

1 Deborah A. Sivas (CA Bar No. 135446)
Matthew J. Sanders (CA Bar No. 222757)
2 Stephanie L. Safdi (CA Bar No. 310517)
Benjamin Clark (CA Bar Student Cert. No. 00843490)
3 Ian Faucher (CA Bar Student Cert. No. 00844718)

4 ENVIRONMENTAL LAW CLINIC
Mills Legal Clinic at Stanford Law School
559 Nathan Abbott Way
5 Stanford, California 94305-8610
Telephone: (650) 725.8571
6 Facsimile: (650) 723.4426
dsivas@stanford.edu
7 matthewjsanders@stanford.edu
ssafdi@stanford.edu
8

9 *Attorneys for Petitioners COMMUNITIES FOR A
BETTER ENVIRONMENT and CENTER FOR
10 BIOLOGICAL DIVERSITY*

11 [additional counsel listed on next page]

12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
13 **COUNTY OF CONTRA COSTA**

14 COMMUNITIES FOR A BETTER
15 ENVIRONMENT and CENTER FOR
16 BIOLOGICAL DIVERSITY,

17 Petitioners,

18 v.

19 COUNTY OF CONTRA COSTA; BOARD
OF SUPERVISORS OF COUNTY OF
CONTRA COSTA; CONTRA COSTA
20 COUNTY DEPARTMENT OF
CONSERVATION AND DEVELOPMENT;
21 and DOES 1-20,

22 Respondents.

23 MARATHON PETROLEUM
24 CORPORATION, an Ohio corporation; and
TESORO REFINING & MARKETING
25 COMPANY LLC, a California limited liability
company, and DOES 21-40, inclusive,
26

27 Real Parties in Interest.
28

Case No. N22-1091

**PETITIONERS' OPENING BRIEF IN
SUPPORT OF PETITION FOR WRIT OF
MANDATE**

Date: May 24, 2023
Time: 9:00 a.m.
Dept.: 39
Judge: Hon. Edward G. Weil

[Code Civ. Proc. §§ 1085, 1094.5.; California
Environmental Quality Act, Pub Res. Code, §§
21000 et seq.]

Action Filed: June 7, 2022
Trial Date: May 24, 2023

1 Ellison Folk (CA Bar No. 149232)
Joseph D. Petta (CA Bar No. 286665)
2 Lauren Tarpey (CA Bar No. 321775)
3 SHUTE MAHALY & WEINBERGER LLP
396 Hayes Street
4 San Francisco, California 94102
Telephone: (415) 552-7272
5 Facsimile: (415) 552-5816
Folk@smwlaw.com
6 Petta@smwlaw.com
7 LTarpey@smwlaw.com

8 *Attorneys for Petitioners COMMUNITIES FOR A*
BETTER ENVIRONMENT and CENTER FOR
9 *BIOLOGICAL DIVERSITY*

10 Shana Lazerow (CA Bar No. 195491)
11 Constance Cho (CA Bar No. 343672)
COMMUNITIES FOR A BETTER ENVIRONMENT
12 6325 Pacific Boulevard, Suite 300
Huntington Park, California 90255
13 Telephone: (323) 826-9771
Facsimile: (323) 588-7079
14 slazerow@cbecal.org
15 ccho@cbecal.org

16 *Attorneys for Petitioner*
COMMUNITIES FOR A BETTER ENVIRONMENT

17
18 Victoria Bogdan Tejada (CA Bar No. 317132)
Hollin Kretzmann (CA Bar No. 290054)
19 CENTER FOR BIOLOGICAL DIVERSITY
1212 Broadway, Suite 800
20 Oakland, California 94612
Telephone: (310) 365-9281
21 Facsimile: (510) 844-7150
vbogdantejada@biologicaldiversity.org
22 hkretzmann@biologicaldiversity.org

23 *Attorneys for Petitioner*
24 *CENTER FOR BIOLOGICAL DIVERSITY*

TABLE OF CONTENTS

1

2 Glossary of Acronyms..... 9

3 INTRODUCTION 10

4 LEGAL BACKGROUND 11

5 FACTUAL BACKGROUND 13

6 I. The Community Affected by the Proposed Project 13

7 II. The Permanent Closure of the Martinez Petroleum
8 Refinery..... 14

9 III. The Proposed New “Rednewable Fuels” Project..... 15

10 IV. The Accelerating Demand for Renewable Fuels
11 Feedstock 17

12 PROCEDURAL BACKGROUND..... 19

13 STANDARD OF REVIEW 19

14 ARGUMENT 20

15 I. The EIR’s Use of an Operating Petroleum Refinery as
16 the Project Baseline Misleads the Public and Defies
17 CEQA..... 20

18 A. The project baseline is the critical point of
19 comparison against which an EIR assesses all
20 impacts of, and alternatives to, a proposal. 21

21 B. The EIR’s deviation from the standard “existing
22 conditions” baseline lacks evidentiary support. 22

23 C. The EIR’s legal justification for the baseline is
24 also flawed and misleading. 25

25 D. The EIR’s reliance on an improper baseline
26 tainted its analysis of the Project’s impacts,
27 potential mitigation, and alternatives. 27

28 II. The EIR’s Project Description Violates CEQA Because
It Omits a Reasonable Estimate of the Project’s Mix of
Feedstocks. 29

III. The EIR’s Analysis of the Project’s Direct Greenhouse
Gas Emissions Is Not Supported by Substantial
Evidence. 32

1 IV. The EIR Failed to Adequately Analyze the Project’s
2 Indirect and Cumulative ILUC Impacts. 36
3 A. Renewable fuel production causes significant
4 and unavoidable climate and non-climate land
5 use impacts. 36
6 B. The EIR’s finding that the Project will not result
7 in any ILUC impacts is unsupported by, and
8 contrary to, the evidence in the record. 38
9 C. The EIR also misleadingly claims that the
10 magnitude of the Project’s ILUC impacts is
11 “uncertain” and “speculative.” 39
12 D. The EIR makes no attempt to address cumulative
13 ILUC impacts. 43
14 V. The County Unlawfully Deferred Formulation of
15 Satisfactory Odor Mitigation. 45
16 A. The EIR did not meet its burden of explaining
17 why timely formulation of odor mitigation
18 measures was not practical or feasible. 46
19 B. The County failed to articulate specific, objective
20 performance standards to ensure that the odor
21 mitigation measures would be effective. 47
22 CONCLUSION 49
23
24
25
26
27
28

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page(s)

Cases

Ass’n of Irrigated Residents v. Kern County Board of Supervisors,
17 Cal.App.5th 708 (2017).....27, 29

Bakersfield Citizens for Local Control v. City of Bakersfield,
124 Cal.App.4th 1184 (2004).....45

In re Bay-Delta,
43 Cal.4th 1143 (2008)28

Berkeley Keep Jets Over the Bay Comm. v. Bd. of Port Comm’rs,
91 Cal.App.4th 1344 (2001).....42

Cal. Oak Found. v. City of Santa Clarita,
133 Cal.App.4th 1219 (2005).....35

Center for Sierra Nevada Conservation v. County of El Dorado,
202 Cal.App.4th 1156 (2012).....29

Cherry Valley Pass Acres & Neighbors v. City of Beaumont,
190 Cal.App.4th 316 (2010).....26, 27

Citizens for a Sustainable Treasure Island v. City and County of San Francisco,
227 Cal.App.4th 1036 (2014).....32

Citizens of Goleta Valley v. Bd. of Supervisors,
52 Cal.3d 553 (1990)45

Citizens to Preserve the Ojai v. County of Ventura,
176 Cal.App.3d 421 (1985).....41, 42

Communities for a Better Env’t v. City of Richmond,
184 Cal.App.4th 70 (2010).....32, 34, 47, 48

Communities for a Better Env’t v. S. Coast Air Quality Mgmt. Dist.,
48 Cal.4th 310 (2010)22, 24, 25, 26

County of Amador v. El Dorado County Water Agency,
76 Cal.App.4th 931 (1999).....21

Food & Water Watch v. Fed. Energy Regulatory Comm’n,
28 F.4th 277 (D.C. Cir. 2022)43

Golden Door Properties v. County of San Diego,
50 Cal.App.5th 467 (2020).....20, 45, 48

1 *King & Gardiner Farms, LLC v. County of Kern*,
2 45 Cal.App.5th 814 (2020).....28, 46, 47, 48

3 *Kings County Farm Bureau v. City of Hanford*,
4 221 Cal.App.3d 692 (1990)..... *passim*

5 *Laurel Heights Improvement Ass’n v. Regents of Univ. of Cal.*,
6 47 Cal.3d 376 (1988)12, 20

7 *League to Save Lake Tahoe v. County of Placer*,
8 75 Cal.App.5th 63 (2022).....47

9 *Mountain Lion Found. v. Fish & Game Comm’n.*,
10 16 Cal.4th 105 (1997)11

11 *Napa Citizens for Honest Government v. Napa County Board of Supervisors*,
12 91 Cal.App.4th 342 (2001).....31, 39

13 *Neighbors for Smart Rail v. Exposition Metro Line Constr. Auth.*,
14 57 Cal.4th 439 (2013)21, 22, 25

15 *No Oil, Inc. v. City of Los Angeles*,
16 13 Cal.3d 68 (1974)12

17 *North County Advocates v. City of Carlsbad*,
18 241 Cal.App.4th 94 (2015).....26

19 *Planning & Conservation League v. Castaic Lake Water Agency*,
20 180 Cal.App.4th 210 (2009).....32

21 *POET, LLC v. State Air Res. Bd.*,
22 218 Cal.App.4th 681 (2013).....48

23 *POET, LLC v. State Air Res. Bd.*,
24 12 Cal.App.5th 52 (2017).....21

25 *Preserve Wild Santee v. City of Santee*,
26 210 Cal.App.4th 260 (2012).....46

27 *San Joaquin Raptor Rescue Ctr. v. County of Merced*,
28 149 Cal.App.4th 645 (2007)..... *passim*

San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus,
27 Cal.App.4th 713 (1994).....45

Save the Agoura Cornell Knoll v. City of Agoura Hills,
46 Cal.App.5th 665 (2020).....48

Save Our Peninsula Comm. v. Monterey County Bd. of Supervisors,
87 Cal.App.4th 99 (2001).....25

1 *Sierra Club v. County of Fresno*,
2 6 Cal.5th 502 (2018)20, 42

3 *Sierra Club v. Federal Energy Regulatory Commission*,
4 867 F.3d 1357 (D.C. Cir. 2017)42

5 *Stopthemillenniumhollywood.com v. City of Los Angeles*,
6 39 Cal.App.5th 1 (2019)29, 31

7 *Union of Med. Marijuana Patients, Inc. v. City of San Diego*,
8 7 Cal.5th 1171 (2019)11, 12, 39

9 *WildEarth Guardians v. Zinke*,
10 368 F.Supp.3d 41 (D.D.C. 2019)41, 43

11 *Wildlife Alive v. Chickering*,
12 18 Cal.3d 190 (1976)12, 41

13 *Woodward Park Homeowners Assn., Inc. v. City of Fresno*,
14 150 Cal.App.4th 683 (2007).....29

15 **Statutes**

16 Cal. Pub. Res. Code § 21060.521

17 Cal. Pub. Res. Code § 2115112

18 Cal. Pub. Res. Code § 2106112

19 Cal. Pub. Res. Code § 21061.146

20 Cal. Pub. Res. Code, § 21081.6(b).....28, 45

21 Cal. Pub. Res. Code § 21168.520

22 **Other Authorities**

23 40 C.F.R. § 1508.842

24 CEQA Guidelines App. G, Section II37

25 CEQA Guidelines § 1506439

26 CEQA Guidelines § 15064.634

27 CEQA Guidelines § 1512525, 26

28 CEQA Guidelines § 15125 *passim*

CEQA Guidelines § 15126.212

1 CEQA Guidelines § 15126.428, 45, 46, 47
2 CEQA Guidelines § 15126.628, 29
3 CEQA Guidelines § 1513045
4 CEQA Guidelines § 1514432
5 CEQA Guidelines § 1538424

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Glossary of Acronyms

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

BAAQMD	Bay Area Air Quality Management District
CEQA	California Environmental Quality Act
CO ₂	Carbon Dioxide
CO ₂ e	Carbon Dioxide Equivalent
EIR	Environmental Impact Report
GHG	Greenhouse Gas
HEFA	Hydrotreating Ester and Fatty Acid
ILUC	Indirect Land Use Change
LCFS	Low Carbon Fuel Standard
PM _{2.5}	Particulate Matter (less than 2.5 microns in size)

1 **INTRODUCTION**

2 Demand for petroleum products in California has been declining for decades. Faced with this
3 reality, West Coast petroleum refiners have gradually consolidated operations. For Marathon
4 Petroleum Company (“Marathon”), consolidation meant winding down refinery operations near
5 Martinez, California in favor of its recently expanded and substantially larger facility in Los Angeles.
6 Consistent with the decision to cease operations in Martinez, Marathon canceled millions of dollars in
7 planned capital projects at that refinery. The Martinez facility remains closed to this day.

8 Closing the Martinez petroleum refinery after more than a century of operation provides a
9 unique opportunity to consider new uses at the dormant site that are more compatible with the
10 surrounding communities. Notably, a residential community disproportionately burdened by
11 industrial pollution sits just east of the refinery. But instead of engaging this community on potential
12 future use scenarios for the closed facility, Marathon now proposes to retool and “repurpose” the
13 property for a brand new industrial use – production of “renewable fuels” from agricultural
14 feedstocks like soybean oil or animal wastes like tallow (the “Project”).¹ To accomplish this
15 transformation, Marathon must make substantial “physical and operational changes” and obtain more
16 than a dozen new operating approvals and permits. The overhauled facility will use different
17 feedstocks, employ different processing technologies, and generate different products, but nearby
18 residents will, once again, suffer significant adverse impacts similar to those generated by prior
19 refinery operations.

20 The numerous government approvals required for the Project triggered environmental review
21 and disclosure under the California Environmental Quality Act (“CEQA”). The County of Contra
22 Costa (“County”) prepared the Environmental Impact Report (“EIR”) for the Project, which
23 generated substantial community concern and involvement. Residents and their allies raised
24 significant questions about the environmental harms associated with the proposed new operations.
25 These concerns are especially pressing given the oil industry’s collective push to convert excess
26

27 ¹ The term “renewable” is used in the Project approval documents and replicated here for clarity. As
28 discussed below, however, the production of “renewable” fuels like diesel, propane, naphtha, and
aviation fuel, *see* AR000114, is not without significant environmental impacts.

1 *Comm'n.*, 16 Cal.4th 105, 112 (1997). The California Supreme Court has long held that CEQA must
2 be interpreted to “afford the fullest possible protection to the environment.” *Wildlife Alive v.*
3 *Chickering*, 18 Cal.3d 190, 206 (1976) (quotation omitted).

4 Before granting any discretionary approval for a project that may have a significant effect on
5 the environment, the lead public agency must prepare an EIR. Cal. Pub. Res. Code §§ 21061, 21151.
6 The EIR is “the heart of CEQA,” *Laurel Heights Improvement Ass’n v. Regents of Univ. of Cal.*, 47
7 Cal.3d 376, 392 (1988) (quotation omitted), and “the key to environmental protection under [the
8 Act].” *No Oil, Inc. v. City of Los Angeles*, 13 Cal.3d 68, 75 (1974). It serves as an “environmental
9 alarm bell whose purpose is to alert the public and its responsible officials to environmental changes
10 before they have reached the point of ecological no return.” *Laurel Heights*, 47 Cal.3d at 392
11 (quotation omitted). The EIR’s required environmental review and disclosure are “intended to
12 demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the
13 ecological implications of its action.” *Id.* (quotation omitted). If CEQA is “scrupulously followed,”
14 the “duly informed” public “can respond accordingly to action with which it disagrees.” *Id.* (citation
15 omitted). Thus, an EIR is a “document of accountability,” and the CEQA process “protects not only
16 the environment but also informed self-government.” *Id.*

17 To satisfy this legislative mandate, the CEQA Guidelines² require that an EIR include
18 detailed analysis of a project’s direct, indirect, and cumulative effects on the environment. CEQA
19 Guidelines § 15126.2. For impacts that may be significant, the EIR also must identify mitigation
20 measures and alternatives that could avoid or reduce those impacts. *Id.* § 15126.4. Consistent with
21 CEQA’s information disclosure obligations, the EIR’s analysis and supporting data must be sufficient
22 to “enable those who did not participate in its preparation to understand and to consider meaningfully
23 the issues raised by the proposed project.” *Laurel Heights*, 47 Cal.3d at 405. In short, CEQA ensures
24 “the integrity of the process of decisionmaking by precluding stubborn problems or serious criticism

25 _____
26 ² CEQA is implemented by an extensive series of administrative regulations promulgated by the
27 Secretary of the Natural Resources Agency, ordinarily referred to as the “CEQA Guidelines.”
28 Through long practice, the courts “afford great weight to the Guidelines except when a provision is
clearly unauthorized or erroneous under CEQA.” *Union of Med. Marijuana Patients, Inc.*, 7 Cal.5th
at 1184. The Guidelines are codified at title 14, section 15000 *et seq.* of the California Code of
Regulations.

1 from being swept under the rug.” *Kings County Farm Bureau v. City of Hanford*, 221 Cal.App.3d
2 692, 733 (1990) (citation omitted).

3 **FACTUAL BACKGROUND**

4 **I. The Community Affected by the Proposed Project**

5 Marathon’s shuttered East Bay petroleum refinery occupies a 2,000-acre site on Suisun Bay,
6 wedged between the cities of Martinez and Concord. AR000101-02. During a century of operation,
7 the former refinery caused significant air pollution. *See* AR000180 (Table 3.3-6, listing routine air
8 emissions). Regulators also frequently cited the facility for air permit violations. From 2011 to 2019,
9 for example, the Bay Area Air Quality Management District (“BAAQMD”) issued 141 Notices of
10 Violation to the facility. AR075230. When Marathon closed the petroleum refinery in April 2020,
11 the company was renegotiating a consent decree with the U.S. Environmental Protection Agency
12 stemming from the plant’s emission of nitrous oxide in excess of its annual permit limits. *Id.*

13 The new Project portends more of the same. It “will continue to contribute to the exposure of
14 nearby communities to elevated levels of air pollution,” including residents living to the east, west,
15 and south of the facility. AR048387. The closest homes are just 170 feet from the refinery’s eastern
16 boundary, *id.*, and the Dalis Gardens Mobilehome Park sits only 700 feet south of the facility’s
17 property line. AR000103. Martinez Junior High School is less than a mile away, AR048387, and
18 Concord’s Floyd I. Marchus public school, which serves children with special emotional and
19 behavioral needs, is only half a mile to the south. AR000172; AR000401. As the California Air
20 Resources Board explained, “[t]hese residences and schools are already exposed to toxic diesel
21 particulate matter (diesel PM) emissions generated by existing industrial buildings, vehicle traffic
22 along Interstate 680 (I-680), and rail traffic along existing rail lines.” AR048387. Other nearby
23 polluting activities include, for example, a rock quarry, a concrete batch plant, and a waste transfer
24 station. AR000105. And the Phillips 66 Rodeo refinery, one of the nation’s largest petroleum
25 refineries, is only ten miles away. AR000456.

26 Recognizing these cumulative local hazards, the California Environmental Protection Agency
27 has identified the census tract containing Marathon’s Martinez facility, a low-income area with a
28 pollution burden greater than that borne by 80 percent of the State, as a “disadvantaged community.”

1 AR048354; AR048388 (comment letter from the California Air Resources Board noting “the County
2 must ensure that the [Martinez] Project does not adversely impact neighboring disadvantaged
3 communities”). State agencies use that designation to identify communities that merit additional
4 environmental protections and targeted investments. AR048387-88. Yet the proposed Project will
5 perpetuate harm to this community. Collectively with other local sources, it will exceed BAAQMD’s
6 “level of significance” for particulate emissions and impose “significant and unavoidable” air
7 pollution impacts on the surrounding population. AR000205.

8 **II. The Permanent Closure of the Martinez Petroleum Refinery**

9 Throughout most of the 2010s, the Martinez petroleum refinery reported a maximum
10 production capacity of 166,000 barrels per day (“bpd”), phasing down to a capacity of roughly
11 161,000 bpd in the two years before it ceased operations in April 2020. AR000105; AR048662;
12 AR066067. For the last four years of full operation, the facility actually produced an average of
13 between 144,000 and 152,000 bpd. AR000143. Marathon’s California production exclusively serves
14 the West Coast liquid fuel market, which has been shrinking for decades. AR048438-40. State
15 climate policies have accelerated that trend by encouraging a shift away from liquid fuels and to
16 electric vehicles. AR048439. Alongside this long-term decline, the U.S. petroleum refining industry
17 has undergone a period of prolonged consolidation. AR048437-39. Because operating fewer
18 refineries at higher capacities is more efficient, companies like Marathon have consolidated their
19 production at fewer plants. *Id.*; *see* AR066046.

20 Marathon and its subsidiary Tesoro Refining & Marketing Company, LLC responded to West
21 Coast market conditions by consolidating refinery capacity in Southern California and ultimately
22 closing the Martinez facility. With its “Los Angeles Refinery Integration and Compliance Project,”
23 Tesoro purchased an operating refinery in Carson and consolidated it with the company’s existing
24 Wilmington refinery, more than tripling its Southern California refining capacity. AR048438;
25 AR068646-47. Marathon’s expanded Wilmington facility is now the largest West Coast petroleum
26 refinery, with a throughput capacity of 363,000 bpd. AR066067. These consolidation activities left
27 Marathon with 25 percent more capacity in 2020 than it had in 2010, even as demand declined.

28

1 AR048663. When COVID-19 reduced demand further in April 2020, Marathon closed the Martinez
2 refinery while leaving open its Wilmington facility. AR000100; AR075170; AR075191.

3 In July 2020, Marathon publicly announced that it did not intend to reinstate petroleum
4 refining at the Martinez site, AR068827, and it began taking steps to permanently retire the facility’s
5 petroleum assets. The company canceled \$27 million in capital projects slated for the Martinez
6 facility and identified \$342 million in petroleum refining assets that “would be abandoned” because
7 Marathon was “no longer using [those] assets” and had “no expectation to use [those] assets in the
8 future.” AR075265. Marathon also incurred “exit costs” of \$195 million associated with the closure
9 of the Martinez refinery and another facility in New Mexico. AR068913.

10 Even after demand recovered to pre-COVID levels starting in 2021, California remains
11 saddled with several hundred thousand barrels per day of excess petroleum refining capacity. *See*
12 AR048443 (Tables 4 and 5 displaying U.S. Energy Information Administration data regarding 2021
13 California capacity utilization rates and 2021 West Coast capacity utilization rates as compared to
14 2010-19). That excess capacity far exceeds the full operating capacity of the Martinez plant. Given
15 these circumstances, Marathon logically chose not to reopen the Martinez facility, instead prioritizing
16 the more efficient operations at its expanded and updated Wilmington facility.

17 **III. The Proposed New “Renewable Fuels” Project**

18 In February 2021, nearly a year after Marathon stopped refining petroleum at the Martinez
19 site, the County commenced the permitting process to construct and operate the company’s proposed
20 new Project by releasing a CEQA Notice of Preparation. AR000097; *see* AR001040-43. Marathon
21 proposed to replace petroleum refining at the site with a hydrotreating ester and fatty acid (“HEFA”)
22 technology that can process non-petroleum feedstocks. AR048875. As proposed, the Project can
23 process up to 48,000 bpd (2 million gallons per day) of so-called “renewable fuels,”³ which would
24

25 ³ “Biofuels – hydrocarbons derived from biomass and burned as fuels for energy – are made via
26 many different technologies, each of which features a different set of capabilities, limitations, and
27 environmental consequences.” AR048626. “Renewable” fuels, a subset of biofuels, include diesel,
28 propane, naphtha, and aviation fuels produced from non-fossil fuel feedstocks with high lipid (oil)
contents. AR000484. These feedstocks can include agricultural inputs such as corn oil and soybean
oil as well as animal fats and other residues. AR048524-25. Renewable fuels are distinct from

1 make it the second largest HEFA producer in the world. AR00070; AR000114; AR048553.
2 Marathon “expect[s]” to process a wide range of inputs at the retooled facility, AR000135, including
3 corn oil, soybean oil, rendered animal fats, and “potentially other cooking and vegetable oils.”
4 AR000070. The Project EIR, however, did not specify the type or quantities of feedstocks Marathon
5 intends to use or identify their likely source. Such information is vital to understanding Project
6 impacts because feedstock type and source influence both direct and indirect effects. AR145781.

7 Characterized by Marathon as a “large capital project,” the Martinez facility make-over will
8 require construction of significant new infrastructure and subsstantial alteration of existing processing
9 equipment. *See* AR068889; AR000115-16; AR000118-23 (Table 2-1, enumerating the construction
10 of three entirely new units, the major modification of six units, and the retirement of 18 petroleum
11 processing units). For example, Marathon will construct a *new* Pretreatment Unit to remove
12 impurities from the raw renewable feedstocks. AR000118 (listing new equipment to be purchased
13 and installed with this unit, including a raw feed surge drum and charge pump, a wash water surge
14 drum and charge pump, a weak acid surge drum and pump, heat exchangers and coolers as required
15 to meet Pretreatment Unit operating conditions, a water/oil separator, and wash water effluent pH
16 neutralization and cooling equipment). The new Pretreatment Unit will send 300 to 400 gallons of
17 wastewater per minute to a *new* Stage 1 Wastewater Treatment Unit. *Id.*; AR000137. And a *new*
18 three-stage Thermal Oxidizer will control nitrogen oxide emissions from the sour water stripper. *Id.*

19 Critically, several of the petroleum refinery’s core processing units will undergo a “complete
20 revamp” to facilitate the new HEFA process. AR000138. The Project will convert the No. 2 and No.
21 3 Hydrodesulfurization Units and the Hydrocracker 1st Stage to Hydrodeoxygenation (“HDO”) Units
22 and will convert he Hydrocracker 2nd Stage to a Diesel Isomerization Unit. *Id.* The new HDO
23 reactors, standing 140 feet tall, and the downstream isomerization reactions are “the principal
24 processes required for creating renewable fuels.” AR000115; AR000163. Marathon will also modify
25 the existing gas plant to accommodate gases and liquids from the modified HDO units. AR000119.
26 To make room for these changes, Marathon must clear/grade new portions of the site. AR000115.

27 _____
28 “biodiesel,” a different type of biofuel that must be burned together with petroleum-based fuels to
function in combustion engines. *Id.*

1 To support the new Project operations, Marathon will also make numerous other
2 modifications. It will repurpose as many as 29 aboveground storage tanks to store raw feedstocks
3 and processed fuels, AR000121, and install “interconnecting piping (for transmission of hydrogen,
4 conveyance of wastewater, etc.) between new and modified Refinery units” because the existing
5 pipeline infrastructure “is not well-suited to the movement of renewable fuels.” AR000116:
6 AR000136. Marathon’s nearby Avon and Amorco Marine Terminals, *see* AR000104 (Figure 1-2),
7 will be transformed from receiving to distribution facilities, with new piping and docking
8 infrastructure. AR000116: AR000135-36; AR000138. The company also plans to demolish the
9 many remaining petroleum refining units at the Martinez site that cannot be converted to renewable
10 fuels production. AR000115; *see also* AR000121-23 (Table 2.1); AR000167-70 (Table 3.3-1).

11 These significant facility renovations will take roughly two years to complete, AR000137,
12 although the long-term decommissioning of abandoned refinery equipment may take longer.
13 AR000138. And the changes will necessitate more than a dozen new permits or other approvals from
14 various local, regional, state, and federal agencies, including a new “Authority to Construct/Permit to
15 Operate” from BAAQMD. AR000096-97. In sum, Marathon intends to dramatically transform the
16 site from a closed petroleum refinery brownfield to a new renewable fuels production facility that
17 will receive different feedstock inputs, use different processing equipment, require different
18 government approvals, and produce different final products.

19 **IV. The Accelerating Demand for Renewable Fuels Feedstock**

20 Marathon’s proposed Project allows the company to generate “credits” under California’s
21 Low Carbon Fuel Standard (“LCFS”) from the excess (and abandoned) refinery capacity at the closed
22 Martinez plant. The LCFS program “was designed to reduce the State’s reliance on petroleum-based
23 fuels,” AR000317, by creating “an economic incentive for production of renewable fuels” in
24 California. AR000290. Here, for instance, Marathon may use credits generated by its proposed
25 renewable fuels production at Martinez to offset some of the “deficits” incurred by the more carbon-
26 intensive petroleum-based fuels produced at its large Wilmington refinery in Southern California.
27 See AR000317. But “renewable” fuel production is not costless. As discussed below, it generates
28 significant particulate and greenhouse gas emissions and creates other adverse local impacts.

1 In addition, biofuel production can cause indirect impacts associated with land use changes.
2 Such land use changes occur when increased demand for a particular feedstock drives up the price of
3 the commodity, incentivizing farmers to devote more land to that crop or to clear new land to meet
4 the increased demand. AR145873; AR046981. In this way, increased biofuel production can drive
5 deforestation and loss of biodiversity as land is cleared for cultivation of vegetable oil crops.
6 AR145868; AR047026. Other potentially “irreversible” impacts include disrupting migratory routes
7 and harming species by increased levels of pesticide use. *Id.*; AR047055. The extent of a particular
8 project’s indirect land use change (“ILUC”) impacts will depend on the types and amounts of
9 feedstocks it processes. AR145781; AR145874; AR047054. For example, the production of soybean
10 oil – U.S. refineries’ primary vegetable oil (or lipid) feedstock – is more closely linked to
11 deforestation than is the production of corn oil. AR048451-52. In general, however, scientists have
12 reached “a degree of consensus . . . that ILUC is a real and significant effect in comparison to the
13 potential emissions savings offered by using biofuels.” AR145734.

14 In addition to the potentially significant ILUC impacts from a facility of this size, the
15 collective demand from multiple renewable fuel facilities can create cumulatively considerable ILUC
16 impacts. Here, the proposed Martinez operation could, by itself, consume up to 24 percent of total
17 domestic soybean oil production. AR048454. And Marathon’s Project hardly stands in isolation. In
18 the rush to “repurpose” aging petroleum refinery assets and capture LCFS subsidies, refiners have
19 proposed large-scale renewable fuels projects across California and the nation. A mere ten miles
20 from the Martinez facility, the Phillips 66 Company (“Phillips 66”) aims to “transform” its Rodeo
21 refinery into the largest renewable fuels plant in the world. AR000456; AR124653. That overhauled
22 plant would produce up to 67,000 bpd of biofuels while continuing to churn out up to 40,000 bpd of
23 petroleum-based fuels. AR147050. In Bakersfield and Paramount, too, energy companies plan to
24 convert petroleum refining facilities to renewable fuel operations. AR142496; AR146557.

25 As of December 2021, 18 biofuel projects were proposed or under construction nationwide.
26 AR048494. These projects stand to generate significant new pressures on supplies of animal fats and
27 crops grown for biofuel (including renewable fuel) production, multiplying demand for agriculture-
28 based feedstocks. Collectively, they would nearly triple the consumptive capacity of biofuel and

1 renewable fuel refineries in the United States, from 235,000 bpd of lipid feedstocks to 692,500 bpd.
2 *Id.* Yet the United States currently produces only 372,000 bpd of lipid feedstocks – soybean oil,
3 corn oil, canola oil, yellow grease, white grease, poultry fat, and tallow – for *all* applications,
4 including the production of renewable fuels. AR048491. The rapidly expanding biofuel industry
5 thus has the potential to dramatically alter agricultural decisions and land use patterns.

6 **PROCEDURAL BACKGROUND**

7 In October 2021, the County circulated a Draft EIR for the proposed Project and subsequently
8 received more than 250 public comments, along with various public agencies’ comments. *See*
9 AR048338-42. These written comments were accompanied by an extensive array of technical
10 reports, peer-reviewed scientific studies, corporate filings, and public testimony. AR081765. This
11 record illustrates the many harmful impacts that the Project will impose on the surrounding
12 community and highlights both informational deficiencies and insufficient mitigation measures in the
13 Draft EIR. For example, comments called attention to the inadequate project description, which
14 provided extremely minimal information about the proposed Project’s feedstocks and did not
15 estimate the amounts of any particular feedstocks the Project might use. AR048432. Among other
16 issues, comments also raised concerns that the EIR failed to properly mitigate significant odor
17 impacts, AR048482, and they explained that the EIR failed to consider land use change impacts
18 resulting from increased demand for renewable fuel feedstocks. AR048418.

19 The County’s responses largely ignored or downplayed many of the affected public’s
20 concerns. *See* AR081765. After the County certified the Final EIR, Petitioners timely filed an appeal
21 to the Board of Supervisors, arguing that the EIR violated CEQA and that evidence in the record did
22 not support its findings and conclusions. AR082637-83010. On May 3, 2022, the County Board of
23 Supervisors denied the appeal, certified the EIR, and granted local land use approvals. AR054380-
24 81; AR000004. On May 9, 2022, the State Clearinghouse posted the CEQA Notice of Determination
25 for the Project EIR. AR000001. Petitioners timely filed this case, challenging the adequacy of the
26 EIR, on June 7, 2022.

27 **STANDARD OF REVIEW**

28 An agency violates CEQA if the reviewing court determines that the agency has prejudicially

1 abused its discretion. Cal. Pub. Res. Code § 21168.5. “Abuse of discretion is established if the
2 agency has not proceeded in a manner required by law *or* if the determination or decision is not
3 supported by substantial evidence.” *Id.* (emphasis added). Courts review “de novo whether the
4 agency has employed the correct procedures.” *Sierra Club v. County of Fresno*, 6 Cal.5th 502, 512
5 (2018). Under the de novo standard, a court must “scrupulously enforce all legislatively mandated
6 CEQA requirements.” *Id.* (quoting *Citizens of Goleta Valley v. Bd. of Supervisors*, 52 Cal.3d 553,
7 564 (1990)). This standard applies broadly to legal errors and to mixed questions of fact and law
8 which “requir[e] a determination whether statutory criteria were satisfied.” *Id.* at 516. When an
9 agency fails to proceed as required by CEQA, the error of law is necessarily prejudicial and a
10 “harmless error” analysis does not apply. *Id.* at 515. Courts review an agency’s decision for
11 substantial evidence *only* when factual questions predominate. *See Golden Door Properties v.*
12 *County of San Diego*, 50 Cal.App.5th 467, 504-05 (2020). Such instances are quite limited. *See*
13 *Sierra Club*, 6 Cal.5th at 514. And even when substantial evidence review is appropriate, courts must
14 carefully “scrutinize the record.” *Laurel Heights*, 47 Cal.3d at 408 (citation omitted).

15 ARGUMENT

16 I. The EIR’s Use of an Operating Petroleum Refinery as the Project Baseline Misleads the 17 Public and Defies CEQA.

18 An EIR compares two possible worlds: one with the proposed project and one without. That
19 framework allows the public to understand the full significance of a project’s impacts on the existing
20 environment and requires decisionmakers to consider alternatives and mitigation measures that
21 eliminate or reduce those impacts. Here, the EIR’s description of the world without the proposed
22 Project is not only factually and legally flawed, but also affirmatively misleading. The Martinez
23 refinery is closed and the overwhelming evidence in the record indicates that it will remain closed if
24 the new proposed Project does not go forward. Yet the EIR assumed that, absent the Project,
25 Marathon will simply restart petroleum refining at or near its prior historic capacity. From that
26 unfounded assumption, the EIR concludes that the smaller-capacity new Project will necessarily be
27 insignificant *by comparison* to the prior operations, thereby sidestepping meaningful analysis of
28 actual impacts, feasible mitigation, and reasonable alternatives. Because this threshold legal error

1 taints the entire CEQA process, the Court should set aside the EIR and remand to the County for full
2 and adequate environmental review using a factually grounded and legally proper baseline.

3 **A. The project baseline is the critical point of comparison against which an EIR**
4 **assesses all impacts of, and alternatives to, a proposal.**

5 “Before the impacts of a project can be assessed and mitigation measures considered, an EIR
6 must describe the existing environment” against which any significant environmental effects will be
7 measured. *County of Amador v. El Dorado County. Water Agency*, 76 Cal.App.4th 931, 952 (1999).
8 CEQA defines that environment as the “physical conditions which exist within the area which will be
9 affected by a proposed project.” Cal. Pub. Res. Code § 21060.5. The CEQA Guidelines elaborate
10 that the proposed project’s existing environmental setting constitutes the “baseline” by which a lead
11 agency determines whether an impact is significant. CEQA Guidelines § 15125(a).

12 Use of a proper baseline is vital to the integrity of the CEQA process. The baseline serves as
13 the EIR’s central point of comparison against which the project’s impacts are described and
14 quantified. *See Neighbors for Smart Rail v. Exposition Metro Line Constr. Auth.*, 57 Cal.4th 439,
15 447 (2013). Thus, the baseline is a “key component” of the CEQA analysis. *POET, LLC v. State Air*
16 *Res. Bd.*, 12 Cal.App.5th 52, 78 (2017). When properly defined, the baseline ensures that an EIR
17 fulfills the law’s central purpose of informing decisionmakers and the public of any significant
18 impacts caused by the project and mitigating those impacts as a condition of approval. *Id.* at 78-79.

19 Because the baseline serves as the analytical foundation for an EIR, transparency is
20 paramount: “The public and decision makers are entitled to the most accurate information on project
21 impacts practically possible, and the choice of a baseline must reflect that goal.” *Neighbors for*
22 *Smart Rail*, 57 Cal.4th at 455. To satisfy this mandate, the EIR must “clearly and conspicuously
23 identify the baseline assumptions” against which a project will be analyzed. *San Joaquin Raptor*
24 *Rescue Ctr. v. County of Merced*, 149 Cal.App.4th 645, 659 (2007). A baseline description that fails
25 to facilitate adequate public disclosure of a project’s actual impacts and informed decisionmaking
26 constitutes an abuse of discretion. *County of Amador*, 76 Cal.App.4th at 954-55.

27 “Generally, the lead agency should describe physical conditions as they exist *at the time the*
28 *notice of preparation is published.*” CEQA Guidelines § 15125(a)(1) (emphasis added). CEQA’s

1 central policy goals are best served by this “default” baseline, which provides clarity to
2 decisionmakers and the public, elucidates tradeoffs between short-term and long-term environmental
3 impacts, and avoids the difficulties of predicting the future. *Neighbors for Smart Rail*, 57 Cal.4th at
4 455-56. Time and again, courts have concluded that the “real conditions on the ground” rather than
5 permitted activity must constitute the baseline for CEQA analysis. *E.g. Communities for a Better*
6 *Env’t v. S. Coast Air Quality Mgmt. Dist.*, 48 Cal.4th 310, 321 (2010) (“*CBE v. SCAQMD*”) (citing
7 *Save Our Peninsula Comm. v. Monterey County Bd. of Supervisors*, 87 Cal.App.4th 99, 121 (2001)
8 and *City of Carmel-by-the-Sea v. Bd. of Supervisors*, 183 Cal.App.3d 229, 246 (1986)). For these
9 reasons, an existing conditions baseline is the “norm from which a departure must be justified.”
10 *Neighbors for Smart Rail*, 57 Cal.4th at 455. And any deviation from existing conditions, such as
11 prior historic operations, must be “supported with substantial evidence.” CEQA Guidelines
12 § 15125(a)(1).

13 **B. The EIR’s deviation from the standard “existing conditions” baseline lacks**
14 **evidentiary support.**

15 When the County published its CEQA notice of preparation for the Project EIR in February
16 2021, *see* AR000097, the Martinez petroleum refinery had already been closed for nearly a year.
17 Under CEQA’s general principles, therefore, the default baseline was a *closed* facility with *zero*
18 production. CEQA Guidelines § 15125(a)(1). Ignoring these unassailable facts, the Draft EIR
19 instead built its entire impacts analysis on the fiction that the petroleum refinery is *still operating*. In
20 particular, the EIR selected as its baseline the refinery’s average daily operating throughput during
21 the five years immediately preceding Marathon’s permit application to the County in October 2020.
22 AR000142. During the first four of those years, while the refinery was operating, annualized average
23 daily throughput varied from a low of around 144,000 bpd (in the first year) to a high of nearly
24 152,000 bpd (in the fourth year), presumably reflecting normal operational variability. AR000143.
25 Because the refinery ceased all operations halfway through the fifth year (defined as October 2019 to
26 October 2020), the average daily throughput for that final year fell by half, to roughly 72,000 bpd.
27 *Id.* By averaging all five of these years, the EIR derived an overall throughput rate of approximately
28

1 133,000 bpd, a number that merely reflects the County’s mathematical manipulations, rather than
2 either the current closed conditions *or* the average daily throughput while the facility was operating.

3 In an attempt to justify the “representativeness and conservativeness” of its five-year average
4 daily throughput methodology, AR000145, the EIR alternatively considered two different one-year
5 average throughput scenarios (for 2018-2019 and 2019-20, respectively), as well as a three-year
6 average throughput scenario (for 2017-2020). AR000143 (Table 3-3). The calculated results under
7 these scenarios vary by as much as 80,000 bpd – or roughly two-fold (from 71,858 bpd to 151,894
8 bpd) – depending on how many fully operational years are included and whether the scenario
9 includes time after the refinery closed. *Id.* (Table 3-1). By contrast, when the facility was actually
10 operating, annualized daily throughput varied by less than 8,000 bpd from year to year (ranging from
11 144,013 bpd to 151,894 bpd). *Id.* In short, the EIR did not employ a reason-based methodology that
12 led to a “representative” baseline, but instead engineered a few alternative scenarios and then chose
13 one. Notably, the EIR rejected the lower 2019-20 one-year average (71,858 bpd) as insufficiently
14 “representative” of actual facility operating conditions “because it is deflated by a half-year of zero-
15 production” after the refinery closed. AR000145. But that is precisely Petitioners’ point: Once the
16 facility was closed and operations ceased, the “existing condition” at the site was (and is) zero
17 production, absent a showing in the record that petroleum refining will resume. CEQA Guidelines
18 § 15125(a)(1).

19 There is no such showing here. Just the opposite, in fact. The record concerning “existing
20 conditions” at the Project site is clear and unrefuted: The petroleum refinery has been closed since
21 April 2020; prior to that closure, Marathon completed a significant expansion of its Wilmington
22 refining capacity and subsequently canceled millions of dollars in scheduled capital improvements at
23 its Martinez property; the West Coast petroleum refining market continues to have excess capacity,
24 even after its post-COVID recovery, relative to declining demand; and there is no credible evidence
25 in the record that Marathon will ever resume petroleum operations at the Martinez refinery, much less
26 at or near its historic operating capacity. *See* Factual Background, *supra*, at sections II-IV. Indeed,
27 based on Marathon’s public announcement in the summer of 2020, the business media reported that
28 the company planned to “permanently close” the petroleum refinery. AR147787.

1 Marathon’s actions since its closure announcement have only confirmed that it has no
2 intention or plan to reopen the facility as a petroleum refinery. In February 2021, more than ten
3 months after the closure, the company’s annual report disclosed significant “restructuring expenses”
4 for 2020, including “exit costs” of \$195 million at the Martinez site and one smaller refinery and
5 \$172 million in employee separation costs. AR075235. Elsewhere, the report noted that \$342
6 million in refinery assets “would be abandoned since they had no function in a renewable diesel
7 facility configuration.” AR075265. In writing down these refinery assets, the company has been
8 unambiguous about its intention not to recommence petroleum refining: “[W]e are no longer using
9 these assets and *have no expectation to use these assets in the future.*” *Id.* (emphasis added).
10 Marathon’s decision to abandon petroleum refining at Martinez and consolidate those activities in
11 Southern California is a logical business response to long-term economic trends in the industry.
12 AR048437-38.

13 In contrast to this abundant record, the EIR offered nothing but speculation for its assumption
14 that Marathon could – and therefore would – resume its historic petroleum refining operations.
15 Addressing public comments and market data submitted in response to the Draft EIR’s use of an
16 inappropriate baseline, the Final EIR doubled down, insisting that an operating petroleum refinery is
17 the proper baseline *primarily because* Marathon has maintained permits to operate the former
18 refinery and thus has a “path” and the “option” to resume petroleum refining if it so chooses.
19 AR048841; AR048846. But a “path” or “option” to reopen the petroleum refinery and theoretically
20 resume historic operations does not constitute substantial evidence that Marathon will, or is likely to,
21 do so. *See* CEQA Guidelines § 15384 (“Argument, speculation, unsubstantiated opinion or narrative
22 . . . does not constitute substantial evidence”). And “an applicant’s vested rights [to an operating
23 permit] . . . are not an excuse to avoid realistic CEQA analysis.” *CBE v. SCAQMD*, 48 Cal.4th at
24 325. In fact, many of the permits that Marathon has retained are required for its ongoing storage and
25 transfer activities and needed for its proposed renewable fuels operation. AR081772. The Supreme
26 Court has been clear that, in choosing a legally proper baseline, an EIR may not compare the
27 proposed project to “what *could* happen, rather than to what [is] actually happening.” *CBE v.*
28 *SCAQMD*, 48 Cal.4th at 322 (rejecting maximum permitted operational levels as baseline for a

1 proposed refinery conversion because that baseline was “not a realistic description of the existing
2 conditions”).

3 Applicants like Marathon have “a vested interest in establishing a . . . baseline high enough to
4 allow the project to go forward.” *Save Our Peninsula*, 87 Cal.App.4th at 122. Here, Marathon
5 plainly has a strong incentive to inflate the CEQA baseline – from zero to 133,000 bpd – by the
6 relatively low-cost action of maintaining old operating permits until the environmental review
7 process for the new Project is completed. But condoning such manipulation would “drain Guidelines
8 section 15125(a)’s last sentence (providing that existing environmental conditions ‘will normally
9 constitute the baseline physical conditions by which a lead agency determines whether an impact is
10 significant’) of virtually all prescriptive effect” and “open the door to gamesmanship in the choice of
11 baselines.” *Neighbors for Smart Rail*, 57 Cal.4th at 456. The Court should reject such obvious
12 gamesmanship in this case.

13 **C. The EIR’s legal justification for the baseline is also flawed and misleading.**

14 The EIR’s legal justification for the chosen baseline is as flawed as its factual justification.
15 The EIR invokes section 15125 of the CEQA Guidelines, *see* AR000141-42, which permits some
16 deviation from the normal “existing conditions” default baseline, but only “[w]here existing
17 conditions change or fluctuate over time, *and* where necessary to provide the most accurate picture
18 possible of the project’s impacts.” CEQA Guidelines § 15125(a)(1) (emphasis added). When both
19 conditions are satisfied, the lead agency may define “existing conditions” by reference to historic
20 conditions supported by substantial evidence in the record. *Id.* Here, neither condition is applicable.

21 As the Supreme Court explained in *CBE v. SQAQMD*, section 15125(a)(1) is meant to
22 accommodate “[a] temporary lull or spike in operations that happens to occur at the time
23 environmental review for a new project begins” or to provide flexibility when, for example,
24 “environmental conditions are expected to change quickly during the period of environmental review
25 for reasons other than the proposed project” and “project effects might reasonably be compared to
26 predicted conditions at the expected date of approval, rather than to conditions at the time of
27 analysis.” 48 Cal.4th at 328. While the EIR undoubtedly is correct that operating refineries may
28 experience occasional or periodic fluctuations, that is *not* what is happening here. Operations at the

1 Martinez petroleum refinery are not fluctuating; they have permanently ceased. The County’s
2 reliance on section 15125 and *CBE v. SCAQMD*, AR000141, is wholly misplaced.⁴

3 The EIR wandered even further astray in relying on *North County Advocates v. City of*
4 *Carlsbad*, 241 Cal.App.4th 94 (2015), and *Cherry Valley Pass Acres & Neighbors v. City of*
5 *Beaumont*, 190 Cal.App.4th 316 (2010). See AR000141; AR048847. *North County* concerned a
6 shopping center renovation where the EIR used a historic traffic baseline that reflected full
7 occupancy of the center, even though part of the facility was seasonally vacant. 241 Cal.App.4th at
8 102-03. This approach was consistent with CEQA, the court concluded, because fluctuating
9 occupancy is “the nature of a shopping center,” akin to a “temporary lull or spike in operations” at an
10 operating refinery. *Id.* at 105-06. *North County* is simply inapplicable here, where the permanent
11 cessation of petroleum refining and the abandonment of refinery production assets is neither a
12 “temporary lull” nor “in the nature” of a petroleum refinery.

13 *Cherry Valley*, too, is inapposite. That decision turned on the project proponent’s legally
14 enforceable entitlement to a specific allocation of groundwater under a full adjudication of the basin,
15 as memorialized in a final judgment. The property slated for residential development previously used
16 only a fraction of this water right for an egg farm operation. In assessing project impacts on local
17 water supply, the EIR used the developer’s full water right entitlement under the judgment as the
18 baseline. The challengers argued unsuccessfully that the proper baseline was the amount of water
19 previously used at the property, rather than the full water right entitlement. The court disagreed,
20 noting that the full water entitlement was a realistic and proper baseline because it had already been
21 accounted for in the groundwater adjudication and was unaffected by the operation or subsequent
22

23 ⁴ The Draft EIR explained that operating refineries may experience occasional or periodic
24 fluctuations as a result of both exogenous events like available supply, market demand, and weather,
25 AR000142, and planned “turnarounds consisting of cyclical shutdown of refining equipment for
26 approximately 40-80 days to perform maintenance activity on a unit or units,” such as those listed in
27 Table 3-5. AR000144. The Final EIR elaborated that “turnarounds are a predictable cause of
28 fluctuation occurring on an established schedule.” AR048917. Presumably, these factors account for
the variability of roughly 8,000 bpd in average throughput experienced at the Martinez refinery
during the last four years of its operation. But they are irrelevant to the baseline for a facility that is
no longer operating and thus no longer experiences “turnarounds.”

1 cessation of the egg farm. *Id.* at 337-38. Using a lower baseline would have misled the public, the
2 court concluded, by suggesting that the project would significantly impact the already adjudicated
3 water supply. *Id.* The highly unique circumstances of that case offer no support here.⁵

4 In fact, section 15125(a)(1) cuts sharply against the EIR’s baseline approach in this case.
5 Historic, rather than existing, conditions are appropriate *only* when they provide “the most accurate
6 picture possible of the project’s impacts.” CEQA Guidelines § 15125(a)(1). Pretending that the
7 Martinez petroleum refinery is still operating at or near recent throughput capacity, when in fact it has
8 been shuttered for nearly three years, actually paints the most *inaccurate* picture possible by
9 downplaying Project impacts, rendering the EIR informationally deficient and legally flawed.

10 **D. The EIR’s reliance on an improper baseline tainted its analysis of the Project’s**
11 **impacts, potential mitigation, and alternatives.**

12 Had the EIR used a proper baseline (a closed brownfield site), a very different picture of the
13 Project’s impacts, necessary mitigation, and reasonable alternatives would have emerged. The
14 determination of “significance” under CEQA depends on the setting, and even seemingly minor
15 incremental contributions to an already overburdened community can be significant. *See Kings*
16 *County Farm Bureau*, 221 Cal.App.3d at 718 (citing CEQA Guidelines § 15064(b) and holding that
17 even relatively minor air emissions may be significant in an impaired airshed). In a community like
18 Martinez that already bears disproportionate pollution burdens, the Project’s *new* contributions to air
19 pollution, hazardous materials exposure, noise, truck traffic, and similar local problems may well,

20 _____
21 ⁵ Although the EIR did not cite or rely on *Ass’n of Irrigated Residents v. Kern County Board of*
22 *Supervisors*, 17 Cal.App.5th 708 (2017), that case too is distinguishable on its facts. There, the
23 question was whether the EIR for the expansion of a petroleum refinery could properly use, as its
24 baseline, the historic operating conditions at the plant, which was temporarily closed for two of the
25 prior 12 years due to bankruptcy proceedings and then reopened. Record evidence demonstrated that
26 the facility’s operating approvals were still in effect, that the facility processed petroleum products
27 after it resumed operations following bankruptcy, that facility operations were the subject of prior
28 CEQA review, and that full petroleum refining could commence without the proposed modifications.
17 Cal.App.5th at 728-29. Moreover, the facility’s new post-bankruptcy owner “consistently stated
its intention to continue refining at the site.” *Id.* at 727 (quoting EIR). Under those circumstances,
the court concluded that “substantial evidence supports County’s finding that existing physical
conditions included an operating refinery.” *Id.* at 728. In contrast, Marathon’s proposed Project does
not involve expansion of existing petroleum refining operations, but rather, a retooling of the site to
facilitate a new and different HEFA operation that has never been the subject of CEQA review.

1 standing alone, be significant. Moreover, because an EIR must include mitigation measures *only* for
2 those impacts that rise to the level of “significant,” *see* Cal. Pub. Res. Code § 21081.6(b); CEQA
3 Guidelines § 15126.4(a)(2); *King & Gardiner Farms, LLC v. County of Kern*, 45 Cal.App.5th 814,
4 852 (2020), the EIR’s use of a misleading baseline comparison here allowed the County to skip
5 entirely the critical CEQA step of developing and adopting appropriate project mitigation.

6 For example, by comparing the new Project against an operating petroleum refinery, the
7 County repeatedly camouflaged actual impacts as *improvements* and thereby misled the public:

- 8 • Because annual average PM_{2.5} concentrations were greater for the petroleum refinery than
9 they will be for the new HEFA operations, “*there was a reduction in health risk*
10 *associated with exposure to PM_{2.5} emissions*” and “[n]o mitigation would be required.”
AR000204 (emphasis added).
- 11 • “Due to the decrease in throughput . . . the Project *results in an overall reduction in*
12 *emissions* and supports the goals of the [BAAQMD Clean Air Plan.”AR000207 (emphasis
13 added). Accordingly, “[n]o mitigation would be required.” *Id.*
- 14 • Although “[t]he Project would continue to use/handle hazardous materials,” various
15 petroleum refining units would be shut down, “*generally reducing the overall hazards*
16 *associated with the Project.*” AR000348-49 (emphasis added). Thus, “[n]o mitigation
17 would be required.” *Id.*
- 18 • “Because . . . the Project would generally *produce less noise than under current*
19 *conditions,*” noise impacts on “sensitive and residential receptors in the vicinity of the
Project area and permanent noise increases would be less than significant.” AR000396
(emphasis added). Hence, “[n]o mitigation would be required.” *Id.*
- “Since the Project would *generate fewer truck trips than the existing Refinery*, no
significant impacts on truck traffic are expected,” and “[n]o mitigation would be
required.” AR000416 (emphasis added).

20 The EIR’s improper baseline also rendered the mandatory “no project” alternative
21 meaningless. An EIR must develop and evaluate the comparative merits of a reasonable range of
22 potentially feasible alternatives that foster informed decisionmaking and public participation. CEQA
23 Guidelines § 15126.6(a). Like mandated mitigation measures, this requirement is intended to
24 disclose alternatives capable of avoiding or substantially lessening a project’s significant effects,
25 “even if these alternatives would impede to some degree the attainment of the project objectives, or
26 would be more costly.” *Id.* § 15126.6(b). The mitigation and alternatives discussion “forms the core
27 of the EIR.” *In re Bay-Delta*, 43 Cal.4th 1143, 1162, (2008). Importantly, CEQA requires that every
28 EIR must evaluate a “no project” alternative, defined (like the baseline) as “the existing conditions at

1 the time the notice of preparation is published.” *Id.* § 15126.6(e)(2). The purpose of the “no project”
2 alternative is to allow decisionmakers to compare the impacts of approving the proposed project
3 against the impacts of not approving it. *Id.* § 15126.6(e)(1).

4 Rather than evaluate a true “no project” alternative, the EIR defined the “no project”
5 alternative just like the improper baseline: “Refinery operations *would* resume as described in
6 Section 2.4 of this EIR. . . . and the Refinery *would* operate under . . . current permits and
7 entitlements.” AR000471 (emphasis added). The overwhelming evidence in the record shows that
8 petroleum refining would *not* resume in the absence of project approval and casts doubt on the
9 economic viability of such a theoretical resumption. The “no project” alternative is supposed to
10 reflect “what would be *reasonably expected* to occur in the foreseeable future if the project were not
11 approved.” CEQA Guidelines § 15126.6(e)(2) (emphasis added). Where, as here, an EIR nowhere
12 evaluates actual existing conditions, in either setting the baseline or evaluating the “no project”
13 alternative, the document should be considered inadequate as a matter of law. *Woodward Park*
14 *Homeowners Assn., Inc. v. City of Fresno*, 150 Cal.App.4th 683, 714 (2007).

15 **II. The EIR’s Project Description Violates CEQA Because It Omits a Reasonable Estimate**
16 **of the Project’s Mix of Feedstocks.**

17 The description of the project is an “indispensable element” of an EIR. *Stopthemillennium*
18 *hollywood.com v. City of Los Angeles* (“*Stop the Millennium*”), 39 Cal.App.5th 1, 16 (2019). Failure
19 to accurately describe the project “impairs the public’s right and ability to participate in the
20 environmental review process.” *Washoe Meadows Community v. Dept. of Parks & Rec.*, 17
21 Cal.App.5th 277 (2017). An accurate, stable, and complete project description is necessary for an
22 intelligent evaluation of a project’s potential environmental impacts. *Center for Sierra Nevada*
23 *Conservation v. County of El Dorado*, 202 Cal.App.4th 1156, 1171 (2012). Whether the EIR’s
24 project description complied with CEQA’s requirements is reviewed de novo. *Stop the Millennium*,
25 39 Cal.App.5th at 15.

26 Here, the EIR’s description of the Project falls well short of CEQA’s requirements. With a
27 processing capacity of 48,000 bpd, the Project would be one of the world’s largest renewable fuel
28 producers, a distinction shared with the nearby Phillips 66 proposed project. AR048533. Although

1 the Project will consume an astonishing 17.5 million barrels of feedstock each year, the EIR did not
2 include any breakdown of the approximate *amount* of each feedstock the Project would require or
3 their likely source. Instead, the EIR states only that Marathon “expect[s feedstocks] to include”
4 soybean oil, distillers corn oil, and tallow, a lard-like substance. AR000135.

5 The absence of any meaningful information about feedstocks is a fatal flaw. There is no
6 dispute that an accurate assessment of the Project’s potential environmental impacts depends on the
7 mix of feedstocks. *See* AR048867 (noting that predicting impacts depends on the “mix of feedstocks
8 [] used.”); *see also* AR146665 (“Emissions from HEFA [processing] . . . vary considerably
9 depending on the feedstock.”); AR082863 (“Differences in project processing impacts . . . are caused
10 by differences in the chemistries and processing characteristics among feeds[tocks] that the DEIR
11 does not disclose or describe.”); AR047026 (soy- and other crop-based biofuels may increase the
12 potential for deforestation and the conversion of other lands not currently in agricultural production);
13 AR0145868 (land conversion, carbon emissions, and biodiversity loss concerns “are particularly
14 strong in the case of . . . soy oil.”). Without a more complete description of feedstocks, therefore, the
15 public and decisionmakers cannot intelligently evaluate the Project’s environmental consequences.

16 Given the integral connection between feedstock inputs and Project impacts, Petitioners asked
17 the County to “use available information” to provide “scenarios . . . for likely feedstock mixes,”
18 regardless of whether the County knew the Project’s “precise” feedstock mix. AR082663;
19 AR048868. The County could not, Petitioners explained, ignore the existing evidence that feedstocks
20 are not equally available; nor are all feedstocks available in the substantial quantities that the Project
21 and other concurrently operating or proposed renewable fuels projects would require. AR082679-80.
22 For instance, Petitioners submitted evidence that a large proportion of the feedstock the Project will
23 use may come from soybean oil. AR082680 (citing recent evidence of high soy demand in biodiesel
24 production – a similar technique to the Project’s HEFA process – including U.S. EPA data showing
25 that nearly 60 percent of biodiesel produced from 2018 to 2020 was from soy, compared to just 3
26 percent from tallow). Petitioners also submitted recent data showing that used waste oils “are
27 extremely limited in availability,” rebutting the EIR’s claim that the Project “may rely heavily on
28 non-crop feedstock, such as tallow.” AR082679 (at fn. 68); AR048868. The County ignored this and

1 other evidence that could have facilitated an estimation of the Project’s likely feedstock mix –
2 information that is essential for a complete description of the Project’s operations.

3 Instead, the EIR opted for an approach that is “intentional[ly] flexib[le],” which leaves
4 Marathon with the ability to use whatever mix of feedstocks is most profitable at any given time.
5 AR048873; *see also* AR152450 (“[T]he renewable diesel industry will seek to use whichever mix of
6 feedstocks is most profitable given the balance between feedstock price and availability and the value
7 of regulatory support.”). Because the Project’s feedstock mix is “flexible” by design, the County
8 refused even to estimate the potential mix of feedstocks. AR048868-69. Had the EIR properly used
9 the available information to disclose the *likely* feedstock mix – or even just a set of realistic feedstock
10 scenarios – it could have projected reasonably foreseeable localized direct effects and indirect
11 cumulative impacts and, as appropriate, explored potential mitigation measures. *Stop the*
12 *Millennium*, 39 Cal.App.5th at 14, 19 (“uncertainty about market conditions” was not a “practical
13 impediment” to providing an accurate, stable, and finite description of what developer intended to
14 build). For instance, the County could have limited the use of high impact feedstocks as a condition
15 of Project approval.

16 *Napa Citizens for Honest Government v. Napa County Board of Supervisors*, 91 Cal.App.4th
17 342 (2001), is instructive. There, the County certified an EIR to develop an airport area. The
18 petitioners claimed that the EIR failed to analyze and mitigate the project’s significant impacts on
19 water resources. While the EIR disclosed the *amount* of water the project would use, it did not
20 adequately identify the specific *means* of providing the project’s water needs. *Id.* at 372. The court
21 held that, given the uncertainty surrounding the anticipated sources of water for the project, the EIR
22 could not “simply label the possibility that they will not materialize as ‘speculative,’ and decline to
23 address it.” *Id.* at 373. Instead, the EIR must actually “inform[] [the public] if other [water] sources
24 exist, and . . . of the environmental consequences of tapping such resources.” *Id.* “Without either
25 such information,” the court concluded, “the County simply cannot make a meaningful assessment of
26 the potentially significant environmental impacts of the Project.” *Id.* at 373-74. So too here: The
27 County cannot hide behind Marathon’s desire for “flexibility” to conclude that feedstocks are
28 “uncertain” and impacts too “speculative” to analyze. AR048868-69.

1 While “foreseeing the unforeseeable is not possible,” drafting an EIR “necessarily involves
2 some degree of forecasting,” and thus the lead agency “*must use its best efforts* to find out and
3 disclose all that it reasonably can.” CEQA Guidelines § 15144 (emphasis added). And the EIR itself
4 must demonstrate “*a good faith effort* at full disclosure.” *Id.* § 15151 (emphasis added). To satisfy
5 these core CEQA obligations, the County should have followed the approach taken in *Planning &*
6 *Conservation League v. Castaic Lake Water Agency*, 180 Cal.App.4th 210 (2009). There, the
7 petitioners challenged the EIR for a transfer of 41,000 acre-feet of water from between water
8 agencies. *Id.* at 218, 222. Because actual availability of water was uncertain, the EIR forecast
9 possible water availability for the project under three varying potential water supply “scenarios.” *Id.*
10 at 223. The court held that even when “an EIR must address controversial matters that resist reliable
11 forecasting,” CEQA requires that the agency “use its best efforts to find out and disclose all that it
12 reasonably can” and that an EIR must demonstrate “a good faith effort at full disclosure.” *Id.* at 253
13 (citing § 15144); *id.* at 242 (citing § 15151). The EIR at issue there met this standard by laying out
14 “three water supply scenarios in considerable detail.” *Id.* at 252. *See also Citizens for a Sustainable*
15 *Treasure Island v. City and County of San Francisco*, 227 Cal.App.4th 1036, 1053-54 & fn. 7 (2014)
16 (development project EIR described “representative” development where final details were still
17 uncertain, and EIR evaluated “maximum [potential] development,” thereby “evidenc[ing] a good
18 faith effort at forecasting what is expected to occur if the [p]roject is approved.”).

19 Here, Petitioners repeatedly asked the County to provide a reasonable estimate of the
20 Project’s likely feedstock mix or even just a range of foreseeable scenarios. AR082663, AR056182
21 (public comments at Project approval hearing requesting an estimate of the amount of different
22 feedstocks the Project will use). The EIR’s failure to make even the slightest attempt – let alone a
23 good faith effort – to quantify the Project’s potential feedstock types violates CEQA because it
24 precludes “a full understanding of the [Project’s] environmental consequences.” *Communities for a*
25 *Better Env’t v. City of Richmond*, 184 Cal.App.4th 70, 80 (2010) (“*CBE v. Richmond*”).

26 **III. The EIR’s Analysis of the Project’s Direct Greenhouse Gas Emissions Is Not Supported**
27 **by Substantial Evidence.**

28 The legal flaws in the EIR’s baseline and project description manifest themselves in the EIR’s

1 inadequate and misleading analysis of the Project’s direct greenhouse gas (“GHG”) emissions.
2 Hydrogen is used in the HEFA process to saturate the lipid feeds and remove oxygen from
3 feedstocks. AR048428-29; AR082768-69. Although it is possible to produce “green hydrogen” to
4 meet the Project’s processing needs, the EIR rejected this alternative, instead opting to generate the
5 necessary hydrogen from the former refinery’s steam methane reforming process, which produces
6 carbon dioxide (“CO₂”) emissions. AR000091; AR000472; AR082772. The Project’s hydrogen
7 needs – and thus its direct CO₂ emissions – are substantial. *See* AR082859 (methane gas steam
8 reforming co-produces roughly ten tons of CO₂ emissions for each ton of hydrogen produced). Yet,
9 the EIR’s discussion of direct GHG emissions from hydrogen production falls short of CEQA’s
10 disclosure requirements in multiple ways. Two of those legal defects are particularly egregious.

11 **First**, as Petitioners’ expert renewable fuels consultant explained, the amount of hydrogen
12 required to process each renewable feedstock is highly variable and depends on the feedstock’s
13 chemical composition. AR048466-67; AR082768-69. For example, more hydrogen is required to
14 process soy oil than livestock fats, such as tallow. *Id.* And because the amount of hydrogen can vary
15 widely, the carbon intensity associated with producing hydrogen can also vary significantly. If the
16 Project were to use only soybean oil, for instance, the attendant hydrogen demand would result in
17 165,000 more metric tons of CO₂ emissions annually than if the Project uses only tallow. AR082696-
18 97. Despite this large variability, the EIR provided only a *single* figure representing the increased
19 production or “change” in GHG emissions from the onsite hydrogen plant when shifting from
20 petroleum refining to renewable fuel production. According to the EIR, the repurposed onsite
21 hydrogen plant will emit precisely 104,085.68 more metric tons of GHGs (calculated as CO₂e) each
22 year than would the former petroleum refinery operating at the inflated baseline level. AR000540.⁶

23 Without an explanation of how the EIR arrived at a single, precise GHG emissions number

24 _____
25 ⁶ “CO₂e” or “carbon dioxide equivalent” is the number of metric tons of carbon dioxide emissions
26 with the same global warming potential as one metric ton of another greenhouse gas and is used to
27 standardize the measurement of GHG emissions. This figure represents the net positive *difference*
28 between “post-project” (processing 48,000 bpd of renewable fuel feedstocks) and “pre-project”
(former petroleum refinery operating at 133,000 bpd) CO₂e emissions from the onsite hydrogen
plant. *See* AR000524 (explaining that “October 2015 – September 2020 average activity levels are
used to define the pre-project emissions rates”).

1 when feedstocks (and therefore GHG-generating hydrogen production needs) may vary, the EIR does
2 not adequately inform decisionmakers and the public of the Project’s potentially significant impacts.
3 As such, it cannot possibly constitute the substantial evidence necessary to support the EIR’s “less
4 than significant” finding for direct GHG emissions impact. *See* CEQA Guidelines § 15064.6(c) (EIR
5 “must support” its choice of a “methodology” to estimate a project’s impacts “with substantial
6 evidence”); *CBE v. Richmond*, 184 Cal.App.4th at 90 (EIR “completely failed to discuss” how its
7 GHG emissions estimates came about when they did not disclose “any of the underlying
8 calculations”).⁷

9 In response to this issue, the EIR offered the very same inadequate answer it did with respect
10 to the defective project description: “[T]he uncertainty of availability and sources of feedstocks and
11 market demand for products does not need to be addressed in the current CEQA analysis.”
12 AR0848937 (citing CEQA Guidelines § 15204(a) for the proposition that “CEQA does not require a
13 lead agency to conduct every test or perform all research, study, and experimentation recommended
14 or demanded by commentors”). But Petitioners seek something much more basic – that the County
15 *explain the assumptions* it made about the likely mix of feedstocks to reach its less-than-significant
16 conclusions about GHG impacts. An EIR must explain its assumptions so that the public and
17 decisionmakers can evaluate the project’s impacts. *San Joaquin Raptor*, 149 Cal.App.4th at 663. In
18 *San Joaquin Raptor*, the court rejected the EIR’s use of an unsupported figure to estimate a mining
19 project’s consumption of groundwater. *Id.* at 660. As here, it was “entirely unclear what these
20 numbers actually represent”; in particular, it was not evident whether the estimate of groundwater use
21 was “based on peak production, baseline production, or something else.” *Id.* at 663. “Without such
22 information, the true impact of the project on groundwater supplies cannot be adequately evaluated.”
23 *Id.* Likewise here, without an explanation for how the EIR derived single, precise GHG emissions

24
25 _____
26 ⁷ The County also improperly obscured GHG emissions from the third-party Air Products hydrogen
27 plant which will serve the Project. AR000323. The County provided a single emissions figure for
28 the Air Products plant (304,044.47 tons/year CO₂e), without explaining the assumptions it made to
derive this figure, including the volume or type of feedstocks it planned to process with the hydrogen
from the Air Products plant. AR000585.

1 figures associated with the operation of the onsite hydrogen plant, when hydrogen needs vary
2 depending on feedstock, the EIR is informationally deficient and cannot support the “less-than-
3 significant” conclusion it draws.⁸

4 Furthermore, the text of the EIR itself does not disclose the change in emissions from the
5 repurposed onsite hydrogen plant; that information is buried in an “Air Quality and Greenhouse Gas
6 Technical Analysis” (or “Appendix AG/GHG” to the EIR). And the *actual* amount of GHG
7 emissions from the hydrogen plant – as opposed to the *change* in emissions – is hidden deeper still in
8 an appendix to the Technical Analysis that displays tables of modeling results for “pre-project” and
9 “post-project” emissions from existing stationary sources. AR000560-85 (Appendix A).
10 “[I]nformation ‘scattered here and there in EIR Appendices’ or a report ‘buried in an appendix,’ is
11 not a substitute for ‘a good faith reasoned analysis.’” *Cal. Oak Found. v. City of Santa Clarita*, 133
12 Cal.App.4th 1219, 1239 (2005) (quoting *Santa Clarita Organization for Planning Environment v.*
13 *County of Los Angeles*, 106 CalApp.4th 715, 722-23 (2003)). By burying necessary information
14 about the hydrogen plant’s GHG emissions, the EIR failed to present the data “in a manner calculated
15 to adequately inform the public and decision makers, who may not be previously familiar with the
16 details of the project.” *Id.*

17 **Second**, even if the County could provide a reasonable explanation for its single hydrogen
18 plant GHG emissions estimate, the EIR’s overall GHG analysis is highly misleading because it used
19 the wrong baseline. The EIR conceded that the proposed Project’s HEFA process requires more
20 hydrogen – and thus emits more GHGs – than the prior petroleum refining process. *See* AR000323
21 (acknowledging an increase in GHG emissions from the hydrogen plant); AR048936 (“The impact of
22 increased production at the hydrogen plant due to the new product line” included “[i]ncreases in
23 GHGs at the hydrogen production sites.”). Indeed, to process just 48,000 bpd of “renewable”
24 feedstocks, the onsite hydrogen plant will generate roughly 104,086 *more* metric tons of GHGs (as
25

26 ⁸ The EIR contains various scattered indications of potential limits to the hydrogen plants’ use,
27 asserting both that the Project would limit hydrogen usage to 31,025 MMscf per year, AR048930,
28 and elsewhere, that the Project would use up to 125 MMScf of hydrogen per day. AR000472. These
different hydrogen use estimates cannot be reconciled. And even if the County were using one of
these limits, it is unclear how it then estimated GHG emissions associated with either of these figures.

1 CO2e) each year than the former petroleum refinery would generate operating at a hypothetical
2 CEQA baseline of 133,000 bpd. AR000540 (explaining that analysis reflects “change” in GHG
3 emissions from CEQA-designated baseline). No problem, the EIR assures us, because the increased
4 GHG emissions associated with hydrogen production will be “more than offset by reductions in
5 GHGs from on-site operations post-project.” AR048936.

6 Had the EIR compared the Project’s direct GHG emissions against a proper baseline of zero
7 production at the existing closed facility, it would have revealed net positive GHG emissions of more
8 than 813,000 metric tons of CO2e per year from the onsite stationary sources alone. *See* AR000566
9 (sum of second-to-last column in Table A.1-2a).⁹ For context, BAAQMD’s CEQA “level of
10 significance” for GHG (CO2e) emissions at stationary sources like the Project is 10,000 metric tons
11 per year. AR000321. Accordingly, a proper CEQA analysis, using an appropriate baseline, does not
12 support the EIR’s conclusion that the new Project’s operational GHG emissions “would be less than
13 significant.” AR000326. Indeed, an honest comparison of the Project against the proper existing
14 baseline of zero production shows that hydrogen production will cause significant GHG emissions
15 and that the “green hydrogen” option should be required as feasible mitigation for those impacts.

16 **IV. The EIR Failed to Adequately Analyze the Project’s Indirect and Cumulative ILUC**
17 **Impacts.**

18 **A. Renewable fuel production causes significant and unavoidable climate and non-**
19 **climate land use impacts.**

20 Substantial evidence in the record establishes that increased demand for renewable fuel
21 feedstocks causes significant indirect land use change (“ILUC”) impacts. *See, e.g.*, AR145868
22 (expanding production of biofuel “can be expected to lead to land use changes including
23 deforestation”). ILUC occurs when increased demand for biofuel feedstocks causes more land to be
24 used for cultivating those feedstocks. AR145873. These impacts are generally considered indirect
25 because “even if the specific plantations supplying biofuel facilities have not been expanded at the
26 expense of forests or grasslands, somewhere in the system such expansion is inevitable.” *Id.* The
27 extent of a facility’s ILUC impacts depends on the type and amount of feedstocks it processes, as

28 ⁹ As noted in footnote 7, offsite hydrogen production at the Air Products plant adds another 304,000
metric tons of CO2e emissions per year to the Project’s total direct GHG impacts.

1 certain feedstocks have a greater ILUC impact. AR145874.

2 As described above, ILUC impacts include significant adverse climate (GHG) and non-
3 climate environmental effects. *See* Factual Background, Section IV, *supra*. Increased consumption
4 of oil crops can lead to more land clearing, resulting in the destruction of carbon sinks. *See*
5 AR152450 (“Consuming millions of metric tons of additional vegetable oil could cause tens of
6 thousands of hectares of deforestation”). As a result, “there is extensive evidence that fuels produced
7 from vegetable oils . . . may actually contribute to net increases in GHG emissions due to indirect
8 land use changes.” AR145873. Shifting land use behavior also causes non-climate impacts, including
9 loss of biodiversity, disruption of migratory routes caused by clearing land, harm to species from
10 increased pesticide and nutrient use, soil erosion, water quality degradation, and similar ecological
11 consequences. *See* AR068584; AR047055; AR047026. Although ILUC impacts may manifest in
12 different ways, they all stem from the land use change, including deforestation, that inevitably results
13 from increasing demand for renewable feedstocks. Under CEQA, lead agencies must analyze a
14 project’s likelihood to “[r]esult in the loss of forest land or conversion of forest land to non-forest
15 use[.]” CEQA Guidelines App. G, Section II. Agriculture and Forestry Resources, subd. (d).

16 The Air Resources Board (the “Board”) emphasized renewable fuels’ significant ILUC
17 impacts in the Environmental Assessment for its 2018 Amendments to the Low Carbon Fuel
18 Standard (“LCFS”). Originally adopted in 2009, the LCFS calls for a reduction in the carbon
19 intensity of transportation fuels sold for use in California. AR046942. A fuel’s carbon intensity
20 score reflects its life cycle carbon emissions. *Id.* In 2018, the Board amended the LCFS to increase
21 its carbon intensity reduction targets. AR046944; AR046947. In doing so, the Board recognized that
22 the new carbon intensity scores were a double-edged sword with respect to ILUC impacts. On the
23 one hand, fuels derived from crops that displace sensitive lands (such as forests) would receive a
24 higher revised carbon intensity score and thus have a lower value in the LCFS credit market,
25 potentially decreasing their ILUC impacts. AR047026. On the other hand, the LCFS amendments
26 could increase adverse ILUC impacts by increasing demand for certain fuel-based agricultural
27 feedstock and displacing food-based production on land currently used for row crops, orchards, and
28 grazing; in that case, the amendments will increase pressure for the conversion of rangeland,

1 grasslands, forests, and other land uses to agriculture. AR046998. Such adverse ILUC impacts
2 “could be reduced to a less-than-significant level by land use and/or permitting agency conditions of
3 approval” and by “mitigation measures prescribed by local, State, federal, or other land use or
4 permitting agencies . . . with approval authority over the particular development projects.”
5 AR046999; AR047027. But because the LCFS is a “market-driven” program that does not confer
6 such land use or permitting authority, the Board concluded that the LCFS program amendments
7 would, on balance, necessarily result in “*potentially significant and unavoidable*” adverse impacts on
8 agricultural and forest resources, biological species and their habitats, soil and geologic resources,
9 and water quality. AR046999; AR047026-27; AR047036-37; AR047051-52 (emphasis added).

10 **B. The EIR’s finding that the Project will not result in any ILUC impacts is**
11 **unsupported by, and contrary to, the evidence in the record.**

12 Despite substantial evidence in the record that renewable fuel production causes significant
13 ILUC impacts and despite the Board’s conclusion that the LCFS revisions would likely cause
14 potentially significance adverse ILUC impacts, the EIR categorically concluded that the Project
15 “*would not* itself result in upstream land use changes.” AR048870; *see also* AR048864-67;
16 AR000488 (“the Project would not have significant irretrievable impacts on land, forest, or
17 agricultural resources”). To justify this conclusion, the EIR offered the rationale that the LCFS
18 already accounted for and mitigated any land use change impacts caused by producing renewable
19 fuel.¹⁰ *See* AR000317-20 (“[the Air Resources Board] has previously evaluated, considered *and*
20 *mitigated the environmental impacts* associated with” the production of biofuels); AR048864-67;
21 AR048870. As explained above, this assertion is flatly wrong. In fact, the Board reached the
22 *opposite* conclusion and suggested that local land use agencies consider mitigation measures and
23 permitting conditions to reduce potential ILUC impacts to a level of insignificance. AR046999;
24 AR047026-27; AR047036-37; AR047051-52.

25
26 ¹⁰ The County relied to a lesser extent on the federal Renewable Fuel Standard to support its finding
27 that the Project would not result in ILUC changes. AR048869-70. However, the Renewable Fuel
28 Standard’s requirement that feedstocks be grown on existing agricultural land does not prevent ILUC
impacts. AR053590. Instead, these impacts occur as a result of increased demand for a particular
feedstock or feedstocks anywhere in the system, regardless of where they are grown. *See id.*

1 As the Board explained in assessing the LCFS program amendments, while a fuel’s carbon
2 intensity score attempts to account for “land use change related GHG emissions,” it does *not* account
3 at all for non-GHG ILUC impacts “such as decreased biodiversity and impacts on water resources.”
4 AR047055. Nor does the CEQA review for the LCFS amendments purport to perform a project-level
5 analysis for any future renewable fuel projects. Instead, it expressly contemplates that renewable fuel
6 projects like Marathon’s will conduct project-specific environmental review. AR046950. The EIR’s
7 suggestion that the Board has already addressed all of the Project’s ILUC impacts is simply incorrect.

8 Compounding its errors, the County ignored suggestions of feasible mitigation measures
9 within its purview, such as feedstock restrictions. *See* AR082688, AR145973 (evidence that capping
10 high ILUC-risk feedstocks is feasible). Indeed, Petitioners’ suggested mitigation measures are
11 precisely the kind of local “permitting conditions” that the Board anticipated in the LCFS
12 amendments. An EIR must respond to suggestions for mitigating a significant impact unless they are
13 facially infeasible. *Napa Citizens for Honest Gov’t*, 91 Cal.App.4th at 360. Here, the EIR’s only
14 response was that “it would make little sense for . . . the County to impose conditions on the Project .
15 . . . capping the amounts of particular feedstocks.” AR048873. This facile rejection of Petitioners’
16 suggested feedstock mitigation does not evince the good faith that CEQA requires. *Id.*

17 **C. The EIR also misleadingly claims that the magnitude of the Project’s ILUC**
18 **impacts is “uncertain” and “speculative.”**

19 Despite concluding that the Project would have *no* significant ILUC impacts, the EIR also
20 takes the position that the magnitude of these impacts is “inherently speculative.” AR048867-74.
21 The EIR claims that modeling ILUC impacts is difficult due to “variability in pathways, uncertainties
22 in technological development and ambiguity in political decision-making” and that the Project’s
23 feedstock mix (which the County refuses to restrict) exacerbates the “difficulty in accurately
24 predicting” ILUC impacts. AR048867. The County’s refusal to study this issue is unjustified.

25 CEQA requires that an EIR analyze all “reasonably foreseeable indirect physical changes in
26 the environment which may be caused by the project.” CEQA Guidelines § 15064(d)(2). An indirect
27 physical change – defined as a project impact that occurs “later in time or farther removed in distance
28 than a direct effect, *id.* § 15358(a)(2) – *must* be considered if it is “reasonably foreseeable.” *Id.* §

1 15064(d)(3). Reasonably foreseeable indirect impacts include land use changes beyond the project
2 site. *Id.* § 15358(a)(2); *Union of Med. Marijuana Patients*, 7 Cal.5th at 1197 (an indirect impact is
3 reasonably foreseeable if project is capable, at least in theory, of causing [it])” (citing CEQA
4 Guidelines § 14064(d)(3)).

5 Here, substantial evidence in the record shows that the County, like the Board, could have
6 reached a significance determination about the Project’s reasonably foreseeable ILUC impacts,
7 despite any uncertainty about the precise magnitude of these impacts. Indeed, after acknowledging
8 some uncertainty, AR046990; AR046999, the Board nevertheless determined that the land use
9 change caused by the LCFS amendments would result in potentially significant impacts because the
10 amendments could, like this Project, “lead to an increase in the production of certain agricultural
11 feedstocks to produce low-carbon biofuels.” AR046999; AR047026-27; AR047036-37; AR047051-
12 52; AR046967-68. Notably, the Board did not find that these impacts were too speculative for it to
13 reach a significance determination. *See* Guidelines § 15145 (“If, after thorough investigation, a lead
14 agency finds that a particular impact is too speculative for evaluation, the agency should note its
15 conclusion and terminate discussion of the impact.”). Instead, the Board stated repeatedly in the
16 Environmental Assessment for the LCFS amendments that its analysis did *not* engage in speculation.
17 AR046950 (the analysis addressed environmental impacts only “to the extent they are reasonably
18 foreseeable and do not require speculation.”). In reaching its conclusion that the LCFS amendments
19 would have potentially significant and unavoidable impacts at the program level, the Board also
20 expressly contemplated that proponents of specific projects would be responsible for further analysis
21 and mitigation of the impacts of compliance with the LCFS. AR046950 (contemplating that
22 “[s]pecific development projects . . . would undergo required project level environmental review.”).
23 Furthermore, the environmental analysis for any specific project would necessarily be more detailed
24 than for the LCFS program broadly. *See* AR046949 (the effects of a construction project “can be
25 predicted with a greater degree of accuracy” than they can for the adoption of a plan or program).

26 Indeed, evidence in the record shows that the County could have used well-established
27 models to estimate the Project’s ILUC impacts. The Board has repeatedly performed such an
28 analysis for the LCFS and its amendments, starting in 2009 when “the tools for estimating land use

1 change were few and relatively new.” AR142210 (2015 LCFS Staff Report Appendix I: Detailed
2 Analysis for Indirect Land Use Change); AR082685. The analytical tools for estimating land use
3 change have dramatically improved since 2009. *See* AR145984 (since 2008 “the number of tools and
4 analyses available has grown considerably”). Especially if the County had conditioned Project
5 approval on feedstock restrictions, the EIR could have provided reasonable estimates to inform a
6 significance determination of the Project’s ILUC impacts. The EIR itself noted that the Board was
7 able to estimate ILUC despite “the lack of a perfect model.” AR000319; AR000318 (citing the
8 Board’s use of the GTAP model to quantify anticipated land use changes). The County should have
9 done the same.

10 Even if the County did not recreate the Board’s model, it could have relied on the Board’s
11 analysis to provide some reasonable estimate of the Project’s likely ILUC impacts. *See Citizens to*
12 *Preserve the Ojai v. County of Ventura*, 176 Cal.App.3d 421, 432 (1985) (even if a sophisticated
13 technical analysis of an impact is not feasible, courts require “some reasonable, albeit less exacting,
14 analysis” of the impact). By way of example, Petitioners demonstrated that such an estimate is
15 feasible by extrapolating from the Board’s 2015 analysis of the LCFS’s ILUC impacts. AR082685-
16 86. In 2015, the Board analyzed a hypothetical “shock” scenario in which an additional 0.8112
17 billion gallons of soy biodiesel was produced annually, resulting in an average of over 2 million acres
18 of land converted to cropland. AR142238-39. Based on this analysis, Petitioners calculated that if all
19 of the Project’s annual 0.74 billion gallons of feedstock demand were soybean oil, then the Project
20 alone would result in the conversion of 1.8 million acres of land.¹¹ AR082685-86. The EIR
21 dismissed this estimate as an “oversimplification of a complex mix of variables,” but then failed to
22 provide any alternative estimate of the Project’s potential ILUC impacts. AR048869. At the very
23 least, the EIR should have assessed Petitioners’ estimate and explained why the estimate was
24 “unreliable or otherwise inappropriate to use in its decisionmaking.” *WildEarth Guardians v. Zinke*,
25 368 F.Supp.3d 41, 75 (D.D.C. 2019) (holding that agency is “not entitled to simply throw up its

26
27 _____
28 ¹¹ Petitioners’ calculation required simple arithmetic: (0.74 bill. gallons * 2 mill. acres) / 0.8112 bill.
gallons = 1.82 mill. acres.

1 hands and ascribe any effort at quantification to ‘a crystal ball inquiry’”).¹²

2 Under these circumstances, the County was required to make a “reasonably conscientious
3 effort” to collect data and make inquiries of the relevant experts to determine the extent of the
4 Project’s ILUC impacts. *Berkeley Keep Jets Over the Bay Comm. v. Bd. of Port Comm’rs*, 91
5 Cal.App.4th 1344, 1369-70 (2001). In *Berkeley*, the lead agency maintained that a project’s public
6 health impacts were speculative because there was no approved protocol for evaluating the risk. *Id.*
7 at 1367-68. The court disagreed: “The fact that a single method [did] not currently exist that would
8 provide the [agency] with a precise, or ‘universally accepted,’ quantification” of the risk did not
9 excuse the Port from assessing that risk. *Id.* at 1370. Instead, “it require[d] the [agency] to do the
10 necessary work to educate itself about the different methodologies that *are* available.” *Id.* Likewise
11 here, the EIR concluded that ILUC impacts were “speculative” because, in the County’s view, they
12 are too “difficult” to model. *See, e.g.*, AR048867. As in *Berkeley*, the County failed to use its best
13 efforts to find out and disclose all it could. 91 Cal.App.4th at 1370 (citing CEQA Guidelines § 15144
14 on lead agency obligation to use best efforts to forecast reasonably discoverable impacts).

15 Here, the County did not make the slightest attempt – let alone a conscientious effort – to
16 quantify, model, or otherwise evaluate reasonably foreseeable ILUC impacts. To justify this major
17 omission, the EIR asserts that “we cannot quantify *with precision* the amount of land” used for
18 feedstock production. AR048867 (emphasis added). But Petitioners have never sought “precision,”
19 just reasonable forecasts or estimates that would inform the public and decisionmakers about a whole
20 category of impacts that are nowhere evaluated in the EIR. *See Citizens to Preserve the Ojai*, 176
21 Cal.App.3d at 432 (“some reasonable, albeit less exacting, analysis” is required); *Sierra Club v.*
22 *County of Fresno*, 6 Cal.5th at 522 (“[S]cientific certainty is not the standard . . . [I]f it is not
23 scientifically possible to do more than has already been done . . . the EIR [] must explain why, in a
24 manner reasonably calculated to inform the public of the scope of *what is and what is not yet known*

25
26 ¹² California courts have consistently found that NEPA cases provide persuasive authority for
27 interpreting parallel provisions of CEQA. *Wildlife Alive v. Chickering*, 18 Cal.3d 190, 201 (1976).
28 NEPA’s definition of “indirect impacts” is virtually identical to CEQA’s: Under NEPA, indirect
impacts are “caused by the action and are later in time or farther removed in distance, but are still
reasonably foreseeable.” 40 C.F.R. § 1508.8(b).

1 about the Project’s impacts.”); *Sierra Club v. Federal Energy Regulatory Commission*, 867 F.3d
2 1357, 1374 (D.C. Cir. 2017) (environmental analysis “necessarily involves some ‘reasonable
3 forecasting,’ and [] agencies may sometimes need to make educated assumptions about an uncertain
4 future.”); *Food & Water Watch v. Fed. Energy Regulatory Comm’n*, 28 F.4th 277, 285 (D.C. Cir.
5 2022) (FERC must quantify indirect climate effects or explain in detail why it could not do so; “an
6 initial lack of information does not afford an agency carte blanche to disregard indirect effects”);
7 *WildEarth Guardians*, 368 F.Supp.3d at 75 (agency must consider whether quantifying indirect GHG
8 emissions was “reasonably possible,” including by using plaintiffs’ suggested calculator).

9 The County’s reliance on reports that make general references to “uncertainty” in modeling
10 ILUC impacts, AR048867-68, is misplaced. These reports do not support the County’s conclusion
11 that ILUC impacts are *too speculative to reasonably estimate*. For instance, the 2011 article cited by
12 the EIR, AR048867, states just the opposite: “These indirect emissions resulting from biofuel
13 production *should be considered* in calculating the GHG implications of adopting biofuels.”
14 AR053867 (emphasis added). The report’s finding in 2011 that data were insufficient is outdated,
15 given recent advances in data gathering and modeling. *See* AR145984 (tools available to model
16 ILUC have “grown considerably” since 2008). The County’s remaining sources are similarly
17 unavailing. *See, e.g.*, AR053435 (finding that “[m]ost available model-based studies have
18 consistently found positive and, in some cases, *high emissions* from LUC and ILUC”) (emphases
19 added); AR053631 (“[P]revious accounting may have *downplayed* the environmental effects of
20 cropland expansion . . . These findings are *particularly pertinent to biofuel policies* . . .”) (emphases
21 added); AR053700 (“Recent research and anticipated updates to data are expected to improve our
22 ability over the next three years to quantify the fraction of land use change attributed to biofuel
23 feedstock in the U.S.”). In short, the existence of *some* uncertainty does not justify the County’s utter
24 failure to estimate or in any way evaluate ILUC impacts.

25 **D. The EIR makes no attempt to address cumulative ILUC impacts.**

26 The EIR also makes the specious assertion that it “considered the cumulative land use impact
27 of the Project with other *similar* projects” and determined that the Project will have no significant
28 cumulative ILUC impacts. AR048866 (emphasis added). The EIR’s only “cumulative” impacts

1 analysis centers on a list of 12 other projects in the County, most within a few miles of Marathon’s
2 refinery property. *See* AR000452-56 (including a wetlands restoration project, a housing
3 development, conversion of a billboard to digital format, and a self-storage unit development, among
4 others). Except for the nearby Phillips 66 Rodeo refinery project, none of the other listed projects is
5 remotely “similar” to the renewable fuels Project, and none except Phillips 66 could possibly have
6 cumulative ILUC impacts.

7 By artificially confining the geographic scope of the cumulative impacts analysis, the EIR
8 failed to address nearly 20 other renewable fuels conversion projects throughout California and the
9 nation in various stages of planning, approval, or operation. AR082720 (citing AltAir Paramount and
10 Alon Bakersfield refinery projects, both in California); AR082721, AR082723-26 (list showing eight
11 operating renewable diesel facilities as of fall 2021); AR152451 (January 2022 report identifying 18
12 other renewable diesel projects throughout U.S.). It is reasonably foreseeable – indeed, quite likely –
13 that these renewable fuels conversion projects will collectively and substantially increase demand for
14 agricultural feedstock, as similar projects compete for the same limited crops and incentivize
15 significant changes to land uses patterns. AR082719; AR152455 (“If all of the announced capacity
16 identified by U.S. EIA [] were to come online . . . and operate at 100% of capacity, total feedstock
17 consumption for renewable diesel would increase by 17 million metric tons, a factor of 10 by
18 2024.”); AR124263-68 (citing industry data that “U.S. soybean oil demand could outstrip U.S.
19 production by up to 8 billion pounds annually if half the proposed new renewable diesel capacity is
20 constructed”). The EIR’s failure to even mention, let alone consider, the cumulative ILUC impacts
21 from these projects leaves a gaping hole in the CEQA analysis. *See Kings County Farm Bureau*, 221
22 Cal.App.3d at 722-23 (cogeneration plant EIR’s cumulative impact analysis inadequate because it
23 omitted over 80 other similar plants throughout California’s Central Valley). Indeed, even two such
24 conversion projects may be cumulatively significant. Marathon’s Martinez Project alone could
25 consume up to 24 percent of domestic soybean oil, AR082685 (citing USDA data in record at
26 AR148625), and could boost domestic demand for agricultural and animal feedstocks by 42 percent.
27 AR082684 (citing U.S. EIA data in record at AR123373). Likewise, the nearby Phillips 66 project
28 alone could increase demand for feedstock oils by 71 percent and consume up to 39 percent of the

1 nation's supply of soybean oil. AR082720.

2 Given these facts, the exclusion of other renewable fuels projects from the EIR's analysis
3 "prevented the severity and significance of the cumulative impacts from being accurately reflected."
4 *Bakersfield Citizens for Local Control v. City of Bakersfield*, 124 Cal.App.4th 1184, 1215 (2004); *see*
5 *also San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus*, 27 Cal.App.4th 713, 741
6 (1994) (finding EIR's cumulative impacts analysis "inadequate as a matter of law" where "other
7 development projects are neither listed nor adequately discussed"). At the very least, the lead agency
8 must provide "a reasonable explanation for the geographic limitation used" in the cumulative impacts
9 analysis so that the public, the decisionmakers, and the courts can ascertain whether the missing
10 information would have revealed a more severe impact. CEQA Guidelines § 15130(b)(3); *Kings*
11 *County Farm Bureau*, 221 Cal.App.3d at 724.

12 The EIR's utter lack of any cumulative ILUC impact analysis is especially egregious here. A
13 goldrush of similar projects across the State and nation, each gobbling up tens of thousands of barrels
14 of feedstock every day, will very likely precipitate dramatic shifts in agricultural practices and
15 attendant ecological impacts. Although Petitioners explained that "confining the analysis entirely to
16 local projects does not make sense with respect to project impacts that are regional [], statewide [], or
17 national and international," such as climate and ILUC impacts, AR082719, the County made no
18 meaningful effort to address these legitimate concerns. *See* AR048870 (claiming, simply, that "there
19 are limits to how accurately [cumulative ILUC impacts] can be predicted"). The virtually non-
20 existent cumulative ILUC impacts analysis constitutes an abuse of discretion. *Golden Door*
21 *Propertie*, 50 Cal.App.5th at 528.

22 **V. The County Unlawfully Deferred Formulation of Satisfactory Odor Mitigation.**

23 Mitigation measures form the "core" of an EIR because the primary purpose of environmental
24 review is to identify significant impacts and "indicate the manner in which those significant effects
25 can be mitigated or avoided." *Citizens of Goleta Valley v. Bd. of Supervisors*, 52 Cal.3d 553, 564-65
26 (1990). Thus, an EIR must include mitigation measures for all impacts identified as significant, and
27 those measures must be enforceable through legally binding instruments. Cal. Pub. Res. Code
28 § 21081.6(b); CEQA Guidelines § 15126.4(a)(2). Here, the EIR acknowledged that the Project will

1 emit potentially significant “objectionable odors.” AR000073. These odors would arise, in part,
2 from odorous compounds produced by hydrogen sulfide, which is known for its “rotten egg” smell.
3 AR048893; AR000176. Additionally, “loading and unloading activities,” as well as animal fat and
4 oil feedstocks held in storage tanks, could cause “rancid odors” during the production of renewable
5 fuels. AR048892; AR048989. Yet the EIR unlawfully failed to identify specific measures to
6 mitigate these potentially significant odor impacts on the disadvantaged community of Martinez.

7 **A. The EIR did not meet its burden of explaining why timely formulation of odor**
8 **mitigation measures was not practical or feasible.**

9 To satisfy CEQA and fulfill its primary purpose, an EIR must “describe feasible measures
10 which could minimize significant adverse impacts.” CEQA Guidelines § 15126.4(a)(1). CEQA
11 prohibits an EIR from deferring the formulation of such mitigation measures until after the project is
12 approved, *id.* § 15126.4(a)(2), because doing so “leave[s] the reader in the dark about what . . .
13 management steps will be taken, or what specific criteria or performance standard will be met.” *San*
14 *Joaquin Raptor*, 149 Cal.App.4th at 670. “Thus, as a general rule, ‘it is inappropriate to postpone the
15 formulation of mitigation measures.’” *King & Gardiner Farms*, 45 Cal.App.5th at 856 (citing *POET*,
16 *LLC v. State Air Res. Bd.*, 218 Cal.App.4th 681, 735 (2013) (“*POET I*”). In very limited
17 circumstances, however, an EIR may postpone development of the “specific details” of a mitigation
18 measure. CEQA Guidelines § 15126.4(a)(2). To do so, the EIR must first demonstrate why “it is
19 impractical or infeasible to include those details during the project’s environmental review.” *Id.*;
20 *Preserve Wild Santee v. City of Santee*, 210 Cal.App.4th 260, 281 (2012) (finding that EIR
21 improperly deferred formulation of mitigation measures in part because it did not state why
22 specifying performance standards for habitat management was impractical or infeasible). Only after
23 satisfying this threshold requirement may an EIR lawfully consider deferring the formulation of
24 specific mitigation measures, and then only if additional criteria are satisfied.

25 Here, the EIR unlawfully deferred development of mitigation measures for odor impacts until
26 “the construction phase of the Project.” *See* AR048895; AR048971. Nowhere does the EIR explain
27 why formulating specific odor mitigation measures before approving the Project is impractical or
28 “infeasible” – that is, not “capable of being accomplished.” *See* Cal. Pub. Res. Code § 21061.1. The

1 EIR’s silence is perplexing given that it already anticipates the likely sources of objectionable odor
2 from the Project. Moreover, that silence undermines CEQA’s purpose of systematically identifying
3 and mitigating project impacts *before* a project is approved. *King & Gardiner Farms*, 45 Cal.App.5th
4 at 858. This informational deficiency alone renders the deferral unlawful. *League to Save Lake*
5 *Tahoe v. County of Placer*, 75 Cal.App.5th 63, 95 (2022) (an EIR’s omission of required information
6 constitutes a procedural error of law).

7 **B. The County failed to articulate specific, objective performance standards to**
8 **ensure that the odor mitigation measures would be effective.**

9 Even assuming the County could show why it is impractical or infeasible to formulate odor
10 mitigation measures before the Project is approved, the EIR may only postpone the development of
11 specific mitigation measures if three additional criteria are satisfied. First, the County must adopt
12 specific and objective performance standards – tailored to the Project – that ensure eventual measures
13 will be effective. CEQA Guidelines § 15126.4(a)(1)(B)(2); *CBE v. Richmond*, 184 Cal.App.4th at
14 94. Second, the County must identify actions that could feasibly achieve the performance standard.
15 *Id.* § 15126.4(a)(1)(B)(3). And third, the County must commit itself to the mitigation. *Id.*
16 § 15126.4(a)(1)(B)(1). If any one of these criteria is not satisfied, the EIR may not defer formulation
17 of mitigation measures. Here, the EIR fails the very first of these requirements – the adoption of
18 specific, objective performance standards that ensure efficacy of mitigation.

19 Anticipating objectionable odors from the Project, the Draft EIR purported to reduce such
20 impacts to a “less than significant” level through the future adoption of a future plan. AR000073
21 (“[T]he operational Odor Management Plan (OMP) shall be developed and implemented upon
22 commissioning of the renewable processes.”). After Petitioners pointed out that such a “plan to plan”
23 is inconsistent with CEQA, the Final EIR added that Marathon would seek County review and
24 approval of an Odor Management Plan “prior to” the start of operations; it also included a list of
25 “options” to “reduce odors” that Marathon may consider. AR048892. The Final EIR explained that
26 “in the event that odor complaints are reported,” Marathon will “take action to prevent repeat
27 complaints” and will “develop additional mitigation strategies in consultation with the BAAQMD” if
28 more than five complaints are lodged in a year. AR048895.

1 But a promise to develop a future plan to “reduce odors” in the event of community
2 complaints is not a specific, objective performance standard that will ensure effective mitigation.
3 Such vague and noncommittal gestures toward performance standards do “no more than . . . allow
4 approval by a county department without setting any standards.” *Golden Door Properties*, 50
5 Cal.App.5th at 520. Nor does merely adding a precise trigger condition – here, “more than five
6 confirmed complaints in any single year” – transform a vague promise into a specific, measurable,
7 and *effective* mitigation measure. *See Save the Agoura Cornell Knoll v. City of Agoura Hills*, 46
8 Cal.App.5th 665, 688 (2020) (finding performance standards inadequate where EIR called for a
9 future “mitigation monitoring and restoration plan” without explaining how the plan would mitigate
10 impacts or be “effective”). Rather, performance standards must include specific and mandatory
11 criteria to ensure that mitigation will be achieved. *Golden Door Properties*, 50 Cal.App.5th at 520;
12 *CBE v. Richmond*, 184 Cal.App.4th at 94 (“generalized goal” insufficient, as CEQA requires “that the
13 measures, as implemented, will be effective”); *San Joaquin Raptor*, 149 Cal.App.4th at 670 (“future
14 management plans” not a substitute for specific performance criteria).¹³ As it stands, it is “unclear
15 what tests will be performed and what measurements will be taken to determine” that the Project has
16 mitigated potentially significant noxious odors. *POET I*, 218 Cal.App.4th at 740.

17 In its comments on the Draft EIR, BAAQMD highlighted these same shortcomings, focusing
18 particularly on the EIR’s inadequate performance criteria for odor mitigation. To satisfy CEQA,
19 BAAQMD noted, Marathon “must commit to specific actions in the EIR as part of the public review
20 process for the Odor Plan to be acceptable as a mitigation measure.” AR048356. BAAQMD also
21 explained that “[a]dditional details are needed to document how the County will enforce the Odor
22 Plan to ensure the expected management and control strategies are achieved, such as what actions

23 _____
24 ¹³ To formulate adequate performance standards, the County could have, for instance, set a limit on
25 the amount by which the Project is allowed to alter existing odor levels. *See King & Gardiner*
26 *Farms, LLC v. County of Kern*, 45 Cal.App.5th at 894 (noise mitigation plan would have been
27 sufficient if it had considered increases in magnitude). Or it could have set a specific performance
28 benchmark, such as a quantitative standard based on odor units or “dilutions to threshold.” *See*
Purdue Engineering, SOP 15, Odor Evaluation and Intensometry, <https://engineering.purdue.edu/~odor/QAPP/sop15.htm> (defining “dilutions to threshold” as the dilution of an odor sample that cannot be distinguished from odorless air by 50 percent of the members of an odor panel). The EIR did none of these things.

1 will be taken if an odor is suspect.” *Id.* Without such details, it was not possible for BAAQMD to
2 “assess its potential benefits or shortcomings” or to “agree or disagree with the EIR’s determination
3 that the Odor Plan will reduce odor impacts to less than significant.” *Id.* In response to these
4 comments, the Final EIR merely added a list of potential mitigation options that might be considered
5 or deployed. AR048892 (options include “carbon adsorption, incineration, biofilter use, and
6 chemical scrubbing, all in conjunction with a vapor recovery system and nitrogen blanketing of
7 storage tanks”). But a list of possible future control strategies does not remedy the absence of
8 enforceable, effective, and measurable specific performance standards. *King & Gardner Farms*, 45
9 Cal.App.5th at 858 (finding that EIR does not provide a performance standard when it “addresses
10 whether a measure would be employed, but does not address the performance of the measure”).¹⁴

11 By failing to explain why it was impractical or infeasible to formulate satisfactory mitigation
12 before Project approval and then failing to articulate the specific effective performance standards as
13 required to defer odor mitigation measures, the EIR violated both the spirit and the letter of CEQA
14 and left the reader “in the dark.” *San Joaquin Raptor*, 149 Cal.App.4th at 670.

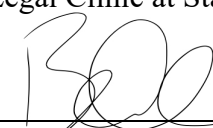
15 CONCLUSION

16 For the foregoing reasons, Petitioners respectfully request that the Court issue a peremptory
17 writ of mandate declaring that the EIR is inconsistent with CEQA, setting aside the County’s land use
18 approvals for the Project, and enjoining implementation of the Project unless and until the County
19 prepares an EIR that fully complies with CEQA.

20 DATED: February 3, 2023

Respectfully submitted,

21 ENVIRONMENTAL LAW CLINIC
22 Mills Legal Clinic at Stanford Law School

23 By: 
24 Benjamin Clark, Certified Law Student
25 Ian Faucher, Certified Law Student§
26 Deborah A. Sivas, Supervising Attorne

27 ¹⁴ To the extent the County hedges on odor mitigation commitments because the EIR has not
28 described Project feedstocks (which may affect odor emissions), that problem is one of its own
making and a separate CEQA violation, as discussed above. *See* Argument, *supra* at Section II.

1 **PROOF OF SERVICE**

2 **STATE OF CALIFORNIA, COUNTY OF SANTA CLARA**

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

6 On February 3, 2023, I served true copies of the following document(s) described as
PETITIONERS' OPENING BRIEF IN SUPPORT OF PETITION FOR WRIT OF
7 **MANDATE** on the interested parties in this action as follows:

8 Thomas L. Geiger, Assistant County Counsel
9 Kurtis C. Keller, Deputy County Counsel
10 COUNTY OF CONTRA COSTA
11 1025 Escobar Street, 3rd Floor
12 Martinez, California 94553
13 Tel: (925) 655-2200
14 Fax: (925) 655-2263
15 Email: thomas.geiger@cc.cccounty.us
kurtis.keller@cc.cccounty.us

Peter S. Modlin
James Erselius
GIBSON, DUNN & CRUTCHER LLP
555 Mission Street
San Francisco, California 94105-0921
Tel: (415) 393-8392
Fax: (374)-8488
Email: pmodlin@gibsondunn.com
jerselius@gibsondunn.com

16 Attorneys for Respondents County of Contra
17 Costa; Board of Supervisors of County of
18 Contra Costa; and Contra Costa County
19 Department of Conservation and
20 Development

Attorneys for Real Parties in Interest
Marathon Petroleum Corporation and Tesoro
Refining & Marketing Company LLC

21 **BY E-MAIL OR ELECTRONIC TRANSMISSION:** I caused a copy of the
22 document(s) to be sent from e-mail address anamv@stanford.edu to the persons at the e-mail
23 addresses listed in the Service List. I did not receive, within a reasonable time after the
24 transmission, any electronic message or other indication that the transmission was unsuccessful.

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

27 Executed on February 3, 2023, at Stanford, California.

28 

Ana Villanueva