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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

CITY OF PETALUMA[1] AND NON-PROFIT PETITIONERS' CONSOLIDATED REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDATE

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

[1] City of Petaluma joins in all portions of this brief except for the section addressing the Brown Act, on which it takes no position.

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I. INTRODUCTION

The Opposition Briefs filed by Dutra, Shamrock and the County ("Defendants") are ships passing in the night. Dutra and the County contend that any impacts related to the Revised Project II ("RPII"), particularly truck traffic and related air emissions, were mitigated by moving the barge dock to the Shamrock facility. But, Shamrock steadfastly maintains that it "has disclaimed any role in the Dutra Project." (Opposition of Shamrock Materials to Petition for Writ of Mandate ("Shamrock Opp.") at pp.4-5). Both positions cannot be true. In any case, the one thing that is clear is that the EIR's Project description is patently inadequate. Even the real parties to this action disagree on the nature of the Project that will be constructed. Defendants simply cannot escape the fact that neither the Draft EIR, nor the Final EIR, nor any other single document, describes the Project that was approved by the Board.

Along the same lines, the only rationale that the County had for finding the Project to be "river dependent" was the conveyor belt from Shamrock to Dutra. The finding of general plan consistency is dependent, then, on an aspect of the Project that is, at best, in question. It is one thing for the County to contend that if the conveyor belt does not go forward, there will be no Project. But the County has made zoning changes that will apply to the site regardless of whether this particular Project goes forward, and made those changes based on the faulty assumption that the conveyor belt was a "done deal," and that the Project was therefore "river dependent." The zoning changes cannot be undone. Further, once the Project is built based on those zoning changes, if in three years' time Shamrock continues to refuse to allow Dutra to use its barge dock, the County cannot realistically force Dutra to shut down the Project.

Unless the County's action is set aside and the matter remanded to the Board for a legally adequate environmental review, the County will permanently lose a 38-acre site to industrial use, directly across the Petaluma River from Shollenberger Park, AR137, 142, 200, along with its rookery for great blue heron, great egrets, and snowy egrets. AR208, 15772-3. Shollenberger Park, home to birds and wildlife including over 190 bird species, including tidal marsh endangered and threatened species such as the salt marsh harvest mouse, California clapper rail and black rail, AR29014-8, and the Point Reyes Bird Observatory, which has been recognized as a top birding spot by Audubon Society and National Geographic, AR12451-4, 15772-3, 22902, will be forever changed.

II. ARGUMENT

A. GENERAL PLAN ISSUES (6th Cause of Action).

The County contends that it is entitled to great deference in interpreting its general plan, and "a given project need not be in perfect conformity with each and every general plan policy." County Opp.

p. 3. While true to an extent, the County fails to acknowledge that a project cannot be found consistent with a general plan if it conflicts with a general plan policy that is "fundamental, mandatory, and clear," regardless of whether it is consistent with other general plan policies. *Endangered Habitats League v. County of Orange* (2005) 131 Cal. App. 4th 777, 782-3.

1. The County Violated General Plan Section 2.4 and Policy LU-7a by Creating a Limited Industrial Zoning Designation in a Flood Plain.

General Plan ("GP") Section 2.4, Criteria #5 provides that "Amendments to add this designation [Limited Industrial] ***must meet all*** of the following:" "Lands ***shall not*** be in areas subject to flood, fire, and geologic hazards or in areas constrained by groundwater availability or septic suitability." RJN, Exh. B, p. LU-42. GP Policy LU-7a states that the County must "Avoid General Plan amendments that would allow additional development in flood plains, unless such development is of low intensity and does not include large permanent structures." RJN, Exh. B, p. LU-26.

The final EIR admits that "the majority of the developed project site and the parcel adjacent to the barge offloading facility are located within the FEMA 100-year flood hazard zone and the County F2 (floodplain) zoning district." AR1966, 2007, see AR458.

The County contends that it does not violate these policies because it required Dutra to elevate the parcel with fill to a level above the 100-year flood elevation. County Opp., p. 4. While this may address GP Section 2.4, which prohibits rezoning lands "subject to flood," it does not address Policy LU-7a, which directs the County to avoid General Plan amendments that allow additional development "in flood plains." The County cannot and does not deny that the Dutra parcel is in a "flood plain." The County discusses flood storage capacity, but this criterion is nowhere to be found in Policy LU-7a. Since the Dutra parcel is admittedly in a "flood plain," the County violated the General Plan by allowing additional development including a large permanent structure in the flood plain.

2. The County Violated General Plan Policy LU-19c by Approving the Project Because the Project is not River-Dependent.

Policy LU-19c of the GP states that the "Limited Industrial" category may be applied only to "appropriate uses existing as of 1986." RJN, Exh. B, p. LU-79. The Dutra site was not designated Limited Industrial in 1986. AR141. The County relies on an exception that allows the County to "consider additional ***river dependent commercial and industrial uses*** along the Petaluma River, ***where necessary to maintain the river as a navigable waterway*** connecting the Bay to downtown Petaluma." AR4622, 25858, 29038; RJN, Exh. B, p. LU-79 (emphasis added). However, no evidence supports the

County's conclusion that Dutra's Revised Project II ("RPII") is either "river dependent" or "necessary to maintain the river as a navigable waterway.

RPII eliminated all barge docking, barge loading or unloading at the Dutra site. (AR4606) County staff admitted that "[w]ith the elimination of the barge unloading facilities…*the proposed facility no longer has its own direct connection to the river*." AR4622 (emph. added). Instead, RPII proposed to transport aggregate from Shamrock to Dutra first by truck for 3-years and then by a conveyor belt constructed through Shamrock's wetland mitigation area. AR113-4, 4606-8, 1984, 1995, 23943-61. The Oct. 12, 2010 Staff Report admits that,"***[S]taff 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.

The County contends that the conveyor between Shamrock's barge dock and the Dutra facility "provides a permanent, fixed connection to the river . . . and is therefore considered to be river-dependent." County Opp. p. 6. However, Shamrock states clearly in its own Opposition Brief, that "***Shamrock has disclaimed any role in the Dutra Project***." Shamrock Opp. p. 4-5. In a March 2010 letter, Shamrock stated, "We cannot allow our property to be associated with the Dutra proposal to allow their project barges to unload at our facility." AR29071, 25778. Shamrock's Verified Answer states under penalty of perjury, "there is no agreement between Shamrock and Dutra to sell 500,000 tons of sand and aggregate to Dutra." The County ignores Shamrock's statements of non-participation entirely.

Absent Shamrock's participation, the Project approved by the County involves only the trucking option, and is therefore not river-dependent by the County's own admission. AR4631. The County's finding that "the delivery of aggregates and sand from an existing adjacent barge off-loading facility at Landing Way…would maintain a link between the new facility and the Petaluma River," AR32, 4622, is not supported by any substantial evidence in the record and must therefore be reversed. *A Local & Reg'l Monitor v. City of Los Angeles* (1993) 16 Cal.App.4th 630, 648.

Moreover, the idea that the mere purchase of materials renders a buyer "river-dependent" is far-fetched at best. If true, it would mean that every business that purchases products delivered to a vendor by waterway transforms the purchaser into a "river-dependent" use. This reading defies any plain language meaning of "river-dependent" and should be rejected.

Even if RPII were a "river dependent" use, the County has supplied no evidence to support the finding that the project must be "necessary to maintain the river as a navigable waterway." The County staff has stated that "[t]he question of whether the proposed new industrial use is necessary to maintain

the river as a navigable waterway probably does not have a definitive answer…*the Landing Way depot will likely continue to operate and import aggregates regardless of whether the Dutra project goes forward*." AR4623 (emph. added). Shamrock is already operating at or near its maximum import level, and the only difference with the Dutra Project would be that its material would be shipped to Dutra rather than to other customers. *Id*. Thus, the Dutra Project does nothing to "maintain the river as a navigable waterway." Thus, the purchase of materials by Dutra is *not* a use that is "*necessary*" to maintaining the river as a navigable waterway. AR20281, 20693, 25858, 29038-9. With no substantial evidence to support a conclusion that that the Dutra Project is "necessary to maintain the river as a navigable waterway," the General Plan amendment must be rescinded.

Finally, the County cannot hide behind the fact that, without Shamrock's participation, RPII is unlikely to go forward. The General Plan zoning changes made be the County in approving the project are in effect whether RPII goes forward or not, and will allow other industrial uses on the site without any evidence whether those uses are "river dependent" or required to maintain the river as a navigable waterway.

3. Measure D.

GP Policy OSRC-1k ("Measure D") prohibits changes in land use in the Petaluma/Novato Community Separator without voter approval. *Id*.; AR6275-7.

The County's brief ignores entirely the plain text of the GP, which makes clear that a majority of the Project area is within the Petaluma/Novato Community Separator. The GP defines this area as "bounded on the north by the Petaluma Urban Service Boundary, on the east by NWPRR rail right-of-way, on the south by the Sonoma/Marin County line, and on the west by the hills south of Petaluma." AR20282; RJN, Exh. C, p. OS-4. These boundaries indisputably include Areas C and D of the Project site, which lie south of the Urban Service Boundary and west of the railroad right-of-way. *Id*.; AR236-40.

The County's Opposition Brief ignores the plain text of Measure D, and instead relies entirely on a single figure attached to General Plan 2020, Figure OSRC-5h, that does not appear to show any of the Project area as included within the Community Separator. AR33, 20283; RJN, Exh. C, Figure OSRC-5h. The boundaries of the Community Separator as shown on Figure OSRC-5h, however, are inconsistent with those described in the text of the General Plan. AR20283; RJN, Exh. C, p. OS-4. There is no rule that a figure controls over the plain text of the General Plan. Even assuming there was such a rule, however, at best, this would indicate that the GP is, in fact, internally inconsistent by giving conflicting direction to decision-makers and the public. *See Concerned Citizens of Calaveras County v. Bd. of*

Supervisors (1985) 166 Cal. App. 3d 90, 97. Because this inconsistency goes to the heart of this Project's compliance with the General Plan, the Project cannot be approved at all. *See Garat v. City of Riverside* (1991) 2 Cal. App. 4th 259, 289-90. Thus, either the General Plan text controls, and the Project is within the Measure D boundaries, mandating a vote on the amendments, or the General Plan is internally inconsistent and RPII cannot be approved at all until the inconsistency is remedied.

4. The Project Fails to Meet the Seven Criteria Required under General Plan Element LU-43 Before a Project Parcel Can Be Re-Designated for Limited Industrial Use.

LU-43 sets forth seven specific criteria, all of which must be met before a parcel may be redesignated for Limited Industrial use. AR4621-2, 20278-81; RJN, Exh. B, p. LU-43. The Dutra Project fails to fulfill at least the following criteria:

Criterion 6: "[L]ands shall not be located in a scenic corridor." AR20280-1; RJN, Exh. B, p. LU-43. The Project site includes land (the frontage of Areas B, C and D) designated as Scenic Corridor and zoned Scenic Resources Combining District. AR505. The County contends that this criterion is satisfied because the Project is outside of the scenic resource setback. County Opp. p.5. However, the GP clearly states that the "lands shall not be located in a scenic corridor." It does not contain an exception for projects outside of a setback.

Criterion 7: "Any applicable Land Use Policies for the Planning Area." As discussed above, the Project violated GP Policy LU-19c since it is not "river dependent." The Project also violates GP Policy LU-7a, which directs the County to "avoid" general plan amendments that would allow additional development in floodplains. AR20281, 20693, 25858; RJN, Exh. B, p. LU-26. GP Policy LU-7c requires the County to "prohibit new permanent structure within any floodway." *Id*. Therefore, the Project may not be redesignated for Limited Industrial use.

B. CEQA EIR ADEQUACY ISSUES (1st Cause of Action).

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

Defendants contend that the EIR's Project description was adequate because "The Project, ***as applied for***, was accurately described in the DEIR." Dutra Opp. p.4 (emph. added). What Defendants fail to acknowledge is that the Project ***as approved*** (RPII) was so vastly different from the Project ***as applied for*** as to be a different Project. For example, an EIR describing a classical music pavilion cannot be used to approve a rock concert arena, even though both host music. *Concerned Citizens of Costa Mesa v. 32nd Dist. Agr. Assn*. (1986) 42 Cal. 3d 929, 932. At a certain point the proposed project becomes a different project requiring a supplemental EIR. RPII is clearly far beyond that point.

Defendants simply cannot escape the fact that the documents published by the County and circulated for public review entitled "Draft EIR" and "Final EIR," AR1543-1942, did not describe the Project that was approved by the Board – RPII. The Project described in the EIR had barges unloading directly at the Dutra facility, did not include a conveyor between Shamrock and Dutra destroying Shamrock's wetland mitigation area, and did not include trucking for 3 years between the two facilities. 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. As Aimi Dutra said, "our new proposal [RPII] is significantly different from our original application." AR28853.

Instead of preparing a supplemental EIR to describe RPII, on the morning of Dec. 14, 2010, only hours before the final vote on the Project, the County identified an assortment of private consultant reports, letters and various other documents and deemed those documents, together with the documents entitled DEIR and FEIR, to be the new Final EIR. AR5538. The County admits, AR1984, that RPII Project is described primarily in three letters from Dutra's paid consultant, CSW Stuber-Stroeh. AR4749-53; AR4768; AR4783. 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. This does not comply with CEQA for several reasons.

a. Project Description is Inaccurate Because Shamrock Refuses to Participate: The most obvious shortcoming in the EIR's Project description is that it is simply erroneous. The Dec. 14, 2010 FEIR describes a Project that will be required to use the Shamrock barge dock. When asked by Sup. Zane, "you are saying that Shamrock has now approved to go ahead and use their loading facility for the barging?" County staff replied, "there is an agreement that they will be working together." AR6139. Staff stated, "Dutra has talked with Shamrock and Shamrock is obviously willing to work with them to have this operation completed." AR6138. This Project description not only appears inaccurate – it appears that staff misled the Board and the public.

Shamrock states in its Opposition Brief, "Shamrock has disclaimed any role in the Dutra Project." Shamrock Opp. p. 4-5. In the only document on the issue in the Administrative Record, Shamrock states, "we cannot allow our property to be associated with the Dutra proposal to allow their project barges to unload at our facility," AR29071, Shamrock states in its Verified Answer, filed under penalty of perjury,

"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.). The Project description is not only inaccurate – it is false. At the very least, the "enigmatic or unstable project description draws a red herring across the path of public input." *San Joaquin Raptor v. Merced* (2007) 149 Cal. App. 4th 645, 655.

b. The EIR is Internally Inconsistent: Defendants contend that the EIR's Project description is adequate because it is not "internally inconsistent." Dutra Opp. p.4. To the contrary, the addition of the last minute consultant reports and letters renders the EIR patently inconsistent. The published DEIR states that the Shamrock barge dock alternative "was rejected as infeasible." AR617. However, the last minute documents added to the FEIR state that all barge traffic would be directed to Shamrock's facility. AR4749-53; 4768; 4783. An EIR that states that the Shamrock barge dock is "rejected as infeasible" and also states that the barge dock will be required is plainly inconsistent. Defendants admit that an EIR that is internally inconsistent is inadequate. Dutra Opp. p.4, citing, *San Joaquin Raptor*, 149 Cal.App.4th at 672-3. A member of the public reading the dozens documents deemed to constitute the Final EIR as of Dec. 14, 2010 would be hard-pressed to determine whether the Shamrock barge dock was a rejected or mandatory feature of the approved project.

c. The EIR's Environmental Setting Description is Inaccurate: "An EIR must include a description of the physical environmental conditions in the vicinity of the project," called, "environmental setting." 14 Cal. Code Regs. ("CCR") § 15125(a). Defendants ignore entirely the fact that they intentionally misled the US Coast Guard and the public by presenting falsified maps showing the Petaluma River navigable channel to be up to 130 feet in width at relevant locations when in fact it is only 100 feet wide, AR22954-72, and showing 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. AR23925-42. The US Coast Guard ultimately determined that the maps were "inappropriate." AR22995. These falsified maps, circulated for public review, created a misleading view of the Project's impacts and environmental setting, and were never corrected or clarified by the County. Defendants fail to discuss this issue anywhere in their briefs.

d. County Failed to Publish a Single, Comprehensible EIR: The EIR is inadequate because it fails to describe the Project and its impacts in a single, "plain language" document "so that decisionmakers and the public can rapidly understand the documents." 14 CCR § 15140, 15141. 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 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."

Envtl. Prot. Info. Ctr. v. Cal. Dep't Forestry (2008) 44 Cal.4th 459, 493, quoting, *Vineyard Area Citizens v. Rancho Cordova* (2007) 40 Cal.4th 412, 442. "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.

Defendants respond to this issue only in a brief footnote, arguing that the *Russian Hill* case is old. (Dutra Opp. p.5, fn.4) Even if old, *Russian Hill* is good law. Defendants ignore entirely similar language in the 2008 Supreme Court decision in *EPIC, supra*, and the 2007 Supreme Court *Vineyard* case, both cited in Petitioners' Opening Brief.

Put simply, the hodgepodge of letters, private consultant reports, staff reports and various other documents identified on the morning of the final hearing to be the Final EIR, is not an adequate CEQA document. The adequacy of an EIR's project description is reviewed *de novo* by the court. *Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214, 1224. The EIR's Project description fails to comply with CEQA's minimum requirements.

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

Defendants rely on the wrong section of CEQA in responding to Petitioners' recirculation argument. Recirculation of an EIR ***prior*** to certification (as here) is addressed in CEQA § 21092.1 (and CEQA Guidelines §15088.5). However, Defendants rely in their brief on CEQA § 21166, which applies only recirculation ***after*** EIR certification. Defendants cite *Laurel Heights Impr. Assn. v. Reg. of Univ. of Cal.* (1993) 6 Cal. 4th 1112 ("*Laurel Heights II*") to argue that the two sections are similar. Dutra Opp., p. 7, fn.6. In fact, *Laurel Heights II* states exactly the opposite. In *Laurel Heights II*, the Supreme Court explained that Section 21166 ***disfavors*** EIR recirculation ***after*** certification, but Section 21092.1 contains an additional, fourth category, which ***favors*** EIR recirculation ***prior*** to certification. The Court stated:

> With the addition of the fourth category of "triggering information" to the list, we recognize that "***significance" for purposes of section 21092.1 cannot be defined exclusively in terms of the grounds for recirculation found in section 21166***, from which the first three categories are drawn. The different circumstances governed by these statutes mandate this conclusion.

> In the case of a certified EIR, which is a prerequisite for application of section 21166, section 21167.2 mandates that the EIR be conclusively presumed valid unless a lawsuit has been timely brought to contest the validity of the EIR. This presumption acts to preclude reopening of the CEQA process even if the initial EIR is discovered to have been fundamentally inaccurate and misleading in the description of a significant effect or the severity of its consequences. ***After certification, the interests of finality are favored over the policy of encouraging public comment***.
>
> ***By way of contrast, section 21092.1 was intended to encourage meaningful public comment***. (See State Bar Rep., supra, at p. 28.) Therefore, new information that demonstrates that an EIR commented upon by the public was so fundamentally and basically inadequate or conclusory in nature that public comment was in effect meaningless triggers recirculation under section 21092.1. (See, *Mountain Lion Coalition v. Fish & Game Com.*, *supra*, 214 Cal.App.3d 1043.)

Laurel Heights II, 6 Cal.4th at 1130 (emph. added).

CEQA §21092.1, reads: "When significant new information is added to an environmental impact report after notice has been given pursuant to Section 21092 … ***but prior to certification***, the public agency shall give notice again pursuant to Section 21092, and consult again pursuant to Sections 21104 and 21153 before certifying the environmental impact report." PRC § 21092.1. "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; *Mountain Lion Coal. v. Fish and Game Comm'n* (1989) 214 Cal.App.3d 1043.

In *Mountain Lion,* the court held that when a detailed project analysis is not prepared until the FEIR, then the document must be recirculated for public comment.

> If we were to allow the deficient analysis in the draft EID[2] to be bolstered by a document that was never circulated for public comment … we would be subverting the important public purposes of CEQA. Only at the stage when the draft EID is circulated can the public and outside agencies have the opportunity to analyze a proposal and submit comment. No such right exists upon issuance of a final EID unless the project is substantially modified or new information becomes available. (See Cal. Code Regs., tit. 14, § 15162.) To evaluate the draft EID in conjunction with the final EID in this case would only countenance the practice of releasing a report for public consumption that hedges on important environmental issues while deferring a more detailed analysis to the final EID that is insulated from public review.

Mountain Lion, 214 Cal.App.3d at 1052.

[2] EID is essentially the same as an EIR since the Dept. of Fish and Game had a certified environmental program.

This case presents precisely the situation described in *Mountain Lion*. RPII was not described at all in the Draft EIR or even the Final EIR that were circulated to the public. It was not until the morning of the final hearing that the County identified an assortment of documents describing the Project, which it for the first time contended constituted the FEIR. The public never had any opportunity to comment on the FEIR since even oral testimony was precluded. See Sec.C.3, Brown Act. Certainly, a revision to the Project to move the highly controversial barge dock to an entirely new location, construct a conveyor that will destroy a wetland mitigation area required by a different CEQA document, and massive increases in diesel trucking for at least 3 years (and maybe forever if Shamrock continues to refuse to allow the conveyor belt), none of which is described in the EIR that was circulated for public review, renders the EIR "so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded." Defendants do not address this provision since they ignore § 21092.1.

a. Wetland Impacts (1st, 4th and 8th Causes of Action). 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. Petitioners agree with Shamrock's position that the County was without power "to modify the Shamrock approvals" when approving the Dutra Project. Shamrock Opp. p. 5. Defendants contend that the conveyor will not destroy the wetland, but will merely "traverse" it. Dutra Opp. at p.9. However, this statement is contradicted by the official County Staff Report, which 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 or any use of the Shamrock wetland area.

Defendants also contend that even if the impact is significant, it will be adequately mitigated by requiring Dutra to purchase wetland offset bank credits at a location 4 miles away. Dutra Opp. p. 9. However, Wildlife Biologist Phyllis Faber, MA, concluded that the offsite mitigation is insufficient to mitigate the impacts of destroying Shamrock's wetland. Faber concluded 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. AR29042-4.

New expert evidence of impacts caused by a project revision prior to EIR certification requires recirculation. *Mountain Lion*, 214 Cal. App. 3d at 1052. New mitigation measures also require EIR recirculation. *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1120. CEQA provides that

recirculation is required when (1) A new significant environmental impact would result from the project or from a new mitigation measure proposed to be implemented… or when (3) A feasible project alternative or mitigation measure considerably different from others previously analyzed would clearly lessen the significant environmental impacts of the project. 14 CCR § 15088.5. Here, since the Project revision creates an impact to the wetland that the County admits will be significant without mitigation, AR4618, and a new mitigation measure of off-site mitigation, recirculation is required to analyze the impact and the adequacy of the proposed mitigation.

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. See also, *Katzeff v. Dep't of Forestry* (2010) 181 Cal.App.4th 601, 613. The wetland area was created pursuant to a CEQA document to mitigate the impacts of the Shamrock facility. AR24341, 24373-4.

Defendants contend that the Shamrock CEQA document allowed the wetland mitigation measure to be either onsite or offsite. This statement is untrue. The Shamrock CEQA document required creation of the onsite wetland mitigation area, and allowed offsite mitigation only "if the [Army] Corps does not approve of the creation of the onsite seasonal wetlands." AR24341. Since there is no dispute that the Army Corps approved the onsite wetland area, the offsite wetland is not permitted under the Shamrock CEQA document. Therefore, a supplemental EIR is required to analyze the impacts of eliminating this wetland area, and to analyze the adequacy of feasible mitigation measures.

b. Traffic Impacts. RPII involves Dutra trucking aggregate from Shamrock for at least 3 years. AR113-14. County Staff Admits that the additional truck traffic exceeds levels analyzed in the EIR prepared for the Dutra project:

> 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). (AR4628) … 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. AR4631.

The Staff Report recommends a traffic signal and right turn lane at Petaluma Blvd South/Landing Way to mitigate this impact. AR4630.

Defendants contend that this impact is not significant because it is not "permanent," since the trucks will eventually be replaced by a conveyor. Dutra Opp. p. 10. However, there is no authority for an impact being insignificant because it is temporary – particularly when "temporary" is 3 years. Also, since Shamrock makes clear that it will not participate in the Project, the increased trucking is likely to be a permanent feature of the Project – which was never analyzed in any EIR.

Defendants also contend that any traffic impacts are fully mitigated by a traffic signal. However, Traffic Engineer Tom Brohard, PE, concluded that the traffic calculations prepared by Dutra's consultant, significantly understate traffic. AR29050. Dutra's consultant calculated that transport of 56,250 tons of recycled aggregate imported by truck will require only 1 truck per year. 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. Thus, the County understates traffic impacts by at least 4,894 trips per year. While Defendants contend that a dispute among experts does not require recirculation, the Defendants point to no substantial evidence to rebut Mr. Brohard's calculations, and point to no truck capable of carrying 56,250 tons. A "clearly inadequate or unsupported study is entitled to no judicial deference." *Berkeley Keep Jets v. Bd.* (2001) 91 Cal.App.4th 1344, 1355.

c. Air Quality Impacts. Defendants contend that substantial evidence supports the County's conclusion that the Project would have no adverse air impacts or health risks. However, examination of the record shows that there is simply no evidence at all to support the County.

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." AR29062.

Defendants contend that evidence in the record supports a conclusion that RPII would not have significant air impacts. Dutra Opp. p. 11. However, the cited analysis is of the Project after construction of the conveyor between Shamrock and Dutra. AR4616. Dr. Pless was discussing the 3 or more year period before construction of the conveyor. Defendants also state that the PM10 impact would be insignificant because it is not permanent. Dutra Opp. p. 11. However, there is no CEQA exemption for impacts lasting for 3 years or less. Also, given Shamrock's sworn statements that it will not participate in the Project, the impact may well be permanent. Finally, Defendants contend that an expert analysis shows that trucking emissions will remain below significance thresholds, but review of the cited page, AR4864,

shows no calculations at all, but only a raw conclusion. The underlying calculations actually show reactive organic gas ("ROG") emissions of 55 pounds per day, which exceeds the BAAQMD significance threshold of 54 pounds per day. AR4867. The record contains no substantial evidence disputing Dr. Pless's calculations.

d. Health Risks. Defendants dispute Petitioners' contention that no Health Risk Assessment ("HRA") was prepared for RPII. Defendants cite AR4613 to support their contention that an HRA was prepared. Dutra Opp. p. 12. However, the cited page states the exact opposite: "Although a new HRA was not completed by the Air District for the Revised Project II, Environ did complete a revision to the BAAQMD HRA on September 30, 2010. Due to time constraints, this revised HRA was not analyzed by BASELINE in the Summary Report II." AR4613. County staff stated at the Dec. 14 hearing, AR5994:

> Steve Padovan: Yeah, we do not have a new HRA on the revised project –
> Supervisor Zane: Do not have a new HRA. Ok. And why do we not have data from BAAQMD? On this proposal?
> Steve Padovan: Again, they did not want to run the HRA model for, or run the model for us to do an HRA.
> Supervisor Zane: Why? Why would that be?
> Steve Padovan: I don't have that answer. I actually don't know why. They just refused to do it.

Petitioners submitted expert evidence from Dr. Petra Pless and Dr. James Clark that the Project would have increased health impacts above significance thresholds, AR29063; AR, 26368, 26744-50, and cumulative impacts with nearby facilities such as Shamrock and Highway 101. AR23751-2. Since the County prepared no HRA for RPII, it has no substantial evidence to rebut these experts. The failure of the County to analyze the health risks of the Project renders the EIR inadequate. *Berkeley Jets,* 91 Cal.App.4th at 1369.

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. Castle noted that the methodology used to evaluate noise impacts only analyzed scales for human hearing, and did not evaluate noise and ground vibration impacts on endangered and threatened species. AR29014-8, see 25561-71. Defendants cite AR3873-8 to contend that their own expert concluded that RPII would have less than significant noise impacts. Dutra Opp. p.13. However, the study at AR3873-8 was prepared for a prior version of the Project that did not

include the conveyor between Shamrock and Dutra, and did not analyze RPII at all. Defendants can point to no substantial evidence to rebut Petitioners' expert evidence.

3. The EIR Uses 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." 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.

In July 2005, Dutra closed its decades-old asphalt plant at 1600 Petaluma Blvd. So. 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 Notice of Preparation ("NOP") for the Dutra Project on Feb. 17, 2006. AR657.

The only evidence in the record is the calculation performed by Dr. Pless, who concluded 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.

Defendants attempt to defend their CEQA baseline by arguing that the temporary Dutra plant was open until September 2007, and the NOP was issued for the Dutra Project on Feb. 17, 2006, Dutra Opp. p. 13, making the temporary plant properly part of the baseline. However, this misunderstands the law.

The temporary Dutra plant was located at an entirely different location. No court has ever allowed the baseline to include emissions from a closed facility at a different location. All of the cases cited by Defendants involve modifications and expansions to existing facilities ***at the same location***. *CBE v. SCAQMD* (2010) 48 Cal. 4th 310, 321 (expansion of existing refinery); *Fairview Neighbors v. Ventura* (1999) 70 Cal.App.4th 238, 243 (expansion of existing quarry); *Fat v. Sacramento* (2002) 97 Cal.App.4th 1270 (continuation of existing airport). The rule from these cases is that when an existing facility seeks to expand at the same location, the actual existing level of operations is the CEQA baseline.

No case has ever allowed the developer to take credit for the closure of a different facility at a different location. For example, the refinery in *CBE v. SCAQMD* could not take baseline credit for the

fact that the nearby Cenco refinery had closed. *See Comtys. for a Better Env't v. Cenco Refining Co.*, 179 F.Supp.2d 1128; 180 F.Supp.2d 1062 (C.D. Cal. 2001).

All of the cases involving construction of a new facility on vacant land require use of a zero baseline. *Woodward Park v. Fresno* (2007) 150 Cal.App.4th 683; *Envtl. Planning & Info. Council v. County of El Dorado* (1982) 131 Cal.App.3d 350, 352. No case has ever allowed a facility to take baseline "credit" for other facilities that it may close at different locations. This Court recently rejected a similar approach. *North Sonoma Co. Healthcare Dist. v. County of Sonoma*, SCV248271, Statement of Decision (June 9, 2011), RJN, Ex. A.

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. 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." *San Joaquin Raptor* 149 Cal.App.4th at 657.

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. *CBE v. SCAQMD* makes crystal clear that it is erroneous 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." Defendants ignore this point entirely.

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. "The substantial evidence standard of review is not applied to this type of CEQA challenge." *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1208.

a. Greenhouse Gas ("GHG"): As discussed above, the County's analysis is flawed because it uses the closed asphalt plant as the CEQA baseline. Without this skewed baseline, there is no dispute that the Project has significant GHG impacts. Despite Defendants' protestations, there is no cognizable difference between the "no net increase" mitigation measure imposed in this case, AR110, and the "no net increase" mitigation rejected by the court in *CBE v. Richmond* (2010) 184 Cal. App. 4th 70, 93.

b. Sea Level Rise: Defendants contend that the EIR adequately analyzed the impacts of sea level rise. However, Defendants can point to no evidence to indicate that the County ever considered, responded to, or rebutted the expert testimony of Urban planner Terrell Watt, AICP, 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. Substantive comments of this nature require substantive responses. *Cleary v. County of Stanislaus* (1981) 118 Cal.App.3d 348. No response exists in the record.

c. Urban Blight. Defendants do not dispute that the EIR contains absolutely no substantial evidence or analysis of the Project's impacts related to urban blight. Instead, Defendants contend that Urban Planners Terry Watt, AICP, and Jared Ikeda offer only "unsubstantiated opinion" that does not require a response. Dutra Opp. p.17. CEQA defines "substantial evidence" to include "expert opinion supported by facts." 14 CCR §15384(b). Urban Planners Watt and Ikeda are duly credentialed urban planners – precisely the type of experts qualified to opine on urban blight. Both concluded that the Dutra Project would have the potential to cause or contribute to urban blight. The County has no substantial evidence to rebut this conclusion. Defendants cite *Melom v. Madera* (2010) 183 Cal.App.4th 41, but in that case, there was "no expert evidence or any other evidence that approval of the project with the refined site plan might lead to urban decay," *Melom* at 51, unlike in this case.

d. General Plan. This argument turns entirely on the dispute over whether the Project is inconsistent with the General Plan.

e. Cumulative Impacts. Petitioners rest on their Opening Brief.

f. Worker Health. Defendants do not deny that the EIR fails entirely to address the impact of the Project on worker health or that Dr. Pless provided expert evidence that the Project may adversely impact worker health. AR12526. Instead, Defendants contend that "worker safety is not subject to CEQA analysis because it is not an impact to the environment." Dutra Opp. p.19. This is a truly astonishing position. It is well established that human "health impacts resulting from the adverse air quality impacts must be identified and analyzed in … EIRs." *Bakersfield Citizens*, 124 Cal. App. 4th at 1220. Workers are humans. Workers have health. Therefore worker health impacts must be analyzed under CEQA. Defendants also contend that compliance with federal worker safety regulations will mitigate any worker health impacts, but there is no substantial evidence to support this conclusion.

g. Geotechnical Issues. Petitioners rest on their Opening Brief.

C. PROCEDURAL ISSUES.

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

The County characterizes the 2nd and 3rd Causes of Action as "picayune legal challenges." County Opp. p. 1. But there is nothing more fundamental to CEQA than requiring elected decision-makers to

confront the Project and its environmental impacts and to have an actual vote on whether to approve the Project despite its adverse environmental impacts. The County cannot escape the fact that such a vote never occurred.

"***Prior to approving a project***, the lead agency shall certify that the final EIR has been completed in compliance with CEQA." 14 CCR 15090(a)(emphasis added). "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." *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.

Although the County Board was presented with CEQA findings prepared by staff, the Board made no motion to approve the EIR and took no vote. AR6135-42. The only motion was made by Supervisor Kerns, who expressly clarified that this motion was only "for the General Plan Amendment." AR6137. The transcript of the Dec. 14, 2010 hearing reads as follows, AR6137:

> **Sup. Kerns**: We have two Resolutions before us, which reflect approval of the project. And Madam Chair, I will move that we approve both of the Resolutions before us.
> **Chair Brown**: For the General Plan Amendment?
> **Sup. Kerns**: Yes, for the General Plan Amendment.

The transcript makes clear that Supervisor Kerns moved directly to "approval of the project" without making any motion to certify the EIR. Sup. Kerns moved only the "two Resolutions before us, which reflect approval of the project. . . for the General Plan Amendment." AR6137. However, the minutes reflect approval of three resolutions, AR6181-2 – one approving the General Plan Amendment (Item 78A), one effecting a zoning amendment (Item 79), and one certifying the FEIR (Item 78). From the transcript, it appears that Sup. Kerns attempted to move only the two resolutions for "approval of the project," (Items 78A and 79) but ultimately only moved the one resolution for a General Plan Amendment (Item 78A). In any case, it is clear that neither Sup. Kerns nor anyone else even attempted to make a motion to certify the FEIR (Item 78). Thus, the County approved the Project and never certified the FEIR, in plain violation of CEQA. 14 CCR § 15090(a).

The County attempts to escape this crucial point by contending that the EIR was certified at a "straw vote" taken on October 12, 2010. County Opp. p. 1-2; AR6098. However, a "straw vote" is without effect. A "straw vote" is merely a non-binding "poll-taking device." *Farley v. Healey* (1967) 67 Cal.2d 325, 332. County Code Sec. 11.20.010.F, provides for only one final action of the Board, and makes no mention of a "straw vote." Supervisor Kerns explained at the final Dec. 14, 2010 hearing:

> And just to further clarify, the reason why we straw vote and ***don't vote on the final action, and we didn't at the last hearing***, is that sometimes during the course of deliberations maybe a new issue will come up or a tweak to the Resolution needs to be made if there's a draft Resolution." AR6137.

Thus, the Oct. 12, 2010 "straw vote" cannot be redefined as the final vote to certify the EIR.[3]

Also, the County did not identify the documents that it alleges constitute the Final EIR until the morning of Dec. 14, 2010. AR12, 5413-5560. Thus, it would have been impossible for the Board to certify the FEIR on Oct. 12, 2010, since the FEIR had not even been identified at that time.

The County also contends that the EIR was certified because the minutes indicate a certification. County Opp. p. 2, citing AR2181-2. The County has it backwards. The minutes must conform to the truth of what actually happened at the meeting, not vice-versa. *Carruth v. Madera* (1965) 233 Cal.App.2d 688 (court may review parole evidence to determine whether minutes accurately reflect actions taken at meeting). Since the transcript shows that no final motion was made and no vote taken to certify the EIR or adopt CEQA findings, the Project approval must be set aside. *Vendanta, supra*.

2. The County Failed to Properly Adopt an Ordinance Amending the General Plan (5th Cause of Action).

The amendment of a zoning designation is a legislative act and must be accomplished by ordinance, not by simple resolution. Gov. Code §65850; *City of Sausalito v. County of Marin* (1970) 12 Cal.App.3d 550, 562. A zoning amendment adopted by resolution rather than ordinance is void. *Sounhein v. San Dimas* (1992) 11 Cal.App.4th 1255, 1260. Adoption of an Ordinance is far more formal than a resolution. For example, unless a vote is taken to waive reading, "*all ordinances shall be read in full either at the time of introduction or passage*." Gov. Code §25131.

Here, the Board attempted to amend the zoning by resolution and also failed to read the Ordinance at all, at either the Oct. 12, 2010 or Dec. 14, 2010 meeting. Nor was any motion made to waive reading. AR4695-6, 5951-6100, 6127-9; 6130-42. The only motion was made by Sup. Kerns, who stated, "I will move that we approve both of the ***Resolutions*** before us." AR6137. It is clear that the only motion was

[3] If a "straw vote" is a final vote, then the County cannot explain why the Board's 3-2 straw vote on June 9, 2009 rejecting the Project and its EIR was not a final action. (AR5867-70)

for a resolution, not an ordinance. The courts have made clear that, "we are not at liberty to ignore the very real difference between a 'resolution' and an 'ordinance.' The resolution of a board of supervisors is ordinarily not equivalent to an ordinance." *Sausalito v. Marin*, 12 Cal. App. 3d at 565. Ordinances, but not resolutions, must be "read in full at the time of passage." There is no dispute that the Board failed to read the proposed Ordinance at all, nor was any vote taken to waive reading.

The County contends that there is a "separate process" for "zoning ordinances" found at Gov. Code §§ 65854-65857, that somehow trumps the requirements of Gov. Code § 25131, and that does not require reading. County Opp. p. 2. However, even that provision requires adoption of an ordinance, not a resolution. Thus, the Board's action, clearly passing a "resolution," falls short.

Also, the courts have held that zoning ordinances require the County to comply with the "formalities" set forth in Gov. Code §§ 25120-25121. *Sausalito v. Marin*, 12 Cal.App.3d at 566. It is a basic rule of statutory construction that statutes should be interpreted to harmonize rather than to conflict whenever reasonably possible, unless the two statutes are "irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation." *Stop Youth Addiction v. Lucky Stores* (1998) 17 Cal.4th 553, 569. Since Gov. Code § 65850 can easily be reconciled with the procedures of Section 25131, the two statutes must be harmonized and the County must comply with both. It failed to do so and the resolution attempting to amend the zoning designation must be set aside.

3. The County Violated the Brown Act[4] (9th Cause of Action).

The County refused to allow public comment on the Project at the Dec. 14, 2010 hearing where the Project was approved. 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 Brown 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 § 54954.2(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. "[S]ection 54954.2, subdivision (b)(3) mandates that action on

[4] The City of Petaluma does not join in this portion of the brief.

continued agenda items ***must occur within five calendar days*** of the meeting at which the continuance is called." *Chaffee*, 115 Cal. App. 4th at 469 (emph. added).

The County ignores the "five calendar day" requirement entirely. County argues that since public testimony was allowed at the Oct. 12, 2010 hearing, no further testimony was required at the Dec. 14, 2010 hearing. County Opp. pp. 9-10. The Brown Act requires that if the matter is continued for more than five days, then a new agenda and new public comment period are required. *Chaffee* at 469. Here, the County continued the matter for 2 months (more than 5 days), and published a new agenda, yet refused to allow public comment. Furthermore, the County substantially changed the item, most notably by identifying an entirely new set of documents for the first time to be the official Final EIR. AR12, 5413-5560. The public never had any opportunity to comment on the FEIR, which was identified for the first time on the morning of the Dec. 14, 2010 hearing.

4. The County Failed to Give the City 10-Days Notice of the FEIR (First Cause of Action).

At approximately 9:00 a.m. on Dec. 14, 2010, the County released over 100 pages of new documents related to the Project, including new conditions of approval, AR5413-5560, and for the first time identified an entirely different set of documents as the "final EIR," including expert reports prepared by Dutra's private consultants. AR12. The document previously published by the County entitled "final EIR" did not include these documents. AR1543-1942. The County's last minute document dump failed to provide the City with 10-days notice of the new information as required by CEQA. PRC § 21092.5; 14 CCR § 15088(b); AR29248. PRC § 21092.5 provides:

> At least 10 days prior to certifying an environmental impact report, the lead agency shall provide a written proposed response to a public agency on comments made by that agency which conform with the requirements of this division. Proposed responses shall conform with the legal standards established for responses to comments on draft environmental impact reports. Copies of responses or the environmental document in which they are contained, prepared in conformance with other requirements of this division and the guidelines adopted pursuant to Section 21083, may be used to meet the requirements imposed by this section.

The County contends it "met that requirement by responding to all comments on the Draft EIR in June 2008, more than two years before certification." (County Opp. p. 8) Of course, this position points out the absurdity of the County's environmental review process. The response to comments prepared in 2008 was for an entirely different Project – not including the Shamrock facility, the conveyor over the wetland, trucking between the two facilities, and many other elements and impacts. Clearly, a response to comments on an entirely different Project fails to meet the letter and intent of CEQA.

III. CONCLUSION: Petitioners respectfully request that this Court grant the writ of mandate.

Respectfully submitted,

Dated: November 8, 2011

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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 November 8, 2011 I served a copy of the foregoing document(s) entitled:

CITY OF PETALUMA AND NON-PROFIT PETITIONERS' CONSOLIDATED REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDATE

☒ **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 November 8, 2011 at Oakland, California.

Toyer Grear

Toyer Grear