C091012 (related Case No. C090840)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

WE ADVOCATE THOROUGH ENVIRONMENTAL REVIEW, INC.; and WINNEMEM WINTU TRIBE
Plaintiffs/Appellants
v.

CITY OF MOUNT SHASTA; and CITY OF MOUNT SHASTA CITY COUNCIL,
Defendants/Respondents

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

APPELLATE CASE NO. **C091012**
Siskiyou County Superior Court Case No. SCCV-CVPT-180531
Honorable Karen Dixon

APPELLANTS' OPENING BRIEF

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and Winnemem Wintu Tribe

TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL THIRD APPELLATE DISTRICT, DIVISION	COURT OF APPEAL CASE NUMBER: C091012
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 153721 NAME: Donald B. Mooney FIRM NAME: Law Office of Donald B. Mooney STREET ADDRESS: 417 Mace Boulevard, Suite J-334 CITY: Davis STATE: CA ZIP CODE: 95618 TELEPHONE NO.: 530-758-2377 FAX NO.: 530-212-7120 E-MAIL ADDRESS: dbmooney@dcn.org ATTORNEY FOR (name): We Advocate Through Environmental Review, et al	SUPERIOR COURT CASE NUMBER: SCCV-CVPT-180531
APPELLANT/ PETITIONER: We Advocate Through Environmental Review, et al RESPONDENT/ REAL PARTY IN INTEREST: City of Mount Shasta, et al.	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

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1. This form is being submitted on behalf of the following party *(name)*: We Advocate Through Environmental Review

2. a. [X] There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. [ ] Interested entities or persons required to be listed under rule 8.208 are as follows:

	Full name of interested entity or person	Nature of interest *(Explain):*
(1)		
(2)		
(3)		
(4)		
(5)		

[ ] Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: April 15, 2021

Donald B. Mooney
(TYPE OR PRINT NAME)

(SIGNATURE OF APPELLANT OR ATTORNEY)

Form Approved for Optional Use
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APP-008 [Rev. January 1, 2017]

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Cal. Rules of Court, rules 8.208, 8.488
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1. This form is being submitted on behalf of the following party (*name*): WINNEMEM WINTU TRIBE

2. a. [X] There are no interested entities or persons that must be listed in this certificate under rule 8.208.
   b. [ ] Interested entities or persons required to be listed under rule 8.208 are as follows:

	Full name of interested entity or person	Nature of interest (Explain):
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Date: April 15, 2021

Donald B. Mooney
(TYPE OR PRINT NAME)

(SIGNATURE OF APPELLANT OR ATTORNEY)

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INTRODUCTION

Appellants We Advocate Thorough Environmental Review ("WATER") and the Winnemem Wintu Tribe ("Tribe") (collectively "Petitioners") challenge the City of Mount Shasta's March 26, 2018, approval of the Industrial Waste Discharge Permit for Crystal Geyser IWD-2018-01 ("IWDP" or "Permit"); and the conclusion that the Permit was adequately reviewed by the City, and also adequately considered in the Environmental Impact Report ("EIR") prepared by the lead agency, and Siskiyou County (SCH# 2016062056)[1] under the California Environmental Quality Act ("CEQA"), Public Resources Code section 21000 et seq. The IWDP allows the Real Party in Interest, Crystal Geyser Water Company ("CGWC") to discharge wastewater to the City's wastewater collection and treatment system under one of the wastewater disposal "options" set forth by the County, and requires construction of an off-site sewer system upgrade to accommodate flows. AR 7975.[2] CGWC's domestic wastewater and industrial process wastewater will go to the City treatment facility, while industrial "rinse"

[1] Appellants also challenged Siskiyou County's December 12, 2017 certification of the EIR and approval of what is referred to as the Crystal Geyser bottling facility project ("Bottling Facility"), Case No. SCCV-CVPT-2018-41 ("County Case"). The County Case is also on appeal to this Court, Case No. C090840.

[2] References to the administrative record of proceedings are to "AR" and the page number.

wastewater will go to an on-site leach field. AR 7974-7983.

During the County's administrative review process of the CGWC bottling facility operations and the EIR, the City submitted comments objecting to various aspects of the project and the wastewater sections of the EIR. AR 21043 and 22183.

The significant impacts associated with the IWDP are those to water quality and the off-site impacts that will occur as a result of the construction necessary to upgrade the City sewer system to accommodate flows from the Bottling Facility project. Water quality impacts are two-fold: the impacts resulting from the discharges to the City wastewater treatment plant ("WWTP"); and impacts to groundwater that will result from discharges to the leach field. The IWDP approval also has off-site impacts that were not adequately addressed, reviewed, and mitigated by the City.

After the County approved the proposed bottling operation and certified the EIR, the City, despite being a responsible agency for the Project, failed to make any formal findings in compliance with Guidelines section 15091.[3] The City also failed to adopt mitigation measures to mitigate potentially significant impacts of the approval of

[3] Cal. Code Regs, tit. 14, will be referenced as the "Guidelines."

the IWDP and the associated sewer facility improvements. Guidelines § 15096(g)(1); and *see RiverWatch v. Olivenhain Municipal Water Dist.* (2009) 170 Cal.App.4th 1186, 1207, *as modified (Jan. 30, 2009)*.

It is difficult to assess the City's analysis and reasoning in issuing the IWDP, as it did not make the required findings. It is also odd that the City submitted more than 20 pages of comments on the failings of the County's environmental review (AR 719-730 and *see* 2444-64), and yet chose not to even articulate findings when it approved the IWDP based upon that same environmental document.

The trial court found that the City "considered" the impacts of the off-site improvements to the City sewer system and met all of its duties as a responsible agency by commenting on the Draft EIR and relying in its brief on the conclusions in the Final EIR without having made any of its own CEQA findings. AA 443-344.[4] The City was required to make its own findings, and the trial court's judgment was in error.

The trial court also erred when it declined to take judicial notice of two letters that were inadvertently left out of the Administrative Record ("Record"), despite the fact that the two letters were submitted during the administrative review and referred to by a responsive document in

[4] References to the Appellants' Appendix are cited as "AA" [page number].

the Record from the City Attorney. The two letters were received and acknowledged by the City during its administrative process and were properly part of the Record. *See* AA 224-234 (Exhibits A and B), and 441-42.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

The City acted as a Responsible Agency under CEQA in issuing the IWDP, and relied upon the EIR for the "Bottling Facility" project approved by the County on December 12, 2017.[5] AR 19620. The Bottling Facility project and EIR were approved by the County after an appeal on December 12, 2017. AR 1.

The County's EIR was based upon a project description that was unstable and anything but finite, as there is no upper limit on the amount of groundwater that may be extracted (and as a result, no upper limit on bottling production and wastewater). *See* AR 1587. The County

[5] On December 12, 2017, the County certified the EIR and approved a Conditional Use Permit for a "caretaker's residence" on the CGWC property where the Bottling Facility is located. The "project" the County reviewed is referred to here as the "Bottling Facility," but the County continues to assert that it has *no authority* over *any of the activities* of the CGWC water extraction and bottling plant other than the caretaker's residence and other minor building permits for outbuildings, etc. AR 1587 ("Proposed Project, which includes the by-right operations of the bottling facility over which the County has no approval authority, and the caretaker residence, for which the County has discretionary approval authority to issue a conditional use permit.")

approvals did not include any development agreement or mitigation agreement as has previously been the practice of the County in authorizing use of the bottling facility. AR 1587 (bottling facility "by-right" and County claims no approval authority).

At the time it approved the IWDP the City did not make any CEQA findings, and so there is no way to determine the factual basis and rationale for any of the City's conclusions.

A. The Bottling Facility project.

The Bottling Facility site is bound by residential housing and a few industrial businesses, as well as a KOA campground and a railroad line. AR 7962. The County's General Plan designates the Project site as Woodland Productivity and Building Foundation Limitations: Severe Pressure Limitations Soils. The central project site that contains the plant and leach field is zoned M-H (Heavy Industrial), the northern project site that contains the production well is zoned AG-2 (Non-Prime Agricultural), and the eastern project site is zoned R-R-B-1 (Rural Residential Agricultural District). AR 7966.

The Bottling Facility site is located on 118 acres adjacent to the City of Mount Shasta. AR 2265. The bottling plant was previously developed and operated by Dannon Waters of North America, which then became Coca-Cola Dannon ("CCDA") and was operated for

approximately ten years between 2000 and 2010. AR 2265. CGWC purchased the property in 2013. *Id.*

The "project" reviewed in the EIR consists of the operation of a bottling facility for the production of sparkling water, flavored sparkling water, juice beverages and tea. AR 227 and 7969. The bottling plant would use groundwater from the aquifer through an existing production well (DEX-6) in the northern area of the site. "Bottling operations would consist of: (1) water processing (carbonation, tea brewing, juice beverage batching); (2) blow molding of polyethylene terephthalate (PET) plastic bottles from purchased preforms; and (3) filling bottles with product and packaging." AR 7970.

Total production at the bottling plant is relevant to the City's review of the IWDP because the amount of water extracted and bottled will have a direct impact on the amount of wastewater generated by CGWC. The project description includes a "scenario" for predicting water consumption, wastewater production, traffic and air quality impacts. AR 7969-7970. The assumption is not based on substantial evidence, as there is nothing requiring CGWC to remain below a certain level of groundwater extraction, production and/or vehicle trips, and the County and CGWC are in agreement that the County has no authority to limit extraction or bottling activity. AR 1587. The County set up the

following conundrum: the EIR could not evaluate expansion of the bottling plant because that would be "speculative"; but the EIR *could speculate* that CGWC would not expand, even though there is nothing in the Bottling Facility approval that would prevent it from doing so. The EIR simply assumes that the Bottling Facility will engage in the same level of production as the previous site owner, CCDA Waters. AR 7969-70.

The EIR for the Bottling Facility project included four wastewater treatment options. AR 7974-7983. The options varied with respect to the destination of "domestic wastewater flows", "industrial process wastewater flows" and "industrial rinse wastewater flows." Option 1 would result in all flows going into the City's sewer system and to the City WWTP. *Id.* With Option 2, all flows would go to the WWTP except for industrial rinse wastewater, which would go into the onsite leach field. Option 3 would send domestic flows only to the WWTP and industrial rinse water and industrial process wastewater would go into the leach field, while Option 4 would be similar to Option 3 with some industrial process wastewater being used in an irrigation application. *Id.* Option 4 was deleted in the Final EIR. AR 1998. The IWDP processed by the City approves the discharge of wastewater and triggers the need for the off-site sewer facility improvements.

The City submitted comments to the County regarding various aspects of the Draft EIR, and the Final EIR included responses to the comments. AR 719-730 and 1617-24. The City retained an expert, ENPLAN, to review the response to the City's comments. AR 424-445. Thereafter, with additional input from ENPLAN, the City provided a comment at an October 10, 2017, County Planning Commission meeting. AR 671 and 19785-89.

In its letter to the City Manager ENPLAN noted that the City's preference was Option 1 (all wastewater flows to be discharged to the City WWTP) and noted that the Draft EIR stated that "[t]he initial wastewater treatment option will be selected prior to project approval" but that it did not appear the County intended to follow through with that commitment. AR 19785. ENPLAN's letter stated that Option 1 was the only option acceptable to the City and surmised that the County could not take action until this issue was resolved. *Id.*

The wastewater disposal option was *not* determined by the County before it approved the project and so the City considered the various options, and ultimately approved the IWDP providing that all waste water will go the WWTP, except that industrial rinse water will *not*, and may be discharged to the on-site leach field. *See* AR 374-375 and 404.

B. Administrative process in City of Mt. Shasta

On August 12, 2016, the City prepared a Draft IWDP for the Bottling Facility. AR 19842. CGWC responded to the Draft IWDP with extensive comments. AR 19842-19847. The City then requested that the County include a copy of the draft permit in the environmental review (AR 19848-19851), and so the draft was attached to the EIR. AR 6.

After County approval of the Bottling Facility project and certification of the EIR, at a special meeting on February 5, 2018, the City Council was set to consider a revised version of the IWDP but continued the item to a future meeting. AR 2. The item was on the agenda again for a February 26, 2018, City Council meeting, but was again continued. AR 125. On March 26, 2018, the City Council again considered the revised IWDP, and by a vote of 3 to 2 approved the permit. AR 248-249.

On February 23, 2018, Appellants' counsel sent a letter to the City regarding the IWDP. AA 224-234. The letter informed the City that it must make an *independent* decision on the adequacy of the EIR and make CEQA findings. On March 16, 2018, Appellants' counsel sent another letter to the City, discussing the shortcomings in the City's compliance with CEQA. *Id.*

The March 26, 2018 City Council meeting packet included a staff report less than a page long, with an attached resolution containing the following language regarding the EIR for the Bottling Facility project:

> WHEREAS; The City Council has 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 alternate waste discharge disposal methods. AR 254.

This Resolution was ultimately adopted by the City Council. AR 691. Notably, the City did not make any independent findings regarding the environmental impacts of granting the IWDP. AR 254 and 691. In addition to its failure to adequately analyze and make findings regarding the potentially significant impacts relating to use of the leach field, the City failed to address the fact that CGWC's activities under the IWDP will require the completion of the off-site sewer pipeline upgrades. The EIR for the Bottling Facility project included numerous mitigation measures related to the work on the City's sewer infrastructure (Mitigation Measures 4.3-1, 4.3-2, S-4.3-1, S-4.3-2, S-4.3-3, S-4.4-2, and S-4.5-1 at AR 1940-1946). The City failed to adopt those measures as required by CEQA. *Id.*; Public Resources Code ("PRC") § 21002.1(d) and Guidelines § 15096(a). In fact, the City administrative review process did not include one mention of these Mitigation Measures.

The City argued to the trial court that the sewer facility improvements required in conjunction with the issuance of the IWDP were "outside the scope of the City's authority." AA 257. This argument is not well taken in light of the fact that in 2014 the City issued a Notice of Preparation as the lead agency for the *very same sewer facility improvements* that it intended to undertake in order to facilitate the use of the bottling plant by CGWC. AR 20100-107. CGWC was one of the entities funding the City's review of the sewer line improvements. AR 20100. The 2014 Notice of Preparation stated that the project was needed in order to "improve capacity, to prevent storm water infiltration and eliminate manhole surcharging that presently occurs… and to accommodate additional wastewater flows from the Crystal Geyser bottling facility." AR 20100. The City indicated at that time that the facilities were operated by the City and are "publicly owned." AR 20102. In response to the County's Notice of Preparation ("NOP") for the EIR at issue in this case, the City itself submitted a comment letter and attached hundreds of pages of comments the City had received in response to its 2014 NOP. AR 2444-3914.

According to the City's 2014 NOP for the sewer line improvement project, the City's 1992 Master Sewer Plan apparently indicated that

section of the interceptor sewer would reach capacity by 2001, and in 2003 the City's evaluation of its facilities revealed that a portion of the interceptor required replacement. AR 20102. In 2006, the City obtained funding and replaced the most essential segment of the system but continued to seek funding to replace upper portions identified as deficient. AR 20102. In 2013, CGWC contacted the City regarding their connection to the "City's sewer system," indicating they wished to reopen the bottling plant. AR 20103. When the City told CGWC about the current limitations in capacity "Crystal Geyser offered the City up to $3 million, in matching EDA grant funds, to fund improvements to the sewer system." AR 20103.

In response to the NOP issued by the County regarding the EIR at issue in this case, the City sent a comment stating "[t]he project site abuts the City of Mt. Shasta municipal limits, is within the City's sphere of influence, and is within the City's municipal sewer system service area boundary." Arguments today that the sewer improvements are not within the City's authority are not well taken when viewed against the City's letters and the fact that in 2014 the City's sewer system was treated as being well within the "scope" of its authority.

During the County's environmental review process, the City requested that a draft of the IWDP be attached to the EIR and did so

because this would allow review of the potential impacts. The Draft EIR for the Bottling Facility project did have a draft IWDP attached that provided information regarding potential impacts that would result from the waste-streams. *See* AR 6 and 19848-19851. Thereafter, the City revised the permit to include three waste-streams that were not considered in the EIR. AR 141. The final Permit also replaced the type of anti-scaling agent allowed at the plant from "Boilercare" to "Boilermate." AR 20912.

Two letters from Appellants' counsel stated that the revised permit deviated significantly from the permit analyzed in the EIR, and that there was no evidence in the record to support the City's conclusions that these waste-streams would not have significant impacts. AA 224-234 (Exhibits A and B). The City Attorney responded to the letters and argued that the changes were not significant. AR 19783-19784.

On March 20, 2018, the attorney for the City presented a memorandum to the City manager regarding the letters from Appellants' counsel, dismissing concerns about the significant changes in the draft IWDP attached to the EIR and the one being considered by the City, first by misstating the requirements of CEQA with respect to changes in a project and concluding that, in his opinion, the new permit did not "contain any information that would require further or subsequent

environmental review." AR 19783-19784. The memorandum from the City attorney did not even address the fact that as a Responsible agency the City was required to exercise its independent judgment and make CEQA findings.

As set forth in detail below, the City failed to comply with CEQA by failing to make independent findings and refusing to adopt mitigation measures applicable to the work to be performed on the City's sewer infrastructure.

II. PROCEDURAL HISTORY OF THE LITIGATION

On May 1, 2018, Appellants timely filed their Petition for Writ of Mandate, challenging the City's approvals under CEQA. AA 6.

The trial court held the writ hearing on this matter on June 7, 2019, and issued its statement of decision denying the petition on October 17, 2019. AA 456-65. Judgment was entered on December 11, 2019. AA 453-54. On November 25, 2019, Appellants timely filed their Notice of Appeal. AA 435.

STATEMENT OF APPEALABILITY

This is an appeal from a final judgment entered on December 11, 2019. AA 453-54. Code Civ. Proc. § 904.1(a)(1) (appeal may be taken from final judgment); *see also* California Rules of Court, Rule 8.104.

STANDARD OF REVIEW

CEQA's dual standard of review is well-settled. A court will "determine de novo whether the agency has employed the correct procedures, 'scrupulously enforc[ing] all legislatively mandated CEQA requirements," while according "greater deference to the agency's substantive factual conclusions." *Banning Ranch v. City of Newport Beach* (2017) 2 Cal.5th 918, 935, citations omitted ("*Banning Ranch*"). Thus, when reviewing an agency's CEQA compliance, the "court must adjust its scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of the improper procedure or a dispute over the facts." *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435 (*"Vineyard"*); and *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 515-16 (*"Fresno"*).

Whether an EIR "omit[s] essential information," or fails to address an issue, is a procedural issue subject to de novo review. *Banning Ranch, supra,* 2 Cal.4th at 935; and *Fresno, supra,* 6 Cal.5th at 515. By contrast the courts use the "substantial evidence" test to review an agency's "substantive factual conclusions." *Id.* "Substantial evidence" is "evidence of ponderable legal significance, reasonable in nature, credible, and of solid value, evidence that a reasonable mind might

accept as adequate to support a conclusion." *American Canyon Community United for Responsible Growth v. City of American Canyon* (2006) 145 Cal.App.4th 1062, 1070.

Here, Appellants have challenged the City's approval of the IWDP and raise the following issues: (1) whether the City erred in failing to make any CEQA findings and failing to adopt the mitigation measures applicable to the portions of the project within the City's scope of authority; and (2) whether the City erred in relying on the EIR's analysis of the impacts of wastewater disposal in light of the significant changes made to the draft IWDP considered in the EIR.[6] The first issue falls squarely under the *de novo* standard applicable to a determination of whether the agency complied with the procedural requirements of CEQA or failed to provide sufficient information. The second issue includes analysis of whether the City followed the proper procedures for reviewing the changes to the IWDP post-certification of the EIR, and an issue of substantial evidence regarding the conclusion that the new

[6] Petitioners have not included on appeal their claim that the City failed to meet the requirements of Assembly Bill 52 (Chapter 532, Statutes 2014) ("AB 52"). Because of the evolving nature of the new CEQA sections requiring consultation with tribes and analysis of impacts to trial cultural resources, the claims arising from AB 52 were not carried forward.

waste streams would have no significant impacts. The inquiry is complicated by the lack of findings.

As the Supreme Court instructed in the landmark *Friends of Mammoth v. Board of Supervisors* case, CEQA must be construed broadly to "afford the fullest possible protection to the environment within the reasonable scope of the statutory language." *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259 (superseded by statute on other grounds).

The City approval was not supported by EIR analysis of all of the waste-streams included in the final IWDP, and the City ignored its obligation to make the required CEQA findings and adopt mitigation measures applicable to the sewer facility improvements required in conjunction with the issuance of the IWDP. The City's errors were prejudicial. See *Banning Ranch, supra,* 2 Cal.5th at 942; and *Fresno, supra,* 6 Cal.5th at 515.

ARGUMENT

A. The trial court erred in denying the request for judicial notice of two letters submitted to the City and acknowledged by the City Attorney.

When the Record of Proceedings was completed and certified by the City, two letters had inadvertently been left out, and Appellants

requested that the trial court take judicial notice of the letters. AA 224-34.[7]

The letters were written by Appellants' counsel and submitting during the City's administrative process and were mistakenly left out of the documents as they were compiled for the record. AA 224-234 and 346-47. Appellants' counsel made a declaration stating that the letters had been submitted on the dates appearing on the letters and explained how they had been inadvertently left out of the Record. *Id*. The letters fell within the scope of PRC section 21167.6(e)(6), (6). "All written comments received in response to, or in connection with, environmental documents prepared for the project, including responses to the notice of preparation."

Respondents opposed the request for judicial notice in the trial court, stating that the letters were not official records of the City and constituted "extra-record" evidence. AA 318-322. As noted above, counsel declared under oath that the letters were part of the record and had inadvertently been left out. Further, the City Attorney responded to

[7] The Request for Judicial Notice filed in the trial court also sought notice of the Record of Proceedings in the related case against the County. That request is not included here because the Assembly Bill 52 arguments raised in the trial court have not been included on appeal. Because of the evolving nature of the laws and policies surrounding Tribal consultation requirements Petitioners do not seek review of the Assembly Bill 52 issues.

both of the letters *at the time the letters were received*. AR 19783-19784.

The trial court simply stated that it would not take judicial notice of the letters because they "are not helpful to the court in determining the facts of the case." AA 416-17. The trial court did not apply the appropriate legal standard, and this ruling was in error.

"The contents of the administrative record are governed by subdivision (e) of section 21167.6, which begins: 'The record of proceedings shall include, but is not limited to, all of the following items:....' Subdivision (e) then enumerates 11 categories of material that must be included in the administrative record." *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48, 63 ("*Madera"*). Inclusion of these record documents is mandatory. *Id.*

The trial court's decision to omit the record documents is reviewable by this Court, with the trial court's findings of fact subject to a substantial evidence standard, and its conclusions of law subject to *de novo* review. *Madera, supra,* 199 Cal.App.4th at 65-66.

In this case, the trial court did not make a finding of fact so much as a statement that the missing record documents were not helpful. AA 416-17. The law mandates that letters submitted to a public agency regarding its review of a project are part of the record of proceedings for

the purposes of a CEQA challenge. *Madera, supra,* 199 Cal.App.4th at 63. The trial court record shows that the letters were submitted to the City and responded to during the CEQA review process, and the legal conclusion that they are not part of the record under the PRC because they are not helpful was an error of law and should be reversed.

B. The City erred in failing to make CEQA findings and adopt mitigation measures.

To comply with CEQA, the responsible agency must consider the final EIR prepared by the lead agency and reach its own conclusions on whether and how to approve the proposed project. Guidelines § 15096(a) and (f). Before reaching a decision, a responsible agency must consider the environmental effects identified in the EIR of those activities that it is required to approve or carry out, and it must independently decide whether to require additional environmental documentation. PRC § 21002.1(d); Guidelines § 15096(a) and (f).

The trial court found that while the City had considered the impacts of the off-site improvements to the City sewer system, it met all of its duties as a responsible agency by simply commenting on the Draft EIR and relying on the conclusions in the Final EIR without making any of its own CEQA findings. AA 443-44. The trial court went on to state that the final permit issued by the City requires CGWC to "complete the

'off-site' sewer improvements in the EIR…" and "[t]he EIR includes a summary of impacts and mitigation measures in Section 2 of the FIER." AA 444. That summary, according to the trial court, "demonstrates that the proposed project's wastewater options 1, 2, and 3 would have less-than significant impact on the environment and therefore no mitigation was necessary." *Id.*

The trial court concluded that the City "determined" (despite the fact that there are no findings to corroborate this assumption) that the off-site sewer improvements may have significant impacts if mitigation measures are not implemented, but that other agencies would be responsible for overseeing the mitigation. AA 444. The record does not support the trial court's conclusion because the City made *no findings* to suggest that this was their rationale.

When the City issued an IWDP that included a condition requiring off-site improvements to the City-owned sewer system, it was required to make written findings regarding the potentially significant impacts that will result from that construction work. PRC §21081. One possible finding is that another agency will be responsible for overseeing mitigation measures (PRC § 21081(a)(2)), but it is not an option to simply approve the project and make no findings such that the public

and a reviewing court have no idea what formed the basis of the approval.

The City's refusal to make findings is particularly troublesome in light of the fact that prior to the County's approval of the Bottling Facility project, the City had submitted detailed comments to the County asserting that many aspects of the EIR were insufficient. *See* AR 19785-19811 and 19825-19836. As set forth above, the City believed that the waste-streams from the Bottling Facility project pose a risk to groundwater quality, and yet the City allowed three additional waste-streams to be included, and these three new items were vaguely identified. AR 20190. With little discussion, and no CEQA findings, the City attorney simply made the conclusion that this "new information" did not trigger the need for additional environmental review. AR 1982. This is insufficient.

A responsible agency, like a lead agency, must make the findings required by Section 21081 and Guidelines section 15091, and must make a statement of overriding considerations as required by Guidelines section 15093. Guidelines § 15096(h).

If a proposed project would have significant adverse effects on the environment, CEQA requires a responsible agency to prepare findings describing how those effects would be reduced or avoided. Under

California PRC Section 21081(a), several findings are possible. They include:

1. Changes or alterations have been required in, or incorporated into, the project which mitigate or avoid the significant effects on the environment.
2. Those changes or alterations are within the responsibility and jurisdiction of another public agency and have been, or can and should be, adopted by that other agency.
3. Specific economic, legal, social, technological, or other considerations, including considerations for the provision of employment opportunities for highly trained workers, make infeasible the mitigation measures or alternatives identified in the environmental impact report.

In the present case, the City issued the IWDP and while it claims that it did nothing more than issue the permit, allowing CGWC to discharge wastewater under the IWDP, sewer facility improvements requiring construction and mitigation of impacts was authorized. AR 7992-996. The City has exercised its authority over the sewer system in the past and acted as the lead agency in conjunction with exactly the same sewer system improvements it now claims are not within the "scope of its authority." AR 20100-107. The approval issued by the

City included the improvements to the City-owned sewer system, and the City abdicated its responsibility to adopt the necessary mitigation measures and a Mitigation Monitoring and Reporting Program ("MMRP").

The City argued to the trial court that it is not responsible for the mitigation measures related to the sewer improvements. AA 252-53. The City argued this despite the fact that the City's own Municipal Code Provides that Chapter 13.56 is intended to provide "adequate regulation of *sewer construction,* sewer use, and industrial waste discharges." AA 274 (Section 13.56.010, emphasis added). The City approval of the IWDP will result in direct impacts as a result of the sewer improvements, and even if the Court determines that these construction impacts are not a "direct" result of the IWDP approval, they are certainly *indirect* impacts as the IWDP includes a condition requiring the improvements. AR 19650; and Guidelines § 15096(g)(1).

The MMRP in the Final EIR notes that CGWC is to implement the mitigation measures and the County will be the agency monitoring compliance. AR 1939-46. For some of the sewer improvement mitigation measures the California Department of Fish and Wildlife ("CDFW"), United States Fish and Wildlife Service ("USFWS") and/or

the Regional Water Quality Control Board is listed along with the County as the monitoring agencies. AR 1939-46.

The City argued to the trial court that these "other agencies" would be responsible for implementing or monitoring mitigation measures for the impacts of the sewer improvement work. AA 257. This reliance on other agencies is insufficient because the County itself has no ability to enforce the mitigation measures, and the sewer improvements are within the City's authority and so it was required to at least make CEQA findings stating that the mitigation would be the responsibility of another agency. PRC § 21081(a).

Further, the City is *actually identified* as one of the agencies that will be responsible for monitoring mitigation measure compliance for some of the mitigation measures. This completely belies the argument made in the trial court that the sewer improvement work is beyond the City's scope of authority. AA 252-53. Mitigation Measure S-4.4-1 requires a work stoppage in the event cultural resources are discovered. AR 1944. If artifacts are found, the *City and County* planning departments shall be immediately notified, and the *City and County* will develop mitigation measures. AR 1945.

Mitigation Measure S-4.5-1 also requires participation by the City for implementation and monitoring. AR 1946. The erosion control plan

("ECP") for the off-site sewer improvement activities shall be "prepared and submitted to the City and County for review and approval for the proposed construction activity." AR 1946. The ECP shall be consistent with City land development manual. *Id.*

The City argues that it was not required to make any written findings regarding the potential impacts and mitigation measures for the off-site sewer improvements because the improvements are outside of the scope of its authority, and because the EIR dealt with the impacts and mitigation somehow excusing the City from the task of making findings regarding its own sewer system. These arguments are not compelling in light of the fact that the City is responsible for the facilities it owns, and is even identified as having a role in the applicable mitigation measures.

To compound the problem created by the City's failure to make any findings, the County does not have the clear ability to enforce most of the mitigation measures. The County approval was not for the water bottling facility but for a Conditional Use Permit ("CUP") for the caretaker's residence only. AR 1587. The County and CGWC both insist that the County has no authority over CGWC's activities other than the caretaker's residence. AR 1587. The "conditions" that the County claims will allow it to exert control over CGWC are all

associated with an unnecessary caretaker's residence that was a pretense used to allow the County to act as the lead agency for the EIR. The caretaker's residence, if it is ever constructed, will not even be habitable because of toxic air contaminants. AR 1939. Thus, the County issued a CUP for a caretaker's residence that may only be occupied by a consenting adult for no more than 40 hours per week because of the health risks. *Id.* The residence will not be a "residence" because one may not live there and so there is nothing about the caretaker's residence that could possibly be essential to the operation of the bottling plant. The County's enforcement authority is attached to the CUP for this unnecessary structure, and because CGWC does not need the residence, the County has no true ability to monitor or enforce mitigation measures. This is particularly true with respect to the City-owned sewer system improvement that will be required in order for CGWC to discharge wastewater into the City sewer system under the IWDP.

As set forth above, the City did not make CEQA findings. The City also failed to include any analysis or discussion of the mitigation measures that the EIR identified as necessary with respect to the aspects of the Bottling Facility project over which the City has authority.

The EIR required several mitigation measures for the work to be done to improve the City's sewer collection system (Mitigation Measures 4.3-1, 4.3-2, S-4.3-1, S-4.3-2, S-4.3-3, S-4.4-2, and S-4.5-1 at AR 1940-1946) and the City not only failed to consider or discuss these measures, it failed to adopt the measures and include them in a mitigation and monitoring plan. AR 370-419.

Failure to make the findings required by CEQA is a prejudicial abuse of discretion. *Village Laguna of Laguna Beach, Inc. v. Board of Supervisors* (1982) 134 Cal.App.3d 1022, 1034-1035. In reviewing the record of the City's proceedings, it is as though an EIR was not prepared at all. The resolution approving the IWDP makes no mention of the improvements to the City sewer that will be required as a result of the permit, nor of any aspect of the EIR's analysis. The only statement included is a cursory mention that the "City Council has 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 alternate waste discharge disposal methods." AR 254. The City disclosed no analysis and no findings.

When discussing a lead agency's findings, courts have found that "[t]he writing of a perfect EIR becomes a futile action if that EIR is not adequately considered by the public agency responsible for approving a

project. Indeed, it is almost as if no EIR was prepared at all. ... [¶] Additionally, even though the board may have fully considered the EIR and made a wise and eminently rational decision in approving the proposed project, the board's thinking process, its 'analytic route,' has not been revealed. Only by making this disclosure can others, be they courts or constituents, intelligently analyze the logic of the board's decision." *Village Laguna of Laguna Beach, Inc. v. Board of Supervisors, supra,* 134 Cal.App.3d at 1034-1035. California courts also hold that responsible agencies must make written findings in order to explain its rationale. *Resource Defense Fund v. Local Agency Formation Com.* (1987) 191 Cal.App.3d 886, 896–898, rev. den. July 29, 1987.

In addition to making findings, a responsible agency must incorporate mitigation measures into its findings prior to approving a portion of a project with identified potentially significant impacts. *Citizens for Quality Growth v. City of Mt. Shasta* (1988) 198 Cal.App.3d 433, 442. The fact that the City did not even mention much less adopt the mitigation measures set forth in the EIR for the portions of the Bottling Facility project under the City's jurisdiction compels a finding of prejudice.

The conventional "harmless error" standard has no application when an agency has failed to proceed as required by the CEQA. *Resource Defense Fund v. Local Agency Formation Com.*, *supra,* 191 Cal.App.3d at 898-99. Failure to comply with the CEQA procedures is necessarily prejudicial. *Id.*

C. The City failed to disclose and adequately review the addition of three unanalyzed waste-streams in the final IWDP.

The IWDP approved by the City was a revised version of the Draft IWDP that was attached to the EIR as Appendix I, and it was revised to include: "condensate, boiler blowdown water, [and] cooling tower blowdown water." AR 133-246, at 141. The EIR did not analyze these wastewater streams, and the constituents that will be contained in this wastewater were not disclosed to the public or the decision makers, nor were the potential impacts of treatment of this wastewater analyzed. The City made the cursory conclusion that the new constituents were not significant. AR 19783-19784.

City staff was aware of the additional waste-streams before the County approved the FEIR for the Bottling Facility project, but the City did not notify the County that the Draft IWDP was incorrect. *See* AR 20190. CGWC's consultant explained to the City in January of 2018 that CGWC wished to revise the permit to allow the discharge of the

three wastewater streams to the City WWTP. *Id.* CGWC wished to add condensate and non-contact cooling water to the permit. *Id.* The justification for adding the condensate is that the air compressors at the Bottling Facility are oil free, so this waste-stream would be free of oil. AR 20190.

The non-contact cooling water, according to CGWC's consultant, would consist of "boiler blow down water" and "cooling tower blow down water." AR 20190-20191. These waste streams would contain anti-scaling chemicals, and the consultant made the conclusion that "[w]e anticipate having no problems in meeting the water quality objectives at the monitoring point…." AR 20191.

The City did not explain to the public how or why these additional chemicals would not cause water quality impacts. The data sheets sent to the City by the consultant indicate that Boilermate 1200S should not be discharged into lakes, streams, ponds or public waters. AR 20193. The product has also been identified as a "Hazardous Chemical" as defined by OSHA Hazard Communication Standard, 29 CFR 1910.1200. AR 20198. Boilermate 3300C is also noted for "acute toxicity" and for being a hazardous chemical. AR 20200, 20202, and 20206. These types of hazardous chemicals warranted at least some analysis and discussion.

The City's only response to concerns raised about these new constituents is a statement by Pace Engineering that "an evaluation was conducted and the current permit reflects that evaluation." AR 20904. The IWDP mentions Boilermate products in a footnote, but there is no "evaluation" of the chemicals it contains. AR 20884.

In the trial court, the City argued that the City adequately considered the three new waste streams, citing to an email in the Record from a consultant, stating that they anticipated "having no problems." AA 258, citing AR 20190. This "analysis" was provided internally to someone at the City and was never released to the public nor subject to discussion or peer review.

In response to comments, the City explained to one citizen that "the Public Works Director has discretion to authorize certain waste streams, including condensate, boiler blowdown, and cooling tower blowdown water. Given the quality and quantity of the waste streams, no detrimental effects are anticipated at the WWTP; therefore, the additional waste streams were allowed." AR 20908. The City attorney responded to concerns about the new waste streams raised by Appellants' counsel by concluding that the letters raising the concerns did not submit information that would require further or subsequent

environmental review. AR 19783. Appellants were attempting to submit evidence, they were seeking disclosure.

In the trial court the City argued that there was no need to do any additional environmental review as a result of the addition of the waste streams, and relies upon the "expert opinion" it received from CGWC's consultant (AA 259-62), but the City failed to disclose the information to the public, and failed to consider and make findings in order to support any conclusion in this regard. PRC §21081.

Whether an EIR "omit[s] essential information," or fails to address an issue, is a procedural issue subject to de novo review. *Banning Ranch, supra,* 2 Cal.4th at 935. In this case, the failure to even discuss the impacts associated with constituents that had not been included in the EIR's analysis equates to a failure to disclose essential information, and it was a prejudicial abuse of discretion.

CONCLUSION

The trial court erred in finding that the City met its obligations as a responsible agency simply by submitting comments to the lead agency on the Draft EIR. The City overlooked its obligation as a responsible agency to exercise its independent judgment, make CEQA findings, and adopt the mitigation measures applicable to the portions of the project it was approving and has authority over. The City added hazardous

constituents to the IWDP's allowed waste streams that had never been analyzed in the EIR, then failed to identify a single fact (until the trial court briefing) to support its conclusion that the additions were insignificant. For the foregoing reasons, Petitioners respectfully request that the trial court judgment be reversed.

DATED April 15, 2021

LAW OFFICES OF DONALD B. MOONEY

By /s/
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Attorneys for Appellants
We Advocate Thorough Environmental Review and the Winnemem Wintu Tribe

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, Rule 8.204(c))

I certify that this brief contains 7,139 words, not including tables of contents and authorities, signature block, and this certificate of word count as counted by Microsoft Word, the computer program used to produce this brief.

DATED: April 16, 2021

/s/
Marsha A. Burch

PROOF OF SERVICE

I am employed in the County of Yolo; my business address is 417 Mace Blvd, Suite J-334, Davis, California; I am over the age of 18 years and not a party to the foregoing action. On April 16, 2021, I served a true and correct copy of

APPELLANTS' OPENING BRIEF

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__X__ (by mail) on all parties in said action listed below, in accordance with Code of Civil Procedure §1013a(3), by placing a true copy thereof enclosed in a sealed envelope in a United States mailbox in the Davis, California.

Clerk of the Court
Siskiyou County Superior Court
311 4th Street
Yreka, CA 96097

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on April 16, 2021.

/s/
Donald B. Mooney