

CASE NO. C088922

**IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT**

California Coastkeeper Alliance; California Coastal
Protection Network; and Orange County Coastkeeper,

Petitioners and Appellants,

v.

California State Lands Commission

Respondent,

Poseidon Resources (Surfside) LLC

Real Party in Interest.

Appellant's Opening Brief

On Appeal from the Superior Court for the State of California,
County of Sacramento, Case No. 34-2017-80002736
Hon. Richard K. Sueyoshi

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

There are no interested entities or persons that must be listed in this certificate under Rule 8.208, California Rules of Court.

Dated: October 22, 2019

Respectfully submitted,
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TABLE OF CONTENTS

INTRODUCTION 10

STATEMENT OF APPEALABILITY 17

STATEMENT OF THE CASE 18

I. Legal Background 18

 A. The CEQA Concepts of Lead Agency and a Single, Comprehensive EIR Document for the Whole Project. 18

 B. Substitute Lead Agencies for Updated EIRs..... 26

II. Factual Background..... 29

 A. The 2010 EIR Prepared by the City of Huntington Beach. 29

 B. Changed Circumstances and New Information Since 2010. 32

 C. The 2017 CEQA Review Process. 38

ISSUES PRESENTED 46

STANDARD OF REVIEW..... 47

ARGUMENT 50

I. The Lands Commission Erred by Refusing to Assume and Perform Its Lead Agency Obligations..... 50

II. The Lands Commission Erred by Unlawfully Segmenting Its Environmental Review. 58

 A. CEQA Flatly Prohibits Piecemealing of Project EIRs..... 58

 B. The Lands Commission Unlawfully Deferred Required Analysis to the Regional Water Board. 62

C. The Lands Commission Unlawfully Refused to Consider Reasonably Foreseeable Project Changes.....	68
CONCLUSION	71
CERTIFICATE OF WORD COUNT	73
PROOF OF SERVICE	74

TABLE OF AUTHORITIES

	Page(s)
Cases	
<u>Ass'n for a Cleaner Env't v. Yosemite Cmty. Coll. Dist.,</u> 116 Cal. App. 4th 629 (2004)	57
<u>Banning Ranch Conservancy v. City of Newport Beach,</u> 2 Cal. 5th 918 (2017)	<i>passim</i>
<u>In re Bay-Delta etc.,</u> 43 Cal. 4th 1143 (2008)	44
<u>Berkeley Keep Jets Over the Bay Comm. v. Bd. of Port Comm'rs,</u> 91 Cal. App. 4th 1344 (2001)	59
<u>Bozung v. Local Agency Formation Comm.,</u> 13 Cal. 3d 263 (1975)	59
<u>California Unions for Reliable Energy v. Mojave Desert Air</u> <u>Quality Mgmt. Dist.,</u> 178 Cal. App. 4th 1225 (2009)	71
<u>Christward Ministry v. Superior Court,</u> 184 Cal. App. 3d 180 (1986)	59
<u>Citizens Assn. for Sensible Dev. of Bishop Area v. Cty. of Inyo,</u> 172 Cal. App. 3d 151 (1985)	59, 60
<u>Citizens For A Megaplex-Free Alameda v. City of Alameda,</u> 149 Cal. App. 4th 91 (2007)	71
<u>Citizens for the Restoration of L Street v. City of Fresno,</u> 229 Cal. App. 4th 340 (2014)	49
<u>Citizens Opposing a Dangerous Env't v. County of Kern,</u> 228 Cal. App. 4th 360 (2014)	48
<u>Citizens Task Force on Sohio v. Bd. of Harbor Comm'rs,</u> 23 Cal. 3d 812 (1979)	22
<u>City of Antioch v. City Council,</u> 187 Cal. App. 3d 1325 (1986)	60

<u>City of Irvine v. Cty. of Orange,</u> 238 Cal. App. 4th 526 (2015)	57
<u>City of Sacramento v. State Water Res. Control Bd.,</u> 2 Cal. App. 4th 960 (1992)	28
<u>Communities for a Better Env't v. City of Richmond,</u> 184 Cal. App. 4th 70 (2010)	70
<u>Communities for a Better Env't v. S. Coast Air Qual. Mgmt. Dist.,</u> 48 Cal. 4th 310 (2010)	19
<u>Friends of the College of San Mateo Gardens v. San Mateo Community College Dist.,</u> 1 Cal. 5th 937, 952-53 (2016)	50
<u>Friends of Mammoth v. Town of Mammoth Lakes Redevelop. Agency,</u> 82 Cal. App. 4th 511 (2000)	57
<u>Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.,</u> 47 Cal. 3d 376 (1989)	<i>passim</i>
<u>Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.,</u> 6 Cal. 4th 1112 (1993)	26
<u>McQueen v. Bd. of Directors,</u> 202 Cal. App. 3d 1136 (1988)	24
<u>Mountain Lion Found. v. Fish & Game Comm'n,</u> 16 Cal. 4th 105 (1997)	18
<u>Muzzy Ranch Co. v. Solano Cty. Airport Land Use Com.,</u> 41 Cal. 4th 372 (2007)	18
<u>Nelson v. Cty. of Kern,</u> 190 Cal. App. 4th 252 (2010)	59, 71
<u>No Oil, Inc. v. City of Los Angeles,</u> 13 Cal. 3d 68 (1974)	18, 19, 20
<u>Orinda Ass'n v. Bd. of Supervisors,</u> 182 Cal. App. 3d 1145 (1986)	59
<u>Plan for Arcadia, Inc. v. City Council of Arcadia,</u> 42 Cal. App. 3d 712 (1974)	60

<u>Planning & Conservation League v. Dep’t of Water Res.,</u> 83 Cal. App. 4th 892 (2000)	24
<u>POET, LLC v. State Air Res. Bd.,</u> 12 Cal. App. 5th 52, 73 (2017)	23
<u>Riverwatch v. Olivenhain Mun. Water Dist.,</u> 170 Cal. App. 4th 1186 (2009)	25
<u>San Joaquin Raptor/Wildlife Rescue Center v. Cty. of Stanislaus,</u> 27 Cal. App. 4th 713 (1994)	59, 71
<u>Santiago Cty. Water Dist. v. Cty. of Orange,</u> 118 Cal. App. 3d 818 (1981)	71
<u>Save San Francisco Bay Ass’n v. San Francisco Bay Conservation and Dev. Com.,</u> 10 Cal. App. 4th 908 (1992)	25
<u>Save Tara v. City of W. Hollywood,</u> 45 Cal. 4th 116 (2008)	57
<u>Sierra Club v. County of Fresno,</u> 6 Cal. 5th 502, 512 (2018)	48
<u>Sierra Club v. State Bd. of Forestry,</u> 7 Cal. 4th 1215 (1990)	48, 58
<u>Topanga Beach Renters Assn. v. Dep’t of Gen. Servs.,</u> 58 Cal. App. 3d 188 (1976)	60
<u>Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora,</u> 155 Cal. App. 4th 1214 (2007)	24, 49, 59, 71
<u>Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova,</u> 40 Cal. 4th 412 (2007)	20, 48, 70
<u>Wildlife Alive v. Chickering,</u> 18 Cal. 3d 190 (1976)	18
Statutes	
Pub. Res. Code § 21002	68
Pub. Res. Code § 21002.1(d)	22, 25, 59

Pub. Res. Code § 21064.....	19
Pub. Res. Code § 21065.....	23
Pub. Res. Code § 21067.....	21
Pub. Res. Code § 21069.....	22
Pub. Res. Code § 21080.1.....	19, 26
Pub. Res. Code § 21165.....	24
Pub. Res. Code § 21166.....	<i>passim</i>
Pub. Res. Code § 21167.....	25
Pub. Res. Code § 30500.....	31
Pub. Res. Code § 30512.....	31
Water Code § 13142.5(b).....	63

Regulations

Cal. Code Regs. §§ 13114-13120.....	31
Cal. Code Regs., tit. 23, § 3009.....	33
CEQA Guidelines § 15050(a).....	22
CEQA Guidelines § 15051(b).....	22
CEQA Guidelines § 15052(a).....	28, 51, 55, 56
CEQA Guidelines § 15162(c).....	29, 52
CEQA Guidelines § 15064.....	19
CEQA Guidelines § 15071.....	19
CEQA Guidelines § 15096.....	22
CEQA Guidelines § 15096(a).....	27
CEQA Guidelines § 15096(c).....	28
CEQA Guidelines § 15096(e).....	22

CEQA Guidelines § 15120	20
CEQA Guidelines § 15126.2	20
CEQA Guidelines § 15126.6	68
CEQA Guidelines § 15162(a).....	27, 55
CEQA Guidelines § 15162(c).....	52, 56
CEQA Guidelines § 15378(a).....	23
CEQA Guidelines § 15378(c).....	23, 24, 57

Other Authority

Coastal Management, <u>The National Significance of California’s Ocean Economy</u> (2015), available at <u>https://coast.noaa.gov/data/digitalcoast/pdf/</u>	10
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INTRODUCTION

This case implicates California’s continuing effort to protect vital coastal waters and marine resources. Spanning roughly 1,100 miles, the California coast is a critical source of both ecological and economic health for local communities. Millions of people live, work, and play along the coast, with nearly 70 percent of the state’s population residing in coastal counties. The state’s “ocean-based economy” – i.e., human activities that depend directly on ocean resources, such as fishing and coastal recreation – contributes significantly to state and national wellbeing. Coastal recreation and tourism, for instance, is the largest of California’s six ocean-dependent sectors, accounting annually for \$17.6 billion dollars in gross state product and providing 75 percent of the ocean economy’s employment.¹

The state has long recognized the importance of protecting these coastal resources. In 1999, for instance, California adopted the Marine Life Protection Act, which led to the creation in 2012 of a network of marine protected areas to promote sustainable fisheries, including in the coastal

¹ National Oceanic and Atmospheric Administration, Office for Coastal Management, The National Significance of California’s Ocean Economy, at 11 (2015), available at <https://coast.noaa.gov/data/digitalcoast/pdf/california-ocean-economy.pdf>.

waters near Huntington Beach.² California also has used its existing robust environmental laws to ensure the continued vibrancy of imperiled coastal waters. Most recently, in 2015 California adopted stringent new regulations under the Porter-Cologne Water Quality Control Act, Cal. Water Code § 13000 et seq., to protect marine life from the potentially adverse impacts of ocean desalination facilities. Such facilities use large amounts of energy to pump seawater through a porous membrane, removing the salt and generating freshwater and brine wastes. All marine life entrained in the intake water is destroyed. Traditional “open-ocean intake systems” – essentially large diameter intake pipes that pump water into the facility – kill enormous quantities of marine larvae and other organisms. In contrast, subsurface intake pumps that filter intake water through seafloor sediment do not adversely impact marine life.

For this reason, the new California desalination regulations create a presumption against the use of open-ocean systems, similar to regulations adopted five years earlier banning such systems at coastal power plants.³ The desalination regulations also place new safeguards on the discharge of

² See <https://www.wildlife.ca.gov/Conservation/Marine/MPAs/Network/Southern-California>.

³ See https://www.waterboards.ca.gov/water_issues/programs/ocean/cwa316/.

concentrated salty brine wastes into coastal waters. To comply with the new regulations, desalination project proponents must now undertake a robust analysis of project need, size, location, technology, alternatives, and mitigation measures before proceeding with a facility that would harm marine life.

The facility at issue on this appeal is a regional ocean desalination facility proposed by Poseidon Resources (Surfside) LLC (“Poseidon”) to be constructed on the public tidelands and adjacent oceanfront property in Huntington Beach (the “Project”). As conceived, the facility would withdraw roughly 107 million gallons of seawater each day, killing all larvae and other marine life caught in its open-ocean intake system, and would discharge 60 million gallons of brine waste a day into coastal waters. The facility, which would be among the nation’s largest and most expensive desalination plants, must comply with California’s new desalination regulations.

The Project is also subject to the state’s bedrock environmental law, the California Environmental Quality Act (“CEQA”). For any project that may have a significant environmental effect, CEQA requires preparation of an environmental impact report (“EIR”). EIRs must evaluate the project’s direct, indirect, and cumulative environmental effects and, importantly, must consider alternatives and mitigation measures that could eliminate or

reduce those impacts. CEQA adopts the core concept that a single public agency will prepare a single EIR for any one project. This so-called CEQA “lead agency” oversees and certifies the EIR for the whole action, including those parts of the project that are under the jurisdiction of other agencies. CEQA expressly forbids segmentation of a project into its component pieces or distinct agency approvals; for purposes of environmental review, all project impacts and alternatives must be evaluated in a single, comprehensive EIR certified by the lead agency. Thereafter, all other public agencies must rely on that certified EIR to make their separate approval decisions for the project. And a reviewing court must determine the adequacy of that single certified EIR, not a series of EIRs prepared by various approving agencies, to determine CEQA compliance. This mandatory CEQA framework avoids redundant environmental review and provides all parties with certainty and finality.

Where implementation of a project is delayed and the previously certified EIR becomes stale due to changed circumstances or new information, CEQA requires appropriate updating of the environmental analysis, using essentially the same public process as the original EIR, before any additional approvals may proceed. The CEQA updating process adheres to the statute’s overarching principle of a single, comprehensive EIR prepared by a single lead agency. Accordingly, if the original lead

agency that certified the EIR no longer has any approval authority over the project, CEQA requires that the next public agency to grant a discretionary approval “shall” step into the role of lead agency and undertake all necessary updates to make the original project EIR legally adequate. This mandatory shift in lead agency status is critical to ensuring that only a single updated EIR for the project is prepared, certified, and available for use by all other approving agencies and that the courts have a single updated EIR to review.

The issue at the heart of this appeal is whether the California State Lands Commission (“Lands Commission”) complied with these mandatory “single lead agency, single EIR” procedures when it certified a “Supplemental EIR” for the Project in 2017. That updated EIR was prepared to evaluate facility design changes made necessary by the new desalination regulations. Several key facts in this case are not in dispute: (1) The City of Huntington Beach served as the original CEQA lead agency, preparing and certifying an EIR for the desalination Project in 2010; (2) Poseidon never obtained all of the necessary government approvals for the Project evaluated in the 2010 EIR and never constructed that Project; (3) In 2015, California adopted stringent new regulations for ocean desalination facilities that required Poseidon to redesign certain aspects of the Project, to assess the need for the Project as sized, and to

reevaluate alternative intake designs, technologies, and locations that could mitigate or avoid marine impacts; (4) Changes to the Project and its circumstances, in turn, triggered CEQA's requirement for an updated EIR to be used in future approvals by at least four public agencies; (5) At that point, the City of Huntington Beach disclaimed any further discretionary approval authority over the Project; and (6) The Lands Commission thereafter volunteered to prepare and certify an updated EIR when it issued the next discretionary approval for the Project – which included a modification and substantial extension of its expiring public tidelands lease with Poseidon.

Rather than evaluate impacts and alternatives from the modified seawater desalination Project, however, the Lands Commission redefined the subject and scope of its updated environmental review as a “Lease Modification Project” and limited the updated EIR to those aspects of Poseidon's Project over which the Commission has direct leasing jurisdiction. In doing so, the Lands Commission expressly deferred additional necessary environmental impacts review and alternatives analysis to other agencies. The Commission's express refusal to evaluate impacts and alternatives that might fall within the authority or jurisdiction of another public agency undermines CEQA's single EIR mandate and flies directly in the face of the California Supreme Court's recent holding in

Banning Ranch Conservancy v. City of Newport Beach, 2 Cal. 5th 918 (2017), which reaffirmed that such truncated CEQA analysis is unlawful.

Accordingly, Appellants California Coastkeeper Alliance et al. (“Coastkeeper”) sought a writ of mandate declaring that the Lands Commission had unlawfully segmented the updated environmental review in violation of CEQA. Importantly, Coastkeeper did not challenge the adequacy of the actual analysis that the Lands Commission chose to include in the updated EIR; rather, Coastkeeper’s CEQA claim was and is addressed solely to the EIR’s deliberate omission of the legally-required analysis for certain aspects of the Project, which the Lands Commission punted to other agencies. The dispute in this case presents two pure questions of law: (1) whether CEQA required that the Lands Commission step up and serve as the substitute lead agency when it prepared and certified the updated EIR; and (2) whether CEQA required the updated EIR, whatever its label, to evaluate all reasonably foreseeable new impacts and reasonable alternatives for the Project as a whole. The trial court’s ruling did not address these legal questions, but instead decided a claim Coastkeeper did not bring – whether the limited analysis that the Lands Commission elected to conduct was adequately supported by substantial evidence in the record.

If the trial court ruling stands, several other agencies that still need to evaluate and approve the Project will likely have to conduct their own additional CEQA analyses and prepare their own additional CEQA documents, perhaps resulting in several additional CEQA lawsuits over the very same Project. Such serial piecemealing of CEQA compliance is precisely what the Legislature intended to avoid, as the courts have repeatedly and unequivocally affirmed. This Court should, therefore, reverse the decision below and order the trial court to enter a writ of mandate finding that the Lands Commission failed, as a matter of law, to comply with CEQA.

STATEMENT OF APPEALABILITY

Coastkeeper timely filed a Verified Petition for Writ of Mandate challenging Respondent State Lands Commission's failure to comply with CEQA on November 17, 2017, within the 30-day period allowed by CEQA. On January 8, 2019, the trial court issued a Ruling on Submitted Matter Re: Petition for Writ of Mandate. CT 1120. On February 1, 2019, the court entered an Amended Judgment, denying the writ petition in its entirety. CT 1146. Respondent served a Notice of Entry of Amended Judgment on February 6, 2019. CT 1173. Coastkeeper timely filed a Notice of Appeal pursuant to California Code of Civil Procedure section 904.1 on February 6, 2019. CT 1202.

STATEMENT OF THE CASE

I. Legal Background

A. The CEQA Concepts of Lead Agency and a Single, Comprehensive EIR Document for the Whole Project

CEQA is the state's bedrock environmental statute, intended to "[e]nsure that the long-term protection of the environment shall be the guiding criterion in public decisions." No Oil, Inc. v. City of Los Angeles, 13 Cal. 3d 68, 74 (1974) (quoting Pub. Res. Code § 21001(d)). It requires public agencies to "give prime consideration to preventing environmental damage when carrying out their duties." Mountain Lion Found. v. Fish & Game Comm'n, 16 Cal. 4th 105, 112-14 (1997). Courts thus interpret the statute to "afford the fullest possible protection to the environment." Wildlife Alive v. Chickering, 18 Cal. 3d 190, 206 (1976). The mechanics of how CEQA works are prescribed by statute and administrative implementing regulations, commonly called "CEQA Guidelines," as augmented by case law. See Muzzy Ranch Co. v. Solano Cty. Airport Land Use Com., 41 Cal. 4th 372, 379-80, n.2 (2007) ("The term 'CEQA Guidelines' refers to the regulations for the implementation of CEQA authorized by the Legislature . . . In interpreting CEQA, we accord the

CEQA Guidelines great weight except where they are clearly unauthorized or erroneous”).⁴

CEQA requires the preparation of an EIR whenever there is a fair argument that a discretionary agency action may have a significant effect on the environment. See Cal. Pub. Res. Code (hereafter “PRC”) §§ 21080(d), 21100, 21151; CEQA Guidelines § 15064(a)(1), (f)(1); Communities for a Better Env’t v. S. Coast Air Qual. Mgmt. Dist., 48 Cal. 4th 310, 319 (2010); No Oil, Inc., 13 Cal. 3d at 82.⁵ The EIR is “the heart of CEQA,” Laurel Heights Improvement Ass’n v. Regents of Univ. of Cal., 47 Cal. 3d 376, 392 (1989) (“Laurel Heights I”), and “the key to environmental protection under [the Act].” No Oil, Inc., 13 Cal. 3d at 75. In essence, an EIR is “the primary means of achieving the Legislature’s considered declaration that it is the policy of the state to ‘take all action

⁴ The CEQA Guidelines are “prescribed by the Secretary of Resources to be followed by all state and local agencies in California in the implementation of [CEQA]” and codified in title 14, section 15000 et seq. of the California Code of Regulations. Id. For efficiency, this brief uses the nomenclature “CEQA Guidelines § 15___.”

⁵ If a project will not have a significant effect on the environment, CEQA may be satisfied through use of a “negative declaration,” defined as “a written statement briefly describing the reasons that a proposed project will not have a significant effect on the environment and does not require the preparation of an [EIR].” PRC §§ 21064, 21080(c); CEQA Guidelines § 15071.

necessary to protect, rehabilitate, and enhance the environmental quality of the state.’’ Id.

To satisfy this legislative mandate, CEQA requires that an EIR include detailed analysis of a project’s direct, indirect, and cumulative effects on the environment, as well as potential mitigation measures and alternatives (including the “no project” alternative) that could reduce or avoid those impacts. CEQA Guidelines §§ 15120, 15126.2. The analysis and supporting data in an EIR must be sufficient to allow a full assessment of significant environmental impacts and must be presented in a manner that meaningfully informs the public and decisionmakers who did not participate in the EIR’s preparation. Id. § 15147; Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova, 40 Cal. 4th 412, 442 (2007); Laurel Heights I, 47 Cal. 3d at 405.

By requiring such early and comprehensive review of proposed projects, the EIR serves as an “‘environmental alarm bell’ whose purpose is to alert the public and its responsible officials to environmental changes before they have reached the point of ecological no return.” Laurel Heights I, 47 Cal. 3d at 392. It is “intended to demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action.” Id. If CEQA is “scrupulously followed,” the public will know the basis for the agency’s action and

“being duly informed, can respond accordingly to action with which it disagrees.” Id. Thus, an EIR is also a “document of accountability,” and the CEQA process “protects not only the environment but also informed self-government.” Id.

The claim in this case is based on CEQA’s core animating principle – namely that, for any particular project, a single agency will prepare a single, comprehensive EIR that addresses all project impacts. The California Supreme Court recently affirmed this principle in Banning Ranch. There, in rejecting an agency’s decision to restrict the scope of its EIR and defer some of the necessary analysis to a different agency, the Court reiterated that “CEQA’s policy of integrated review” requires that the agency preparing the environmental analysis “must take a comprehensive view in the EIR.” 2 Cal. 5th at 939 (emphasis in original). This core animating principle manifests itself in two critical CEQA requirements.

First, because many or most projects will involve discretionary review by multiple agencies, the Legislature devised the concept of a single “lead agency” to gather information and prepare the required CEQA analysis. The lead agency is “the public agency which has the principal responsibility for carrying out or approving a project which may have a significant effect upon the environment.” PRC § 21067. As the CEQA Guidelines explain: “Where a project is to be carried out or approved by

more than one public agency, one public agency shall be responsible for preparing an EIR or Negative Declaration for the project. This agency shall be called the Lead Agency.” CEQA Guidelines §15050(a).

Ordinarily, the agency with the “greatest responsibility for supervising or approving the project as a whole” acts as the lead agency. CEQA Guidelines § 15051(b). If more than one agency could meet this description, “the agency which will act first on the project in question shall be the lead agency.” Id.; Citizens Task Force on Sohio v. Bd. of Harbor Comm’rs, 23 Cal. 3d 812, 814 (1979). Any public agency other than the lead agency which has responsibility for carrying out or approving a part of the project is a “responsible agency.” PRC § 21069. Responsible agencies comply with CEQA by providing relevant input and comments to the lead agency and by “considering the EIR . . . prepared by the lead agency” in making their own approval decisions. CEQA Guidelines § 15096 (emphasis added); see also PRC § 21002.1(d) (specifying that “the responsibility of the lead agency shall differ from that of a responsible agency”). Responsible agencies do not prepare their own EIR or certify the adequacy of the lead agency’s EIR. Id.⁶

⁶ Indeed, except under limited circumstances where the responsible agency explicitly finds the EIR inadequate for its purposes and takes certain specified actions, the responsible agency may not prepare its own separate CEQA analysis. See CEQA Guidelines § 15096(e).

Second and related, the lead agency must prepare a single, comprehensive EIR for a given project, even a complex or multi-faceted project. The term “project” is broadly defined as “an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and . . . that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies.” PRC § 21065 (emphasis added). The regulations clarify that the term “project” means “the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.” CEQA Guidelines § 15378(a) (emphasis added). Thus, a “project” under CEQA “refers to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies.” *Id.* § 15378(c) (emphasis added). As the courts have affirmed, “[t]he term ‘activity’ plays an important role in the definition of ‘project’ – a role reflected in the statement that “‘project’ refers to the underlying activity which may be subject to approval”” and not the approval of that activity.” *POET, LLC v. State Air Res. Bd.*, 12 Cal. App. 5th 52, 73 (2017) (quoting *California Unions for Reliable Energy v. Mojave Desert Air Quality Mgmt. Dist.*, 178 Cal. App. 4th 1225, 1238

(2009)). In short, “[t]he term ‘project’ does not mean each separate governmental approval.” CEQA Guidelines § 15378(c).

Consistent with this legislative mandate, the courts have broadly interpreted the term “project” to ensure that “the requirements of CEQA ‘cannot be avoided by chopping up proposed projects into bite-size pieces’ which, when taken individually, may have no significant adverse effect on the environment.” Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora, 155 Cal. App. 4th 1214, 1223 (2007) (quoting Plan for Arcadia, Inc. v. City Council of Arcadia, 42 Cal. App. 3d 712, 726 (1974) and others). A broad definition of what constitutes a “project” is necessary, the courts have explained, to avoid “the fallacy of division . . . that is, overlooking its cumulative impact by separately focusing on isolated parts of the whole.” McQueen v. Bd. of Directors, 202 Cal. App. 3d 1136, 1144 (1988).

Under this statutory scheme, “[t]he lead agency plays a pivotal role in defining the scope of environmental review” and ensuring that a project EIR complies with the law. Planning & Conservation League v. Dep’t of Water Res., 83 Cal. App. 4th 892, 904 (2000); PRC § 21165 (requiring that lead agency oversee preparation of EIR). Ultimately, the lead agency shoulders the burden of satisfying CEQA in all respects. In particular, “the lead agency is responsible for considering the effects of all activities

involved in a project and, if required by CEQA, preparing the draft and final EIR's and certifying the final EIR for a project." Riverwatch v. Olivenhain Mun. Water Dist., 170 Cal. App. 4th 1186, 1201 (2009) (emphasis added); PRC § 21002.1(d) (providing that "[t]he lead agency shall be responsible for considering the effects, both individual and collective, of all activities involved in a project"). Put differently, "CEQA mandates a lead agency to conduct a thorough review of the project in question even though additional review might later be undertaken by other agencies with jurisdiction over specific resources." Save San Francisco Bay Ass'n v. San Francisco Bay Conservation and Dev. Com., 10 Cal. App. 4th 908, 921 (1992) (citing Lexington Hills Ass'n v. State of California, 200 Cal. App. 3d 415, 433-35 (1988)).

As the Legislature recognized, this legal regime provides efficiency, certainty, and finality for all stakeholders, including the project proponent. All comments on a project's impacts by responsible agencies, the public, and the project proponent are funneled through the lead agency's environmental review process, and any subsequent judicial challenge by an interested party is directed solely at the resulting EIR. See PRC § 21167 (providing short statute of limitations for judicial challenge after lead agency certifies EIR and files notice of determination). Where a judicial challenge of a project EIR is not timely commenced, the EIR "shall be

conclusively presumed to comply with the provisions of this division for purposes of its use by responsible agencies,” unless a subsequent EIR is required. Id. § 21167.2 (emphasis added).⁷ Even when a judicial challenge is filed, “responsible agencies shall assume” that the EIR complies with CEQA and go forward with approvals or conditional approvals, although the project applicant proceeds at its own risk. Id. § 21167.3. As the Supreme Court has explained, this statutory presumption of validity fosters the state’s interest in finality for public agencies and certainty for project proponents. Laurel Heights Improvement Ass’n v. Regents of Univ. of Cal., 6 Cal. 4th 1112, 1130 (1993) (“Laurel Heights II”).

B. Substitute Lead Agencies for Updated EIRs

The Legislature recognized that projects sometimes do not go forward immediately after the lead agency certifies an EIR (and CEQA’s short period for judicial challenge has expired) – the very facts of this case. To address situations where the project proponent delays construction or implementation and thereafter new information, changed circumstances, or project alterations render the certified EIR inadequate in some respect, the Legislature included section 21166 in CEQA. That section provides that “a

⁷ For the same policy reason, if the lead agency determines that no EIR is required, that determination “shall be final and conclusive on all persons, including responsible agencies, unless [timely] challenged.” PRC § 21080.1(a).

subsequent or supplemental environmental impact report” will be required where:

- (a) Substantial changes are proposed in the project which will require major revisions of the environmental impact report.
- (b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report.
- (c) New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available.

PRC § 21166.

The CEQA statute itself does not further define the phrase “subsequent or substantial environmental impact report,” but the CEQA regulations elaborate on the question of when “major changes” require an updated EIR. See CEQA Guidelines § 15162(a). These implementing regulations expressly contemplate and address the situation where the original lead agency that prepared and certified the EIR no longer has any authority over the project. They provide:

Once a project has been approved, the lead agency’s role in project approval is completed, unless further discretionary approval on that project is required. Information appearing after an approval does not require reopening of that approval. If after the project is approved, any of the conditions described in [CEQA section 21166 and CEQA Guidelines section 15096(a)] occurs, a subsequent EIR or negative declaration shall only be prepared by the public agency which grants the next discretionary approval for the project, if any. In this situation no other responsible agency shall grant an approval for the

project until the subsequent EIR has been certified or subsequent negative declaration adopted.

CEQA Guidelines § 15096(c) (emphasis added). Thus, when the original lead agency has completed its CEQA obligations but an updated environmental review becomes necessary, one of the responsible agencies must step forward and become the new lead agency for purposes of the updated review.

Consistent with the “single lead agency” and “single EIR” concepts embedded in CEQA, this shift whereby one responsible agency becomes the substitute lead agency role is mandatory, not optional:

[W]here a Responsible Agency is called on to grant an approval for a project subject to CEQA for which another public agency was the appropriate Lead Agency, the Responsible Agency shall assume the role of the Lead Agency when . . . (2) The Lead Agency prepared environmental documents for the project but the following conditions occur:

- (A) A subsequent EIR is required pursuant to Section 15162,
- (B) The Lead Agency has granted a final approval for the project, and
- (C) The statute of limitations for challenging the Lead Agency’s action under CEQA has expired.

CEQA Guidelines § 15052(a)(2) (emphasis added). Thus, where the section 15052 conditions are satisfied, one of the responsible agencies is “required to step into the shoes of the lead agency” and “assume the duties of the lead agency.” City of Sacramento v. State Water Res. Control Bd., 2 Cal. App. 4th 960, 970 (1992). The regulations impose that legal obligation

on the agency that grants the next discretionary approval for the project.
CEQA Guidelines § 15052(c).

II. Factual Background

A. The 2010 EIR Prepared by the City of Huntington Beach

Poseidon proposes to construct a large regional seawater desalination facility on public tidelands and adjacent private property within the City of Huntington Beach. As proposed, the Project will withdraw approximately 107 million gallons of seawater each day from the coastal waters of Huntington Beach, killing all larvae and other marine life consumed through its open-ocean seawater intake systems. Using an energy-intensive high pressure “reverse osmosis” process that extracts salt by forcing seawater through a semipermeable membrane, the Project is designed to produce and distribute approximately 50 million gallons per day (mgd) of potable water for use by local customers of the Orange County Water District (“Water District”), the regional water wholesaler for the County. AR0006204. The Project will discharge nearly 60 mgd of concentrated toxic brine waste back into the near-shore ecosystem, causing additional environmental harms to marine life. Id. If constructed, the Project will nearly double the cost of water for local users as compared to other viable sources such as the State Water Project water.

AR0024391.028.⁸ As State Lands Commissioner Yee stated, “it is the most expensive type of water we could be producing.” AR001064.

As the local land use authority and delegated local permitting agency under the California Coastal Act, the City of Huntington Beach (“City”) originally assumed CEQA lead agency status to prepare an EIR for the Project. AR0002607. The Final EIR, certified by the City in September 2010, evaluated environmental impacts associated with construction and operation of the desalination facility itself, as well as construction of the Project’s proposed water transmission lines and pumps that would convey the treated product water for direct, immediate use by local customers. See AR0000269. Although the pipeline distribution route had not yet been finalized, the 2010 EIR properly evaluated its impacts as an integral and necessary part of the Project, while also identifying and evaluating possible alternative pipelines routes to provide “a worst-case analysis” and “to ensure that all potential alignment segments are analyzed.” AR0000269. There was never any question that transmission of water produced by the desalination facility was an inextricable

⁸ A 2016 study conducted by the Municipal Water District of Orange County estimates that Poseidon’s desalination plant water will cost \$1,870 per acre-foot to produce and deliver, while the current most common source of water for the District (the Tier 1 MET treated water rate) costs \$998 per acre-foot. Id.

component of the Project and that the attendant environmental impacts were, therefore, a necessary part of the CEQA analysis. Id.

Based on this EIR, the City approved a coastal development permit for those portions of the Project within its jurisdiction. AR0018913.

Concerned parties appealed the City's permit to the California Coastal Commission ("Coastal Commission"), pursuant to the Coastal Act, and that appeal remains pending for final resolution by the Coastal Commission.⁹

The City takes the position that it has no further discretionary authority over the Project and thus no further CEQA obligations. AR0018913 ("The City does not currently have a pending project for Poseidon.").

Poseidon never built the Project as approved by the City in 2010 or obtained the requisite final approvals from at least four other public

⁹ The California Coastal Act is jointly implemented by local governments and the statewide Coastal Commission. Cities and counties develop local coastal programs which must be certified by the Coastal Commission as consistent with the Coastal Act requirements. PRC §§ 30500, 30512. After certification, cities and counties are responsible for issuing "coastal development permits" for projects within their jurisdiction, although the Coastal Commission retains original permitting jurisdiction over development on the state public tidelands. Id. §§ 30519, 30600, 30600.5, 30601. Interested parties may appeal a local coastal development permit to the Coastal Commission. Id. § 30603. If the Coastal Commission finds that the appeal presents a substantial issue under the Coastal Act, it will hear and decide the appeal de novo. See Cal. Code Regs., tit. 14 §§ 13114-13120. Here, because part of the Poseidon facility will be located within the City's local permitting jurisdiction and part will be located on the public tidelands, the Project requires two Coastal Act permits, both of which are now pending before the Coastal Commission.

agencies – the Coastal Commission, the Santa Ana Regional Water Quality Control Board (“Regional Water Board”), the Water District, and the Lands Commission. In the intervening years since 2010, critical regulatory developments, changed circumstances, and new information have required Project design changes and rendered the 2010 EIR inadequate to support the remaining discretionary agency approvals. There has never been any dispute, therefore, that an updated environmental analysis was required under CEQA section 21166 before the Project could proceed. See, e.g., AR0023629-34 (interagency agreement for updated CEQA review signed by three agencies and Poseidon).

B. Changed Circumstances and New Information Since 2010

Since 2010, changed circumstances and new information have significantly altered the planning landscape and compelled Poseidon to redesign the Huntington Beach Project in several substantial ways.

New Desalination Facility Regulations. First and foremost, the regulatory landscape for desalination facilities changed dramatically in 2015, driving various changes to the Project. In response to increasing environmental concern over the impact of desalination facilities on marine ecosystems, the State Water Quality Control Board (“State Water Board”) adopted an “Amendment to the Statewide Water Quality Control Plan for the Ocean Waters of California Addressing Desalination Facility Intakes,

Brine Discharges, and to Incorporate Other Nonsubstantive Changes” (hereinafter “Desalination Regulations”), implementing section 13142.5(b) of the Porter-Cologne Act. These regulations became effective on January 28, 2016. Cal. Code Regs., tit. 23, § 3009. They were designed to create a systematic approach for “controlling adverse effects of desalination facilities,” AR0017348, with the express purpose of “protect[ing] and maintain[ing] the highest reasonable [ocean] water quality possible for the use and enjoyment of the state.” AR0017347.

The Desalination Regulations manifestly changed how Regional Water Boards must now evaluate proposed desalination facilities. Most significantly, the regulations strongly discourage the use of open-ocean intake systems and, instead, establish a significant regulatory preference for subsurface intake systems. The State Water Board found that “[o]peration of surface water intakes can result in significant intake and mortality of all forms of marine life.” AR0017145. In contrast, subsurface intake systems extract ocean water through intake pipes that lie underground and collect seawater filtered through sand and sediment, thereby effectively avoiding marine life intake. AR0017058. In the Desalination Regulations, therefore, the State Board established subsurface intakes as “the preferred intake technology because they are the best method for minimizing intake and mortality of all forms of marine life.” AR0017063. In exercising their

permitting authority, Regional Water Boards must now require subsurface intake systems unless they are deemed infeasible. AR0017290. Moreover, even if subsurface intakes are deemed infeasible for the project as proposed by the applicant, the Regional Water Board must evaluate whether a combination of subsurface and open-ocean intakes is possible.

AR0017291.

To effectuate the policy of avoiding open-ocean intake systems for new facilities, the State Water Board explicitly directed that a facility's intake size should match but not exceed the local need for desalinated water. AR0017627-28 ("it is important to consider need for the water [] because the size of the facility is directly related to intake and mortality of marine life."). Regional Water Boards must, therefore, continue to evaluate the quantifiable need for any new desalination facility and consider whether subsurface intakes, if not feasible for the proposed facility, would nevertheless be feasible for a smaller capacity facility. AR0017289-91. At the same time, the regulations impose stringent "best available" requirements on the siting, design, technology and mitigation measures for new desalination facilities. AR0017287. Importantly, Regional Water Boards must analyze a range of feasible alternatives for the site, design, technology and mitigation measures that will "minimize intake and mortality of all forms of marine life." AR0017287.

Here, Poseidon's proposed open-ocean intake system will kill hundreds of millions of marine larvae, AR0006300, while subsurface intake would effectively eliminate those environmental harms. To comply with the new regulations, therefore, the Regional Water Board must reevaluate the feasibility of alternative intake systems and the need for a desalination facility of the proposed size at the proposed location in light of current water demand information.

Diminishing Water Demand and Need for the Project. Spurred by newfound water supplies and innovative conservation measures, the demand for potable water in Orange County has fallen even as water supply grows. Using the 2010 Regional Urban Water Management Plan, the Water District previously projected total water demand in 2035 at 525,079 acre-feet per year. AR00021796; AR0031539. By 2016, however, that water demand projection for 2035 had fallen to 433,233 acre-feet per year, a 17.5 percent reduction. AR0031541; AR0024391.

Indeed, new local sources of recycled water are becoming increasingly available for use, supplanting the need for a large desalination plant. In 2008, the Water District began its Groundwater Replenishment System, an approach whereby wastewater is recycled and treated to produce purified water for indirect potable reuse. AR0021852. This new practice provides a cost-effective solution to replenish water supply and is projected

to produce 130,00 acre-feet per year of potable water. AR0000297; AR0022388; AR0022551. A similar Los Angeles recycling program, the Carson Indirect Potable Reuse Project, will provide Orange County with up to 65,000 acre-feet of additional potable water per year – more than the proposed capacity of the entire Huntington Beach Desalination Project, which would produce 56,000 acre-feet per year. AR0020298; AR0024391.136.

Water users are simultaneously increasing their conservation practices, leading to an overall decrease in demand for potable water. While water demand was previously forecasted to increase during multi-year droughts, users have in fact achieved reductions on the order of 20 to 30 percent due to advancing practices in water conservation. AR0032717. Based on those projections, Water District staff now estimates water shortfalls through 2040 of only 6,300 acre-feet per year and has concluded that the Poseidon yield of 56,000 “would supply more water than needed in most ever year.” AR0024391.145; AR0032704. Certain retail water agencies within Orange County that are customers of the Water District, including Irvine Ranch Water District, have questioned the need for this desalination facility. AR0029891 (“water supply and system reliability can be achieved throughout the county through [separate] member agency planned projects,”). As the Orange County Water District has itself

confirmed, “there are many routes to [water] reliability” and the Poseidon Project is “not specifically necessary,” but merely one option among others. AR0026788.

Proposed Aquifer Injection Distribution System. In response to changing water demand and other circumstances, Poseidon is proposing new distribution plans for the Project’s desalinated water. While the 2010 EIR evaluated transmission pipelines and pumps for direct delivery to the existing Orange County water distribution system, Poseidon now proposes to inject the desalinated water into an underlying aquifer for storage and future use, requiring the construction of up to 26 new injection wells.

AR0020289. This plan is being considered by the Water District. In 2016, the Water District completed a 53-page report with cost estimates and potential layouts for the new distribution system, directed staff to begin the environmental analysis of the work, and executed an agreement with Poseidon for reimbursement of CEQA analysis costs. AR0030659-712; see also AR0020261.

This injection system poses serious environmental risks not previously considered or evaluated by the City. Water from the Project will contain concentrations of the chemical boron and total dissolved solids that exceed current groundwater quality objectives. AR0029888. It also will reduce the ability to recharge the aquifer basin naturally from storm water

flows during wet years and will potentially place additional treatment burdens on agencies, like the Irvine Ranch Water District, that draw water from this aquifer. AR0029888-90. The 2010 EIR prepared by the City of Huntington Beach did not address any of these impacts because direct injection was not yet contemplated.

C. The 2017 CEQA Review Process

With the adoption of the new Desalination Regulations in 2015, the Santa Ana Regional Water Board notified Poseidon that its discharge permits previously granted in 2012 were no longer valid for the Project. The Regional Water Board requested that Poseidon submit additional information necessary to evaluate the Project's consistency with the new Desalination Regulations. AR0018964-67. In response to this new regulatory landscape and additional project design changes, Poseidon submitted a flurry of applications for new agency approvals, including one to the Lands Commission to add wedgewire screens to the facility's intake system and a brine diffuser on the outfall pipes. AR0009929.¹⁰ Even with

¹⁰ The addition of wedgewire screens will do little, however, to mitigate the marine life impacts from the proposed open ocean intake system. The Lands Commission has required the installation of screens with a one-millimeter aperture on the intake pipe to "mitigate" marine life impacts, AR0006159, but studies commissioned by the State Water Board have concluded that screens with one-millimeter openings only reduce marine life entrainment by less than one percent. AR0013519.006.

these technology changes, the Project's open-ocean intake system will kill approximately 74 million fish larvae each year, see AR0008072, and the high-velocity jets of saline brine from the discharge pipes will kill another 543 million larvae every year. See AR0006301.

Poseidon acknowledged that, to obtain these new approvals, updated CEQA review was required and a new lead agency would need to be identified. In its application to modify and extend the Lands Commission tidelands lease, Poseidon explained that the Lands Commission could either (1) remain a "responsible agency" under CEQA and rely on an updated environmental analysis and review to be prepared by the Coastal Commission, which could serve as the new CEQA lead agency in lieu of the City or, alternatively, (2) "choose to act as the Lead Agency under CEQA" and prepare the necessary updated EIR in accordance with CEQA Guidelines sections 15162 through 15164, a document upon which other agencies would then rely. AR0020322-23.

Ultimately, the Lands Commission, the Coastal Commission, and the Regional Water Board formulated an agreement to coordinate and conduct the necessary updated CEQA review. Tellingly, early drafts of that agreement designated the Lands Commission to "serve as Lead Agency to prepare and approve any additional environmental analysis required by the California Environmental Quality Act" and to consider the comments of the

other two agencies sufficiently to allow these responsible agencies “to rely on the State Lands Commission’s certified CEQA analysis.” AR0023557. As originally drafted, the agreement provided that the Regional Water Board would issue its tentative permit order after “the State Lands Commission’s approval of any CEQA analysis and certification required in connection with the Poseidon Project.” AR0023558. Consistent with this sequencing and allocation of roles, the draft agreement contemplated that “[a]s a CEQA Responsible Agency, the Regional Board shall consult, as necessary with the State Lands Commission regarding the areas of the CEQA analysis it may require” and that the Regional Water Board “agrees to rely on the 2010 [City EIR] in combination with CEQA analysis prepared and approved by the State Lands Commission.” *Id.* In the final agreement, to which Poseidon was also a signatory, the “lead agency” language was deleted, but the remaining language makes it clear that the Regional Water Board and the Coastal Commission intend to rely on the certified EIR prepared by the Lands Commission to comply with their own “responsible party” CEQA obligations. *See* AR0023630.¹¹

¹¹ The Regional Board’s most recent public presentation confirms that it intends to rely, in considering a permit for the proposed Project, on the 2010 EIR prepared by the City and the 2017 Supplemental EIR prepared by the Lands Commission. *See* https://www.waterboards.ca.gov/santaana/water_issues/programs/Wastewater/Poseidon/2019/Item_11.pdf.

Consistent with this “Interagency Permit Sequencing Framework Agreement,” the Lands Commission undertook the first – and so far only – updated CEQA review for the Project. But instead of stepping in as the substitute lead agency under CEQA, the Lands Commission claimed that it was acting only in the capacity of a “responsible agency” and that it was evaluating only a so-called “Lease Modification Project,” “not the larger desalination project approved in 2010.” AR0005513; see also AR0006156; AR0006174. The final updated EIR was unequivocal in its limited scope: “This Supplemental EIR addresses only the Lease Modification Project (i.e., the proposed modifications to the approved 2010 Project that lie offshore within the [tidelands lease] footprint) which includes operational change and two physical modifications” necessary to address the new Desalination Regulations. AR0006200 (emphasis added). In response to public comments about the impropriety of this limited scope, the Lands Commission explained that it “stands by its determination [in the draft EIR] that the proper project scope . . . encompasses those activities proposed in Poseidon’s application to the Commission, specifically, the proposed installation on subsea pipelines . . . of wedgewire screens and a multiport diffuser.” AR0005536. As the Lands Commission Executive Officer subsequently stated at the public hearing to adopt the lease amendment, “we approached the CEQA review, and our analysis and processing of the

application within that narrow lens of the minor modification to the existing property rights, and the existing authorization that the [Lands] Commission had already granted in 2010.” AR0009934.

There is thus no dispute in the record that the “Lease Modification Project” evaluated in the Lands Commission’s 2017 EIR differed dramatically in scope from the full Seawater Desalination Project evaluated in the City’s 2010 EIR. The 2010 EIR defined the Seawater Desalination Project as “consist[ing] of a seawater intake system, pretreatment facilities, a seawater desalination facility utilizing reverse osmosis (RO) technology, post-treatment facilities, product water storage, on-and off-site landscaping, chemical storage, on-and off-site booster pump stations, and 48-to 54-inch diameter product water transmission pipelines.” AR0000219. The 2010 EIR evaluated the impacts from each component of the proposed Project, as well as alternatives and mitigation measures to avoid or minimize those impacts. By contrast, the 2017 updated EIR narrowly evaluated only impacts associated with three proposed design/operational changes on the public tidelands. AR0006200; AR0005536.

In carving off one small part of the whole Project for updated environmental review, the Lands Commission intentionally deferred significant portions of the necessary CEQA analysis to other agencies. The Commission explained that evaluation of the factors forth in the new

Desalination Regulations – e.g., size, location, technology, and mitigation measures that would reduce or avoid marine impacts – was not part of the 2017 EIR because consideration of these factors is “a responsibility . . . under the sole authority of the Water Board, not the State Lands Commission.” AR0009932; see also AR0005549 (deferring evaluation of these factors to Regional Water Board and noting that additional CEQA review may be required after the Board evaluates those factors); AR0005553 (stating that “[c]ommon sense dictates that [the Commission’s] limited discretionary action” does not require review of “the entire HB Desalination Plant Project approved in 2010”); AR0005546 (explaining that Regional Water Board is responsible for facility’s discharge permit and will determine “whether Poseidon’s proposal for the entire Huntington Beach seawater desalination facility (not simply the offshore modifications to the Commission’s 2010 lease) avoids or minimizes impacts to [marine protected areas] and all marine resources through best available siting, design, and technology”).

For the same reason, the 2017 EIR explicitly deferred consideration of various alternatives – including alternative sites, intake systems, size, discharge location, and potable water distribution system – that could avoid or reduce the Project’s adverse impacts. See, e.g., AR0005544 (noting that “it would not be prudent to begin an extensive environmental analysis

related to” the Water District’s distribution system before Poseidon has obtained Regional Water Board approvals); AR0005572 (deferring consideration of certain alternatives to the Regional Water Board and Water District); AR0006412 (eliminating from review several reasonable alternatives because they were “outside the scope of this Supplemental EIR”). In short, the truncated 2017 EIR intentionally omitted and deferred much of the alternatives analysis that courts have recognized as “the core of the EIR.” In re Bay-Delta etc., 43 Cal. 4th 1143, 1162 (2008).

Other agencies with discretionary authority over the Project warned against such improper segmentation and deferral of the updated impacts and alternatives analysis. For example, the Coastal Commission objected to the Lands Commission’s approach, explaining that CEQA environmental “review of solely the [Lease Modification Project] means that [the 2017 EIR] will be of limited use for the Coastal Commission to rely on for evaluating conformity of the Poseidon Project to relevant provisions of the Coastal Act and the City of Huntington Beach Local Coastal Program.” AR0029905 (emphasis added). The deficient EIR meant that the Coastal Commission’s evaluation of the Project would need to address “proposed project changes and changed circumstances that have occurred since 2010, the majority of which [were] not addressed in the [2017 EIR].” Id.

Other commenters similarly urged the Lands Commission to assume CEQA lead agency status and undertake a comprehensive updated review for the whole Project. See, e.g., AR0029864 (City of Huntington Beach); AR0029870-71 (Irvine Ranch Water District). The Irvine Ranch Water District, the largest retail water agency in Orange County, asked the Lands Commission to “defer consideration of the lease amendment until after a comprehensive environmental review of the changed project has been completed.” AR0032782. The California Fish and Game Commission requested that “at a minimum the supplemental CEQA review . . . fully evaluate how the proposed open intake as modified would adversely impact productivity and connectivity of the affected [Marine Protected Area] system.” AR0031966.

Ignoring these comments, the Lands Commission certified a narrow final “Supplemental EIR,” deferring much of the environmental impact and alternatives analysis to the Regional Water Board, where, the Commission claimed, it would be “more appropriately addressed.” AR001077. Relying on this partial CEQA update, the Lands Commission approved a lease amendment on October 19, 2017 that (1) authorized changes to those parts of the Project’s intake/discharge system located on the public tidelands and (2) granted an eight-year extension of Poseidon’s October 29, 2018

construction completion deadline, the breach of which would otherwise have led to expiration of the lease. AR0010186.004-005; AR009125.

Appellants filed a Verified Petition for Writ of Mandate within 30 days of the October 19, 2017 decision, alleging that the Lands Commission unlawfully segmented the updated CEQA review and violated its public trust obligations.¹² CT 0001-0022. The superior court denied the writ petition. CT 1120-1137.

ISSUES PRESENTED

This appeal presents two closely interrelated questions of law:

(1) Where new information or changed circumstances undisputedly require the preparation of “a subsequent or supplemental environmental impact report” under California Public Resources Code section 21166, but the agency that prepared the original EIR no longer has any discretionary authority over a project, must the next public agency that makes a discretionary action on the project serve as the substitute CEQA “lead agency” and prepare a single updated EIR that addresses all changes and new information, including reasonable alternatives and mitigation?

(2) Where a public agency is undisputedly required to prepare a subsequent or supplemental EIR, may that agency restrict the scope of the

¹² On appeal, Appellants pursue only their CEQA claim.

updated EIR to only those environmental impacts and project mitigation measures or alternatives under its jurisdiction, leaving other agencies that have later discretionary authority over the same project to prepare their own CEQA analyses for those pieces of the project within their respective jurisdictions?

STANDARD OF REVIEW

Coastkeeper's CEQA claims present pure questions of law which this Court reviews de novo. Coastkeeper contends that the Lands Commission failed to proceed in a manner required by law when it (1) refused to assume lead agency status as required by the CEQA regulations, and (2) as a direct consequence of that procedural violation, improperly segmented and piecemealed its CEQA analysis, redefining the scope of the Project and explicitly omitting the evaluation of certain significant Project impacts and alternatives from its Supplemental EIR.

The California Supreme Court recently explained: “[A]n agency may abuse its discretion under CEQA either by failing to proceed in the manner CEQA provides or by reaching factual conclusions unsupported by substantial evidence. . . . Judicial review of these two types of error differs significantly.” Banning Ranch, 2 Cal. 5th at 935 (quoting Citizens of Goleta Valley v. Board of Supervisors, 52 Cal. 3d 553, 564 (1990)). A reviewing court, therefore, “must adjust its scrutiny to the nature of the

alleged defect.” Vineyard Area Citizens, 40 Cal. 4th at 435. Under either standard, however, the appellate court reviews the agency’s action, not the trial court’s decision. Id. at 428.

For the procedural violations alleged by Coastkeeper in this case, this Court “determine[s] de novo whether the agency has employed the correct procedures, ‘scrupulously enforc[ing] all legislatively mandated CEQA requirements.’” Banning Ranch, 2 Cal. 5th at 935 (quoting Citizens of Goleta, 52 Cal. 3d at 564); Citizens Opposing a Dangerous Env’t v. County of Kern, 228 Cal. App. 4th 360, 382 (2014). “For example, where an agency failed to require an applicant to provide certain information mandated by CEQA and to include that information in its environmental analysis, [courts hold that] the agency ‘failed to proceed in the manner prescribed by CEQA.’” Vineyard Area Citizens, 40 Cal. 4th at 435 (quoting Sierra Club v. State Bd. of Forestry, 7 Cal. 4th 1215, 1236 (1990)). Very recently, the California Supreme Court affirmed that, for legal questions such as whether an agency omitted the required discussion of alternatives, judicial review is de novo and “courts will invalidate an EIR that fails to meet [the legal requirements].” Sierra Club v. County of Fresno, 6 Cal. 5th 502, 512 (2018) (citing Laurel Heights I, 47 Cal. 3d at 403-05). Moreover, Sierra Club confirmed that questions concerning the

adequacy of the EIR's analysis are generally subject to independent de novo review. Id. at 516.

Here, Coastkeeper's threshold claim that the Lands Commission improperly refused to assume substitute lead agency status presents a pure question of law subject to de novo review. See Citizens for the Restoration of L Street v. City of Fresno, 229 Cal. App. 4th 340, 354 (2014) (holding that question of whether agency had authority to act as lead agency presents question of law). Likewise, Coastkeeper's central claim that the Lands Commission unlawfully segmented the updated environmental analysis and improperly deferred necessary pieces of that analysis to other agencies is a legal question reviewed de novo. See Tuolumne County, 155 Cal. App. 4th at 1224 (holding that proper scope of activity addressed in EIR presents question of law); Banning Ranch, 2 Cal. 5th at 935-36.

Unfortunately, the trial court ignored Coastkeeper's actual legal claims and instead improperly applied the quite different "substantial evidence" test to a question not raised by this case – to wit, whether the original EIR remained relevant. CT 1125. But no party has ever disputed that most of the certified 2010 EIR remains relevant; the central issue before the trial court was whether the Lands Commission, as the next agency to make a discretionary decision on Poseidon's modified Project after the City's involvement as lead agency was completed, should have

prepared an updated EIR evaluation that covered all design changes, new information, and changed circumstances for the Project.¹³ The superior court failed to address that core legal question, which is the sole subject of this appeal.

ARGUMENT

I. The Lands Commission Erred by Refusing to Assume and Perform Its Lead Agency Obligations.

The core legal error at the center of this case is the Lands Commission’s unlawful decision to segment the updated CEQA analysis for Poseidon’s proposed seawater desalination Project. That legal error occurred because the Lands Commission misapprehended its required role

¹³ Contrary to Respondent’s arguments and the trial court’s ruling, this case does not question the propriety of “[a]n agency’s determination to proceed under CEQA’s additional environmental review procedures after an initial EIR has been prepared and certified for a project.” CT1124. All responsible agencies and Poseidon itself agreed that additional environmental review was required under CEQA section 21166. The only dispute here is over the scope of that review – a dispute that presents a purely legal question. Thus, the trial court erred in invoking the “substantial evidence” test under Friends of the College of San Mateo Gardens v. San Mateo Community College Dist., 1 Cal. 5th 937, 952-53 (2016), a case which addressed the issue of whether the lead agency properly determined that its proposed action was a modification of a prior project rather than a whole new project. Here, Coastkeeper does not contend that the “Lease Modification Project” is a “new” project subject to new CEQA review, as Respondents argued; to the contrary, Coastkeeper contends that there is only one seawater desalination Project at issue here – the same one at issue in 2010 – and that any updated CEQA analysis must cover all aspects of that one Project.

under CEQA. Long after the City of Huntington Beach, as the original lead agency, completed all of its CEQA obligations, Poseidon proposed changes to the Project that indisputably required a “subsequent or supplemental” EIR under Public Resources Code 21166 before any other public agency could grant new discretionary approvals. The Lands Commission voluntarily stepped forward to make the next discretionary decision and, in doing so, to undertake the necessary CEQA update. In completing this work, however, the Lands Commission declined to become the substitute CEQA lead agency, claiming instead that it was acting only as a responsible agency and thus only required to prepare a partial EIR for those impacts and alternatives under its direct jurisdiction. The Lands Commission’s refusal to step into the substitute CEQA lead agency role constituted a threshold legal error that precipitated the ultimate legal defect – unlawful segmentation of the updated CEQA analysis.

CEQA and its implementing regulations make clear that when the original lead agency has completed its statutory duties, but project changes or new information require additional environmental review, the next public agency to take discretionary action on the project shall step into the role of the “lead agency.” CEQA Guidelines §§ 15052(a)(2), 15162(c). Consistent with CEQA’s basic framework discussed above, the lead agency role requires the preparation of a single updated EIR that adequately

addresses all necessary facets of the project as whole; other “responsible agencies” thereafter must rely on the certified updated EIR in making their own approval decisions. See CEQA Guidelines § 15162(c).

Here, the City completed its role as the original CEQA lead agency in 2010, when it certified a final EIR for the Project, and it has no other discretionary decision to make regarding the Project. AR0018913.

Pursuant to the Interagency Permit Sequencing Framework Agreement executed by three agencies, the Lands Commission volunteered to be the next public agency, among several, to make a discretionary decision for the Project.¹⁴ Because changes and new information required an updated EIR, the Lands Commission agreed to “prepare any additional environmental analysis required by CEQA in connection with its consideration of the Poseidon Project” and to undertake sufficient environmental review necessary for the Coastal Commission and the Regional Water Board “to rely on the State Lands Commission’s certified CEQA analysis.”

AR0023629. For its part, the Regional Water Board agreed to act solely as

¹⁴ The Lands Commission voluntarily made the choice to go first; nothing in CEQA required it to do so. Given the Commission’s later deferral of significant pieces of the environmental review to the Regional Water Board process, prudence may well have dictated that the Regional Water Board step forward to make the first discretionary decision and assume the substitute lead agency role. But having elected to go first, the Lands Commission was required to comply with the regulations and become the new lead agency for the whole Project.

a CEQA responsible agency, consulting with the Lands Commission regarding the intake and discharge technology modifications, and to rely on “the CEQA analysis prepared and approved by the State Lands Commission . . . for the purpose of complying with CEQA.” AR0023630. Consistent with this framework, the Lands Commission then followed all of the normal steps for a CEQA lead agency – issuing a Notice of Preparation for the EIR and a Notice of Public Scoping Meeting; holding a public scoping meeting; issuing a Notice of Availability for the draft EIR; noticing and holding of another public meeting; accepting public and agency comments; and preparing and certifying a final EIR that included detailed responses to comments. See AR0005523.

Despite its first actor role in the updated CEQA process, the Lands Commission ultimately certified a truncated “Final Supplemental Environmental Impact Report” that evaluated only a “Lease Modification Project” – not the whole seawater desalination Project evaluated in the 2010 EIR. AR0005513 (“The Commission’s only consideration is the proposed modifications to the approved lease, not the larger desalination plant project approved in 2010”); AR0005536 (stating that scope of EIR was limited to impacts from proposed wedgewire screens and multiport diffuser changes on the public tidelands). The Commission justified the narrow scope of its CEQA update on the grounds that (1) the City was and

remains the lead agency for the whole Project; (2) the Lands Commission previously granted a “vested right” to the tidelands lease and thus any decision on the proposed modifications “would not terminate Poseidon’s lease”;¹⁵ (3) the Lands Commission’s discretionary authority is limited to Poseidon’s request for “minor modifications” to the tidelands lease; and (4) for all of these reasons, the Lands Commission remains merely a CEQA “responsible agency.” See AR0005522; AR0005534-42; AR0005552-53.

None of these factors, however, grants the Lands Commission license to ignore CEQA’s mandatory command that the next public agency

¹⁵ Peppered throughout its responses to public comments in the final EIR, the Lands Commissions erroneously suggested that its prior issuance of the tidelands lease for the Project in 2010 created a “vested right” to construct the Project and thus somehow tied the Commission’s hands as a CEQA matter. This reasoning is deeply flawed. While the tidelands lease issued in 2010 did grant development rights to Poseidon for the Project evaluated in the original EIR, it did not create “vested rights” to build the modified Project; indeed, that is the very reason that Poseidon applied for a lease modification. Moreover, any development rights under the 2010 tidelands lease had to be exercised by October 29, 2018. AR0000027 (condition in October 29, 2010 tidelands lease providing that Poseidon “shall complete construction of the desalination facility within eight years”); AR0000017 (providing that failure to meet timeline or obtain government approvals constitutes “immediate” breach and default of lease). In its 2017 lease amendment for the modified Project, the Lands Commission also granted an eight-year discretionary extension of this deadline. AR0009125. Both the physical modifications to the original Project and the eight-year lease extension were CEQA-triggering discretionary approvals for which Poseidon held no vested rights. Once CEQA was triggered, the Lands Commission was legally obligated to evaluate new information and changed circumstances for the entire Project, regardless of its discretionary approval jurisdiction.

to make a discretionary decision “shall assume the role of the Lead Agency” when (i) additional CEQA review is necessary, (ii) the original lead agency has issued its final approval, and (iii) the statute of limitations for the original EIR has expired. CEQA Guidelines § 15052(a) (emphasis added). Because all three of these conditions are satisfied here, the Lands Commission was required as a matter of law to assume lead agency status when it elected to take the next discretionary action. Id. at Discussion (explaining that if the section 15052(a) criteria are met, “then the Responsible Agency would be required to assume the role of the Lead Agency”).¹⁶

¹⁶ There is no dispute that the first condition listed in section 15052(a) – “[a] subsequent EIR is required pursuant to Section 15162” – is satisfied here. CEQA section 21166 identifies those circumstances that trigger the requirement for a “subsequent or supplemental” EIR. PRC § 21166. Section 15162 of the CEQA regulations implements that statutory section by elaborating on the three conditions (project changes, changed circumstances, and new information) that trigger a subsequent EIR. CEQA Guidelines § 15162(a). When any of these conditions require a subsequent EIR – as here – the Guidelines allow the agency to prepare a either a slightly streamlined “supplemental” EIR, in lieu of a “subsequent” EIR, if it determines that more minor additions will make the original EIR adequate. Id. § 15163(a). Like a subsequent EIR, however, a supplemental EIR undergoes the normal CEQA public review process and must contain all information necessary to make the prior EIR adequate for the project as revised. Id. § 15163(b)-(e). An agency’s election to prepare a supplemental rather than a subsequent EIR, once the subsequent EIR requirement is triggered, does not abrogate its obligation to assume lead agency status for the whole project under section 15052(a). The substitute lead agency obligation applies whenever a subsequent EIR is required, and a subsequent EIR is always required before an agency elects to prepare a

The mandatory nature of the Lands Commission’s legal obligation under section 15052(a) to step up and become the substitute lead agency is affirmed by CEQA Guideline section 15162(c), which echoes CEQA’s guiding principle that a single agency must prepare a single EIR. Section 15162(c) provides that where the conditions for a subsequent EIR exist but the original lead agency’s role in project approval is completed, “a subsequent EIR or negative declaration shall only be prepared by the public agency which grants the next discretionary approval for the project, if any.” CEQA Guidelines § 15162(c) (emphasis added). The regulation confirms that, under these circumstances, there is only a single updated CEQA document prepared for use by all agencies: “In this situation no other responsible agency shall grant an approval for the project until the subsequent EIR has been certified or subsequent negative declaration adopted.” *Id.* Indeed, this is precisely the sequence envisioned by the Interagency Permit Sequencing Framework Agreement, which provided that the Lands Commission would act first, preparing an updated CEQA

more limited supplemental EIR, as the Lands Commission did here. Thus, whether the next agency taking discretionary action labels its CEQA document a subsequent or supplemental EIR, it must assume lead agency status under section 15052(a) and complete a single, legally adequate analysis for the whole project.

analysis on which other public agencies would then rely in making their own discretionary decisions. AR0023629-30

The Lands Commission’s legal error in failing to step forward as the next CEQA lead agency would have been of little practical consequence had its “Supplemental EIR” updated the impacts and alternatives for the entire seawater desalination Project.¹⁷ But the Commission hid behind the “responsible agency” label to avoid the preparation of a comprehensive EIR update for the seawater desalination Project, opting instead to limit its CEQA review to something it called the “Lease Modification Project.” This approach violates CEQA’s basic tenet that “[t]he term ‘project’ does not mean each separate governmental approval” but instead means “the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies.” CEQA Guidelines § 15378(c); Save Tara v. City of W. Hollywood, 45 Cal. 4th 116, 129, n.8

¹⁷ As the courts have repeatedly held, it is the content of the EIR that matters for any judicial inquiry, not the “semantic label accorded to the EIR” or the drafting agency. E.g., Friends of Mammoth v. Town of Mammoth Lakes Redevelop. Agency, 82 Cal. App. 4th 511, 533 (2000) (citing Al Larson Boat Shop, Inc. v. Bd. of Harbor Commissioners, 18 Cal. App. 4th 729, 741-42 (1993)). Thus, “the appropriate judicial approach is to look to the substance of the EIR, not its nominal title.” City of Irvine v. Cty. of Orange, 238 Cal. App. 4th 526, 540 (2015). Whatever labels the Lands Commission chose for itself and its document are of no legal consequence here; the relevant question for the Court is whether the EIR unlawfully piecemealed the CEQA review.

(2008); Citizens Assn. for Sensible Dev. of Bishop Area v. Cty. of Inyo, 172 Cal. App. 3d 151, 165 (1985).

The Lands Commission’s threshold legal error thus constituted a prejudicial abuse of discretion, not harmless error. See Banning Ranch, 2 Cal. 5th at 942 (noting that error is prejudicial when it substantially impairs an EIR’s informational function); Sierra Club, 6 Cal. 5th at 515 (affirming that when an agency fails to proceed as CEQA requires, the error is prejudicial and the harmless error analysis is inapplicable). Its practical effect is that a single project may well be the subject of three or four different updated EIRs – by the Lands Commission, the Regional Water Board, the Coastal Commission, and the Water District – and the subject of multiple CEQA challenges in the courts. That result is exactly what the Legislature intended to avoid in crafting the mandatory CEQA “lead agency” concept.

II. The Lands Commission Erred by Unlawfully Segmenting Its Environmental Review.

A. CEQA Flatly Prohibits Piecemealing of Project EIRs.

In cleaving off the “Lease Modification Project” as a separate, discrete CEQA activity subject to a narrowly-drawn EIR, the Lands Commission acted contrary to decades of case law interpreting the statute and regulations. More than 40 years ago, the California Supreme Court

described “the mandate of CEQA that environmental considerations do not become submerged by chopping a large project into many little ones – each with a minimal potential impact on the environment – which cumulatively may have disastrous consequences.” Bozung v. Local Agency Formation Comm., 13 Cal. 3d 263, 283-84 (1975). It is now well-established in case law that “CEQA forbids ‘piecemeal’ review of the significant environmental impacts of a project” – a prohibition derived from CEQA section 21002.1(d)’s admonition that an EIR must consider both the individual and collective effects of all activities connected to a project. Berkeley Keep Jets Over the Bay Comm. v. Bd. of Port Comm’rs, 91 Cal. App. 4th 1344, 1358 (2001).¹⁸

¹⁸ Since Bozung, the lower courts have uniformly affirmed that “[a] public agency is not permitted to subdivide a single project into smaller individual sub-projects in order to avoid the responsibility of considering the environmental impact of the project as a whole.” Orinda Ass’n v. Bd. of Supervisors, 182 Cal. App. 3d 1145, 1171 (1986); see also, e.g., Nelson v. Cty. of Kern, 190 Cal. App. 4th 252, 272 (2010) (EIR should have covered both mining operations and reclamation plan); Tuolumne County, 155 Cal. App. 4th 1214, 1231 (2007) (home improvement center “cannot be completed and opened legally without the completion of [a] road realignment”); Ass’n for a Cleaner Env’t v. Yosemite Cmty. Coll. Dist., 116 Cal. App. 4th 629, 639 (2004) (activities are “all part of a single, coordinated endeavor”); San Joaquin Raptor/Wildlife Rescue Center v. Cty. of Stanislaus, 27 Cal. App. 4th 713, 732 (1994) (sewer expansion which was a “crucial element” of residential development); Christward Ministry v. Superior Court, 184 Cal. App. 3d 180, 195 (1986) (“City impermissibly ‘chopped up’ the project into at least three separate projects . . . This is exactly the type of piecemeal environmental review prohibited by CEQA.”); Citizens Ass’n for Sensible Dev. of Bishop Area v. Cty. of Inyo,

The California Supreme Court recently reiterated that the agency drafting an EIR cannot defer parts of the requisite environmental impacts and alternatives analysis to other agencies with discretion over those parts of the project. Banning Ranch, 2 Cal. 5th at 941. There, the City of Newport Beach prepared an EIR for a development proposal on a privately-owned ranch that contained important wildlife habitat within the coastal zone. Because Newport Beach does not have a certified local coastal program, the developer needed to obtain the requisite coastal development permit from the Coastal Commission, separate from any city approvals. Id. at 925, 927. As part of an earlier consent decree concerning other activity on the property, the Coastal Commission, the city, and the developer agreed that the Commission would undertake a separate analysis of whether the

172 Cal. App. 3d 151, 167 (1985) (separate negative declarations for rezoning and tentative map “is inconsistent with the mandate of CEQA that a large project shall not be divided into little ones because such division can improperly submerge the aggregate environmental considerations of the total project”); City of Antioch v. City Council, 187 Cal. App. 3d 1325, 1337-38 (1986) (because “the sole reason to construct the road and sewer project is to provide a catalyst for further development in the immediate area,” all impacts must be evaluated in the EIR); Topanga Beach Renters Assn. v. Dep’t of Gen. Servs., 58 Cal. App. 3d 188, 195-96 (1976) (“requirements of CEQA, ‘cannot be avoided by chopping up proposed projects into bite-size pieces which, individually considered, might be found to have no significant effect on the environment or to be only ministerial’); Plan for Arcadia, 42 Cal. App. 3d at 726 (shopping center, parking lot, and adjacent road widening “should be regarded as a single project”).

property contained “environmentally sensitive habitat areas” (“ESHA”) as defined and protected by the Coastal Act in a future proceeding. Id. at 928. During the city’s CEQA process, the Commission provided comments on the project’s potential impacts to ESHA. Id. at 930. The city, however, declined to evaluate ESHA in its EIR, disavowing any obligation to do so because ESHA findings were “within the discretion and authority of the Coastal Commission” as part of the later coastal development permitting process. Id. at 932-33. In the subsequent judicial challenge, the Court of Appeal sided with the city, finding that because ESHA determinations are made by the Commission, the evaluation of ESHA was not a subject for consideration in the EIR. Id. at 935.

The California Supreme Court reversed, reviewing the city’s procedural error de novo. The Court held that “the City did not make a good faith attempt to analyze project alternatives and mitigation measures in light of applicable Coastal Act requirements.” Banning Ranch, 2 Cal. 5th at 941. To the contrary, the city “openly declared that it was omitting any consideration of potential ESHA from the EIR, and deferring that analysis to a subsequent permitting process.” Id. This omission was particularly problematic because “[e]valuation of project alternatives and mitigation is ‘[t]he core of an EIR.’” Id. at 937 (quoting Citizens of Goleta Valley, 52 Cal.3d at 564). In finding the EIR defective, the Court

concluded: “The City’s approach, if generally adopted, would permit lead agencies to perform truncated and siloed environmental review, leaving it to other responsible agencies to address related concerns seriatim.” *Id.* at 941.

The very same flaws infect the Lands Commission’s EIR here. In particular, the Commission expressly deferred the critical analysis of impacts and feasible alternatives related to Poseidon’s proposed open-ocean intake system and declined to consider reasonably foreseeable changes in the Project’s potable water delivery system. If this fragmented approach is allowed to stand, the result will be a mushrooming of separate environmental analyses by different agencies, each of which may result in separate judicial challenges.

B. The Lands Commission Unlawfully Deferred Required Analysis to the Regional Water Board.

Contrary to the trial court’s conclusion, the Lands Commission’s EIR explicitly and indisputably deferred an important piece of the environmental impacts review and alternatives analysis to the Regional Water Board, precisely as Newport Beach did in Banning Ranch.¹⁹ In its

¹⁹ The trial court’s Ruling erroneously states that “[t]he issue is not, whether the Commission engaged in improper piecemealing with regard to the previously studied Project, but instead, is whether one or more of the [CEQA section 21166 triggering] events has occurred.” CT 1131. Nobody disputed, however, that CEQA section 21166 was triggered; the core and

Supplemental EIR, the Lands Commission deflected responsibility for evaluating critical environmental impacts, issues, and alternatives for the proposed intake system – the very concerns that drove adoption of the Desalination Regulations and the need for Project modifications – with the dismissive statement that “the Santa Ana [Regional Water Board], not the Commission, is responsible for determining feasibility of subsurface intakes and compliance with Water Code section 13142.5, subdivision (b).” AR0005572 (emphasis added); see also AR0005549 (deferring evaluation and potential additional CEQA review); AR0005553 (claiming that Commission need not review “the entire HB Desalination Plant Project approved in 2010”); AR0005546 (explaining that Regional Water Board will determine whether the Project as a whole avoids or minimizes marine impacts).

At the public hearing on the Project, Lands Commission officials affirmed the agency’s justification for its truncated CEQA analysis. Executive Officer Lucchesi explained that “the Santa Ana Regional Water Quality Control Board, and the Coastal Commission, and other agencies still have discretionary approvals and permits to give to consider for this project to move forward, including compliance with the [Desalination

only legal issue in the case was whether the Lands Commission unlawfully piecemealed the resulting Supplemental EIR.

Regulations] under the Ocean Plan, which is a responsibility, and under the sole authority of the Water Board, not the State Lands Commission.” AR0009934; see also AR0010155 (explaining deferment of analysis on grounds that authority under the Desalination Regulations rests with the Regional Water Board). Lands Commissioner Ortega likewise stated that many environmental review issues raised at the hearing were “more appropriately addressed at the regional board, and not in the context of the decision” before the Commission, which was “really about the amendment to the lease.” AR0010177.

As the Supreme Court held in Banning Ranch, this “fragmented presentation” of project impacts and alternatives does not comply with CEQA, which requires “a good faith effort to analyze project alternatives and mitigation measures in light of applicable [Desalination Regulation] requirements.” 2 Cal. 5th at 941. In that case, Newport Beach “did provide a detailed biological analysis of project impacts,” but the Court found that “however technically accurate the City’s analysis might otherwise be, it fell short by failing to account for the Coastal Act’s ESHA protections.” Id. Analogously here, the limited marine effects analysis included in the 2017 EIR did not and could not replace the CEQA requirement to evaluate impacts and feasible alternatives to comply with the new Desalination

Regulations, which are targeted directly at eliminating or reducing the consequences of open-ocean intake.

Specifically, the new regulations strongly discourage open-ocean intake systems of the kind proposed here. AR0017063; AR0017290. They implement this policy preference by requiring a comprehensive evaluation of a proposed facility's site, design, technology, and mitigation measures before any Regional Water Board may allow construction of such a system. See AR0017288-99 (Ocean Plan at M.2.b (7-factor test for best site), M.2.c (5-factor test for best design), M.2.d (10-factor test for best technology); M.2.e (at least 7-factor test for best mitigation measure). In addition, they require consideration of all four elements collectively to determine the best combination of feasible alternatives to minimize marine life intake and mortality. AR0017287 (Ocean Plan at M.2.a.(2)).

To implement this comprehensive evaluation, the regulations require analysis of a reasonable range of (1) alternative sites where subsurface wells are feasible, (2) alternative sizes to minimize marine life mortality and avoid impacts to sensitive habitats and species, and (3) alternative technologies, including a comparative analysis of different design capacities and combinations of surface and subsurface wells. For example, to satisfy the best available site requirement, the analysis must consider "sites that would likely support subsurface intakes," including for each site

an analysis of direct and indirect impacts on marine life, the feasibility of subsurface intakes, and the need for desalinated water. AR0017288-89 (Ocean Plan at M.2.b.(1)-(2)). Likewise, for the best available design and technology, the agency “shall require subsurface intakes” unless they are determined infeasible. AR0017289-91 (Ocean Plan at M.2.c.(2) and M.2.d.(1).(a)). Where feasibility becomes an issue, the required analysis must evaluate the need for desalinated water because “[a] design capacity in excess of the need for desalinated water . . . shall not be used by itself to declare subsurface intakes as not feasible.” AR0017290 (Ocean Plan at M.2.d.(1).(a)). Additionally, the alternatives evaluation must include a “reasonable range of alternative intake design capacities” because the Regional Water Board may find that a combination of subsurface and surface intakes are the best feasible alternative. AR0017291 (Ocean Plan at M.2.d.(1).(a).i).

The 2017 EIR did none of this analysis. Adhering to its improper re-labeling of the seawater desalination facility Project as a limited “Lease Modification Project,” the Lands Commission only evaluated alternatives for the proposed modifications, including (i) the required “no project” alternative, (ii) “rotating brush-cleaned, status steel wedgewire screens,” (iii) “copper-nickel alloy wedgewire screens,” and (iv) six-port diffuser. AR0006411. The EIR explicitly declined to consider or evaluate eight

other alternatives “because they were 1) outside the scope of this Supplemental EIR, or 2) for the same reasons as in [sic] 2010 FSEIR”; these unevaluated alternatives included alternative sites, alternative ownership and operation, alternative facility configuration, beach well intake alternatives, subsurface infiltration gallery intake alternatives, alternative discharge location, alternative discharge design, and reduced facility size alternatives. AR0006412. By way of justification, the EIR stated that the Regional Water Board “is currently conducting its separate analysis of these alternatives under the Desalination Regulations and the results of that analysis could result in a change to Poseidon’s site, design, technology, or mitigation measures.” Id.

With respect to such critical alternatives as beach intake wells, subsurface infiltration galleries, alternative location, and reduced facility size, the Supplemental EIR noted that the 2010 EIR found each of these alternatives technically or practically infeasible to satisfy Poseidon’s proposed design capacity of 50 mgd facility. But the 2017 EIR did not re-evaluate these alternatives in light of the dramatically changed regulatory requirements to analyze precisely those design capacity issues. AR0006415. Nor did it evaluate existing new water demand data that would be necessary to provide an informed feasibility analysis.

The EIR’s omission of these critical analyses violated CEQA. In enacting the statute, the Legislature declared that “it is the policy of the state that public agencies should not approve as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects” and that CEQA’s mandatory review and disclosure procedures “are intended to assist public agencies in systematically identifying both the significant effects of proposed projects and the feasible alternatives or feasible mitigation measures which will avoid or substantially lessen such significant effects.” PRC § 21002. An EIR must, therefore, evaluate potentially feasible alternatives to the project or its location that are capable of lessening significant effects, even if those alternatives would impede attainment of project objectives to some degree or be more costly. CEQA Guidelines § 15126.6. Moreover, the EIR “must include sufficient information about each alternative to allow meaningful evaluation, analysis, and comparison with the proposed project.” *Id.* § 15126.6(d). The Lands Commission’s EIR does not satisfy these minimal CEQA requirements.

C. The Lands Commission Unlawfully Refused to Consider Reasonably Foreseeable Project Changes.

The 2017 EIR also improperly excluded any consideration of a significant proposed change in the Project’s treated water distribution

system. When drafting the EIR, the Lands Commission was well aware that the Water District was actively considering a new distribution option which included the construction of new injection wells and connecting pipelines to the desalination facility. AR0020258 and AR0020289 (staff report describing this new distribution option being “considered”). Indeed, a lengthy 2016 Water District report estimated the costs and possible layout of this new distribution system, and the District directed its staff to begin environmental review for this alternative. AR0030659-712. The October 2016 Interagency Permit Sequencing Agreement likewise reflected the agencies’ shared knowledge of this significant project change, explaining that the Regional Water Board “may want additional environmental information and analysis on the Orange County Water District (OCWD) groundwater injection system plans (should they involve desalinated water from the Huntington Beach Desalination Facility in new injection wells).” AR0023629. As noted above, this new alternative has potentially significant adverse impacts that were not considered in the 2010 EIR.

AR0029888

CEQA requires that impacts from such a “reasonably foreseeable” significant change in the Project must be considered in the Supplemental EIR. Laurel Heights I, 47 Cal. 3d at 396. “While foreseeing the unforeseeable is not possible, an agency must use its best efforts to find out

and disclose all that it reasonably can.” Id. at 399 (citing CEQA Guidelines § 15144). The California Supreme Court has emphasized that “CEQA’s demand for meaningful information ‘is not satisfied by simply stating information will be provided in the future.’” Vineyard Area Citizens, at 431 (quoting Santa Clarita Organization for Planning the Environment v. County of Los Angeles, 106 Cal. App. 4th 715, 723 (2003)). Where uncertainty in long-term project planning exists, “an EIR may satisfy CEQA if it acknowledges the degree of uncertainty involved, discusses the reasonably foreseeable alternatives . . . and discloses the significant foreseeable environmental effects of each alternative, as well as mitigation measures to minimize each adverse impact.” Id. at 434.

Despite the emergence of a reasonably foreseeable – indeed, quite probable – new option for the distribution portion of the Project, the Supplemental EIR declined to address and disclose its impacts, deferring any evaluation to some future Water District process. AR0005544. But as the earlier 2010 EIR recognized, the water distribution system is an integral component of the Project which must be evaluated in the Project EIR. Without it, the desalination facility has no independent utility and could not proceed; that is, the desalination plant and the distribution system are interdependent components of a single project. Communities for a Better Env’t v. City of Richmond, 184 Cal. App. 4th 70, 99 (2010). The cases are

clear that “when one activity is an integral part of another activity, the combined activities are within the scope of the same CEQA project.” Tuolumne County, 155 Cal. App. 4th at 1229; see also San Joaquin Raptor, 27 Cal. App. 4th at 732 (sewer expansion was necessary element of development requiring consideration in EIR): Santiago Cty. Water Dist. v. Cty. of Orange, 118 Cal. App. 3d 818, 829 (1981) (construction of water delivery facilities necessary for project must be considered in EIR). The Lands Commission’s refusal to consider the impacts of a reasonably foreseeable option for the water distribution portion of the Project constituted unlawful project segmentation and a prejudicial abuse of discretion that will lead, inevitably, to multiple CEQA processes for a single project.

CONCLUSION


CEQA’s definition of a project as the “whole of an action” and not each separate government approval is “meant to ‘ensure that a project proponent does not file separate environmental reports for the same project to different agencies’” and “prevents a proponent or a public agency from avoiding CEQA requirements by dividing a project into smaller components.” Nelson, 190 Cal. App. 4th at 271 (citation omitted); California Unions for Reliable Energy, 178 Cal. App. 4th at 1238-39; Citizens For A Megaplex-Free Alameda v. City of Alameda, 149 Cal. App.

4th 91, 106 (2007). The Lands Commission's deliberate segmentation of the Supplemental EIR wholly undermines these central CEQA principles. Accordingly, the Court should reverse the judgment below and direct the trial court to enter a writ of mandate setting aside the unlawful 2017 Supplemental EIR.

Dated: October 22, 2019

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c) of the California Rules of Court, I certify that the text of this brief consists of 14,000 words, not including tables, signature blocks, and required certificates, as counted by Microsoft Word, the computer word processing program used to generate the brief.

Dated: October 22, 2019



Deborah A. Sivas

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SANTA CLARA

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Santa Clara, State of California. My business address is Crown Quadrangle, 559 Nathan Abbott Way, Stanford, CA 94305-8610.

On October 22, 2019, I served true copies of the following document(s) described as **APPELLANT'S OPENING BRIEF** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Mills Legal Clinic at Stanford Law School for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at Stanford, California.

BY ELECTRONIC SERVICE: I served the document(s) on the person listed in the Service List by submitting an electronic version of the document(s) to TrueFiling 3.0, through the user interface at <https://tf3.truefiling.com/>.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 22, 2019, at Stanford, California.



Ana Villanueva

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