**CASE NO. C088922**

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

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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.*

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# Appellants' Reply 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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## INTRODUCTION

The State Lands Commission's answering brief confirms that this case presents pure issues of law, reviewed de novo by the Court. Coastkeeper contends: Once the Commission undertook the task of preparing a "subsequent or supplemental environmental impact report" in accordance with California Environmental Quality Act (CEQA) section 21166 – a fact no one disputes here – it was obligated to (i) assume substitute lead agency status and (ii) prepare an updated environmental review for the whole Huntington Beach Regional Desalination Project, on which other agencies could then rely. In contrast, the Commission contends: These legal requirements apply only where the original EIR for a project retains no "informational value" whatsoever and "a brand new EIR" is, therefore, necessary. Commission Br. at 37, 39. The Court must decide which view of the law is correct – a procedural legal question for which no agency deference is afforded.

The Commission's answer to that purely legal question rests on a fundamental misreading of section 21166, the implementing provisions of the CEQA Guidelines, and the case law. The Commission argues, in effect, that a "subsequent" EIR means a "brand new" EIR which wholly replaces the previously certified EIR, while a "supplemental" EIR means any other update of the prior EIR with new information and analysis. In the Commission's view, as long as an agency elects to prepare a

"supplemental" rather than a "subsequent" EIR, it need not comply with CEQA's core anti-piecemealing requirement. That is, when the prior EIR retains any informational value whatsoever, each remaining responsible agency may prepare a partial supplemental EIR to meet the requirements of section 21166. Neither the statute itself nor the implementing regulations say any such thing. Indeed, they are crafted to avoid precisely this result. See Coastkeeper Br. at 21-24, 28.

The Commission's novel reading of section 21166 is built almost entirely on the misapplication of a single recent case, Friends of the College of San Mateo Gardens v. San Mateo County Community College District, 1 Cal. 5th 937 (2016) ("San Mateo Gardens"). That case has no purchase here, however. There, the lead agency concluded that its proposed minor project changes did not trigger the section 21166 criteria for an updated EIR and, therefore, the agency did not prepare a subsequent EIR, a supplemental EIR, or any other kind of EIR. Instead, it issued a technical addendum to its prior negative declaration – essentially a project erratum that is not subject to any of CEQA's procedural or substantive requirements. On appeal, the threshold question was whether the agency's proposed changes were so substantial as to effectively render the modifications "a new project altogether," thereby requiring the agency to start the CEQA process all over again from scratch. San Mateo Gardens, 1 Cal. 5th at 944. The Court remanded that issue for further proceedings,

concluding that the question of whether a proposal constitutes a modification of a prior project under CEQA section 21166 or a whole new project under CEQA section 21151 is one for the agency to decide in the first instance. Id. at 951-53, 960. The Court's holding in San Mateo Gardens thus does not touch on the difference between a subsequent and supplemental EIR under 21166 or in any way support the Commission's unprecedented argument that agencies are free to piecemeal updated EIRs.

Critically here, every party agrees that section 21166 applies; nobody has ever argued that the proposed changes to Poseidon's desalination facility, intended to bring the Project into compliance with significant new requirements of state law, are drastic enough to constitute a "new project" subject to a whole new EIR. The new-versus-modified question at issue in San Mateo Gardens is, therefore, irrelevant to this case. Rather, the only question before the Court is: When the Commission voluntarily stepped forward to make the next discretionary decision for the Project, did it violate CEQA by expressly limiting the scope of its updated EIR? No matter what label that document bore, the answer to this question, which the Court reviews de novo, is "yes." Accordingly, the Court should reverse the decision below and hold, as a matter of law, that the Commission unlawfully omitted critical portions of the required CEQA analysis from its Supplemental EIR.

## SUMMARY OF RESPONSIVE ARGUMENTS

Because Respondents' opposition briefs are overlapping and redundant, this joint reply organizes Coastkeeper's responses into three parts:

(I) The Commission's principal argument in this case hinges on two premises, neither of which can bear the weight that the Commission places on it. First, the Commission argues that an agency preparing an updated EIR under CEQA section 21166 may choose between labeling that document a "subsequent" or a "supplemental" EIR. Commission Br. at 52-53. This proposition is generally true, but irrelevant here; Coastkeeper does not dispute that a drafting agency can choose the name to place on the cover of its updated EIR. Second and truly unprecedented, the Commission argues that an agency's choice of label for the updated EIR – "subsequent" versus "supplemental" – effectively dictates the applicable procedural requirements and the document's contents. Id. at 37-39. For this proposition, there is not a shred of support in CEQA, the implementing regulations, or the case law. In fact, as discussed below, the law treats these two EIR denominations interchangeably, consistent with the plain language of section 21166.

(II) From these wobbly foundations, the Commission then spins its central legal fiction: By choosing to prepare a "supplemental" EIR instead of a "subsequent" EIR to address substantial changes or new information,

an agency like the Commission can evade CEQA's procedural requirements, including its core prohibition against project segmentation and the piecemealing of environmental review. The Commission's novel interpretation would open the door to a proliferation of multiple EIRs prepared by multiple agencies for any given project. It would invite serial citizen suits challenging serial CEQA documents for the same project. And it would undermine the very finality and certainty that the Commission purports to embrace. See Commission Br. at 54-57. The Court should, therefore, reject the Commission's ill-conceived reading of CEQA, which departs dramatically from the statute's central concept of a single, comprehensive EIR prepared by a single agency.

(III) Perhaps recognizing the legal infirmity and dire policy implications of the Commission's legal theory, Poseidon takes a different tack. Essentially arguing in the alternative, Poseidon submits that the Commission's updated EIR actually does, in fact, include a comprehensive and adequate analysis for the whole Project, apparently sufficient for other agencies, like the Regional Water Board and the Coastal Commission, to rely on in their future discretionary approvals. Poseidon Br. at 58-81. This argument stands at stark odds with what the Lands Commission said it was doing in the 2017 Supplemental EIR – and with the first half of Poseidon's brief, which embraces the Commission's legal argument that a limited EIR complies with CEQA. If Poseidon were correct that no further

environmental analysis is necessary, the Regional Water Board would not still be struggling to understand the Project's marine impacts and intake alternatives or grappling with water demand and distribution questions. Like the Commission's legal theory, Poseidon's alternative argument should be rejected.

## ARGUMENT

### I. The Law Does Not Support the Commission's Novel Theory that a "Supplemental EIR" Need Not Comply with CEQA's Core Procedural Requirements.

#### A. Neither CEQA Nor Its Implementing Regulations Comport with the Commission's Legal Position.

To construct its legal argument, the Commission misinterprets and misapplies the regulations implementing CEQA section 21166. In the Commission's view, "subsequent" and "supplemental" EIRs are categorically distinct beasts that serve quite different ends. The Commission argues, in particular, that CEQA section 21166 requires a "subsequent" EIR only where a project is so radically changed that the prior EIR has no remaining informational value and thus a "brand new" EIR for what is essentially a whole new project is necessary. In effect, the Commission narrows the concept of a "subsequent" EIR to only those documents that entirely supersede and displace the prior certified project EIR. In all other instances, the Commission implies, the agency prepares a "supplemental" EIR that adds to but does not displace the original EIR.

And this difference, in the Commission's telling, has enormous implications for which CEQA requirements apply.

The problem for the Commission is that CEQA does not draw this distinction or support it. Nor do the implementing regulations. And like the statute, the interpretative case law uses the terms "subsequent" and "supplemental" interchangeably to refer to section 21166's "subsequent review provisions." See San Mateo Gardens, 1 Cal. 5th at 950-53 (repeatedly using the phrase "subsequent review provisions" to refer collectively to both subsequent and supplemental EIRs under section 21166). Indeed, as discussed in detail below, Respondents' leading case, San Mateo Gardens, reveals the logical flaw in the Commission's interpretation: If a project is so radically modified as to require a whole new EIR, it is subject to the broad initial environmental review provisions of CEQA section 21151, not the more restrictive subsequent review provisions of section 21166. A project cannot be both a new project under section 21151 and a modified project under section 21166. Thus, by definition, neither a "subsequent" nor a "supplemental" EIR prepared pursuant to section 21166 is a "new project" EIR under 21151.

**The Statute.** To understand the Commission's foundational error, the Court should look first to the statute itself. CEQA section 21166 says only that no "subsequent or supplemental" EIR is required unless "substantial changes" require "major revisions" to the initial EIR or "[n]ew

information" becomes available. Cal. Pub. Res. Code § 21166. The purpose of this section is to balance the need for full environmental review with the desire for finality and certainty; section 21166 thus sets a higher threshold for subsequent environmental review after an EIR has already been completed and certified than section 21151 does for the initial environmental review. Bowman v. City of Petaluma, 185 Cal. App. 3d 1065, 1073-75 (1986) (explaining that section 21151 intentionally sets a "low threshold" for initial review, requiring an EIR if there is a "fair argument" that a project "may have" a significant environmental effect, while section 21166 embodies a "quite different" intent to prohibit a "subsequent or supplemental environmental impact report unless the stated conditions are met") (internal quotation marks omitted). Notably, while section 21166 sets this higher bar for subsequent and supplemental EIRs, it does not define the terms "subsequent" or "supplemental" or distinguish between them in any way. The same statutory criteria trigger both, and the courts refer interchangeably to "subsequent or supplemental" EIRs. Equally important, nothing in the statute in any way suggests that different procedural or content requirements apply to updated EIRs prepared under section 21166 simply because an agency chooses one label over another.

**Implementing Regulations.** The Court should look next to the implementing regulations, which likewise undercut the Commission's theory. CEQA section 21166 is implemented primarily through section

15162 of the CEQA Guidelines. E.g., Abatti v. Imperial Irrigation Dist., 205 Cal. App. 4th 650, 669 (2012) (explaining that "Guidelines, section 15162 implements the principles contained in section 21166"); San Mateo Gardens, 1 Cal. 5th at 944 (interchangeably discussing the "subsequent review standards of section 21166 and CEQA Guidelines section 15162").[1] Guidelines section 15162 mirrors and elaborates on section 21166's conditions for triggering updated EIRs. See Cal. Code Regs. tit. 14 ("CEQA Guidelines"), § 15162(a). Specifically, section 15162(a) requires preparation of a subsequent EIR where substantial changes "in the project" or "with respect to the circumstances under which the project is undertaken" will require "major revisions of the prior EIR" – notably, not a "brand new" EIR – or where "new information of substantial importance" becomes available. Id. Consistent with CEQA's single agency/single document structure, discussed at pages 18-29 of Coastkeeper's opening brief, section 15162 requires a subsequent EIR in accordance with CEQA section 21166 only where the statutory criteria are triggered and "only . . . by the public agency which grants the next discretionary approval for the project, if any." Id. § 15162(c). Phrased in the negative, Guidelines section 15162 is the gateway regulatory provision by which an agency determines

[1] See also CEQA Guidelines §§ 15162-15164 ("Note" describing "Authority Cited" as CEQA section 21166).

whether or not it is allowed to prepare, or to require the preparation of, an updated EIR in accordance with section 21166.

Once the next approval-granting public agency determines that section 15162 is triggered, it "may choose to prepare" a supplemental "rather than a subsequent EIR," but, importantly, only when "the conditions described in Section 15162 would require the preparation of a subsequent EIR." Id. § 15163(a)(1). This formulation ensures that supplemental EIRs, just like subsequent EIRs, cannot be demanded at the whim of an agency; both types of updated EIR are allowed only when the triggering conditions of CEQA section 21166 and Guidelines section 15162 are satisfied. If, but only if, these conditions are met, and something less than "major revisions" are necessary to "make the previous EIR adequately apply to the project in the changed situation," the preparing agency may elect to use a "supplemental" EIR instead of a "subsequent" EIR. Id. §§ 15162-15163. "Subsequent" and "supplemental" EIRs are thus not different animals; a "supplemental" EIR is merely a breed of updated EIR, available to an agency when the conditions triggering a "subsequent" EIR are satisfied.

In contrast, Guidelines section 15164 provides for the preparation of an "addendum" rather than any kind of updated EIR when the agency determines that "some changes or additions are necessary but none of the conditions described in Section 15162 calling for preparation of a subsequent EIR have occurred." Id. § 15164(a) (emphasis added); see also

§ 15162(b) (providing that where a subsequent EIR is not required update an earlier negative declaration, agency may prepare an addendum or no documentation at all). Although CEQA does not expressly authorize addendums, the courts have upheld their use when a subsequent or supplemental EIR is not required by CEQA section 21166. See, e.g., Bowman, 185 Cal. App. 3d at 1081 ("The question, however, is not whether an addendum was authorized but whether a supplemental EIR was required" under section 21166). Unlike subsequent and supplemental EIRs, which must comply with CEQA's public review and comment provisions and myriad other statutory requirements, an addendum is effectively a technical erratum to the previous EIR that does not itself need to satisfy the public circulation and review or other procedural requirements of CEQA. CEQA Guidelines § 15164(c); Save Our Heritage Organisation v. City of San Diego, 28 Cal. App. 5th 656, 668 (2018) (noting that "the absence of public review reflects the nature of an addendum as a document describing project revisions too insubstantial in their effect to require subsequent environmental review").

In sum, where substantial changes occur or new information becomes available after competition and certification of an EIR, and additional discretionary public approvals remain, the agency making the next approval decision must first decide whether CEQA section 21166 requires an updated EIR or whether a mere addendum will suffice. If

section 21166 applies, the agency may prepare either a "subsequent" or a "supplemental" EIR, depending on the degree of revision necessary. But in either case, the updated EIR is still an EIR subject to CEQA's general requirements. A "supplemental" EIR still must contain "the information necessary to make the previous EIR adequate for the project as revised." CEQA Guidelines § 15163(b). And any agency making later discretionary decisions must consider the previous EIR, along with the updated EIR, in approving the modified project. Id. § 15163(e).

**Interpretative Case Law.** The relevant CEQA case law confirms this plain reading of the statute and regulations, not the Commission's interpretation that a "subsequent" EIR is effectively a "brand new" EIR. For instance, the Commission relies on City of Irvine v. County of Orange, 238 Cal. App. 4th 526 (2015), a case challenging the preparation of a supplemental EIR on the grounds that a subsequent EIR should have been prepared instead. There, the court affirmed that CEQA section 21166 "treats supplemental and subsequent EIRs in the same category"; if the initial triggering conditions of section 21166 are not satisfied, "there is no need to prepare either a subsequent or supplemental EIR." Id. at 538. The same "basic rule" applies under the CEQA Guidelines when "either a subsequent or a supplemental EIR must be prepared." Id. at 538-39. The "only difference" is that when a "subsequent" EIR would otherwise be required by section 15162, the agency "may choose" instead to prepare a

"supplemental" EIR containing the necessary information. Id. at 539 (internal quotation marks omitted).

Noting that the "supplemental" EIR in that case was "six times heftier" than the original EIR, the City of Irvine court rejected the challenger's notion that an agency's "choice to prepare a supplemental EIR, when a subsequent EIR might arguably have been more appropriate" can ever be fatal. Id. at 538-39. And rightly so. While a supplemental EIR "might fail on its own merits," the law does not support a claim that an updated EIR is "legally inadequate merely because it bears the title 'subsequent' instead of 'supplemental.'" Id. at 539. "[T]he appropriate judicial approach," the court concluded, "is to look to the substance of the EIR, not its nominal title." Id. at 540 (citing Citizens for a Sustainable Treasure Island v. City & Cty. of San Francisco, 227 Cal. App. 4th 1036, 1047-48 (2014), and California Oak Foundation v. Regents of University of California, 188 Cal. App. 4th 227, 271, n.25 (2010)).

Far from supporting the Commission's legal theory, City of Irvine affirms that the label an agency chooses to put on the cover of an updated EIR prepared in accordance with CEQA section 21166 is of no practical or legal significance.[2] The Commission's entire argument turns on this non-existent legal distinction.

[2] Respondents also cite A Local & Regional Monitor v. City of Los Angeles, 12 Cal. App. 4th 1773 (1993). Commission Br. at 52; Poseidon

### B. Because All Parties Agree that an Updated EIR Was Required, San Mateo Gardens Provides No Support for Respondents' Legal Theory.

With no statutory or regulatory language to support its extraordinary view of CEQA, the Commission turns to case law. But it can find no solace there, either. Both the Commission and Poseidon rely almost entirely on San Mateo Gardens for their core legal theory, as well as their proffered (and wrong) standard of review. See, e.g., Commission Br. at 23-27, 30, 36-37, 40, 55, 59-61, 68; Poseidon Br. at 35, 44-46, 49, 79.

Respondents' reliance on San Mateo Gardens is badly misplaced. That case turned on the distinction between updated EIRs under CEQA section 21166 and "brand new" EIRs under CEQA section 21151, not on any difference between "subsequent" and "supplemental" EIRs prepared under section 21166. Here, the Commission chose to prepare an updated EIR under CEQA section 21166, rather than a mere addendum, because the statutory conditions were satisfied. No party disputed that choice. See, e.g., AR0023629-34 (agreement between Lands Commission, Regional

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Br. at 35. Like San Mateo Gardens, this case dealt solely with the question of whether the agency "failed to proceed in the manner required by law by declining to prepare a subsequent or supplemental EIR under the circumstances." Id. at 1800. That question is not presented here. But the resulting opinion does highlight how courts routinely use the term "subsequent EIR" as shorthand for a "subsequent or supplemental EIR" under section 21166 and how courts generally do not distinguish between these two types of updated EIRs. Id.

Water Board, Coastal Commission, and Poseidon that an additional EIR was required and that other agencies would rely on Lands Commission's updated EIR); AR0020322-23 (Poseidon application asking Commission to serve as new Lead Agency for updated EIR). Thus, the facts and posture of San Mateo Gardens are strikingly different from the facts and posture of this case, and its holding offers no support for the Commission's notion that supplemental EIRs somehow escape CEQA's core procedural requirements. To the contrary, the Supreme Court's decision in San Mateo Gardens is fully consistent with Coastkeeper's legal claims in this case and with its description in the opening brief of how CEQA operates.

In San Mateo Gardens, a community college district concluded that its proposed improvement plan for demolishing and renovating various campus buildings would not have any unmitigated significant environmental impact and thus approved the plan without preparing an EIR. Years later, the district approved changes to the plan, again without preparing an EIR, "after concluding [the modifications] did not require the preparation of a subsequent or supplemental EIR under Public Resources Code section 21166." 1 Cal. 5th at 943. Instead, the district prepared an addendum to the prior "initial study" and mitigated negative declaration for the original project. Id. at 946-47.

The district's use of an addendum for the proposed project modifications "proved controversial" and members of the public sued,

arguing that the modified decision to demolish rather than restore one building complex was a new project triggering a new initial study and, potentially, a full EIR. Id. at 947. In particular, the challengers argued that the district's proposal was "subject to the initial environmental review standards of Public Resources Code section 21151 . . . rather than the subsequent review standards of section 21166 and CEQA Guidelines section 15162." Id. at 944. The legal question before the lower courts, therefore, was whether the modified proposal was merely a change in a previously-approved project subject to what the Supreme Court repeatedly called the "subsequent review provisions" of section 21166 or, instead, "a new project altogether" subject to the "initial environmental review standards" of section 21151. Id. at 943-44, 950.[3] The trial court granted the writ petition and the appellate court affirmed, concluding "as a threshold matter of law, that the proposed building demolition was a new project, rather than a project modification." Id. at 947. The California Supreme Court took the case to resolve a disagreement among the appellate courts. Id. at 947-49.

The Supreme Court began its analysis by summarizing CEQA's general framework for updating EIRs and negative declarations. "Once a

[3] As the Supreme Court recognized, this difference was potentially consequential because section 21151 provides a "more demanding 'fair argument' standard" for triggering a full EIR. Id. at 957.

project has been subject to environmental review and received approval," the Court explained, "section 21166 and CEQA Guidelines section 15162 limit the circumstances under which a subsequent or supplemental EIR must be prepared." Id. at 949. "The purpose behind the requirement of a subsequent or supplemental EIR," the Court continued, "is to explore environmental impacts not considered in the original environmental document." Id. Thus, "a change in a project is not an occasion to revisit environmental concerns laid to rest in the original analysis. Only changed circumstances . . . are at issue." Id. Consistent with these principles, if proposed project changes trigger CEQA's "subsequent review standards" under section 21166, "then a subsequent or supplemental EIR is required." Id. at 950. Crucially, the Supreme Court made no distinction between "subsequent" and "supplemental" EIRs, treating them interchangeably as "a subsequent or supplemental EIR" under section 21166. Id. at 943, 945, 946, 948, 949, 950, 953, 955, 957, 959, 960, 961.

The San Mateo Gardens plaintiffs argued that implicit in this statutory scheme is a threshold requirement for the CEQA lead agency to determine – and the reviewing court to satisfy itself – that the modified project "remains the same project as before, rather than an entirely new project, before proceeding to evaluate whether the changes call for a subsequent or supplemental EIR under CEQA's subsequent review provisions." Id. at 950. While the Supreme Court acknowledged this two-

step process, it rejected the lower court's "new project test" formula, which would obligate courts to determine "purely in the abstract" whether a project is entirely new or merely modified, without "any standards to govern the inquiry." Id. at 950-51.

Instead, the Supreme Court placed the onus on the agency to make the initial new-vs-modified determination, subject to judicial review. If an agency determines that the original document "retains some informational value," then the "subsequent review provisions" of section 21166 apply. Id. If, on the other hand, "the proposed changes render the previous environmental document wholly irrelevant to the decisionmaking process, then it is only logical that the agency start from the beginning under section 21151 by conducting an initial study to determine whether the project may have substantial effects on the environment." Id. This first-step agency determination is subject to judicial review based on the substantial evidence in the record supporting it. Id. at 953.[4]

[4] On remand, the appellate court concluded that substantial evidence in the record supported the district's conclusion that the original mitigated negative declaration retained some informational value and, therefore, the "subsequent review provisions" of section 21166 rather than the new project provisions of section 21151 applied. Friends of Coll. of San Mateo Gardens v. San Mateo Cty. Cmty. Coll. Dist., 11 Cal. App. 5th 596, 605 (2017). The court then proceeded to "the next – and critical – step" of determining "whether the agency has properly determined how to comply with its obligations under [CEQA's subsequent review] provisions." Id. Ultimately, the appellate court concluded that the district's "decision to adopt an addendum was improper under CEQA's subsequent review provisions" because there was substantial evidence that the project

The holding in San Mateo Gardens, therefore, has nothing to teach us in the instant case, where everyone agrees that the prior 2010 EIR prepared by the City of Huntington Beach retains substantial informational value and nobody argues that the proposed modifications amount to a "new project" subject to a new initial study under the initial environmental review standards of section 21151. Importantly, San Mateo Gardens did not in any way alter the de novo standard of review applicable to the central question posed by this case – whether the Commission unlawfully segmented the updated EIR by explicitly omitting certain impacts and alternatives from consideration.[5] See POET, LLC v. State Air Res. Bd., 12 Cal. App. 5th 52, 100 (2017) (explaining that San Mateo Gardens "did not overturn, explicitly or by implication, this court's conclusion that the question of which acts make up the whole of the action constituting the CEQA project is a question of law . . . resolved without deference to the agency's determination"). As discussed below and in Coastkeeper's

modifications "might have a significant environment effect." Id. at 611.

[5] Respondents suggest that Coastkeeper's failure to cite evidence favorable to its side is "fatal" to its claim. Commission Br. at 47; Poseidon Br. at 37-39. Because Coastkeeper's claims are procedural and reviewed de novo rather than for substantial evidence, these arguments have no bearing on this case. Cf. South Cty. Citizens for Smart Growth v. Cty. of Nevada, 221 Cal. App. 4th 316, 330 (2013) (citing Defend the Bay v. City of Irvine, 119 Cal. App. 4th 1261, 1265-66 (2004)) (requirement to lay out evidence favorable to the other side applies to substantial evidence challenges).

opening brief, the answer to that singular question is clear from the statute, the regulations, and the case law.

## II. The Commission Failed to Follow CEQA's Core Procedural Requirements for EIRs, which Apply Equally to All EIRs, Including Supplemental EIRs.

The foregoing more fulsome and careful reading of the law reveals the fatal flaws in the Commission's legal reasoning. Nobody contests that the threshold conditions of CEQA section 21166 and Guidelines section 15162 were satisfied here; otherwise, the Commission could not have exercised its option to prepare a supplemental EIR instead of a subsequent EIR under Guidelines section 15163. But the Commission claims that it could, nevertheless, limit its update to a partial EIR covering only the so-called "Lease Modification Project" because (1) the proposed changes and new information in this instance triggered a "supplemental" EIR rather than a "subsequent" EIR, and (2) this (incorrect) conclusion permitted the Commission to restrict its analysis to only certain pieces of the requisite EIR updates, leaving other pieces to other agencies. Both claims are in error.

### A. CEQA Does Not Provide a Lower Threshold or Lesser Standards for Supplemental EIRs.

For the reasons explained above, there is no such thing as a supplemental EIR for only part of a project. By definition, a supplemental EIR is only available and allowed where the circumstances trigger a full

subsequent EIR. An agency cannot lawfully conclude that a subsequent EIR is unnecessary – because the triggering conditions are not met – and yet still require the preparation of a partial supplemental EIR. Guidelines section 15163 is clear that an agency can require a supplemental EIR only where "the conditions described in section 15162 would require the preparation of a subsequent EIR." CEQA Guidelines § 15163(a)(1). In other words, there is not a lower triggering threshold for a "supplemental" EIR that somehow abrogates CEQA's basic procedural requirements; either a subsequent EIR is required (in which case, the agency can then elect to prepare a supplemental EIR instead) or no EIR is required.

This result makes sense. As Coastkeeper explains in its opening brief, section 21166 is intended to balance finality with the need for accurate and informed environmental analysis when a previously-certified EIR has become stale in some respect. It thus limits the circumstances under which an agency may require a post-certification EIR, as opposed to a mere technical addendum to the original EIR. If the conditions for an updated EIR – styled as a "subsequent or supplemental" EIR in CEQA section 21166 and as a "subsequent EIR" in the section 15162 regulations – are not satisfied, the agency simply cannot require an additional EIR of any kind, whatever its label. Consistent with this structure, the Commission could not lawfully conclude that the conditions for a "subsequent" EIR were not satisfied, but the conditions for a "supplemental" EIR were.

The Commission's reliance on language in section 15163 allowing either a lead agency or a responsible agency to prepare a supplemental EIR does not alter this result or help the Commission's argument. See Commission Br. at 52-54. A "responsible agency" is severely constrained under CEQA. To foster CEQA's single agency/single document approach, responsible agencies generally must use and rely on the lead agency's certified EIR in making their separate discretionary decisions. CEQA Guidelines § 15096(a). As the Commission acknowledges, responsible agencies generally "are not allowed to prepare a separate EIR." RiverWatch v. Olivenhain Mun. Water Dist., 170 Cal. App. 4th 1186, 1201 (2009); see Commission Br. at 50 (recognizing this principle). While responsible agencies may (and should) provide comments on and input to the lead agency's EIR process for those project activities within their expertise, all responsible agencies ultimately must rely on the certified EIR. CEQA Guidelines § 15096(b)-(d), (f). After the lead agency certifies an EIR, a responsible agency's options for additional environmental analysis are tightly circumscribed. See id. § 15096(e).

Where a responsible agency believes from the outset that a certified EIR is not adequate for its use in making a discretionary decision on the project, its only option is to "[t]ake the issue to court within 30 days after the Lead Agency files a Notice of Determination," just like any other potential challenger. Id. § 15096(e)(1). If the responsible agency fails to

follow this course, it is deemed to have waived its concerns, just like any other potential challenger, and cannot require an additional EIR of any kind. Id. § 15096(e)(2). Such a strict limitation on what responsible agencies may do after project EIR certification ensures efficiency and finality in the CEQA process. The situation described in section 15096(e)(1) does not exist here, as the Commission relied on the 2010 EIR prepared by the City of Huntington Beach to make its 2010 lease decision.

Once the original statute of limitations passes, a responsible agency that participated during the original CEQA process has only one real option if it later determines that an earlier EIR on which it intends to rely for a discretionary decision has become outdated due to substantial changes or new information – to "[p]repare a subsequent EIR if permissible under Section 15162." Id. § 15096(e)(3).[6] Thus, a responsible agency concerned about a stale EIR may not simply prepare a supplemental EIR without making a determination that a subsequent EIR is triggered under section 15162. Without first finding that a subsequent EIR was required, the Commission would lack the legal authority to prepare, or demand the preparation of, a supplemental EIR. By preparing a supplemental EIR,

[6] If the lead agency failed to consult with the responsible agency during the original CEQA process, the lease agency may be able to assume the lead agency role. Id. § 15096(e)(4) (referencing CEQA Guidelines § 15052(a)(3)).

therefore, the Commission necessarily determined that section 15162's subsequent EIR conditions were triggered.[7]

To distract from this logical conclusion, the Commission suggests that the CEQA Guidelines provide a "variegated structure for additional review" that includes "differing levels of review." Commission Br. at 54. This discussion has no traction. In particular, the Commission references "staged" CEQA processes under Guidelines section 15167, where agencies conduct environmental review in phases because a project will be constructed in multiple parts over some number of the years. Id. at 56-57.[8]

[7] Whether the Commission could require an updated EIR without assuming lead agency status is not entirely clear from the regulations. CEQA section 21166 permits an updated "subsequent or supplemental" EIR "by the lead agency or by any responsible agency" when the triggering conditions are satisfied. Guidelines section 15162(a), on the other hand, speaks only in terms of a "lead agency" determination. Section 15162 could be read literally, therefore, to require that a responsible agency first assume lead agency status before deciding to trigger an updated EIR, although CEQA section 21166 and Guidelines section 15162 are not so limited. In any event, whether or not a responsible agency must assume lead agency status before making a section 15162 determination, one thing is unequivocal: Whatever its status, an agency must first determine that a subsequent EIR is necessary before it can require a supplemental EIR instead.

[8] Even staged EIRs for multi-part projects, moreover, do not escape CEQA's core piecemealing prohibition; they must include an analysis of all foreseeable impacts from future phases, in order to ensure CEQA's statutory goals of full public disclosure and informed decisionmaking before a project is approved. See, e.g., Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova, 40 Cal. 4th 412, 449 (2007) ("Vineyard Area Citizens"); Save Tara v. City of W. Hollywood, 45 Cal. 4th 116, 139, 194 P.3d 344, 361 (2008) (explaining that even in staged EIR, all reasonably foreseeable impacts and alternatives must be analyzed).

The Commission's detour into staged or phased EIRs is disingenuous. The 2010 EIR for the Poseidon Project was not a staged EIR under section 15167; it was a single project EIR prepared under section 15161 that now requires a single updated EIR under section 15162.

Coastkeeper has not challenged the form or name of the EIR prepared in this case, so why does the relationship between subsequent and supplemental EIRs matter? Because the Commission's argument pivots entirely on its view that the two are categorically different. By choosing a more "limited" supplemental EIR over a subsequent EIR, the Commission believes it somehow has leeway to circumvent core procedural and content requirements that apply to all EIRs. Such a substantive distinction between section 21166 "subsequent or supplemental" only exists in the Commission's imagination, not in the actual law. Adopting the Commission's conceit in the real world would profoundly undermine CEQA's core focus on preparation of a single document to foster finality and certainty. The Court should reject the Commission's attempt to so fundamentally rewrite CEQA.

### B. A Supplemental EIR Must Comply with CEQA's Procedural Requirements, Including the Prohibition on Project Segmentation and EIR Piecemealing.

The second part of the Commission's argument strays even further from the law. When CEQA section 21166 and Guidelines section 15162 require a subsequent EIR, an agency may choose to label its updated

document a "supplemental EIR," but like any other EIR, that document must be circulated for public review and comment and must include all information necessary to make the environmental review adequate under CEQA. CEQA Guidelines § 15163(b)-(c). Nothing in section 15163, and certainly nothing in the statute itself or the CEQA jurisprudence, suggests that a supplemental EIR can escape CEQA's procedural requirements. Indeed, "[a]ll EIRs" must meet the same general "content requirements." See CEQA Guidelines § 15160 (referring to the requirements in CEQA Guidelines §§ 15120-15132); San Mateo Gardens, 1 Cal. App. 5th at 952, n.3 ("Although CEQA distinguishes 'subsequent EIRs' (§ 21166) from initial EIRs (see § 21151), both types of EIRs are subject to the same general procedural and substantive requirements.").

Most salient here is CEQA's central tenet that a project EIR must cover the "whole of an action." CEQA Guidelines § 15378; see also Coastkeeper's Br. at 58-62. The requirement that a single CEQA document, prepared by a single agency, consider all individual and collective activities involved in a project fosters efficiency and ensures informed public decisionmaking. See, e.g., Berkeley Keep Jets Over the Bay Comm. v. Bd. Of Port Comm'rs, 91 Cal. App. 4th 1344, 1358 (2001) (citing Cal. Pub. Res. Code § 21002.1(d)). For this reason, in Banning Ranch Conservancy v. City of Newport Beach, 2 Cal. 5th 918 (2017) ("Banning Ranch"), the California Supreme Court recently and forcefully

reaffirmed the well-established principle that CEQA strictly forbids project segmentation and EIR piecemealing. See Coastkeeper Br. at 58-62 (discussing some of anti-piecemealing case law).

The Commission does not dispute that it quite intentionally engaged in project segmentation here. Indeed, it concedes that the 2017 Supplemental EIR for the so-called "Lease Modification Project" was a "limited, supplemental review" for those aspects of the Poseidon Project within the Commission's authority. Commission Br. at 58. During the administration process, the Commission repeatedly admitted that its Supplemental EIR was of limited scope, evaluating only the proposed lease amendments and not the larger desalination project. See, e.g., AR0005513, AR0005536, AR0006156, AR0006174, AR0006200, AR0009934.

Of particular concern are two glaring omissions. First, the Commission explicitly declined to review the feasibility of several potential alternatives to the proposed open-ocean intake system, deferring that analysis to the Regional Water Board. See, e.g., AR0005546-49, AR0005553; AR0005572. Second, the Commission declined to address the potential impacts from an alternative water distribution option under active consideration but not previously evaluated in the 2010 EIR, deferring that analysis to the Orange County Water District. See AR0005544-45. The Commission claims that such explicit project segmentation does not violate

Banning Ranch and the unbroken line of anti-piecemealing cases that precede it. The Commission is wrong.[9]

**Feasible Intake Alternatives.** The Commission claims that the 2017 EIR comported with Banning Ranch when it deferred much of the analysis of feasible alternatives that may reduce or mitigate the Project's marine impacts. Commission Br. at 61-65. Not true. Yes, the Regional Water Board must ultimately apply the new Desalination Regulations that largely drove the need for an updated EIR, but that fact does not excuse the Commission's truncated CEQA analysis. Nothing required the Commission to make the next discretionary decision on the Project; it chose to do so. In making that choice, the Commission necessarily took on core CEQA responsibilities.[10]

[9] Predictably, the Commission begins its defense of the EIR's intentional omissions by, once again, mischaracterizing Coastkeeper's arguments: "[T]he essence of [Coastkeeper's] arguments is that the Commission was required to go back and, as if it were preparing the initial EIR for the Facility anew, reevaluate the entirety of the Facility." Commission Br. at 57-58. False. As the Commission well knows, Coastkeeper has never made this argument. Persistent and repeated mischaracterization of Coastkeeper's claims and arguments will not cure the EIR's legal defects.

[10] In this part of its brief, the Commission repeats the trope that, by choosing to remain a mere responsible agency preparing a mere supplemental review, it had no obligation to comply with Banning Ranch. Commission Br. at 62, n.17. As discussed elsewhere, there is not a shred of legal authority for that proposition, and Banning Ranch itself is certainly not so limited.

Banning Ranch makes clear that the agency preparing an EIR has a legal duty to evaluate the requirements imposed by other related statutory and regulatory regimes and to fully consider a range of reasonable project alternatives that "would 'feasibly attain' most of [the project's] basic objectives but 'avoid or substantially lessen' its significant effects." 2 Cal. 5th at 936. Among the factors relevant to such a feasibility analysis are "other . . . regulatory limitations" like those found in the Desalination Regulations. Id. at 937. Just as "the Coastal Act's ESHA provisions should have been central to the Banning Ranch EIR's analysis of feasible alternatives," id., so too the Porter-Cologne Act's new Desalination Regulations should have been central to the Supplemental EIR's analysis of feasible alternatives available to mitigate the Project's marine life impacts.

The Commission retorts that Coastkeeper "fails to explain how changes to the regulations could suddenly render previously infeasible [per the 2010 EIR] alternatives feasible" and that the Commission relied, in completing the 2017 Supplemental EIR, on a 2013 Coastal Commission report regarding the economic feasibility of subsurface intakes. Commission Br. at 66-67. These responses miss the mark entirely. In 2016, the State of California radically altered the terms of the discussion, concluding that open-ocean intake systems like the one proposed for the Poseidon Project "can result in significant intake and mortality of all forms of marine life," AR0017045, and adopting new regulations that preclude

open-ocean intake systems unless all other options (e.g., subsurface wells, reduced facility size, different locations, and combinations of such mitigation measures) are thoroughly evaluated and found to be infeasible. AR0017290-91. Where a project proposes an open-ocean intake system, the regulations require a robust alternatives analysis based on a multi-faceted evaluation of project size, need, location, technology, and mitigation measures, individually and collectively. See AR0017287-91; AR0017627-28; Coastkeeper Br. at 32-35, 65-67. In effect, the 2016 Desalination Regulations set a new statewide threshold of significance for facilities like the proposed Poseidon Project. Whatever the conclusions of the alternatives analyses or feasibility studies completed in 2010 or 2013, the new marine life protection standards adopted in 2016 require an updated CEQA analysis – particularly with respect to feasible alternatives for open-ocean intake – that employs and reflects California's new regulatory directives.

The Commission's attempts to deflect responsibility for the analysis of feasible alternatives are unavailing. The existence of an interagency agreement does not cure the unlawful deferral of analysis, see Banning Ranch, 2 Cal. 5th at 927, and mere consultation with the Regional Water Board or other agencies is insufficient to satisfy the Commission's CEQA obligations. See CEQA Guidelines § 15020 ("A public agency must meet its own responsibilities under CEQA and shall not rely on comments from

other public agencies . . . as a substitute for work CEQA requires the lead agency to accomplish."). Nor does the Regional Water Board's ultimate responsibility for approving the intake system excuse the Commission's defective CEQA analysis. Banning Ranch, 2 Cal. 5th at 938. If the Commission felt hamstrung in its ability to properly or fully analyze feasible alternatives, as its appellate papers now suggest, the Commission had a ready remedy – it could have allowed the Regional Water Board to go first and prepare a comprehensive subsequent or supplemental EIR on which all other agencies could rely.

**Foreseeable Distribution System Modifications.** The Commission makes the same mistake in defending its decision to omit any analysis of the potentially significant adverse impacts associated with new product water distribution options under active consideration by the Orange County Water District. Here again, the Commission argues that Coastkeeper misframes its concern as a piecemealing issue when "it is more properly viewed through the lens of supplemental review." Commission Br. at 67. As the Commission frames it, "the question is whether one of the triggering events in Guidelines Section 15162 has occurred." Id. at 68. As discussed at length above, there is simply no question that the section 15162 conditions were triggered here – or else the Commission could not have required a supplemental EIR under section 15163.

What the Commission seems to be suggesting is that the agency preparing an updated EIR must decide for each individual issue, impact, or event whether the section 15162 conditions are triggered. So, for instance, if substantial changes to the intake system or regulations trigger the section 15162 conditions, the agency need only address those triggering changes in the resulting EIR and can ignore new information concerning other reasonably foreseeable impacts that were not previously evaluated. This is the Commission's "limited" and "partial" supplemental EIR theory on steroids. Under the Commission's approach, EIRs can be parceled not only between different agencies, but also between different issues. If this view is adopted, the public – and ultimately, the courts – would face a crazy patchwork of different supplemental EIRs prepared by different regulatory agencies on myriad different topics.

For all of the reasons discussed above and in the opening brief, CEQA simply does not work that way. The single agency/single document approach and strict subsequent review standards embedded in the statutory structure are there for a reason. They ensure and balance environmental disclosure efficiency, public accountability, informed decisionmaking, and finality. All stakeholders know where and when to focus their input. The Commission's alternative universe of limited and partial CEQA compliance by myriad different agencies, as the fancy strikes them, is a public policy nightmare and a recipe for judicial gridlock.

Poseidon, at least, focuses on the proper question: Was an alternative groundwater distribution system not considered in the prior EIR reasonably foreseeable at the time the Commission was drafting the Supplemental EIR? As discussed in Coastkeeper's opening brief, the 2010 EIR correctly recognized that new distribution system components were necessary for operation of the Project as a whole and, accordingly, analyzed their impacts. See AR0000210-13, AR0000269-74. But in the intervening years, circumstances, needs, and plans have changed. In January 2016, the Water District published a lengthy technical and cost feasibility study regarding specific options for distributing water from the Project. Each of these options involved groundwater recharge – which was not addressed at all in the 2010 EIR – and none involved the layouts of new distribution pipeline analyzed in the prior EIR. See AR0030659-712. The next month, a presentation before the Water District's Board of Directors identified eight discrete distribution options, seven of which incorporated some groundwater recharge element and the construction of new infrastructure not analyzed in the 2010 EIR; the eighth alternative encompassed all of the direct distribution sub-alternatives analyzed in the 2010 EIR. AR0030716; see also AR0030718-31.

Based on these potential changes, the 2017 Supplemental EIR itself recognized that "[f]uture CEQA analysis may be needed to construct an onshore desalinated drinking water distribution system, for example if a

proposed system differs from the distribution system previously evaluated in the 2010 [EIR]." AR0006185. The Commission thus acknowledged that none of the distribution options assessed in the 2010 EIR might be adopted, but then deferred any further analysis of the distribution system to a later, separate CEQA process by another agency. Given the Water District's detailed written technical exploration of new and quite different distribution system options, the potential negative impacts associated with newly-proposed groundwater injection alternatives were "reasonably foreseeable," and the Supplemental EIR should have addressed them. Laurel Heights Improvement Assn., 47 Cal. 3d at 396.

Poseidon counters that the omission of this analysis was justified because the Water District "has not reached any conclusion or made any decisions regarding how it would use and distribute the water" and "has no firm plans concerning the distribution system." Poseidon Br. at 76, 78. But the CEQA standard is not "firm plans"; it is "reasonably foreseeable." Laurel Heights Improvement Assn., 47 Cal. 3d at 396, 399 ("future plans" that are "less-than-definite" may nonetheless be reasonably foreseeable consequences of the initial project, and thus must be analyzed in the EIR); see also Whitman v. Bd. of Supervisors, 88 Cal. App. 3d 397, 414 (1979) (facts "strongly suggest[ed]" that a potential future transport pipeline that

"was . . . within the contemplation" of an oil and gas company should have been included in a project's EIR).[11]

Because a substantial change in the water distribution system was reasonably foreseeable during the Supplemental EIR process, the Commission could not simply ignore that change and defer all analysis to a hypothetical future Water District CEQA process. Banning Ranch, 2 Cal. 5th at 940-42 (agency preparing EIR may not defer analysis simply because the relevant legal determination falls under another agency's jurisdiction). The intentional and complete omission of any such discussion from the Supplemental EIR constituted prejudicial error.[12]

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[11] The cases Poseidon cites are inapposite. Poseidon Br. at 78. In Citizens for a Sustainable Treasure Island v. City & Cty. of San Francisco, 227 Cal. App. 4th 1036 (2014), the challengers argued that the EIR did not adequately address impacts from unplanned, but theoretically possible future demolition of buildings and the related remediation of hazardous materials beneath them. The court found these potential impacts "speculative" because the future landowners "cannot possibly know whether [they] will be called upon to undertake a more active role in the investigation and cleanup of any portion of the Project site." Id. at 1058-59. Likewise, in Lucas Valley Homeowners Assn. v. Cty. of Marin, 233 Cal. App. 3d 130, 162 (1991), the court found that a neighborhood synagogue's plans to expand were speculative when a permit for that expansion had already been denied, and the permit that had been granted actively restricted expansion. Here, in contrast, there is no question that the Project will deliver its product water to the Water District in some form or fashion, and the Water District is actively considering new distribution alternatives with potential groundwater impacts never previously considered in any CEQA document. Those changed circumstances do not amount to mere "speculation"; they are reasonably foreseeable consequences of the modified Project.

[12] Astoundingly, Poseidon argues in the alternative that the water

### C. The Commission Should Have Assumed Lead Agency Status, as Mandated by the CEQA Regulations, but Its Failure to Do So Does Not Excuse Piecemealing.

The Commission's argument that it lawfully could prepare a partial, limited Supplemental EIR for a "Lease Modification Project" is based, in large part, on its refusal to assume substitute lead agency status for the additional CEQA review after the City of Huntington Beach disclaimed any further involvement in the Project. The Commission's logic fails on two grounds.

**First**, the CEQA Guidelines mandate that a responsible agency for a project "shall assume the role of the Lead Agency when" the responsible agency is called upon to grant a discretionary approval and all of the

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distribution system is no longer an integral part of the desalination Project that must be evaluated in the EIR. It claims, in particular, that the proposed desalination facility has "independent utility" without a distribution component because "the water distribution system is already in place to serve the Project" and a distribution system is "not necessary to proceed with the Project." Poseidon at 80. But the only record pages Poseidon cites for this proposition refer exclusively to the ability of the existing distribution system to handle water of the quality that the project will produce once that water has entered the system. See AR0003922 ("Impacts Related to Product Water Quality"). The off-site distribution analysis in the 2010 EIR was entirely premised on the understanding that at least five miles of new pipeline – and approximately ten miles under the primary design option – would need to be constructed to allow project water to be discharged into the existing distribution system. See AR0000269-72. The 2010 EIR thus properly analyzed the distribution system as part of the whole Project. No one has ever indicated that the facility could distribute its product water without additional infrastructure, whether that means pipeline and connections for direct customer use or, as seems increasingly likely, groundwater injection wells for stored future use.

following conditions exist: (A) "[a] subsequent EIR is required pursuant to section 15162"; (B) the original lead agency has granted its final approval for the project; and (C) the statute of limitations for challenging the original lead agency's analysis has expired. CEQA Guidelines § 15052(a)(2) (emphasis added). There is no factual question that conditions (B) and (C) are satisfied here. But the Commission argues that condition (A) is not satisfied because "a responsible agency must assume lead agency status only if a subsequent EIR is required under CEQA Guidelines, section 15162" and the Commission chose to prepare a supplemental EIR rather than a subsequent EIR. Commission Br. at 50-51 (emphasis in original).

Of course, this circular, self-serving logic would allow all responsible agencies to escape the law's "shall assume" mandate merely by labeling its document a "supplemental EIR" and then invoking agency deference for that choice of moniker. But more to the point, the Commission's argument is wrong on the law. As explained above, an agency may exercise its choice to prepare a "supplemental EIR" under Guidelines section 15163 only when "the conditions described in Section 15162 would require the preparation of a subsequent EIR." CEQA Guidelines § 15163(a)(1). Thus, before an agency can lawfully require preparation of a "supplemental EIR," it must (explicitly or implicitly) determine that the conditions for a "subsequent EIR" exist; otherwise, the agency lacks any legal authority to demand a supplemental EIR. Because

the Commission chose to prepare a "supplemental EIR," it follows that condition (A) of section 15052(a)(2)(A) was also satisfied here and the Commission was obligated to assume the duties of substitute lead agency.

**But second**, even if the Commission could avoid stepping into the lead agency role with clever linguistic gymnastics, its claim that it lawfully may issue a partial, piecemealed supplemental EIR still fails. As discussed above, all EIRs must comply with CEQA's procedural requirements, including its prohibition on project segmentation and piecemealing. The Commission cannot escape these legal obligations by labeling itself "only a responsible agency" or labeling its document "only a supplemental EIR."

The "shift in lead agency" regulation found at CEQA Guidelines section 15052 is designed to prevent exactly what the Commission did here. When the original lead agency is no longer involved in a project, but an additional EIR becomes necessary under CEQA section 21166 and Guidelines section 15162, there must be a new lead agency to shepherd the update process and comply with the law's procedural requirements. And, in fact, the Commission behaved like a CEQA lead agency in all other respects: It circulated a Notice of Preparation and held an initial CEQA scoping meeting (AR0003324-39), issued a 2,163-page Draft EIR for public review (AR0003340-5502), filed a Notice of Completion for the

Draft EIR with the Office of Planning and Research (AR0005503-04),[13] accepted and responded to public and other agency comments (AR0005527-6140), produced a 2,181-page Final EIR (AR0006142-8323), issued a Notice of Availability and Intent to Consider Certification of the Final EIR (AR0005505-06), held a final approval hearing where it made extensive CEQA Findings, certified the Final EIR, and adopted a Statement of Overriding Considerations for the Project's significant and unavoidable impacts (AR0000114-46), and filed a final Notice of Determination with the State Clearinghouse (AR0000006).

The regulations do not contemplate or countenance a situation where an EIR is produced without a lead agency to carry out these core CEQA functions. In the absence of a single lead agency, the project proponent and the public face the prospect of multiple "supplemental EIRs" prepared by multiple "responsible agencies" – and the courts face the prospect of multiple lawsuits – for a single project. Such a result directly contravenes CEQA's overarching structural design and mandate. The Commission's crafty but incorrect reading of Guidelines section 15052(a) threatens to tear

[13] Tellingly, the Notice of Completion listed the Commission as the "Lead Agency" and checked the box for "Supplement/Subsequent EIR." The Office of Planning and Research website confirms that Notices of Completion are to be filed by the lead agency. See http://resources.ca.gov/ceqa/flowchart/lead_agency/public_notice_draft_EIR.html.

a gaping hole in this statutory design and to undermine decades of case law focused on ensuring efficiency and finality.[14]

## III. Poseidon's Additional "Factual" Arguments Cannot Remedy the EIR's Fatal Procedural Flaws.

Poseidon's opposition brief largely piggy-backs on the Commission's flawed legal arguments. Like the Commission, Poseidon disclaims any obligation on the part of a "responsible agency" to comply with CEQA's procedural requirements where the agency chooses to prepare a "supplemental EIR" rather than a "subsequent" EIR. Poseidon Br. at 39-47. This argument is particularly rich coming from Poseidon, which in its July 15, 2016 lease amendment application to the Commission recognized the need for a lead agency and suggested that the Coastal Commission could serve that role, with the Lands Commission serving as a responsible agency. AR0020322. "Alternatively," Poseidon wrote, "the [State Lands

[14] Continuing its pattern of mischaracterizations, the Commission erroneously claims that "in Coastkeeper's view, if a responsible agency decides to undertake any further review," including "an addendum to an EIR," the agency must step into the role of the lead agency. Commission Br. at 54 (emphasis in original). False again. Coastkeeper has never claimed that a mere addendum would require a shift in lead agency status under section 15052. Indeed, where an update or erratum in the form of a section 15164 "addendum" – rather than an EIR – would suffice, section 15052 does not come into play. Section 15052 is intended to ensure there is a new lead agency when an actual new EIR process occurs, not when an agency merely makes minor technical changes to a prior CEQA document. Given the scope of the changes here, and the size of the resulting Supplemental EIR, no party has ever suggested that a mere addendum would suffice.

Commission] may choose to act as the Lead Agency under CEQA and apply CEQA Guidelines Sections 15162-15164 in determining whether a Subsequent EIR, Supplemental EIR, or EIR Addendum would be appropriate." AR00020323. Poseidon had the law right the first time.

Perhaps for that reason, Poseidon offers a backup "factual" argument: The Supplemental EIR "fully evaluated" the application of the Desalination Regulations to the Project. Poseidon Br. at 63. Of course, this startling statement not only contradicts the Commission's core theory that it may and did prepare a "limited" partial EIR, but it also runs counter to the entire first half of Poseidon's own brief, which embraces and mimics the Commission's approach. No matter. In an attempt to convince the Court that "black is white" and "up is down," Poseidon spends the next ten pages – and dozens of record citations – arguing that the Supplemental EIR really, really did perform the expansive alternatives feasibility analysis required by the new Desalination Regulations and Banning Ranch. Poseidon Br. at 65-75. But every single one of the documents that Poseidon cites predates California's stringent new regulations, which went into effect in January 2016 and impose new, more rigorous marine life protection standards and strict new evaluation requirements on this Project.[15]

[15] See AR0000150-2600 (**2010** Draft EIR); AR0002601-3323 (**2010** Final EIR); AR0020365-67 (Poseidon summary chart citing "**2005** REIR, **2010** SEIR, **2012** NPDES [Permit], **2014** and **2015** ISTAP reports, and the **2015** Dudek Report"); AR0020964-21164 (**2012** Temporary Regional Water

The new regulations, in particular, require a more robust feasibility analysis of potential ocean water intake options. Coastkeeper Br. at 32-35. Any updated EIR for the Project necessarily must reflect these regulatory changes and new limitations. Banning Ranch, 2 Cal. 5th at 937. Despite Poseidon's protestations to the contrary, the Commission unequivocally refused to consider or to revisit a number of potential alternatives that must be evaluated under the new regulations. See AR0006412 (eliminating several alternatives as "outside the scope" of the Supplemental EIR); AR0005572 (deferring evaluation of other alternatives to the Regional Water Board); AR0009932 (declining to provide full evaluation of size, location, technology, and mitigation measures that would reduce or avoid marine impacts because consideration of these factors is a "responsibility under the sole authority of the water board"); AR0005549 (noting that these factors from the new regulations may require additional CEQA compliance by Regional Water Board). No amount of citation by counsel to outdated technical studies buried in Poseidon's lease application can change this reality: The Supplemental EIR intentionally declined to evaluate a range of alternatives previously discarded by the City and Poseidon that the State of

Board NPDES Permit and Responses to Comments); AR0021166-21305 (**2015** Dudek Memo); AR0021306-391 (**2014** ISTAP Report Phase 1); AR0021392-504 (**2015** ISTAP Report Phase 2).

California then put back on the table. In fact, the Desalination Regulations were adopted precisely for that reason, with this very Project in mind.

Poseidon's misrepresentation of the factual record is particularly troubling. While the Commission concedes that its EIR was limited and that more CEQA review may well be required by the Regional Water Board and other approval-granting agencies, Poseidon takes the ominous position that the Supplemental EIR adequately analyzed all aspects of the Project under the new Desalination Regulations and that further environmental analysis is not required. Poseidon Br. at 62, n.21. Tell that fact to the Regional Water Board, which very recently directed Poseidon to produce more information, analysis, and justification concerning the proposed size of the Project; potential injection of treated product water into the local aquifer; the need for the Project given its last place ranking in a 2018 water reliability study; the high cost of desalinated water relative to other sources and its implication for the State's human right to "safe, affordable, and clean" water; and relevant recent changes in the proposed use of desalinated water in Orange County. See Appellants' Request for Judicial Notice, at Exhibit A. Contrary to CEQA's mandate, none of this analysis has so far been included in any public EIR process.

At bottom, this is a CEQA piecemealing case. Coastkeeper does not seek to have the Lands Commission displace the Regional Water Board's

role in implementing the new Desalination Regulations.[16] But those regulations implicate important environmental concerns and options that must be evaluated in the updated EIR. The Lands Commission leaves half the job undone, for other agencies. Poseidon argues that the whole job has been completed, and no more CEQA disclosure is required. In the meantime, no one has evaluated intake alternatives in light of current regulatory requirements and there has been no analysis of impacts from reasonably foreseeable groundwater injection options not previously considered in the 2010 EIR. The public is left to wait and wonder.

The EIR's gaping procedural flaw is fatal. As the Supreme Court has often repeated, "[t]he EIR is the heart of CEQA, and the mitigation and alternatives discussion forms the core of the EIR." In re Bay-Delta etc., 43 Cal. 4th 1143, 1162 (2008); see also Citizens of Goleta Valley v. Bd. of Supervisors, 52 Cal. 3d 553, 564 (1990); Laurel Heights Improvement

[16] Like the Commission, Poseidon makes repeated misrepresentations throughout its brief. Poseidon suggests, for example, that Coastkeeper's real beef is that "the Commission did not make findings that are the statutory authority of the Regional Board." Poseidon Br. at 58. False. Coastkeeper's claim relates exclusively to the Commission's omission of critical analysis necessary to make the EIR adequate as an informational document on which the public and other agencies can rely. See Save San Francisco Bay Ass'n v. San Francisco Bay Conservation and Development Corp., 10 Cal. App. 4th 902, 922 (1992) (holding that agency preparing and certifying EIR with "full realization" that another regulatory agency will rely on that analysis to reach its own conclusions has "a duty to produce a comprehensive alternatives analysis that could be relied upon by" the second agency).

Assn., 47 Cal. 3d at 392. "One of [the EIR's] major functions . . . is to ensure that all reasonable alternatives to proposed projects are thoroughly assessed by the responsible official." Wildlife Alive v. Chickering, 17 Cal. 3d 190, 197 (1976). To satisfy CEQA, an EIR must facilitate public disclosure and informed decisionmaking. See Vineyard Area Citizens, 40 Cal. 4th at 442 (explaining that reader of an EIR should not have to "ferret out" related discussion in an earlier proposal); Laurel Heights Improvement Assn., 47 Cal. 3d at 392 (explaining that CEQA "protects . . . informed self-government" by ensuring public disclosure of the environmental effects of projects). The Commission's Supplemental EIR fails this most basic CEQA test.[17]

**CONCLUSION**

CEQA is a carefully crafted statute. Its strong single agency and single document provisions are finely calibrated to balance a range of

[17] Respondents are wrong to rely on Neighbors for a Smart Rail, 57 Cal. 4th 439, 463 (2013), for their claim of "harmless error." Commission Br. at 46; Poseidon Br. at 37. That case concerned a factual dispute, while this case raises critical procedural errors. Recently, the California Supreme Court reiterated that if "an agency fails to proceed [as CEQA requires], harmless error analysis is inapplicable. The failure to comply with the law subverts the purposes of CEQA if it omits material necessary to informed decisionmaking and informed public participation. Case law is clear that, in such cases, the error is prejudicial." Sierra Club v. County of Fresno, 6 Cal. 5th 502, 515 (2018) (string citations omitted). Here, the omission of analysis crucial to understanding Project impacts and alternatives "substantially impaired the EIR's informational function" and is, by definition, prejudicial. Banning Ranch, 2 Cal. 5th at 942.

competing interests and concerns. The courts take those provisions seriously, even if Respondents do not. The Commission's operational view of CEQA is that once an initial EIR is certified, responsible agencies are free to demand partial and limited EIRs that cover particular information they need, even as they sidestep any greater obligation to evaluate the whole project and all of its reasonably foreseeable impacts and alternatives.

If the Court adopts this theory of the law, CEQA's goals of transparency, efficiency, and certainty dissolve to dust. Stakeholders like Poseidon, interested members of the public like Coastkeeper, and courts like this one will face an onslaught of fragmented CEQA analyses if every regulatory agency can demand and pursue its own partial supplemental EIR in isolation. Coastkeeper urges the Court to reject this dim future, reverse the decision below, and direct the lower court to issue a writ of mandate setting aside the Commission's unlawful 2017 Supplemental EIR.

Dated: February 5, 2020

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 test of this brief consists of 11,029 words, not including caption, tables, signature block, and required certificates, as counted by Microsoft Word, the computer word processing program used to generate the brief.

Dated: February 5, 2020

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