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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.

PHILLIPS 66, a Texas Corporation, and DOES 21-40, inclusive,

Real Parties in Interest.

Case No. N22-1080

PETITIONERS' REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDATE

Date: June 28, 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.]

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INTRODUCTION

The Rodeo Renewed Project ("Project") – the largest producer of renewable fuels *in the world* – would soak up a staggering 1.23 *billion* gallons of soybean oil and other lipid feedstocks each year and lock in new sources of pollution and hazards for fenceline communities for decades. The Project's massive feedstock demand threatens to create significant land use change impacts, including deforestation, habitat and biodiversity loss, and destruction of carbon sinks. These and other impacts, like odors, from the converted refinery may be different from the environmental harm caused by conventional petroleum refining, but they are no less important. And they could exceed any supposed environmental benefits of switching from fossil fuels if not accurately assessed and effectively mitigated.

The Project's Environmental Impact Report ("EIR") vastly understates the scope of the Project and its environmental consequences. It hides the first phase of the refinery's conversion (referred to in the record as the "Unit 250 Renewable Diesel Project") and refuses to analyze its adverse impacts, even though this closely entangled phase established the infrastructure to transport over half the soybean oil demanded by the Project and produces one-fifth of its projected fuel output. The EIR omits any forecast of the Project's feedstock mix to provide the accurate, stable, and complete project description that CEQA requires, even though the refinery was already piping in and processing tens of thousands of barrels per day ("bpd") of soybean feedstocks and obtaining credits for these fuels through the state's Low Carbon Fuel Standard ("LCFS") program before the EIR was certified. The EIR does not even attempt to analyze land use changes that the Project is likely to induce – both on its own and in combination with similar renewable fuels projects – even though the data and well-established methods exist to reliably forecast these indirect land use change ("ILUC") impacts. And it fails to adopt feasible mitigation measures to minimize significant odor impacts from processing 132,000 bpd of food-based feedstocks, instead unlawfully deferring formulation of odor mitigation details to a future planning process without the justification or safeguards CEQA demands.

The County and Phillips (collectively, "Respondents") largely ignore these defects, instead marshalling inadmissible extra-record evidence to try to backstop obvious flaws in the EIR and leaning into the narrative that the Project is part of the state's climate policy agenda to phase out fossil fuels.

But policy debates are not before the Court: The record is. And the record is clear that converting former petroleum refineries to produce so-called "renewable" fuels will create new forms of environmental degradation as growers race to satisfy the massive demand these projects create for food-based feedstocks.

Respondents are ultimately unable to will away what the administrative record shows to be true – that the fatally truncated EIR violated CEQA by failing to provide decisionmakers and the public with a complete and accurate picture of the Project and its significant impacts to the local and global environment. Petitioners request that the Court set aside the Project's approvals and enjoin its implementation until the County prepares an EIR that adequately describes the Project, analyzes its impacts, and develops the mitigation needed to protect communities from significant harm.

ARGUMENT

I. The EIR Unlawfully Piecemeals the First Phase of Refinery Conversion

Respondents fail entirely to engage with Petitioners' arguments on both the facts and the law. Ignoring their own "diligently prepared" record (Opp. Br. at 20 n.1), Respondents instead construct an alternate reality where the Unit 250 Renewable Diesel Project consisted only of minor updates to the hydrotreater itself. But facts matter. *See Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.*, 47 Cal.3d 376, 396 (1988) ("facts of each case" determine whether activities are part of a project for CEQA purposes). In obscuring the numerous activities that together contribute *one-fifth* of the Project's massive renewable fuels output, Respondents hid the extent of the Project and the full scope of its environmental impacts from public view. And they continue to will away these activities in their briefing. Likewise, Respondents ignore the numerous facts substantiating a close relationship between the two phases of the Rodeo Refinery conversion, instead proclaiming the Unit 250 Renewable Diesel Project's independence – and thus, purportedly, its severability – based entirely on their own bare assertions. The agency's opinions are irrelevant: The question whether Unit 250 Renewable Diesel Project activities are part of the whole of the action for purposes of CEQA is one of law that the court must "independently decide based on the undisputed facts in the record." *Tuolumne Cnty. Citizens for Responsible Growth, Inc. v. City of Sonora* ("*Tuolumne*"), 155 Cal.App.4th 1214, 1224 (2007).

Failing to justify piecemealing on the merits, Respondents instead distract with a series of

jurisdictional strawmen that misrepresent Petitioners' claim – that the County has not properly defined the Rodeo Renewed Project – by recasting it as a challenge to the Unit 250 approvals standing alone. This misdirection misses the point: Petitioners' challenge is to approval of the *Rodeo Renewed Project*, of which the Unit 250 activities are an integral part. And there is no question that Petitioners have met all jurisdictional prerequisites to bring this action. Respondents' logic, which has no support at all in the CEQA Guidelines or case law, would require litigants to independently challenge each piece of a project just to preserve a piecemealing claim – even if it was not yet clear when an initial phase was approved that it was part of a larger project. This is an unattainable standard that would demand impossible clairvoyance from petitioners, clog court dockets, and perversely incentivize agencies to do precisely what CEQA forbids: "chopping a large project into many little ones – each with a minimal potential impact on the environment." *Laurel Heights*, 47 Cal.3d at 396 (citation omitted).

A. Respondents do not, and cannot, show that the Unit 250 Renewable Diesel Project was unrelated to the Rodeo Renewed Project.

1. Respondents ignore the full scope of severed activities.

As an initial matter, Respondents limit their piecemealing discussion to the conversion of Unit 250 from a hydrotreater that could process only petroleum feedstocks to one that processes up to 12,000 bpd of pretreated renewable feedstocks. But that is only one piece of the severed Unit 250 Renewable Diesel Project. The Project also comprises the installation of at least 2,300 feet of new pipeline and extensive support infrastructure (including new metering, new pumps, a new building for power upgrades, and thirty-three offload headers) to transport up to *45,000 bpd* of soybean oil and other renewable feedstocks from the nearby Nustar Selby rail terminal to Unit 250 as well as to "existing tankage" at the Refinery for processing into renewable diesel – a set of activities that Phillips called the "Nustar Selby Soybean Project" in its permit applications. AR103086-87; AR 103096; *see* Petitioners' Opening Brief ("Open. Br.") at 12. This is in addition to construction activities that allowed the Unit 250 hydrotreater to receive and process the piped renewable feedstocks – including installation of new pumps, a new product air cooler, and new pipelines at the Refinery – as well as its ongoing production of 12,000 bpd of renewable diesel products. AR000932; AR103087; Open. Br. at 12. Respondents accuse Petitioners of "cobbl[ing] together various construction activities,"

Respondents' Joint Opposition Brief ("Opp. Br.") at 21 n.2, yet it was Phillips' own permit applications that described the Nustar Selby Soybean Project (including work that "Nustar intends to undertake on its rail rack") and the Unit 250 conversion and operations as, collectively, the "Unit 250 Renewable Diesel Project." AR103087.

Rather than address the relationship of the Nustar Selby Soybean Project activities to the Rodeo Renewed Project, Respondents waive them away through a single footnote asserting that this entire sweep of activities was "performed by an unrelated entity at a different facility." Opp. Br. at 21 n.2. The record shows otherwise. Phillips itself would own and operate the thousands of feet of pipeline transporting soybean oil from Nustar to the Refinery (AR103087); the pipeline would "run entirely on Phillips 66 property to receive the pretreated renewable feedstock from the adjacent Nustar Terminal rail rack" (*id.*); and Phillips was the applicant for two of the three building permits for the pipeline and related facilities (AR103083-85). Even as to components on Nustar's property or under its building permit, Respondents are wrong that Nustar's involvement severs the relationship to the Project. *See San Joaquin Raptor/Wildlife Rescue Ctr. v. County of Stanislaus*, 27 Cal.App.4th 713, 731-33 (1994) (expansion of wastewater treatment plant owned and operated by third party must be reviewed as part of development project on separate site).

Respondents' transparent purpose in brushing aside these activities is to downplay the "practical consequence" of piecemealing. Opp. Br. at 25-26. This argument is inapposite as the County's failure to comply with CEQA's requirements to accurately describe and analyze the Project was prejudicial error "regardless of whether a different outcome would have resulted." *Sierra Club v. County of Fresno*, 6 Cal.5th 502, 515 (2018) (quoting Pub. Res. Code § 21005(a)); *see San Joaquin Raptor*, 27 Cal.App.4th at 731 (setting aside EIR for development project where it was impossible to "discern [the] scope or environmental consequences" of "sewer expansion" that served it). Respondents also fail to locate support for this proposition in the EIR. Instead, they rely on a staff report on Petitioners' administrative appeal of the Project approval and a post-EIR Notice by the Bay Air Quality Management District ("BAAQMD"), neither of which can fill the informational void in the EIR itself. Opp. Br. at 26; *see Santiago Cnty. Water Dist. v. County of Orange*, 118 Cal.App.3d 818, 831 (1981) ("[W]hatever is required to be considered in an EIR must be in that formal report; what any official

might have known from other writings or oral presentations cannot supply what is lacking in the report." (citation omitted)); *id.* (rejecting "attempt[] to remedy the inadequacies of the EIR by presenting evidence to the trial court"). In any event, these documents are at most evidence of the delta in criteria pollutant emissions between pre- and post-Project Unit 250 operations. They say nothing about environmental impacts of the Unit 250 Renewable Diesel Project *as a whole* – including all manner of adverse impacts from construction and operation of 2,300 feet of pipeline and new facilities at Unit 250 and the Nustar rail terminal, or operational impacts of Unit 250 beyond the asserted change in air emissions. *See* Open. Br. at 26.

2. The Unit 250 Renewable Diesel Project and the Rodeo Renewed Project are closely linked phases of a single facility conversion.

Tellingly, Respondents barely address Petitioners' piecemealing claim on its merits. When they do, Respondents distort both the law and the facts. At the threshold, Respondents confuse the piecemealing standard. They cite *Make UC a Good Neighbor v. Regents of University of California* ("*Make UC*"), 88 Cal.App.5th 656 (2023), for the proposition that a piecemealing inquiry "is not simply a matter of whether two projects are related." *Id.* at 683. But Respondents omit the relevant part of the standard: "The projects must be linked in a way that logically makes them one project, not two." *Id.* Such a logical link exists "where two activities are part of a coordinated endeavor, among the various steps which taken together obtain an objective, or otherwise related to each other" such that they constitute a single project. *County of Ventura v. City of Moorpark*, 24 Cal.App.5th 377, 385 (2018) (citations omitted). A logical link also tends to exist when activities "are related in (1) time, (2) physical location, and (3) the entity undertaking the action." *Tuolumne*, 155 Cal.App.4th at 1227; *accord POET, LLC v. State Air Res. Bd.* ("*POET II*"), 12 Cal.App.5th 52, 74 (2017).

This logical link clearly exists here. Phillips proposed the Unit 250 Renewable Diesel Project to repurpose "its existing Diesel Hydrotreating unit to produce renewable diesel from pretreated renewable feedstocks." AR103087. Toward this end, it built new facilities, installed thousands of feet of pipeline to "receive the pretreated renewable feedstocks from the adjacent NuStar Terminal rail rack" and route them to the Refinery, and began processing 12,000 bpd of renewable feedstocks at the Refinery – all while the Rodeo Renewed application was pending. *Id.*; Open. Br. at 11-13. These

activities together constitute a "phase of the overall Project" to convert the Refinery to a renewable fuels processing facility. *Orinda Assn. v. Bd. of Supervisors*, 182 Cal.App.3d 1145, 1171 (1986). Indeed, Phillips itself referred to it as a "dry run" for the Rodeo Renewed Project. AR001757.

Respondents make several attempts to explain away these close links. Each falls short. First, Respondents assert that the Unit 250 Renewable Diesel Project and the Rodeo Renewed Project "have independent utility" and that "Unit 250 can operate independently without the Project." Opp. Br. at 23-24. This position relies on a mistaken legal premise. As explained in *Tuolumne*, "[t]heoretical independence is not a good reason for segmenting the environmental analysis of the two matters." 155 Cal.App.4th at 1230. Instead, what matters is "what actually is happening."[1] *Id.*

As Petitioners explained in their opening brief, the Unit 250 Renewable Diesel Project and the Rodeo Renewed Project are, in design and in practice, closely intertwined. Among other entanglements, the Rodeo Renewed EIR factors Unit 250's 12,000 bpd renewable diesel output into the Project's 67,000 bpd total capacity. AR053654; AR053731; *see also, e.g.*, AR171532. The EIR contemplates that renewable feedstocks treated at the Rodeo Renewed Project's new Pretreatment Unit "may be used as an alternative source of feedstock for Unit 250;" and it contemplates that renewable naptha produced by Unit 250 will be further processed by units installed under the Rodeo Renewed Project. AR002303; AR053737; *see* AR053734 (Project Flow Diagram). Further, the Unit 250 Renewable Diesel Project description specifies that modifications to the Nustar rail terminal are intended to enable it to receive 45,000 bpd of soybean oil – *more than half* the feedstock capacity of the Rodeo Renewed Project – and that the new 2,300-foot pipeline will supply not only Unit 250 with renewable feedstocks, but also "existing tankage" at other parts of the Refinery. AR103086; AR103096. As in *Tuolumne*, these practical entanglements bring to an end any theoretical

[1] Respondents also suggest that Unit 250 must be necessary to the Project (or vice versa) to be the same action. *See* Opp. Br. at 23-24. But this "'necessitated by' test" applies only when courts consider whether a potential future activity is sufficiently certain to occur to justify its inclusion in the scope of an action; it is inapplicable where, as here, the severed activity actually is occurring. *Tuolumne* 155 Cal.App.4th at 1228. Likewise, Respondents employ a logical fallacy in suggesting that Unit 250's renewable feedstock processing activities must be integral to the Rodeo Renewed Project to be the same action: "The idea that all integral activities are part of the same CEQA project does not establish that *only* integral activities are part of the same CEQA project." *Id.* at 1229.

independence of the two Refinery conversion stages. 155 Cal.App.4th at 1230-31. Respondents make no attempt to address these facts, instead resting their argument on unsupported staff assertions about Unit 250's "function[al] independent[ce]." Opp. Br. at 24 (quoting AR000151).

Next, Respondents imply that the Unit 250 Renewable Diesel Project must share all "the same" objectives with the Rodeo Renewed Project to be included in the whole of the action. Opp. Br. at 24. But again, this is not the law. Courts consider how related the severed activity is to the "*overall* objective of the project." *POET II*, 12 Cal.App.5th at 74 (emphasis added). In *Tuolumne*, for instance, the Court of Appeal held that a road realignment project was part of a shopping center construction project because it was "a step that [the real party] must take to achieve its objective." 155 Cal.App.4th at 1227. This was so even though a road realignment could not possibly share every objective of a shopping center. Were CEQA to require otherwise, a piecemealing claim would never be well-founded, as it would require showing that a severed activity is entirely synonymous with the larger project. Here, Respondents do not dispute that the severed activities advance the Project's overall objective to maximize the Refinery's renewable fuels output and maintain pre-Project throughput levels without crude oil. AR053660; AR053730; *see also* AR171532 (citing statement by Phillips describing "commence[ment] of renewable diesel production" at the Rodeo Refinery with completion of the Unit 250 conversion as part of "plans at the [Refinery] to meet the growing demand for renewable fuels").

Finally, contrary to Respondents' assertions, the Rodeo Renewed and Unit 250 Renewable Diesel Projects are clearly "related in (1) time, (2) physical location and (3) the entity undertaking the action."[2] *Tuolumne*, 155 Cal.App.4th at 1227. There is no dispute that the two sets of activities took place on the same property (Phillips' Rodeo Refinery) and by, or in close coordination with, the same entity (Phillips). Respondents assert only that the "Unit 250 modifications were . . . distinct from the Project in time," Opp. Br. at 25, but the record shows otherwise. Both permitting processes were initiated by Phillips in the summer of 2020. *See* AR061344 (Rodeo Renewed Project application submitted August 2020); AR103084-6 (Unit 250 Renewable Diesel Project applications submitted June

[2] Notably, Phillips included activities in other parts of the state in the Project scope – including discontinuation of the Santa Maria Refinery and decommissioning of pipelines across ten counties – but not the Unit 250 and Nustar pipeline activities occurring at the Refinery site itself. AR053739.

2020). Phillips began processing renewable feedstocks at Unit 250 and applying for LCFS credit pathways based on its renewable diesel output while the Rodeo Renewed Project approvals were pending. AR026059 (Unit 250 began producing renewable diesel in April 2021); AR026054 (December 2021 LCFS Fuel Pathway Report); AR053631 (Project EIR released October 2021). And Phillips was still in the process of applying for air permits for the converted Unit 250 after the County approved the Rodeo Renewed Project land use permit in May 2022. *See* Cho. Decl. at Exs. B & C.

Respondents' reliance on *Make UC* is misplaced. In *Make UC,* the court considered whether the university improperly piecemealed its long-range development plan by limiting its geographic scope to the campus and adjacent properties, thereby excluding certain geographically "remote properties." 88 Cal.App.5th at 683-84. In finding against piecemealing, the court explained that the properties included in the scope of the project were all linked geographically (on or adjacent to campus), in their function (comprising "all of UC Berkeley's major instruction facilities"), and in their purpose ("contribut[ing] to the university's institutional objectives" of "fostering collaboration"). *Id.* at 684. The remote university properties shared none of these features and no logical link to the development project. *Id.* The opposite is true of the Unit 250 Renewable Diesel and Rodeo Renewed Projects: They take place within the same geographic location (the Refinery property) and have the same function and purpose (to process renewable feedstocks into renewable fuels). They are not simply related; they are logically linked. In this way, the Unit 250 Renewable Diesel Project is much more akin to the unlawfully piecemealed demolition activities in *Orinda* that were a "phase of the overall project" to build out a mixed-used development. 182 Cal.App.3d at 1171; *see* AR171532.

B. Respondents' efforts to sidestep piecemealing are meritless.

Respondents try to get around the merits of Petitioners' piecemealing claim by arguing, for the first time, that the Court lacks jurisdiction to entertain it. Respondents' theories are unsupported and in conflict with the language and spirit of CEQA, and the Court should pay them no heed.

First, Respondents argue that Petitioners did not exhaust their piecemealing claims and that the claims are "procedurally barred" because Petitioners did not administratively appeal the Unit 250 Renewable Diesel Project's building permits or file separate CEQA lawsuits challenging them. Opp. Br. at 26-28. Both arguments rest on a faulty premise: Petitioners' challenge is to the *Rodeo Renewed*

Project approval, not the Unit 250 approvals on their own. And there is no question that Petitioners thoroughly exhausted available administrative remedies to challenge the Rodeo Renewed Project by "object[ing] to [its] approval" and truncated project description through comments on the draft and final EIR and by appealing the Planning Commission's determination to the Board of Supervisors. Pub. Res. Code § 21177(a)-(b). Nor is there any question that Petitioners timely filed their CEQA lawsuit within 30 days of the issuance of the Notice of Determination for the Rodeo Renewed Project approval. *See id.* § 21167. Respondents' building permit approvals for the Unit 250 conversion and Nustar soybean pipeline activities are relevant only insofar as they demonstrate that the EIR for *this* Project improperly truncated its description by excluding the full scope of activities that comprised it.[3]

Respondents cite no authority for the proposition that a petitioner must separately challenge each severed activity's approval to maintain a claim that the activity was improperly piecemealed from a larger project.[4] To the contrary, without identifying any jurisdictional concerns, courts routinely consider piecemealing claims where petitioners challenge *only* the approval of the larger project. *See, e.g.*, *Orinda,* 182 Cal.App.3d at 1150-51, 1160, 1172 (finding impermissible piecemealing of demolition phase of larger project without inquiring into whether petitioners appealed demolition permit); *Nelson v. County of Kern*, 190 Cal.App.4th 252, 263, 272 (2010) (holding that mining project was impermissibly piecemealed from reclamation project even though petitioners did not participate in administrative process for or judicial challenge to mining project approval). Nor does the text of CEQA support Respondents' theory. Instead, the Guidelines expressly contemplate that activities may

[3] In addition to being inapposite, Respondents' exhaustion defense fails because Respondents made no effort to show that "there was [a] public hearing or other opportunity for members of the public to raise . . . objections" to the building permit approvals, Pub. Res. Code § 21177(e), or that administrative remedies were available to challenge them. *See Tahoe Vista Concerned Citizens v. County of Placer*, 81 Cal.App.4th 577, 590 (2000) ("The exhaustion of administrative remedies doctrine has never applied where there is no available administrative remedy.").

[4] Respondents' authorities stand for the undisputed propositions that a litigant must exhaust available administrative remedies before bringing a CEQA action and file the suit within the applicable limitations period set forth by Public Resources Code section 21167; none of these cases considered application of these principles to a piecemealing claim. *See, e.g.*, *Bakersfield Citizens for Local Control v. City of Bakersfield*, 124 Cal.App.4th 1184, 1199 (2004) (rejecting exhaustion defense); *Stockton Citizens for Sensible Plan. v. City of Stockton*, 48 Cal.4th 481 (2010) (filing of Notice of Exemption triggered 35-day limitations period for CEQA challenge under section 21167).

have their own separate approvals yet nonetheless be reviewed as a single project under CEQA. *See* CEQA Guidelines § 15378(c) ("The term 'project' refers to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies. The term 'project' does not mean each separate governmental approval."); *Tuolumne*, 155 Cal.App.4th at 1228 (need for separate approvals does not sever connections between acts). To endorse Respondents' theory "could result in the fallacy of division" by "separately focusing on isolated parts of the whole" of an action or incentivizing agencies to evade CEQA review by severing off pieces of a project under the guise of ministerial approvals. *McQueen v. Bd. of Dirs.*, 202 Cal.App.3d 1136, 1144 (1988), disapproved of on other grounds by *W. States Petroleum Assn. v. Superior Court*, 9 Cal.4th 559 (1995); *see Orinda*, 182 Cal.App.3d at 1171 (piecemealing doctrine prevents agencies from chopping project into "bite-size pieces which, individually considered, might be found . . . to be only ministerial" (citation omitted)).

Next, Respondents argue that Petitioners' piecemealing claim is moot because BAAQMD has since issued a Notice of Exemption from CEQA for its air permit for Unit 250 operations. This is nonsense. As Respondents concede, a claim is moot only when "a court ruling can have no practical effect or cannot provide the parties with effective relief." *Lincoln Place Tenants Assn. v. City of Los Angeles*, 155 Cal.App.4th 425, 454 (2007) (rejecting mootness defense); *Banning Ranch Conservancy v. City of Newport Beach*, 211 Cal.App.4th 1209, 1224 n.6 (2012) (piecemealing not moot even though city abandoned request for allegedly severed access road in coastal development permit application). BAAQMD's air permit approval neither forecloses further County review of the Rodeo Renewed Project (including of the severed Unit 250 Renewable Diesel Project components), nor in any way affects the County's ability to modify the Project or mitigate its impacts in light of that review, nor prevents this Court from ordering the EIR to be decertified or Project approvals set aside based on the truncated Project description and environmental review.[5] *See Bakersfield Citizens*, 124 Cal.App.4th at 1204 (partial construction of shopping center project did not moot CEQA claims even though retail stores were already operating, as city retained discretion to reject approvals after further environmental study and could "compel additional mitigation measures to require the projects to be modified,

[5] For these reasons, it is of no consequence that Petitioners have not independently challenged BAAQMD approvals. *Cf.* Opp Br. at 28 n.5.

reconfigured or reduced"); *Save Tara v. City of West Hollywood*, 45 Cal.4th 116, 127-28 (2008) (city's certification of EIR did not moot challenge to approval of permits without CEQA review because court could still grant effectual relief by ordering city to set approvals aside).

C. In the alternative, the EIR should have considered the cumulative impacts of the Unit 250 Renewable Diesel Project.

Even if the Unit 250 Renewable Diesel Project were independent of the Rodeo Renewed Project for piecemealing purposes, CEQA would still require that the Rodeo Renewed EIR consider the cumulative contributions of this "closely related" project.[6] CEQA Guidelines § 15355. In *Communities for a Better Environment* ("*CBE*") *v. Richmond*, 184 Cal.App.4th 70, 99 (2010), for instance, a hydrogen pipeline project's "cumulative contribution" to environmental impacts was properly included in the EIR for a project to upgrade infrastructure at the refinery even though the two projects had different proponents, distinct purposes, and were otherwise independent for piecemealing purposes. As discussed above, the two projects here clearly satisfy this threshold.

Likewise, even if Petitioners' piecemealing claim were somehow procedurally barred, that would have no bearing on a cumulative impacts claim, as cumulative impacts analysis expressly contemplates consideration of "past" and fully operational projects. CEQA Guidelines § 15355. Indeed, it would only make cumulative consideration all the more pressing. As the court explained in *Bakersfield Citizens*, "[c]onsideration of the effects of a project or projects as if no others existed would encourage the piecemeal approval of several projects that, taken together, could overwhelm the natural environment," even when "sources appear insignificant when considered individually." 124 Cal.App.4th at 1214-15 (citation omitted). As in *Bakersfield Citizens*, failure to consider the Unit 250 Renewable Diesel and Rodeo Renewed Projects together amounts to a prejudicial abuse of discretion because it thwarts meaningful assessment of the "true scope" of environmental impacts. *Id.* at 1220.

[6] Respondents suggest that "[g]iven Unit 250's inclusion in the baseline, it would not be appropriate to include its operations in the cumulative impacts analysis." Opp. Br. at 25 n. 3. This is factually untrue as the baseline included emissions from Unit 250's 2019 operations, when it processed only petroleum. AR000151; AR053654. It is also inapposite: What matters is that the EIR refused to consider Unit 250 Renewable Diesel Project impacts, either as part of the Project or cumulatively. AR053660; AR054245-46.

II. The EIR's Failure to Identify a Likely Mix of Feedstocks in Its Project Description Violates CEQA.

In addition to omitting the entirety of the Unit 250 Renewable Diesel Project, the EIR's project description also fails to estimate, even generally, the amounts of each type of feedstocks the Project will use. Open. Br. at 27-31. Failure to accurately describe the project "impairs the public's right and ability to participate in the environmental review process." *Washoe Meadows Cmty. v. Dep't of Parks & Rec.*, 17 Cal.App.5th 277, 288 (2017). A curtailed project description infects the entirety of the EIR. *Ctr. for Sierra Nevada Conservation v. County of El Dorado*, 202 Cal.App.4th 1156, 1171 (2012) (complete project description is necessary to intelligently evaluate project's potential impacts). The type of feedstocks used will make a great deal of difference to the Project's impacts, including to ILUC and odors. Respondents do not, for instance, dispute the overwhelming record evidence that biofuel refineries' increased demand for agricultural feedstocks leads to increased ILUC impacts. *See, e.g.*, AR019520-21; AR025354; AR000471; AR002625. Rather, Respondents concede that the Project's feedstock mix will affect the magnitude of impacts. *See, e.g.*, Opp. Br. at 43 (because the Project will process "various feedstocks" which are "not possible to predict," it is "not reasonably feasible to hypothesize about potential ILUC impacts").

Petitioners do not seek the "precise" or "exact" feedstock blend, as Respondents repeatedly suggest. *Id.* at 31, 32. They ask only that the EIR's project description provide "a reasonable and accurate estimate of the Project's likely feedstock mix." Open. Br. at 31. 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 its 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"). For this reason, the EIR's claim that the Project's "exact mix" of feedstocks "cannot presently be determined because it depends on a web of interconnected variables" is beside the point.[7] Opp. Br. at 31.

[7] Respondents compare having to disclose the Project's likely feedstock mix to requiring a proposed mall to disclose the "various types of products to be sold." Opp. Br. at 32 n.7. This analogy misses the

CBE v. Richmond controls here. In that case, the refinery proposed to install new equipment to enable it to process lower quality, heavier crude than it had processed before, potentially creating more serious public health risks. *CBE v. Richmond*, 184 Cal.App.4th at 81. The petitioners challenged the adequacy of the EIR's project description because it omitted pertinent information about the project's likely feedstocks – that is, whether it was reasonably foreseeable that the updated facility would process heavier crude oil. *Id.* at 82. As here, the project proponent resisted disclosing the project's reasonably foreseeable reliance on higher-impact feedstocks, arguing that doing so would compromise the refinery's "operational flexibility." *Id.* at 84. The court rejected this approach because it did not "explain 'whether the mix the [converted R]efinery is 'designed' to process is heavier than [the] mix [the] Refinery is currently processing." *Id.* at 85.[8] The court also held that the record contained "conflicting signals" about whether the project would process heavier crudes. *Id.* at 83 (citation omitted). As a result, "[f]ar from being an informative document, the EIR's conclusions call for blind faith in vague subjective characterizations." *Id.* at 85.

As in *CBE v. Richmond*, the record here contains "conflicting signals" about the Project's likely reliance on soy feedstocks, which are particularly prone to induce deforestation and conversion of lands to agricultural production. The County failed to disclose in the EIR that the Project would use substantial and quantifiable amounts of soybean oil based on Unit 250 operations alone. *See, e.g.*, AR103096; AR026060. Nor do Respondents address the fact that the "Nustar Selby Soybean Project" (AR103083-86) would provide up to 45,000 bpd of soybean oil to the Refinery – *more than half* the Project's total feedstock processing capacity. AR103096; AR103087; AR026060. Because Phillips' April 2022 LCFS application reflected nearly a full year ("May 2021 to February 2022") of *current* renewable feedstock processing at the Refinery (Opp. Br. at 33), Respondents effectively concede that

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mark. Unlike this hypothetical mall, this Project will be the largest renewable diesel facility *in the world*, capable of consuming 22 percent of the domestic lipid feedstock supply. AR010492. Respondents concede that this unprecedented feedstock demand could shift entire feedstock markets. Opp. Br. at 41 (The Project is "not an (*intentionally*) market-forcing program.") (emphasis added).

[8] Respondents misread *CBE v. Richmond* to require only that Chevron disclose the "*pre*-project feedstock mix." Opp. Br. at 34 n.8. The issue in *CBE* was whether the EIR obscured the fact that the project would enable the refinery to "process lower quality, heavier crude as compared with the crude the Refinery currently processes." 184 Cal.App.4th at 81. Thus, the court's inquiry asked whether the EIR omitted necessary information about the proposed *project*'s feedstocks. *See id.* at 83.

Phillips had information about the Refinery's renewable feedstock usage prior to certifying the EIR in May 2022 but failed to include it in the Project description.

Respondents simply assert, without support, that "it would be speculative to identify . . . the Project's selections of feedstocks." Opp. Br. at 36. Nor is there support for the EIR's claim that the Project would rely more on waste oils than on crop-based feedstocks. AR010445; AR000733-34. Information in the record suggests just the opposite. *See, e.g.*, AR000474 (analysis by refinery expert Greg Karras of project feed demand vs. total domestic yield of HEFA feed sources, concluding that Project "would likely process soy-dominated feed blends"); AR000279 (citing EPA data showing that nearly 60 percent of biodiesel produced from 2018 to 2020 was from soy compared to three percent from animal fats); AR019520-21 (production of soy is linked to higher ILUC impacts). Respondents' suggestion that any estimate of the Project's feedstock mix would be entirely "random" (Opp. Br. at 32) is hardly credible given that the Project's massive scale will impact its ability to procure more scarce, lower-impact feedstocks relative to more widely available, higher-impact feedstocks like soy. AR000372-73.[9] This Court should follow *CBE v. Richmond* and find that "the EIR fails as an informational document because the EIR's project description is inconsistent and obscure." 184 Cal.App.4th at 89; *see Stopthemillenniumhollywood.com v. City of Los Angeles*, 39 Cal.App.5th 1, 14, 19 (2019) (uncertainty about market conditions did not practically impede disclosure of accurate, finite project description); *City of Redlands v. County of San Bernardino*, 96 Cal.App.4th 398, 408 (2002) ("agency should not be allowed to hide behind its own failure to gather relevant data" (citation omitted)).

Respondents' remaining arguments are strawmen. They claim, incorrectly, that "CEQA counsels against" estimating a likely feedstock mix or mixes. Opp. Br. at 31. Instead, courts have held that agencies may meet their duty to make a "good faith effort at forecasting what is expected to occur" by describing a range of potential operational profiles "for analysis purposes." *Citizens for a*

[9] Respondents argue that feedstock data for biodiesel production is irrelevant here, yet they ignore evidence that biodiesel feedstock data is at least strongly suggestive of the Project's likely feedstock mix. *See, e.g.*, AR059872 ("Though produced differently, [biodiesel and renewable diesel] typically share the same feedstocks."). Regardless, Respondents concede that CARB data from April 2022 – prior to Project approval – also shows a "relative statewide increase in soy oil demand" by renewable diesel producers, as compared to their demand for animal-based feedstocks. Opp. Br. at 36.

Sustainable Treasure Island v. City & County of San Francisco, 227 Cal.App.4th 1036, 1053 & n.7 (2014); *see also South of Market Cmty. Action Network v. City & County of San Francisco* ("*Cmty. Action Network*"), 33 Cal.App.5th 321, 333-34 & n.3 (2019) (EIR described "one project" yet "carefully articulated two possible variations and fully disclosed the maximum possible scope of the project," thus "enhanc[ing], rather than obscur[ing], the information available to the public"); *Plan. & Conservation League v. Castaic Lake Water Agency* ("*PCL*"), 180 Cal.App.4th 210, 222-23, 252-53 (2009) (where "EIR must address controversial matters that resist reliable forecasting," it satisfied CEQA by examining three water transfer scenarios, including a "reasonable worst-case scenario"). The EIR lacks any similar, reasonable attempt at forecasting. *See Cmty. Action Network*, 33 Cal.App.5th at 333 n.3 (EIR gave detailed square footage estimates for each alternate project scenario's mix of proposed land uses).[10] The cases Respondents cite are inapposite: In *Washoe Meadows*, the lead agency's CEQA violation was in the "failure to identify or select *any project at all*" because the CEQA documents described five "vast[ly]" different proposals for addressing a river's discharge of sediment into Lake Tahoe. 17 Cal.App.5th at 288-89 (emphasis added). Similarly, the EIR in *County of Inyo v. City of Los* Angeles, 71 Cal.App.3d 185 (1977) shifted between two projects of very different scope. *Id.* at 189-90 ("[T]he project concept expands and contracts from place to place within the EIR"). And the holding Respondents cite from *Make UC* does not even address the project description; rather, it has to do with an agency's failure to reasonably estimate *noise impacts* from additional student housing. 88 Cal.App.5th at 689.

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

Respondents defend the County's failure to assess the Project's ILUC impacts on the basis that they are not reasonably foreseeable. They also dismiss the failure to use available modeling tools to evaluate ILUC, such as those CARB used to assess the LCFS, by asserting that the data required to

[10] In each of these cases, the court noted that review was based on the "maximum development . . . assumed." *Treasure Island*, 227 Cal.App.4th at 1053 & n.7; *see Cmty. Action Network*, 33 Cal.App.5th at 333-34; *PCL*, 180 Cal.App.4th at 252-53. Although Respondents claim here that the EIR "provid[ed] an 'outer limit' on the [Project's] expected impacts based on the types of feedstocks that may be processed," Opp. Br. at 34, the EIR did not use *any* estimated feedstock mix to quantify "expected impacts," much less Petitioners' suggestion of a predominantly soy-based mix, *id.*

analyze these impacts do not exist. As a result, rather than use *any* of the available tools and data to forecast large-scale ILUC impacts this Project would induce, the County skipped the analysis altogether. But CEQA prohibits this kind of willful blindness: The County cannot abdicate its duty to perform a "thorough investigation" before concluding that impacts are too speculative to evaluate.

A. Substantial evidence shows that ILUC impacts are reasonably foreseeable.

Respondents deny the causal link between the Project's immense feedstock demand and its ILUC impacts. Opp. Br. at 39 ("Absent a causal connection . . . , the agency is not entitled to assume [the impacts] will potentially come to pass"); *see also id.* at 36. Yet they ignore substantial evidence that the Project *will* rely heavily on renewable fuel feedstocks with such impacts, particularly soy. *See, e.g.*, Open. Br. at 15, 33 (describing chain of causation from increased oil crop consumption to climate and non-climate impacts of land clearing); AR023905; AR019521; AR019549-50. Respondents' only response to this evidence is that it is not "reliable." Opp. Br. at 39, 42; AR002281. But an agency's subjective *opinion* is not substantial evidence, nor does it represent the "thorough investigation" an agency must conduct before concluding an impact is too speculative to evaluate. CEQA Guidelines § 15145; *see id.* at § 15384(a). By ignoring evidence of the Project's reasonably foreseeable ILUC impacts and refusing to make a good faith effort to find out and disclose all that it reasonably could about them, the County abused its discretion. *Vineyard Area Citizens for Responsible Growth. v. City of Rancho Cordova*, 40 Cal.4th 412, 435 (2007).

The fact that crop feedstocks are a "global commodit[y]" does not support Respondents' assertion that the ILUC impacts from producing them for transportation fuels cannot feasibly be assessed. Opp. Br. at 40. Courts do not excuse an agency from analyzing impacts caused by a project's inputs merely because the inputs are bought and sold. *See, e.g.*, *POET, LLC v. State Air Res. Bd.* ("*POET I*"), 218 Cal.App.4th 681, 732, 734, 739 (2013) (CARB failed to justify deferring mitigation for increase in NOx emissions due in part to "the feedstock used to produce the biodiesel," including soybean, canola, and corn oils); *WildEarth Guardians v. Zinke*, 368 F.Supp.3d 41, 69-70 (D.D.C. 2019) (agency required to quantify climate change impacts of authorizing oil and gas leasing in spite of "mix of economic drivers that could change future demand for oil and gas"); *Sierra Club v. Fed. Energy Regul. Comm'n* ("*FERC*"), 867 F.3d 1357, 1371 (D.C. Cir. 2017) (approval of natural gas

pipelines must consider "not only the direct effects, but also the *indirect* environmental effects" of power plant emissions the pipelines would enable). Similarly, CARB found the ILUC impacts associated with cultivation of renewable feedstocks spurred by the LCFS program to be reasonably foreseeable, unhampered by the fact that the feedstocks are global commodities. *See, e.g.*, AR019494; AR019521-22.

Respondents also contend that the Project's ILUC impacts would result from future "cultivation projects" and that, therefore, the County was not required to consider them. Opp. Br. at 39-40. But under CEQA, "environmental review cannot be deferred until reasonably foreseeable future development is, in fact, proposed." *Stanislaus Audubon Soc'y, Inc. v. County of Stanislaus*, 33 Cal. App.4th 144, 158 (1995) (county must prepare EIR to study projected future development spurred by golf course); *see Cnty. Sanitation Dist. No. 2 of Los Angeles Cnty. v. County of Kern*, 127 Cal.App.4th 1544, 1602 (2005) (rejecting argument that CEQA review for sewage sludge ordinance would occur later, where agency would have "no opportunity to assess the indirect physical impacts of [the ordinance] before those impacts occurred"); *Vineyard Area Citizens*, 40 Cal.4th at 441 ("CEQA's information purposes 'is not satisfied by simply stating information will be provided in the future'" (citation omitted)). Here, approval of the Project – not future, unidentified cultivation projects – is an irretrievable commitment that will require increased generation of renewable feedstocks, thus triggering CEQA's requirement to analyze the full range of impacts of such approval. That "the exact extent and location of such [impacts] cannot now be determined does not excuse the County" from assessing those impacts. *Stanislaus Audubon Soc'y*, 33 Cal.App.4th at 158. The EIR was obligated to conduct this analysis, particularly as the County's environmental review presents the only chance to comprehensively evaluate the Project's ILUC impacts.[11]

[11] Respondents cite inapposite cases involving future hypothetical projects that would necessarily undergo discretionary review by other agencies. *See* Opp. Br. at 39-40 (citing *Rio Vista Farm Bureau Ctr. v. County of Solano*, 5 Cal.App.4th 351, 372-73 (1992) (program EIR for a hazardous waste management plan need not analyze potential impacts of hypothetical future facilities that would necessarily be analyzed in future project EIRs); *Nat'l Parks & Conservation Assn. v. County of Riverside*, 42 Cal.App.4th 1505, 1518-19 (1996) (EIR for landfill project need not analyze prospective facilities to process trash, which would necessarily be subject to additional review); Opp. Br. at 37 (citing *Marin Mun. Water Dist. v. KG Land Cal. Corp.*, 235 Cal.App.3d 1652, 1662-63 (1991) (long-

Respondents' claim that the Project's ILUC impacts are speculative also fails because it is inconsistent with CARB's 2018 conclusion that ILUC impacts are a foreseeable consequence of generating renewable fuels. AR019494 (finding agricultural and forest resources impacts potentially significant and irreversible); AR019521-22 (same for biological resources); AR019531-32 (same for soil and geologic resources); AR019546-47 (same for hydrology and water quality impacts). CARB furthermore concluded that "vari[able] . . . market conditions" (Opp. Br. at 40) would not affect the foreseeability of significant and unavoidable ILUC impacts from increased renewable fuels production. *See, e.g.*, AR019549-50 (presence of "market forces" does not affect foreseeability of ILUC impacts). Respondents err in asserting that CARB's analysis is irrelevant given the difference in scope between the LCFS, a statewide "(intentionally) market-forcing program," and this Project. Opp. Br. at 38; *id.* at 41-42 (asserting County need not do "equivalent type of investigation" CARB did for LCFS). But as Respondents concede, this Project – with an unequaled input volume of 80,000 bpd of renewable feedstocks – could shift entire feedstock markets. AR053654. Given the magnitude of the Project and severity and scope of its foreseeable effect, Respondents have no excuse for failing to analyze its ILUC impacts. *See* CEQA Guidelines §§ 15204(a), 15064(d)(2).[12]

Respondents' remaining contentions are unavailing. They claim that because "the underlying permit" did not require identification of feedstocks, the County need not analyze ILUC impacts. Opp. Br. at 38. But the requirement to properly describe the Project and assess its impacts stems from CEQA itself, not from the "underlying permit" that is *subject* to CEQA. CEQA Guidelines § 15126.2(a) (describing requirements for environmental impacts analysis). They also assert that such

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term impacts of water service moratorium would necessarily be considered in subsequent EIRs)). These cases are inapplicable here, where ILUC impacts stem from *this* Project, not future unknown projects, and where there is no commitment to future environmental review.

[12] Respondents claim that CARB's analysis supports the County's refusal to analyze ILUC impacts due to their alleged inherent uncertainty. Opp. Br. at 40-41, 42 n.13. But CARB reached its significance conclusions about the LCFS amendments' ILUC impacts without speculation, and *despite* the existence of some uncertainty about the precise magnitude or location of those impacts. *See* AR019444 (CARB's analysis "contains as much information about those [LCFS] impacts as is currently available, without being unduly speculative"); AR019445 (environmental assessment addresses impacts only "to the extent they are reasonably foreseeable and do not require speculation"). Respondents lack any evidence for their vague claim that CARB's conclusions are unreliable given "[i]ntervening changes in the regulatory and economic climate." Opp. Br. at 42.

an analysis is not "within the County's ability" given its "expertise and limitations." Opp Br. at 38 n.10, 41. But the depth and breadth of a CEQA analysis does not depend on the type or size of the agency conducting the review. *See* CEQA Guidelines § 15084 (describing the lead agency's obligations). Respondents' suggestion that the level of analytical rigor CEQA requires is tied to the lead agency's "expertise" (Opp. Br. at 38 n.10) ignores that agencies commonly contract with other entities to prepare an EIR. CEQA Guidelines § 15084(d)(2).

B. The County violated CEQA by refusing any attempt to quantify ILUC impacts.

Respondents do not dispute that methods exist to analyze the Project's ILUC impacts. Opp. Br. at 43 (disputing not "lack of a suitable methodology" but rather "lack of . . . predictable inputs"). Nor could they. CARB has been using the GTAP model to quantify the LCFS program's ILUC impacts since 2009. *See* AR019318 (GTAP model was "relatively mature" in 2015 and "has a long history of use in modeling complex international economic effects"); AR023955 (number of tools has "grown considerably" since 2009). The County could have used this model, or as Petitioners recommended in comments on the draft EIR, it could have extrapolated from CARB's analysis to reasonably estimate converted acreage based on a representative feedstock mix. *See Citizens to Pres. the Ojai v. County of Ventura*, 176 Cal.App.3d 421, 432 (1985) (even if a sophisticated technical analysis is not feasible, courts require "some reasonable, albeit less exacting, analysis" of the impact).

For illustrative purposes, Petitioners showed that a fully soy Project feedstock slate could result in conversion of over three million acres to new agricultural use. AR019322-23; AR000284. Such a scenario is particularly appropriate here, given that the Refinery has secured multiple LCFS credit pathways to process soy, AR026054-72, has built infrastructure to receive 45,000 bpd of soy feedstock, AR103096, and is already processing 12,000 bpd of soy through Unit 250, AR053654. This evidence directly undermines Respondents' refusal to consider Petitioners' soy-based feedstock scenario because it was assertedly based on "highly unpredictable inputs." AR002285.

Respondents object to the fact that this soy-based scenario extrapolated from production of soy biodiesel, rather than renewable diesel. Opp. Br. at 42 n. 14. Yet they point to no evidence that these two fuel types, which "typically share the same feedstocks" (AR059872), are not sufficiently similar for the analysis to be instructive. Nor do Respondents address why the County could not adjust the

suggested approach to account for any alleged differences in production method. "Drafting an EIR . . . necessarily involves some degree of forecasting," and the County was required to "use its best efforts to find out and disclose all that it reasonably c[ould]." CEQA Guidelines § 15144. That certain assumptions may be necessary does not eliminate the County's obligation to reach a significance conclusion for ILUC impacts. *See Sierra Club v. FERC*, 867 F.3d at 1374 ("[T]he effects of assumptions on estimates can be checked by disclosing those assumptions so that readers can take the resulting estimates with the appropriate amount of salt."). In short, Respondents quibble with Petitioners' calculations but are unable to point to any attempted estimate of their own.

The County would not need to pinpoint the locations where impacts would occur to inform decisionmakers and the public of the Project's ILUC impacts. *Cf.* Opp. Br. at 40. In its 2015 analysis of previous LCFS amendments, CARB quantified ILUC impacts of increased biofuel production without speculating about precise locations of feedstock cultivation. AR019334 (GTAP model assumes "new land [is brought] into agricultural production from forest and grassland areas. It isn't specific about exactly where that land will come from."); *see also* AR023769 ("Economic models do not attempt to link specific patches of land to specific end uses for commodities and in fact are incapable of doing so."). Rather, the "primary input" to CARB's model is a hypothetical increase in production of a particular kind of biofuel, for example, biodiesel made from soy feedstock. AR019322 (describing examples of potential amounts of ethanol and biodiesel made with different renewable feedstocks). The County could have provided a similar estimate of the Project's ILUC impacts based on reasonable assumptions about the types and amounts of feedstocks it would use.[13]

Respondents' claim that the County lacked data to input into a model (Opp. Br. at 43) strains credulity, given not only Phillips' need to forecast its inputs and expenses for an investment of this magnitude, but also record evidence showing Phillips *planned* to rely heavily on soy feedstock. *See, e.g.*, AR103096 (Nustar Selby Soybean Project receives 45,000 bpd soy feedstock); AR026054-72 (December 2021 LCFS Fuel Pathway Report showing Refinery was processing soy and canola feedstock). And even if the record did not show that the Project would rely heavily on soy, the County

[13] Moreover, Phillips itself has relied on a methodology to estimate the Refinery's ILUC impacts for purposes of complying with the LCFS, a fact Respondents do not deny. *See* Open. Br. at 36.

could still have analyzed illustrative examples of foreseeable increases in demand for biofuels generated from certain feedstocks as CARB did for its 2015 LCFS analysis. *See* Part II, *supra*; AR019322; AR019337-51. Under CEQA, a lead agency's alleged lack of data does not excuse its failure to make reasonable assumptions or take steps to ensure informed decisionmaking. *Berkeley Keep Jets Over the Bay Comm. v. Bd. of Port Comm'rs*, 91 Cal.App.4th 1344, 1370 (2001); *see Sierra Club v. FERC*, 867 F.3d at 1374 (existence of "uncertain variables" did not excuse agency from "reasonably forecasting" project's indirect GHG emissions).

Respondents misread *Rodeo Citizens Association v. County of Contra Costa*, 22 Cal.App.5th 214 (2018). That case does not hold that *any* shred of uncertainty about a project's impacts justifies the conclusion that those impacts are speculative. Opp. Br. at 37-38. In *Rodeo Citizens*, the project's propane and butane byproducts could be used by end-users in such different ways that they would either cause a net increase *or reduction* in GHG emissions. 22 Cal.App.5th at 227, 321. Because the proposal to capture and sell these byproducts "relate[d] not just to the extent of the impact, but to the fundamental direction of the impact, i.e., whether the change may be beneficial or adverse," the court held that the impacts were speculative. *Id.* at 227. Here, in contrast, substantial evidence shows that the Project's ILUC impacts will *only* be adverse. *See, e.g.*, AR024758 (Marathon Martinez project, which would consume two-thirds of this Project's feedstock input, would cause "irreversible" commitment of land). Mere uncertainty about the precise magnitude of ILUC impacts does not support the conclusion that they were too speculative to evaluate altogether.

Respondents' remaining cases underscore the County's failure to make any effort to analyze the Project's ILUC impacts. *See* Opp. Br. at 43 n. 15. In *Los Angeles Unified School District v. City of Los Angeles*, 58 Cal.App.4th 1019 (1997), the court *rejected* an agency's determination that a project's noise impact on schools was "too speculative" to evaluate where the agency had collected data and modeled the project's noise impacts on residences. *Id.* at 1027-28. Similarly here, the County had to at least attempt to use existing methods for analyzing ILUC impacts using reasonable feedstock assumptions. *Laurel Heights* is likewise inapt as it addressed the agency's timing for preparing an EIR, which is not at issue here. 47 Cal.3d at 395-96. And contrary to Respondents' contention (Opp. Br. at 41), Petitioners do not demand anything akin to the "broad-based regional planning" at issue in *Citizens*

of Goleta Valley v. Board of Supervisors, 52 Cal.3d 553, 570 (1990). Here, it is plain the County made no attempt to forecast the Project's reasonably foreseeable ILUC impacts before "throw[ing] up its hands and ascrib[ing] any effort at quantification to a 'crystal ball inquiry.'" *WildEarth Guardians*, 368 F.Supp.3d at 75 (citation omitted). This refusal to attempt analysis before deeming impacts speculative violated CEQA.

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

Under CEQA, if a project has "possible environmental effects" that may be significant when viewed in connection with the effects of past, current, and probable future projects, then an EIR "shall discuss [the] cumulative impacts of [the] project." CEQA Guidelines § 15130(a). Such discussion shall include "[a] list of past, present, and probable future projects producing related or cumulative impacts" (*id.* § 15130(b)(1)(A)) and "a reasonable explanation for the geographic limitation used" (*id.* § 15130(b)(3)). Despite the existence of nearly 20 other renewable fuels projects around the state and country in various stages of planning or completion (AR010491-96; AR000727), Respondents assert it was reasonable for the cumulative impacts analysis to include *only one* such project, the nearby Marathon Martinez conversion project. Opp. Br. at 44-47. This cribbed analysis makes little sense for ILUC impacts, which can be national and even global in scale and effect. Open. Br. at 40. The County should have tailored the cumulative impacts analysis to the geographic scope of the impact, either by including all renewable diesel projects Petitioners identified (AR000727), or by including some conservative subset, such as the four renewable diesel projects Petitioners identified within California, where the LCFS aims to reduce the carbon intensity of the transportation fuel pool by 20 percent by 2030. AR054014; *see* AR000727 (listing the Project, the Marathon Martinez project, the Global Clean Energy Holdings project, and the Paramount project).

Respondents claim that the EIR's use of a "3-mile radius" around the Refinery and Santa Maria sites (AR054245) for the cumulative land use impacts analysis was "tailored" to the Project's potential land use impacts, yet they can point to nothing in the record explaining this boundary. Opp. Br. at 45-46 & n.16; *cf.* CEQA Guidelines § 15130(b)(3); *Bakersfield Citizens*, 124 Cal.App.4th at 1215 (court must determine "whether it was reasonable and practical to include the omitted projects and whether their exclusion prevented the severity and significance of the cumulative impacts from being accurately

reflected"). Respondents claim that Petitioners "cannot [] explain why their proposed set of projects would satisfy" a cumulative ILUC analysis here (Opp. Br. at 46 n.17), yet it was the County's obligation to explain *in the EIR* why the three-mile geographic boundary was reasonable. *See Kings Cnty. Farm Bureau v. City of Hanford*, 221 Cal.App.3d 692, 724 (1990) (cumulative impacts analysis requirement does not "place the burden of producing relevant environmental data on the public").

Instead, the County's real reason for this narrow scope was the County's *assumption* that because this Project's ILUC impacts are assertedly speculative, other projects' ILUC impacts must be too. Opp. Br. at 46; AR002275 (asserting that "market-based projections" of projects' feedstock mixes "may or may not be available"). *Kings County Farm Bureau* – which Respondents do not even attempt 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. 221 Cal.App.3d at 724. Instead of calculating the extent to which they could collectively increase air pollution, the EIR focused only on the project's incremental 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 . . . ." *Id.* at 721.

Similarly here, the EIR completely ignored the collective ILUC effect of similar renewable fuel projects. AR054244-47; AR058908-17. This is particularly egregious as 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. AR000727. The County could and should have investigated the volume and composition of these projects' feedstock inputs to quantify – or at least estimate – their cumulative ILUC effect, particularly in light of extensive evidence that renewable fuels projects collectively will cause a significant ILUC impact. *See* AR058908-10; AR000731; AR013044-49.

Sierra Club v. West Side Irrigation District, 128 Cal.App.4th 690 (2005), is inapposite. Where,

as here, the Project would have "possible environmental effects" including ILUC impacts, the lead agency must address the cumulative effect as well. CEQA Guidelines § 15065(a)(3), *see id.* at § 15130(a)-(b). By contrast, in *West Side Irrigation District* the lead agency determined based on substantial evidence that the project "would have *no impact* on area hydrology" (128 Cal.App.4th at 701 (emphasis added)), and only then concluded that the project therefore "would have no *incremental* effect" on cumulative hydrologic impacts, *id.* (emphasis in original). Although Respondents claim that CARB's analysis of the 2018 LCFS amendments underscores the inherent "uncertainty" of a cumulative analysis here (Opp. Br. at 45), CARB's analysis does just the opposite: It concluded that the biofuels industry's collective response to the LCFS amendments would have a "significant and unavoidable" impact on land use and other resource areas, while expressly stating that this conclusion did not require speculation. AR019494; AR019521-22; AR019531-32; AR019546-47; *see id.* AR019444-45. By ignoring the cumulative ILUC impacts of similar renewable fuel projects, the County "avoids analyzing the severity of the [ILUC] problem." *Kings Cnty. 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 Props., LLC v. County of San Diego*, 50 Cal.App.5th 467, 528 (2020).

IV. The County Violated CEQA by Improperly Deferring the Formulation of Mitigation for Significant Odor Impacts

A lead agency's approval of a project must be predicated on full disclosure of its significant environmental impacts, as well as the mitigation measures the EIR relies on to minimize them. *See Sierra Club v. State Bd. of Forestry*, 7 Cal.4th 1215, 1233 (1994); *Citizens of Goleta Valley*, 52 Cal.3d at 564. As such, the CEQA Guidelines mandate that agencies "shall not" defer formulation of mitigation measures "until some future time" beyond the EIR. CEQA Guidelines § 15126.4(a)(1)(B). Were it otherwise, the public would be unable to comment on the specifics of mitigation and the lead agency would be unable to certify its efficacy. *Id.* § 15090. The singular exception to this prohibition on deferral is when it is "*impractical or infeasible* to include those details during the project's environmental review." *Id.* § 15126.4(a)(1)(B) (emphasis added). Even then, the agency may only defer developing details of mitigation if it: (1) "commits itself to the mitigation," (2) adopts specific performance standards the mitigation will achieve" to ensure that a later-formulated mitigation plan

will reduce impacts to insignificance, and (3) "identifies the type(s) of potential action(s) that can feasibly achieve that performance standard." *Id.* An EIR that defers formulating mitigation without justification and without these safeguards "preclude[s] informed decisionmaking and public participation" in prejudicial violation of CEQA. *San Joaquin Raptor*, 149 Cal.App.4th at 672.

That is precisely the case here. Respondents do not dispute that the EIR deferred formulating measures to protect surrounding communities from significant odors expected from Project operations – odors that, if not effectively addressed, would make the facility smell like an animal processing factory. AR053827. Nor could they. Mitigation Measure AQ-4 ("MM AQ-4"), which the EIR relies on to minimize odors, directs Phillips to "develop and implement an Odor Management Plan (OMP)," setting forth mitigation details outside of environmental review. AR002322; AR000921-22 (staff report asserting MM AQ-4 meets criteria for deferral). Yet, the County made no effort at the time – and Respondents make none now – to explain why it was impractical or infeasible to include mitigation details in the EIR itself. And even if deferral were somehow justified, Respondents fail to point to any performance standard actually adopted by the County to ensure the efficacy of the eventual mitigation or to actions to feasibly achieve it.

A. Respondents' efforts to distract from the contents of MM AQ-4 fail.

As a threshold matter, Respondents attempt to confuse the issue before the Court by distracting from the flawed mitigation measure itself. The Court should not take the bait.

First, Respondents accuse Petitioners of "ignor[ing] the extensive processing measures already incorporated into the Project's systems to address odors." Opp. Br. at 47; *see id.* at 49. This argument is irrelevant. The EIR concludes that emissions of "organic-based odorous gases" from the converted facility "would be a significant impact" *despite* incorporation of "engineer control measures" into the project design. AR053827-28; *see* AR000922 (confirming "there would be a significant odor impact"). Accordingly, the EIR relies on MM AQ-4 to reduce odor impacts to insignificance. AR053828-29. To the extent Respondents now suggest that engineering controls are relevant to the adequacy of MM AQ-4, they improperly conflate Project design features with mitigation.[14] *See Lotus v. Dep't of Transp.*,

[14] Respondents go so far as to suggest that the "engineering controls" may qualify as both "Project

223 Cal.App.4th 645, 655-56 (2014) (mitigation measures "are not part of the project"); *Cleveland Nat. Forest v. San Diego Assn. of Govts.*, 17 Cal.App.5th 413, 433 (2017) (same). The real issue before the Court is whether the County lawfully deferred formulating the details of mitigation to reduce significant odor impacts expected of the Project, with engineering controls already baked in.

In a similar vein, the EIR disposes of Respondents' insinuation that the Project may have no significant odor impacts at all because odors would be reduced relative to petroleum refining. Opp. Br. at 49. According to the EIR, cessation of petroleum refining would largely eliminate "typical" refinery odors because renewable feedstocks do not contain the same sulfur and organic compounds found in petroleum. AR053827. Instead, the Project would substitute a new class of odorous compounds – those associated with "an animal and/or food processing facility." *Id.* The EIR is decisive that the Project's anticipated emission of these odors "would be a significant impact" by "adversely affecting a substantial number of people." AR053827-28; *see* AR053691; AR053809.

Second, Respondents suggest that BAAQMD's submission of comments on odor mitigation somehow insulates the County from error. Opp. Br. at 49-51. Not so. BAAQMD provided the County with comments on the draft EIR, but only to express its concern that because an OMP "has not been completed and made public," it was impossible to evaluate whether MM AQ-4 would actually reduce odor impacts to insignificance. AR002317. BAAQMD also faulted the County for failing to require Phillips to "commit to specific actions in the EIR" and for failing to incorporate adequate enforcement measures into MM AQ-4. AR002317-18. These comments highlight flaws in the County's approach to odor mitigation; they do not show that MM AQ-4 "was prepared at the direction of BAAQMD" or that it is adequate mitigation, as Respondents assert.[15] Opp. Br. at 49.

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components" and as "mitigation measures." Opp. Br. at 49. But case law has disposed of such efforts "to compress[] the analysis of impacts and mitigation measures into a single issue." *Lotus*, 223 Cal.App.4th at 655 (agency violated CEQA by "incorporating the proposed mitigation measures into its description of the project and then concluding that any potential impacts from the project will be less than significant"). Here, the EIR is explicit that engineering controls are components of the Project. *See* AR053828. These controls cannot also count toward the mitigation MM AQ-4 requires.

[15] That BAAQMD did not renew concerns to MM AQ-4 in the Final EIR has no bearing on Petitioners' ability to pursue their challenge to that measure or the merits of the claim. *See Kings Cnty. Farm Bureau*, 221 Cal.App.3d at 721 (EIR improperly limited scope of cumulative impacts analysis even though CARB, the responsible agency, stated that its "previous concerns . . . have been addressed").

Third, Respondents rely on extra-record evidence of BAAQMD's purported statements *after* Project approval about the supposed adequacy of MM AQ-4. Opp. Br. at 51. Not only is that evidence inadmissible and inappropriate for judicial notice (*see* Opp. to RJN), but it is also irrelevant to this Court's determination whether the EIR itself lacked the justification and safeguards the Guidelines require to defer formulating mitigation. *Clover Valley Foundation v. City of Rocklin*, 197 Cal.App.4th 200 (2011), which Respondents rely on (Opp. Br. at 51), only proves this point. There, the court examined the text of the mitigation measure to determine whether the city's approach to mitigating impacts on protected bird species (by conditioning project approval on compliance with federal and state permits) passed muster. *Clover Valley*, 197 Cal.App.4th at 237. Far from endorsing reliance on extra-record opinions from a responsible agency, *Clover Valley* dictates that it is what is *actually in* the EIR – and specifically in the mitigation measure in question – that matters.

As to what is actually in the EIR here, MM AQ-4 contains no conditions "requiring compliance with regulatory permitting requirements" similar to those imposed in *Clover Valley*. *Id.* at 236. Rather, it directs *Phillips* to "develop and implement" an OMP in the future, subject only to BAAQMD and the County's "review." AR002322. In this way, MM AQ-4 is more akin to the defective mitigation in *King & Gardiner Farms, LLC v. County of Kern*, 45 Cal.App.5th 814, 859-60 (2020), which purported to direct oil industry water users to develop a plan to reduce water use rather than committing the lead agency to adopt or enforce measures in the eventual plan. Further, any role that BAAQMD may have in the eventual OMP does not excuse the County's failure to comply with the section 15126.4(a)(1)(B) conditions for deferring formulation of mitigation details. *See Clover Valley*, 197 Cal.App.4th at 237 (considering whether EIR adequately set forth performance standards and other criteria for deferral notwithstanding responsible agency involvement).

B. The County failed to show that including the specifics of odor mitigation in the EIR was impractical or infeasible.

Respondents acknowledge that an EIR must demonstrate that it was "impractical or infeasible" to formulate mitigation during environmental review for deferral to be lawful, Opp. Br. at 52 (quoting CEQA Guidelines § 15126.4(a)(2)), but they make no effort to show that the EIR did so here. Courts routinely strike down EIRs for violating this prerequisite. *See, e.g.*, *San Joaquin Raptor*, 149

Cal.App.4th at 671 (deferral improper when "no reason or basis is provided in the EIR for the deferral"); *Pres. Wild Santee v. City of Santee*, 210 Cal.App.4th 260, 281 (2012) (deferral improper when "EIR does not state . . . why specifying performance standards or providing guidelines . . . was impractical or infeasible at the time the EIR was certified"); *Cleveland Nat. Forest*, 17 Cal.App.5th at 443 (deferral unlawful where evidence did not support agency's contention that "no other mitigation [was] feasible at the program level of environmental review"). The County's failure here similarly dooms the EIR.

Not even attempting to point to a justification for deferral in the EIR, Respondents instead confirm that no such justification could exist. As they concede (Opp. Br. at 55-56) and the Final EIR acknowledges, "Phillips 66 ha[d] prepared a draft OMP" before the EIR was certified (AR002322). Yet, the County inexplicably elected not to "present[] [the draft OMP] with the EIR" (Opp. Br. at 56) or to recirculate the EIR with the OMP to allow the public to review and comment on its measures. *See* CEQA Guidelines § 15088.5(a) (lead agency "is required to recirculate an EIR when significant new information is added" following public notice of Draft EIR). Instead, it stood by its position that mitigation was lawfully deferred, asserting that the OMP would be finalized outside of the EIR and public view.[16] Opp. Br. at 56. But as Petitioners explained in their opening brief, the existence of the draft OMP prior to certification of the EIR serves as evidence that it was feasible and practical for the County to develop the details of odor mitigation *before* certification. This should be the beginning and end of the inquiry into whether the conditions for lawful deferral under CEQA are satisfied.

C. The County failed to adopt performance standards or identify feasible actions to attain them.

If the Court looks beyond the EIR's failure to justify deferral, it should still find MM AQ-4 defective. "[D]eferral of the formulation of mitigation measures requires the agency to commit itself to *specific performance criteria* for evaluating the efficacy of the measures implemented." *POET I*, 218

[16] Even while conceding MM AQ-4 deferred formulation of odor mitigation, Respondents point to the draft OMP as somehow supplying relevant details of mitigation. Opp. Br. at 55-56. Respondents cannot have it both ways. Either MM AQ-4 deferred formulating mitigation, in which case it was required to satisfy section 15126.4(a)(1)(B) criteria. Or it did not, in which case the Guidelines required the County to recirculate the EIR with the draft OMP to provide for public review of this significant new information. CEQA Guidelines § 15088.5. Either way, the County flouted CEQA.

Cal.App.4th at 738; *see id.* (agency must adopt "*objective criteria for measuring success*" of mitigation (citation omitted)). In the cases Respondents point to as examples of lawful deferral, the agency had adopted clear, objective yardsticks against which the agency and the public could evaluate the performance of the eventual mitigation program. *See, e.g.*, *N. Coast Rivers All. v. Marin Mun. Water Dist. Bd. of Dirs.*, 216 Cal.App.4th 614, 648 (2013) ("EIR set[] forth [180 dB] sound level that must not be exceeded" to ensure performance of deferred acoustic mitigation); *City of Hayward v. Bd. of Trustees of Cal. State Univ.* 242 Cal.App.4th 833, 851, 854-55 (2015) (agency adopted "quantitative criteria" including "minimum performance goals of reducing the percentage of single driver vehicle trips onto campus from the existing 79 percent to 64 percent, and increasing present transit use by 50 percent"); *Ctr. for Biological Diversity v. Dep't of Fish & Wildlife*, 234 Cal.App.4th 214, 244-45 (2015) (EIR provided multiple "biodiversity objectives" to ensure later formulated "aquatic biodiversity management plans will mitigate impacts in mountain lakes to insignificance"); *Clover Valley*, 197 Cal.App.4th at 237 (EIR "stated the performance standard" requiring no take of protected birds).[17] The County has done nothing of the sort here.

Respondents point to a provision in MM AQ-4 calling for investigation of "[a]ll odor complaints received" by Phillips as a performance standard. Opp. Br. at 52; *see* AR002322. But a commitment to investigate reported odor problems does not make up for the absence of an objective, measurable standard to ascertain whether the mitigation program is effective. *See, e.g.*, *Gray v. County of Madera*, 167 Cal.App.4th 1099, 1119 (2008) (commitment to "specific mitigation goal – the replacement of water lost by neighboring landowners because of mine operations" not the same as commitment to a standard to evaluate performance); *San Joaquin Raptor*, 149 Cal.App.4th at 670 (commitment to "maintaining the integrity of" habitat not a performance standard). By Respondents' logic, the facility could generate thousands of complaints and yet the OMP would be performing just fine so long as each of those complaints were investigated.

Failing to locate a performance standard in the EIR itself, Respondents reach outside the record

[17] Respondents curiously rely on *Residents Against Specific Plan 380 v. County of Riverside*, 9 Cal.App.5th 941(2017), but there the EIR concluded that air quality impacts were "significant and unmitigable" *and still* adopted a quantitative performance standard that required exceeding energy efficiency standards "by a minimum of 15 percent." *Id.* at 970-71.

– arguing, for the first time, that BAAQMD's Regulation 7 supplies them. Opp. Br. at 53. But MM AQ-4 does not reference Regulation 7, not to mention commit to its provisions. AR002322; *cf. Oakland Heritage All. v. City of Oakland*, 195 Cal.App.4th 884, 910 (2011) (EIR required compliance with "host of specific performance criteria imposed by various ordinances, codes, and standards"). Counsel cannot now backstop this deficiency in litigation. As the court in *Preserve Wild Santee* explained in rejecting such an attempt, "[t]he audience to whom an EIR must communicate is not the reviewing court but the public and the government officials deciding on the project. That a party's briefs to the court may explain or supplement matters that are obscure or incomplete in the EIR, for example, is irrelevant because the public and decision makers did not have the briefs available at the time the project was reviewed and approved." 210 Cal.App.4th at 284. Likewise here, the Court should disregard counsel's "post hoc rationalizations for agency action" already taken. *S. Cal. Edison Co. v. Pub. Utils. Comm'n*, 85 Cal.App.4th 1086, 1111 (2000) (quoting *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983)).

Nor do Respondents point to anywhere in the EIR identifying types of feasible actions that could achieve those standards. Opp. Br. at 53-54. Rather, they cite to already-integrated engineering controls that, as discussed above, the EIR found incapable of adequately mitigating odor impacts. And they point to a provision in MM AQ-4 calling for "continuous evaluation" of the OMP. Opp. Br. at 54 (citing AR002322). But evaluating the adequacy of the OMP is not the same thing as setting forth actual management and control strategies that the OMP could include, not to mention ones that would feasibly reduce the types of odors emitted from food-based feedstock processing to insignificance. *Cf. San Joaquin Raptor*, 149 Cal.App.4th at 699 (EIR set forth actions land management plan could adopt, such as "periodic mowing, rational grazing, and weed abatement"). At the end of the day, the EIR has done nothing more than set forth a plan to make a plan without providing the required indication of what it may contain or metrics to evaluate and ensure its efficacy.

CONCLUSION

The errors in the EIR affect its integrity as an informational document and result in a deeply flawed environmental analysis. Petitioners accordingly request that the Court set aside the Project's approvals and enjoin its implementation until the County prepares a compliant EIR.

DATED: June 2, 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 June 2, 2023, I served true copies of the following document(s) described as **Petitioners' Reply Brief 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 June 2, 2023, at Stanford, California.

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