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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

MARINA COAST WATER DISTRICT,

Plaintiff and Appellant,

v.

CALIFORNIA COASTAL COMMISSION,

Defendant and Respondent;

CALIFORNIA-AMERICAN WATER  
COMPANY,

Real Party in Interest and Respondent.

H042742

(Santa Cruz County

Super. Ct. No. CV180839)

**I. INTRODUCTION**

Real party in interest California-American Water Company (Cal-Am) wanted to construct and operate a temporary test slant well on private beach property owned by CEMEX, a company that used the site for sand mining. Cal-Am was required to obtain coastal development permits for the project from the California Coastal Commission (Coastal Commission)<sup>1</sup> and the City of Marina. In its permit application to the City of Marina, Cal-Am stated that the purpose of the temporary test slant well project was to

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<sup>1</sup> The coastal development permit issued by the Coastal Commission is not at issue in this appeal.

gather technical data regarding the feasibility of a subsurface water intake system for a potential future desalination project.

The Marina City Council denied Cal-Am's application for a coastal development permit and Cal-Am filed an appeal to respondent Coastal Commission. After preparing a staff report addressing the environmental impacts of the test slant well project and holding a public hearing, the Coastal Commission issued the coastal development permit sought by Cal-Am.

Appellant Marina Coast Water District (Marina Coast) is a municipal water district that provides water service to 30,000 residential and commercial customers in the City of Marina and the former Ford Ord Army Base. According to Marina Coast, the test slant well will pump groundwater from the Salinas Valley Groundwater Basin from which Marina Coast also pumps groundwater. Marina Coast filed a petition for writ of mandate<sup>2</sup> challenging the Coastal Commission's decision to issue the coastal development permit to Cal-Am, which the trial court denied in its August 24, 2015 judgment.

On appeal, Marina Coast contends that the trial court erred in denying the petition for writ of mandate and the Coastal Commission's approval of Cal-Am's coastal development permit should be reversed because the Coastal Commission lacked appellate jurisdiction. Alternatively, Marina Coast contends that the Coastal Commission's approval violated several provisions of the California Environmental Quality Act

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<sup>2</sup> Public Resources Code section 30801 provides: "Any aggrieved person shall have a right to judicial review of any decision or action of the commission by filing a petition for a writ of mandate in accordance with Section 1094.5 of the Code of Civil Procedure, within 60 days after the decision or action has become final."

All further statutory references are to the Public Resources Code unless otherwise indicated.

(CEQA) (Public Resources Code § 21000 et seq.) For the reasons stated below, we find no merit in Marina Coast’s contentions and we will affirm the judgment.<sup>3</sup>

## II. OVERVIEW: COASTAL DEVELOPMENT PERMITS

We begin with the statutory scheme for land use in the coastal zone of California, including coastal development permits, as outlined by the California Supreme Court in *Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2012) 55 Cal.4th 783, 793-794 (*Pacific Palisades*). “The Coastal Act ‘was enacted by the Legislature as a comprehensive scheme to govern land use planning for the entire coastal zone of California. The Legislature found that “the California coastal zone is a distinct and valuable natural resource of vital and enduring interest to all the people”; that “the permanent protection of the state’s natural and scenic resources is a paramount concern”; that “it is necessary to protect the ecological balance of the coastal zone” and that “existing developed uses, and future developments that are carefully planned and developed consistent with the policies of this division, are essential to the economic and social well-being of the people of this state . . . .” (§ 30001, subds. (a) and (d).)’ [Citation.] The Coastal Act is to be ‘liberally construed to accomplish its purposes and objectives.’ (Pub. Resources Code, § 30009.) Under it, with exceptions not applicable here, any person wishing to perform or undertake any development in the coastal zone must obtain a coastal development permit ‘in addition to obtaining any other permit required by law from any local government or from any state, regional, or local agency . . . .’ (*Id.*, § 30600, subd. (a).)” (*Pacific Palisades, supra*, 55 Cal.4th at pp. 793-794.)

“The Coastal Act expressly recognizes the need to ‘rely heavily’ on local government ‘[t]o achieve maximum responsiveness to local conditions, accountability,

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<sup>3</sup> This court granted the application of the Monterey Peninsula Regional Water Authority to file an amicus curiae brief in support of Cal-Am and the application of the Monterey County Water Resources Agency to file an amicus curiae brief in support of the Coastal Commission.

and public accessibility . . . .’ (Pub. Resources Code, § 30004, subd. (a).) As relevant here, it requires local governments to develop local coastal programs, comprised of a land use plan and a set of implementing ordinances designed to promote the act’s objectives of protecting the coastline and its resources and of maximizing public access. (*Id.*, §§ 30001.5, 30500–30526; [citation.] Once the California Coastal Commission certifies a local government’s program, and all implementing actions become effective, the commission delegates authority over coastal development permits to the local government. (Pub. Resources Code, §§ 30519, subd. (a), 30600.5, subds. (a), (b), (c).) Moreover, ‘[p]rior to certification of its local coastal program, a local government may, with respect to any development within its area of jurisdiction . . . , establish procedures for the filing, processing, review, modification, approval, or denial of a coastal development permit.’ (*Id.*, § 30600, subd. (b)(1).) An action taken under a locally issued permit is appealable to the commission. (*Id.*, § 30603.) Thus, ‘[u]nder the Coastal Act’s legislative scheme, . . . the [local coastal program] and the development permits issued by local agencies pursuant to the Coastal Act are not solely a matter of local law, but embody state policy.’ [Citation] ‘In fact, a fundamental purpose of the Coastal Act is to ensure that state policies prevail over the concerns of local government.’ [Citation.] Moreover, in certain areas, sometimes referred to as dual permit jurisdictions, an applicant must obtain a permit from the local entity and after obtaining the local permit, a second permit from the commission. (Pub. Resources Code, §§ 30600, 30601; Cal. Code Regs., tit. 14, § 13301, subd. (a).)”<sup>4</sup> (*Pacific Palisades, supra*, 55 Cal.4th at pp. 793–794.) Thus, the Coastal Act “requires a coastal development permit for ‘any development’ in the coastal zone. (Pub. Resources Code, § 30600.)” (*Id.* at p. 794.)

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<sup>4</sup> All further undesignated references to regulations are to Title 14 of the California Code of Regulations.

In the present case, the record reflects that the City's local coastal program was certified by the Coastal Commission in 1982.

### **III. FACTUAL AND PROCEDURAL BACKGROUND**

#### ***A. Cal-Am's Application for a Coastal Development Permit***

On March 12, 2013, Cal-Am submitted an amended application for a coastal development permit to the City of Marina (City) that superseded its previous application. Cal-Am sought a coastal development permit in order to construct and operate a temporary test slant well on private beach property owned by CEMEX, a company that used the site for sand mining. The temporary test slant well project would include infrastructure in addition to the test slant well, such as monitoring wells and a discharge pipe.

Cal-Am stated in its application that the purpose of the temporary test slant well project was to "gather technical data related to feasibility of a subsurface intake system for a potential future desalination project. . . . The temporary slant test well data will be used, in part, to facilitate design and intake siting for the separately proposed Monterey Peninsula Water Supply Project (MPWSP)." The technical data sought included "current, site-specific field data concerning geologic, hydrogeologic, and water quality characteristics of the Sand Dunes Aquifer, Salinas Valley Aquitard, and [the] 180-Foot Aquifer."

Cal-Am noted in its application that numerous environmental issues had been addressed. For example, Cal-Am stated that the temporary test slant well would be constructed and pumped during the five-month non-nesting period for the snowy plover, from October 2013 through February 2014. The site for the temporary test slant well was chosen to minimize or avoid disruption of the snowy plover habitat.

Also included in Cal-Am's application was its detailed analysis of the project's consistency with the California Coastal Act (§ 30000 et seq.) and the City's local coastal plan (LCP). Cal-Am's analysis concluded that the project was consistent with both

provisions and would not adversely impact the environment, agriculture, or public recreational activities.

## ***B. City's Denial of Cal-Am's Application***

### **1. Initial Study/Mitigated Negative Declaration**

After Cal-Am submitted its application for a coastal development permit, the City prepared an initial study to determine whether the proposed temporary test slant well would have a significant adverse impact on the environment. The initial study noted that a hydrologic working group had been formed to facilitate the environmental planning and design of the the Monterey Peninsula Water Supply Project, and that data obtained from the temporary test slant well would be used “to analyze the potential effects of subsurface pumping at this location on groundwater use and quality within the Salinas Valley Groundwater Basin.”

The initial study reviewed the project components, site access, project construction, project operation and decommissioning, potential environmental impacts, mitigation measures, and residual environmental impact. Among other things, the initial study stated that “[t]he slant test well would operate continuously, 24 hours a day for a period of up to 24 months. Routine operation would include continuous extraction of water from the Dune Sand and/or 180-FTE Aquifers and discharge into the Pacific Ocean via the existing outfall pipe.” Additionally, “[a]t the conclusion of the 24-month operational phase, the slant test well, monitoring well clusters, and all related appurtenances and infrastructure are proposed to be decommissioned and removed.”

The initial study concluded with a May 16, 2014 “environmental declaration” by City’s planning services manager that stated: “On the basis of this Initial Study and Analysis: [¶] . . . [¶] I find that although the proposed project could have a significant effect on the environment, there will not be a significant effect in this case because revisions in the project have been made by or agreed to by the project proponent. A MITIGATED NEGATIVE DECLARATION will be prepared.”

In July 2014 the City's Planning Commission held a public hearing and declined to certify the mitigated negative declaration and also declined to approve or disapprove Cal-Am's application for a coastal development permit for the temporary slant test well.

## **2. Cal-Am's Appeal to the City Council**

Cal-Am filed an appeal of the Planning Commission's decision to the City Council. City staff then submitted a request to the City Council to open a public hearing and consider Cal-Am's appeal. City staff also submitted a report regarding the temporary test slant well project, accompanied by a draft resolution certifying the mitigated negative declaration and approving Cal-Am's application for a coastal development permit. The draft resolution contained CEQA findings as well as findings regarding the proposed project's consistency with the LCP.

The City Council held a public hearing on September 3, 2014, to consider Cal-Am's appeal of the Planning Commission's decision. On September 4, 2014, the City Council adopted Resolution No. 2014-103, which stated the City Council's findings and its decision to deny Cal-Am's appeal. The City Council found that (1) based on the whole record, it was unable to find that the temporary test slant well would not have a significant effect on the environment; and (2) the initial study/mitigated negative declaration "does not reflect the independent decision of the City and . . . has not been prepared in accordance with CEQA." The City Council concluded, as stated in Resolution No. 2014-103, that "[b]ased upon the above conclusions regarding CEQA, the City is unable to approve the Project and therefore denies the Project without prejudice to reconsideration at such time as the appropriate CEQA review is completed."

Thereafter, the City issued a notice of final local action (FLAN) in a letter dated September 11, 2014. The FLAN stated: "At a continued Public Hearing on September 4, 2014, the City of Marina City Council adopted Resolution No. 2014-103, on appeal disapproving a mitigated Negative Declaration and denying Coastal Development Permit CDP 2012-05, for the California American Slant Test Well Project located at CEMEX's

Lapis Road property.” The FLAN also stated that an appeal of the City Council’s decision could be filed with the Coastal Commission within 21 days of the “final City Council action on a Coastal Development Permit within the appeal zone.”

### ***C. Cal-Am’s Appeal to the Coastal Commission***

On September 24, 2014, Cal-Am filed an appeal to the Coastal Commission from the City Council’s decision to deny Cal-Am’s application for a coastal development permit for the temporary test slant well.

The documents attached to the appeal included Cal-Am’s statement of reasons supporting the appeal, which concluded that “[b]ecause the proposed Project conforms to the standards set forth in the City’s certified LCP and the public access policies set forth in the Coastal Act, the Commission should grant [Cal-Am’s] request for the CDP [coastal development permit]. Issuing the CDP would allow completion of a critical test well program that will further the policies and interests of numerous State and Federal agencies, and will help ensure protection of the critical Carmel River ecosystem while addressing the significant water supply crisis that the Monterey Peninsula is facing. . . . [T]he proposed Project has broad support among State agencies and environmental organizations, and would help inform decision-making on critical statewide water supply questions.”

#### **1. Staff Report**

The Coastal Commission issued a 63-page staff report on October 31, 2014, that included the staff recommendations regarding Cal-Am’s appeal. The staff report described Cal-Am’s project as follows: “Construct and operate a test slant well and associated monitoring wells to develop data necessary to assess the feasibility of the project site as a potential long-term water source for a desalination facility.”

The Coastal Commission staff report also included a summary of the staff recommendations. Regarding the Coastal Commission’s jurisdiction, the report noted that the proposed test slant well project “would be partially within the coastal

development permit jurisdiction of the City of Marina and partially within the Commission's retained permit jurisdiction. Development within the City's jurisdiction includes all the project's land-based activities, which represent almost all of the project-related development. The only part of the project within the Commission's permit jurisdiction is the portion of the slant well that is below grade and extends beneath the beach and seafloor."

The staff report also addressed the Coastal Commission's appellate jurisdiction: "The City's action is appealable to the Commission pursuant to [] Section 30603(a)(5), which allows appeals of any development that constitutes a major public works facility. Staff recommends the Commission determine that the appeal **raises** a substantial issue with the consistency of the local government's action with the certified [LCP] and that the Commission hold a *de novo* hearing."

Having conducted their review, the Coastal Commission staff recommended that the Coastal Commission conditionally approve the coastal development permits for Cal-Am's test slant well project. The recommendation was based on staff findings that (1) alternative locations for the project were infeasible or more environmentally damaging; (2) permit delays would not be in the public interest in obtaining a water supply to replace the Carmel River; and (3) the project had been mitigated to the extent feasible by including special conditions on the permit that required Cal-Am to avoid and minimize effects on the environmentally sensitive habitat areas (ESHA). Staff recommended that the project be approved by the Commission "despite its inconsistency with the LCP's habitat protection policy."

On November 11, 2014, Coastal Commission staff issued two addendums to the staff report. The addenda added staff responses to comments and correspondence, but did not change the staff recommendations that a substantial issue existed and Cal-Am's permit application should be conditionally approved.

## **2. Proceedings Before the Coastal Commission**

The Coastal Commission set a public hearing date of November 12, 2014, for Cal-Am's appeal of the City's decision denying Cal-Am's application for a coastal development for the test slant well.

After holding the public hearing, the Coastal Commission issued its final adopted findings. The Coastal Commission's findings were based on the staff report, and included the following conclusion: "The Commission finds that the proposed project meets all of the tests of section 30260 and the parallel LCP policies. It therefore exercises its discretion to approve this coastal-dependent industrial project, despite its inconsistency with the LCP's habitat protection policy prohibiting non-resource dependent development in primary habitat."

On November 17, 2014, the Coastal Commission issued its notice of intent to issue permit. The coastal development permit for the test slant well issued on December 8, 2014. Several special conditions (including protection of biological resources and project area restoration) were attached to the permit, which states that the coastal development permit is granted to Cal-Am for "[c]onstruction, operation, and decommissioning of a test slant well at the CEMEX sand mining facility in the City of Marina and beneath Monterey Bay in the County of Monterey."

### ***D. Marina Coast's Petition for a Writ of Mandate***

On January 15, 2015, Marina Coast filed a petition for writ of mandate challenging the decision of respondent California State Lands Commission to issue a general lease to real party in interest Cal-Am for the test slant well project. Both Cal-Am and the Coastal Commission answered the petition. The California State Lands Commission is not a party to this appeal and the record reflects that in the proceedings below the Coastal Commission has participated as the respondent.

Marina Coast sought a peremptory writ of mandate directing respondents to comply with the requirements of CEQA and injunctive relief preventing any further

action to implement the project pending full compliance with CEQA. In its opening brief in support of the petition for writ of mandate, Marina Coast argued that the petition should be granted because the Coastal Commission lacked jurisdiction and had committed numerous violations of CEQA.

Regarding jurisdiction, Marina Coast contended that the Coastal Commission lacked appellate jurisdiction to consider Cal-Am's appeal of City's denial of its application for a coastal development permit because (1) City's denial of the permit application was without prejudice and therefore the denial was not a final action that could be appealed; and (2) the Coastal Commission's finding of a substantial issue on appeal was not supported by substantial evidence. Alternatively, Marina Coast contended that the appeal should have been denied on the grounds that the Coastal Commission had found the test slant well project to be inconsistent with City's LCP and the Coastal Commission could not "override" City's denial of a major public works project.

Marina Coast also argued that the Coastal Commission's granting of Cal-Am's coastal development permit application violated many provisions of CEQA, as follows: (1) failure to comply with CEQA's 30-day public review period for an environmental document; (2) failure to respond to "any significant environmental comments"; (3) improper "piecemealing" (analyzing the environmental impacts of the test slant well separately when it is actually the initial phase of the Monterey Peninsula Water Supply Project); (4) failure to establish an adequate baseline for environmental impacts to hydrology and water quality; (5) failure to adequately analyze impacts or propose adequate mitigation for environmentally sensitive habitat areas and special-status species; and (6) failure to analyze a reasonable range of alternatives to the test slant well project.

In addition, Marina Coast argued that the Coastal Commission's staff report must be re-noticed and re-circulated due to its failure to provide notice of the significant new

information included in an addendum. Both the Coastal Commission and Cal-Am filed opposition to the writ petition.

***E. Statement of Decision and Judgment***

The trial court held a hearing on Marina Coast's writ petition on July 23, 2015. The court issued its decision on the writ petition from the bench and, pursuant to the parties' agreement, the reporter's transcript of the court's rulings was utilized in lieu of a written statement of decision.

As stated in the reporter's transcript of the hearing, the trial court made several rulings leading to the court's decision to deny the writ petition. At the outset, the trial court determined that the writ petition constituted a challenge to the Coastal Commission's approval of the coastal development permit. The court also determined that the standard of review with respect to the Coastal Commission's findings was substantial evidence, while review of noncompliance with CEQA was limited to review for prejudicial error.

The trial court then rejected Marina Coast's contention that the Coastal Commission lacked appellate jurisdiction, finding that City's denial of Cal-Am's application for a coastal development permit was a final action that was appealable to the Coastal Commission, and substantial evidence supported the Commission's finding that a substantial issue existed.

Regarding the alleged CEQA violations, the trial court rejected Marina Coast's contentions as follows: (1) the Coastal Commission was not required to comply with CEQA's 30-day public notice period; (2) review of City's denial of Cal-Am's coastal development application for the test slant well did not constitute improper piecemealing under CEQA; (3) there was substantial evidence that the Coastal Commission adequately determined baseline hydrological conditions; (4) the Coastal Commission analyzed a reasonable range of alternative locations for the project; (5) substantial evidence supports

the Coastal Commission's decision that any biological impacts would be fully mitigated; and (6) the Coastal Commission was not required to revise or recirculate its staff report.

The judgment in favor of the Coastal Commission and Cal-Am and awarding their costs was filed on August 24, 2015. The judgment also includes an order denying the parties' requests for judicial notice with the exception of the excerpts from City's Municipal Code, and states that the parties waived any request for a statement of decision.

The trial court denied Marina Coast's motion for a stay and a preliminary injunction in its June 5, 2015 order.

#### **IV. DISCUSSION**

##### ***A. Standard of Review***

A permit applicant may seek judicial review of a Coastal Commission decision by filing a petition for writ of administrative mandate under Code of Civil Procedure section 1094.5. (§ 30801.) "The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (Code Civ. Proc., § 1094.5, subd. (b); *La Costa Beach Homeowners' Assn. v. California Coastal Com.* (2002) 101 Cal.App.4th 804, 814 (*La Costa*).) It is presumed that the Coastal Commission's decision is supported by substantial evidence. (*Ocean Harbor House Homeowners Assn. v. California Coastal Com.* (2008) 163 Cal.App.4th 215, 227.)

“ “Our role here is precisely the same as that of the trial court. “ “[I]n an administrative mandamus action where no limited trial de novo is authorized by law, the trial and appellate courts occupy in essence identical positions with regard to the administrative record, exercising the appellate function of determining whether the record

is free from legal error. [Citations.]” [Citation.] Thus, the conclusions of the superior court, and its disposition of the issues in this case, are not conclusive on appeal. [Citation.]’ [Citation.]” [Citation.]’ [Citation.]” (*La Costa, supra*, 101 Cal.App.4th at pp. 814–815.)<sup>5</sup>

The general rule is that “ ‘[c]ourts may reverse an agency’s decision only if, *based on the evidence before the agency*, a reasonable person could not reach the conclusion reached by the agency.” [Citation.]’ [Citation.]” (*La Costa, supra*, 101 Cal.App.4th 814; Code Civ. Proc., § 1094.5, subd. (c); § 21168.)<sup>6</sup>

### **B. Appellate Jurisdiction**

As a threshold matter, Marina Coast contends that the Coastal Commission lacked jurisdiction to hear Cal-Am’s appeal of City’s denial of Cal-Am’s application for a coastal development permit for the test slant well. “We independently review whether an

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<sup>5</sup> We deny the requests for judicial notice filed by Marina Coast, Cal-Am, and the Monterey Peninsula Regional Water Authority. “By statute, review of the [Coastal] Commission’s decision to grant a permit is by way of a ‘ writ of [administrative] mandate in accordance with Section 1094.5 of the Code of Civil Procedure.’ (§ 30801.) ‘ “The general rule” ’ in such actions is that judicial review ‘ “is conducted solely on the record of the proceeding before the administrative agency. [Citation.]” [Citation.]’ [Citation.] . . . Thus, in reviewing the Commission’s decision, courts are ‘confined to the record before the Commission unless’ the petitioner shows it ‘could not have produced’ the new evidence ‘in the exercise of reasonable diligence or unless relevant evidence was improperly excluded at the administrative hearing.’ [Citation.]” (*Sierra Club v. California Coastal Com.* (2005) 35 Cal.4th 839, 863.)

<sup>6</sup> Section 21168 provides: “Any action or proceeding to attack, review, set aside, void or annul a determination, finding, or decision of a public agency, made as a result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in a public agency, on the grounds of noncompliance with the provisions of this division shall be in accordance with the provisions of Section 1094.5 of the Code of Civil Procedure. [¶] In any such action, the court shall not exercise its independent judgment on the evidence but shall only determine whether the act or decision is supported by substantial evidence in the light of the whole record.”

agency has acted within its statutory jurisdiction [citations].” (*Hagopian v. State of California* (2014) 223 Cal.App.4th 349, 360.)

### **1. Coastal Commission’s Appellate Jurisdiction**

The Coastal Commission’s appellate jurisdiction is set forth in the Coastal Act. As this court has stated, “[t]he Coastal Act provides for administrative appeals to the Coastal Commission in certain cases. (§ 30603.)” (*McAllister v. County of Monterey* (2007) 147 Cal.App.4th 253, 273 (*McAllister*)). Relevant here, section 30603, subdivision (a)(5) provides: “After certification of its local coastal program, an action taken by a local government on a coastal development permit application may be appealed to the commission for only the following types of developments: [¶] . . . [¶] Any development which constitutes a major public works project or a major energy facility.” Marina Coast does not dispute that the proposed test slant well constitutes a major public works project within the meaning of section 30603, subdivision (a)(5).<sup>7</sup>

The Coastal Act limits the grounds for an appeal where, as here, the appeal is from the denial of a coastal development permit for a major public works project: “The grounds for an appeal of a denial of a permit pursuant to paragraph (5) of subdivision (a) shall be limited to an allegation that the development conforms to the standards set forth in the certified local coastal program and the public access policies set forth in this division.” (§ 30603, subd. (b)(2).)

Thus, in this case “[t]he Coastal Commission’s appellate jurisdiction is limited to determining whether the development conforms ‘to the standards set forth in the certified

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<sup>7</sup> “ ‘Major public works’ and ‘Major energy facilities’ mean facilities that cost more than one hundred thousand dollars (\$100,000) with an automatic annual increase in accordance with the Engineering News Record Construction Cost Index, except for those governed by the provisions of Public Resources Code Sections 30610, 30610.5, 30611 or 30624.” (Cal. Code Regs., tit. 14, § 13012, subd. (a).)

local coastal program or the public access policies set forth in this division.’ (§ 30603, subd. (b)(1); [citation].)” (*McAllister, supra*, 147 Cal.App.4th at p. 286.)

## **2. Final Local Action**

Marina Coast contends that the Coastal Commission lacked jurisdiction to hear Cal-Am’s appeal for several reasons. First, Marina Coast argues that the City’s denial of Cal-Am’s application for a coastal development permit for the test slant well was not appealable because the City’s denial was not a final action. The City Council stated in Resolution No. 2014-103 that “the City is unable to approve the Project and therefore denies the Project without prejudice to reconsideration as [*sic*] such time as the appropriate CEQA review is completed.”

Marina Coast explains that the City Council’s denial was not final because the denial was “without prejudice” and the City did not make any findings as to the project’s conformity with the LCP. Although Marina Coast acknowledges that the City sent a letter to the Coastal Commission regarding the City Council’s denial of Cal-Am’s permit application that was entitled “Notice of Final Local Action,” Marina Coast maintains that the City’s staff were not authorized to determine whether the City Council had taken final action. Therefore, according to Marina Coast, “there simply was no action—much less final action under the Coastal Act—that triggered the [Coastal Commission’s] jurisdiction, and therefore nothing to appeal from.”

The Coastal Commission rejects Marina Coast’s contention that the City’s denial of Cal-Am’s application for a coastal development permit was not an appealable action, emphasizing that section 30603, subdivision (a)(5), expressly authorizes appeals to the Coastal Commission for “an action taken by a local government on a coastal development permit application” for a major public works project or major energy facility. The Coastal Commission also emphasizes that there is no legal authority for the City’s denial of a coastal development application “without prejudice” and, in any event,

all denials of coastal development permit applications are implicitly without prejudice since an applicant may reapply for a coastal development permit.

We observe that Marina Coast has not provided any decisional or statutory authority for the proposition that a city's action in denying a coastal development permit application without prejudice, and without making any findings as to whether the project conforms with the local coastal program, is not a final action that may be appealed to the Coastal Commission.

As support for its position, Marina Coast relies on California Code of Regulations, title 14, section 13114, which provides: "Where the appellant has exhausted local appeals a de novo review of the project by the [Coastal] Commission shall occur only after the local decision has become final." Marina Coast also relies on California Code of Regulations, title 14, section 13570, which provides: "A local decision on an application for a development shall not be deemed complete until (1) the local decision on the application has been made and all required findings have been adopted, including specific factual findings supporting the legal conclusions that the proposed development is or is not in conformity with the certified local coastal program and, where applicable, with the public access and recreation policies of Chapter 3 of the Coastal Act, and (2) when all local rights of appeal have been exhausted as defined in Section 13573."

We are not convinced that the regulatory scheme for Coastal Commission appeals may be interpreted to provide that a city may render its denial of a coastal development permit for a major public works project nonappealable by stating that the denial is "without prejudice" and by declining to make any findings regarding the proposed project's conformity with the local coastal program.

Even assuming for purposes of discussion that section 13570 and section 13114 of title 14 of the California Code of Regulations may be interpreted to provide that a city's denial of a coastal development permit application is not a final appealable action where the denial was expressly made "without prejudice" and no findings of LCP conformity

were made, such an interpretation would be inconsistent with the applicable statute, section 30603, subdivision (a)(5). That statute broadly authorizes appeals to the Coastal Commission for “an *action* taken by a local government on a coastal development permit application” for a major public works project, and does not require an appealable denial of a coastal permit application to be made with prejudice or with findings of LCP conformity. (§ 30603, subd. (a)(5), italics added.) The general rule is that “an administrative agency has no ‘discretion to promulgate a regulation which is inconsistent with the governing statute.’ [Citation]; see Gov. Code, § 11342.2.” (*May v. City of Milpitas* (2013) 217 Cal.App.4th 1307, 1336.) Accordingly, we determine that Cal-Am properly appealed the City’s action in denying Cal-Am’s application for a coastal development permit for the test slant well, a major public works project, to the Coastal Commission pursuant to section 30603, subdivision (a)(5).

Moreover, “[w]e are required to defer to the [Coastal] [C]ommission’s interpretation of its own regulations. Courts must defer to an administrative agency’s interpretation of a statute or regulation involving its area of expertise unless the challenged construction contradicts the clear language and purpose of the interpreted provision. [Citations.]” (*Ross v. California Coastal Com.* (2011) 199 Cal.App.4th 900, 938 (*Ross*).

Here, the Coastal Commission explains in its respondent’s brief that “[t]he obvious intent of [Regs.,] section 13570 is to address those situations where a local government has made a decision but is still in the process of adopting findings to support the decision. It is intended to avoid premature appeals where the local government has not yet stated the basis for its decision. Section 13570 does not apply to situations like the one here, where the local government has made a decision, stated a basis, given notice that its decision is final, and has made all of the findings it intends to make in connection with its final decision. [¶] . . . [W]hile section 13570 imposes requirements on local governments, it is not a provision that governs the Commission’s jurisdiction to hear an

appeal.” We will defer to the Coastal Commission’s interpretation since it does not contradict “the clear language and purpose” of section 13570 of title 14 of the California Code of Regulations. (See *Ross, supra*, 199 Cal.App.4th at p. 938.)

We further determine that Cal-Am’s appeal was proper under California Code of Regulations, title 14, section 13114, which, as we have noted, provides: “Where the appellant has exhausted local appeals a de novo review of the project by the [Coastal] Commission shall occur only after the local decision has become final.” Section 13114 is preceded by section 13110 of title 14 of the California Code of Regulations, which provides: “Within three (3) working days of receipt of notice of final local decision, the executive director of the Commission shall post a description of the development in a conspicuous location in the Commission office and the appropriate district office. The executive director shall at the same time mail notice of the local action to the members of the Commission. The ten working day appeal period shall be established from the date of receipt of the notice of the final local government action.”<sup>8</sup>

In this case, the City sent the Coastal Commission a letter dated September 11, 2014, that was captioned “Notice of Final Local Action, California American Water Slant Test Well Project.” The letter set forth City’s final local action as follows: “At a continued Public Hearing on September 4, 2014, the City of Marina City Council adopted Resolution No. 2014-103, on appeal disapproving a mitigated Negative Declaration and denying Coastal Development Permit CDP 2012-05, for the California American Water Slant Test Well Project located at CEMEX’s Lapis Road property.” The letter also provides the deadlines for appealing the City Council’s decision to the Coastal Commission. Therefore, pursuant to section 13110 of title 14 of the California Code of

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<sup>8</sup> “The appeal must be received in the Commission district office with jurisdiction over the local government on or before the tenth (10th) working day after receipt of the notice of the permit decision by the executive director.” (Regs., § 13111, subd. (c).)

Regulations, the Coastal Commission was obligated to begin the appeal process for Cal-Am's appeal because it had received a notice of final local action. Marina Coast's contention that the letter did not constitute a notice of final local action because it was not authorized by the City Council is not supported by a reference to any supporting evidence in the record before the Coastal Commission.

We therefore find no merit in Marina Coast's contention that the Coastal Commission lacked appellate jurisdiction because the City's denial of Cal-Am's coastal development permit was not an appealable final action.

### **3. Substantial Issue**

Marina Coast also contends that the Coastal Commission lacked appellate jurisdiction and failed to proceed in the manner required by law because the Commission erroneously found that Cal-Am's appeal raised a substantial issue.

The Coastal Act provides that "[t]he commission shall hear an appeal unless it determines the following: [¶] [¶] With respect to appeals to the commission after certification of a local coastal program, that no substantial issue exists with respect to the grounds on which an appeal has been filed pursuant to Section 30603." (§ 30625, subd. (b)(2).)

"A substantial issue is defined as one that presents a 'significant question' as to conformity with the certified local coastal program. (Regs., tit. 14, § 13115.)<sup>9]</sup> We

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<sup>9</sup> California Code of Regulations, title 14, section 13115, subdivision (b) provides: "Unless the Commission finds that the appeal raises no significant question as to conformity with the certified local coastal program or, in the case of a permit application for a development between the sea and the first public road paralleling the sea (or within 300 feet of the inland extent of any beach or of the mean high tide line of the sea where there is no beach) that there is no significant question with regard to the public access and public recreation policies of Chapter 3 of the Coastal Act of 1976, the Commission shall consider the application de novo in accordance with the procedures set forth in Sections 13057-13096."

review the [Coastal] Commission’s determination of whether a substantial issue has been raised for abuse of discretion. . . .” (Code Civ. Proc., § 1094.5, subd. (b); [citations].)” (*Alberstone v. California Coastal Com.* (2008) 169 Cal.App.4th 859, 863–864, fn. omitted.)

We understand Marina Coast to contend that the Coastal Commission’s finding that a substantial issue was raised by Cal-Am’s appeal is not supported by substantial evidence. The Coastal Commission disagrees, arguing that it did not abuse its discretion in finding under five factors that a substantial issue was raised by Cal-Am’s appeal.

In its final adopted findings, the Coastal Commission set forth the five factors that the Commission considers in determining whether a substantial issue exists: (1) “The degree of factual and legal support for the local government’s decision that the development is consistent or inconsistent with the certified LCP and with public access policies of the Coastal Act;” (2) “The extent and scope of the development as approved or denied by the local government;” (3) “The significance of the coastal resources affected by the decision;” (4) “The precedential value of the local government’s decision for future interpretation of its LCP;” and, (5) “Whether the appeal raises only local issues or those of regional or statewide significance.”

The Coastal Commission concluded as follows: “With the lack of City findings showing that the project does not conform to relevant LCP and Coastal Act public access provisions, the Commission finds that there is insufficient factual and legal support for the City’s denial of the proposed test well. The appeal raises significant regional concerns, as the data that will be produced by the test well are needed to assess the feasibility, location and design of a desalination facility that is intended to address regional water shortages. It is also poor precedent for the City to deny a [coastal development permit] without making any findings as to why the proposed project does not conform to the City’s LCP. In addition, while the project is not expected to impact a significant portion of the CEMEX site, it will be constructed in areas that are within

primary habitat, so significant coastal resources will be affected by the proposed project. Thus, these four factors all weigh strongly in favor of a finding of substantial issue. Conversely, the extent and scope of this project are fairly minor, as project construction is expected to adversely affect less than one acre and the test well is proposed to operate for only two years, so this one factor weighs more towards a finding of no substantial issue. However, four of the five substantial issue factors weigh heavily in favor of a finding of substantial issue, so when all five factors are taken together, the Commission finds that the appeal raises [a] substantial issue regarding conformity to the LCP and to the Coastal Act's public access policies.”

Thus, the Coastal Commission determined that a substantial issue was raised by Cal-Am's appeal because there was a significant question as to test slant well project's conformity with the City's certified local coastal program in the absence of any findings by the City Council regarding conformity. (See Regs., § 13115.) In addition, the Coastal Commission determined that a substantial issue existed as to the project's conformity with the LCP's habitat protection provisions because the test slant well would be constructed in a primary habitat area.

On this record, we determine that the Coastal Commission's carefully reasoned finding of a substantial issue pursuant to section 30625, subdivision (b)(2) does not constitute an abuse of discretion, since “[a] ruling that constitutes an abuse of discretion has been described as one that is ‘so irrational or arbitrary that no reasonable person could agree with it.’ [Citation.]” (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773.)

#### **4. Local Coastal Program Conformity**

Finally, we understand Marina Coast to contend that the Coastal Commission lacked appellate jurisdiction to approve Cal-Am's coastal development permit application for the test slant well project because the project did not conform to the habitat protection provisions in the City's LCP.

The Coastal Commission analyzed the test slant well project and found that the project “as proposed, does not conform to the Habitat Protection policies in the City’s [local coastal program]. However, because the proposed project is considered a ‘coastal-dependent’ industrial facility and the LCP designates coastal-dependent industrial uses as appropriate uses on this site, consistent with Coastal Act Section 30260, such uses may be approved despite inconsistencies with other LCP policies.”

In reaching this conclusion, the Coastal Commission reviewed the relevant provisions of the LCP. First, the Coastal Commission noted that when the Commission “certified the City’s LCP, the Coastal Commission acknowledged the importance of the City’s dune ecosystem to provide habitat for rare and endangered species. It nevertheless designated the area north of [R]eservation Road and west of Dunes Drive as Coastal Conservation and Development (CD), in which appropriate uses include ‘commercial activities dependent for economic survival on proximity to the ocean, salt water or other elements only available in this particular environment.’ [LCP] p. 15.<sup>[10]</sup> The LCP states that this designation is consistent with section 30260.”<sup>[11]</sup>

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<sup>10</sup> At page 15, the City’s LCP states: “Coastal Conservation and Development uses shall be allowed on the west side of Dunes Drive. These activities shall include, but not be limited to, . . . other commercial activities dependent for economic survival on proximity to the ocean, salt water or other elements only available in this particular environment. Development in this area will be allowed in already disturbed areas (see Sensitive Habitat section).”

<sup>11</sup> Section 30260 provides: “Coastal-dependent industrial facilities shall be encouraged to locate or expand within existing sites and shall be permitted reasonable long-term growth where consistent with this division. However, where new or expanded coastal-dependent industrial facilities cannot feasibly be accommodated consistent with other policies of this division, they may nonetheless be permitted in accordance with this section and Sections 30261 [tanker facilities] and 30262 [oil and gas development] if (1) alternative locations are infeasible or more environmentally damaging; (2) to do otherwise would adversely affect the public welfare; and (3) adverse environmental effects are mitigated to the maximum extent feasible.”

Second, the Coastal Commission determined whether the proposed test slant well constituted a coastal-dependent industrial facility, “such that it is an allowed use in the [Coastal Conservation and Development area] and subject to [section] 30260 and LCP provisions for coastal-dependent industrial uses.” Since the LCP did not define “coastal-dependent development,” the Coastal Commission turned to the statutory definition provided by section 30101, which states: “ ‘Coastal-dependent development or use’ means any development or use which requires a site on, or adjacent to, the sea to be able to function at all.” Applying this definition, the Coastal Commission determined that the test slant well was a coastal-dependent industrial facility since the well was dependent on accessing seawater and had to be located on or adjacent to the sea in order to function, and also because the well would be implemented by Cal-Am, an entity that is part of the water industry.

Finally, the Coastal Commission considered whether the test slant well project could be approved as a coastal-dependent industrial project although the project was inconsistent “with the LCP’s habitat protection policy prohibiting non-resource dependent development in primary habitat.” The Coastal Commission resolved the inconsistency by applying the test provided by section 30260: “[W]here new or expanded coastal-dependent industrial facilities cannot feasibly be accommodated consistent with other policies of this division, they may nonetheless be permitted in accordance with this section . . . if (1) alternative locations are infeasible or more environmentally damaging; (2) to do otherwise would adversely affect the public welfare; and (3) adverse environmental effects are mitigated to the maximum extent feasible.”

The Coastal Commission found that (1) the site for the test slant well was in an area that had been continually disturbed by sand mining for several decades; (2) denial of the permit for the test slant well would adversely affect the public welfare because the test well was necessary “to inform the design of a potential full-scale [desalination] facility;” and (3) the Commission had imposed a number of special conditions on the

coastal development permit that would mitigate the environmental effects to the maximum extent feasible, such as requiring project construction and decommissioning to occur primarily outside the breeding and nesting season for the Western snowy plover, the active season for the Smith's blue butterfly, and the blooming period of the Monterey spineflower.

As a result of these findings, the Coastal Commission concluded that “the proposed project meets all of the tests of section 30260 and the parallel LCP policies. [The Commission] therefore exercises its discretion to approve this coastal-dependent industrial project, despite its inconsistency with the LCP’s habitat protection policy prohibiting non-resource dependent development in primary habitat.”

Marina Coast argues that the Coastal Commission acted in excess of its jurisdiction and improperly “overrode” the City’s LCP by approving the test slant well project despite the project’s inconsistency with the habitat protection policies precluding development in primary habitat unless the project is “dependent on those resources.” Additionally, Marina Coast argues that section 30260 is not relevant because that section is considered when the Coastal Commission is certifying a LCP, not when the Coastal Commission is exercising its appellate jurisdiction over a city’s denial of an application for a coastal development permit.

Rejecting Marina Coast’s arguments, the Coastal Commission points out that the City’s LCP expressly authorizes industrial uses, such as the test slant well, in the already disturbed area on the west side of Dunes Drive where such uses are dependent on proximity to the ocean. In addition, the Coastal Commission maintains that it may properly consider section 30260 in its interpretation of the LCP and its interpretation is entitled to deference. We agree.

“[A] fundamental purpose of the Coastal Act is to ensure that state policies prevail over the concerns of local government. [Citation.]” (*Pacific Palisades, supra*, 55 Cal.4th at p. 794.) Thus, “[u]nder the Coastal Act’s legislative scheme, . . . the LCP and the

development permits issued by local agencies pursuant to the Coastal Act are not solely a matter of local law, but embody state policy. The [Coastal] Commission’s primary responsibility is the implementation of the Coastal Act. It is designated the state coastal zone planning and management agency for any and all purposes. (§ 30330.) Local government prepares the LCP. (§ 30500, subd. (a).) But the LCP must be submitted for the [Coastal] Commission’s approval. (§ 30512, subd. (a).) The [Coastal] Commission may certify the LCP only if it meets the requirements of and is in conformity with the policies of the Coastal Act. (§ 30512, subd. (c).)” (*Charles A. Pratt Const. Co., Inc. v. California Coastal Com.* (2008) 162 Cal.App.4th 1068, 1075 (*Pratt*).)

Accordingly, in evaluating Marina Coast’s contentions we are required to “ ‘grant broad deference to the [Coastal] Commission’s interpretation of the [local coastal program] since it is well established that great weight must be given to the administrative construction of those charged with the enforcement and interpretation of a statute. [Citations.] We will not depart from the Commission’s interpretation unless it is clearly erroneous. [Citation.]’ [Citation.]” (*Hines v. California Coastal Com.* (2010) 186 Cal.App.4th 830, 849 (*Hines*).)

In this case, we determine that the Coastal Commission’s interpretation of the City’s LCP is not clearly erroneous. (See *Hines, supra*, 186 Cal.App.4th at p. 849.) As we have noted, the City’s LCP provides that “Coastal Conservation and Development uses shall be allowed on the west side of Dunes Drive. These activities shall include, but not be limited to, . . . other commercial activities dependent for economic survival on proximity to the ocean, salt water or other elements only available in this particular environment. Development in this area will be allowed in already disturbed areas (see Sensitive Habitat section).” Moreover, as we have noted, the LCP also states that this designation is consistent with section 30260.

Therefore, we see no error in the Coastal Commission’s interpretation of the LCP to allow construction of the test slant well in a primary habitat area already disturbed by

sand mining because the test slant well meets the LCP's definition of a coastal-dependent industrial facility, and also meets the section 30620 three-part test for placing the facility in a sensitive habitat area. (See *Hines, supra*, 186 Cal.App.4th p. 849.) Thus, the Coastal Commission's interpretation of the City's LCP is consistent with the Commission's obligation to ensure that "the development permits issued by local agencies pursuant to the Coastal Act are not solely a matter of local law, but embody state policy." (*Pacific Palisades, supra*, 55 Cal.4th at p. 794.)

Marina Coast's reliance on the decision in *City of Malibu v. California Coastal Com.* (2012) 206 Cal.App.4th 549 (*Malibu*) for a contrary conclusion is misplaced, since that decision is distinguishable. The issue in *Malibu* was whether the Coastal Commission had acted in excess of its jurisdiction when it approved amendments to a city's certified LCP. (*Id.* at p. 552.) The appellate court determined that under section 30515, the Coastal Commission may override a city's decision not to amend its LCP only where the amendment is sought for "the development of a public works project or energy facility that would meet the public needs of an area greater than that encompassed in the local coastal program that were not anticipated when the LCP was certified." (*Malibu, supra*, 206 Cal.App.4th at p. 564.) Since an LCP amendment is not at issue in this case, the decision in *Malibu* is inapplicable and does not aid Marina Coast.

For these reasons, we determine that the Coastal Commission did not exceed its appellate jurisdiction in considering Cal-Am's appeal from the City's denial of its application for a coastal development permit for the test slant well. Having resolved the threshold jurisdictional issue, we turn to Marina Coast's remaining issues on appeal.

### **C. CEQA Issues**

#### **1. Public Notice Period**

Marina Coast contends that the Coastal Commission violated its obligation under

CEQA, as provided by section 21091, subdivision (a),<sup>12</sup> to provide a 30-day public review period for its staff report. According to Marina Coast, the Coastal Commission improperly circulated its environmental review document—the staff report—on October 31, 2014, which was 13 days before the hearing held on November 12, 2014.

The Coastal Commission responds that the 13-day circulation period for its staff report was proper because the Commission is a certified regulatory program and the applicable statutes and regulations provide that the public review period for the staff report must be for a “reasonable time.” The Coastal Commission also contends that Marina Coast has failed to show prejudice. As we will discuss, we find the issue of prejudice to be dispositive.

“The purpose of the California Environmental Quality Act [CEQA; § 21000 et seq.] is to ensure that the agencies regulating activities ‘that may’ affect the environmental quality give primary consideration to preventing environmental damages. [Citations.] Under the California Environmental Quality Act, a state agency with a regulatory program may be exempted from the requirements of preparing initial studies, negative declarations and environmental impact reports. This exemption arises if the secretary certifies that the agency’s regulatory program satisfies the criteria set forth in section 21080.5. [Citations.] [¶] The secretary approved the [Coastal] [C]ommission’s certified regulatory program, including the statutes and regulations relating to the preparation, approval and certification of the local coastal programs on May 22, 1979.” (*Ross, supra*, 199 Cal.App.4th at pp. 930-931; § 15251, subd. (c).)<sup>13</sup>

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<sup>12</sup> Section 21091, subdivision (a) provides: “The public review period for a draft environmental impact report may not be less than 30 days. If the draft environmental impact report is submitted to the State Clearinghouse for review, the review period shall be at least 45 days, and the lead agency shall provide a sufficient number of copies of the document to the State Clearinghouse for review and comment by state agencies.”

<sup>13</sup> Section 15251, subdivision (c) provides: “The following programs of state regulatory agencies have been certified by the Secretary for Resources as meeting the

Thus, “[w]ith respect to environmental responsibilities, under CEQA and its accompanying Guidelines,<sup>14</sup> Coastal Commission environmental review may substitute for an [environmental impact report]. (See § 21080.5, subds. (a), (e)(1); Guidelines, §§ 15002, subd. (l); 15251, subds. (c), (f).) Thus, the Coastal Commission’s ‘permit appeal procedure is treated as the functional equivalent of the EIR process.’ [Citation.]” (*McAllister, supra*, 147 Cal.App.4th at p. 272.) The requirements for the Coastal Commission’s environmental review document—the staff report—are set forth in California Code of Regulations, title 14, section 13057. (*Strother v. California Coastal Com.* (2009) 173 Cal.App.4th 873, 877.)

Section 21080.5, subdivision (d)(3)(B) provides that the environmental review document of a state agency’s certified regulatory program must be “available for a reasonable time for review and comment by other public agencies and the general public.” The Coastal Commission’s regulations specify that “[s]taff reports shall be distributed within a reasonable time to assure adequate notification prior to the scheduled public hearing. The staff report may either accompany the meeting notice required by [Regs.] section 13015 or may be distributed separately.” (Regs., § 13059.) The meeting notice must be “dispatched not later than 10 days preceding the meeting and containing an agenda listing each item to be considered.” (Regs., § 13015.)

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requirements of Section 21080.5: [¶] . . . [¶] The regulatory program of the California Coastal Commission and the regional coastal commissions dealing with the consideration and granting of coastal development permits under the California Coastal Act of 1976, Division 20 (commencing with Section 30000) of the Public Resources Code.”

<sup>14</sup> “The regulations that guide the application of CEQA are set forth in title 14 of the California Code of Regulations, and are often referred to as the CEQA Guidelines. [Citation.]” (*Pfeiffer v. City of Sunnyvale City Council* (2011) 200 Cal.App.4th 1552, 1561, fn. 5.)

We need not determine whether the 30-day public review period for an EIR (section 21091, subd. (a)) or the “reasonable time” period (Regs., § 13059) for distribution of a Coastal Commission staff report governs the public review period for a staff report because Marina Coast has not demonstrated that the alleged error was prejudicial. In that regard, we find the decision in *Rominger v. County of Colusa* (2014) 229 Cal.App.4th 690 (*Rominger*) to be instructive.

“ ‘Noncompliance with CEQA’s information disclosure requirements is not per se reversible; prejudice must be shown.’ [Citation.]” (*Rominger, supra*, 229 Cal.App.4th at p. 709.) To determine if the noncompliance was prejudicial, we evaluate the nature of the noncompliance “to determine if it was of the sort that ‘preclude[d] informed decisionmaking and informed public participation.’ [Citation.]” (*Ibid.*)

In *Rominger*, the plaintiffs challenged a mitigated negative declaration approved by the defendant county with respect to a proposed subdivision. (*Rominger, supra*, 229 Cal.App.4th at p. 695.) They contended that the 29-day public review period that the county had provided for the mitigated negative declaration was less than the full 30-day period required under section 21091, subdivision (b). (*Rominger*, at pp. 705-706.) The *Rominger* court concluded that no prejudice was shown from the shortened public review period because the plaintiffs had “point[ed] to no evidence in the record that anyone who wanted to was prevented from reviewing the pertinent documents or from submitting comments on those documents” and no one had appeared at the public hearing to complain that they had been prevented from participating in the review and comment process. (*Rominger*, at pp. 709-710.)

We reach a similar result in the present case. Even assuming, without deciding, that the Coastal Commission’s staff report was subject to a 30-day public review period pursuant to section 21091, subdivision (a), Marina Coast has pointed to no evidence in the record showing that anyone was prevented from reviewing the staff report or other pertinent documents, or complained at the November 12, 2014 hearing that the 13-day

review period was too short and had prevented them from participating in the review and comment process. In its reply brief, Marina Coast argues that prejudice was shown due to the number of CEQA violations that Marina Coast alleges occurred in the Coastal Commission proceedings. We are not convinced by this argument, since Marina Coast does not identify any incidents or complaints showing that the 13-day public review period provided by the Coastal Commission for its staff report prevented public review or participation.

We therefore find no merit in Marina Coast's contention that the 13-day public review period provided by the Coastal Commission constitutes a basis for relief in this action. (See *Rominger, supra*, 229 Cal.App.4th at p. 710.)

## **2. Response to Public Comments**

Marina Coast contends that the Coastal Commission failed to respond to any of the significant environmental points raised in public comments during its evaluation of the proposed test slant well project, which violated the Coastal Commission's own regulations (Regs., § 13057, subd. (c)(3)).

The Public Resources Code provides that “[t]o qualify for certification pursuant to this section, a regulatory program shall require the utilization of an interdisciplinary approach that will ensure the integrated use of the natural and social sciences in decisionmaking and that shall meet all of the following criteria: [¶] . . . [¶] Require that final action on the proposed activity include the written responses of the issuing authority to significant environmental points raised during the evaluation process.” (§ 21080.5, subd. (d)(1)(D).)

As we have noted, the Coastal Commission's regulatory program for considering and granting coastal development permits was approved in 1979. (*Ross, supra*, 199 Cal.App.4th at p. 930; § 15251, subd. (c).) The Coastal Commission's regulations, which are part of its regulatory program, state: “The executive director shall prepare a written staff report for each application filed pursuant to section 13056, [with exceptions not

relevant here]. The staff report shall include the following: [¶] . . . [¶] Staff’s recommendation, . . .” (Regs., § 13057, subd. (a)(6).) The regulations further state: “The staff’s recommendation required by [§ 13057,] subsection (a)(6) above shall contain: [¶] . . . [¶] Responses to significant environmental points raised during the evaluation of the proposed development as required by the California Environmental Quality Act.” (Regs., § 13057, subd. (c)(3).)<sup>15</sup>

Marina Coast argues more specifically that the Coastal Commission failed to provide any responses to significant environmental points raised in public comments regarding (1) hydrological and groundwater impacts; (2) impacts to endangered species and environmentally sensitive habitat areas; (3) greenhouse gas emissions and air quality impacts; (4) the adequacy and effectiveness of proposed mitigation; (5) the failure to consider feasible alternatives; and (6) the failure to establish an adequate baseline for groundwater impacts.

According to the Coastal Commission, the staff report and its addenda demonstrate that the Commission complied with its obligation to respond in writing to significant environmental points, and the Commission also responded to comments made during the November 12, 2014 hearing.

Our analysis is guided by the decision of the California Supreme Court in *Environmental Protection Information Center v. California Dept. of Forestry and Fire Protection* (2008) 44 Cal.4th 459 (*EPIC*). In *EPIC*, the court stated: “ ‘[P]ublic review and comment . . . ensures that appropriate alternatives and mitigation measures are

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<sup>15</sup> In conducting its de novo review of a coastal development application on appeal, the Coastal Commission considers the application under the same rules as a coastal development permit application made to the Commission in the first instance: “Unless the commission finds that the appeal raises no substantial issue in accordance with the requirements of Public Resources Code Section 30625(b), and Section 13115(a) and (c) of these regulations, the commission shall conduct a de novo consideration of the application in accordance with the procedures set forth in Sections 13114 and 13057-13096 of these regulations.” (Regs., § 13321.)

considered, and permits input from agencies with expertise . . . . [Citations.] Thus public review provides the dual purpose of bolstering the public’s confidence in the agency’s decision and providing the agency with information from a variety of experts and sources.’ [Citation.]” (*Id.* at p. 486.)

“If it is established that a state agency’s failure to consider some public comments has frustrated the purpose of the public comment requirements of the environmental review process, then the error is prejudicial. [Citation.] . . . [¶] On the other hand, an agency’s failure to consider public comments is not necessarily prejudicial.” (*EPIC, supra*, 44 Cal.4th at p. 487.) “Agencies generally have considerable leeway regarding such response. When an agency adequately addresses an environmental issue in response to one commenter, it may refer to the prior response when addressing other commenters, and a failure to respond to a particular comment is not prejudicial error when the issue raised by the comment is adequately addressed elsewhere. [Citation.]” (*Id.* at p. 487, fn. 9.)

Although the Coastal Commission’s staff did not format its written responses to significant environmental points in a question and answer format, Marina Coast has not provided any authority requiring that format in the Commission’s staff report, or shown in the alternative that the Commission’s failure to respond in a question and answer format constitutes prejudicial error. We therefore consider the adequacy of the Coastal Commission’s responses to significant environmental points as set forth in the staff report and its addenda. (See Regs., § 13057, subd. (c)(3).)

### ***Hydrology and Groundwater Impacts***

Marina Coast asserts that the public comments that raised significant environmental points about hydrology and groundwater impacts include the following: Marina Coast’s own letters regarding the mitigation of groundwater impacts and its concerns regarding salinity levels; a letter to the Coastal Commission from a county supervisor suggesting that pumping from the test slant well be monitored and halted if

there is evidence of aquifer damage; and two letters from Ag Land Trust regarding the protection of groundwater supplies for agriculture. According to Marina Coast, the Coastal Commission provided no response to these environmental points.

The Coastal Commission maintains that it responded to these comments regarding hydrology and groundwater impacts by adding Special Condition 11 to the staff recommendation and by adding a discussion in an addendum to the staff report.

Our review of the administrative record shows the following responses by the Coastal Commission. The staff report notes that “[a]t least one of the opponents of the test well project raises concerns that the test well . . . will have significant adverse environmental impacts on coastal agriculture, particularly on the quantity and quality of water available to neighboring agricultural interests. They assert that the aquifer underlying their property is already subject to seawater intrusion and that the test well will exacerbate this effect. [¶] . . . [¶] In order to address these concerns, **Special Condition 11** requires Cal-Am to monitor both the quantity and quality of water in areas that may be affected by operation of its test well. [Fn. omitted.]”

Special Condition 11 states: “PRIOR TO STARTING PROJECT-RELATED PUMP TESTS, the Permittee shall install monitoring devices at one or more offsite wells within 5,000 feet of the project site to record water and salinity levels within the wells. During the project pump tests, the Permittee shall, at least once per day, monitor water and salinity levels within those wells. If water levels drop more than one foot, or if salinity levels increase more than two parts per thousand from pre-pump test conditions, the Permittee shall immediately stop the pump test and inform the Executive Director. The Permittee shall not re-start the pump test until receiving an amendment to this permit, unless the Executive Director determines no amendment is legally necessary.”

In addition, Addendum 1 to the staff report includes a discussion of the monitoring of water levels and the levels of total dissolved solids in onsite and inland wells that is required by Special Condition 11, as well as the recommended mitigation measures.

The administrative record accordingly shows that the Coastal Commission provided written responses to the significant environment points regarding hydrology and groundwater impacts that were raised by public comments during the evaluation process for the test slant well, as required by the Commission's regulations. (See Regs., § 13057, subd. (c)(3).)

***Endangered Species and Environmentally Sensitive Habitat Areas***

The public comments that raised significant environmental points about impacts to endangered species and environmentally sensitive habitat areas that Marina Coast asserts received no response from the Coastal Commission were contained in letters from Marina Coast. The letters concerned the impact of the construction of the test slant well on the snowy plover's breeding season and the inadequacy of the proposed mitigation of those impacts.

Our review of the record shows that the Coastal Commission's staff report included a discussion of the impacts on the Western snowy plover and the proposed mitigation, as follows. The Western snowy plover is "listed as threatened under the federal [Endangered Species Act] and is considered a Species of Special Concern by the CDFW [California Department of Fish and Wildlife]. The shoreline along the project site is within designated critical habitat for the species. The CEMEX site provides nesting habitat for the plover, with recent evidence of successful nesting. . . . Cal-Am's proposed project construction activities would occur outside of the breeding and nesting period, which runs from February 15 to September 1 of each year."

Addendum 1 to the staff report proposed a revision to the last sentence of the above paragraph, which read: "Some of Cal-Am's proposed construction activities would occur ~~outside of~~ during the breeding and nesting period, which runs from February 15 to ~~September~~ October 1 of each year."

Addendum 1 also revised Special Condition 14.d., which the staff report recommended for inclusion in Cal-Am's coastal development permit. As revised, Special

Condition 14.d. addressed construction impacts and mitigation with respect to the snowy plover. For example, revised Special Condition 14.d. states: “If active plover nests are located within ~~250~~300 feet of the project or access routes, avoidance buffers shall be established to minimize potential disturbance of nesting activity, and the biologist shall coordinate with and accompany the Permittee’s operational staff as necessary during the nesting season to guide access and activities to avoid impacts to nesting plovers. The biologist shall contact the USFWS [United States Fish and Wildlife Service] and CDFW [California Department of Fish and Wildlife] immediately if a nest is found in areas near the wellhead that could be affected by project operations. Operations shall be immediately suspended until the Permittee submits to the Executive Director written authorization to proceed from the USFWS.”

Based on the administrative record, we therefore determine that the Coastal Commission adequately responded to Marina Coast’s comments regarding the construction impacts on the snowy plover and the proposed mitigation with a “good faith, reasoned analysis in response.” (*Berkeley Keep Jets Over the Bay Com. v. Board of Port Cmrs.* (2001) 91 Cal.App.4th 1344, 1367, italics omitted; see *EPIC, supra*, 44 Cal.4th at p. 487.)

### ***Greenhouse Gases and Air Quality***

The Coastal Commission received a letter from a concerned citizen who stated that he had “worked in the area of carbon management for several years” and suggested that greenhouse gas emission from the test slant well be measured “so that the greenhouse gas emission from the project slant wells can be accurately projected.”

The Coastal Commission acknowledges that it did not provide a written response to this public comment, but states: “Given that this single comment did not point to any evidence that the specific project before the Commission would have significant environmental impacts, the Commission staff’s determination that the letter did not raise

‘significant environmental points’ about the project, requiring specific analysis in the staff report, was not clearly erroneous.”

We determine that no response was required to the public comment on greenhouse gases, since the citizen’s letter appears to concern potential greenhouse gas emissions from a future desalination plant project, rather than the test slant well.

### ***Other Public Comments***

Marina Coast also argues that it “and other commentators repeatedly questioned the adequacy and effectiveness of proposed mitigation, the [Coastal Commission’s] failure to consider feasible alternatives, and the [Coastal Commission’s] failure to establish an adequate baseline from which to measure groundwater impacts.”

According to Marina Coast’s citations to the record, these general comments were contained in Marina Coast’s letters to the Coastal Commission. Since the Coastal Commission’s staff report demonstrates that the Coastal Commission considered mitigation of environmental impacts in a number of areas (e.g., snowy plover, groundwater), reasonable alternatives, and groundwater baselines, we are not convinced that the Coastal Commission’s response to Marina Coast’s general comments was inadequate. Moreover, “comments that are only objections to the merits of the project itself may be addressed with cursory responses. [Citation.]” (*City of Irvine v. County of Orange* (2015) 238 Cal.App.4th 526, 553.)

For these reasons, our review of the administrative record shows that, contrary to Marina Coast’s contentions, the Coastal Commission complied with its obligation to respond in writing to significant environmental points raised during the evaluation process for the test slant well. (See Regs., § 13057, subd. (c)(3).)

### **3. Piecemealing**

Marina Coast contends that the Coastal Commission erred by “piecemealing” its environmental review of the test slant well project. According to Marina Coast, the Coastal Commission improperly considered the test slant separately from the Monterey

Peninsula Water Supply Project although the well is the initial phase of that overall project, in violation of CEQA Guidelines, § 15165.<sup>16</sup>

The California Supreme Court has established a test for piecemealing: “We hold that an EIR must include an analysis of the environmental effects of future expansion or other action if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects.” (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 396 (*Laurel Heights I.*)) Thus, “[t]he requirements of CEQA cannot be avoided by piecemeal review which results from ‘chopping a large project into many little ones—each with a minimal potential impact on the environment—which cumulatively may have disastrous consequences.’ [Citations.]” (*Rio Vista Farm Bureau Center v. County of Solano* (1992) 5 Cal.App.4th 351, 370.)

The applicable standard of review is de novo: “Whether a project has received improper piecemeal review is a question of law that we review independently. [Citation.]” (*Paulek v. California Department of Water Resources* (2014) 231 Cal.App.4th 35, 46 (*Paulek*)). In performing our independent review, we have found the decision in *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70 (*Communities for a Better Environment*) to be instructive.

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<sup>16</sup> “Where individual projects are, or a phased project is, to be undertaken and where the total undertaking comprises a project with significant environmental effect, the lead agency shall prepare a single program EIR for the ultimate project as described in Section 15168. Where an individual project is a necessary precedent for action on a larger project, or commits the lead agency to a larger project, with significant environmental effect, an EIR must address itself to the scope of the larger project. Where one project is one of several similar projects of a public agency, but is not deemed a part of a larger undertaking or a larger project, the agency may prepare one EIR for all projects, or one for each project, but shall in either case comment upon the cumulative effect.” (Regs., § 15165.)

The decision in *Communities for a Better Environment* involved a CEQA challenge to a Chevron oil refinery upgrade project on the ground that a proposed new pipeline for excess hydrogen was not evaluated as part of the project, thereby improperly piecemealing the pipeline from the overall project. (*Communities for a Better Environment, supra*, 184 Cal.App.4th at pp. 96-97.) The appellate court determined that no improper piecemealing had occurred because the “principal purpose” of the overall refinery upgrade project was to improve the refinery’s ability to process crude oil, while the “principal purpose” of the hydrogen pipeline project was to provide a way to transport excess hydrogen to other hydrogen consumers. (*Id.* at p. 101.)

Similarly, a piecemealing challenge was rejected in *Paulek* because the two projects at issue each had a different purpose. The *Paulek* court considered whether the separation of an emergency outlet extension into a different project from the Perris Dam Remediation Project constituted improper piecemealing under CEQA. (*Paulek, supra*, 231 Cal.App.4th at p. 39.) The court determined that “the principal purpose of the dam remediation and outlet tower reconstruction—to improve the ability of the Perris Lake facility itself to withstand seismic events—is different from, and does not depend on, the functioning of the emergency outlet extension, the purpose of which is to transport water out of the lake and safely downstream from the dam, should it be necessary to do so.” (*Id.* at p. 47.)

Since the administrative record reflects that the test slant well has a different principal purpose than the Monterey Peninsula Water Supply Project, we are not convinced by Marina Coast’s piecemealing argument. The Coastal Commission staff report states that the test slant well’s “main project purpose is to develop the data needed to determine the overall feasibility, available yield, and hydrogeologic effects of extracting water from this site that might be used by Cal-Am’s separately proposed desalination facility.” In contrast, “the [Monterey Peninsula Water Supply Project] includes slant wells that would be located at the CEMEX site, a desalination facility to be

located about two miles inland of the test well site adjacent to a regional wastewater treatment facility, pipelines, and the other related facilities needed to produce and deliver water to the Monterey Peninsula.”

Thus, the principal purpose of the test slant well is to gather data. In contrast, the principal purpose of the Monterey Peninsula Water Supply Project is to provide water from a desalination facility. Moreover, Marina Coast has not shown that the proposed desalination facility will likely change the scope or nature of the test slant well or its environmental effects, since the record reflects that the test slant well would either be decommissioned or remain a well. Therefore, the second prong of the *Laurel Heights I* test is not met. (See *Laurel Heights I, supra*, 47 Cal.3d 376, 396.) Accordingly, we determine that the Coastal Commission did not engage in improper piecemealing of the test slant well project.

#### **4. Mitigation of Biological Impacts**

Marina Coast argues that the Coastal Commission violated CEQA by failing to “disclose, analyze, or propose legally adequate mitigation for the [test slant well’s] significant impacts on special-status species and [environmentally sensitive habitat areas].”

Cal-Am disagrees, contending that Marina Coast’s argument regarding biological impacts is moot because construction of the test slant well is complete. Alternatively, Cal-Am contends that the Coastal Commission’s changes to Special Condition 14 show that the Commission determined that the biological impacts would be fully mitigated.

We will resolve the issue on the merits, since we determine that the completion of the test slant well does not moot Marina Coast’s claim. “A case is moot when any ruling by this court can have no practical impact or provide the parties effectual relief. [Citation.]” (*Woodward Park Homeowners Assn. v. Garreks, Inc.* (2000) 77 Cal.App.4th 880, 888.) Thus, an appellate challenge under CEQA is not moot where, as here, “the project can be modified, torn down, or eliminated to restore the property to its original

condition.” (*Id.* at p. 889; see also *California Oak Foundation v. Regents of University of California* (2010) 188 Cal.App.4th 227, 280, fn. 31 (*California Oak Foundation*) [under CEQA Guidelines, § 15233 a responsible agency’s approval of project provides permission to proceed with the project at the applicant’s own risk pending a final decision in a lawsuit]; but see *Hixon v. County of Los Angeles* (1974) 38 Cal.App.3d 370, 378 [CEQA challenge to EIR moot where project completed and trees cut down and replaced].)

Turning to Marina Coast’s merits argument, we begin by reiterating that the Coastal Commission’s regulatory program for considering and granting coastal development permits is a certified regulatory program. (*Ross, supra*, 199 Cal.App.4th at p. 930; § 15251, subd. (c).) “Under CEQA law, such ‘certified regulatory programs’ may use a program-generated written report with sufficient environmental analysis . . . . [Citations.] As an in-lieu EIR, such a report must describe the project, reasonable alternatives to it, and mitigation measures for its environmental impacts (or a statement of overriding considerations) . . . . (§ 21080.5, subd. (d)(3);<sup>17]</sup> see also § 21081, subd. (b);<sup>18]</sup> [Citation.]” (*San Joaquin River Exchange Contractors Water Authority v. State Water Resources Control Bd.* (2010) 183 Cal.App.4th 1110, 1125–1126 (*San Joaquin River*).)

Specifically, “CEQA requires an EIR to discuss a project’s potential impacts to biological resources if the lead agency determines those impacts are ‘significant.’”

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<sup>17</sup> Section 21080.5, subdivision (d)(3) provides: “(3) The plan or other written documentation required by the regulatory program does both of the following: [¶] (A) Includes a description of the proposed activity with alternatives to the activity, and mitigation measures to minimize any significant adverse effect on the environment of the activity.”

<sup>18</sup> Section 21081, subdivision (b) provides: “With respect to significant effects which were subject to a finding under paragraph (3) of subdivision (a), the public agency finds that specific overriding economic, legal, social, technological, or other benefits of the project outweigh the significant effects on the environment.”

(§§ 21002.1, 21081.)” (*California Oak Foundation, supra*, 188 Cal.App.4th at p. 280.) The EIR (or here, the in-lieu Coastal Commission staff report) must also include a detailed statement setting forth the “[m]itigation measures proposed to minimize significant effects on the environment.” (§ 21100, subd. (b)(3); CEQA Guidelines, § 15126.4.)

Where there is “a factual dispute over ‘whether adverse effects have been mitigated or could be better mitigated’ [citation], the agency’s conclusion is reviewed “only for substantial evidence.” (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435 (*Vineyard*)). The CEQA Guidelines define “[s]ubstantial evidence” as “enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.” (CEQA Guidelines, § 15384.)

The petitioner has the burden of (1) setting forth all of the evidence material to the agency’s finding that the mitigation measures chosen by the agency would reduce the adverse impacts of the project; and (2) showing that the “evidence could not reasonably support the finding. [Citation.]” (*California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 626 (*California Native Plant*); see also *Save our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 139 [petitioners bear the burden of proving that the record does not contain substantial evidence to support the agency’s decision].)

In this case, we understand Marina Coast to argue that there is no evidence in the record to show that the mitigation proposed by the Coastal Commission in its staff report would reduce the adverse impact of the construction of the test slant well on the snowy plover nesting season. Our review of the administrative record shows that the Coastal Commission identified the Western snowy plover as a special-status species in its staff report and determined that “[t]he shoreline along the project site is within the designated

critical habitat for the species.” The staff report also included a number of mitigation measures.

As Cal-Am points out, Addendum 1 to the staff report includes revisions to Special Condition 14, which discusses the measures that would be utilized to mitigate the impacts on the Western snowy plover and other species. Among other measures, Special Condition 14.d. requires a biologist to conduct a breeding and nesting survey of sensitive avian species within 500 feet of the project footprint and to ensure that nesting birds are not disturbed by construction noise. Special Condition 14.d. also requires that avoidance buffers be established to minimize potential impacts to active Western snowy plover nests located within 300 feet of the project or access routes, and mandates that operations be immediately suspended if a nest is found near the wellhead that could be affected by project operations.

We find that Marina Coast has failed to meet its burden to show that the evidence in the record before the Coastal Commission could not reasonably support the Commission’s finding that the mitigation measures required by Special Condition 14 will reduce the adverse impacts on the Western snowy plover. (See *California Native Plant*, *supra*, 172 Cal.App.4th at p. 626.) However, Marina Coast also argues that any impact on the dune habitat where the test slant well will be located is prohibited because the dune habitat is a “primary habitat area” and an environmentally sensitive habitat area.

The staff report states that the Coastal Commission found that the coastal dune area in which “the proposed project would be located constitutes ESHA [an environmentally sensitive habitat area].” Under CEQA, “[e]nvironmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and

only uses dependent on those resources shall be allowed within those areas.”<sup>19</sup> (§ 30240, subd. (a); see *Hines, supra*, 186 Cal.App.4th at p. 841.)

CEQA also provides that “[c]oastal-dependent industrial facilities shall be encouraged to locate or expand within existing sites and shall be permitted reasonable long-term growth where consistent with this division. However, where new or expanded coastal-dependent industrial facilities cannot feasibly be accommodated consistent with other policies of this division, they may nonetheless be permitted in accordance with this section and Sections 30261 [tanker facilities] and 30262 [oil and gas development] if (1) alternative locations are infeasible or more environmentally damaging; (2) to do otherwise would adversely affect the public welfare; and (3) adverse environmental effects are mitigated to the maximum extent feasible.” (§ 30260; see *Gherini v. California Coastal Com.* (1988) 204 Cal.App.3d 699, 707 (*Gherini*).

Therefore, under section 30260, a coastal-dependent facility like the test slant well may be located in an environmentally sensitive habitat area such as the coastal dunes if the three-part test of section 30260 is met. (See *Gherini, supra*, 204 Cal.App.3d at pp. 707-709.) Marina Coast’s reliance on the decision in *Bolsa Chica Land Trust v. Superior Court* (1999) 71 Cal.App.4th 493 (*Bolsa Chica*) is misplaced, since that decision does not support its contention that placement of the test slant well on the environmentally sensitive area of the coastal dunes is prohibited under CEQA. In *Bolsa Chica*, the appellate court determined that “[t]he Coastal Act does not permit destruction of an environmentally sensitive habitat area (ESHA) simply because the destruction is mitigated offsite. At the very least, there must be some showing the destruction is needed

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<sup>19</sup> “ ‘Environmentally sensitive area’ means any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments.” (§ 30107.5.)

to serve some other environmental or economic interest recognized by the act.” (*Bolsa Chica, supra*, 71 Cal.App.4th at p. 499.)

Here, we have determined that the Coastal Commission did not err in determining pursuant to section 30260 that the test slant well may be located in an environmentally sensitive habitat area because it is a coastal-dependent industrial facility.

### **5. Analysis of Hydrologic Impacts**

Marina Coast contends that the Coastal Commission violated CEQA because its staff report failed to evaluate the test slant well’s potential hydrological impacts to the Salinas Valley Groundwater Basin. As we have previously noted, the Coastal Commission may use a program-generated written report in lieu of an EIR that describes the mitigation measures for a project’s environmental impacts. (*San Joaquin River, supra*, 183 Cal.App.4th at pp. 1125-1126.)

According to Marina Coast, the Coastal Commission’s staff report failed to consider or analyze Marina Coast’s concern that the test slant well will “endanger[] the [Salinas Valley Groundwater Basin’s] water supply and quality to the detriment of area residents dependent on that supply.” Cal-Am responds that to the contrary, the staff report concluded on the basis of substantial evidence that the Salinas Valley Groundwater Basin “is severely contaminated by seawater intrusion extending several miles inland, and therefore the [test slant well] will not significantly affect groundwater supply and quality.”

The Coastal Commission’s staff report states: “The test slant well would remove up to about 3.6 million gallons per day of primarily seawater from a sub-seafloor extension of the 180-Foot Aquifer of the Salinas Valley Groundwater Basin.” Further, the staff report states that the amount of water that would be withdrawn for the test slant well project “represents only about 0.1 percent of the [Salinas Valley Groundwater] Sub-Basin’s groundwater storage.” In addition, the staff report states: “Cal-Am has modeled the expected ‘cone of depression’—that is, the area in which groundwater levels are

lowered due to this water withdrawal—to extend to about 2,500 feet from the well, where the drawdown is expected to be about four inches.”

Regarding mitigation measures, the staff report notes that “the [Coastal] Commission imposes **Special Condition 11**, which requires Cal-Am to conduct monitoring during all pumping activities and to record all drawdown levels and changes in salinity in those nearby inland wells. **Special Condition 11** also requires that Cal-Am cease its pump tests if monitoring shows a drawdown of one foot or more or shows an increase of more than two parts per thousand of salinity.” Further, the staff report concludes that “[t]he test well is therefore designed and conditioned to ensure that it will have no significant adverse environmental effect on water quantity or quality in the area surrounding the test project.”

Based on the administrative record, we therefore find no merit in Marina Coast’s contention that the Coastal Commission failed to consider the impacts of the test slant well on the Salinas Valley Groundwater Basin.

## **6. Adequate Baselines**

Marina Coast contends that the Coastal Commission violated CEQA by failing to “provide any meaningful baseline information regarding hydrologic conditions beyond the historic level of sea-water intrusion.” According to Marina Coast, “there is simply no basis for the public or the Commissioners to evaluate the [test slant well’s] potential impacts to groundwater supplies and water quality.”

Cal-Am responds that substantial evidence supports the Coastal Commission’s finding of baselines for hydrological conditions, including baselines for seawater intrusion in the aquifers, water levels, and salinity levels.

The California Supreme Court has instructed that “[t]he fundamental goal of an EIR is to inform decision makers and the public of any significant adverse effects a project is likely to have on the physical environment. (§ 21061; [Citation.] To make such an assessment, an EIR must delineate environmental conditions prevailing absent the

project, defining a baseline against which predicted effects can be described and quantified. [Citation.]” (*Neighbors for Smart Rail v. Exposition Metro Line Const. Authority* (2013) 57 Cal.4th 439, 447.)

“Neither CEQA nor the CEQA Guidelines mandates a uniform, inflexible rule for determination of the existing conditions baseline. Rather, an agency enjoys the discretion to decide, in the first instance, exactly how the existing physical conditions without the project can most realistically be measured, subject to review, as with all CEQA factual determinations, for support by substantial evidence. [Citation.]” (*Communities For A Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 328 (*Communities For A Better Environment*)).

Our review of the administrative record shows that the staff report and its supporting documents included information about the existing conditions of groundwater supplies and water quality. Regarding the Salinas Valley Groundwater Basin, the staff report states that “[s]eawater intrusion has been estimated to occur at a baseline rate of about 10,000 acre-feet (equal to about three billion gallons) per year, though the groundwater management programs are attempting to significantly reduce this rate. [Fn. omitted.]”

Additionally, the staff report states that, as to the Dune Sand Aquifer and the 180-Foot Aquifer, “water quality data collected from nearby areas over the past several years show that both aquifers exhibit relatively high salinity levels . . . .” As to groundwater supplies, the staff report states that the “total water withdrawal for the test well would be no more than just over 4,000 acre-feet per year over the two-year test period [which] . . . represents only about 0.1 percent of the Sub-Basin’s groundwater storage.”

Moreover, Special Condition 11 requires Cal-Am to install monitoring devices in at least four wells on the CEMEX site, plus one or more offsite wells, in order to provide “the baseline water and Total Dissolved Solids (‘TDS’) levels in those wells prior to commencement of pumping from the test well.” Marina Coast has not shown that the

Coastal Commission’s exercise of its discretion in determining that these baselines could be most realistically measured by installing monitoring wells is not supported by substantial evidence. (See *Communities For A Better Environment, supra*, 48 Cal.4th at p. 328.)

We are therefore not persuaded by Marina Coast’s contention that the Coastal Commission violated CEQA by failing to “provide any meaningful baseline information regarding hydrologic conditions beyond the historic level of sea-water intrusion.”

### **7. Analysis of Alternatives**

Marina Coast contends that the Coastal Commission violated CEQA by failing to provide an adequate analysis of alternatives to the test slant well, including a failure to analyze a “ ‘no project’ ” alternative.

This court has stated that “ ‘CEQA establishes no categorical legal imperative as to the scope of alternatives to be analyzed in an EIR. Each case must be evaluated on its facts, which in turn must be reviewed in light of the statutory purpose.’ ” [Citation.] ‘An EIR shall describe a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives. An EIR need not consider every conceivable alternative to a project. Rather it must consider a reasonable range of potentially feasible alternatives that will foster informed decisionmaking and public participation. An EIR is not required to consider alternatives which are infeasible. The lead agency is responsible for selecting a range of project alternatives for examination and must publicly disclose its reasoning for selecting those alternatives. There is no ironclad rule governing the nature or scope of the alternatives to be discussed other than the rule of reason.’ (CEQA Guidelines, § 15126.6, subd. (a).)” (*Watsonville Pilots Assn. v. City of Watsonville* (2010) 183 Cal.App.4th 1059, 1086 (*Watsonville Pilots*)).

“[I]t is appellants’ burden to demonstrate that the alternatives analysis is deficient.” (*California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 987.) “As with the range of alternatives that must be discussed, the level of analysis is subject to a rule of reason.” (*Laurel Heights I, supra*, 47 Cal.3d at p. 407.) In other words, “[t]here is no need for the EIR to consider an alternative whose effect cannot be reasonably ascertained and whose implementation is deemed remote and speculative [citations]. Absolute perfection is not required; what is required is the production of information sufficient to permit a reasonable choice of alternatives so far as environmental aspects are concerned. It is only required that the officials and agencies make an objective, good-faith effort to comply.” (*Foundation for San Francisco’s Architectural Heritage v. City and County of San Francisco* (1980) 106 Cal.App.3d 893, 910 (*Foundation*)). “To that end, an EIR’s discussion of alternatives must be reasonably detailed, but not exhaustive. [Citation]; Guidelines, § 15126.6.) The key issue is whether the alternatives discussion encourages informed decisionmaking and public participation. [Citation.]” (*California Oak Foundation, supra*, 188 Cal.App.4th at p. 276.)

Here, the staff report includes an “Assessment of Alternatives” section that notes Cal-Am’s recognition of “the state’s preference for using subsurface intakes, where feasible, to provide source water for its proposed desalination facility. Those types of intakes are generally less environmentally damaging than intakes that draw directly from the water column. Consideration of potential alternative locations for this project has therefore been focused on sites within the Monterey Bay region where geologic and hydrogeologic characteristics are likely to lend themselves to subsurface intake methods.”

The feasible sites for the test slant well discussed in the staff report included the CEMEX site and a site “about eight miles further north near Moss Landing that might also be suitable for subsurface intakes.” The alternative Moss Landing site had been

previously dismissed due to its distance from the Cal-Am service area and “its additional adverse impacts.”

Another alternative site that was considered was located in the northern end of the CEMEX site. The staff report states that “consultation with state and federal wildlife agencies and others showed that locating the test well there would have more significant potential impacts to nearby nesting Western snowy plovers, which are listed as federally-endangered. That site was also closer to the shoreline than the current site, and would have involved more excavation, required shoreline protective devices, and been subject to more erosion and associated coastal hazards. The focus then shifted to the current site at the south end of the CEMEX facility, which is within an already disturbed area, is further from the shoreline, and involves fewer coastal resource impacts.”

We determine that the level of Coastal Commission’s alternatives analysis satisfies the rule of reason and is adequate under CEQA, since the analysis of alternative sites for a subsurface water intake (1) disclosed the reasons for selecting the alternative sites (*Watsonville Pilots, supra*, 183 Cal.App.4th at p. 1086); (2) the information produced was sufficient to permit a reasonable choice of alternatives with regard to the environmental aspects of subsurface water intake (*Foundation, supra*, 106 Cal.App.3d at p. 910); and (3) encouraged informed decision-making and public participation (*California Oak Foundation, supra*, 188 Cal.App.4th at p. 276).

We also determine that the Coastal Commission adequately discussed a “no project” alternative. “The purpose of the ‘No Project’ alternative is ‘to allow decisionmakers to compare the impacts of approving the proposed project with the impacts of not approving the proposed project.’ ([CEQA Guidelines], § 15126.6, subd. (e)(1).) CEQA requires the ‘No Project’ alternative to ‘discuss the existing conditions at the time the notice of preparation is published . . . as well as what would be reasonably expected to occur in the foreseeable future if the project were not approved, based on current plans and consistent with available infrastructure and community services.’

([Citations]; § 15126.6, subd. (e)(2).)” (*Bay Area Citizens v. Assn. of Bay Area Governments* (2016) 248 Cal.App.4th 966, 1015.)

The Coastal Commission’s staff report includes a “ ‘No Action’ Alternative” section, which states: “For at least two reasons, the ‘no action’ alternative is also likely to result in greater adverse environmental impacts than the currently proposed project.” The two reasons were a delay in obtaining the information needed from the test slant well, which would prevent Cal-Am from obtaining the information needed for review of the potential desalination facility project, and a further delay in the review of that project. The staff report also stated: “Either of these options could extend the period of Cal-Am’s excessive withdrawals from the Carmel River, thereby exacerbating the ongoing adverse effects of those withdrawals on fish and habitat in that watershed.” Another environmental consequence of the “no project” alternative discussed in the staff report was the potential development of a desalination facility in Monterey Bay that would use open water intakes, which was expected to have greater adverse effects on marine life and coastal waters.

Accordingly, we find no merit in Marina Coast’s contention that the Coastal Commission violated CEQA by failing to provide an adequate alternatives analysis in its staff report.

### **8. Recirculation of Staff Report**

Marina Coast argues that the Coastal Commission is required by CEQA to recirculate the staff report. According to Marina Coast, “the Staff Report was substantially modified the night before project approval to fundamentally alter the project description, the mitigation, and the disclosure of feasible alternatives . . . . The eleventh-hour changes deprived the public of any opportunity to comment on the environmental impacts of the actual project approved.”

Cal-Am disagrees, asserting that the Coastal Commission is not bound by CEQA’s EIR recirculation provisions because the Commission’s own regulations include

provisions governing the recirculation of a staff report. Cal-Am argues that since the Coastal Commission’s action on Cal-Am’s coastal development permit was not substantially different than the action recommended in the staff report, recirculation is not required under the Commission’s regulations. Alternatively, Cal-Am argues that recirculation was not required under CEQA because the addenda to the staff report did not include significant new information.

We need not determine whether the Coastal Commission’s regulations governing recirculation of a revised staff report (Regs., § 13096)<sup>20</sup> apply in this case, since we determine that recirculation of the Coastal Commission’s staff report was not required under the CEQA provisions governing recirculation of an EIR.

“Section 21092.1<sup>[21]</sup> provides that when a lead agency adds ‘significant new information’ to an EIR after completion of consultation with other agencies and the public (see §§ 21104, 21153) but before certifying the EIR, the lead agency must pursue

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<sup>20</sup> “Unless otherwise specified at the time of the vote, an action taken consistent with the staff recommendation shall be deemed to have been taken on the basis of, and to have adopted, the reasons, findings and conclusions set forth in the staff report as modified by staff at the hearing. If the commission action is substantially different than that recommended in the staff report, the prevailing commissioners shall state the basis for their action in sufficient detail to allow staff to prepare a revised staff report with proposed revised findings that reflect the action of the commission. Such report shall contain the names of commissioners entitled to vote pursuant to Public Resources Code section 30315.1.” (Regs., § 13096, subd. (b).)

<sup>21</sup> Section 21092.1 provides: “When significant new information is added to an environmental impact report after notice has been given pursuant to Section 21092 and consultation has occurred pursuant to Sections 21104 and 21153, but prior to certification, the public agency shall give notice again pursuant to Section 21092, and consult again pursuant to Sections 21104 and 21153 before certifying the environmental impact report.”

an additional round of consultation.” (*Vineyard, supra*, 40 Cal.4th at p. 447; see also CEQA Guidelines, § 15088.5.)<sup>22</sup>

The California Supreme Court has further instructed “that the addition of new information to an EIR after the close of the public comment period is not ‘significant’ unless the EIR is changed in a way that deprives the public of a meaningful opportunity to comment upon a *substantial* adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect (including a feasible project alternative) that the project’s proponents have declined to implement. [Citation.] [R]ecirculation is not required where the new information added to the EIR ‘merely clarifies or amplifies [citations] or makes insignificant modifications in [citation] an adequate EIR.’ [Citation.]” (*Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1129–1130 (*Laurel Heights II*)).

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<sup>22</sup> CEQA Guidelines, § 15088.5, subs. (a), (b) provide: “A lead agency is required to recirculate an EIR when significant new information is added to the EIR after public notice is given of the availability of the draft EIR for public review under Section 15087 but before certification. As used in this section, the term ‘information’ can include changes in the project or environmental setting as well as additional data or other information. New information added to an EIR is not ‘significant’ unless the EIR is changed in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect (including a feasible project alternative) that the project’s proponents have declined to implement. ‘Significant new information’ requiring recirculation include, for example, a disclosure showing that: [¶] (1) A new significant environmental impact would result from the project or from a new mitigation measure proposed to be implemented. [¶] (2) A substantial increase in the severity of an environmental impact would result unless mitigation measures are adopted that reduce the impact to a level of insignificance. [¶] (3) A feasible project alternative or mitigation measure considerably different from others previously analyzed would clearly lessen the significant environmental impacts of the project, but the project’s proponents decline to adopt it. [¶] (4) The draft EIR was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded. [Citation.] [¶] Recirculation is not required where the new information added to the EIR merely clarifies or amplifies or makes insignificant modifications in an adequate EIR.”

“On the other hand, recirculation is required, for example, when the new information added to an EIR discloses: (1) a new substantial environmental impact resulting from the project or from a new mitigation measure proposed to be implemented (cf. Guidelines, § 15162, subd. (a)(1), (3)(B)(1)); (2) a substantial increase in the severity of an environmental impact unless mitigation measures are adopted that reduce the impact to a level of insignificance (cf. Guidelines, § 15162, subd. (a)(3)(B)(2)); (3) a feasible project alternative or mitigation measure that clearly would lessen the environmental impacts of the project, but which the project’s proponents decline to adopt (cf. Guidelines, § 15162, subd. (a)(3)(B)(3), (4)); or (4) that the draft EIR was so fundamentally and basically inadequate and conclusory in nature that public comment on the draft was in effect meaningless [citation].” (*Laurel Heights II, supra*, 6 Cal.4th at p. 1130.)

“[T]he lead agency’s determination that a newly disclosed impact is not ‘significant’ so as to warrant recirculation is reviewed only for support by substantial evidence. [Citation.]” (*Vineyard, supra*, 40 Cal.4th at p. 447.) “ ‘[I]n applying the substantial evidence standard, ‘the reviewing court must resolve reasonable doubts in favor of the administrative finding and decision.’ ” [Citations.]” (*Laurel Heights II, supra*, 6 Cal.4th at p. 1135.) “Thus, the appellant bears the burden of proving substantial evidence does not support the agency’s decision not to recirculate an EIR. [Citation.]” (*San Francisco Baykeeper, Inc. v. California State Lands Commission* (2015) 242 Cal.App.4th 202, 224 (*San Francisco Baykeeper*).

Marina Coast makes a general argument in its opening brief that recirculation of the Coastal Commission’s staff report is required under CEQA because the staff report “was substantially modified the night before project approval to fundamentally alter the project description, the mitigation, and the disclosure of feasible alternatives.” Since Marina Coast did not specify any of the modifications, we determine that Marina Coast’s argument in its opening brief is insufficient to meet its burden to prove that substantial

evidence does not support the Coastal Commission's implicit decision not to recirculate the staff report because the new information in the addenda was not significant. (See *San Francisco Baykeeper, supra*, 242 Cal.App.4th at p. 224.)

In its reply brief Marina Coast argues more specifically that recirculation was required under CEQA because the addenda to the staff report included (1) the new environmental impact of allowing construction of the test slant well to continue into the snowy plover nesting season; and (2) the Coastal Commission's rejection of an alternative site at Potrero Road that was not discussed in the staff report.

“ ‘It is axiomatic that arguments made for the first time in a reply brief will not be entertained because of the unfairness to the other party.’ [Citations.]” (*May v. City of Milpitas* (2013) 217 Cal.App.4th 1307, 1333, fn. 11.) We will disregard Marina Coast's argument that the newly disclosed environmental impact of continuing construction into the snowy plover nesting season warrants recirculation of the staff report, since that argument was made for the first time in Marina Coast's reply brief. However, because Cal-Am discusses the newly disclosed Potrero Road alternative site in its respondent's brief, we will determine whether recirculation of the staff report is required under CEQA on that ground.

Addendum 1 added the following new information to the staff report's discussion of alternative sites: “The recent investigation included a single borehole at a site on Potrero Road, near Moss Landing. Data from that borehole identified the site as likely suitable for a slant well. Compared to the CEMEX site, the Potrero Road site presented higher hydraulic conductivity values but less available aquifer depth and a wider range of water quality in the underlying aquifer. The Potrero Road site is also within a parking lot used for public access to the Salinas River State Beach, and conducting test well construction and operation at this site would result in higher adverse effects on public access and recreation compared to the CEMEX site. The Potrero Road site is also closer to the Salinas River National Wildlife Refuge, which, along with the Salinas River State

Beach, provides important habitat areas for the Western snowy plover and the Caspian tern, which could be adversely affected by well-related construction and operations.” (Underscoring omitted.)

Thus, the administrative record reflects that the new information about the Potrero Road site was not “significant new information” (*Vineyard, supra*, 40 Cal.4th at p. 447) that would require recirculation of the staff report, since it appears that the Potrero Road site would not lessen the environmental impacts of the test slant well project. (See *Laurel Heights II, supra*, 6 Cal.4th at pp. 1129–1130.) Marina Coast fails to make a contrary showing that substantial evidence does not support the Coastal Commission’s determination that the newly disclosed alternative site was not significant information warranting recirculation. (See *Laurel Heights II, supra*, 6 Cal.4th at pp. 1129–1130; *San Francisco Baykeeper, supra*, 242 Cal.App.4th at p. 224.)

## **V. CONCLUSION**

Under the applicable standards of review, we have determined that the Coastal Commission had jurisdiction to hear Cal-Am’s appeal of the City’s denial of Cal-Am’s application for a coastal development permit for the test slant well, since the City Council’s denial of the application was a final action and there was a substantial issue as to conformity with the City’s LCP. We have also determined that Marina Coast failed to show that the Coastal Commission violated CEQA in approving Cal-Am’s coastal development permit for the test slant well. We will therefore affirm the trial court’s August 24, 2015 judgment, which denied Marina Coast’s petition for a writ of mandate challenging the Coastal Commission’s decision.

## **VI. DISPOSITION**

The judgment is affirmed. Costs on appeal are awarded to respondent and real party in interest.

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BAMATTRE-MANOUKIAN, J.

WE CONCUR:

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ELIA, ACTING P.J.

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MIHARA, J.

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