C091012

In the Court of Appeal of the State of California
Third Appellate District

WE ADVOCATE THOROUGH ENVIRONMENTAL REVIEW, INC.; and WINNEMEM WINTU TRIBE,

Plaintiffs and Appellants,

v.

CITY OF MOUNT SHASTA; and MOUNT SHASTA CITY COUNCIL,

Defendants and Respondents.

CRYSTAL GEYSER WATER COMPANY, INC.
Real Party in Interest/Respondent.

RESPONDENTS' AND REAL PARTY IN INTEREST'S JOINT BRIEF

Siskiyou County Superior Court No. SCCV-CVPT-180531

Honorable Karen Dixon

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INTRODUCTION

This action stems from the City of Mount Shasta's ("City") approval of the Industrial Waste Discharge Permit for Crystal Geyser IWD-2018-01 ("Permit"). Appellants We Advocate Thorough Environmental Review and the Winnemem Wintu Tribe (collectively, "Appellants") improperly attempt to expand this narrow issue to take a second bite at challenging the sufficiency of the Environmental Impact Report ("EIR") prepared by Siskiyou County ("County") for the operation of the Crystal Geyser Bottling Plant ("Plant") and all ancillary uses for the Plant ("Project"). (See related Third District Court of Appeal Case No. C090840.)

Appellants' unsupported attempts to attack the EIR lack merit. The City is a responsible agency in the California Environmental Quality Act ("CEQA") process in its review and approval of the Permit. The City's role in the Project and any challenge to the City's actions are limited to the narrow issue of wastewater discharged to the City treatment plant. Appellants completely disregard the narrow scope of review in this case. They attempt to saddle the City with lead agency responsibilities, arguing that the City could not rely on the County's EIR and was required to conduct its own environmental review of portions of the Project already sufficiently reviewed by the County.

Appellants, however, already had their opportunity to challenge the sufficiency of the EIR and did so in *We Advocate Thorough Environmental Review v. County of Siskiyou, Siskiyou Board of Supervisors*, Case No. SCCV-CVPT-2018-41 ("County Case"). Just as they were in the County Case, Appellants' arguments here regarding the sufficiency of the EIR are misplaced, repetitive, and irrelevant to the facts and issues of the action against the City.

The facts and issues that are relevant to this case are simple. The City is a responsible agency for the Project. A responsible agency is limited in its authority, only reviewing the portion of the project which it is called upon to carry out or approve. Here, the City is charged with reviewing and approving the Permit for Crystal Geyser Water Company's ("Crystal Geyser") operation of the Plant. The City properly served as a responsible agency: participating in the EIR process, submitting comments to the County, and providing a draft of the Permit to the County for inclusion in the EIR.

The Project utilized the City's preferred alternative for wastewater discharge and the City's concerns about the Project were addressed. The City issued the Permit, relying on the EIR the County drafted, and finding that there were no unmitigated impacts of the Project. As such, the City properly engaged in CEQA and approved the Permit based on the EIR. The trial

court's decision to deny the writ of mandate was correct and should be affirmed.

STATEMENT OF THE CASE

A. STATEMENT OF FACTS

1. Project Background

The Project is located on a 118-acre site in the County, outside of City limits. (Administrative Record ("AR") 2265.) The Project site was previously developed and operated as a water bottling facility for Dannon Waters of North American ("Dannon"), which then became Coca-Cola Dannon ("CCDA Waters") from approximately 2000 to 2010. (*Ibid*.) Crystal Geyser purchased the Project site in 2013. (AR 2266.) Crystal Geyser's planned use of the Plant is for the "production and bottling of sparking water, teas, and juice beverages." (AR 227.) The water supply for Crystal Geyser's production activities comes from an on-site production well commonly referred to as DEX-6. (*Ibid*.) Crystal Geyser plans to initially operate a single bottling line, but a second bottling line is anticipated in the next seven years. (*Ibid*.)

The County, as the lead agency, prepared the EIR for the Project. (AR 2303.) The EIR was an expansive document addressing the whole of the Project. (AR 2273.) The City's only approval associated with the Project was for the Permit. (AR

2273; 2305.) A draft of the Permit was included as an appendix to the EIR and all options to treat the Project's wastewater were considered. (AR 11076; 2278-84.)

2. City Review of the Project

On February 23, 2017, the City authorized the City Manager to submit comments on the Draft EIR to the County. (AR 690.) The County provided responses to those comments in the Final EIR. (AR 1617-24.) Upon release of the Final EIR, the City retained a consultant, ENPLAN, to evaluate the County's response to the City's comments. (AR 424-445.) In a letter to the City dated September 15, 2017, ENPLAN found that the City's comments regarding aesthetics, most transportation concerns and utilities, including wastewater, had been adequately addressed. (AR 424-445.) Following that evaluation and ENPLAN's supplemental evaluation on September 19, 2017, the City provided comment at an October 10, 2017, public meeting before the County Planning Commission to discuss the Final EIR. (AR 671, 19785-89.)

On November 13, 2017, the City passed a resolution instructing the City Manager to transmit a letter to the County indicating that the City is not requesting recirculation of the EIR, nor does it intend to pursue litigation with regard to the EIR. (AR 673.)

Following the County's certification of the EIR, Crystal Geyser and the City began final discussions of the conditions and requirements associated with the Permit in January 2018. (AR 20190, 22957-67, 22970-71.) To properly address all waste streams that may be discharged from the Plant, the City spent three months reviewing the Permit and addressing comments. (AR 20190, 20903-20904, 22959.)

During the three months of discussions, the City reviewed the Final EIR and determined that three additional wastewater streams could be added to the Permit under both the City's authority and the provisions of CEQA. (AR 20190, 20903-20904.) Comments and questions were addressed in writing and during the City's public hearing that was held on March 26, 2018. (AR 248, 20903-20904.)

The City also delayed consideration of the Permit several times to make sure that all comments regarding the Permit were addressed, including corrections to the Utilities section of the Draft EIR. (AR 2, 126, 16779-16794, 21036.)

After all comments had been addressed, the City approved the permit. (AR 691.) Contrary to Appellants' assertions that the City failed to analyze or adopt any mitigation measures, the final Permit included a compliance schedule that requires Crystal Geyser to complete the off-site sewer improvements pursuant to

the EIR, which includes a thorough analysis of impacts and mitigation measures. (AR 1969, 2239-2263.)

Further, the City recognized the potential significant impacts to the environment due to the off-site sewer improvements, such as impacts to biology, cultural resources, noise, and transportation; however, the City is not responsible nor has jurisdiction to oversee the mitigation of those impacts. (AR 1614-1617, 1939, 1945.) The Final EIR identifies the City as the agency responsible for monitoring the impacts of the Project on wastewater treatment; however, the City's obligation to monitor has not been triggered because there has been no construction of the Project. (AR 2499-2502.)

3. Wastewater Treatment Options.

The Project's wastewater types are domestic wastewater, industrial process wastewater, and industrial rinse wastewater. (AR 2277.) Domestic wastewater includes water from faucets, drinking fountains, sinks, and bathrooms. (AR 2277.) Industrial process wastewater contains cleaning agents, boiler discharge, cooling tank discharge, and floor washing wastewater, while industrial rinse wastewater includes wastewater from filter backwash and equipment rinsing. (AR 2277.)

Appellants assert speculative and irrelevant arguments in their Statement of Facts regarding the Project's operation and wastewater activities, inferring that Crystal Geyser will expand

and engage in additional groundwater pumping and wastewater discharge without any limit or additional environmental review. (Appellants' Opening Brief ("AOB"), pp. 10, 12-13.) Appellants' speculation has been repeatedly addressed, indicating that such expansion and increased use was a preliminary design option but "ultimately not a part of the project … submitted to the County." (AR 1552.) Moreover, the Permit establishes a maximum amount of discharge Crystal Geyser may release to the City's Wastewater Treatment Plant ("WWTP"). (AR 351.) Undeterred by these points, Appellants nonetheless insist that the EIR fails to address something that is not planned nor is part of the Project.

The EIR considered three options for wastewater treatment and discharge. (AR 2279.) The Draft EIR included a fourth option that was ultimately removed from the Project. (AR 2284.) The City's preferred option was the first option considered in the EIR, in which the City would receive all domestic and industrial process and rinse wastewater at the existing connection to the City system at the southwest corner of the Project site. (AR 2279.) The second option would discharge domestic and industrial process wastewater to the City, but industrial rinse wastewater would discharge to an on-site leach field. (AR 2281.) The third and final option for wastewater discussed in the EIR would be a temporary measure during the time the Plant only operated a single production line for sparkling water. (AR 2281.) Under that

option, only domestic wastewater would discharge to the City and both industrial process and industrial rinse water would discharge to the on-site leach field. (AR 2281.)

Wastewater treatment Options 1 and 2 require that the City issue a wastewater treatment permit. (AR 2281.) Following the County Planning Commission's approval of the conditional use permit, certification of the EIR for the Project on September 27, 2017, and an administrative appeal of that decision at the County level, the City considered approval of the Permit on March 26, 2018. (AR 691, 21043.) The City approved the Permit and "considered the Environmental Impact Report prepared by the County of Siskiyou for the Crystal Geyser Bottling Plant and finds no unmitigated adverse environmental impacts relating to the alternative waste discharge disposal methods." (AR 691.) The Permit, as approved, had "minor revisions" from the draft version included in the EIR, establishing a limit of 24,000 gallons per day of wastewater discharge. (AR 253, 351.)

Under the Permit, Crystal Geyser "is authorized to discharge process, non-process, and sanitary wastewater to the City of Mt. Shasta sewer system." (AR 323.) Appellants allege that the Permit does not follow treatment Option 1, the City's preferred alternative, to have industrial rinse water discharged to the City's sewer system. (AOB, 14.) However, the Permit provides that industrial rinse water can be discharged to the

City's sewer system or the on-site leach field. (AR 323-24.) The industrial rinse water discharge option was always part of the Permit, even the draft Permit included in the Draft EIR. (AR 264-65, 323-24.)

B. PROCEDURAL HISTORY

On May 1, 2018, Appellants timely filed their Petition for Writ of Mandate challenging the City's approval of the Permit.

A hearing on the merits of Appellants' Petition for Writ of Mandate was heard by Honorable Karen L. Dixon of the Siskiyou County Superior Court on June 7, 2019.

The lower court issued its Statement of Decision on October 17, 2019. Appellants filed their Notice of Appeal on November 7, 2019 and, subsequently, Judgment was entered in favor of the City on December 11, 2019.

STANDARD OF REVIEW

A. ABUSE OF DISCRETION

"In mandamus actions, the trial court's decision is entitled to deference," such that "[a] judgment or order of the lower court is presumed correct." (*A Local & Regional Monitor v. City of Los Angeles* (1993) 12 Cal.App.4th 1773, 1792 ("*ALARM*") [challenge brought under CEQA].) A reviewing court applies the abuse of discretion standard to a responsible agency's compliance with the statutory requirements of CEQA. (Pub. Resources Code, §

21168.5; *Bakman v. Department of Transportation* (1979) 99 Cal.App.3d 665, 681 ("*Bakman*"); *ALARM, supra,* 12 Cal.App.4th at pp. 1792-1793.) Under the abuse of discretion standard, the court reviews the record to determine whether the responsible agency proceeded as required by law or substantial evidence supports its findings and determinations. (*ALARM, supra*, 12 Cal.App.4th at p. 1792.)

Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392 ("*Laurel Heights*").) When reviewing the responsible agency's factual determinations, courts apply the substantial evidence test and resolve reasonable doubts in favor of the administrative finding and decision. *(Ibid.*) An agency's substantive factual conclusions regarding a project's impacts are afforded deference under the substantial evidence test that applies where an abuse of discretion is the standard of review. (*Ebbetts Pass Forest Watch v. California Dept. of Forestry & Fire Protection* (2008) 43 Cal.4th 936, 944.)

B. SUBSTANTIAL EVIDENCE

Substantial evidence means "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other

conclusions might also be reached." (Cal. Code Regs, tit. 14 ("CEQA Guidelines"), § 15384, subd. (a).) A court "must resolve reasonable doubts in favor of the administrative finding and decision," even though other conclusions might be reached from the same body of evidence. (*Laurel Heights, supra*, 47 Cal.3d at p. 422, internal quotations omitted.)

A court's task is not to weigh conflicting evidence and determine who has the better argument. These questions are left to the discretion of the agency; it is they who decide how best to achieve CEQA's informational purpose. The decision makers can rely upon the expertise of staff and its consultants. (*Porterville Citizens for Responsible Hillside Development v. City of Porterville* (2007) 157 Cal.App.4th 885, 901; *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1380.)

The City's determinations regarding disputed questions of fact are entitled to the same deference appellate courts give to the factual findings of trial courts. (*Environmental Council of Sacramento v. City of Sacramento* (2006) 142 Cal.App.4th 1018, 1042; *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 570-573.)

Appellants incorrectly argue that a de novo standard of review applies to this case because the City failed to conduct further environmental review as required by CEQA. (See AOB, 21-22.) However, "[a] decision not to require a subsequent or

supplemental EIR is reviewed under an abuse of discretion standard of review." (*ALARM, supra*, 12 Cal.App.4th at p. 1793.) "[W]hen a court reviews an agency decision under section 21166 not to require a subsequent or supplemental EIR on a project, *the traditional, deferential substantial evidence test applies.* (*Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1318, emphasis original.) The City's decision to not conduct further review beyond the EIR is not a failure to comply with CEQA, but rather a substantive choice subject to the abuse of discretion standard. As such, this Court's review is limited to whether the administrative record contained "substantial evidence to support the determination that the changes in the project or its circumstances were not so substantial as to require major modifications of the EIR." (*Ibid.*)

An error in procedure by itself is not the basis for an adverse judicial determination. Appellants challenge the City's CEQA findings and decision not to conduct further environmental review based on the revised Permit. The narrow questions of whether the City followed appropriate CEQA procedures should be reviewed for a prejudicial abuse of discretion.

C. THE SCOPE OF REVIEW IS LIMITED TO THE ADMINISTRATIVE RECORD BEFORE THE RESPONSIBLE AGENCY

In a CEQA action, the court's review is generally limited to the "whole record" before the agency. (Pub. Resources Code, § 21168; Code Civ. Proc., § 1094.5, subd. (e).) Judicial review of a CEQA decision pursuant to Public Resources Code section 21168 is generally limited to the record of the agency proceedings as provided by Code of Civil Procedure section 1094.5, subdivision (e). (*Sierra Club v. California Coastal Com*. (2005) 35 Cal.4th 839, 863.) No party may rely on information not part of the administrative record before the agency. (*Ibid.; Western States Petroleum Assn. v. Superior Court, supra,* 9 Cal.4th at pp. 570-573.) Few circumstances warrant the introduction of extra record evidence. (*Sierra Club, supra,* 35 Cal.4th at p. 863.; see also Code Civ. Proc., § 1094.5, subd. (e).) Appellants attempt to rely on extra-record evidence already properly excluded from the record by the lower court. (See, *infra,* Argument, §2.) Appellants have failed to establish the necessary circumstances allowing them to rely on extra record evidence. (*Ibid.*)

D. BURDEN OF PROOF

A petitioner "bears the burden of demonstrating that the record does not contain sufficient evidence." (*Latinos Unidos de Napa v. City of Napa* (2013) 221 Cal.App.4th 192, 206; see also,

Tracy First v. City of Tracy (2009) 177 Cal.App.4th 912, 934.) "[A]n appellant must set forth in its brief all the material evidence on the point … [and] failure to do so is deemed a concession that the evidence supports the findings." (*Latinos Unidos de Napa, supra,* 221 Cal.App.4th at p. 206, citing *Citizens for a Megaplex-Free Alameda v. City of Alameda* (2007) 149 Cal.App.4th 91, 112-113.) A court does not "independently review the record" when a petitioner fails to carry its burden. (*Ibid*.)

E. THE COURT REVIEWS THE ACTIONS OF THE RESPONSIBLE AGENCY, NOT THE LEAD AGENCY.

Under CEQA, "an EIR is presumed adequate." (*ALARM, supra*, 12 Cal.App.4th at p. 1793, citing *State of California v. Superior Court* (1990) 222 Cal.App.3d 1416, 1419.) An action against a responsible agency cannot be used as a collateral attack to reach the EIR prepared by a lead agency. (*Id.* at p. 1794.) If a petitioner believes that the lead agency's EIR was inadequate, its remedy is to challenge the certification of the EIR. (*Ibid.*) A petitioner may not challenge a responsible agency's actions as a disguised attempt to take a second bite of the apple to challenge the EIR's original analysis. (*Ibid.*)

A reviewing court only considers whether the responsible agency complied with *its* obligations under CEQA. (*ALARM, supra*, 12 Cal.App.4th at p. 1793.) In their brief, Appellants improperly attempt to attack the County's EIR. (AOB, pp. 7, 10-

13, 28, 32-33, 39.) This Court's review is limited to the City's approval of the Permit, however, and Appellants' transparent attempts to attack the EIR must be disregarded. (*Ibid.*)

ARGUMENT

A. DEFICIENCIES IN APPELLANTS' OPENING BRIEF

1. Appellants' Statement of Facts Does Not Fairly Summarize the Underlying Facts of the Case.

As an initial matter—and consistent with their failure to show that the record does not contain substantial evidence—Appellants' fail in their basic duty to "[p]rovide a summary of the significant facts" in their opening brief. (Cal. Rules of Court, rule 8.204(a)(2)(C).) Not only do Appellants sprinkle their Statement of Facts with legal conclusions, Appellants make little effort to accurately and fairly summarize the facts critical to this action. (See *Silva v. See's Candy Shops, Inc.* (2016) 7 Cal.App.5th 235, 260, disapproved on other grounds by *Donohue v. AMN Services, LLC* (2021) 11 Cal.5th 58; see AOB, pp. 10-13, 15-16, 20.) Appellants' version of the facts is entirely one-sided, ignoring any facts that do not support their position. (*In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1530-1531.) "Such conduct is not to be condoned." (*Ibid.*)

Appellants' opening brief includes misleading and irrelevant information regarding the County's environmental review of the Project throughout its Statement of Facts, pairing such distractions with cherry-picked and distorted facts from the Administrative Record to fit their own narrative. (See AOB, pp. 10, 12-13, 17-18.) Moreover, many "facts" are stated without any citation to the record (See e.g., AOB pp. 12, 13, 16, 18-19.) Statements of fact that are not supported by references to the record should be disregarded by the reviewing court. (*McOwen v. Grossman* (2007) 153 Cal.App.4th 937, 947; *Fierro v. Landry's Restaurant Inc.* (2019) 32 Cal.App.5th 276, 281, fn. 5 ["appellate courts 'ignore' factual statements without record references"].)

2. Appellants Improperly Rely on Extra-Record Evidence Which Was Properly Excluded by the Lower Court.

Judicial notice *may* be taken of "decisional law and of public and private official acts of any state" including counties "since they are … legal departments of the state." (Evid. Code, § 452, subd. (c); *Marino v. Los Angeles* (1973) 34 Cal.App.3d 461, 465.) While a court may judicially notice a variety of matters, only relevant matters may be noticed. (*Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063 ("*Mangini*"), disapproved on other grounds in *In re Tobacco Cases II* (2007) 41 Cal.4th 1257.) Additionally, extra-record evidence is not admissible when

used "merely to contradict the evidence the administrative agency relied on in making a quasi-judicial decision or to raise a question regarding the wisdom of that decision." (*Western States Petroleum Assn. v. South Coast Air Quality Management Dist.* (2006) 136 Cal.App.4th 1012, 1025.)

Appellants improperly seek to rely on extra-record evidence – two letters from counsel for Appellants in the current action, Marsha Burch, to the City (the "Burch Letters") regarding the EIR prepared by the County. (See, e.g., AOB, pp. 10, 19.) Despite Appellants electing to prepare the administrative record to include all relevant evidence related to the City's approval of the Permit, Appellants failed to request the Burch Letters' incorporation into the record until they filed their opening brief in the lower court. (Appellants' Appendix ("AA"), 224.) All parties had this extra-record evidence in their possession since the inception of this action. Yet, Appellants did not consider the Burch Letters or the administrative record from the County Action as relevant to the City's approval of the Permit when they compiled the record and confirmed its completion. Just as the trial court denied their request for judicial notice, this Court also should not now consider the Burch Letters nor the administrative record in the County Action on this appeal.

i. *The Lower Court's Denial of Appellants' Request for Judicial Notice Should be Upheld Because Appellants Provided No Information to Evaluate the Propriety of Judicial Notice.*

Appellants provided no information to support their request for judicial notice. A court shall take judicial notice only when the requesting party "[f]urnishes the court with sufficient information to enable it to take judicial notice of the matter." (Evid. Code, § 453, subd. (b).) A court may deny a request for judicial notice made without proper support. (*Willis v. State of California* (1994) 22 Cal.App.4th 287, 291 ("*Willis*") [denying judicial notice where request was made "without appending any information whatsoever"].)

Appellants' request to the trial court included no supporting information or explanation as to why the Burch Letters are appropriate for judicial notice, nor does the request identify with specificity which provision of the Evidence Code allows for admission of such records. (See, generally, AA, 224.) Appellants generally refer to multiple subdivisions of Evidence Code section 452, as well as exhaustive case law and their own attorneys' declarations in support of the original request, with no indication of how such authority or their attorneys' promises of submittal timing is applicable to the records Appellants seek this Court to judicially notice. (AOB, pp. 23-26.) The trial court property denied the Appellants' request for judicial notice due to

its lack of supporting information. (*Willis, supra,* 22 Cal.App.4th at p. 291.)

ii. *The Extra-Record Evidence is Irrelevant.*

Only matters that are relevant to an issue in the action may be judicially noticed. (*Poseidon Dev., Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117; *Mangini, supra,* 7 Cal.4th at p. 1063; Evid. Code, § 350.) Relevant evidence in a CEQA action is limited to the "whole record" before the agency. (Pub. Resources Code, § 21168; Code Civ. Proc., § 1094.5, subd. (e).) Judicial review of a CEQA decision pursuant to Public Resources Code section 21168 is generally limited to the record of the agency proceedings as provided by Code of Civil Procedure section 1094.5, subdivision (e). (*Sierra Club v. California Coastal Com., supra,* 35 Cal.4th at p. 863.) No party may rely on information not part of the administrative record before the agency. (*Ibid.*)

Appellants attempt to further argue the merits of their lawsuit against the County of Siskiyou in this case. However, the "agency" in this action is the City and the record of proceedings before the agency is the administrative record evidencing the process by which the City made its decision to issue the Permit to Crystal Geyser.

Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) The Burch Letters are from Appellants' counsel in this action, Marsha Burch. They were neither authored nor considered by any public agency in any official action. Without further indicia of their relevance, the Burch Letters fail to show any tendency to prove or disprove a disputed fact that is of consequence to the determination of this case. (*Brokopp v. Ford Motor Co.* (1977) 71 Cal.App.3d 841, 853.) The trial court agreed, correctly observing that the Burch Letters "are not helpful to the court in determining the facts of this case…" (AA, p. 417; *ALARM, supra,* 12 Cal.App.4th at p. 1792 ["[a] judgment or order of the lower court is *presumed correct*" (italics original)].)

Had the Burch Letters been relevant and, thus, considered by the City in its decision to approve the Permit, those letters would have been part of the administrative record lodged with the trial court. Even the Appellants did not consider the Burch Letters relevant, having not seen fit to include them in the administrative record.

Accordingly, the Burch Letters had no legal consequence or effect in the City's decision making or in the trial court, as they were neither authored nor considered by a state agency. And this Court now should not consider them on appeal. (*Western States*

Petroleum Assn. v. Superior Court, supra, 9 Cal.4th at pp. 570-573.)

B. THE TRIAL COURT CORRECTLY FOUND THAT THE CITY FULLY COMPLIED WITH ITS OBLIGATIONS AS A RESPONSIBLE AGENCY

Appellants claim that the City did not comply with CEQA for two reasons: (1) the City failed to make the requisite CEQA findings to adopt mitigation measures applicable to the portions of the Project being approved by the City; and (2) the City improperly relied on the County's EIR analysis for impacts from wastewater disposal. (AOB, 7, 26, 36.) To the contrary, the City complied with CEQA when it approved the Permit and properly considered the Project's environmental effects.

1. The Trial Court Correctly Found That the City Made Necessary CEQA Findings.

Since an EIR is presumed adequate, responsible agencies generally rely on the information in the CEQA document prepared by the lead agency and ordinarily are not allowed to prepare a separate EIR. (CEQA Guidelines, § 15096, subd. (a); *Bakman*, *supra*, 99 Cal.App.3d at pp. 678-679; *ALARM, supra,* 12 Cal.App.4th at p. 1793.) "A responsible agency complies with CEQA by considering the EIR or negative declaration prepared by the lead agency and by reaching its own conclusions on whether and how to approve the project involved." (CEQA

Guidelines, § 15096, subd. (a); see also CEQA Guidelines, § 15050, subd. (b); *Bakman, supra,* 99 Cal.App.3d at p. 680.)

The responsible agency must consider the environmental effects of the project as shown in the EIR. (CEQA Guidelines, § 15096, subd. (f); *RiverWatch v. Olivenhain Municipal Water Dist.* (2009) 170 Cal.App.4th 1186, 1207.) A responsible agency can only prepare a subsequent or supplemental EIR as provided in Sections 15162 or 15163 of the CEQA Guidelines. (CEQA Guidelines, § 15096, subd. (f); see also CEQA Guidelines, §§ 15162 [subsequent EIR], 15163 [supplemental EIR].)

In the resolution approving the Permit, the City properly certified that it had reviewed and considered the adequacy of the EIR. (AR 691; see *Bakman, supra,* 99 Cal.App.3d at p. 680.) In reviewing the EIR, the City also considered the environmental effects of the Project and the feasible mitigation measures within its powers. (AR 691.) The draft Permit was incorporated into the EIR as Appendix I. (AR 4882-4932.) The EIR incorporated the terms of the draft Permit as Mitigation Measure 4.12-1. (AR 8092; see also AR 8086, 8088.) After the EIR was certified, the City adopted the Permit with minor modifications. (See AR 255-317 [tracked changes of draft to final Permit].)

The City found that there would be "no unmitigated adverse environmental impacts relating to the alternate waste discharge disposal methods." (AR 691.) This finding fulfills the

City's requirements as a responsible agency under CEQA to review the EIR, consider the Project's environmental effects, and mitigate any significant effects within its powers with feasible mitigation measures.

Based on these findings, the City properly approved the Permit in compliance with its CEQA requirements as a responsible agency.

2. The Trial Court Correctly Found That the City Was Not Required to Adopt Additional Mitigation Measures Because There are No Significant Impacts to the Environment Due to the Portion of the Project Over Which the City Had Discretion.

The CEQA Guidelines require the responsible agency make the findings for each significant effect of the project over which it has jurisdiction. (CEQA Guidelines, § 15096, subd. (h); see also Pub. Resources Code, § 21002.1, subd. (d).)

Section 3.5.8.3 of the EIR describes the three wastewater treatment and disposal options considered in the Final EIR. (AR 2279-2289.) Domestic wastewater generated at the Plant would be conveyed through the City's sewer system under all wastewater treatment options; industrial process wastewater would be conveyed to the WWTP under Wastewater Treatment Options 1 and 2; and industrial rinse wastewater would be conveyed to the WWTP under Wastewater Treatment Option 1. (AR 2401.)

Section 4.12.2 of the EIR analyzed the Project's wastewater system. (AR 2384-2405; see also Appendix L of the EIR at AR 4953-4972.) "The evaluation of [the Project's] potential wastewater service impacts was based on comparing the current capacity and the approved expansion of the City's sewer system and WWTP to the amount of wastewater that would be conveyed to the City's WWTP under each of the three Wastewater Treatment Options." (AR 2391.) The impacts for the wastewater system options are analyzed in Section 4.12.1.3 of the EIR. (AR 2391-2405.)

Appellants also reference Sections 4.3, 4.4, and 4.5 of the EIR. (AOB, p. 16.) Section 4.3 discussed the EIR's analysis on biological resources related to the project and off-site areas that would be disturbed for any sewer system improvements. (AR 2000.) Section 4.4 analyzed the Project's potential impacts on cultural resources on the Project site and in off-site areas that may be disturbed for sewer system upgrades. (AR 2028.) Section 4.5 addressed the Project's impacts on geology and soils in and around the Project location from construction, operation, and/or maintenance of the Project. (AR 2049, 2058.) As related to these sections, Appellants cite to Mitigation Measures 4.3-1 [protection of nesting migratory birds and other birds of prey], 4.3-2 [protection of water quality during construction activities], S-4.3-1 [protection of special-status amphibians in off-site sewer

improvements area], S-4.3-2 [protection of nesting migratory birds and other birds of prey in off-site sewer improvement area], S-4.3-3 [protection of waters of the U.S. in off-site sewer improvement area], S-4.4-1 [cease work and implement procedures for unanticipated discoveries at off-site sewer improvements area],[1] and S-4.5-1 [erosion control plan for off-site improvements], stating that the City failed to properly consider and adopt these measures. (AOB, p. 16.)

Appellants' assertions are incorrect. The EIR analyzed the whole of the Project, including impacts on biological resources, cultural resources, and geology and soils from the potential off-site construction to expand the sewer segments. (AR 2000-2027, 2049-2067.) The EIR analyzed the construction impacts from the potential sewer segment improvements. To reduce any potential construction impacts, the EIR recommended various mitigation measures related to biological resources, cultural resources, and soil erosion control. (See AR 1940-1946, 1976-2067.)

The City's portion of the larger project considered in the EIR is limited to the industrial wastewater discharge permit. (See *infra*, at Argument, § E.) The mitigation measures that Appellants cite are outside the scope of the City's authority as part of its industrial waste discharge permit. (*Ibid.*)

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[1] Appellants' brief refers to Mitigation Measure S-4.4-2, which does not exist. For the purposes of this brief, it is assumed that Appellants meant to reference Mitigation Measure S-4.4-1.

Appellants attempt to expand the scope of the City's authority under the Municipal Code. However, the City lacked any power or jurisdiction over these mitigation measures as part of the Permit. To implement some of these mitigation measures, Crystal Geyser will be required to obtain additional authorizations from other responsible agencies, such as the California Department of Fish and Wildlife for a streambed alteration agreement. (See AR 1614-1617, 8164.) Conditions of any such agreement will require that best management practices are implemented. (AR 8164.) Thus, the City was not required to analyze Mitigation Measures 4.3-1, 4.3-2, S-4.3-1, S-4.3-2, S-4.3-3, S-4.4-1, and S-4.5-1.

In approving the Permit, the City found "no unmitigated adverse environmental impacts relating to the alternative waste discharge disposal methods." (AR 254.) The City was not required to make any CEQA findings because the restrictions in its Permit meant there would be no significant environmental impacts related to sewer segment expansions. Since the City was not required to make CEQA findings, it was also not required to adopt the mitigation measures as part of a mitigation and monitoring program. (Compare CEQA Guidelines, § 15097, subd. (a), with AOB, pp. 28-32.)

Most of the cases cited by Appellants do not relate to the obligations of responsible agencies and instead focus on the findings required by lead agencies. (See AOB, 35; *Citizens for Quality Growth v. City of Mt. Shasta* (1988) 198 Cal.App.3d 433 [lead agency adopted a statement of overriding considerations but did not make the necessary findings]; *Village Laguna of Laguna Beach, Inc. v. Board of Supervisors* (1982) 134 Cal.App.3d 1022 ("*Village Laguna*") [lead agency made a finding regarding one of four alternatives].) Unlike *Village Laguna*, the City did make a finding that there would be no unmitigated environmental impacts from the project. (AR 691.)

3. The Trial Court Correctly Found That the City Was Not Required to Analyze the Additional Waste Streams Because They Will Not Create Significant New Impacts.

Had the City believed the EIR was inadequate for purposes of reviewing the Permit's environmental impacts, the City would have been required to: (1) file an action against the County within 30 days; or (2) deem any objections to the EIR to have been waived; or (3) prepare a subsequent EIR pursuant to CEQA Guidelines section 15162, if permissible; or (4) assume the lead agency role pursuant to CEQA Guidelines section 15052, subdivision (a)(3). (CEQA Guidelines, § 15096, subd. (e).)

The City would have been required to conduct additional environmental analysis if one or more of the following events had occurred: (1) substantial changes are proposed in the project which would require major revisions to the EIR; or (2) substantial changes occur with respect to circumstances under which the project is being undertaken which will require major revisions in the EIR; or (3) new information, which was not known and could not have been known at the time the EIR was completed, becomes available. (See Pub. Resources Code, § 21166.)

The standard of review when determining whether a public agency properly determined that a subsequent EIR was unnecessary is " 'whether the record as a whole contains substantial evidence to support a determination that the changes in the project [or its circumstances] were not so 'substantial' as to require 'major' modifications to the EIR.' " (*ALARM, supra*, 12 Cal.App.4th at p. 1799.)

The final Permit was revised to add three wastewater streams: condensate, boiler blowdown water, and cooling tower blowdown water. (AR 141.) The final Permit also replaced the type of anti-scaling agent used at the plant from "Boilercare" to "Boilermate." (AR 20912.) The City's expert, PACE Engineering, reviewed the changes to the Permit and concluded that the revisions did not result in substantial changes or new

information requiring additional CEQA analysis by the City. (See AR 20190-91, 20911-12.)

Regardless of the amendments to the Permit, Appellants may not reopen the EIR through an attack of the Permit. The City relies on the EIR, which is presumed valid, in conducting its own analysis. Appellants' challenge must be limited to whether the City complied with CEQA, not whether the EIR properly analyzed the same issues. (*ALARM, supra,* 12 Cal.App.4th at p. 1793.)

i. Additional Wastewater Streams are Not Substantial Changes Which Require Further CEQA Analysis.

The final Permit contained three additional wastewater streams: condensate, boiler blowdown water, and cooling tower blowdown water. (AR 141.) Condensate comes from the use of air compressors. (AR 20190.) The general concern with condensate from air compressors is the inclusion of oil from the air compressors. (AR 20190.) However, the air compressors at the Plant will be oil free. (AR 20190.) Thus, condensate from the Plant can discharge into the City's sewer system without significant impacts to water quality. (AR 20190.)

Noncontact boiler blowdown water is water intentionally released from a boiler to avoid concentration of impurities during the continued evaporation of steam. Boiler blowdown water from the Plant will have a total dissolved solids concentration between

660 to 880 milligrams per liter and contain two anti-scaling chemicals. (AR 20191.) There is no anticipated impact from the boiler blowdown water. (AR 20191; see also AR 2392.)

Noncontact cooling tower blowdown water will consist of water from the onsite domestic well. (AR 353.) While the cooling tower water will have no added chemicals, evaporation will cause the total dissolved solids to increase by about 6 to 8 times. (AR 20191.) The total dissolved solids in the cooling tower blowdown water is estimated to be between 660 to 880 milligrams per liter. (AR 20191.) There is no anticipated impact from the noncontact cooling tower water. (AR 20191; see also AR 2392.)

In total, the condensate, boiler blowdown water, and cooling tower blowdown water will produce approximately 1,000 gallons per production day (0.001 mgd). (AR 20191.) This amount is accounted for in the 24,000 gallons maximum daily discharge limit in the Permit. (AR 20191.) This amounts to less than five percent of the wastewater Crystal Geyser would discharge to the City's WWTP under the Permit and an even smaller portion of the wastewater that would discharge to the City's WWTP from all users in the City.

Under the impacts analysis, water quality impacts would be considered significant if it would "[e]xceed wastewater treatment requirements of the applicable [Regional Water Quality Control Board]." (AR 2392.) As the City's expert

explained in a memorandum, it is not anticipated that the additional wastewater streams will have any detrimental effects on water quality for the WWTP. (AR 20903-20904 ["Given the quality and quantity of the waste streams, no detrimental effects are anticipated at the WWTP"]; see also AR 20191 ["anticipate no problems in meeting the water quality objectives"], 22951 ["don't see any issues with this waste stream"].) Thus, adding these wastewater streams does not constitute a substantive change to the EIR or new information warranting further environmental review.

ii. The Change in Anti-Scaling Products Was Not a Substantial Change That Requires Additional CEQA Review.

The Final EIR describes Boilercare 1002 as the anti-scaling agent used for maintenance purposes at the Plant. (See AR 2098.) Production of Boilercare has been discontinued. (AR 20904.) Crystal Geyser requested an equivalent replacement product be used, Boilermate, and the City agreed. (AR 20912.) In the final permit, Boilermate is listed as the anti-scaling agent. (AR 353.)

Appellants complain that the EIR failed to analyze the difference between Boilercare versus Boilermate. (AOB, p. 19.) Appellants point to the "Safety Data Sheets" for "Boilermate 1200S" and "Boilermate 3300C," which describe these products as hazardous chemicals that should not be released into lakes,

streams, ponds, or public waters. (AOB, p. 37; AR 20192-208; See AR 20193, 20198, 20200, 20202, 20206.)

Appellants vaguely refer to "concerns raised" regarding these products without any record reference. The City's expert, PACE Engineering, drafted a memorandum to respond to all relevant issues raised in the comment period, explaining that "the Boilercare Series of products is no longer manufactured. [Crystal Geyser] has requested the use of an equivalent product, Boilermate." (See AR 20903-20904.) As the expert explains, Boilermate is an equivalent product to Boilercare. The replacement from Boilercare to Boilermate in the Permit is not a substantial change in the Permit. Thus, substantial evidence in the record supports the City's factual determination that no further CEQA review was required by the change in anti-scaling agents.

Moreover, a memorandum from the City's expert constitutes substantial evidence upon which the City may rely. (*Porterville Citizens for Responsible Hillside Development v. City of Porterville, supra,* 157 Cal.App.4th at p. 901; *Gentry v. City of Murrieta, supra,* 36 Cal.App.4th at p. 1380.) Whereas a comment letter "is not, in itself, substantial evidence" unless that letter is supported by citation to factual information or evidence. (*Wal-Mart Stores, Inc. v. City of Turlock* (2006) 138 Cal.App.4th 273, 297, disapproved on other grounds by *Hernandez v. City of*

Hanford (2007) 41 Cal.4th 279.) The City is not responsible for resolving differences in opinion between its experts and other commenters. (See *Greenebaum v. City of Los Angeles* (1984) 153 Cal.App.3d 391, 413.) The agency's factual determinations and analysis will be upheld so long as they are supported by substantial evidence, even in the face of conflicting data or conclusions. (See *North Coast Rivers Alliance v. Marin Municipal Water Dist. Bd. of Directors* (2013) 216 Cal.App.4th 614, 642-643; *Assn. of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1398.)

Appellants bear the burden to "*affirmatively show* there was no substantial evidence in the record to support" the findings, and Appellants cannot "carry that burden by simply pointing to portions of the administrative record that favored its position." (*California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 626, italics original.)

There is no evidence in the record to show that the anti-scaling agents will be released into lakes, streams, ponds, or public waters. (See *East Sacramento Partnerships for a Livable City v. City of Sacramento* (2016) 5 Cal.App.5th 281, 297 ("*East Sacramento*"); see also *ALARM, supra,* 12 Cal.App.4th at p. 1800.) Instead, the anti-scaling agents will be discharged into the City's sewer system, where it will be treated at the City's WWTP. (AR 20600.) Neither the City nor the EIR was required to analyze

the environmental impacts from the anti-scaling agents being released into the environment before treatment.

Finally, a chemical's classification as a hazardous chemical pursuant to Occupational Safety and Health Administration regulations does not equate to a significant environmental impact. Appellants have presented no evidence in the record to show that these chemicals will create environmental impacts beyond mere speculation. (See *East Sacramento, supra*, 5 Cal.App.5th at p. 297; see also *ALARM, supra*, 12 Cal.App.4th at p. 1800.)

For this reason also, Appellants fall short of their burden to affirmatively show that no substantial evidence in the record supports the City's decision. Conversely, there is substantial evidence in the record to support the City's decision not to conduct further CEQA review of the anti-scaling agents.

The changes in the final permit were not substantial enough to warrant CEQA review. The City was not required to conduct additional environmental analysis on these issues.

C. THE TRIAL COURT CORRECTLY FOUND THAT THE CITY'S AUTHORITY AS A RESPONSIBLE AGENCY IS LIMITED UNDER CEQA

A responsible agency is "a public agency, other than the lead agency, which has responsibility for carrying out or approving a project." (Pub. Resources Code, § 21069; CEQA

Guidelines, § 15381.) A responsible agency's role under CEQA is narrower than the lead agency; a responsible agency only considers those aspects of the project that are subject to its jurisdiction. (Pub. Resources Code, §§ 21002.1, subd. (d), 21153, subd. (c); CEQA Guidelines, §§ 15050, 15051, 15096, subd. (a); see also *RiverWatch v. Olivenhain Municipal Water Dist., supra,* 170 Cal.App.4th at pp. 1201-1202.)

The City is a responsible agency because it has limited discretionary authority to consider and approve the Permit. (See AR 2221, 2305.) The City has no discretionary authority over other aspects of the Project considered in the EIR (e.g., the conditional use permit approved by the County or the waste discharge requirement permit by the Central Valley Regional Water Quality Control Board). (See AR 2221, 2303-2305.) Thus, the City's review under CEQA for environmental impacts was limited to the Permit and environmental impacts related to the Permit.

1. The City's Authority is Limited to Regulating Discharges Once They Enter the City's Sewer System.

The Mount Shasta Municipal Code ("Municipal Code") requires that all persons discharging industrial wastewaters into the City's sewer system obtain a City permit for industrial wastewater discharges. (AA, 281-82, § 13.56.270, subd. (A).)

Under the Municipal Code, the City's wastewater discharge permits may require: pretreatment of industrial wastewaters before discharge; restriction of peak flow discharges; discharge of certain wastewaters only to specified sewers of the City; relocation of point of discharge; prohibition of discharge of certain wastewater components; restriction of discharge to certain hours of the day; and payment of additional charges to defray increased costs of the City created by the wastewater discharge. (AA, 282, § 13.56.270, subd. (B); see also AA, 284-86, § 13.56.320, subd. (B) [listing prohibited discharges].) "No person shall discharge industrial wastewaters in excess of the quantity or quality limitations set by the permit for industrial wastewater discharge." (AA, 282, § 13.56.270, subd. (D).) If sewerage capacity is not available, the City may require the discharger to restrict any discharges until sufficient capacity can be made available. (AA, 287, § 13.56.340.)

The City may also adopt other conditions in the permit as required to effectuate its Municipal Code. (AA, 282, § 13.56.270, subd. (B).) As explained in the Municipal Code, the purpose of the industrial wastewater discharge permitting scheme is to provide for the maximum possible beneficial use of the City's facilities through adequate regulation of industrial wastewater discharges. (See AA, 274, § 13.56.010.) The scope of the City's authority to permit industrial discharges is limited to the discharge of liquids

into the City's sewer system and WWTP. (See, generally, AA, 274-275, § 13.56.020.) However, the Municipal Code does not provide the City authority to regulate how permit holders comply with any permit restrictions (i.e., prior to entering the sewer system).

In exercising the authority granted under its Municipal Code, the City approved the Permit with effluent limitations, monitoring requirements, reporting requirements, and slug discharge requirements. (AR 319-369.) The effluent limitations also contained a daily maximum for discharge flows of 24,000 gallons per day (0.024 mgd). (AR 324.) To comply with the daily maximum flow requirement, Crystal Geyser will have to meter its discharges. (See AR 8092.) These limitations and requirements are within the City's authority under the Municipal Code.

Mitigation Measure 4.12-1 further requires that Crystal Geyser install an underground storage tank to hold its discharges before it enters the City's sewer system. (AR 8092.) The tank will allow Crystal Geyser to meter and regulate its discharges into the City's sewer system. (AR 8092.) As explained above, the City lacks the authority to require Crystal Geyser to install underground storage tanks. How Crystal Geyser reduces its flows to comply with the Permit's daily maximum flow limitations is not within the City's purview or authority. The City's ability to

regulate Crystal Geyser's flows begins when the wastewater enters the sewer system. (AA, 281-82, § 13.56.270, subd. (A).)

While the City lacks the authority to require underground storage tanks, the County's conditional use permit may incorporate such a requirement. Indeed, the County did incorporate all Mitigation Measures contained in the Mitigation Monitoring and Reporting Plan into its conditional use permit. (See AR 1549.)

Therefore, in approving the Permit, the City regulated and mitigated Crystal Geyser's discharges to the fullest extent of its authority under the Municipal Code.

CONCLUSION

Appellants improperly attempt to attack the EIR throughout their Opening Brief, especially in reference to the EIR's analysis of impacts from the Plant's wastewater streams. Where a responsible agency's decision is challenged, and that decision was based on an EIR prepared and certified by a lead agency, the EIR is presumed adequate and review is limited to the issues associated with the responsible agency's jurisdiction. (*ALARM, supra,* 12 Cal.App.4th at p. 1793; Pub. Resources Code, §§ 21002.1, subd. (d), 21153, subd. (c); CEQA Guidelines, §§ 15050, 15051, 15096, subd. (a).)

evidence in the record regarding the wastewater impacts and fulfilled its obligations to mitigate those impacts from the Project through the Permit. The City acted properly in making its determination regarding the Project and issuing the Permit.

For the reasons set forth above, the Court should affirm the trial court's judgment denying the Petition for Writ of Mandate.

Respectfully submitted,

DATED: June ___, 2021

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DATED: June 18, 2021

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to rule 8.204(c) of the California Rules of Court, the enclosed "Respondent's Brief" was produced using 13-point Century Schoolbook type, and including footnotes, but excluding the tables, the Certificate of Service, and this certificate, contains 8,064 words. Counsel relies on the word count of the computer software used to prepare this brief.

DATED: June 21, 2021

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CERTIFICATE OF SERVICE

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in this action. I am employed by White Brenner LLP and my business address is 1414 K Street, 3rd Floor, Sacramento, CA 95814. I caused to be served the following document(s):

RESPONDENTS' AND REAL PARTY IN INTEREST'S JOINT BRIEF

☒ By United States Mail. I enclosed the DOCUMENTS in a sealed envelope or package addressed to the PERSON's at the addresses set forth below.

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☒ placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business' practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepared.

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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. Executed on this 21st day of June 2021, at Sacramento, California.

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