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SUPERIOR COURT FOR THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SONOMA

CITY OF PETALUMA, et al.,

Petitioners and Plaintiffs,

v.

COUNTY OF SONOMA, et al.,

Respondents and Defendants,

THE DUTRA GROUP, et al.,

Real Parties in Interest and Defendants.

Case No.: SCV 248948

NON-PROFIT PETITIONERS'[1] MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDATE (CEQA AND BROWN ACT[2])

Trial Date: December 9, 2011
Time: 2:30 p.m.
Dept.: 17
Hon. René Chouteau
Case Filed: Jan. 14, 2011

[1] Non-profit Petitioners are defined as all petitioners other than the City of Petaluma.
[2] Non-profit Petitioners join in the brief filed concurrently by Petitioner City of Petaluma.

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I. INTRODUCTION

Non-profit Petitioners Petaluma River Council, Madrone Audubon Society, Friends of Shollenberger Park, Moms for Clean Air, Petaluma Tomorrow, Petaluma residents (collectively, "Petitioners") and the City of Petaluma ("City") challenge the December 14, 2010 decision of Respondents County of Sonoma, et al. ("County") to approve an asphalt plant ("Project") proposed by Real Parties in Interest, the Dutra Group, et al. ("Dutra") on the banks of the Petaluma River, immediately across from Shollenberger Park, in violation of the California Environmental Quality Act ("CEQA"), Pub. Res. Code ("PRC") §21000, et seq.; Gov. Code, §§25131, 25124(b)(1), 36933(c)(1); Land Use and Zoning Law; and the Brown Act (Non-profit Petitioners only). This brief addresses the CEQA and Brown Act causes of action.

This case presents a textbook example of when EIR recirculation is required. Throughout the County's consideration of the Project, Dutra made multiple major changes to the Project and produced hundreds of pages of new environmental analysis demonstrating previously undisclosed significant environmental impacts. Rather than revising the EIR to include this new information and circulating the revised EIR for public comment, the County produced this new information in a series of staff reports, letters, and private consultant reports, some issued only hours before public meetings on the Project. Such actions do not comport with CEQA's procedural requirements. Moreover, by rushing through the process in the last days before new Board members were scheduled to assume power, the County failed to properly certify the EIR or make CEQA findings and committed violations of the Brown Act.

The EIR is substantively inadequate as an informational document because it fails to include a stable, finite project description, fails to analyze new significant impacts of the Project caused by multiple revisions, improperly uses a baseline that gives Dutra "credit" for the impacts from a temporary, now closed, facility at a separate location, and fails to examine the Project's impacts in multiple areas.

II. STATEMENT OF FACTS

The Project is proposed to be built on a 38-acre site directly across the Petaluma River from Shollenberger Park and adjacent to Highway101, at 3355 Petaluma Blvd. South, just outside the City of Petaluma. (AR137, 142, 200) The Project site contains a significant rookery (nesting area) for great blue herons, great egrets, and snowy egrets. (AR208, 15772-3) These species tend to be highly sensitive to human intrusion and disturbance of nesting colonies. (AR381) Shollenberger Park, owned by the City (AR378), is home to over 190 bird species and the Point Reyes Bird Observatory, and has been recognized as a top birding spot by the Audubon Society and National Geographic. (AR12451-4, 15772-

3, 22902) Project requires a general plan amendment and zoning change from commercial to industrial zoning, as well as a use permit and design review permit. (AR141)

On January 14, 2008, the County released a draft EIR ("DEIR") for the original Dutra Project ("Original Project"). (AR6, 128) The Original Project was proposed as a 76-foot tall hot mix asphalt plant, anticipated to process 665,000 tons of material annually, including 425,000 tons of raw aggregate and 75,000 tons of fine sand. (AR236, 242) The Original Project proposed to produce up to 400 tons per hour of asphalt with annual production of 225,000 tons per year, including 10% rubberized asphalt, asphalt recycling and crushing. (AR242) The Original Project included a new barge docking facility on the Petaluma River at the Dutra Site to import 500,000 tons per year of aggregate and sand. (AR242-3)

Petitioners and others filed comments on the DEIR, raising concerns about impacts to wetlands, Shollenberger Park, tourism, wildlife, the egret and heron rookery, odors, noise (AR1594-1602, 1615, 1619-1629, 1636), cumulative impacts, alternative sites, aesthetics, (AR1603-11) greenhouse gases and sea level rise (AR1643), traffic (AR1646, 1648-57), the CEQA baseline (AR1662) and many other issues. (AR1594-1746, 1831-1927) Petitioners and others testified in opposition to the Project before the County Planning Commission on March 6, 2008. (AR1933-37)

On July 18, 2008, the County released the Final EIR ("FEIR"). (AR6, 1543, 13086) On October 16, 2008, the Planning Commission, voted by a one-vote margin (3-1-1) to recommend that the Board of Supervisors certify the EIR and approve the request by Dutra for a General Plan Amendment, General Plan Text Amendment, Area Plan Amendment, Zone Change, Use Permit, and Design Review Permit. (AR13086) On December 8, 2008, Petitioners submitted to the Board over 200 pages of written comments on the FEIR (AR12468-12707), including expert comments from environmental scientist Dr. Petra Pless, D. Env. (AR12505), and acoustical engineer Dr. T.A. Barnebey, Ph.D. (AR12542) The comment letter raised issues including the EIR's underestimation of air emissions, health risks, noise impacts on egrets and herons, impacts on water quality, fish and animal populations, greenhouse gases, inadequate alternatives analysis, and others. The North Bay Rowing Club raised concerns about Dutra's new barge dock blocking the navigable channel. (AR12278-83) Dozens of local residents, school children and parents wrote to urge the County to reject the Project. (AR12055-12713; 13996-14023; 14033-15755; 15772-15944 (selected pages only provided in paper copy)) On February 2, 2009, a unanimous Petaluma City Council wrote the County urging the Board to deny approval of the Project due to impacts on Shollenberger Park, blockage of the navigational channel, blighting impacts, and inadequacies in the EIR. (AR16084-16089) Jerico Products, the largest barge operator on the Petaluma

River, expressed concerns that Dutra's barge dock would block the navigable channel. (AR16076) Petitioners submitted comments to the County addressing deficiencies with the FEIR, including navigational hazards posed by Dutra's barge dock, miscalculation of truck emissions, failure to analyze adverse economic impacts on eco-tourism, failure to address impacts to worker health, and other issues. (AR16097-16101) Petitioners' comments were supported by Dr. Petra Pless, who concluded that the FEIR significantly underestimated air pollution from the Project. (AR16202-06)

On February 3, 2009, the County Board held a 5 ½ hour hearing on the Project, attended by over 300 people with 66 testifying. (AR5561-5713; 5723-5) The Board voted 4-1 to require Dutra to revise the Project to reduce noise and air pollution, and continued consideration of matter. (AR5726)

On April 16, 2009, the Planning Commission met to consider an exception for the Project to allow Dutra to exceed the General Plan Noise Policy. (AR31778-83) The City submitted a letter concluding that the General Plan amendment would be unlawful because it would create inconsistencies in the General Plan. (AR20526-7) Petitioners filed written comments concerning noise issues and sea level rise, supported by urban planner Terrell Watt, AICP. (AR20271-84; see also AR019746-20269) This letter focused on the Project's General Plan inconsistencies, including failure to meet general plan noise thresholds, and the fact that the Project did not meet the requirements for rezoning from commercial to industrial use. The letter also raised the fact that the Project site is in the Petaluma/Novato community separator created by the voters in Measure D, and thus may not be developed without a vote of the people. (AR20271-84) The Commission continued the matter to May 21, 2009, and then approved the General Plan amendment on a 3-2 vote. (AR31786-7)

On May 20, 2009, Petitioners filed a comment letter supported by urban planners Watt, and Jared Ikeda, concluding that the Project would cause urban blight and urging the County to analyze this impact in a recirculated supplemental EIR. The letter cites a recent State study showing that the Project site is likely to be inundated by sea level rise of 39 to 55 inches, which is not analyzed in the EIR. (AR20528-43) On May 26, 2009, the City of Sonoma wrote to the County expressing their dismay that the County would disregard the unanimous opposition of the Petaluma City Council. (AR20619-20)

On June 2, 2009, the City submitted a major comment letter raising numerous deficiencies in the EIR, including that the FEIR identified new significant traffic impacts, weakened mitigation measures, and made project changes including allowing 24-hour barge traffic, thereby requiring recirculation of a supplemental EIR. The City also pointed out that the EIR improperly deferred development of mitigation measures, failed to properly analyze greenhouse gases, and failed to properly consider feasible

alternatives. The City concluded that the Project is inconsistent with the General Plan, particularly since it allows industrial uses in an area subject to flooding. (AR20682-94)

On June 9, 2009, the Project returned to the Board of Supervisors. This time the Board voted 3-2 to REJECT the Project (AR5867-70), following an outpouring of public testimony (AR5828-47), including hundreds of citizens attending the meeting, opposition from the City, concerns from Rep. Lynn Woolsey, Assem. Jared Huffman, and Sen. Mark Leno, and a Press-Democrat editorial opposing the Project. (AR21958) The Board then continued the final vote to July 21, 2009. (AR5870)

On Sept. 15, 2009 Dutra submitted a letter describing a substantially revised Project deemed "Revised Project I" ("RPI"). RPI would (1) reduce peak production from 400 to 300 tons per hour, but maintaining the same annual production; (2) reduce the height of the silos from 76-feet to 62-feet; (3) eliminate on-site crushing of recycled material, and (4) move the barge dock location. (AR22142-51) The proposal contained detailed drawings showing that the new barge dock would not block the navigational channel. (AR22150) Based on the maps provided by Dutra at an Oct. 19, 2009 meeting, the US Coast Guard ("USCG") concluded that the barges would not pose a navigational hazard. (AR4497-8, 22743) The County did not prepare a new CEQA document, but retained a consultant who concluded that RPI would have reduced impacts compared to the Original Project. (AR1961-76) RPI was presented to the Board of Supervisors on Dec. 8, 2009. (AR4487) The City submitted a letter urging the County to recirculate a supplemental EIR to analyze the substantial changes made to the Project. (AR22777-83)

On Dec. 13, 2009, the North Bay Rowing Club ("NBRC") submitted a detailed letter and maps to the County raising very serious allegations that Dutra had presented falsified maps to the USCG and the County. The letter states that Dutra's maps show the Petaluma River navigable channel to be up to 130 feet in width at the relevant locations when in fact it is only 100 feet wide. The letter alleges that these erroneous maps led to the USCG determination that Dutra's 50-foot wide barges would not obstruct the channel. (AR22954-72) In response to the NBRC letter, the USCG made a site-visit to the Petaluma River. (AR22956) After the site visit, the USCG reversed its decision and agreed that the Dutra maps had been falsified, and that Dutra's barges would illegally block the navigable channel:

> After further review we have determined that your drawing EX14 dated October 5th, 2009, inappropriately indicates the eastern bank of the river as the edge of the navigation channel. Based on the new information that barges moored at your proposed facility would encumber approximately 50 feet of the 100-foot federally maintained navigation channel, your facility will create a navigational hazard to other users of the channel. The moored barge or barges as proposed would result in a violation of the federal anchorage regulations in 33 CFR 110.224(a)(5)… (AR22995)

In addition, Petitioners pointed out that Dutra's maps erroneously showed the location of 2 high pressure PG&E 12-inch natural gas pipelines to be located on the Shamrock parcel, when in fact both pipelines are on the Dutra parcel in the path of the proposed barge mooring dock. (AR23925-42)

In response to USCG's disapproval, Dutra again revised its Project. On Jan. 29, 2010, Dutra submitted a letter describing "Revised Project II" ("RPII"). (AR23943-61) RPII was radically different from the Project described in the EIR. RPII proposed to eliminate entirely Dutra's barge dock and instead to move all barge off-loading to the adjacent Shamrock facility, and then transport aggregate from Shamrock to Dutra, first by truck for 3 years, and then by an 800-foot conveyor belt constructed through Shamrock's wetland mitigation area. (*Id*., AR4608) The County's own Staff Report states:

> Revised Project II would result in changes to environmental impacts related to Aesthetics, Air Quality, Biological Resources, Cultural Resources, Geology and Soils, Hydrology/Water Quality, Hazards/Hazardous Materials, Land Use, Noise and Transportation/Traffic that were not addressed in the DEIR or Response to Comments Document. (AR4609)

The Staff Report admits that RPII would result in significant traffic impacts causing "the intersection of Petaluma Blvd. South and Landing Way…[to] fall from LOS E to LOS F," requiring new mitigation. (AR4630) The Staff Report also admits that "[t]he construction of the conveyor would impact the entire .48 acres [wetland], a potentially significant impact absent mitigation." (AR4618) The impact is particularly significant since the wetland to be destroyed by Dutra was created pursuant to a 2004 CEQA document to mitigate wetland impacts of the Shamrock facility. Shamrock's 2004 CEQA document required Shamrock to create the onsite wetland to replace wetlands destroyed, and allowed purchasing offsite "wetland bank" credits only if the Army Corps did not approve the superior onsite replacement. (AR7675, 7687, 7718) Also, the "staff believes that the trucking option is not consistent with the General Plan because it would not result in a river-dependent use, as required by General Plan Policy LU-19c." (AR4631) Finally, the entire RPII is called into doubt since Shamrock has steadfastly maintained that "we cannot allow our property to be associated with the Dutra proposal to allow their project barges to unload at our facility." (AR29071, 25778; see, Shamrock Answer, ¶60 ("there is no agreement between Shamrock and Dutra to sell 500,000 tons of sand and aggregate to Dutra.") (emph. in orig.)

On Oct. 12, 2010, the City wrote to urge the County to prepare a supplemental EIR because "the Project before the County now is fundamentally different from the project proposed and evaluated in the Draft EIR," and due to new traffic, wetlands, water use, and other impacts, and "over 300 pages of new analyses from at least ten different environmental consultants." (AR25853-59, 25854; see AR24035-65) The County refused to prepare a supplemental EIR, instead releasing over 500 pages of private consultant

reports only 4 business days before the County Board hearing on the matter, prompting renewed requests for a supplemental EIR. (AR25548-56; 25887-917; 28856-58) Despite these comments, after a lengthy public hearing (AR5656-6099), the County Board took a 3-2 "straw vote" to approve the EIR and RPII, and require the facility to use the Shamrock barge dock and conveyor. (AR6127-29, 6098) Supervisor Kerns moved to certify the final EIR, adopt CEQA findings, find that the Project is "river dependent," and approve a general plan amendment. (AR6086-7) However, the motion received no second, the only second being to "accept [the] staff report." (AR6096) No Supervisor made a motion to adopt an ordinance required to amend the General Plan and zoning, and no roll call vote was taken on any of these actions. (AR6097-8) Thus, only a "straw vote" was taken on Oct. 12, 2010. (AR6128) The Board continued the actual vote to Dec. 14, 2010. (AR6129)

On Dec. 7, 2010, the City again urged the County to disapprove the Dutra Project and to prepare a supplemental EIR. (AR28884-5) On Dec. 13, 2010, Petitioners submitted comments urging the County to prepare a supplemental EIR, and attaching expert analysis concluding that RPII would have increased impacts not analyzed in the EIR. Biologist Phyllis Faber, MA, concluded that the conveyor would destroy Shamrock's wetlands, and a wetland bank miles away would not mitigate this impact.(AR29042) Traffic engineer Tom Brohard, PE concluded that RPII would generate 19,702 additional truck trips per year over levels analyzed in the EIR (16% increase), creating significant traffic impacts. (AR29050) Dr. Petra Pless, concluded that additional truck and barge traffic of RPII would create significant air pollution impacts not analyzed in the EIR. (AR29058; 29023-77; see, AR31828-40, 31989-93)

At approximately 9:00 a.m. on Dec. 14, 2010, County released over 100 pages of new documents related to the Project, including several private consultant reports, new conditions of approval (AR5413-5560), and for the first time identifying an entirely different set of documents as the "Final EIR," including reports prepared by Dutra's private consultants, (AR12) despite having published a document entitled "final EIR" that did not include these documents. (AR1543-1942) The City objected to the last minute document dump pointing out that the County failed to provide it with 10 days notice of the final EIR as required by CEQA. PRC §21092.5. (AR29248) Despite these objections, on Dec. 14, 2010 the Board refused to allow any public testimony, thereby depriving the public of any opportunity to comment on the new FEIR (AR6130-6), and then deliberated and voted 3-2 to approve the General Plan Amendment for the Project. (AR6181-2) The meeting transcript shows that the board never voted to certify the EIR at all – no motion or vote was taken to certify the EIR, and no motion or vote was taken on required CEQA findings or statement of overriding considerations. (AR 6130-43) Supervisor Kerns

made the only motion -- to approve a ***resolution*** to amend the General Plan. (AR6137) There was no second and no vote on the motion. (AR6137-42) Rather than taking any vote, after discussion, Chair Brown concluded that it appeared that the resolution would pass 3-2. (AR6142) There was no motion, reading or second reading of a proposed Ordinance to change the zoning for the Project. (AR6137-42)

The Board required Shamrock to agree to a lot line adjustment to convey Shamrock's wetland area to Dutra (AR103), to allow Dutra to construct an aggregate conveyor from Shamrock to Dutra. The approval requires Dutra to use Shamrock's dock to receive all of Dutra's aggregate by barge, and to truck aggregate for up to 3 years until the conveyor is completed. (AR113-14) Staff informed the Board, "there is an agreement that they [Shamrock and Dutra] will be working together," (AR6139) but there is no such agreement in the administrative record, and Shamrock continues to dispute this allegation.

On Feb. 2, 2011, County rejected requests from Petitioners and City to reopen the hearing due to Brown Act violations -- the refusal to allow public testimony at the Dec. 14 hearing. (AR31809-27)

III. LEGAL STANDARDS

A. CEQA: CEQA requires an agency to analyze the potential environmental impacts of proposed projects in an environmental impact report ("EIR"). PRC §21100. The EIR is "the heart of CEQA" and the "primary means" of ensuring that public agencies "take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state." *Laurel Heights Improvement Assn. v. Regents of Univ. of Calif.* (1988) 47 Cal.3d 376, 392. "The 'foremost principle' under CEQA is that the Legislature intended the act 'to be interpreted in such a manner so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.'" *Id*. at 390.

CEQA has two purposes. First, CEQA is designed to truthfully inform the public about the potential environmental effects of a project. 14 Cal.Code Regs. ("CCR") §15002(a)(1). "Thus, the EIR 'protects not only the environment but also informed self-government.'" *Citizens of Goleta Valley v. Bd. of Sups.* (1990) 52 Cal. 3d 553, 564. Second, CEQA requires agencies to reduce environmental damage when "feasible" by requiring "environmentally superior" alternatives and mitigation measures. If the project will have significant effects, the agency may approve the project only if it makes express findings that it has "eliminated or substantially lessened all significant effects on the environment where feasible" and that any unavoidable significant effects are "acceptable due to overriding concerns." PRC §21081.

The reviewing Court must determine whether the City prejudicially abused its discretion either by: (1) failing to proceed in the manner required by law, or (2) reaching a decision that is not supported by substantial evidence. PRC § 21168.5; *Vineyard Area Citizens v. Rancho Cordova* (2007) 40 Cal. 4th 412,

426. "Certification of an EIR which is legally deficient because it fails to adequately address an issue constitutes a prejudicial abuse of discretion." *Citizens to Preserve the Ojai v. Ventura* (1985) 176 Cal.App.3d 421, 428. "[T]he reviewing court is not to 'uncritically rely on every study or analysis presented by a project proponent in support of its position. A 'clearly inadequate or unsupported study is entitled to no judicial deference.'" *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm'rs* (2001) 91 Cal. App. 4th 1344, 1355. "A prejudicial abuse of discretion occurs 'if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process.'" *Id*. "[T]he ultimate decision of whether to approve a project, be that decision right or wrong, is a nullity if based upon an EIR that does not provide the decision-makers, and the public, with the information about the project that is required by CEQA." *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 829.

B. **BROWN ACT:** "It is the intent of the law that [agency] actions be taken openly and that their deliberations be conducted openly." Gov.Code §54950. "A major objective of the Brown Act is to facilitate public participation in all phases of local government."*Cohan v. Thousand Oaks* (1994) 30 Cal.App.4th 547, 555. The Act provides for injunctive or declaratory relief. Gov.Code §54960. Actions taken in violation of the Brown Act may be declared null and void by the court. Gov.Code §54960.1.

IV. ARGUMENT

A. The County Failed to Certify the EIR (2nd Cause of Action) and Failed to Adopt CEQA Findings (3rd Cause of Action).

The most basic requirement of CEQA is that "***Prior to approving a project***, the lead agency shall certify that the final EIR has been completed in compliance with CEQA – CEQA certification. 14 CCR 15090(a)(emphasis added). The agency must also adopt express written findings that all feasible mitigation measures and alternatives have been adopted and the economic benefits of the project outweigh its environmental impacts -- statement of overriding considerations. PRC §21081.

"Under CEQA … an appeal from the certification of an EIR by an unelected planning commission must be decided by the majority vote of the elected body." *Vedanta Soc'y v. Calif. Quartet* (2000) 84 Cal.App.4th 517, 525. "Findings and adoptions of findings are by nature ***affirmative acts***." *Id*. at 529 (emph. added). "[T]he elected decision makers must have a real confrontation with the EIR; they cannot avoid the required 'consideration' by omitting a procedure for appeal." *Id*. at 527. Requiring an affirmative vote to certify the EIR is intended "to expose the elected decision makers to the political heat of certifying an EIR." *Id*. at 527. Evidence that the EIR, certification and findings were presented to the decision-makers does not prove actual certification "any more than does the fact that a horse was led to

water compel the inference that it drank from it." *Kleist v. Glendale* (1976) 56 Cal.App.3d 770, 777; see, *W. Chandler Blvd. v. Los Angeles*, 2011 Cal.App.LEXIS 1162,*9,14(8/16/11)(written findings required).

Here, although the County Board was presented with CEQA findings and a CEQA certification prepared by staff, the Board made no motion to approve either document and took no vote. (AR6135-42) Since the Project may not be approved until after a valid certification and CEQA findings have been approved by an affirmative vote of the Board, the Project approval must be set aside. *Vedanta, supra; Res. Def. Fund v. LAFCO* (1987) 191 Cal.App.3d 886, 900.

B. The EIR Is Inadequate (First Cause of Action).

1. The EIR Fails to Include a Stable Project Description in a Single Document.

The fundamental problem with the EIR is that it does not describe the Project that was approved by the County. The City explained, "the Project before the County now is fundamentally different from the project proposed and evaluated in the [Jan. 2008] Draft EIR," due to new traffic, wetlands, and other impacts, created by the new Shamrock-Dutra conveyor and trucking proposal. (AR25853-59, 25855; see AR24035-65) Indeed the project description appears to be wholly inaccurate since Shamrock has stated, "we cannot allow our property to be associated with the Dutra proposal to allow their project barges to unload at our facility," (AR29071) and, "there is no agreement between Shamrock and Dutra to sell 500,000 tons of sand and aggregate to Dutra." Shamrock Answer ¶60 (emph. in orig.).

As stated in *San Joaquin Raptor v. Merced* (2007) 149 Cal. App. 4th 645, 655:

> "[A]n accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR." … However, "[a] curtailed, enigmatic or unstable project description draws a red herring across the path of public input." … "[O]nly through an accurate view of the project may the public and interested parties and public agencies balance the proposed project's benefits against its environmental cost, consider appropriate mitigation measures, assess the advantages of terminating the proposal and properly weigh other alternatives … ."

The adequacy of an EIR's project description is reviewed *de novo* by the court. *Tuolumne County Citizens v. Sonora* (2007) 155 Cal.App.4th 1214, 1224. To be "meaningful and useful to decision-makers and the public," PRC §21003(b), the EIR should be a compilation of all the relevant environmental data into a "***single formal report***" presented "well in advance of the public hearing on the application," not a collection of various staff and consultant reports. *Russian Hill Impr. Ass'n. v. Bd. of Permit Appeals* (1974) 44 Cal.App.3d 158, 168, 171 (emph. added). The Supreme Court stated:

> The data in an EIR must not only be sufficient in quantity, it must be presented in a manner calculated to adequately inform the public and decision makers, who may not be previously familiar with the details of the project. "[I]nformation scattered here and there in EIR appendices, or a report "buried in an appendix, is not a substitute for a good faith reasoned analysis."

Envt.. Prot. Info. Ctr. v. Cal. Dep't Forestry (2008) 44 Cal.4th 459, 493. "The decision makers and general public should not be forced to sift through obscure minutiae or appendices in order to ferret out" the true nature of the Project. *San Joaquin Raptor*, 149 Cal.App.4th at 659.

Here, the documents entitled Draft EIR and Final EIR do not describe the RPII Project at all. To the contrary, the DEIR states that the Shamrock alternative "was rejected as infeasible," and not analyzed because it "would increase truck trips to the existing barge off-loading facility, which would increase air quality, noise, and traffic impacts." (AR617) Thus, a member of the public reading the EIR would reasonably assume that the Shamrock barge dock alternative was rejected.

Instead, only hours before the final hearing to approve RPII the County designated hundreds of pages of various private consultant reports to be the new "Final EIR," which reports allegedly described RPII and analyzed some of its impacts. (AR12) County admits (AR1984) that RPII Project is described primarily in three letters from Dutra's paid consultant, CSW Stuber-Stroeh, dated Jan. 29 (AR4749-53), Apr. 8 (AR4768) and June 10, 2010 (AR4783), each describing a continuously-mutating Project. The impacts are described in a set of over a dozen reports prepared by Dutra's hired consultants: air quality (AR4754, 4774, 4863, 4791); noise (AR4756, 4802, 4857); traffic (AR4772, 4788, 4797); wetlands (AR4761, 4807); health risk (AR4759). While the Project and some impacts are summarized in staff reports for the Board, those reports are based on Dutra's consultant reports. (AR4605-5286, 5413-5560)

Dr. Petra Pless concluded that the County's analysis was "impenetrable" because it required reference to numerous consultant and staff reports. (AR29060) This is very similar to the situation in *Russian Hill*, where the project description was impermissibly spread across numerous staff and consultant reports, and is precisely the type of "information scattered here and there" prohibited by CEQA. "To the extent the County … relied on information not actually incorporated or described and referenced in the FEIR, it failed to proceed in the manner provided in CEQA." *Vineyard Area Citizens,* 40 Cal.4th at 442.[3]

2. The County Refused to Recirculate the EIR Despite Significant Project Changes Resulting in New Significant Impacts.

As the City explained in a letter to the County on Oct. 12 (AR25854):

[3] Furthermore, if Dutra's letters and private consultant reports are determined to be the EIR, then that EIR is invalid. CEQA requires that the EIR "shall be prepared directly by, or under contract to, a public agency," to reflect the County's "independent judgment." PRC §21082.1; *People v. County of Kern* (1976) 62 Cal.App.3d 761, 775; *Gentry v. Murietta* (1995) 36 Cal.App.4th 1359, 1397-98. Although the County may charge the applicant for the cost of EIR preparation and may retain an outside consultant, that consultant may not be paid directly by the applicant. *Id*. Allowing the applicant's consultants and attorneys to prepare the EIR makes the lead agency "clearly captive" to the applicant. *City of Poway v. San Diego* (1984) 155 Cal.App.3d 1037, 1042.

> If, subsequent to the period for public and interagency review, the lead agency adds significant new information to an EIR, the agency must issue new notice and must "recirculate" the revised EIR, or portions thereof, for additional commentary and consultation. The revised environmental document must be subjected to the same critical evaluation that occurs in the draft stage, so that the public is not denied an opportunity to test, assess, and evaluate the data and make an informed judgment as to the validity of the conclusions to be drawn therefrom. *Save Our Peninsula v. Monterey* (2001) 87 Cal.App.4th 99, 131.
>
> "Significant new information" includes:
>
> (1) A new significant environmental impact would result from the project or from a new mitigation measure proposed to be implemented.
> (2) A substantial increase in the severity of an environmental impact would result…
> (3) A feasible project alternative or mitigation measure considerably different from others previously analyzed would clearly lessen the significant environmental impacts of the project…
> (4) The draft EIR was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded.
> 14 CCR §15088.5; *Gentry v. Murietta,* 36 Cal.App.4th at 1392, 1411, 1417; *Mountain Lion Coalition v. Fish and Game Comm'n* (1989) 214 Cal.App.3d 1043.

Even minor project changes have required recirculation of a revised EIR. *Save Our Neighborhood v. Lishman* (2006) 140 Cal.App.4th 1288, 1301; *Mani Bros. v. Los Angeles* (2007) 153 Cal.App.4th 1385, 1393; *Am. Canyon Cmty. v. City of Am. Canyon* (2006) 145 Cal.App.4th 1062.

The County's Staff Report admits that RPII "would result in changes to environmental conditions not previously analyzed in the January 2008 DEIR, the July 2008 Response to Comments document, or in previous public hearings." (AR4609) County admits, "Revised Project II would result in changes to environmental impacts related to Aesthetics, Air Quality, Biological Resources, Cultural Resources, Geology and Soils, Hydrology/Water Quality, Hazards/Hazardous Materials, Land Use, Noise and Transportation/Traffic that were not addressed in the DEIR or Response to Comments Document." *Id.* The Staff Report states, "[T]he [RPII] trucking option results in increased impacts to Air Quality (PM10 and CO) and Traffic (Landing Way/PBS intersection) than were analyzed in the DEIR." (AR4631) The DEIR states that the Shamrock dock alternative "would increase truck trips to the existing barge off-loading facility, which would increase air quality, noise, and traffic impacts." (AR617)[4] Since the County admits that RPII will have new impacts not analyzed in the EIR, a recirculated EIR is required.

If the County's own conclusions were not enough, several independent experts concluded that RPII would have numerous more severe impacts than the very different Project analyzed in the EIR.

[4] Having reached that conclusion in the EIR, the County cannot now "unring [the] bell." *Stanislaus Audobon Soc'y, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 154.

a. **Wetland Impacts**: The Shamrock-Dutra conveyor belt will completely destroy a wetland area that Shamrock was required to construct as mitigation in a 2004 CEQA document for its own facility. (AR29142) The Staff Report states, "the existing wetland mitigation area on the Landing Way Depot site would be formally decommissioned." "The construction of the conveyor would impact the entire .48 acres, a potentially significant impact absent mitigation." (AR4618) This is a new impact of RPII since the Original Project contained no such conveyor.

Although the Staff Report proposes to mitigate this significant wetland impact by requiring Dutra to purchase wetland offset bank credits at a location 4 miles away (AR4617), the adequacy of this mitigation measure must be analyzed in a recirculated EIR, not a private consultant report. *Perley v. Bd. of Sups.* (1982) 137 Cal.App.3d 424, 429, and *Gentry*, 36 Cal.App.4th at 1392, 1411, 1417 held that the public has a right to review mitigation measures in their final form and a CEQA document must be recirculated if new mitigation measures are added to address significant impacts. A recirculated EIR is required since a new significant impact created by Project modification requires a new mitigation measure. *Id*.; 14 CCR 15088.5(1).

Also, where a project proposes to eliminate a mitigation measure imposed pursuant to a prior CEQA document, a supplemental EIR is required. *Lincoln Place Tenants Ass'n v. Los Angeles* (2005) 130 Cal.App.4th 1491, 1509, held that elimination of mitigation measures from a previously certified CEQA document requires substantial evidence that the mitigation measure is "infeasibile" and preparation of a supplemental EIR. In *Katzeff v. Dep't of Forestry* (2010) 181 Cal.App.4th 601, a CEQA document prepared for a timber harvesting plan required an area of trees to be left standing as a mitigation measure. Years later, the agency proposed to allow those trees to be cut down. The court stated,

> when an earlier adopted mitigation measure has been deleted, the deference provided to governing bodies with respect to land use planning decisions must be tempered by *the presumption that the governing body adopted the mitigation measure in the first place only after due investigation and consideration...* where a public agency has adopted a mitigation measure for a project, it may not authorize destruction or cancellation of the mitigation--whether or not the approval is ministerial--without reviewing the continuing need for the mitigation, stating a reason for its actions, and supporting it with substantial evidence. (*Id*. at 613-14)

Under *Katzeff* and *Lincoln Place*, the wetland mitigation measure may only be deleted if the County produces substantial evidence that the measure is "infeasible," and a supplemental EIR must be prepared to analyze the impacts of destroying the wetland. The County failed to do either.

Furthermore, Biologist Phyllis Faber, MA, concluded that the offsite mitigation is insufficient to mitigate the impacts of destroying Shamrock's wetland. Faber concludes that the Shamrock wetland area

provides important habitat to numerous protected species, and is particularly important due to the lack of other appropriate habitat areas along the Petaluma River. Given its geographic significance, Faber concludes that providing mitigation miles away, would not be adequate mitigation. Faber states:

> Because of the extensive amount of development along the Petaluma River over the past century, there is little open habitat available for providing sustainable protection for the river, making the physical and habitat services this small open undeveloped site provides especially valuable. There [are] a number of specific wildlife habitat values the site provides such as feeding and resting refugia for endangered species such as black rail, salt marsh harvest mouse, and the burrowing owl. During storms and extreme high tides, these buffer areas play an important role essential for the survival of wildlife, especially critical to endangered species. Additionally, the site should be given special consideration for its riverine open space and wildlife values provided to an adjacent nesting heronry in nearby Eucalyptus trees. Because of it[] location adjacent to the river, these become important hunting grounds for nesting heron and egrets…. It will not be possible to simply transfer the values this site provides to another distant site. The current site provides values to the local riverine/transitional community that are not transferrable. (AR29042-4)

These are new significant impacts of RPII that were never described, analyzed or mitigated in the EIR. A supplemental EIR is required to be recirculated to analyze and mitigate these impacts.

b. Traffic Impacts. RPII involves Dutra trucking aggregate from Shamrock for 3 years. (AR113-14) Since the Original Project had all aggregate delivered by barge directly to Dutra, this will result in a significant increase in truck traffic. The County's consultant admits that this is additional traffic that was not analyzed in Shamrock's CEQA document. (AR4710) The additional truck traffic also exceeds levels analyzed in the EIR prepared for the Dutra project. The Staff Report states:

> However, under the trucking option, the total number of truck trips will increase [from 125,082] to 144,782 or 16% more than was projected in the Original Project in the DEIR (see Table 1). Truck transfer of import material would consist of trucks exiting onto Petaluma Boulevard South at the Landing Way Depot driveway traveling south to the Dutra Haystack Landing driveway and returning. (AR4628) … Upon analysis of the Revised project II data, Dowling found that … at the intersection of Petaluma Boulevard South and Landing Way where AM peak hour traffic conditions would fall from LOS E to F. (AR4629) …At the intersection of Petaluma Boulevard South and Landing Way, Revised Project II traffic would cause AM traffic to increase by more than five seconds compared to DEIR project traffic while remaining at LOS F. PM traffic would fall from LOS E to LOS F as a result of Revised Project II traffic. AM peak hour volume signal warrants would be met for the Revised Project II because with over 2,000 peak hour vehicles on Petaluma Boulevard South, the volume threshold for Landing Way is 100 which is exceeded by the 113 expected AM vehicles. (AR4631)

As a result of these impacts, the Staff Report recommends mitigation measures, including adding a traffic signal and right turn lane at Petaluma Blvd South/Landing Way. (AR4630) As discussed above, since the revised Project creates significant new impacts requiring mitigation measures not analyzed in the EIR, a recirculated EIR is required. See, *Perley*, and *Gentry, supra*.

Furthermore, Traffic Engineer Tom Brohard, PE, demonstrates that the traffic calculations conducted by Dutra's consultant, and relied upon by the County significantly understate traffic. (AR29050) Dutra's consultant calculates that transport of 56,250 tons of recycled aggregate imported by truck will require only 1 truck per year (one in and one out). (AR4732) In fact, given that trucks carry a maximum of 23 tons, moving 56,250 tons of material will require 2,446 trucks per year, or 4,896 truck trips (one trip in and out per truck). (AR29051) The Project description is inaccurate because it understates traffic impacts by at least 4,894 trips per year. Thus, RPII has significant new unmitigated traffic impacts. (AR29052) A supplemental EIR is required to analyze and mitigate this new significant impact of RPII.

c. **Air Quality Impacts.** The Staff Report admits, "[T]he [RPII] trucking option results in increased impacts to Air Quality (PM10 and CO) … than were analyzed in the DEIR." (AR4631) Dr. Petra Pless concludes,"Total daily emissions of PM10 from the Revised Project II under the truck option and during the interim phase of the conveyor option of 85.2 lb/day would exceed the BAAQMD's [Bay Area Air Quality Management District] significance threshold of 80 lb/day. This is a new significant impact that the Staff Report fails to identify and mitigate." (AR29062)

The County admits that it did not conduct any air quality analysis at all for RPII, but instead relies entirely on Dutra's paid consultants (AR4613), despite the fact that the County concludes that Dutra's consultant used the wrong methodology. (AR4615) Dr. Pless points out that Dutra's consultant used the wrong "silt loading" factor to calculate road dust. (AR29061-2) Dutra's consultant used the silt loading factor for "public paved roads with low average daily traffic under normal conditions." (*Id*.) Of course, the road between Shamrock and Dutra will have high daily traffic levels, with trucks carrying sand and gravel. Dr. Pless used the far more appropriate silt loading factors for industrial roads including sand and gravel processing, concluding that the PM10 impact of RPII would be significant. (AR29063)

The administrative record contains no response to Dr. Pless' comments. A supplemental EIR is required to acknowledge and mitigate this new significant impact of RPII.

d. **Health Risks.** The County admits that it performed no health risk assessment for RPII due to "time constraints." (AR4613) Dr. Pless points out that RPII will increase toxic emissions compared to the Project analyzed in the EIR. In the Original Project, the County required Dutra to utilize barges with low-emission Tier 3 engines. Without this mitigation measure, the Project would have exceeded the BAAQMD CEQA threshold of 10 cancers per million. Dr Pless points out that in RPII this mitigation measure will no longer be enforceable. Dutra has no power to require Shamrock to use Tier 3 barges. Thus, the barge emissions created by RPII will once again exceed the 10 per million health risk CEQA

threshold. (AR29063) Dr. James Clark also points out that the EIR fails to analyze many toxic chemicals associated with asphalt plants (AR, 26368, 26744-50) and ignores cumulative impacts of the Dutra Plant with nearby facilities such as Shamrock and Highway 101 entirely. (AR23751-2) Since the County conducted no health risk assessment of RPII, it has no evidence to rebut this expert testimony.

e. **Noise.** Biologist James Castle concluded that compared to the Original Project, RPII will increase noise impacts to the Salt Marsh Harvest Mouse, California Clapper Rail, California Black Rail, White-tailed Kite, herons and egrets, due to noise and vibration created by the 800 foot conveyor belt to be built directly over Shamrock's wetland mitigation area, and that this impact will not be mitigated by purchasing wetlands miles away. (AR29014-8, see 25561-71) This impact was not addressed in the EIR at all since the conveyor did not exist in the Original Project, but only in private consultant reports prepared directly for Dutra. Although the final conditions of approval include new noise mitigation measures for the conveyor, (AR57-8) these measures have never been subjected to CEQA review to determine their adequacy, in violation of CEQA. The new impact and mitigations require recirculation. *Gentry, supra*.

3. The EIR's Analysis Wrongly Assumed that the Closed Former Asphalt Plant at a Different Location was Still Operational, thus using the Wrong Baseline.

The County substantially underestimated the Project's air quality impacts by using a long-closed Dutra asphalt plant as the CEQA "baseline." This methodology has been rejected by the Supreme Court. *Cmtys. for a Better Env't v. So. Coast Air Qual. Mgmt. Dist.* (2010) 48 Cal. 4th 310, 321 ("*CBE v. SCAQMD*").

The CEQA "baseline" is the set of environmental conditions against which to compare a project's anticipated impacts. *Id.* at 321. The impacts of the project must be measured against the "real conditions on the ground," and not against hypothetical levels. (*Id.*) The baseline is generally the actual environment at the time of the Notice of Preparation ("NOP"). *Id.*

In July 2005, Dutra closed its decades old asphalt plant at 1600 Petaluma Blvd. So., on the site of what is now the Lomas Quarry Residential development. (AR234, 2106, 2355, 2198) In April 2004, Dutra applied for a permit to operate a temporary asphalt plant for a maximum of three years about ½ mile from the proposed Project location. (AR2106, 2198) The temporary plant closed in September 2007. (AR26) The County issued the NOP for the Dutra Project on Feb. 17, 2006. (AR657)

The EIR calculates the air pollution from the proposed Project, but then subtracts the emissions from "the five-year historic average production rate of 131,498 tons per year of asphalt and a maximum daily production rate of 2,000 tons per day that occurred at the original (now closed) facility and the temporary

facility in Petaluma." (AR359) This analysis is legally erroneous because it gives Dutra "baseline" credit for emissions from the temporary facility and the closed facility which do not exist.

Since Dutra is constructing a new facility on undeveloped wetlands (AR201-9), this is a new project, not a modification of an existing project. The "real condition on the ground" is a zero baseline. The EIR misleads the public into thinking the Project's emissions will be much lower by subtracting maximum daily emissions from the closed asphalt plant and the temporary asphalt plant – neither of which exist. Using such a skewed baseline "mislead[s] the public" and "draws a red herring across the path of public input." *San Joaquin Raptor*, 149 Cal.App.4th at 656. Subtracting emissions from a plant that does not exist "failed to adequately apprise all interested parties of the true scope and magnitude of the Project." *Id*. at 657. In *Woodward Park Homeowners v. Fresno* (2007) 150 Cal.App.4th 683, 708-711, a developer proposed to build a shopping mall on a vacant lot. The EIR erroneously used as a baseline an office park that was previously approved for the parcel, and subtracted the difference. The court held that the baseline should have been zero since the property was in reality vacant – as here.

Even if the County could use emissions from a different facility on a different property as the CEQA "baseline," it would be improper to use the Dutra plant that closed in 2005, since it did not exist at the time of the NOP. *CBE v. SCAQMD*, 48 Cal. 4th at 321. Even though Dutra's temporary facility existed for a few months after the NOP, it was a temporary facility operating on a three-year lease. (AR2106) "The very fact one was temporary and the other is permanent is enough to distinguish them because the environmental impact of a short-term program may be much less significant than a program of indefinite duration." *Apartment Ass'n v. Los Angeles* (2001) 90 Cal.App.4th 1162, 1169; *Chamberlin v. Palo Alto* (1986) 186 Cal.App.3d 181, 187.

Finally, even if the former asphalt plant could be used as part of the baseline, the County erred by using the "maximum daily production rate of 2,000 tons per day that occurred at the original (now closed) facility and the temporary facility." (AR359) It is error to use the maximum permitted operation level as the baseline rather than the actual average historic level of operation. *CBE v. SCAQMD*, 48 Cal. 4th at 322 ("the District erred in using the boilers' maximum permitted operational levels as a baseline.").

Dr. Pless, calculates that if a zero baseline were applied, then the Project would have significant air pollution impacts far in excess of BAAQMD thresholds for particulate matter ("PM-10"), reactive organic gases ("ROGs"), and greenhouse gases ("GHG"). (AR12516, 12530-2) The County has no substantial evidence to rebut Dr. Pless' calculations, since it continued to rely on the erroneous baseline throughout the CEQA process. (AR26)

4. The EIR Failed to Analyze Significant Impacts of the Project.

The EIR failed to analyze several significant Project impacts, rendering the EIR inadequate as an informational document. *Kings Cty. Farm Bur. v. Hanford* (1990) 221 Cal.App.3d 692, 711. An agency abuses its discretion by failing to proceed in a manner required by law when it fails to address a potentially significant impact in the EIR. "The substantial evidence standard of review is not applied to this type of CEQA challenge." *Bakersfield Citizens v. Bakersfield* (2004) 124 Cal.App.4th 1184, 1208. "Although the agency's factual determinations are subject to deferential review, questions of interpretation or application of the requirements of CEQA are matters of law." *Id.*

a. Greenhouse Gas ("GHG"): An EIR must analyze a project's significant GHG emissions and propose feasible mitigation. *CBE v. Richmond* (2010) 184 Cal. App. 4th 70. Dr. Pless explained that the Project's GHG emissions of 8060 metric tons per year ("TPY") far exceed relevant CEQA significance thresholds. (AR12530-2; 12481-3, see also, 20685) The County refused to acknowledge the significance of the Project's GHG emissions. The County concluded that the Project's GHG impacts would be rendered insignificant by a mitigation measure providing that there be "no net increase" in GHG emissions over the level emitted by the long-closed former Dutra asphalt plant, through a condition that "prior to occupancy, the applicant/developer shall submit a plan to eliminate or substantially reduce the increase in GHG emissions on-site through all feasible strategies." (AR26, 110-1, 1947)

First, as discussed above, the County's analysis is flawed because it uses the closed asphalt plant as the CEQA baseline. This Court recently rejected a similar approach. (*North Sonoma Co. Healthcare Dist. v. Co. of Sonoma,* SCV248271, Statement of Decision (June 9, 2011), Request for Judicial Notice, Ex. A.) Second, the court of appeal has rejected exactly such a "no net increase" GHG mitigation measure as improper deferred mitigation prohibited by CEQA. The court explained,:

> Here, the final EIR merely proposes a generalized goal of no net increase in greenhouse gas emissions and then sets out a handful of cursorily described mitigation measures for future consideration … No effort is made to calculate what, if any, reductions in the Project's anticipated greenhouse gas emissions would result from each of these vaguely described future mitigation measures…We find this proposal is no different than the deferred mitigation rejected by the appellate court… (*CBE v. Richmond*, 184 Cal. App. 4th at 93)

An EIR is required to acknowledge that the Dutra Project will have a significant GHG impact, and to propose specific mitigation measures to reduce the impact. *Id.*

b. Sea Level Rise: Urban planner Terrell Watt, AICP, submitted comments attaching new information released by the State of California Climate Change Center showing that global warming is projected to cause sea levels to rise by 39 to 55 inches by 2100, totally inundating the Dutra site.

(AR20536) Grading the site to place the Project one foot above the mean high sea level (AR96) will obviously not mitigate this impact. Although the DEIR addressed the issue briefly, concluding that sea level rise would be 14.4 inches (AR460), it did not address this new evidence that the impact will be far more severe. Although Dutra's lawyer dismissively responded to this comment (AR21064-5), this letter was not incorporated into the EIR, which failed entirely to address the new evidence. (AR21-2, 1543-2028) Recirculation is required since significant new information substantial demonstrates an "increase in the severity of an environmental impact" previously identified. 14 CCR §15088.5.

c. Urban Blight: City expressed concern that the Project could have adverse economic impacts on ecotourism. (AR25861) Urban planners Watt and Ikeda submitted expert comments concluding:

> The proposed Dutra facility may have a blighting impact on the City of Petaluma and the surrounding area …by generating toxic emissions, noise, asphaltic odors, glare, truck and barge traffic, and other impacts. These impacts depress property values, drive people and businesses away from Petaluma, and create a downward spiral of urban blight. (AR20532)

Although Dutra's lawyer dismissively responded to this comment (AR21061), the EIR fails to mention the impact at all. The courts have held that "urban decay" must be addressed in the EIR if substantial evidence indicates that a project may cause blight. *Bakersfield Citizens*, 124 Cal.App.4th at 1207; *Christward Ministry v. Super. Court* (1986) 184 Cal.App.3d 180, 197. Substantial evidence includes "expert opinion." 14 CCR §15384(b). Since expert opinion indicates that the Dutra Project will cause urban blight, the EIR is deficient for failing to analyze the impact.

d. General Plan Inconsistency: As discussed in the City's brief, the Dutra Project is inconsistent with the General Plan. As discussed in Petitioners' Apr. 15, 2009 comment letter (AR20272) each General Plan conflict is a potentially significant CEQA impact. *Pocket Protectors v. Sacramento* (2004) 124 Cal. App. 4th 903, 930, 934. Since the EIR erroneously concluded that the Project is consistent with the General Plan, it failed to acknowledge the significant impacts related to the inconsistencies.

e. Cumulative Impacts: The Dutra project will have significant cumulative impacts with the Novato Disposal construction debris facility, recently proposed for the site adjacent to Dutra. (AR26940) Dr. Pless concluded that the two projects will have significant cumulative impacts on air quality, dust, traffic, diesel exhaust and other impacts. (AR27027-8) CEQA requires the agency to consider "past, present, and probable future projects producing related or cumulative impacts." 14 CCR §15130(b)(1)(A); *CBE v. Cal. Res. Agency* (2002) 103 Cal.App.4th 98, 117. The EIR fails entirely to analyze this cumulative impact, rendering the document inadequate.

f. Worker Health: Dr. Pless pointed out that toxic chemical concentrations and exposures will be highest to workers at the project site and neighboring facilities. (AR12526) The County refused to analyze these impacts, contending that workers are somehow exempt from CEQA due to OSHA rules. (AR1955) Under the doctrine of *expressio unius est exclusio alterius,* since CEQA contains a list of exemptions, the court may not imply additional exemptions not specified in CEQA. *Mountain Lion Found. v. Fish & Game Comm'n* (1997) 16 Cal.4th 105, 116-19. Since CEQA does not exempt worker health, the County erred by refusing to analyze and mitigate impacts to workers.

g. Deferred Mitigation: The City explained that the EIR contains improper deferred mitigation measures. (AR20688) For example, Mitigation Measure Geo-2 requires Dutra to retain a consultant after project approval to evaluate the potential for aggregate stockpiles to cause instability of the Bay mud and then devise mitigation measures. (AR45, 96-7) As the City explained, this measure violates CEQA's prohibition on deferred mitigation since measures must be set forth prior to Project approval to ensure their adequacy. *CBE v. Richmond,* 184 Cal.App.4th at 91.

C. The County Failed to Prepare an EIR to Analyze Elimination of Shamrock's Wetland Area and Has Violated Shamrock's Mitigation Monitoring Plan (4th & 8th Causes of Action).

For all of the reasons set forth in section IV.B.2.a, the County violated CEQA by requiring destruction of Shamrock's wetland mitigation area without preparing an EIR to analyze the impacts of that decision on the Shamrock facility. (AR24045-7) In 2004, the County made a final determination that the wetland area was necessary to mitigate the significant adverse impacts of the Shamrock facility. (AR24341, 24373-4) Therefore, elimination of the wetland area will mean that Shamrock will have an unmitigated significant adverse wetland impact requiring an EIR. *Katzeff,* 181 Cal. App. 4th 601.

The County has also violated the mitigation monitoring plan for the Shamrock negative declaration. The mitigation plan requires Shamrock to construct the onsite wetland, and only allows the inferior offsite wetland bank if the Army Corps refuses to permit the onsite wetland. (AR7675, 7687, 7718) Since the Army Corps permitted the onsite wetland, the offsite wetland violates Shamrock's mitigation plan.

D. The County Violated the Brown Act By Refusing to Allow Public Comment at the Final Hearing to Approve the Dutra Project (9th Cause of Action).

The Brown Act requires that "[e]very agenda for regular meetings shall provide an opportunity for members of the public to directly address the legislative body on any item of interest to the public, before or during the legislative body's consideration of the item…" Gov.Code §54954.3(a); *Chaffee v. San Francisco Library Comm'n* (2004) 115 Cal.App.4th 461, 468. The Act creates a narrow exception when a meeting under the ***same agenda*** is continued for ***no more than five days*** to a later date, Gov.Code

§54943.2(b)(3), allowing the agency to forego public comment on agenda items previously opened, heard, and closed at the first meeting, which are neither "substantially changed since the committee heard the item" nor further discussed at the second meeting. *Chaffee, supra*, at 464-5, 468-9. The County erroneously relied on this exception to prohibit public comment at its Dec. 14 meeting. (AR31819, 31825)

In *Chaffee* a San Francisco agency ("SF") posted an agenda including 8 items, but lost quorum after hearing 3 items, without discussing the remaining 5 items. SF continued the hearing for five days to consider the remaining 5 items only. The court held that SF was not required to take public comment on all 8 items at both hearings since both hearings involved the same "agenda." *Chaffee* at 468. The Chaffee court emphasized that the Brown Act only allows the same agenda to be used for a meeting that is continued for no more than five days. After that time, a new agenda is required, triggering the requirement for public comment on any matter on the new agenda. *Id*. at 469.

Here, the County continued consideration of the Dutra Project for 2 months – more than 5 days – and posted a new agenda for the Dec. 14, 2010 meeting. (AR5413; 29216-7) The new agenda required by a continuance of more than 5 days requires a new public comment period for each matter on the agenda. (*Chaffee* at 469 ("action on continued agenda items must occur within five calendar days of the meeting.") Also, the Board actively discussed and deliberated on the Project on Dec. 14, but refused to take public comment, violating the Act's requirement for public comment on "each agenda item as it is taken up by the body." *Chaffee* at 469. Finally, the County substantially changed the Dutra item between Oct. 12 and Dec. 14 by identifying, for the first time in the Dec. 14 staff report, a new set of documents it claimed constituted the "final EIR" for the Project, and adding new mitigation measures. (AR12, 5413-5560) This represented a complete departure from the FEIR previously presented to the public and relied upon by the County from July 2008 to Dec. 13, 2010, and necessitated the opportunity for public comment. Gov.Code §54954.3(a). The public was denied any opportunity to comment on the final FEIR.

V. CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant the writ of mandate.

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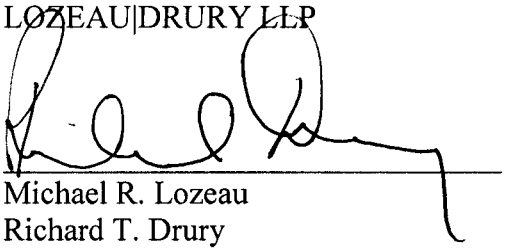
Respectfully submitted,

Dated: September 21, 2011

LOZEAU|DRURY LLP



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PROOF OF SERVICE

I, Toyer Grear, declare as follows:

I am a resident of the State of California, and employed in Oakland, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 410 12th Street, Suite 250, Oakland, CA 94607. On September 21, 2011 I served a copy of the foregoing document(s) entitled:

NON-PROFIT PETITIONERS'[5] MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDATE (CEQA AND BROWN ACT)

☒ **BY ELECTRONIC MAIL AND US FIRST CLASS MAIL (PURSUANT TO CASE MANAGMEENT ORDER AND STIPULATION).** By sending the documents as an electronic mail attachment in PDF format to the e-mail addresses below, and by placing the document(s) listed above in a sealed postage pre-paid envelope, and causing the envelope to be delivered to a US Mail receptacle for collection

on the following interested parties in the above referenced case addressed as follows:

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I declare under penalty of perjury (under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed September 21, 2011 at Oakland, California.

Toyer Grear

[5] Non-profit Petitioners are defined as all petitioners other than the City of Petaluma.