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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF CONTRA COSTA

COMMUNITIES FOR A BETTER ENVIRONMENT and CENTER FOR BIOLOGICAL DIVERSITY,

Petitioners,

v.

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

Respondents.

Case No. N22-1091

PETITIONERS' REPLY 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

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

Real Parties in Interest.

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INTRODUCTION

The EIR for the Marathon Martinez Renewable Fuels Project ("Project") contains fundamental and pervasive flaws that hide the magnitude of the proposed operation's impacts on the community and beyond. Despite Respondents' attempts at obfuscation, substantial evidence in the record shows that the Project – one of the largest renewable fuels refineries *in the world* – will have significant impacts that the EIR fails entirely to disclose or analyze.

Although Respondents assert that the Project will provide far-reaching environmental benefits, the record shows otherwise: Study after study reveals that converting former petroleum refineries to produce so-called "renewable fuels" simply results in *different*, but no less harmful, impacts on historically burdened fenceline communities. Massive conversions such as this one also create entirely new kinds of environmental degradation, including indirect land use change ("ILUC") that can lead to deforestation and habitat destruction across the country and globe. Respondents' simplistic narrative that the Project is a boon to the local community and a step towards reducing greenhouse gas emissions does not tell the whole story. And although it is the intent of the California Environmental Quality Act ("CEQA") to compel lead agencies to do exactly that, here Respondents have subverted CEQA's intent in multiple ways.

In a threshold error that taints the entire analysis, the EIR denies the fact that the former petroleum refinery has been permanently closed since 2020 and that the Project entails a complete overhaul of that shuttered facility. As a result, the EIR sets an artificial baseline that hides the Project's significant impacts, including direct greenhouse gas ("GHG") emissions that dwarf the Bay Area Air Quality Management's ("BAAQMD") threshold of significance. Respondents defend the EIR's misleading baseline by claiming that Marathon's retention of operating permits for its historic petroleum refining operations means it "could" theoretically restart those operations at any time. But the California Supreme Court has held under similar circumstances that the mere existence of operating permits is irrelevant to the baseline determination. Furthermore, substantial evidence in the record shows that after the facility closed in 2020, Marathon had no plan to resume its historic refining operations.

In another fatal error, the EIR's project description omits any forecast of the Project's potential feedstocks. Ignoring its obligation to make a good faith effort at full disclosure, the EIR contends that it is impossible to forecast the Project's "precise" mix of feedstocks, even though Petitioners never have sought precision, only reasonable estimates of the Project's anticipated feedstock mix. Moreover, Respondents pretend the feedstock mix is irrelevant to project impacts, despite substantial evidence that multiple significant Project impacts will flow directly and indirectly from the choice of feedstocks.

In deeming the Project's ILUC impacts too "speculative" to analyze, Respondents ignore evidence showing that agencies *do* have the tools and information available to analyze ILUC impacts. Respondents fail to meaningfully rebut Petitioners' demonstration, based on the California Air Resources Board's environmental analysis for the Low Carbon Fuel Standard ("LCFS"), that the EIR *could* have estimated the Project's ILUC impacts and instead assert, without explanation, that Petitioners' demonstration is an "oversimplification." Compounding their failure to analyze the Project's ILUC impacts, Respondents also fail to explain why the EIR did not even mention the nearly 20 other renewable fuels projects proposed or under construction around the country, despite their and the Project's potentially devastating cumulative ILUC impacts.

Respondents are ultimately unable to justify an EIR that fails to inform the public and decisionmakers about the true scope of the Project's impacts and that improperly defers developing mitigation measures for its direct impacts on the community. Accordingly, Petitioners request that the Court set aside the Project's approvals and enjoin its implementation until the County prepares a compliant EIR.

ARGUMENT

I. The EIR's Improper CEQA Baseline Misinformed the Public and Decisionmakers.

A critical threshold question in this case is whether the EIR used a legally improper CEQA baseline against which to evaluate the impacts from a proposed brand-new renewable fuels Project. In Respondents' telling, it is "undisputed" that "the Project baseline is based on actual conditions at the Refinery" and "on *actual* emissions at the Refinery." Respondents' Joint Opposition Brief ("Opp. Br.") at 18, 21 (emphasis in original). Those statements are flatly wrong. In fact, it is *undisputed* that

the "actual condition" (or the existing physical environmental conditions, in CEQA parlance) at the site during the CEQA process was a closed petroleum refinery with no foreseeable plans to reopen. Moreover, months before the County published its CEQA notice of preparation, Marathon informed the County and publicly announced that it did not intend to recommence petroleum refining; instead, it planned to retool the facility to accommodate a new hydrotreating esters and fatty acids ("HEFA") technology to process renewable (non-petroleum-based) fuels. The "actual emissions" from the closed petroleum refinery were zero (or near zero). Consistent with CEQA Guidelines section 15125(a) and the overwhelming weight of interpretative case law, the default CEQA baseline was thus a non-operating site. CEQA Guidelines § 15125(a) (existing physical condition at time of EIR preparation is "normally" the CEQA baseline). Yet the EIR used an *operating* petroleum refinery as the existing environmental baseline. The *only* justification Respondents offer for this approach is that Marathon retained its prior petroleum refinery operating permits during the CEQA process and thus was entitled to resume petroleum operations in the future. The California Supreme Court has directly addressed and flatly rejected that reasoning. This Court should do the same.

A. *Communities for a Better Environment* governs this case.

This case falls within the legal framework articulated by the California Supreme Court in *Communities for a Better Environment v. South Coast Air Quality Management District* ("*Communities*"), 48 Cal.4th 310 (2010). There, ConocoPhillips applied to the South Coast Air Quality Management District for a permit to construct a "new industrial process" that would produce low sulfur diesel fuel at its existing petroleum refinery in Wilmington. *Id.* at 316-17. The proposed new "Diesel Project" would replace or modify hydrotreater reactions, a cooling tower, a storage tank, and a compressor; install new pipelines and pumps; and increase operation of an existing cogeneration plant and four boilers that provided steam generation. *Id.* As the lead CEQA agency, the Air District concluded that impacts caused by this new industrial process should be considered part of the existing facility baseline for CEQA purposes, rather than part of the proposed new Diesel Project, because ConocoPhillips already had permits to operate the equipment as an established use at its existing refinery and the proposed new process "did not call for any equipment to exceed its permitted capacity." *Id.* at 318.

The Supreme Court squarely rejected the Air District's baseline analysis and affirmed the appellate court's holding that "the proper baseline measurement should rest on 'realized physical conditions on the ground' instead of 'merely hypothetical conditions.'" *Id.* at 318-19. In reaching this conclusion, the Court emphasized that the required environmental setting for a CEQA analysis '"*will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant*.'" *Id.* at 320 (emphasis in original) (quoting CEQA Guidelines § 15125(a)). As the Court explained, "[a] long line of Court of Appeal decisions holds, in similar terms, that the impacts of a proposed project are ordinarily to be compared to the actual environmental conditions existing at the time of CEQA analysis . . . rather than the level of development or activity that *could* or *should* have been present according to a plan or regulation." *Id.* at 321 (emphasis in original) (citing cases).

Applying these basic CEQA principles to the facts of the case, the Court concluded that the maximum allowable operation under existing air permits "is not a realistic description of the existing conditions without the Diesel Project." *Id.* at 322. The Court explained that "[b]y comparing the proposed project to what *could* happen, rather than to what was actually happening," the Air District improperly set the baseline as '"merely hypothetical conditions allowable' under the permits." *Id.* (citation omitted) (emphasis in original). The use of hypothetical allowable conditions based on the facility's existing permit entitlements, the Court held, "results in 'illusory' comparisons that 'can only mislead the public as to the reality of the impacts and subvert the full consideration of the actual environment impacts,' a result at direct odds with CEQA's intent." *Id.* (citation omitted).

The County in this case made the same legal error as the Air District in *Communities*. Because Marathon's petroleum refinery had been closed for a year when the CEQA process began and Marathon had decided to decommission unneeded petroleum refining equipment and accelerate the depreciation of remaining assets (*see* Petitioners' Opening Brief ("Open. Br.") at 14-17, 22-25), the "realized physical conditions on the ground" at the time of EIR preparation was a closed facility and the default CEQA baseline was non-operation. Yet the EIR assumed an *operating* petroleum refinery as the CEQA baseline and then compared all impacts from the proposed new renewable fuels

processing against that hypothetically operating facility.[1] AR000142. Like the Air District in *Communities*, the County here improperly relied on the speculative assumption that because Marathon hypothetically "could" reverse course and resume petroleum refining, it would do so. As the Supreme Court explained in *Communities*, the County's approach misleads the public and the decisionmakers as to the reality of the Project and dramatically subverts the full consideration of actual environment impacts, at direct odds with CEQA's intent. 48 Cal.4th at 323.

Indeed, the facts in this case are even more compelling than those in *Communities*. Unlike in *Communities*, Marathon's proposed Project is not merely an expansion of an ongoing petroleum refining operation. Rather, Marathon ceased petroleum refining at the Martinez site altogether in April 2020 and proceeded with its plan to commence new and different HEFA operations – processes that have not previously been evaluated under CEQA. Whatever Marathon's "intent" when it first shuttered the petroleum refinery, the record shows conclusively that the company ultimately proposed a *new use* for the site. On August 3, 2020, Marathon informed the County that "[o]ver the weekend [Marathon] leadership announced that the Martinez refinery would not be brought back online. Instead, it will be idled indefinitely and used as a terminal." AR122705. "As a result of this decision," Marathon explained, "the vast majority of the projects that had been planned for the upcoming months/years are being cancelled. Please instruct your team to cease processing all [Marathon] permits." *Id.*; *see also* Open. Br. at 14-16.[2]

[1] Respondents state that after the petroleum refinery facility closed, "Marathon continued to receive refined petroleum products at the facility's marine terminals for storage and distribution." Opp. Br. at 10. Respondents point to no analysis in the EIR that would enable the public to understand the extent of any continued "storage and distribution" at the offsite marine terminals. But in any event, Marathon does *not* claim that it was operating any petroleum refining at the facility site – the critical fact for baseline purposes.

[2] Respondents focus on Marathon's alleged "intent" in April 2020 to only "temporarily idle" the plant. *See, e.g.*, Opp. Br. at 9, 24. They even go so far as to ask the Court to substitute a more legible copy of a Marathon website screenshot (dated April 16, 2020) using the "temporarily idle" language for the illegible copy of that document contained in the Administrative Record and provided to Petitioners and the public. *See* Joint Motion to Substitute a More Legible Copy (attaching new copy of AR081690-AR081697). Respondents also belatedly filed a Request for Judicial Notice ("RJN") of Marathon's April 17, 2020 quarterly filing with the Securities and Exchange Commission, presumably because it mentions that the company "temporarily idled portions of refining capacity"

Notably, the renewable fuels Project involves *new* industrial processes to produce *new* products using *new* equipment and requiring *new* permits. *See* Open. Br. at 16-17 (detailing new equipment and equipment modifications required for the HEFA process). The Draft EIR explained that "[p]roduction of renewable fuels involves three main hydroprocessing units, two hydrogen supply units, a hydrocracker gas plant for fractionation, and . . . a conventional wastewater treatment plant." AR000115. Of the seven units required to produce renewable fuels, five would need to be built for the first time or assembled through significant modifications of existing equipment. *See* AR000118-AR000121. Four industrial units would need to be "complete[ly] revamp[ed]." AR000138; *see* AR000289; AR000119-AR000121 (listing other modifications to existing infrastructure that are required to convert feedstocks into fuel); AR001028 (summarizing the Project's new and modified equipment). And numerous new permits would be required for construction and operation of the new Project. AR000096-AR000097 (noting that new Project will require permits from at least seven federal, state, and local agencies); *see also, e.g.*, AR029044 (application to BAAQMD for Authority to Construct and "a significant revision to the Title V operating permit"); AR029052-AR029058 (noting Project's 47 new or modified emissions sources "*that require permitting* [from BAAQMD] *on a source-by-source level*," including hydrogen plant, pretreatment unit, and thermal oxidizers (emphasis added)); AR090280 ("Prior to startup [of the new Project], the owner/operator shall ensure that a *revised* National Pollutant Discharge Elimination

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(although the document does not speak specifically to the Martinez facility). The Court should deny the motion to substitute because Respondents provide no evidence that the Board of Supervisors reviewed and relied on a more legible copy of the document than the one provided in the Administrative Record. Likewise, the Court should deny Respondents' RJN because it improperly seeks to augment the Administrative Record without making any showing for an exception. *See* Cal. Code Civ. Proc. § 1094.5(e) (court may admit extra-record documents in an administrative mandamus challenge only where it finds that the documents constitute "relevant evidence that, in the exercise of reasonable diligence, could not have been produced or that was improperly excluded at the hearing before respondent"); *see also Cooper v. Kizer*, 230 Cal.App.3d 1291, 1300 (1991) (internal quotation marks omitted) (holding that "it is error for the court to permit the record to be augmented, in the absence of a proper preliminary foundation . . . showing that one of these exceptions applies"). Moreover, neither document is relevant here because Marathon's "intent" in April 2020 does not establish the environmental baseline. The existing environmental setting is established by the undisputed facts that (1) the petroleum refining operations were shuttered in April 2020 and have never resumed and (2) in August 2020, Marathon decided instead to construct and operate a quite different renewable fuels processing plant that requires its own full CEQA review.

System (NPDES) Permit has been issued . . . *to reflect the change to alternative fuels operations*." (emphases added)). In other words, Marathon proposes a significant overhaul of the closed Martinez petroleum refinery, but the EIR hides the impacts of the new operations and misleads the public by using a speculative, hypothetical "operating refinery" baseline.

Communities teaches that the CEQA baseline for an operating facility is the existing environmental condition on the ground, not hypothetical operations based on existing permit entitlements. The rationale is even stronger here, where the petroleum refinery was indefinitely closed long before the CEQA process commenced. And the proposed HEFA process for the Martinez site has not previously undergone any CEQA review. Even more so than in *Communities*, Marathon's proposed renewable fuels Project "cannot be characterized as merely the modification of a previously analyzed project." *Communities*, 48 Cal.4th at 326. Contrary to Respondents' claim, the "actual conditions" on the site at the time of CEQA review were *not* an operating petroleum refinery, but a *closed* petroleum refinery which Marathon proposed to repurpose. By hiding behind a misleading baseline, the EIR engaged in the very gamesmanship that *Communities* rejected, frustrating CEQA's twin objectives of transparency and accountability.

B. Respondents misconstrue *Communities* to justify their misleading baseline.

Respondents defend the EIR's baseline on the specious ground that Marathon "could" restart petroleum refining if it elects to do so. This justification relies on a two-step argument. First, they claim that during the CEQA process for the new Project, Marathon maintained the permits necessary to resume petroleum refining operations and could, therefore, do so. Second, they argue that retention of these permits allowed the EIR to invoke the "temporary lull or spike" exception to the normal "existing conditions" default baseline articulated in CEQA Guidelines section 15125(a). *See Communities*, 48 Cal.4th at 328. Neither proposition justifies the use of a hypothetical operating petroleum refinery as the CEQA baseline.

1. The retention of unused operating permits is irrelevant.

Conceding as they must that Marathon's "temporary" cessation of the petroleum refining in April 2020 turned into an "indefinite" cessation by August 2020, Respondents nevertheless maintain that "[e]ven after Marathon decided to pursue the Project, it continued to take all steps – and incur all

expenses – necessary to resume oil refining if the renewable fuels project did not progress." Opp. Br. at 20. But Marathon's decision to retain its old permits during the permitting process for the new Project, whatever the reason (perhaps to hedge against future uncertainty or simply to justify the EIR's choice of a CEQA baseline), is simply not relevant to the legal question here.

The principles established by the Supreme Court in *Communities* address and defeat Respondents' retained-permit argument. There, the Air District and ConocoPhillips tried to distinguish earlier cases rejecting the use of a "hypothetical conditions" baseline by arguing that, unlike those cases, the ConocoPhillips refinery "held an entitlement" to operate its boilers at increased capacity under the existing permit limits. *Communities*, 48 Cal.4th at 323. In a section of the *Communities* opinion pointedly titled "**Prior Operating Permits Do Not in Themselves Establish a Baseline for CEQA Review of a New Project**," the Court rejected this argument, noting that the existing permits gave ConocoPhillips "no vested right to *pollute the air* at any particular level." *Id.* at 324 (emphasis in original) (citations omitted). And in any event, the Court explained, "ConocoPhillips' contentions fail for a more fundamental reason": Even if the operating refinery did have vested rights, "CEQA would still demand an analysis of the [expansion] project's true effects." *Id.* at 324-25. Here, Respondents advance precisely the argument that *Communities* rejected, claiming that "Marathon maintained all permits necessary for crude oil refining." Opp. Br. at 20. But regardless of existing permit entitlements, CEQA demands that the true effects of the new renewable fuels processing operations be thoroughly analyzed and disclosed, not obscured by a misleading and factually incorrect baseline. Although Respondents cite *Communities* in their brief, they do not and cannot distinguish its direct application to the facts of this case.

Instead, Respondents turn to a lower court decision in *Cherry Valley Pass Acres & Neighbors v. City of Beaumont*, 190 Cal.App.4th 316 (2010), and then misapply it. As Petitioners explained in the Opening Brief, that case addressed the proper CEQA baseline for determining project impacts on groundwater supply in connection with property that held adjudicated water rights. The property had a long history of varied use, from a small turkey farm ranch in the 1950s to an egg farm starting in the 1960s to cattle ranching in 2005 to the proposed 560-unit residential development at issue in the case. *Id.* at 323-25. As these uses changed, the property consumed varying levels of groundwater

from the Beaumont Basin. *Id.* at 329. To settle various claimed water rights in the aquifer, the owner of the property and several other local landowners entered into a stipulated adjudication of the Beaumont Basin; that adjudication allocated the existing groundwater supply among the various overlying landowners and was ultimately entered as a court judgment in 2005. *Id.* at 330. The judgment fixed the *permanent* overlying water right entitlement for each landowner, and individual landowners were entitled in perpetuity to use up to their adjudicated amount, regardless of what activity consumed the water (which, as a form of property right, could also be transferred to other parties for use elsewhere). The court concluded that, under those specific facts, the appropriate CEQA water supply baseline was the property's full adjudicated water right entitlement, not the then-current lower level of use by a cattle ranch. *Id.* at 337-38. An existing conditions baseline under those facts would be misleading, the court explained, because it would incorrectly suggest that increased pumping up to the full entitlement would adversely affect overall water supply, when the full basin adjudication had already accounted for that scenario. *Id.* Unlike water rights entitlements, which establish vested rights to draw groundwater regardless of the specific use of a property, the operating permits in *Communities* and here do not constitute vested rights to pollute and are thus not part of the property's baseline. *See Communities*, 48 Cal.4th at 324.

The facts here are more akin to those in *Hollywoodians Encouraging Rental Opportunities (HERO) v. City of Los Angeles*, 37 Cal.App.5th 768 (2019). There, in preparing to replace 18 rental apartment units with a 39-unit condominium development, the property owner evicted all tenants, and the property sat empty for two years. *Id.* at 774. After the condominium financing fell through, the owner proposed instead to convert the property to a 24-room boutique hotel. *Id.* at 775. In the EIR for the hotel project, the city used the existing vacant building status as the baseline for evaluating the project's impacts on population and housing, consistent with the normal default established by CEQA Guidelines section 15125. *Id.* at 780. HERO challenged the use of this baseline, arguing that it was an "unproven hypothetical" because the owner's earlier decision to evict tenants and opt out of the rental market was not irreversible and could have changed if the city denied the hotel project. *Id.*. The court rejected this argument, holding that "the baseline against which the Project properly was measured was a vacant building, *not* a tenant-occupied rental property." *Id.* (emphasis in original).

The court emphasized: "Contrary to HERO's argument, the 'unproven hypothetical' is being posited by HERO, not by respondents" because HERO's theory "that the owner may at some point restore the apartment units to the rental market is purely speculative." *Id.*

So too here. Respondents repeatedly accuse Petitioners of making a "speculative" argument that the petroleum refinery will not reopen (Opp. Br. at 8, 26, 27), but in truth it is *Respondents* who push an "unproven hypothetical" – that petroleum refining would recommence if the new Project were not to go forward. Nothing in the record supports such speculation, other than Marathon's self-serving statements in response to public comments. *See, e.g.*, AR048841. To the contrary, all of the relevant evidence in the record suggests that Marathon is unlikely to recommence petroleum refining at the site given market conditions and industry consolidation. Open. Br. at 14-16.[3] In any event, *the burden rests with the County* to justify why it deviated from the normal "existing condition" baseline – here, an indefinitely shuttered petroleum refinery – in favor of a baseline that assumes ongoing operation of the refinery. *Neighbors for Smart Rail v. Exposition Metro Line Constr. Auth.*, 57 Cal.4th 439, 447 (2013) (holding that while the agency has some discretion around the choice of baseline, existing conditions on the ground will "normally constitute the baseline" and a "departure from this norm" must be justified by substantial evidence in the record that an existing conditions baseline would be "misleading or without informational value to EIR users"). There is no analysis in the record – let alone substantial evidence – by which the County can meet its burden of showing that the normal "existing conditions" baseline in this instance would be misleading or without informational value. To the contrary, a baseline which assumes that petroleum refining will resume at the site is misleading and informationally defective because it hides the new Project's potentially significant impacts.

2. The cessation of petroleum refining is not a temporary fluctuation.

Based on Marathon's retention of old operating permits, Respondents invoke the periodic

[3] Respondents devote several pages to depreciation standards and Petitioners' analysis of the petroleum refining market in California (*see* Opp. Br. at 24-28), but that discussion is beside the point. Petitioners included this analysis to provide background context for why a petroleum refinery like the Martinez facility might logically close in response to long-term market trends. But the only legally dispositive (and undisputed) fact in the record on this issue is that the refinery closed in 2020 and has not refined petroleum since then, as Marathon pivots to a different type of facility.

fluctuation language of CEQA Guidelines section 15125, which provides: "Where existing conditions change or fluctuate over time, *and* where necessary to provide the most accurate picture practically possible of the project's impacts, a lead agency may define existing conditions by referencing historic conditions, or conditions expected when the project becomes operational, or both, that are supported with substantial evidence." CEQA Guidelines § 15125(a)(1) (emphasis added). They claim, incorrectly, that *Communities* supports use of this so-called "temporary lull or spike" exception under the facts of this case. Communities, 48 Cal.4th at 328. It does not.

While *Communities* acknowledged the existence of such an exception, the Court did not leave its application to the unchecked discretion of the lead agency, as Respondents imply. After finding that the Air District unlawfully folded the proposed expansion project into the existing facility baseline, the Court explained:

> In some circumstances, peak impacts or recurring periods of resource scarcity may be as important environmentally as average conditions. Where environmental conditions are expected to change quickly during the period of environmental review for reasons other than the proposed project, project effects might reasonably be compared to predicted conditions at the expected date of approval, rather than to conditions at the time analysis is begun. . . . A temporary lull or spike in operations that happens to occur at the time environmental review for a new project begins should not depress or elevate the baseline; overreliance on short-term activity averages might encourage companies to temporarily increase operations artificially, simply in order to establish a higher baseline.

48 Cal.4th at 328.

For this reason, a lead agency has "discretion to decide, in the first instance, exactly how the existing physical conditions without the project can most realistically be measured, *subject to review, as with all CEQA factual determinations, for support by substantial evidence.*" *Id.* (emphasis added). As the *Communities* decision noted, the fact "[t]hat refinery operations fluctuate over time, however, does not excuse the District from estimating the increase in NOx emissions, if any, the Diesel Project will create." *Id.* Thus, while the Air District could, on remand for preparation of an EIR, adjust its methodology, the Court instructed that "[w]hatever method the District uses, however, *the comparison must be between existing physical conditions without the Diesel Project and the conditions expected to be produced by the project.*" *Id.* (emphasis added). "Without such a comparison, the EIR will not inform decision makers and the public of the project's significant

environmental impacts, as CEQA mandates." *Id.* In other words, the agency could, on remand, consider normal capacity fluctuations at the *operating* ConocoPhillips facility to set the operating baseline, but it still had to compare the expansion project against that existing baseline notwithstanding prior permit entitlements. Here, by contrast, there are no temporary capacity fluctuations because the petroleum refinery is closed. The EIR must compare the new renewable fuels Project against that non-operating baseline.

In *Neighbors for Smart Rail*, the Supreme Court confirmed that a lead agency must justify with substantial evidence a decision to deviate from the "existing conditions" baseline. 57 Cal.4th at 457. As discussed above, the County did not and cannot do so here. Indeed, the only information in the record to justify invocation of the temporary fluctuation approach is Marathon's statement that it "could" restart the petroleum refinery. *See* Opp. Br. at 11-12 (citing AR081693). Put simply, there is no basis in the record to assume that petroleum refining at Martinez is on temporary hiatus: Respondents chose to sunset that use and repurpose the site for new industrial processes.

The two other cases on which Respondents principally rely, *North County Advocates v. City of Carlsbad*, 241 Cal.App.4th 94 (2015), and *Ass'n of Irritated Residents v. Kern County Board of Supervisors*, 17 Cal.App.5th 708, 721 (2017) ("*AIR*"), are no more helpful to their arguments. In fact, both cases show how the temporary fluctuation language of section 15125(a)(1) exception may be properly applied and, by contrast, why it does not apply here. *North County* affirmed deviation from an existing conditions baseline for traffic considerations in connection with the proposed renovation and re-rental of vacant space in an existing shopping center. The court found that it was proper to use a traffic baseline reflecting full occupancy at the site, notwithstanding the temporary vacancy, because it is "in the nature of" a shopping center to have fluctuating occupancy over time, as retail tenants move in and out. 241 Cal.App.4th at 105. There, unlike the situation here, the use of the property as a shopping center persisted over time, with retail tenants coming and going, akin to periodic fluctuations in refinery operations. In contrast, the permanent closure of the Marathon petroleum refinery was not "in the nature of" a refinery, nor was it a temporary fluctuation.

The *AIR* case likewise provides no support for the County's baseline analysis here. *AIR* concerned the expansion of delivery infrastructure at a petroleum refinery that had fluctuating

processing levels over more than a decade, in part due to the operator's temporary bankruptcy. After being entirely closed for two years (out of the prior 12 years), the facility resumed the processing of hydrocarbons under its existing permits and was functioning as an *operating* refinery when the EIR for the proposed expansion was prepared. *AIR*, 17 Cal.App.5th at 728-29. Moreover, the existing operations had been the subject of prior environmental review under CEQA (unlike here) and did not need additional permits to continue (unlike here) – two considerations that were also important to the *AIR* decision. *Id.* at 729. On the record before it, the court in *AIR* found a sufficient evidentiary basis for the lead agency's conclusion that the existing conditions baseline *was* an operating refinery, despite the temporary fluctuations during the bankruptcy proceedings. *Id.* at 728. Not so here, where the Martinez petroleum refinery was closed and is being replaced by a new and quite different renewable fuels processing operation that requires new equipment and operating permits.

C. The EIR's improper baseline obscures the Project's significant impacts and frustrates CEQA's primary purpose of timely and adequate disclosure.

The EIR's use of an improper baseline triggered cascading consequences throughout the document. It resulted in a systematic underreporting of the Project's actual and potentially significant effects on air emission, traffic, noise, hazardous materials risks, and the like. And it rendered the "no project" alternative a meaningless paper exercise. *See* Open. Br. at 27-29. Perhaps most problematically, the EIR masks the Project's significant GHG emissions. The renewable fuels Project will generate more than 813,000 metric tons of carbon dioxide equivalent ("CO2e") emissions per year onsite (AR000566) and an additional 304,044 metric tons per year from the offsite Air Products plant (AR000585). Collectively, these emissions dwarf the applicable "level of significance" for GHG emissions. AR000321 (BAAQMD threshold of significance of 10,000 metric tons of CO2e per year). Yet, by comparing Project GHG emissions against overall GHG emissions from historical operations at the closed petroleum refinery, the EIR concluded that there will be a net reduction in emissions. *See* Open. Br. at 36. The EIR's use of a false baseline comparison and the resulting dismissal of the Project's substantial GHG emissions as "insignificant" allowed the County and Marathon to avoid even considering, let alone adopting, possible mitigation measures to reduce or avoid these significant adverse impacts (e.g., through "green hydrogen" or otherwise).

II. The EIR's Project Description Violates CEQA.

An intelligent evaluation of a project's potential environmental impacts begins with an accurate, stable, and complete project description. *Ctr. for Sierra Nevada Conservation v. County of El Dorado*, 202 Cal.App.4th 1156, 1171 (2012). Failure to accurately describe the project "impairs the public's right and ability to participate in the environmental review process." *Washoe Meadows Community v. Dep't of Parks & Rec.*, 17 Cal.App.5th 277, 288 (2017). As Petitioners explained in their Opening Brief, the EIR failed to provide an adequate description of the Project's potential feedstocks. Open. Br. at 29-32. In response, Respondents argue that "consideration of feedstock mix is not relevant to evaluation of . . . environmental impacts." Opp. Br. at 30. But overwhelming evidence in the record shows otherwise, particularly with respect to indirect land use change ("ILUC") impacts from increased demand for agricultural feedstocks. *E.g.*, AR146665; AR082863; AR047026; AR145868. Respondents do not dispute this record evidence, nor could they. Indeed, even the EIR acknowledges that predicting ILUC impacts depends on the "mix of feedstocks [] used." AR048867; *see Communities for a Better Env't v. City of Richmond*, 184 Cal.App.4th 70, 82-83 (2010) ("*City of Richmond*") ("weighing of the [project's] environmental consequences" requires knowing its "true scope").

Petitioners do not seek the "precise" or "specific" feedstock blend, as Respondents repeatedly suggest. Opp. Br. at 28, 29, 30, 31. They ask only that the EIR's project description provide "a reasonable estimate of the Project's likely feedstock mix or even just a range of foreseeable scenarios." Open. Br. at 32. This more modest demand is required by CEQA's mandate that an EIR use "best efforts to find out and disclose all that it reasonably can" about the Project's operational inputs for the purpose of analyzing the Project's impacts. CEQA Guidelines § 15144; *City of Antioch v. City Council*, 187 Cal.App.3d 1325, 1338 (1986) (although agency "cannot be expected to know the exact" future use of the project, it must assume a use that "now seems reasonable to anticipate, as the developer has doubtless already done").

The record also lacks evidence supporting Respondents' legal conclusion that estimating the Project's feedstock mix would "require speculation about . . . unknowable future developments." Opp. Br. at 29. Nor is there support for the Final EIR's response to Petitioners' concerns that the

Project "may rely heavily on non-crop feedstock, such as tallow, in which case the Project would have a limited effect on crop-based markets." AR048868. To the contrary, information in the record suggests just the opposite. *See, e.g.*, AR080333 (citing U.S. EPA data showing that nearly 60 percent of biodiesel produced from 2018 to 2020 was from soy, compared to just 3 percent from animal fats); AR080519 (analysis by refinery expert and former Senior Scientist with Communities for a Better Environment Greg Karras of project feed demand vs. total domestic yield of HEFA feed sources, concluding that the Project "would likely process soy-dominated feed blends"); AR048451-AR048452 (production of soy is linked to higher ILUC impacts). And Respondents' suggestion that the Project's feedstock mix is "unknowable" is hardly credible given widely publicized data showing that different feedstocks are not equally available, while the Project's feedstock demand will be among the largest in *the world*. AR048533. The Project's massive scale will impact its ability to procure more scarce, low-ILUC impact feedstocks, relative to more widely available, higher-ILUC impact feedstocks like soy. *Id.* Marathon's claim of ignorance about potential feedstocks is particularly suspect given that it already operates an LCFS-qualified renewable fuels facility in North Dakota (*see* Opp. Br. at 1; AR048860) and presumably understands something about the national feedstock market.

The facts here are closely analogous to the facts in *City of Richmond*. There, the refinery proposed to install and operate new equipment that would enable the facility to process lower quality, heavier crude oil as compared to what it was previously processing, potentially creating more serious public health risks. *City of Richmond*, 184 Cal.App.4th at 81. The petitioners challenged the EIR on the ground that it failed to provide an accurate, complete, and stable project description by omitting pertinent information on the project's likely feedstocks – that is, whether it was reasonably foreseeable that the updated facility would process heavier crude oil. *Id.* at 82.

In *City of Richmond*, as here, the project proponent asserted "heated opposition" to any permit limitation on the type of feedstock that the facility could process in order "to preserve its operational flexibility to process a heavier range of crude than was currently being processed." *Id.* at 84. The court concluded that this approach was problematic because it did "not provide any objective quantification of the 'continuing mix that [the] Refinery was 'designed to process.'" *Id.* at 85

(citations omitted). As a result, "[f]ar from being an informative document, the EIR's conclusions call for blind faith in vague subjective characterizations." *Id.* The appellate court thus agreed with the trial court that "the EIR fails as an informational document because the EIR's project description is inconsistent and obscure." *Id.* at 89. This Court should follow the lead of *City of Richmond*.

Respondents' reliance on *Aptos Council v. County of Santa Cruz*, 10 Cal.App.5th 266 (2017) is misplaced. There, the court concluded that a County's CEQA review for amendments to its hotel density ordinance need not consider future hotel development. *Id.* at 286. The court pointed to the fact that the County had tried – but failed – to obtain relevant information about future hotel development before concluding that such future development was "too speculative to be reasonably foreseeable." *Id.* at 186-87; *see id.* at 294 ("The County did not come to [its] conclusion without investigating or conducting studies.").

Unlike in *Aptos Council*, here Respondents conducted *no* investigation or studies that would justify their failure to estimate Project feedstocks. *See id.* at 295; *see also* CEQA Guidelines § 15145 (requiring "thorough investigation" before an EIR may claim a Project impact or its causes would be too speculative to determine). When describing the project, "[an] agency should not be allowed to hide behind its own failure to gather relevant data." *City of Redlands v. County of San Bernardino*, 96 Cal.App.4th 398, 408 (2002). Furthermore, unlike in *Aptos Council*, where the petitioners had asked the County to consider future actions by third-party developers, here Petitioners seek disclosure about only the *Project*'s operations, an analysis "the developer has doubtless already done." *City of Antioch*, 187 Cal.App.3d at 1338; *see also Stopthemillenniumhollywood.com v. City of Los Angeles*, 39 Cal.App.5th 1, 14, 19 (2019) (project applicant's alleged uncertainty about market conditions was not a practical impediment to providing an accurate and finite project description). In sum, the EIR's failure to make even the slightest attempt to quantify the Project's potential feedstock types violates CEQA because it precludes "a full understanding of the [Project's] environmental consequences." *City of Richmond*, 184 Cal.App.4th at 80.

III. Respondents' *Post Hoc* Rationale for the Project's GHG Emissions Does Not Cure the EIR's Shortcomings.

In their Opening Brief, Petitioners contend that the EIR was informationally defective

because, among other omissions, it did not explain how it arrived at a single, precise estimate of GHG emissions generated by hydrogen production for the Project, even though hydrogen demand (and thus GHG emissions) varies depending on the type of feedstock. Open. Br. at 33-35. As explained below, this argument mirrors Petitioners' comments during the administrative process, but Respondents never responded with any meaningful analysis. Now, for the first time, Respondents assert that no further analysis or explanation is required because the EIR assumed that the onsite and offsite hydrogen plants would run at "maximum capacity" and, therefore, that the feedstock type "has no impact on GHG calculations." Opp. Br. at 31, 33. This *post hoc* explanation is inconsistent with other information in the EIR and, in any event, cannot cure the informational defect under CEQA.

A. Petitioners exhausted their argument that the EIR failed to disclose its assumptions about the Project's feedstock mix.

A party's comments need only "fairly apprise[]" the lead agency of the party's concerns. *Santa Clarita Org. for Plan. the Env't v. City of Santa Clarita*, 197 Cal.App.4th 1042, 1051-52 (2011) ("*SCOPE*") ("general nature" of comments referring to inadequate GHG mitigation measures was sufficient to exhaust issue that EIR did not support its conclusions about the project's impacts on climate change). Regardless, contrary to Respondents' claim, Petitioners did exhaust the "exact" argument in their Opening Brief that substantial evidence does not support the EIR's GHG emissions figure because the EIR did not disclose its assumptions about the Project's feedstock mix. *See* Opp. Br. at 31.[4]

Petitioners' comments explained that the EIR must justify how it calculated its GHG emission estimate, including how this estimate accounted for the variability in feedstock carbon intensity. AR080347-AR08351. Petitioners also asserted that the EIR must account for the wide variability in GHG emissions that could result from different feedstock choices. AR080348 ("project GHG emissions vary widely with feedstock choice"); AR080350 ("feedstock choice would drive the magnitude of carbon emissions"). Petitioners also specifically explained that the EIR should have

[4] To the extent Respondents may now argue that Petitioners failed to exhaust a challenge to the claim that the EIR's GHG emissions figure represented the "worst case scenario," Petitioners could not have addressed this claim prior to receiving Respondents Opposition Brief, where it was raised for the first time.

divulged the basis for its hydrogen-related GHG emissions. AR080350-AR080351 ("The DEIR should have evaluated [HEFA hydrogen production] emissions using data for the Marathon and Air Products hydrogen plants that would be used by the Project; and Marathon should have been required to provide detailed data on those plants to support this [carbon-intensity] estimate."); AR080347 ("The DEIR . . . fails to account for potentially increased GHG emissions associated with the processing of varying biofuel feedstocks."); AR080351 (explaining the EIR should include "a reasonable worst case scenario" of GHG emissions from various feedstocks and product slates). Additionally, Petitioners pointed out the failure to disclose "plant and project-specific design specifications," thereby giving Respondents the opportunity to explain their assumptions. AR080315 (noting the absence of any description of "the project-specific hydrogen production design data necessary" to estimate impacts). Although the County ignored these comments, they directly apprised the County of Petitioners' argument that the EIR must explain how it derived a single GHG emission figure given the wide variation in GHGs associated with different feedstocks.

B. The EIR contradicts Respondents' claim that the County used a "worst case scenario" for direct GHG impacts.

Respondents assert for the first time that the EIR determined GHG emissions from the Project's two hydrogen plants by assuming both plants were running at their "maximum capacity." Opp. Br. at 33. Therefore, they claim, the Project's feedstock mix – and specifically, the fact that the carbon intensity of renewable fuels production depends on the feedstock types used – "has no impact on the GHG calculations" and the EIR did not err by giving a single figure for GHG emissions from the Project's increased hydrogen production. *Id.* at 31. However, the record does not support Respondents' claim, nor does the EIR refer to any "maximum capacity" assumption for the purpose of calculating the Project's GHG impacts. *See Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal.4th 412, 443 (2007) ("That a party's briefs to the court may explain or supplement matters that are obscure or incomplete in the EIR . . . is irrelevant, because the public and decision makers did not have the briefs available at the time the project was reviewed and approved."). Accordingly, without a coherent explanation in the EIR of the Project's direct GHG emissions, the County lacked substantial evidence to find that the Project's GHG emissions were

less-than-significant. *Id.* at 439 ("Factual inconsistencies and lack of clarity" in the EIR "leave the reader – and the decisionmakers – without substantial evidence for concluding" that the Project's direct GHG emissions will be less than significant.); *see also San Joaquin Raptor Rescue Ctr. v. County of Merced*, 149 Cal.App.4th 645, 663 n.7 (2007) (where it was not clear how the EIR derived its estimate of groundwater use, there was "no substantial evidence to support a conclusion that the estimate represents *either* groundwater use when the project is operating at baseline production levels *or* when it is operating at peak production levels").

Respondents assert that the maximum capacity of the onsite hydrogen plant is 90 million standard cubic feet per day ("MMscfd"), while the maximum capacity of the offsite hydrogen plant is considerably smaller, at 35 MMSscfd, and that the EIR assumed total hydrogen production of 125 MMscfd. Opp. Br. at 34 (citing AR000472). Yet, the EIR reports the maximum GHG emissions from the offsite hydrogen plant as 304,044.47 tons per year, AR000585, versus 412,696.90 tons per year from the onsite hydrogen plant, AR000566. Thus, although Respondents claim that the onsite plant's "maximum capacity" is nearly three times greater than that of the offsite plant, the EIR indicates that the onsite plant will emit just *one-third more GHGs* than the offsite plant. AR000566. This suggests either that the EIR substantially underreported GHG emissions from the onsite plant, or that, contrary to Respondents' claim, the EIR assumed some other level of "expected operations" (Opp. Br. at 34), in which case Respondents fail to justify the EIR's use of a single GHG emissions figure given the variability in different feedstocks' carbon intensity. The EIR contains no explanation for why the onsite plant would have such anomalously low emissions while running at "maximum capacity." New efficient technology does not explain the discrepancy, as the onsite plant was built in 1963. AR080351.

Furthermore, as Petitioners have explained in Part I.C, the EIR did not report the *overall* emissions from the Projects' stationary sources, including those from the onsite hydrogen plant – which far exceed BAAQMD's threshold of significance for GHG emissions. *See*, Part I.C, *supra*. Instead, Respondents rely on an artificially elevated baseline to contend that the *change* in emissions at the onsite hydrogen plant is only 104,086 metric tons per year. AR000540.

IV. The EIR Failed to Adequately Analyze the Project's Indirect and Cumulative ILUC Impacts.

Respondents attempt to justify the EIR's failure to assess indirect and cumulative ILUC impacts with a series of contradictory and factually inaccurate arguments. First, they assert that the LCFS program already mitigated ILUC impacts, despite the fact that the LCFS environmental assessment expressly disclaims exactly such project-specific mitigation. Second, they claim that ILUC impacts are too speculative to analyze, even though substantial evidence in the record shows the opposite. Third, compounding their errors, they misrepresent the scope of the EIR's cumulative impacts analysis, and they misread the law requiring the County to consider the Project's ILUC impacts together with those caused by related projects.

A. Respondents' claim that the LCFS program already "mitigated" the Project's ILUC impacts is factually incorrect.

Respondents rely on certain aspects of the California Air Resources Board's ("CARB") Environmental Assessment ("EA") for the 2018 LCFS program amendments to argue that the County's analysis of ILUC impacts was proper, while ignoring or mischaracterizing the many aspects of CARB's EA that directly undermine the County's analysis. Respondents have no basis to claim that in adopting the 2018 amendments, CARB fully "addressed" and "mitigated" the Project's ILUC impacts (*see* Opp. Br. at 39-40), such that the EIR's failure to analyze these impacts complied with CEQA.

As an initial matter, Respondents distort Petitioners' arguments by recasting them as a policy objection to the LCFS program generally, or to CARB's analysis of the 2018 amendments. Opp. Br. Opp. Br. at 39-40; *id.* at 38 n.11. Quite the opposite: As Petitioners pointed out in their opening brief, CARB *appropriately* disclosed that by incentivizing production of renewable fuels from crop-based feedstocks, the LCFS program would have significant and unavoidable ILUC impacts. Open. Br. at 37-38. Petitioners' argument is not that the LCFS environmental assessment was defective, but rather that, by addressing both climate and non-climate ILUC impacts, it undermines Respondents' argument that such analysis is impossible.

Respondents' claim that the LCFS program "mitigated" the Project's ILUC impacts stems from their conflation of two separate categories of ILUC impacts: climate (GHG) impacts versus

non-climate impacts, including impacts to biological resources, habitat, soil, and water quality. AR145873; AR068584; AR047055; AR047026. CEQA requires lead agencies to separately analyze *both* categories of impacts. *See, e.g.*, CEQA Guidelines App. G, § II(d) (Agriculture and Forestry Resources) (EIR must analyze project's potential to "[r]esult in the loss of forest land or conversion of forest land to non-forest use[.]"); *id.* § VIII(a) (Greenhouse Gas Emissions) (EIR must analyze project's potential to "[g]enerate [GHG] emissions … that may have a significant impact on the environment"); *see also* Open. Br. at 37.

CARB recognized that the LCFS program amendments could increase pressure to convert rangeland, grasslands, forests, and other land uses to agriculture. AR046998 (describing indirect land use change impacts of increased cultivation of fuel-based agricultural feedstocks); *see also* AR047026 (outlining adverse effects on habitat and biodiversity of this conversion). Such adverse land use impacts could be reduced by local mitigation measures imposed by agencies with land use or permitting authority over "particular development projects." AR046999; AR047027. But because the LCFS does not confer such authority, the Board concluded that the LCFS program amendments would necessarily result in "*potentially significant and unavoidable*" adverse impacts on agricultural and forest resources, as well as biological species and their habitats, soil and geologic resources, and water quality. AR046999 (emphasis added) (agricultural and forest resources impacts); AR047026-AR047027 (biological resources); AR047036-AR047037 (soil and geologic resources); AR047051-AR047052 (hydrology and water quality impacts).

Nevertheless, Respondents assert that the LCFS program "mitigated" the Project's ILUC impacts generally. In so doing, they ignore the Project's potential to cause significant agricultural, forest, and other non-climate ILUC impacts, which CARB expressly stated that the LCFS did *not* mitigate. Opp. Br. at 38-39 (quoting EIR's specious claim that "CARB has previously evaluated, considered, and mitigated the environmental impacts associated with increased production and consumption of biofuels"). Respondents furthermore suggest that because the Project would participate in the LCFS program by producing non-petroleum-based fuel products or purchasing credits to offset any deficits from higher carbon intensity fuels, the Project necessarily addresses its own climate *and non-climate* ILUC impacts through "consisten[cy] with the State's climate goals."

Opp. Br. at 39.[5] But mere participation in the LCFS program does not mean that refineries do not cause non-climate ILUC impacts, including impacts to agricultural and forest resources. Indeed, CARB indicated that local agencies should analyze the non-climate ILUC impacts of "particular development projects" during project-level environmental review because such impacts are reasonably foreseeable. AR046999; *see also* AR047026-AR047027; AR047036-AR047037; AR047051-AR047052.

In addition to misrepresenting that CARB mitigated the Project's potentially significant ILUC impacts, Respondents also continue to ignore feasible mitigation measures the County could impose, like capping high-ILUC impact feedstocks. Opp. Br. at 41; *see Los Angeles Unified School Dist. v. City of Los Angeles* 58 Cal.App.4th 1019, 1029 (1997) (citations omitted) ("[A]n adequate EIR must respond to specific suggestions for mitigating a significant environmental impact unless the suggested mitigation is facially infeasible."). Petitioners' suggested mitigation measures are precisely the kind of local permitting conditions that CARB anticipated in the LCFS amendments. *See* AR047026-AR047027. Respondents claim that "there are no Project-specific actions that Marathon could take beyond those already incorporated into the LCFS program," and that "Petitioners' proposal for feedstock caps would directly conflict with the LCFS program." Opp. Br. at 41. Yet, the County approved the Project with the express condition that it not process palm oil feedstocks. AR000030; AR000070. The County thus had authority to "limit the use of high impact feedstocks as a condition of Project approval." Opp. Br. at 41.

B. The County failed to "thorough[ly] investigat[e]" the Project's ILUC impacts before concluding that they were too speculative to estimate.

In addition to erroneously claiming that the LCFS program "previously . . . mitigated" the Project's non-climate ILUC impacts, Respondents further assert that these impacts are "hopelessly speculative" and impossible to estimate. Opp. Br. at 38 n.11. However, CEQA requires the County to conduct a "thorough investigation" before concluding that an impact is too speculative to analyze.

[5] Respondents also claim that "[w]hether or not the LCFS program itself causes significant ILUC impacts is irrelevant to the question of whether the EIR for this particular project is sufficient." Opp. Br. at 40. Having purported to rely on the LCFS program to reach the significance conclusions in the EIR, Respondents cannot now distance themselves from CARB's "significant and unavoidable" conclusions.

CEQA Guidelines § 15145. And substantial evidence in the record must support this conclusion. *Vineyard Area Citizens*, 40 Cal.4th at 435 (agency abuses its discretion when it reaches "factual conclusions unsupported by substantial evidence). Here, the County failed to attempt even a *single* analysis of the Project's ILUC impacts before concluding that these impacts were too speculative to estimate. *See* Opp. Br. at 43-44 (referring to such analyses as "pointless"). Its refusal to attempt any analysis is particularly egregious given that the County cited CARB's environmental analysis for the LCFS, which demonstrated just the type of ILUC analysis the County could have conducted. *See, e.g.*, AR047026-AR047027 (describing CARB's GTAP model). The County's failure to "use its best efforts to find out and disclose all that it reasonably can" about the Project's ILUC impacts violated CEQA. Guidelines § 15144.

The County instead relied on a handful of reports referring *generally* to ILUC impact modeling as "difficult[]" or "uncertain[]." Opp. Br. at 37 (citing EPA report discussed at AR048867, AR048865, AR048868). At least one of these reports is more than a decade old (*see* Opp. Br. at 46; AR048867 (citing 2011 report at AR053867)), thus predating "considerabl[e]" growth in modeling capability. AR145984. *None* of the County's sources reference the Project or the particular methods for estimating ILUC impacts which Petitioners advised the County to use. Furthermore, merely alleging that modeling is "difficult" or "uncertain" does not justify the County's failure even to attempt it. *See* Open. Br. at 40-42. CEQA *presumes* that forecasting project impacts frequently poses technical challenges, yet nonetheless requires lead agencies to use their "best efforts." CEQA Guidelines § 15144. The County's selective literature review falls far short of this requirement.

Respondents also fail to distinguish caselaw requiring agencies in analogous circumstances to at least attempt to analyze impacts. In *Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners*, 91 Cal.App.4th 1344 (2001), as modified on denial of reh'g (Sept. 26, 2001), the court held that "[t]he fact that a single methodology does not currently exist that would provide the Port with a precise, or 'universally accepted,' quantification of the human health risk from TAC exposure does not excuse the preparation of any health risk assessment – it requires the Port to do the necessary work to educate itself about the different methodologies that are available." *Id.* at 1370–71 (rejecting agency's claim "that the omission of a health risk assessment should be excused because

'there is no methodology universally accepted as to what's significant.'"); *see also Citizens to Preserve the Ojai v. County of Ventura*, 176 Cal.App.3d 421, 424 (1985) (lead agency must conduct some analysis, even if less sophisticated or exacting, rather than eschew the obligation to analyze impacts at all). Respondents claim that these authorities are distinguishable because the impacts were "directly caused by the projects," whereas the ILUC impacts in this case are "more attenuated," or indirect. Opp. Br. at 45. Yet, none of these authorities turns on the proximity of the project to its impacts; rather, they hold that agencies must make a reasonable effort to collect data and attempt *some* actual forecasting before concluding that any impact too difficult to forecast. *See* Open. Br. at 41-42; CEQA Guidelines § 15144. The County should have done the same here.

Federal courts interpreting NEPA similarly hold that agencies must make a meaningful effort to actually analyze environmental impacts even in the face of uncertainty. *See Sierra Club v. Fed. Energy Reg. Comm'n*, 867 F.3d 1357, 1374 (D.C. Cir. 2017). There, FERC claimed it had no obligation to analyze a pipeline's indirect GHG emissions because it was "impossible to know exactly what quantity of [GHGs] will be emitted as a result" of the project's approval. *Id.* at 1373-74. The court disagreed, holding that the existence of "uncertain variables, including the operating decisions of individual plants and the demand for electricity in the region," did not excuse the agency from "reasonably forecasting" the project's indirect GHG emissions. *Id.* As here, the agency had means available to forecast indirect impacts; it simply chose not to do so. *Id.* (FERC could use an estimate of how much gas the pipelines would carry, along with a federal report estimating plants' emissions.). Thus "*at a minimum*, FERC should have estimated the amount of power-plant carbon emissions" the pipelines would make possible. *Id.* at 1371 (emphasis added); *see also Birckhead v. Fed. Energy Reg. Comm'n*, 925 F.3d 510, 519-20 (D.C. Cir. 2019) (The court was "troubled" by FERC's failure to "at least *attempt* to obtain the information necessary to fulfill its statutory responsibilities.") (emphasis in original). Similarly in *WildEarth Guardians v. Zinke*, 368 F.Supp.3d 41, 69-70 (D.D.C. 2019), where the court acknowledged factors complicating the forecast of GHG emissions, including a "mix of economic drivers that could change future demand for oil and gas," it nevertheless held that the agency "could have expressed the forecasts as ranges" and should have "explained the uncertainties underlying the forecasts" rather than failing to attempt any forecast at

all).

Under these cases, the existence of some uncertainty about "precisely where" ILUC impacts would occur or exactly what type of land ILUC might displace (*see* Opp. Br. at 37-38) does not obviate the County's duty to analyze potential impacts. Respondents assert that Petitioners' NEPA authorities are distinguishable from this case because they involved "foreseeable and inevitable downstream uses" of fossil fuel. Opp. Br. at 46. Yet, the EIR and Respondents concede that the Project's ILUC impacts are not only foreseeable, but that they are also "irreversible." AR048866; Opp. Br. at 47. Just as the "entire purpose" of a natural gas pipeline is to facilitate the transport and combustion of natural gas, the "entire purpose" of this Project is to transform crop-based feedstocks into fuel. *See* Opp. Br. at 45-46. The ultimate impacts of generating the Project's feedstocks are no less attenuated than the ultimate impacts of transporting and marketing natural gas to end-users.

Despite their clear obligation to attempt some analysis of the Project's ILUC impacts, Respondents instead claim that *Petitioners* "identify no means by which [ILUC impacts] could be assessed." Opp. Br. at 38 n.11. Not only does this improperly shift the County's duty to find out all it reasonably can (*see* CEQA Guidelines § 15144), but it is also factually inaccurate. In fact, Petitioners demonstrated the feasibility of estimating the Project's potential ILUC impacts by extrapolating from CARB's 2015 analysis of the LCFS program's ILUC impacts. AR080338-AR080339; *see* Open. Br. at 41. Based on this analysis, Petitioners calculated that if all the Project's annual 0.74 billion gallons of feedstock demand were soybean oil, then the Project alone would result in the conversion of 1.8 million acres of land. AR080338-AR080339; *see* Open. Br. at 41 n.11. The County called Petitioner's illustrative estimate an "oversimplification of a complex mix of variables" (AR048869; Opp. Br. at 44 n.12), but it has provided no explanation for why this estimate does not represent at least one reasonably foreseeable impact scenario based on a soy-based feedstock slate. Indeed, Respondents concede that "CEQA permits agencies to perform this type of 'worst-case' analysis," and that "agencies often focus on such scenarios as a means of erring on the side of conservatism." *See* Opp. Br. at 35. By rejecting Petitioner's proposed methodology out of hand, the

County failed to "thoroughly investigate" the feasibility of estimating the Project's ILUC impacts.[6] *See WildEarth Guardians*, 368 F.Supp.3d at 75 (remanding to agency to thoroughly consider possibility of quantifying indirect emissions, "including through the use of the emissions calculator suggested by Plaintiffs"); *Plan. & Conservation League v. Castaic Lake Water Agency*, 180 Cal.App.4th 210, 223, 253 (2009) (EIR's analysis of three possible water supply scenarios for a project, where actual water availability was uncertain, showed the agency had "use[d] its best efforts to find out and disclose all that it reasonably c[ould]") (quoting CEQA Guidelines § 15144).

Respondents' authorities further underscore that the EIR's lack of analysis violated CEQA. In *Californians for Alternatives to Toxics v. Dep't of Food & Agric.*, 136 Cal.App.4th 1 (2005), the court held that the Department abused its discretion by failing to evaluate the impacts of a pesticide program. *Id.* at 20. The court noted that while the Department was not required to duplicate a risk assessment performed by a different state agency (Caltrans) for a different project, Caltrans' approach nevertheless showed the Department's failure to evaluate impacts was improper. *Id.* at 19. The County similarly failed to conduct any independent analysis of the Project's ILUC impacts, despite evidence – including the ILUC modeling performed by CARB – showing that such analysis was possible. Respondents' other authorities for the proposition that lead agencies need not conduct all additional testing requested by Petitioners are inapposite; unlike the County, the agencies in these cases actually conducted a meaningful analysis, albeit not the petitioners' preferred one. *See Gray v. County of Madera*, 167 Cal.App.4th 1099, 1115 (2008) ("additional testing is required only if the initial testing is insufficient"); *Save Panoche Valley v. San Benito County*, 217 Cal.App.4th 503, 524 (2013) (an agency may decline "*additional* tests" where it has already done some analysis) (emphasis

[6] Even if the County had adequately demonstrated that this method "oversimplifi[ed] … complex [] variables," the record show that the County had other forecasting options available to it – such as application of CARB's GTAP model to quantify anticipated land use changes from the Project. AR080338. The EIR itself noted that CARB was able to estimate ILUC despite "the lack of a perfect model." AR000318-AR000319. Respondents claim that applying the model here would "simply involve inputting the same information into the same model to generate the same results." Opp. Br. at 43. But as with any predictive model, the results would depend on the inputs and thus would be unique to the Project, thereby providing presently nonexistent information about its likely ILUC impacts.

added); *Nat'l Parks & Conservation Ass'n v. County of Riverside*, 71 Cal.App.4th 1341, 1359-62 (1999) (where EIR went "the extra mile in examining every possible sensory impact on a Park visitor," an additional "comprehensive visitor use and perception study" was unnecessary).

Respondents' remaining authorities are also inapposite.[7] In *Rodeo Citizens Ass'n v. County of Contra Costa*, 22 Cal.App.5th 214 (2018), for example, there was insufficient evidence that the project would have an adverse indirect impact *at all*. *Id.* at 226-27 (EIR's "uncertainty regarding the end uses of the propane and butane 'relates not just to the extent of the impact, but to the fundamental direction of the impact;'" thus it was unclear "whether the change may be beneficial or adverse."). And in Respondents' NEPA cases, any impact was not a foreseeable consequence of the challenged agency approval at issue or within the control of the approving agency. *See Sierra Club v. Fed. Energy Reg. Comm'n*, 827 F.3d 36, 47-48 (D.C. Cir. 2016) (because a different agency, not FERC, had final approval authority over action that could cause downstream impacts, those impacts were not a foreseeable consequence of *FERC approval*); *EarthReports, Inc. v. Fed. Energy Reg. Comm'n*, 828 F.3d 949, 955 (D.C. Cir. 2016) (same). Here, by contrast, there is no dispute that ILUC impacts are foreseeable and negative; indeed, the EIR and Respondents concede that the Project's ILUC impacts are "irreversible." AR048866; Opp. Br. at 47. Moreover, here ILUC impacts are a consequence of the Project's proposed consumption of renewable feedstocks, over which the County has direct approval authority.

In sum, the County's failure even to attempt to analyze the Project's "irreversible" ILUC impacts, on the basis of generic reports calling such analysis "difficult" or "uncertain," did not fulfill the County's duty to "thorough[ly] investigat[e]" the Project's ILUC impacts before concluding they were too speculative to estimate. CEQA Guidelines § 15145.

C. The EIR's defective cumulative impacts analysis is an abuse of discretion.

Despite the existence of nearly 20 other renewable fuels projects around the state and country

[7] Respondents also cite to, and quote directly from, an *unpublished* portion of *Cal. Coastkeeper Alliance v. State Lands Comm'n*, 64 Cal.App.5th 36, 66 (2021). Not only must the Court disregard Respondents' citation as procedurally improper, but the citation is also inapposite, as it addresses the foreseeability of future *alternatives* to a proposed drinking water distribution system analyzed in the EIR at issue. *Id.* at 66.

in various stages of planning or completion (AR082720-AR082726, AR152451), Respondents assert it was reasonable for the cumulative impacts analysis to include *only one* other such project, the nearby Phillips 66 conversion project. Opp. Br. at 48. But confining the analysis to one other local renewable fuels project is improper with respect to ILUC impacts, which can be national and even global in scale and effect. Open. Br. at 45. Because CEQA required the County to "provide a reasonable explanation for the geographic limitation used," the County should have tailored the cumulative impact analysis to the geographic scope of the impact. CEQA Guidelines § 15130(c).

Respondents purport to justify the geographic scope of the EIR's cumulative impacts analysis because it allegedly encompassed "projects in the two nearest air quality districts" (Opp. Br. at 49) – an apparent reference to BAAQMD, where the Project is located, and the neighboring San Joaquin Valley Air Pollution Control District ("SJVAPCD"). AR048856-AR048857. Yet, both this Project and the Phillips project are located within BAAQMD. AR000171, AR082731 (Phillips 66 San Francisco Refinery is BAAQMD Facility #A0016). *Petitioners* told the County the EIR must also consider the Alon Bakersfield renewable diesel project (AR082719-AR082720) – located within the SJVAPCD – yet the County excluded this project from the analysis. AR000452-AR000456. Therefore, Respondents are simply wrong that the cumulative impact analysis' geographic scope is "logically defined" because it includes renewable fuel projects from "two air quality districts (to include the Phillips 66 project)." Opp. Br. at 48.

Respondents' real reason for omitting analysis of other renewable fuels projects' cumulative ILUC impacts has nothing to do with geography, but rather their assumption that it would be "speculative" to estimate these impacts. Opp. Br. at 49. Respondents claim that because the EIR found the Project's ILUC impacts speculative, evaluating the cumulative ILUC effect of similar projects would be futile. *Id.* at 48. Therefore, according to Respondents, the EIR need not disclose these other projects' existence, let alone determine, based on substantial evidence, whether their cumulative ILUC impacts were capable of estimation. *Id.* at 48.

Kings County Farm Bureau v. City of Hanford, 221 Cal.App.3d, 692, 722 (1990) – which Respondents fail to distinguish – prohibits this end-run around CEQA's cumulative impacts analysis requirement. There, the court held that the lead agency improperly omitted dozens of other

cogeneration projects from the EIR's cumulative impacts analysis. *Id.* at 724. Instead of calculating the extent to which these projects could collectively increase air pollution, the EIR focused only on the project's incremental air pollution effect and found it less than significant. *Id.* at 719. The EIR thus concluded that the cumulative effect would *also* be less than significant – "even though cumulative ozone impacts . . . might be considered substantial." *Id.* Rejecting this approach, the court held that "the standard for a cumulative impacts analysis is defined by the use of the term 'collectively significant' in CEQA Guidelines section 15355 and the analysis must assess the collective or combined effect of energy development. The EIR improperly focused upon the individual project's relative effects and omitted facts relevant to an analysis of the collective effect this and other sources will have. . . ." *Id.* at 721.

Similarly here, the EIR completely ignored the collective ILUC effect of other similar renewable fuel projects. AR000452-AR000456; AR082719-AR082727. Based solely on its assertion that the Project's ILUC impact would be speculative (Opp. Br. at 47), the EIR leaped to the *unrelated* conclusion that the ILUC impacts of other renewable fuel projects are also "speculative." Instead, the record shows that at least three of the renewable fuel projects that the EIR ignored were *already built* and operating before the County approved the Project. AR152451. Thus, the County could and should have investigated the volume and composition of these projects' feedstock inputs to quantify – or at very least, should have estimated – these projects' cumulative ILUC effect. The EIR fails to point to any evidence or "thorough investigation" (CEQA Guidelines § 15145) concluding that the individual or collective ILUC impacts of other similar projects are speculative. And it ignores Petitioners' extensive evidence that these projects collectively would cause a reasonably foreseeable cumulatively significant ILUC impact. AR082719; AR152455; AR124263-AR124268.

Even if it were true that similar projects' contributions to a cumulative impact were speculative, failure to disclose these projects and attempt to analyze their potential cumulative effect is a failure to proceed in the manner required by law. *Friends of the Eel River v. Sonoma County Water Agency*, 108 Cal.App.4th 859, 868-69 (2003) (agency required to discuss other projects' "speculative" pending water supply applications because the lead agency "was well aware" that the proposals, "if approved, would limit [the agency's] ability to supply water to its customers in an

environmentally sound way"). By failing to mention nearly 20 other renewable fuels projects, the EIR completely failed to describe the potential magnitude of the overall ILUC problem.

Respondents' error goes to the very heart of CEQA's cumulative impacts analysis requirement. By ignoring the potential cumulative ILUC impact of similar renewable fuel projects simply because Respondents claim that the *Project*'s ILUC impact is speculative, they "avoid[] analyzing the severity of the [ILUC] problem." *Kings County Farm Bureau*, 221 Cal.App.3d at 721. The EIR's virtually non-existent cumulative ILUC impacts analysis is an abuse of discretion. *Golden Door Properties, LLC v. County of San Diego*, 50 Cal.App.5th 467, 528 (2020).

V. The EIR Improperly Deferred Formulation of Odor Mitigation Measures.

Respondents concede that the EIR deferred formulation of specific odor mitigation measures. Opp. Br. at 52. But they incorrectly claim that the County's deferral of an Odor Management Plan for the Project was "proper." *Id.* The CEQA Guidelines and the courts have made clear that an EIR must demonstrate *why* "it is impractical or infeasible," CEQA Guidelines § 15126.4(a)(2), to include specific details of proposed mitigation measures. Open. Br. at 46; *see, e.g.*, *Preserve Wild Santee v. City of Santee***,** 210 Cal.App.4th 260, 281 (2012) (EIR improper in part because it did not state why specifying performance standards was impractical or infeasible). Respondents claim that providing "detailed measures" regarding odor mitigation was "impractical at the time of [the Project's] approval" (Opp. Br. at 52), but the EIR failed to explain *why* doing so was impractical. That omission constitutes an error of law. *League to Save Lake Tahoe v. County of Placer*, 75 Cal.App.5th 63, 95 (2022) (an EIR's omission of required information constitutes a procedural error of law).

CONCLUSION

The errors in the EIR are fundamental and pervasive, rather than "discrete and severable," as Respondents assert. Opp. Br. at 56. The EIR's failure to assess the Project against an accurate baseline of a closed refinery and its refusal to disclose even a forecast of the Project's likely feedstocks resulted in a deeply flawed and inaccurate environmental analysis in multiple impact areas. Accordingly, Petitioners request that the Court set aside the Project's approvals and enjoin its implementation until the County prepares a compliant EIR.

DATED: May 4, 2023

Respectfully submitted,

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SANTA CLARA

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

On May 4, 2023, I served true copies of the following document(s) described as **PETITIONERS' REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDATE** on the interested parties in this action as follows:

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

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

Executed on May 4, 2023, at Stanford, California.

Ana Villanueva

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