

Sierra Club v. Cty. of San Benito

Court of Appeal of California, Sixth Appellate District

March 22, 2017, Opinion Filed

H042915

Reporter

2017 Cal. App. Unpub. LEXIS 1987 *; 2017 WL 1076373

SIERRA CLUB et al., Plaintiffs and Appellants, v. COUNTY OF SAN BENITO et al., Defendants and Respondents; PANOCHE VALLEY SOLAR, LLC et al., Real Parties in Interest and Respondents.

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Prior History: [*1] San Benito County Super. Ct. No. CU-15-00081.

Save Panoche Valley v. San Benito County, 217 Cal. App. 4th 503, 158 Cal. Rptr. 3d 719, 2013 Cal. App. LEXIS 504 (Cal. App. 6th Dist., June 25, 2013)

Judges: ELIA, ACTING P. J.; BAMATTRE-MANOUKIAN, J., MIHARA, J. concurred.

Opinion by: ELIA, ACTING P. J.

Opinion

This is the second time this court has considered a challenge to the underlying solar project under the California Environmental Quality Act (CEQA) (*Pub. Resources Code, § 21000 et seq.*)¹. As in the first appeal, we conclude the project may go forward.

In 2010, respondents County of San Benito and San Benito County Board of Supervisors (collectively, the County) granted a conditional use permit for a solar project to the predecessor of Real Party in Interest Panoche Valley Solar, LLC (PVS). The County also certified an environmental impact report (EIR) for the solar project, which withstood a legal challenge. In 2014, PVS sought to modify the conditional use permit. The County approved a revised use permit and certified the Final Supplemental Environmental Impact Report (SEIR) in 2015. Appellants Sierra Club and Santa Clara Valley Audubon Society (collectively, Sierra Club) filed a writ of mandate challenging the Final SEIR. The trial court rejected that challenge and ordered judgment in favor of the County and PVS. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Original Project and Related [*2] Litigation

PVS's predecessor in interest applied to the County

¹ Unspecified statutory references are to the Public Resources Code.

for a conditional use permit to construct and operate a solar project in the Panoche Valley in 2010. The proposed project was to be located on land that is primarily used for cattle grazing and has been "identified as an important area for conservation of certain animal and plant species, including the San Joaquin kit fox, giant kangaroo rat, and blunt-nosed leopard lizard." (*Save Panoche Valley v. San Benito County* (2013) 217 Cal.App.4th 503, 509-510, 158 Cal. Rptr. 3d 719 (Save Panoche Valley).) "The Panoche Valley [also] is known for high concentrations of wintering raptors, large sparrow flocks, burrowing owls, and other birds." (*Id.* at p. 510.)

The County approved a project to be constructed over five years that would have generated 399 megawatts of power on 3,202 acres of land (the Original Project). The Original Project would have preserved on- and off-site habitat conservation lands to reduce its biological impacts. (*Save Panoche Valley, supra*, 217 Cal.App.4th at p. 527.) Pursuant to CEQA, the County also certified a Final EIR. Appellants and an organization called Save Panoche Valley filed a petition for writ of mandate challenging the sufficiency of the Final EIR under CEQA. (*Save Panoche Valley, supra*, 217 Cal.App.4th 503.) The trial court entered judgment denying the petition. (*Id.* at p. 513.) On appeal, this court affirmed, finding [*3] no error with the County's certification of the EIR or its approval of the Original Project. (*Id.* at pp. 531-532.)

B. The Revised Project

In August 2014, PVS sought to modify the Original Project by reducing both its size and the construction timeframe. PVS requested County approval of a 2,506-acre solar project to be constructed in 18 months (the Revised Project). Like the Original Project, the Revised Project is to be located in the Panoche Valley in an area that is important for the conservation for many federally and state-listed plants and animals, including the San Joaquin kit fox and the giant kangaroo rat. The

Revised Project includes 24,176 acres of habitat conservation lands, more land than the Original Project would have preserved.

C. Supplemental Environmental Impact Reports

The County circulated a Draft Supplemental Environmental Impact Report (Draft SEIR) evaluating the environmental impacts of the Revised Project on December 23, 2014. The Draft SEIR concluded that the Revised Project would cause similar environmental impacts to the Original Project.

The County circulated a Final SEIR on April 10, 2015. The Final SEIR included all comments made to the Draft SEIR and the County's responses to [*4] those comments.

D. Certification of the Final SEIR and Appeal

The County Planning Commission certified the Final SEIR and approved the revised use permit at a noticed public hearing on April 25, 2015. On May 5, 2015, the Sierra Club and another group appealed that decision to the County's Board of Supervisors. On the afternoon of May 19, 2015, the Board of Supervisors held a hearing on the appeals. At the conclusion of that hearing, the Board of Supervisors denied the appeals and adopted a resolution certifying the Final SEIR.

The Sierra Club filed a petition for writ of mandate in the trial court on June 19, 2015, seeking a determination that the Revised Project violates CEQA. The County and PVS answered and, on July 29, 2015, moved for judgment pursuant to *Code of Civil Procedure section 1094*. The trial court granted that motion on September 25, 2015. The Sierra Club timely appealed on October 23, 2015.²

² Ordinarily, an appeal must be taken only from a final judgment, even in a mandamus action. [Citations.] However, there is also case law to the effect that an order denying a petition for writ of mandamus that effectively disposes of the action because no issues remain to be determined is also appealable. [Citations.] [¶] Here, there is no formal judgment in the record, but the order [granting

II. DISCUSSION

A. Overview of CEQA

"[T]he overriding purpose of CEQA is to ensure that agencies regulating activities that may affect the quality of the environment give primary consideration to preventing environmental damage." (*Save Our Carmel River v. Monterey Peninsula Water Management Dist.* (2006) 141 Cal.App.4th 677, 687, 46 Cal. Rptr. 3d 387.) The statute and its implementing regulations, the CEQA Guidelines³, "prescribe[] review procedures [*5] a public agency must follow before approving or carrying out certain projects." (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1092, 184 Cal. Rptr. 3d 643, 343 P.3d 834.)

"With narrow exceptions, CEQA requires an EIR whenever a public agency proposes to approve or to carry out a project that may have a significant effect on the environment." (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal. 3d 376, 390, 253 Cal. Rptr. 426, 764 P.2d 278 (*Laurel Heights I.*)) "An EIR is an 'environmental "alarm bell" whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.' [Citations.] The EIR is also intended 'to demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action.' [Citations.] . . . [As such, t]he EIR process protects not only the environment but also informed self-government." (*Id.* at p. 392.)

judgment] appears to have terminated the trial court proceedings. . . . Accordingly, we will treat the . . . order as appealable." (*JKH Enterprises, Inc. v. Department of Industrial Relations* (2006) 142 Cal.App.4th 1046, 1056, 48 Cal. Rptr. 3d 563.)

³The term "CEQA Guidelines" refers to the regulations for the implementation of CEQA authorized by the Legislature (*Pub. Resources Code*, § 21083), codified in *title 14, section 15000 et seq. of the California Code of Regulations*, and "prescribed by the Secretary of Resources to be followed by all state and local agencies in California in the implementation of [CEQA]." (CEQA Guidelines, § 15000.)

"Under CEQA, the public is notified that a draft EIR is being prepared (§§ 21092 and 21092.1), and the draft EIR is evaluated in light of comments received. ([CEQA] Guidelines, §§ 15087 and 15088.) The lead agency then prepares a final EIR incorporating comments on the draft EIR and the agency's responses to significant environmental points raised in the review process. ([CEQA] Guidelines, §§ 15090 and 15132, *subs. (b)-(d)*.) The lead agency must certify that the final EIR has been [*6] completed in compliance with CEQA and that the information in the final EIR was considered by the agency before approving the project. ([CEQA] Guidelines, § 15090.) Before approving the project, the agency must also find either that the project's significant environmental effects identified in the EIR have been avoided or mitigated, or that unmitigated effects are outweighed by the project's benefits. (§§ 21002, 21002.1, and 21081; [CEQA] Guidelines, §§ 15091-15093.)" (*Laurel Heights I, supra*, 47 Cal.3d at p. 391, *fn. omitted.*)

B. CEQA Did Not Require Recirculation of the SEIR

The Sierra Club contends that the Final SEIR contains "significant new information" that did not appear in the Draft SEIR, such that the County violated CEQA by failing to recirculate it. That contention lacks merit.

1. Legal Principles and Standard of Review

CEQA requires a lead agency to recirculate an EIR when "significant new information" is added to it after public notice is given of the availability of the draft EIR for public review but before certification. (§ 21092.1; CEQA Guidelines, § 15088.5, *subd. (a)*; *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 447, 53 Cal. Rptr. 3d 821, 150 P.3d 709 (*Vineyard*)). In this context, "the term 'information' can include changes in the project or environmental setting as well as additional data or other information." (CEQA Guidelines, § 15088.5, *subd. (a)*.) "New information added to an EIR is

not [*7] 'significant' unless the EIR is changed in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect (including a feasible project alternative) that the project's proponents have declined to implement." (*Ibid.*) "Recirculation is not required where the new information added to the EIR merely clarifies or amplifies or makes insignificant modifications in an adequate EIR." (*Id.*, subd. (b).)

"[T]he lead agency's determination that a newly disclosed impact is not 'significant' so as to warrant recirculation is reviewed only for support by substantial evidence." (*Vineyard, supra*, 40 Cal.4th at p. 447; CEQA Guidelines, § 15088.5, subd. (e) ["A decision not to recirculate an EIR must be supported by substantial evidence in the administrative record"].) In the CEQA context, 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." (CEQA Guidelines, § 15384, subd. (a).) Substantial evidence includes "facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts" (*id.*, subd. [*8] (b)), but not "[a]rgument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment." (*Id.*, subd. (a).)

"An agency's determination not to recirculate an EIR is given substantial deference and is presumed to be correct. A party challenging the determination bears the burden of showing that substantial evidence does not support the agency's decision not to recirculate." (*Beverly Hills Unified School Dist. v. Los Angeles County Metropolitan Transportation Authority* (2015) 241 Cal.App.4th 627, 661, 193 Cal. Rptr. 3d 846 (*Beverly Hills Unified*)).

2. Presence of California Condors

The Draft SEIR stated that no California condors had been observed on the Revised Project site during approximately 25,000 survey hours logged. However, it acknowledged that "[t]he project could result in the loss [of] foraging habitat for golden eagles, California condors, and other special-status raptors." It further stated that "California condors . . . could occur in all areas of the Revised Project site directly and indirectly affected by the construction of the solar arrays, buildings, substation, and other infrastructure or activities."

The Final SEIR added the following information: "Two [California] [*9] condors [were] observed 10.2 miles southwest of the Project Site during Golden Eagle Nest Surveys in 2014." The Sierra Club argues that new information was significant such that CEQA required recirculation.

We disagree. That California condors were observed near the Revised Project site merely confirmed the Draft SEIR's conclusions that California condors could be present and that the Revised Project could impact their habitat. In other words, the new information "merely . . . amplifie[d]" the SEIR; therefore, recirculation was not required. (CEQA Guidelines, § 15088.5, subd. (b).)

The Sierra Club also faults the Final SEIR for not "includ[ing] specific and detailed analysis of impacts to California condor" and not "provid[ing] specific mitigation measures to address impacts from transmission infrastructure and PG&E Upgrades." That argument fails for two reasons. First, it appears under the heading "THE COUNTY FAILED TO RECIRCULATE THE SEIR" and the subheading "SIGNIFICANT NEW INFORMATION REGARDING THE CALIFORNIA CONDOR," and not under its own separate heading as the Rules of Court require. (*Cal. Rules of Court, rule 8.204(a)(1)(B)* ["Each brief must: . . . [s]tate each point under a separate heading or subheading summarizing the point"].) "The purpose of requiring headings and coherent arguments [*10] in appellate briefs is 'to lighten the

labors of the appellate [courts] by requiring the litigants to present their cause systematically and so arranged that those upon whom the duty devolves of ascertaining the rule of law to apply may be advised, as they read, of the exact question under consideration, instead of being compelled to extricate it from the mass." (*Opdyk v. California Horse Racing Bd.* (1995) 34 Cal.App.4th 1826, 1830, fn. 4, 41 Cal. Rptr. 2d 263.) The Sierra Club has forfeited the argument by failing to raise it under a proper heading. (*In re Mark B.* (2007) 149 Cal.App.4th 61, 67, fn. 2, 56 Cal. Rptr. 3d 697; *Heavenly Valley v. El Dorado County Bd. of Equalization* (2000) 84 Cal.App.4th 1323, 1345, fn. 17, 101 Cal. Rptr. 2d 591 ["Each point in an appellate brief should appear under a separate heading, and we need not address contentions not properly briefed"].) Second, the argument is unsupported by citation to legal authority, which also results in forfeiture. (*Tellez v. Rich Voss Trucking, Inc.* (2015) 240 Cal.App.4th 1052, 1066, 193 Cal. Rptr. 3d 403 ["When an appellant asserts a point but fails to support it with reasoned argument and citations to authority, we treat the point as forfeited"].)

3. Impact on Water Resources

The Draft SEIR stated that "approximately 7.86 acres of ephemeral drainage channels would be subject to impacts by the Revised Project." The Final SEIR states that the Revised Project has the potential to impact 8.5 acres of ephemeral drainages. The Sierra Club, in the mistaken belief that the Draft SEIR stated that only [*11] 0.3 acres would be impacted, argues that the increase to 8.5 acres is significant. Given that, in fact, the Final SEIR increased the area of impacted ephemeral drainage channels by just 0.64 acres, we conclude that the new information was not significant.

The Sierra Club also contends that the Final SEIR includes significant new information regarding the Revised Project's impact on surface flow patterns. In the Sierra Club's view, the Draft SEIR stated that the Revised Project was unlikely to alter surface

flow patterns, while the Final SEIR describes expected surface flow pattern changes. As discussed below, the Sierra Club's argument is premised on a misreading of the Draft SEIR.

The Draft SEIR addressed whether the Revised Project would "[s]ubstantially increase the rate or amount of surface runoff in a manner which would result in flooding on- or offsite," an impact that "would be considered significant and would require mitigation" The Draft SEIR concluded it would not, stating "[b]ecause the majority of the project site occupies relatively flat terrain, it is not anticipated that the grading activities for the Revised Project would result in changes to drainage patterns, creating flooding on- [*12] or off-site." The Draft SEIR further noted that any "activities involving alteration of a jurisdictional drainage channel" would be carried out in "compliance with U.S. Army Corps of Engineers (USACE) regulations and [that] Best Management Practices . . . would [be implemented to] ensure that potential impacts remain less than significant (Class III)." Finally, the Draft SEIR concluded that the Revised Project "would not interfere substantially with drainage patterns," while noting that "alteration of drainage patterns" would occur in "the immediate vicinity of the project construction and operation locations"

As noted, the Sierra Club reads the Draft SEIR as asserting "that surface flow patterns are not likely to change." That reading appears to be based on the statement "[b]ecause the majority of the project site occupies relatively flat terrain, it is not anticipated that the grading activities for the Revised Project would result in changes to drainage patterns, creating flooding on- or off-site." But the Sierra Club ignores the phrase "creating flooding on- or off-site." The apparently misplaced comma before that phrase may be to blame. In any event, the context in which that statement [*13] appears—in a paragraph addressing whether the Revised Project would "[s]ubstantially alter the existing drainage pattern of the site in a manner that results in flooding on- or offsite"—is illuminating. Plainly,

the County's conclusion was that any changes to drainage patterns would not create flooding. Elsewhere, the Draft SEIR concluded that the Revised Project "would not interfere *substantially* with drainage patterns," while acknowledging that "alteration of drainage patterns" would occur. (Italics added.) In our view, the Draft SEIR disclosed that the Revised Project would "alter[] . . . drainage channel[s]" but concluded that any changes to drainage patterns would not result in flooding or be otherwise substantial.

The California Department of Fish and Wildlife requested that "the County clarify the description of proposed stream alterations." In response to that comment, the County sought to "clarify the hydrology flows across the site" in the Final SEIR.⁴

⁴The full added text is as follows: "In general, along the eastern perimeter road, the majority of surface flows from offsite upland areas will be intercepted by a channel (brow ditch) located on the upland side of the road. The flows are then conveyed to either a low water crossing, culvert, and/or discharged at the end of the channel. At the downstream end of the culvert or end of the channel, the surface grade will be transitioned and flattened from a channel shape to a level spread, so the flows are converted from concentrated flows to sheet flows. Similarly, the low water crossings will act as the spreader, and the proceeding surface grades will continue to spread and level out, promoting the transition to sheet flows. Rip rap or other energy dissipation BMPs will be used in the channel and surface grade transitions as needed to ensure the flows are converted from concentrated flows to sheet flows consistent with pre-development hydrologic conditions. In areas where no channel is adjacent to the perimeter road, upland offsite flows will sheet flow across the road in the same manner as predevelopment. [¶] Once in the main interior of the site, the stormwater runoff will sheet flow to its respective main water course; either to Las Aguilas Creek, the unnamed north-south tributary into Las Aguilas Creek, one of four detention ponds, or Panoche Creek. The stormwater detention ponds are located within the western half of the project footprint. These ponds are designed to intercept the sheet flows from respective subbasin watershed and to attenuate the additional flows from the Project's added impervious surfaces. Attenuation from the ponds will be achieved by volume storage and discharge via a riser structure and outlet pipe. Full drawdown and discharge from each detention pond is to occur within 24 hours. The outlet pipe discharge will have outlet protection rip rap aprons that are designed in accordance with state and local standards. The rip rap aprons are designed to dissipate the energy and spread the flows. [¶] Downstream discharge of flows from the western half of the Project Footprint will enter into its respective culvert or bridge along Little Panoche Road. Discharge from the eastern half of the Project Footprint will sheet flow into the Las Aguilas Creek. Flows from both sides of the site will ultimately

The Sierra Club argues that the added text constitutes significant new information because "the assertion that surface flow patterns are not likely to change . . . is negated by the lengthy discussion of how surface flow patterns are expected to change." [*14] But, as discussed above, the Draft SEIR contained no such assertion. Thus, contrary to the Sierra Club's claim, the Final SIER does not contain an about-face regarding the Revised Project's impacts on surface hydrology.

There is substantial evidence to support the County's determination that the revision to the water resources impacts analysis did not warrant recirculation. The Draft SEIR disclosed that the Revised Project would alter drainage patterns, but in a manner that would not result in flooding. The revision was prompted by a request for clarification regarding the hydrology flows across the site and merely clarified how the Revised Project would impact those flows. The Final SEIR concluded that, with the implementation of a Storm Water Pollution Prevention Plan and certain best management practices, the Revised Project would not change drainage patterns so as to create flooding on- or off-site, degrade water quality due to erosion and sedimentation, or create increased runoff. Those conclusions are supported by substantial evidence. Specifically, the conclusion that drainage pattern changes will not cause flooding is supported by a February 24, 2015 Storm Water Hydrology and [*15] Hydraulics Report completed by AMEC, PVS's consultant. That report states that "[p]roposed drainage features onsite include drainage channels along the east and west perimeter roads, low water crossings, culverts and detention ponds. All drainage features are designed to safely convey the 100-year storm event to ensure there will not be any adverse impacts to downstream properties and features." With regard to erosion and sedimentation, AMEC's February

be conveyed to the confluence of Las Aguilas Creek and Panoche Creek. The culverts and bridges along Little Panoche Road as well as the confluence of the two major creeks will be designed so that post-development runoff flow rates do not exceed pre-development runoff flow rates."

2015 Stormwater Pollution Prevention Plan outlines best management practices designed to control erosion and sediment. The Stormwater Pollution Prevention Plan also provides that post-construction runoff reduction will be achieved by permanent measures installed during construction—namely, retention basins.

In view of the foregoing, we conclude the revision did not deprive the public of a meaningful opportunity to comment on a substantial adverse environmental effect. "Recirculation [is] intended to be the exception, rather than the general rule." (*Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1132, 26 Cal. Rptr. 2d 231, 864 P.2d 502 (*Laurel Heights II*)). This case is not the exception.

C. Failure to Address Information Regarding the Drought's Impact on Species

The Sierra Club contends that the Final SEIR failed to address significant [*16] new information about the impact of California's drought on the Panache Valley's San Joaquin kit fox and giant kangaroo rat populations. For that argument, the Sierra Club points to a March 20, 2015 report by William Bean, Assistant Professor of Wildlife at Humboldt State University. In 2014, Professor Bean collected genetic samples from rats in the Ciervo-Panoche Natural Area and the Carrizo Plain National Monument. He "found significantly fewer giant kangaroo rats than in previous years," reporting that "[t]rap success for new individuals in 2011 was 16.8%; in 2013 trap success had declined to 9.9%[:] [i]n 2014, trap success was 1.5%." The Sierra Club argues that the 2015 Bean report has implications for the San Joaquin kit fox as well because San Joaquin kit foxes prey on giant kangaroo rats. The Sierra Club submitted the 2015 Bean report to the Board on May 19, 2015 as part of its appeal.

1. The Nature of the Challenge and Standard of Review

The precise nature of the Sierra Club's argument is somewhat unclear.

The Sierra Club faults the County for not recirculating the SEIR "based upon changed circumstances and significant new information regarding California's historic drought." And yet, its [*17] argument is *not* that the County added new information to the SEIR about the drought's impacts and failed to recirculate it. Instead, its contention is that the County *should* have added such information. It is unclear whether [section 21092.1](#) and CEQA Guidelines [section 15088.5](#) govern in that circumstance, although at least one case, [Chaparral Greens v. City of Chula Vista](#) (1996) 50 Cal.App.4th 1134, 58 Cal. Rptr. 2d 152, indicates they do. (*Id.* at p. 1147 [where the lead agency failed to revise or recirculate an EIR based on new information, applying the "significant new information" standard and reviewing the agency's "implicit decision not to recirculate the [EIR (i.e., the decision that the new information was not 'significant') . . . [for] substantial evidence"].)

Inconsistently with its failure to recirculate argument, the Sierra Club argues that the 2015 Bean report required the County to prepare a supplemental EIR pursuant to [section 21166](#) and CEQA Guidelines [section 15162](#). "[Public Resources Code section 21166](#) and [CEQA] Guidelines [section 15162](#) mandate that once a public agency has prepared an EIR for a project, no further EIR is required unless either (1) substantial changes are proposed in the project that will require major revisions of the EIR, or (2) substantial changes occur with respect to the circumstances under which the project will be undertaken that will require major revisions in the EIR, or (3) [*18] new information, which was not known and could not have been known when the EIR was certified, becomes available." ([Latinos Unidos de Napa v. City of Napa](#) (2013) 221 Cal.App.4th 192, 196, 164 Cal. Rptr. 3d 274, fns. omitted.) But those provisions apply only "[w]hen an EIR has been certified" (CEQA Guidelines, [§ 15162](#); *Laurel Heights II*, *supra*, 6 Cal.4th at p. 1130 ["a certified EIR . . . is a prerequisite for application of [section 21166](#)"].) Here, the SEIR had not yet been certified when the supposed new information was submitted.

It would appear, therefore, that [section 21166](#) and CEQA Guidelines [section 15162](#) do not govern our review. (But see [Silverado Modjeska Recreation and Parks Dist. v. County of Orange \(2011\) 197 Cal. App. 4th 282, 304, 128 Cal. Rptr. 3d 772](#) [declining to decide whether [section 21092.1](#) or [section 21166](#) governed where new information was discovered between the circulation of a draft supplemental EIR and the certification of the final supplemental EIR].)

Finally, the Sierra Club relies on cases involving challenges to the adequacy of an EIR. An EIR is adequate where its "discussion of environmental impacts reasonably sets forth sufficient information to foster informed public participation and to enable the decision makers to consider the environmental factors necessary to make a reasoned decision." ([Berkeley Keep Jets Over the Bay Com. v. Board of Port Comrs. \(2001\) 91 Cal. App. 4th 1344, 1356, 111 Cal. Rptr. 2d 598.](#)) On review, our role is limited to ensuring "that the public and responsible officials are adequately informed "of the environmental consequences of their decisions before they are made."" (*Ibid.* [*19]) We fulfill that role by "determin[ing] whether the EIR contained sufficient information about a proposed project, the site and surrounding area and the projected environmental impacts arising as a result of the proposed project or activity to allow for an informed decision" (*Id.* at p. 1355.) "A prejudicial abuse of discretion occurs if the failure to include relevant information [in an EIR] precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process." ([Kings County Farm Bureau v. City of Hanford \(1990\) 221 Cal.App.3d 692, 712, 270 Cal. Rptr. 650](#) (*Kings County*)).

Regardless of how we construe the Sierra Club's challenge to the Final SEIR, it fails, for the reasons discussed below.

2. Substantial Evidence Supports the Conclusion of No Significant New Information

Under either [section 21092.1](#) or [section 21166](#), the

question is whether the 2015 Bean report constitutes significant new information. ([Laurel Heights II, supra, 6 Cal.4th at p. 1129](#) [looking to [section 21166](#) in interpreting [section 21092.1](#), reasoning that the two provisions govern "analogous situation[s]" involving "new information"].) Substantial evidence supports the County's conclusion that it does not.

In addressing the Revised Project's impact on the giant kangaroo rat, the County relied on a report by Energy Renewal Partners, LLC and McCormick Biological, Inc., biologists retained [*20] by PVS to survey the Revised Project site for giant kangaroo rat activity in 2013. Energy Renewal Partners and McCormick Biological reported that giant kangaroo rat "occupancy within the Project Footprint was relatively low" They also noted that "[t]ypically [giant kangaroo rat] populations can fluctuate significantly from year to year and within years" and that giant kangaroo rats have "periodic population irruptions⁵, resulting in large increases in numbers of individuals" The Final SEIR repeated the biologists' observation that "giant kangaroo rat populations can fluctuate significantly from year to year and within years. . . ." McCormick Biological's principal biologist, Randi McCormick, addressed the 2015 Bean report and the impact of the drought on the giant kangaroo rat at the May 19, 2015 hearing before the Board of Supervisors. She suggested that the Bean report exemplified the sort of "large [population] fluctuation[]" that is "expected" for the giant kangaroo rat. She further opined that the large conservation lands would support the species when its population increases again. The biologists' report and McCormick's testimony support the conclusion that the 2015 Bean [*21] report merely confirms the Final SEIR's observation regarding giant kangaroo rat population fluctuation. The Sierra Club points to nothing in the record to contradict that conclusion. Significantly, the Bean report does

⁵ An irruption is "[a]n abrupt local increase in the numbers of a species of animals." (Oxford English Dict. Online (2017) <<http://www.oed.com> [as of 3/22/17].)

not mention the drought, opine as to the cause of the observed population drop, or predict whether that drop will be permanent or transient.

In sum, the Sierra Club has failed to carry its burden to show that substantial evidence does not support the agency's decision that the 2015 Bean report does not constitute significant new information.

3. The Sierra Club Has Failed to Show a Prejudicial Abuse of Discretion

When the Sierra Club's argument is viewed as a challenge to the Final SEIR's adequacy, the question is whether the Sierra Club has carried its burden to show a prejudicial abuse of discretion. More specifically, has the Sierra Club demonstrated that the failure to discuss the 2015 Bean report "preclude[d] informed decision making and informed public participation . . . [?]" ([Kings County, supra, 221 Cal.App.3d at p. 712.](#)) It has not.

The Final SEIR analyzed giant kangaroo rat survey data collected in 2013, during the drought. It noted that "giant kangaroo rat populations can fluctuate significantly from year to year[*22] and within years. . . ." It further noted that the Revised Project site is located in "an important area for the conservation for many federally and state-listed plants and animals," including the giant kangaroo rat and San Joaquin kit fox. And it acknowledged that the Revised Project could result in the loss of the giant kangaroo rat, San Joaquin kit fox, and their habitats. However, the Final SEIR concluded that "the Revised Project would be expected to impact fewer giant kangaroo rats than would have been impacted under the original 2010 Project design . . . [because] [t]he project footprint was adjusted to avoid areas of highest occupancy that were identified during the 2013 survey. These areas of high occupancy would be preserved in perpetuity as part of the Valley Floor Conservation land and are no longer included in the project footprint." Finally, the Final SEIR concluded that various mitigation measures would render the impacts of

the Revised Project on both the giant kangaroo rat and the San Joaquin kit fox less than significant.

As noted above, the only evidence in the record interpreting Professor Bean's 2015 rat trapping data is the testimony of project biologist McCormick, [*23] who opined that it confirmed the Final SEIR's observation that giant kangaroo rat populations are subject to significant fluctuation. Thus, the Sierra Club has failed to demonstrate that the omission of any discussion of the 2015 Bean report from the Final SEIR "preclude[d] informed decisionmaking and informed public participation" ([Kings County, supra, 221 Cal.App.3d at p. 712.](#))

D. Mitigation Measures

The Sierra Club argues that two of the Final SEIR's mitigation measures, BR-G.5 and BR-G.6, violate CEQA because they are not enforceable.

1. Legal Principles

"If it is feasible to do so, a public agency must mitigate or avoid the significant environmental effects of a project that it carries out or approves. (§ 21002.1, *subd. (b)*; [City of Marina v. Board of Trustees of California State University \(2006\) 39 Cal.4th 341, 359, 46 Cal. Rptr. 3d 355, 138 P.3d 692.](#))" ([South County Citizens for Smart Growth v. County of Nevada \(2013\) 221 Cal.App.4th 316, 336, 164 Cal. Rptr. 3d 68 \(South County Citizens\).](#)) CEQA requires that mitigation measures be "fully enforceable through permit conditions, agreements, or other measures." (§ 21081.6, *subd. (b)*.) ""The purpose of these requirements is to ensure that feasible mitigation measures will actually be implemented as a condition of development, and not merely adopted and then neglected or disregarded."" ([South County Citizens, supra, 221 Cal.App.4th at p. 336.](#))

2. BR-G.5

As set forth in the Final EIR for the Original Project and the Draft SEIR, mitigation measure

BR-G.5 called for the creation of one or more permanent conservation [*24] easements, to be held in perpetuity by a qualified land trust, to preserve habitat for plants and wildlife impacted by the solar project. (*Save Panoche Valley, supra, 217 Cal.App.4th at p. 529* ["The mitigation measures called for creation of conservation easements"].) In the Final SEIR, BR-G.5 still provides for the preservation of plant and wildlife habitat, but through a wider variety of methods. Specifically, BR-G.5 now allows for the use of "permanent conservation easements, [the] purchase of credits from a [California Department of Fish and Wildlife (CDFW)]-approved mitigation bank, or [the] transfer [of] land in fee to a CDFW[-]approved conservation holder with a deed restriction or other appropriate agreement for the management of the land" BR-G.5 provides that the "[c]onservation easement(s), deed restriction, or other appropriate agreement shall . . . [¶] [b]e perpetual." According to the Final SEIR, the above change to BR-G.5 "clarif[ies] that habitat can be preserved . . . under several CDFW-approved legal instruments."

The Sierra Club maintains that, as revised, BR-G.5 fails to ensure that the mitigation lands will be permanently protected because deed restrictions are less effective than conservation easements. It notes that while conservation [*25] easements are perpetual and must be held by a qualified non-profit organization or a public agency (*Civ. Code, §§ 815.1, 815.2, 815.3*), deed restrictions may be of limited duration and are typically held by a benefitted landowner rather than by a third-party entity with the authority to enforce the restrictions. The County responds that BR-G.5 requires that any legal instrument used to protect the mitigation lands, be it a conservation easement or deed restriction, be perpetual. Moreover, it points to the fact that BR-G.5 provides that any deed restrictions must be held by a CDFW-approved conservation holder.

We agree with the County that the Sierra Club has failed to show that BR-G.5 is unenforceable or

otherwise violates CEQA.

3. BR-G.6

Mitigation measure BR-G.6 calls for the development and implementation of a "Wetland Mitigation and Monitoring Plan" and a "Habitat Management Plan" for the mitigation lands. It provides that both plans "will be submitted to the County of San Benito for approval, prior to the issuance of a construction permit."

The Sierra Club raises two complaints about BR-G.6. The first relates to some apparent confusion arising from the County's inconsistent use of language in the Final SEIR. As [*26] the Sierra Club notes, BR-G.5 refers to "the Habitat Mitigation and Monitoring Plan . . . discussed below under MM BR-1.8." But the Final SEIR contains no MM BR-1.8 or any other discussion of a "Habitat Mitigation and Monitoring Plan." BR-G.6 refers to the "Habitat Management Plan." The Sierra Club expresses confusion as to whether the Habitat Mitigation and Monitoring Plan and the Habitat Management Plan are the same thing.

The Draft SEIR includes a redline of changes to BR-G.6 in which "Habitat Mitigation and Monitoring Plan" is changed to "Wetland Mitigation and Monitoring Plan and Habitat Management Plan." Plainly, the reference to the Habitat Mitigation and Monitoring Plan in BR-G.5 is a typo; it should refer to the Wetland Mitigation and Monitoring Plan and Habitat Management Plan. That obvious error does not render BR-G.6 inadequate.

The Sierra Club's second contention is that BR-G.6 violates CEQA because it does not require that the Habitat Management Plan be approved prior to the start of construction. As noted above, quite the opposite is true. Accordingly, we reject the Sierra Club's challenge to BR-G.6.

E. Groundwater Impacts

The Original Project was to be constructed over [*27] the course of five years; the Revised

Project is scheduled to be constructed in just 18 months. The Final SEIR states that the peak daily water use during construction will be 1.72 acre-feet, 1.585 acre-feet per day greater than the Original Project would have required. Thus, as the Final SEIR acknowledges, "[t]he Revised Project would use a substantially greater amount of groundwater during construction than would the [Original] Project." The Sierra Club argues that the Final SEIR fails to adequately address the impacts of the accelerated construction schedule on water supplies in three ways. We address each criticism in turn.

1. Recharge and Drawdown Estimates

First, the Sierra Club contends that the Final SEIR overestimates the groundwater recharge rate and underestimates the drawdown rate. This issue was raised and debated during the EIR process.

In 2014, PVS's consultant, Geologica, analyzed whether increased water pumping during the shorter construction period would substantially deplete local groundwater supplies or interfere with recharge. In conducting that analysis, Geologica calculated that the amount of drawdown that would be caused by groundwater extraction for construction and [*28] operation would not exceed 2.7 feet for offsite wells. Geologica concluded that the predicted drawdown levels during the construction phase and longterm operation were unlikely to significantly impair existing water supply well use in the valley. The County relied on Geologica's reports in the Draft SEIR to conclude that the impact of the Revised Project's water use would be less than significant if certain mitigation measures were implemented.

The San Benito Residents for Responsible Development commented on the Draft SEIR. Attached to their comments was a letter from hydrologic consultant Tom Myers, Ph.D., who questioned certain of Geologica's assumptions, models, and conclusions. As is relevant here, he opined that Geologica's recharge estimate was too high, while its drawdown estimate was too low.

The County retained hydrogeologist Jim Finegan, Ph.D., PG, CHg, to address Myers's critique. Finegan concluded, in a letter included as an appendix to the Final SEIR, that Geologica's recharge value was "not unreasonable for similar areas." Finegan also defended the model Geologica used to predict drawdown, concluding it "is likely to simulate the system with sufficient accuracy that drawdown [*29] can be predicted." The San Benito Residents for Responsible Development also commented on the Final SEIR and attached another letter from Myers. He reiterated his conclusions that the County overestimates recharge and underestimates drawdown.

Plainly, there exists a disagreement among experts regarding the Revised Project's potential impacts on water resources. But such a disagreement does not make an EIR inadequate. ([Laurel Heights I, supra, 47 Cal.3d at p. 409](#); CEQA Guidelines, [§ 15151](#).) The County "was free to reject" Myers's evaluation in favor of that of Geologica and Finegan. ([Association of Irrigated Residents v. County of Madera \(2003\) 107 Cal.App.4th 1383, 1397, 133 Cal. Rptr. 2d 718](#) ["When the evidence on an issue conflicts, the decisionmaker is 'permitted to give more weight to some of the evidence and to favor the opinions and estimates of some of the experts over the others'"].) The Sierra Club has not demonstrated that the reports on which the County relied were so "clearly inadequate or unsupported" as to be "entitled to no judicial deference." ([Laurel Heights I, supra, at p. 409, fn.12](#).) The Final SEIR complied with CEQA by including Myers's comments criticizing Geologica's approach and Finegan's responses, "thereby alerting public decision makers to the differing opinions." ([Save Round Valley Alliance v. County of Inyo \(2007\) 157 Cal.App.4th 1437, 1467-1468, 70 Cal. Rptr. 3d 59](#); CEQA Guidelines, [§ 15151](#) ["the EIR should summarize the main points of disagreement among the experts. The courts have looked not [*30] for perfection but for adequacy, completeness, and a good faith effort at full disclosure"].)

2. Aquifer as a Whole

Second, the Sierra Club maintains the Final SEIR "considered only the effects of [increased water] withdrawals on other users' groundwater wells, not the effects on the aquifer as a whole." The Sierra Club provides no support for that contention. It cites a mitigation measure requiring PVS to conduct aquifer testing and a well interference analysis in certain circumstances. That measure calls for analysis of *both* aquifer parameters and interference with private wells. Accordingly, it does not support the Sierra Club's argument that the County ignored the aquifer as a whole. Geologica's December 2014 Groundwater Extraction Impact Evaluation, on which the County relied, confirms that Geologica evaluated "the potential impacts to the aquifer of groundwater extraction for the project."

3. The Drought and Related Mitigation Measure

Third, the Sierra Club argues that the Final SEIR does not adequately analyze the existing groundwater resources in view of the ongoing drought. In a related criticism, the Sierra Club says Mitigation Measure WR-1.1, on which the Final SEIR relies to [*31] prevent groundwater overdraft despite the drought, is vague and would be ineffective. As discussed below, these contentions lack merit.

The Final SEIR acknowledges that "[t]he continuation of current drought conditions would extend the recovery time for Panoche Valley Groundwater Basin levels after drawdown caused by construction water use for the Revised Project." The Final SEIR then calls for "[c]areful and regular monitoring of groundwater levels in both on-site and off-site wells, as required in Mitigation Measure WR-1.1, . . . to prevent the creation of overdraft conditions in the Panoche Valley Groundwater Basin." Mitigation Measure WR-1.1 requires PVS to monitor groundwater levels in the valley and to submit monthly reports to the County summarizing daily pumping and monthly water level monitoring data. Mitigation Measure WR-1.1 provides that "[i]f results of the monthly trend

analyses indicate that the project pumping has resulted in water level decline of 5 feet or more below the baseline trend at nearby private wells, [PVS] shall be prohibited from using the well(s) as a water source for the project, or shall reduce groundwater pumping until water levels stabilize or recover."

The Sierra Club [*32] criticizes Mitigation Measure WR-1.1 as vague, saying it does not adequately describe (1) how the baseline trend will be determined, particularly given the potential continuation of drought conditions affecting future water levels; (2) how drawdown caused by project pumping will be distinguished from drought-related drawdown; and (3) what alternative water sources will be used if the five-foot decline threshold is passed. In the context of the Final SEIR as a whole, Mitigation Measure WR-1.1 is not so vague as to be unenforceable. ([§ 21081.6, subd. \(b\)](#).) Responses to comments on the Draft SEIR, which are part of the Final SEIR, explain that "water-level trends due to the drought are already known" because "[a] substantial database of water levels from 2004 through the present already exists for over 40 wells throughout the valley" The Final SEIR further states that "water-level trends . . . will continue to be monitored" Thus, the Final SEIR explains that the baseline trend referred to in Mitigation Measure WR-1.1 will be determined based on existing water-level data and water-level data collected by way of the Groundwater Monitoring and Reporting Plan mandated by Mitigation Measure WR-1.1. [*33] Responses included in the Final SEIR also explain how the drawdown effects of project-related pumping will be isolated, stating: "[B]ecause the monitoring program will commence prior to project pumping, pre-existing water levels and local pumping drawdown may be distinguished from project drawdown. The wells selected for monitoring include those known to be actively pumping, specifically so this effect can be monitored." As to alternative water sources, responses in the Final SEIR indicate that "replacement wells will be incorporated into the program if any of the monitored wells are

compromised."

In addition to asserting vagueness complaints, the Sierra Club opines that Mitigation Measure WR-1.1 could be ineffective under two scenarios. "Whether [Mitigation Measure WR-1.1 is] in fact *sufficient* to reduce [the impact of the Revised Project's water use on local groundwater supplies] to a less than significant level is a factual question subject to review for substantial evidence." (*Oakland Heritage Alliance v. City of Oakland (2011) 195 Cal.App.4th 884, 898-899, 124 Cal. Rptr. 3d 755.*) For the reasons discussed below, substantial evidence supports the County's finding that Mitigation Measure WR-1.1 will reduce water resource impacts to a less than significant level.

First, the Sierra Club contends [*34] that if the baseline water-level trend has been significantly lowered by the drought, then a water-level decline of five feet could be significant. As discussed above, Mitigation Measure WR-1.1 was crafted based on a decade of water-level data, including data from during the drought. Thus, the premise of the Sierra Club's concern—that the measure does not account for drought conditions—is unsound. Hydrologist Finegan concluded that "the proposed mitigation measures will insure groundwater supplies are protected." The hydrologists at Geologica likewise recommended Mitigation Measure WR-1.1.

Second, the Sierra Club contends that the County's plan to use replacement wells will be ineffective because simply adding more wells to the same groundwater source does not mitigate the problem. Substantial record evidence supports the County's finding that the use of use replacement wells will reduce water resource impacts to a less than significant level. Burns & McDonnell Engineering Co., Inc., an engineering, environmental, and consulting firm retained by PVS, explained that "project pumping may be distributed among more than one well or alternated between wells to mitigate the impact" and further [*35] noted that "alternative construction methodologies, such as

the use of chemical palliatives, may be utilized that requires less or no groundwater."

III. DISPOSITION

The judgment is affirmed. The County and real party in interest are entitled to costs on appeal.

ELIA, ACTING P. J.

WE CONCUR:

BAMATTRE-MANOUKIAN, J.

MIHARA, J.

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