its decision to withhold the map.

It is true that the provisions cited by the county, Government Code sections 65352.3, subdivision (b), and 6254, subdivision (r), authorize withholding certain information about Native American cultural resources from *the public*. Section 65352.3, subdivision (b), states that a city or county "shall protect the confidentiality of information concerning the specific identity, location, character, and use" of Native American cultural resources. Section 6254, subdivision (r), exempts records of Native American cultural resources from disclosure under the Public Records Act. These provisions do not, however, mandate the withholding of information from Native American representatives. Further, Government Code section 65352.3 is part of a statutory scheme requiring cities and counties to consult with Native American representatives where, as here, a general plan amendment will impact Native American cultural resources. (Gov. Code, § 65352.3, subd. (a)(1).) It is not plausible to treat the confidentiality provision as a basis for withholding information about those very same resources from Native American representatives, even if the information must be withheld from the public. In fact, Government Code section 65352.4 makes clear that confidentiality is part of the process of consulting with Native American representatives, not a means of excluding them:

“[C]onsultation’ means the meaningful and timely process of seeking, discussing, and considering carefully the views of others, in a manner that is cognizant of all parties’ cultural values and, where feasible, seeking agreement. Consultation between government agencies and Native American tribes shall be conducted in a way that is mutually respectful of each party’s sovereignty. Consultation shall also recognize the tribes’

potential needs for confidentiality with respect to places that have traditional tribal cultural significance.”

If the confidentiality provisions had been used as a sword in this case to prevent meaningful participation of Native American representatives in consultations rather than a shield facilitating consultations, that would have been a failure to comply with the law.

That is not what happened, however. The county obtained a tribal contact list from the NAHC and used it to contact tribes and to consult with them, resulting in the participation of representatives of two tribes in the field surveys of the archaeological sites. It can hardly be said that the locations of the sites were withheld from representatives who were present to monitor the archaeologists’ examinations of them. Even the public EIR disclosed significant information about the location of the archaeological sites. In a typical description of a site location, the archaeologists’ report (attached to the EIR as an appendix) states that a site is “immediately north of Tejon Lake Drive, about 2.6 miles east of [Castac] Lake” The challengers have cited nothing in the record to indicate that the representatives who were involved in the surveys were dissatisfied with the information they received or that they asked for the map. One representative who was not involved in the surveys, the MLD Delia Dominguez, was dissatisfied, but this alone does not show that the county failed to fulfill its obligations to consult and to disclose information. In sum, the county’s decision not to release the map properly withheld information from the public, and the challengers have not demonstrated that it stood in the way of meaningful consultation with Native American representatives.

The authorities cited by the challengers do not show otherwise. Guidelines section 15064.5, subdivision (d), provides that “[w]hen an initial study identifies the existence of, or the probable likelihood, of Native American human remains within the project, a lead agency shall work with the appropriate Native Americans as identified by the Native American Heritage Commission as provided in Public Resources Code Section 5097.98.” The county complied with this requirement. It contacted the NAHC,

which referred it to Dominguez, the MLD. Dominguez was then invited to view the site where the human burials were found. Dominguez's own words in her comment letter illustrate her involvement. She examined the site and saw human remains in and around a trench that had been dug by a bulldozer. She observed a lack of funerary items with the remains and considered that the graves might have been robbed, or the remains might have been moved to the location from proper burial sites elsewhere. She advised a TRC employee "to add an additional cover of soil over the site" after the trench was filled in, and "not to build a house or any other building on the site" The record indicates that this last piece of advice has been followed. The EIR says this site is outside the development area; it is to be staked and monitored if construction comes within 100 meters, but it is not to be capped, unlike the sites upon which construction will encroach.

The challengers' position seems to be based in part on the idea that there must be other burial sites, and that if Dominguez or another representative had been given the map or consulted further in unspecified ways, these other sites would have been found. The challengers' opening brief even refers to the county's and real parties' "intentional failure to reveal the location of Native American burial sites" The challengers point to nothing in the record, however, that would support the view that there are additional burial sites, let alone the view that additional burial sites were intentionally hidden. There is no support for the notions that the archaeological surveys likely failed to identify burial sites; that the Native Americans who were involved in the surveys failed to give adequate advice on that subject; that real parties failed to heed their advice; or that sites were found but concealed.

The challengers discuss the possibility of finding more burial sites in the future and say Guidelines section 15064.5, subdivision (d), means additional consultations with Dominguez are required to find them before construction begins. They say the EIR's mitigation measure 4.5-42, requiring compliance with Public Resources Code section 5097.98 if more burials are found during construction, is not sufficient; there must

instead be some additional process to make sure all possible burials are found in advance. Guidelines section 15064.5, subdivision (d), does not require this, however. As we have mentioned, it mandates that the lead agency “work with the appropriate Native Americans as identified by” the NAHC “[w]hen an initial study identifies the existence of, or the probable likelihood, of Native American human remains within the project.”

In this case, the work done before the draft EIR revealed actual human remains, and real parties did, in fact, work with Dominguez on the proper treatment of them. Dominguez believes there may be more, but there are no grounds upon which we could reject the county’s implicit finding that her comments did not establish a “probable likelihood” that there were more, missed by the archaeological surveys, that would be disturbed by the development of the project. The challengers never say just what Dominguez or others might have been able to do if they had been given the map or had been consulted further about human remains. It is true, as the challengers say, that CEQA is designed to require analysis and mitigation of impacts before they happen, but that does not mean all impacts can be predicted in detail in advance, and the challengers have not demonstrated that the uncovering of more human burials was likely.

EPIC does not support the challengers’ position regarding the map. There, the California Department of Forestry approved a timber harvest plan for the logging of a grove of thousand-year-old redwoods in which a Native American archaeological site was located. (*EPIC, supra*, 170 Cal.App.3d at p. 608.) The Forest Practices Act and CEQA both required a public review process before the timber harvest plan could be approved. During this process, members of the public commented that the plan did not contain sufficient measures to protect the archaeological site from logging tractors and the dragging of logs. (*EPIC, supra*, at p. 627.) *EPIC* argued that the Department of Forestry failed to make an adequate response to this comment because, among other reasons, the department stated that it had reviewed an archaeological report and was satisfied, but refused to release the report to the public. The Court of Appeal agreed. “Reference to a

report of unknown content, which the CDF refuses to divulge, cannot constitute a sufficient answer to an environmental objection” from the public, the court held. (*Id.* at pp. 628-629.)

The present case is not similar. The EIR does not rely on the undisclosed map to respond to a public comment. It also does not rely on the map to support its analysis of impacts or justify its choice of mitigation measures. For *EPIC* to be helpful to the challengers, the county would have to have relied on information not disclosed in the EIR as the reason for some conclusion or decision. The challengers have not shown that this happened.

Finally, the challengers argue that the county “violated CEQA’s requirement to consult with trustee agencies by not disclosing the reports detailing the precise location and complete description of Native American cultural resources on the project site to the NAHC.” This is followed by a string citation including seven statutes (three of them not part of CEQA) and a Guideline, without any elaboration on what these authorities say or how they apply. The challengers also fail to explain what they mean by “the reports detailing the precise location and complete description” of the sites. They have provided no reason to think any such secret reports exist. We will assume for the sake of argument that they are referring to the undisclosed map. The challengers also argue that the refusal to release the map means the county “ignored” the NAHC’s request to consult with the Native American representatives on the list the NAHC provided.

Among the challengers’ eight citations, Public Resources Code sections 21104 and 21153 and Guidelines section 15086 seem most relevant. Each of these sections requires a lead agency to consult with certain other agencies when preparing a draft EIR. The county consulted with the NAHC, and the tribes to which the NAHC directed it, in the ways we have described. The challengers have not shown that the nondisclosure of the map rendered these consultations inadequate.

B. Description, analysis, and preservation of sites

In parts IV.A, D, and E of their opening brief, the challengers contend that the EIR did not provide intelligible descriptions of the archaeological sites, failed to analyze some cultural resources, and did not include adequate measures to mitigate the project's impacts on the sites. Again, we disagree.

1. Description of sites

The challengers say the site descriptions in the EIR are “curtailed and distorted,” and it is impossible to determine the location, nature, and significance of the sites because of this situation. These contentions are based on the use of site descriptions such as “prehistoric camps” and “bedrock mortar stations,” and location descriptions such as “immediately north of Tejon Lake Drive, about 2.6 miles east of [Castac] Lake” The challengers assert that the use of these descriptions, instead of a map like the one kept confidential by the county, rendered Native Americans unable to determine whether “sacred burial and ritual sites” were identified.

These arguments presuppose, in effect, that the EIR's descriptions were false—for instance, that what the EIR describes as “camps” or “bedrock mortar stations” might in fact be something else, such as ritual or burial sites. The challengers cite nothing, however, except Ms. Dominguez's speculative comments in her letter, to support this view. We see no reason to believe that the archaeological surveys conducted for the EIR failed to discover or mislabeled sacred sites.

We also do not see why the location descriptions in the EIR would have rendered it impossible for the public to form an adequate conception of where the sites are located. The challengers do not explain what, exactly, could have been done with the map if it had been disclosed. They do not argue, for instance, that Dominguez possessed knowledge of pinpoint locations of sacred sites which, with access to the map, she could have identified with sites discussed in the EIR or could have found to be omitted from the EIR. The fact that Native American monitors participated in the archaeological surveys and yet did not

use the public comment period to criticize the EIR's descriptions of the sites reinforces our conclusion that the record does not support the challengers' view. The challengers have not demonstrated that the county failed to proceed in the manner required by law by describing the archaeological sites as it did.

2. *Analysis of sites*

The challengers next argue that, "largely" because of the allegedly inadequate site descriptions, significant Native American sites remained unanalyzed, making the EIR insufficient as an informational document. As we have already said, the record does not support the notion that there were undiscovered sites or that the EIR's descriptions concealed the true nature of sites. The challengers also argue that the village of Kashtiq was not analyzed in the EIR, but the record plainly contradicts this position. Kashtiq is described in the EIR and referred to by name; the project's impact on it is discussed; and the already-existing mitigation (capping where a road encroaches on it) is described.

In their reply brief, the challengers add that the county failed to respond adequately to comments in Dominguez's letter about sites known as the Ridge Route and Huerta de Arriba (high orchard), which were not mentioned in the draft EIR. The statements in the letter about these sites are as follows:

"Because Tejon Ranch has historically blocked access to the property by MLD's such as myself, many of these settlements [in the canyons surrounding Castac Lake] have not been officially identified. However, in my research in preparing a petition to the Bureau of Indian Affairs for Federal Recognition, I have reviewed the depositions taken [as part of a 1922 lawsuit between the United States government and Tejon Ranch. The deponents] ... included Eugenia Mendez, who was my Great, Great, Great Aunt who lived on Paso Creek at the Huerta de Arriba, as did my Great, Great Grandmother Magdalena Olivas [and other relatives]

"The presence of Indian villages and sacred sites in the Castac Lake area are likewise documented in sources outside of these depositions, in [certain scholarly works]. Newer works documenting these sites include ... the local 'Ridge Route' [studies of certain authors]"

The final EIR's responses to these paragraphs of Dominguez's letter state that the archaeological reports attached to the draft EIR included references to some of the works Dominguez noted. The responses also state that Dominguez's comments are noted and will be provided to the planning commission and the board of supervisors, but that they do not identify new resources or affect the analysis of the resources included in the draft EIR. The county's responses do not add any description or analysis of Huerta de Arriba or the Ridge Route.

In *Twain Harte Homeowners Assn., Inc. v. County of Tuolumne* (1982) 138 Cal.App.3d 664, 678-687 (*Twain Harte Homeowners*), we discussed the scope of a lead agency's discretion in responding to public comments. The case involved approval of a county general plan; members of the public submitted comments on a variety of matters, and the lawsuit claimed the county's responses, included in the final EIR, were inadequate. We disagreed, saying:

“The determination of the sufficiency of County's responses to comments upon the draft EIR turns upon the detail required in such responses.... The sufficiency of the EIR is to be viewed in light of what is reasonably feasible. Courts should look for adequacy and completeness in an EIR, not perfection. [Citation.] ‘While the decision makers must take account of environmental objections [citations], satisfactory answers to these objections may be provided by reference to the EIR itself [citation].’ [Citation.].... ‘The final EIR must include the responses of the proponent agency to significant environmental points raised in the review and consultation process. [Citation.] Appellants contend that the responses were inadequate; but the final EIR responded to objections relating to noise, air pollution, traffic problems, growth-inducing impact and tax burdens on San Francisco residents.... We cannot say that the trial court erred in concluding that the EIR was adequate.’ [Citation.]” (*Twain Hart Homeowners, supra*, 138 Cal.App.3d at p. 686.)

The responses to comments in this case satisfy the standards embodied in this discussion. Dominguez's letter does not even assert that Huerta de Arriba and the Ridge Route are existing archaeological resources within the project boundaries. The agency, having completed extensive archaeological surveys, was not obligated to make a more

detailed response to a mere oblique suggestion that two historical names might possibly correspond to archaeological resources at the site.

The challengers' reply brief also refers to a letter the challengers drafted for the public comment process on a federal environmental impact statement (EIS) involving a conservation plan on a portion of Tejon Ranch land that encompassed the project site. The challengers sent a copy of this letter to the county as an attachment to a comment letter submitted on September 10, 2009, after the close of the comment period for the draft EIR and on the eve of the planning commission's meeting to take a vote on the project. Relying in part on the EIS comment letter, the September 10, 2009, comment letter argued that the cultural resources section of the EIR was inadequate. The letter on the EIS states that the EIS fails to discuss Huerta de Arriba, which is said to include a cemetery, as well as a historic Native American schoolhouse in Tejon Canyon. An appendix to the letter on the EIS (which is another letter written by Dominguez) refers also to a cemetery on Tejon Creek and asserts that there must be a cemetery at the Kashtiq site since a village would be expected to have a cemetery nearby.

The challengers now argue that the EIR is defective because these are "Specific, Known Cultural Resource Sites" that are not analyzed. Neither the letters in the record nor the challengers' appellate briefs show that there are any "Specific, Known" sites within the project boundaries, however. The EIS covered an area larger than the TMV project site, so there is no basis for a conclusion that any of the described places are within the project, except for Kashtiq. The assertion that there must be a cemetery near Kashtiq does not show that the EIR is inadequate; the archeological surveys for the project did not find a cemetery at this location. There is no basis for a conclusion that the EIR omitted cultural resources that would be significantly impacted by the project and thereby failed to fulfill its purpose as an informational document.

3. *Preservation of sites*

The challengers argue that the EIR's mitigation analysis for Native American cultural resources is inadequate because it did not discuss the pros and cons of different available means of achieving preservation in place. They rely on Guidelines section 15126.4, subdivisions (b)(3) and (a)(1)(B). The relevant portion of subdivision (b)(3) provides:

“Public agencies should, whenever feasible, seek to avoid damaging effects on any historical resource of an archaeological nature. The following factors shall be considered and discussed in an EIR for a project involving such an archaeological site:

“(A) Preservation in place is the preferred manner of mitigating impacts to archaeological sites. Preservation in place maintains the relationship between artifacts and the archaeological context. Preservation may also avoid conflict with religious or cultural values of groups associated with the site.

“(B) Preservation in place may be accomplished by, but is not limited to, the following:

- “1. Planning construction to avoid archaeological sites;
- “2. Incorporation of sites within parks, greenspace, or other open space;
- “3. Covering the archaeological sites with a layer of chemically stable soil before building tennis courts, parking lots, or similar facilities on the site;
- “4. Deeding the site into a permanent conservation easement.”

The relevant portion of Guidelines section 15126.4, subdivision (a)(1)(B), provides: “Where several measures are available to mitigate an impact, each should be discussed and the basis for selecting a particular measure should be identified.” The challengers say this means the EIR needed to consider the comparative merits of the different ways of preserving each site in place before selecting a method in each instance.

The county argues, in effect, that Guidelines section 15126.4, subdivision (b)(3), creates an exception to subdivision (a)(1)(B) by declaring preservation in place to be the preferred form of mitigation. The county says, “Because the EIR already implements the preferred mitigation ... the County was not required ... to analyze ‘relative impacts resulting from different methods that may achieve’ preservation.” The county’s view is that, by defining preservation in place as the preferred mitigation, the Guidelines not only relieve agencies of the need to analyze other forms of mitigation, but also make unnecessary any comparison of the merits of the different types of preservation in place.

In this case, upholding the EIR does not require us to take a position on whether the county’s categorical view is correct. Under the particular circumstances here, as we will explain, the EIR was not prejudicially inadequate even assuming situations involving preservation in place are not categorically exempt from the requirement to examine alternative mitigation measures.

The level of detail required in an EIR’s discussion of which mitigation measures should be chosen is determined in light of the facts, not in the abstract. “““CEQA does not require analysis of every *imaginable* alternative or mitigation measure””” (*Concerned Citizens of South Central L.A. v. Los Angeles Unified School Dist.* (1994) 24 Cal.App.4th 826, 841.) Further, an EIR’s discussion of mitigation measures “must be assessed in accordance with the ‘rule of reason’ and in light of the principle that our role is merely to determine whether” an EIR is “sufficient as an informational document.” (*Ibid.*) Even if information required by some authority has been omitted, reversal does not necessarily follow. “Noncompliance with CEQA’s information disclosure requirements is not per se reversible; prejudice must be shown.” (*Association of Irrigated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1391.) “Failure to comply with the information disclosure requirements constitutes a prejudicial abuse of discretion when the omission of relevant information has precluded informed decisionmaking and informed public participation, regardless whether a different outcome would have

resulted if the public agency had complied with the disclosure requirements.”
(*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1198.) An omission is prejudicial “if the decision makers or the public is deprived of information necessary to make a meaningful assessment of the environmental impacts.” (*Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455, 468.)

It is true that the EIR in this case imposes various forms of preservation in place on the archaeological sites, with some to be capped and possibly built on, some to be staked and monitored, and some to be deeded into easements. It is also true that there is no explicit discussion in the EIR of how the county decided which form of preservation in place should be applied to which sites. It is apparent from the entire discussion of mitigation, however, that some sites are in positions where nothing is to be built, while others are near roads that may require expansion, and still others are where other kinds of construction might happen.

The basic distinction the EIR makes, therefore, is between places where the developer’s building plans call for something, such as a road or parking lot, to be built on the surface above an archeological site, and places where they do not call for this to occur. The thrust of the challengers’ argument is that the EIR does not examine the advantages and disadvantages of altering the developer’s plans to avoid building of any kind at some or all of the sites where capping is intended.

To see why the county did not prejudicially abuse its discretion in not including this kind of examination in the EIR, it is necessary to consider, once again, the fact that real parties consulted with tribal representatives, who monitored the archaeological surveys. The challengers have indicated nothing in the record to show that those representatives who were involved in the surveys made any objection to the EIR’s mitigation plans. This is a reliable indication that they did not consider capping to be incompatible with the preservation of the particular sites to be capped.

The challengers point out that Dominguez raised an objection in her comment letter to capping and building on the sites, but she did not indicate that capping was unsuitable for any sites in particular. Likewise, although the challengers remark in their opening brief that “many Native American sacred sites and burials can only truly be preserved by avoidance due to their sacred, religious, and spiritual values, or need to be visually observed in order for their historic and cultural significance to be recognized,” there is nothing in the record to indicate that any of the sites designated for capping are of this character. In light of these facts, we do not think the EIR was prejudicially deficient because of a lack of an explicit discussion of why capping is a more appropriate form of preservation in place for some sites than for others or why avoidance was not chosen for all sites. The lack of this discussion did not, under the circumstances, deprive the public or the agency of information necessary to make a meaningful assessment.

At oral argument, the challengers contended for the first time that our opinion in *Madera Oversight, supra*, 199 Cal.App.4th 48, requires every EIR to include, for every archaeological site upon which a project will have a significant impact, discussion and consideration of all four of the options for preservation in place listed in Guidelines section 15126.4, subdivision (b)(3)(B). The parties in *Madera Oversight* agreed that “an EIR’s discussion of mitigation measures for an impact to historical resources of an archaeological nature must include preservation in place,” so “[t]he question is what must be included in the discussion.” (*Id.* at p. 85.) Because Guidelines section 15126.4, subdivision (b)(3), states that the factors listed there “shall be ... discussed in an EIR” (italics added) for a project involving a significant impact to an archeological resource, we concluded that “the discussion of preservation in place must include, but is not limited to, the four methods of preservation in place listed in subparagraph (B).” (*Madera Oversight, supra*, at p. 85.)

As a threshold matter, we conclude that the challengers’ reliance on the detailed requirements of *Madera Oversight* comes too late. The case was decided recently,

perhaps too recently for the challengers to be reasonably expected to include it in their original briefing (it was filed on June 17, 2011, and the challengers' reply briefs were filed on Sept. 21, 2011). We gave the parties, however, an opportunity to submit supplemental authorities in our oral argument notice dated January 24, 2012. The challengers did not take advantage of this opportunity to make their reliance on *Madera Oversight* known, even though real parties in interest and the county did respond to our notice by citing *Madera Oversight* for another point. The effect of the challengers' failure to state their reliance on *Madera Oversight* before oral argument is that the county and real parties in interest had no opportunity to respond except at oral argument. We conclude that the argument is forfeited for this reason.

We are, of course, usually inclined to consider late-submitted authority if the authority is new and could not have been submitted earlier; that is why our oral argument notice invites submission of supplemental authorities. Here, however, the challengers failed to take advantage of the opportunity we offered, depriving the county and real parties in interest of a fair chance to respond. Therefore, the rule that arguments raised for the first time at oral argument are forfeited applies.

Even if the challengers' reliance on the case were not forfeited, we would not reverse on the basis of it. Even in light of *Madera Oversight*, there is no prejudicial inadequacy in the EIR related to the discussion of preservation in place. For the reasons we have already stated, the absence of express discussion of the pros and cons of the different forms of preservation in place did not deprive the agency or the public of information necessary to meaningfully assess the project's impacts.

The challengers' reply brief contains a conclusory assertion that the EIR's mitigation discussion was inadequate for two further reasons. First, it did not analyze the impacts of the chosen mitigation measures. CEQA calls for analysis not only of a project's impacts but also of the impacts of mitigating those impacts, if significant. (Guidelines, § 15126.4, subd. (a)(1)(D).) Second, in some instances the EIR improperly

defers the choice of method of preservation in place to the time when the developer decides whether a site will be encroached on by construction. These arguments are raised for the first time in the reply brief and the challengers do not develop them, so we will not consider them further. (*Citizens for Responsible Equitable Environmental Development v. City of San Diego* (2010) 184 Cal.App.4th 1032, 1044, fn. 12; *Associated Builders & Contractors, Inc. v. San Francisco Airports Com.*, *supra*, 21 Cal.4th at p. 366, fn. 2.)

V. California condor

The project site includes habitat for the California condor, an endangered species. The challengers argue that the EIR is deficient in its analysis of impacts on and mitigation measures for the condor in several ways. We will state the relevant facts and then consider the several arguments in turn.

California condors are scavengers that feed on large mammal carcasses. Their historical foraging range included mountain areas in the Coastal, Sierra Nevada, and Transverse ranges in eight counties, from San Benito and Madera counties in the north to Kern, Ventura, and Los Angeles counties in the south. Their population declined over many years until, in 1978, the wild population was estimated at 30 individuals. The last wild condor was trapped in 1987. In the late 1970's, a government-sponsored captive-breeding program was initiated to help the species recover. Successful captive breeding led to the release of condors back into the wild in 1992. As of 2009, there were 322 California condors in existence, of which 172 lived in the wild, about 40 of them in Southern California. They continue to be listed as an endangered species under both the federal Endangered Species Act and the California Endangered Species Act.

Various hazards continue to threaten the species' recovery. Ongoing threats to the condor include lead poisoning from hunters' bullets in the carcasses on which the condors feed; ingestion of microtrash, including bottle caps, pop-tops, broken glass, and PVC pipe fragments; habituation, meaning acclimation of condors to human activities and structures, which leads to abandonment of natural foraging and other behaviors necessary

for survival; and miscellaneous dangers, such as collisions with power lines, drownings, poisoning by anti-freeze, and shootings.

Condors were observed on the land comprising Tejon Ranch continuously from 1850 to 1987. They have used the land for foraging and roosting, but not for nesting. About 19,000 acres within the TMV Specific Plan boundary have been designated critical condor habitat by the United States Fish and Wildlife Service pursuant to the federal Endangered Species Act, of which 3,500 to 4,000 acres would be directly impacted by the project. This is a portion of the 130,000 acres of critical condor habitat on Tejon Ranch as a whole. Condors have recently been observed or recorded foraging, feeding, and possibly engaging in temporary night roosting within the project boundaries, predominantly along the northern ridgelines and adjacent open grasslands. Condors often use peaks within the project boundaries as aerial launch sites.

The EIR describes potential impacts to the condor from construction activities on the project site. These include, “abandonment of microtrash at construction sites”; “intentional or inadvertent inappropriate interaction between condors and construction workers or construction equipment”; and “intentional or inadvertent harassment of condors feeding on carcasses, or roosting in trees or on rock outcrops, that are within or adjacent to construction sites,” which would happen “as a result of construction noise or vibration, night lighting, and the presence of people and vehicles.” To mitigate these impacts, the EIR calls for education and training of construction workers.

Construction and grading “could result in construction-period impacts on approximately 1,337 acres of condor foraging habitat, primarily grassland and oak savannah, and some open scrub habitat.” A larger area would have been affected under real parties’ original plans, but “as a result of analysis and input by condor experts,” a decision was made to build 2,385 acres of residential development “away from higher elevation ridges.” Further, the habitat that would be affected “is in lower-elevation areas not typically used by condors and not historically or currently known to be used as

foraging or roosting habitat.” In light of these facts, the EIR concludes that the loss of the 1,337 acres is not a significant impact.

Turning to long-term operational impacts of the project, the EIR describes “[i]ncreased volumes of microtrash”; “intentional or inadvertent harassment of condors feeding on carcasses or roosting in trees or on rock outcrops”; and disruption from “night lighting and the presence of people and vehicles” These impacts would be mitigated to an insignificant level by educational programs, regulation of community recreational events and commercial filming activities, and external lighting controls.

Collisions with and electrocutions by utility lines, towers, and antennas are also potential impacts. These would be mitigated by restrictions on the height and location of these facilities.

Habituation is another source of potential impacts. Condors released from the captive-breeding program may be habituated to human activities and structures and may come to harm by failing to stay away from them. In addition to the limitations on utility lines and towers, this impact would be mitigated by payment of money to the United States Fish and Wildlife Service to fund programs to deter condors or relocate them, and by hiring a full-time biologist to manage and monitor condors on Tejon Ranch. Further, the curtailment of hunting and grazing activities in the project area as the project is built would reduce the number of carcasses and gut piles in the area and thereby reduce the opportunities for contact between condors and people.

At the same time, the project would fund an artificial feeding program for the condors, which would draw them away from human-inhabited areas. Hunting in the area would be supervised by trained personnel to reduce the impact of contacts between condors and hunting parties. At the same time, the continuation of hunting in areas of Tejon Ranch outside the project boundaries, away from people, would provide carcasses for feeding. The EIR finds that all the impacts would be reduced to an insignificant level by these measures.

The loss of 1,337 acres of foraging habitat would be an operational impact as well as a construction impact. The EIR finds that this impact would not be significant for the same reasons as those just mentioned: that acreage has traditionally not been used and is not currently being used by condors; and other, better habitat has been preserved by the decision to relocate some of the housing.

As additional mitigation for the impact on foraging habitat, the project will fund and implement an artificial feeding program. Carcasses free of lead and other contaminants will be provided at two sites, chosen with the approval of the United States Fish and Wildlife Service, within the project boundaries or nearby within Tejon Ranch.

The mitigation approach employed by the EIR is taken from the “Tejon Ranch California Condor Conservation and Management Plan” prepared by a biologist for real parties. The goal of the plan was “to evaluate the proposed TMV project and to identify additional design elements and management measures that would result in significant positive rather than negative impacts to the species.” The author opined that “implementation of the plan proposed in this report would have a substantial positive impact on the long-term survival of condors in Southern California”

A. *Habitat loss*

In support of its finding that the mitigated impact on condors will be insignificant, the EIR states in several places that a government report downplayed the conservation of foraging habitat as an important factor for the well-being of condors. In one of these places, the EIR reads: “The Condor Recovery Plan adopted by the [United States Fish and Wildlife Service] pursuant to the [federal Endangered Species Act] [citation] does not consider that habitat loss was historically, or currently is, an important factor in the recent population declines of the California condor.”

The challengers argue that these statements misrepresent the content of the government report and, as a result, the EIR fails in its purpose as an informational document, and the county has failed to proceed in the manner required by law. As will be

seen, the parties' dispute is a difference of opinion about the meaning of the report, and both sides' opinions were within reason. The challengers' interpretation may or may not be superior, but an interpretation it remains, and the county had discretion to accept a different interpretation, so we perceive no failure to proceed in the manner required by law. For the same reason, the challengers' criticism of the EIR on this point does not show that the EIR's significance finding is unsupported by substantial evidence.

The government's Condor Recovery Plan contains a variety of statements relevant to this dispute. Examples of these statements follow:

"California condors require suitable habitat for nesting, roosting, and foraging.... At present, sufficient remaining habitat exists in California and in southwestern states to support a large number of condors, if density independent mortality factors, including shooting, lead poisoning, and collisions with man-made objects, can be controlled."

"The 1996 revised recovery plan modifies the previous recovery strategy, that focused primarily on habitat protection, to emphasize the captive breeding program and intensive efforts to reestablish the species in the wild. Important measures are also prescribed for habitat conservation and public education, but these are secondary to the continued development of a captive breeding program and reintroduction of captive-bred California condors."

"An important factor in the successful establishment of wild condor sub-populations is the existence of suitable habitat. Therefore, whenever possible or appropriate, a priority for this habitat should include management for condor recovery."

"Foraging habitats have been identified and documented through observations and radiotelemetry. Their preservation is necessary to the maintenance of wild populations of California condors. Habitat management plans and volunteer land use agreements on Federal, State, and private lands should be developed and implemented to protect existing foraging habitats."

"Causes of the California condor population decline have probably been numerous and variable through time.... Although the information regarding California condor mortality is inconclusive, there is evidence to suggest that

two anthropogenic factors, lead poisoning and shooting, have contributed disproportionately to the decline of the species in recent years.”

The last quoted passage went on to discuss various other causes of decline, but did not mention habitat loss.

A fair summary of these excerpts would be that (1) habitat loss was not among the leading causes of the collapse of the condor’s population; (2) the government’s recovery efforts are focused presently on captive breeding and reintroduction, not habitat conservation; (3) suitable habitat must be preserved if the reintroduction program is to succeed; and (4) currently enough habitat exists to support a large recovery of the population.

The EIR’s statement that the government report does not treat habitat loss as an important factor in the *decline* of the condor population appears to be literally correct. On the other hand, the EIR’s implication—that habitat loss would not be harmful to the *recovery* of the species—may be debatable, since the government report also says that suitable habitat is important to the success of the reintroduction program. At the same time, the report also indicates that suitable habitat currently is plentiful.

We conclude that the EIR’s statements about the government report do not amount to a misrepresentation of the report’s contents. The EIR’s interpretation is debatable, but not outside the bounds of reason, so we cannot say it misinforms or misleads the reader or that the county failed to proceed in the manner required by law. Because of this, the interpretation also does not undermine the evidentiary basis for the finding that the impact on habitat will be insignificant with mitigation.

B. Artificial feeding

As we have said, the mitigation measures required for the impacts on the California condor include an artificial feeding program. This program would compensate for the loss of acreage in which condors might have foraged and would mitigate the hazards of lead poisoning and ingestion of microtrash. The challengers argue that the

feeding program “will condemn the species to a permanent zoo-like existence.” They say the EIR fails to analyze the impacts of this mitigation measure, and therefore the county has failed to proceed in the manner required by law. They cite Guidelines section 15126.4, subdivision (a)(1)(D), which provides:

“If a mitigation measure would cause one or more significant effects in addition to those that would be caused by the project as proposed, the effects of the mitigation measure shall be discussed but in less detail than the significant effects of the project as proposed.”

The challengers also argue that, to the extent the EIR provides analysis of the adverse effects of artificial feeding and finds them insignificant, its finding is not supported by substantial evidence.

The challengers presented their concerns about artificial feeding to the county in a comment letter. They stated that the feeding “would: a) condemn the species to dependency on artificial feeding in perpetuity, preventing its full recovery; b) mitigate the project’s impact through manipulation of the behavior of the species; c) potentially lead to greater ingestion of microtrash because of associated behavior modification and d) mitigate a threat (lead poisoning) that other measures, external to the project, will make obsolete regardless.”

The county prepared a written response for inclusion with the final EIR. The response stated that all parts of the condor recovery program, including those in southern California, the central California coast, Baja California, and Arizona, use supplemental feeding programs, and these programs “may have provided up to 90% or more of the diet of released condors” Further, “[c]ondor biologists generally agree” that without artificial feeding, “mortalities from lead poisoning would have been much higher until the ban on the use of lead ammunition within the areas of condor reintroductions in California was implemented” The county also expressed the view that the “theory” that artificial feeding increases the incidence of microtrash ingestion by discouraging condors from foraging widely “has not yet been proven” and is inconsistent with some

evidence. It further stated that “the concept of ‘natural’ foraging behavior is difficult to define” because condor feeding has been associated with human activity, including hunting and grazing, for centuries. The county concluded that the feeding program “will not adversely impact condor behavior and should enhance the potential for a more rapid condor recovery.”

The challengers say the county’s responses addressed only one of the concerns (microtrash) and conclusorily dismissed the others, finding there were no significant impacts from the feeding program. We, however, believe the responses are adequate under the “less detail” standard of Guidelines section 15126.4, subdivision (a)(1)(D). The county discussed all the issues raised by the challengers, not just the microtrash issue. The conclusion of no adverse impact must be understood in context: The county’s view is that artificially feeding the condors is necessary and saves their lives, so not doing it would be worse than doing it. In light of this, it was not unreasonable to conclude that artificial feeding would not have an adverse impact even if it *might* be the case that microtrash ingestion could increase or that natural foraging behavior could be interfered with. The county’s views are supported by scientific authorities cited in the written responses. That the challengers and their experts have a different view does not show either that the county failed to analyze the impacts or that its finding of no adverse impact is unsupported.

We agree with the county’s view that we are presented neither with a failure to proceed in the manner required by law by omitting a necessary analysis, nor with a failure to support a finding with substantial evidence, but only with conflicting scientific views supported by conflicting evidence. That kind of conflict does not show that an EIR is inadequate. (*California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 626.)

C. Changes in hunting and grazing

The EIR states that, as the project is built, hunting and grazing in the area will be curtailed. The challengers argue that the effect of reduced hunting and grazing, which will reduce the number of carcasses available to condors in the vicinity of the project, is insufficiently analyzed in the EIR.

The relevant statements in the EIR are these:

“[T]he managed hunting and grazing programs within the portions of the project site within and nearest the development envelope would be reduced in scale as the development program is implemented, resulting in fewer carcass and gut pile occurrences near development and further reducing the likelihood of California condor and human interaction within the project site and within the development envelope. [¶] ... [¶]

“Managed hunting and grazing programs within the portions of the project site within and nearest the development envelope would be reduced in scale as the development program is implemented, resulting in fewer carcass and gut pile occurrences within the project site as a whole as well as within the development envelope more specifically. Hunting would continue within the open space portions of Tejon Ranch outside Tejon Mountain Village, particularly in those areas such as the Condor Study Area where substantial condor foraging has historically occurred and continues to occur. The continuation of hunting in areas of the site and outside the project in locations where the risk of human contact is reduced would further preserve and maintain condor foraging habitat functions and values within and adjacent to the project.”

In a comment letter, the challengers asserted that the draft EIR “completely fails to consider the consequences of the elimination of hunting and grazing from the TMV Specific Plan and nearby areas.” They said this was the “most incredible” of the many errors and omissions in the EIR’s discussion of foraging habitat. They remarked that “exactly how much either hunting or grazing will be curtailed is not described” and contended that the quantity must be close to the 26,417 acres of the entire TMV specific plan area.

In responding to this comment, the county did not attempt to quantify the curtailment of the grazing and hunting, but instead minimized the importance of hunting and grazing in the project area both before and after development:

“As discussed in the Final EIR . . . , condor use of Tejon Ranch is primarily driven by hunted game animals not retrieved by hunters and by the deposition of gut piles and carcass remains of animals cleaned in the field. While use of the proposed Tejon Mountain Village Project area by condors has occurred, *the majority of the hunting and gut pile deposition occurs to the north and east of the proposed Tejon Mountain Village Project area within the Condor Study Area and beyond* Both hunting and ranching within Tejon Ranch and the proposed Tejon Mountain Village Project site will continue after full build-out, thereby maintaining the pattern of ranch- and hunting-related food supplies that have been critical to supporting California condors throughout their range. Managed hunting facilitated by trained guides is planned for the TMV site, and continued grazing is likewise planned in preserved open space areas of the TMV site. While *neither of these activities has historically resulted in significant condor foraging on the TMV site*, the continuation of these uses will provide for the availability of clean food sources and would continue to support increased condor use of the Ranch for foraging and roosting. . . .

“With respect to hunting, the continuation of hunting on Tejon Ranch and the continuation of managed hunting within the Project site is a valid mitigation measure given the importance of clean, lead-free carcasses to California condors. . . . Commentor asserts that more details of ‘where exactly’ hunting will be allowed or restricted is necessary; in fact the EIR discloses that only managed hunting will be allowed on the TMV site, and *since gut pile and carcass disposal have been banned on the TMV site there will be no change in hunting activity that is relevant to the condor* following project approval.” (Italics added.)

In essence, the county’s response to the comment letter was that hunting and grazing in the project area have never been a major source of food for condors because most of the activity that has benefitted condors has taken place in other parts of the ranch. This position somewhat undermines the claim the county simultaneously makes (which also was made in the EIR) that the continuation of hunting and grazing around the project in reduced quantities will contribute to the availability of safe food for the condors. The

key point, however, is clear enough: There is no need to quantify the curtailment of hunting and grazing in the project area in order to determine the impact of the curtailment on the condor food supply because these activities did not provide a significant food supply in the project area in the first place; instead, their impact has been in other areas of Tejon Ranch.

We see no grounds for disputing the evidentiary basis of this response. Further, in light of the response, we cannot say the omission of details about exactly how much curtailment of hunting and grazing will take place in the project area amounted to a prejudicial failure to produce an informative EIR. Given the marginal impact on the condor food supply of changes in hunting and grazing in the project area, the challengers have not shown how the EIR's treatment of the issue interfered with informed decisionmaking and public participation. (*Association of Irrigated Residents v. County of Madera, supra*, 107 Cal.App.4th at p. 1391; *Bakersfield Citizens for Local Control v. City of Bakersfield, supra*, 124 Cal.App.4th at p. 1198; *Ballona Wetlands Land Trust v. City of Los Angeles, supra*, 201 Cal.App.4th at p. 468.)

The same considerations apply to the parties' dispute over the adequacy of a grazing management plan that was included with the county's responses to comments. The challengers say this plan merely sets forth best management practices already employed at Tejon Ranch as a whole; it does not provide any details about the expected curtailment of grazing in the project area. The lack of these details does not violate CEQA because the EIR sufficiently shows without them that the changes in grazing will not significantly affect the condor food supply.

Finally, the challengers say the EIR is deficient because it does not "evaluate the consequences of altering the grazing regime on fire safety." The challengers have not

pointed to anything in the record to indicate that there would be any such consequences.²² Assuming there is something in the record suggesting that reduced grazing could mean increased fire risk, the challengers have given no reason why the fire protection plan attached to the EIR as an appendix would not be adequate to mitigate that risk. It is true, as the challengers point out, that the fire protection plan does not specifically address the relationship between grazing and fire risk, but the plan's purpose is to address all types of fire risk throughout the project. We see no reason why the report would be required to focus special attention on this particular type of risk. The challengers have not shown a prejudicial failure to provide information.

D. GPS data points

The data in the Condor Conservation and Management Plan prepared for the EIR include information on the roosting, perching, and flying locations over a six-year period of 18 condors equipped with global positioning system (GPS) transmitters. In their opening brief, the challengers criticize the way in which the EIR employs these data, but the nature of the criticism is opaque. The challengers say the county “reject[s] out-of-hand the suggestion of using buffers around GPS data points,” but the opening brief never offers any explanation of what “buffers around GPS data points” are or what would be involved in “using” them. The county's brief interprets the remarks as calling for “a one-half mile development prohibition ‘buffer’ around each individual condor Global Positioning System (‘GPS’) ‘data point’ location.” In their reply brief, the challengers explain that this is not what they meant. Instead, they intended to argue that the representation of the GPS data in the EIR should have included a zone or buffer around each data point to indicate that the condor probably was active in an area around the point picked up by the GPS system, not only at the point itself. They say this way of presenting

²²The challengers provide a quotation they say comes from the EIR about cattle removing fuel and thereby reducing the risk of fire. The page in the administrative record they cite for this quotation, however, does not contain it.

the GPS data would be a better means of “accurately portraying a moving species’ use of the land, and of portraying the potential ‘edge effects’ of development on the land around it.”

As an initial matter, we conclude that neither the opening brief nor the reply brief properly raised this issue for purposes of this appeal. The opening brief did not properly raise the issue because it did not make the point in an intelligible manner. (*Associated Builders & Contractors, Inc. v. San Francisco Airports Com.*, *supra*, 21 Cal.4th at p. 366, fn. 2.) The reply brief did not properly raise the issue because we ordinarily do not consider an issue raised in an intelligible manner for the first time in a reply brief. (*Citizens for Responsible Equitable Environmental Development v. City of San Diego*, *supra*, 184 Cal.App.4th at p. 1044, fn. 12.)

Even if the issue had been raised properly, we would not find it meritorious. A dispute over the best method of presenting scientific data is reviewed under the substantial evidence standard. That standard applies to “the methodology used for studying an impact and the reliability or accuracy of the data upon which the EIR relied” (*Bakersfield Citizens for Local Control v. City of Bakersfield*, *supra*, 124 Cal.App.4th at p. 1198.) A party making a substantial evidence challenge must marshal all the evidence material to the lead agency’s finding and then show that that evidence could not reasonably support the finding. (*California Native Plant Society v. City of Rancho Cordova*, *supra*, 172 Cal.App.4th at p. 626.) The challengers have not done this. They merely assert their contrary view that displaying GPS data points with buffers is methodologically superior.

E. Ranchwide Agreement and Tehachapi Uplands Multiple Species Habitat Conservation Plan

As we mentioned, the EIR discusses the Ranchwide Agreement, a contract between the owners of Tejon Ranch and several environmental conservation organizations, under which the owners promised to limit development and the

organizations agreed not to sue. The EIR also discusses the Tehachapi Uplands Multiple Species Habitat Conservation Plan (TUMSHCP), which is a proposed species conservation plan that real parties submitted to the United States Fish and Wildlife Service in support of an application for a 50-year incidental-take permit under the federal Endangered Species Act. An incidental-take permit allows and regulates activities that have impacts on endangered and threatened species. (16 U.S.C. § 1539(a)(1)(B).) Review of a federal environmental impact statement on the TUMSHCP was pending at the time of the release of the draft EIR.

The challengers argue that when the county included this discussion in the EIR, it caused the EIR not to fulfill its purposes as an informational document, thus failing to proceed in the manner required by law, and also incorporated an improper factor into the EIR's significance findings, causing those findings not to be supported by substantial evidence. The challengers catalogue 74 places where the Ranchwide Agreement is referenced and 37 places where the TUMSHCP is referenced in the EIR and its appendices. They quote a few of these places, in which it is stated that the preservation of land contemplated by these documents will benefit the California condor. In one place—a response to comments from the challengers—the county stated that this land preservation, along with other measures, would “mitigate” project impacts on the condor. The challengers claim:

“The effect of the EIR's repeated references to the Ranchwide Agreement and the TUMSHCP is that they are used as *de facto* mitigation; although they are not included as official mitigation measures in the EIR [citation], and therefore are not enforceable, they are cited throughout the EIR in order to lessen or soften the Project's impacts. Proposed ‘mitigation measures must be fully enforceable through permit conditions, agreements, or other legally binding instruments’ (Guidelines § 15126.4(a)(2)) and cannot be deferred (Guidelines § 15126.4(a)(1)(B)). Given their ubiquitous presence throughout the EIR, one might be excused for believing that the Ranchwide Agreement and the TUMSHCP are parts of the Project and that the TUMSHCP is a final, approved plan. Yet the Ranchwide Agreement is a private agreement between private parties, with limited enforceability

provisions available only to the parties to that agreement [citation] while the TUMSHCP is a federal permit that has yet to be approved. [Citation.] By conflating the Project, the Ranchwide Agreement and the TUMSHCP, and repeatedly analyzing the Project's potential impacts only through the lens of two independent and unenforceable plans (one that is a mere proposal), the EIR fails to adequately describe the Project or analyze its significant impacts and unfairly determines that potential impacts will be less than significant.” (Fn. omitted.)

We first consider the challengers' claim that the county failed to proceed in the manner required by law. As the challengers concede, the two documents are not represented in the EIR as “official” mitigation measures. The EIR states the nature of the documents accurately. It is true that the EIR sometimes uses them as part of the basis for saying the project will not harm the environment, but those comments, read in the context of the EIR as a whole, do not imply that the documents contain enforceable mitigation measures that are conditions of the county's approval of the project. It is a fact that real parties have entered into the Ranchwide Agreement and have submitted the TUMSHCP for approval. We do not think the EIR is made misleading by the inclusion of this fact. Its inclusion was not necessary, but we do not think it misinformed the public. To the contrary, it is information the public might reasonably have considered relevant. The challengers have made no showing of a prejudicial failure to comply with CEQA's information disclosure requirements. (*Bakersfield Citizens for Local Control v. City of Bakersfield*, *supra*, 124 Cal.App.4th at p. 1198.)

We turn next to the claim that the discussion of the two documents resulted in an undermining or distortion of the factual basis for the EIR's conclusions about the significance of impacts. A challenge to this factual basis is reviewed under the substantial evidence standard. As we have just mentioned, a party making a substantial evidence challenge must marshal all the evidence material to the lead agency's finding and then show that that evidence could not reasonably support the finding. (*California Native Plant Society v. City of Rancho Cordova*, *supra*, 172 Cal.App.4th at p. 626.) Once

again, the challengers have not done this. They have merely asserted that the inclusion of discussion of the documents “unfairly determines that potential impacts will be less than significant.” This is not enough to bear the challengers’ burden.

The challengers also say the county was wrong to include a discussion of the two documents in the EIR’s analysis of cumulative impacts. They assert that an EIR’s cumulative-impacts discussion should only analyze ways in which the project’s impacts compound or increase other adverse environmental impacts; it should not discuss potential beneficial effects. We agree that an EIR’s cumulative-impacts analysis *need* not discuss potential beneficial effects, but we see no basis for a conclusion that it *must* not discuss them. Again, we do not see the challenged discussion as misleading in context. The challengers have not shown a failure to proceed in the manner required by law.

VI. *Castac Lake*

Castac Lake is a natural lake surrounded by the land comprising the project site. As described in a comment letter, in its natural condition it is an ephemeral saline sag pond, which fills with runoff and precipitation each year and then evaporates, in many years going completely or almost completely dry.

In 2001, TRC began pumping ground water into the lake to maintain an artificially constant water level. A letter written by Robert Stine, CEO of TRC, states that TRC decided to do this as part of a scheme to manage various problems associated with the lake, including “swirling dust from the dry lakebed surfaces,” “algae blooms and fish deaths from lack of oxygen,” and flooding. The artificial maintenance of the water level also serves to supply water, accessible by truck or helicopter, for regional and local firefighting, according to TRC.

In the notice of preparation distributed to the public at the beginning of the EIR process, the description of the project included the lake, swimming and boating facilities on the lake, and residential and commercial development on the lake shore. This original description also included land areas not included in the final proposal. The original

proposal further stated that ground water would be used by the project, both to maintain the lake level and for drinking water and other purposes.

In response to public comments on a variety of topics, including ground water usage, real parties decided to reduce the scope of the project. This reduction included redrawing the project boundaries so that the lake, although surrounded by the project, was not part of it. In the revised proposal, none of the project's water supply would come from ground water. There was no indication that the use of ground water to keep the lake full would stop, however, and the discussion in both sides' briefs presupposes that it will continue.

The challengers argue that the exclusion of the lake from the project description is what is often referred to as "piecemealing." CEQA requires an EIR's project description to encompass "the whole of an action." (Guidelines, § 15378, subd. (a)(1).) In *Laurel Heights Improvement Assn. v. Regents of University of California*, *supra*, 47 Cal.3d 376, the Supreme Court held that an EIR was inadequate because it included only the first phase of a plan to install a medical research facility in an existing building in a residential neighborhood. It was foreseeable that the facility would occupy the entire building within a few years, so the EIR was required to include that occupation in the project description and analysis of impacts. (*Id.* at pp. 393-395.) A project description must include the whole of an action to ensure "that environmental considerations do not become submerged by chopping a large project into many little ones" (*Burbank-Glendale-Pasadena Airport Authority v. Hensler*, *supra*, 233 Cal.App.3d at p. 592.) By the same token, "independently justified, separate projects" that are "not interdependent," and activities that are not "functionally linked" to or a "crucial element" of a project, need not be included in a project description. (*Richmond*, *supra*, 184 Cal.App.4th at pp. 99, 100, 101.) The challengers' view in this case is that Castac Lake, and the pumping of ground water into it, are important elements of the TMV project; therefore they should have been included in the project description. This, in turn, would have required analysis of the

impact of the ground water pumping on the ground water supply and of the impact of the raised lake level on flood risks.

The challengers' view depends on the conclusion the EIR is "unconvincing" when it says that, although TRC has been and is still pumping ground water into the lake, it is doing so for reasons unrelated to the project. In 2003, in the early planning stages, TRC's chief executive officer gave a presentation to local residents in which he explained that TRC's management of the lake would contribute to the TMV project by making sure "that the son of a gun doesn't go dry and just be an alkaline, ugly spot." (Italics omitted.) TRC continues to pump ground water into the lake now, even though it has abandoned its plan to make the lake a feature of the project, and says it does so for other reasons. As we have said, TRC says its purposes now include dust suppression, oxygenation, and making water available for firefighting.

The challengers say these claims should not be believed for a variety of reasons. For instance, the project creates an increased flood risk because it will include construction of impermeable surfaces, thereby increasing runoff. A mitigation measure in the EIR for this increased flood risk is to reduce the level of the lake from 3,503 feet to 3,500 feet above sea level. The challengers argue that a decision to maintain the lake at a *specific* level and no lower (as opposed to merely ensuring that the lake will never rise above a certain level) is consistent with a desire to keep the lake *not only* available to receive runoff *but also* to keep the lake attractive for the aesthetic benefit of the project.

The challengers also say, more generally, that it is implausible to describe the aesthetic benefits to the project of the filled lake as merely incidental to other purposes. In effect, they claim the attractiveness of the filled lake speaks for itself and shows that filling it must be part of the project. They also point out that, even though the EIR says residents of TMV will not be permitted to access the lake from within the project, there will be no prohibition on accessing it from other parts of Tejon Ranch. Prospective

buyers of homes in TMV therefore will undoubtedly regard the lake as a recreational attraction as well as an aesthetic one, and real parties will take advantage of this situation.

The challengers argue that the correctness of the project description is a matter of law which we should review nondeferentially. The challengers rightly say that an incorrect project description has, in case law, been called a failure to proceed in the manner required by law. (*Riverwatch v. Olivenhain Municipal Water Dist.* (2009) 170 Cal.App.4th 1186, 1201.) This standard makes sense, however, only if the facts in light of which the project description is incorrect are undisputed. Where a project description is correct if the facts are as the project proponent says they are, but incorrect if the facts are as described by the challenger, the dispute is a factual one. Factual disputes are reviewed under the substantial evidence standard. In this case, the EIR's project description is correct unless real parties' account of their purposes in managing the lake level is "unconvincing," as the challengers contend. This means we are confronted with a factual dispute, reviewable under the substantial evidence standard.

Again, a party making a substantial evidence challenge must marshal all the evidence material to the lead agency's finding and then show that that evidence could not reasonably support the finding. (*California Native Plant Society v. City of Rancho Cordova, supra*, 172 Cal.App.4th at p. 626.) Because they mistakenly believe the issue is a matter of law, the challengers have not attempted to do this.

Even if they had marshaled the contrary evidence, we would hold that their argument fails. Real parties' firefighting, dust suppression, and oxygenation rationales are all supported by substantial evidence in the record. It was up to the county to decide whether those rationales were "convincing."

Separately from their piecemealing argument, the challengers say the EIR is deficient because it does not sufficiently analyze the project's impact *on* the lake. Even assuming the lake is not part of the project, they say, impacts of the project on it are environmental impacts of the project which must be analyzed.

The EIR does analyze impacts of the project on the lake. Specifically, it discusses the increased risk of lake flooding arising from runoff caused by the project. The EIR calls for mitigation measures for this risk, including the building of embankments and berms and the plan to reduce the lake level by three feet. The challengers have not shown this discussion is inadequate. They contend that the EIR fails to discuss the impact of the raised lake level itself on flood risk, but because they have not shown that the lake and its artificially maintained level are part of the project, they have not shown that the EIR needed to analyze this impact.

The EIR also contains discussion of the impacts of ground water pumping for lake maintenance. The parties' briefs debate at some length the question of whether this discussion was adequate, assuming the lake and its maintenance were part of the project. Since we have concluded that the challengers have failed to show that the lake was part of the project, we need not address this debate.

DISPOSITION

The judgment is affirmed. Respondents are awarded costs on appeal. The motion filed on December 8, 2011, to strike portions of the challengers' reply briefs is denied as moot.

Wiseman, Acting P.J.

WE CONCUR:

Levy, J.

Poochigian, J.