

**SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SACRAMENTO**

<b>DATE/TIME</b>	DECEMBER 2, 2022	<b>DEPT. NO</b>	21
<b>JUDGE</b>	HON. SHELLEYANNE W. L. CHANG	<b>CLERK</b>	D. LASHLEY
<p><b>CENTRAL DELTA WATER AGENCY, SOUTH DELTA WATER AGENCY, and LOCAL AGENCIES OF THE NORTH DELTA,</b></p> <p style="text-align: center;"><b>Petitioners,</b></p> <p style="text-align: center;">v.</p> <p><b>CALIFORNIA DEPARTMENT OF WATER RESOURCES, and DOES 1 through 10,</b></p> <p style="text-align: center;"><b>Respondents.</b></p>		<p><b>Case No.: 34-2020-80003457</b></p>	
<b>Nature of Proceedings:</b>		<b>RULING ON SUBMITTED MATTER RE: PETITION FOR WRIT OF MANDATE</b>	

This matter came on for a hearing on the merits on October 13, 2022. After hearing oral argument, the Court took the matter under submission. The Court now issues its ruling on submitted matter.

**I. Factual and Procedural Background**

In July 2020, Respondent issued a mitigated negative declaration (MND)<sup>1</sup> for a project entitled “Soil Investigations for Data Collection in the Delta,” with an Addendum issued February 2021. The project will involve “activities to determine the composition, location, and geotechnical properties of soil material commonly found in the Delta which would inform the design, environmental analysis, and development of alternatives for a potential Delta conveyance project and contribute to DWR’s overall understanding of Delta geology.” The work will include 167 soil borings up to 300 feet below ground, 103 cone penetration tests up to 200 feet below ground, up to five noninvasive geophysical survey investigation arrays, and 56 overwater soil borings up to 200 feet below the slough or river bottom. The subject area encompasses the Sacramento-San Joaquin River Delta from south of the City of West Sacramento to just north of Bethany Reservoir.

In issuing a mitigated negative declaration, Respondent determined the project:

would not have any significant effects on the environment because environmental commitments and mitigation measures would be implemented to

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<sup>1</sup> Throughout briefing, the parties refer to both the Initial Study, and the Mitigated Negative Declaration. Seeing no need to refer to them separately, the Court refers to these documents as simply the MND.

clearly reduce impacts to a less than significant level. This conclusion is supported by the following findings:

1. The Proposed Project would not impact agriculture and forest resource, land use and planning, population and housing, recreation, or utilities and service systems.
2. The Proposed Project would have a less than significant impact to aesthetics, air quality, energy, geology and soils, hydrology and water quality, mineral resources, noise, public services, or transportation and traffic.
3. Mitigation has been adopted by DWR to clearly reduce potentially significant impacts related to biological resources, cultural resources, greenhouse gas emissions, hazards and hazardous materials, tribal cultural resources, or wildfire to less than significant.

Petitioners assert the MND and Addendum violate the California Environmental Quality Act's (CEQA) procedural and substantive requirements.

## **II. Standard of Review**

The issue of whether an environmental impact report must be prepared “is resolved by applying the fair argument test.” (*Farmland Protection Alliance v. County of Yolo* (2021) 71 Cal.App.5th 300, 309.) “Under this test, the agency must prepare an environmental impact report whenever substantial evidence in the record supports a fair argument that a proposed project may have a significant effect on the environment. [Citation.] If a court finds the fair argument test has been met but the agency failed to prepare an environmental impact report, the court must set aside the agency’s decision to adopt a negative declaration or a mitigated negative declaration as an abuse of discretion in failing to proceed in a manner as required by law. [Citation.]” (*Id.*, at p. 310.)

“ ‘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. [Citation.]” (*Newton Preservation Society v. County of El Dorado* (2021) 65 Cal.App.5th 771, 781.) Substantial evidence includes “facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.” (*Ibid.*) It does not include argument, speculation, or unsubstantiated opinion or narrative. (*Ibid.*) “Interpretation of technical or scientific information requires an expert evaluation. Testimony by members of the public on such issues does not qualify as substantial evidence.” (*Ibid.*) “Evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment does not constitute substantial evidence.” (14 C.C.R. § 15384.)

“The fair argument standard is a low threshold test for requiring the preparation of an environmental impact report. [Citation.] It is a question of law, not fact, whether a fair argument exists, and the courts owe no deference to the lead agency’s determination. Review is de novo.” (*Newton*, 65 Cal.App.5th at p. 781.) Even in light of this de novo review, the Court must “give the lead agency the benefit of the doubt on any legitimate, disputed issues of credibility. [Citation.]” (*Ibid.*)

### III. Discussion

#### A. Request for Judicial Notice

Respondent has filed a request for judicial notice in connection with its opposition to the petition. Petitioners have not filed objections. The Court finds the documents are relevant to Respondent's assertion that Petitioners' arguments are barred by collateral estoppel. The request is **GRANTED** for the limited basis of considering this argument.

#### B. Statutory Background: Mitigated Negative Declarations

"The basic purposes of CEQA are to:

- (1) Inform governmental decision makers and the public about the potential, significant environmental effects of proposed activities.
- (2) Identify ways that environmental damage can be avoided or significantly reduced.
- (3) Prevent significant, avoidable damage to the environment by requiring changes in projects through the use of alternatives or mitigation measures when the governmental agency finds the changes to be feasible.
- (4) Disclose to the public the reasons why a governmental agency approved the project in the manner the agency chose if significant environmental effects are involved." (14 C.C.R. § 15002, subd. (a).)

This matter involves a challenge to a mitigated negative declaration. "If a lead agency determines that a proposed project, not otherwise exempt from this division, would not have a significant effect on the environment, the lead agency shall adopt a negative declaration to that effect." (Pub. Res. Code § 21080.) The agency shall prepare a mitigated negative declaration when:

#### (b) The initial study identifies potentially significant effects, but:

- (1) Revisions in the project plans or proposals made by or agreed to by the applicant before a proposed mitigated negative declaration and initial study are released for public review would avoid the effects or mitigate the effects to a point where clearly no significant effects would occur, and
- (2) There is no substantial evidence, in light of the whole record before the agency, that the project as revised may have a significant effect on the environment. (14 C.C.R. § 15070.)

A negative declaration circulated for public review shall include:

- (a) A brief description of the project, including a commonly used name for the project, if any;

- (b) The location of the project, preferably shown on a map, and the name of the project proponent;
- (c) A proposed finding that the project will not have a significant effect on the environment;
- (d) An attached copy of the initial study documenting reasons to support the finding; and
- (e) Mitigation measures, if any, included in the project to avoid potentially significant effects.

Much of the discussion in this matter involves whether Respondent improperly deferred consideration of mitigation until a future date. Formulation of such measures:

shall not be deferred until some future time. The specific details of a mitigation measure, however, may be developed after project approval when it is impractical or infeasible to include those details during the project's environmental review provided that the agency (1) commits itself to the mitigation, (2) adopts specific performance standards the mitigation will achieve, and (3) identifies the type(s) of potential action(s) that can feasibly achieve that performance standard and that will [sic] considered, analyzed, and potentially incorporated in the mitigation measure. (14 C.C.R. § 15126.4, subd. (a)(1)(B).)

### C. The Project Description - Baseline

Petitioners argue the project description violates CEQA because it does not properly describe the baseline conditions existing at each individual drilling site. Petitioners maintain Respondent was required to provide site specific information for each drilling site, and that the MND does not even provide the exact locations of the drilling site. Petitioners assert the MND project maps "provide only a broad overview of the hundreds of drilling locations located in multiple counties (AR 39-42) The lack of detail in these maps...made it impossible for the public and the decisionmakers to understand the environmental conditions at these sites." (Op. Br., p. 17.)

For specific examples of inadequate baseline analysis, Petitioners cite to a lack of information as to whether fairy shrimp and the Northern California black walnut exist at the individual drilling sites. Petitioners also argue there is a lack of information concerning cultural and historical resources, specifically shipwrecks, as only 22 percent of the Impact Areas have had field studies previously conducted. (AR 173) Petitioners note that Respondent requested the San Joaquin County Historical Society provide information regarding known historical properties in the study area, and the society was unable to provide such information due to lack of sufficient time and resources. (AR 1657-67)

Petitioners argue Respondent has chosen to rely on future mitigation measures to determine the impacts to cultural resources, including Mitigation Measure CUL-1, which would survey locations with no previous survey coverage, and require a qualified archaeologist to evaluate the potential for impacts. (AR 175) Petitioners contend these actions are not mitigation

but instead are evaluations that should have informed the MND itself. Petitioners maintain gathering relevant data at a future date deprived the public of understanding the project's environmental impacts, and precluding informed decisionmaking.

Respondent argues CEQA Guidelines section 15071 specifies the requirement of a "brief description of the project" and therefore the description was not required to contain the precise details of each and every project aspect. Respondent cites to CEQA Guidelines sections 15071 and 15371 as requiring an MND to also contain the project location, preferably on a map, the project proponent, a proposed finding of no significant environmental effects with a brief description of the reasons why, the completed initial study, and any mitigation measures. Respondent maintains the MND describes the studies in detail, includes a map of site investigations, and has detailed scale mapping of drilling locations. (AR 39-42; Appendix C, AR 363-389) Respondent argues a site-by-site analysis was not necessary because the MND:

provided site analysis of biological impacts within 2-5 miles of individual sites to account for species history and migration, and 328 feet around sensitive plants, to account for possible site relocation. (AR 77) Analysis used reliable sources such as Naturalist and Geographic Information System (GIS) records. (*Id.*) Cultural resources that could be specifically identified were done so. (AR 230) (Oppo. Br., p. 16.)

Respondent urges the Court to find the present circumstances akin to those present in *McCann v. City of San Diego* (2021) 70 Cal.App.5th 51, on the basis that a precise location was not critical to considering the generalized environmental impact of the project.

With regard to the alleged baseline defects concerning black walnut and fairy shrimp, Respondent argues these species are specifically addressed in the MND and Petitioners have not cited to any substantial record evidence of an impact to these species. The MND discussion of fairy shrimp includes analysis of their habitat and their range, including their "moderate" possible presence in the project area and a notation that they live in vernal pools, "large turbid playa pools that may be inundated well into the summer." (AR 112-114.) Respondent maintains the potential for impact and mitigation is described in BIO-1 and BIO-12, along with the provision that biologists will be at individual sites to assure no activity occurs within 100 feet of any vernal pool.

With regard to black walnut, Respondent argues the MND notes it has a "moderate potential to occur within the Study Area based on the presence of potentially suitable habitat." (AR 151) Black walnut mitigation includes on-site identification and protection under BIO-18 and BIO-19, including avoidance and measures to assure unavoidable impacts are below significant. (AR 151)

With regard to shipwrecks, Respondent argues these cultural resources are typically hidden, with many shipwrecks having not been relocated and only having rough estimations as to their locations. (AR 172) Respondent relies on mitigation measure CUL-4 which, "using 'underwater hazard surveys,' cultural experts and study participants with training in identifying cultural resources, including subsurface resources, and with protocols for adjusting borings to

avoid resources discovered...will reduce potentially significant impacts to historical shipwrecks to less than significant.” (Oppo., p. 18, AR 177) Respondent maintains the MND conducted extensive research to determine there are “no known previously recorded archaeological resources within the Study Area” and that the availability of an additional search tool does not mean the MND violates CEQA. (AR 550; *Save Panoche Valley v. San Benito County* (2013) 217 Cal.App.4th 503, 524.)

Respondent maintains Petitioners have not identified substantial evidence in the record that MND mitigation will not prevent substantial impacts to shipwrecks or any other cultural resource. “In contrast, DWR demonstrated a thorough research of possible cultural resources, working closely with tribal cultural experts before and during the studies, and assuring solid protocols for avoiding the discovery of hidden archeological and cultural resources.” (Oppo., p. 19.)

CEQA's regulatory Guidelines, which have the force of law, establish the requirement that potential environmental impacts of a project must be evaluated against a proper baseline. Section 15125(a) states: “An EIR must include a description of the physical environmental conditions in the vicinity of the project. This environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant. The description of the environmental setting shall be no longer than is necessary to provide an understanding of the significant effects of the proposed project and its alternatives. The purpose of this requirement is to give the public and decision makers the most accurate and understandable picture practically possible of the project's likely near-term and long-term impacts.” “[A]n agency enjoys discretion to decide, in the first instance, exactly how the existing physical conditions without the project can most realistically be measured, subject to review, as with all CEQA factual determinations, for support by substantial evidence.” (*Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal. 4th 310, 328.)

The project description provides the project consists of:

on-land and overwater soil investigations as well as several on-land geophysical surveys located within the Study Area...

The distribution of the various types of on-land soil investigations was determined to provide appropriate coverage to gain a preliminary understanding of the geological and geotechnical conditions in the Study Area. An effort was made to distribute soil borings at varying depths evenly throughout the Study Area; the location of CPTs was determined to provide supplementary subsurface information to complement the soil borings...

During the acquisition of site access, DWR will coordinate with property owners, including local land management agencies, on site specific considerations. As stated in Section 1.3, several days or weeks prior to conducting a proposed activity at a proposed investigation location site, a team of DWR and DCA specialists will perform a reconnaissance level site visit.

Reconnaissance level site visits are initial physical visits to a proposed project location to determine the overall existing conditions on the ground and determine the final Impact Area. The reconnaissance team will consist of qualified engineers, geologists, biologists, cultural resources specialists, and if necessary, a qualified wetland delineator, as well as a representative from the Real Estate office to ensure that any stipulations set forth for the visit regarding access are followed averaging 5 to 6 individuals per survey location. Team members will have expertise in the following disciplines: wildlife biologist familiar with the local fauna, botanist/ wetland specialist familiar with the local flora and wetlands, cultural resources specialist familiar with the region and its cultural resources (Native American, archeological and historical), and geologist/geological engineer with an understanding of the data goals of the project.

This reconnaissance level site visit will determine the Impact Area for any given soil location site by identifying any biological (including wetlands as defined in the 1987 Corps of Engineer's Wetlands Delineation Manual), cultural, utility, or other resource concerns and establishing the location site, at least, a minimum distance away from any resources to either fully avoid the resource or reduce the potential for any impacts to a less-than-significant level. The surveys will be non-invasive, consisting only of observations and staking the final soil investigation location. If there is no area within a proposed investigation site where avoidance or impact reduction is possible, then the proposed soil investigation at that location will not be conducted. The Impact Area considered during these reconnaissance surveys is inclusive of the area required for parking for various field personnel. This type of avoidance is made possible by the flexible nature of the Project and the relatively small size of the proposed Impact Areas. DWR has intended since the Project's inception to utilize avoidance as an integral part of the Project to prevent interaction with, and disturbance to, environmental resources. (AR 36-38)

The project description includes several maps depicting sites identified as either "overwater impact area" or "overland impact area." (AR 39-42)

Section 3.4.2.1 is titled "Special-Status Wildlife" and indicates that it includes "species accounts for each of the special-status wildlife species that has potential to occur (Appendix A) within the Study Area..." (AR 79) Included in this list is the fairy shrimp, which has a known range "limited to the Central Valley, with the exception of one occurrence in Ventura County...Conservancy fairy shrimp has moderate potential to occur within the Study Area based on the presence of suitable habitat. (AR 112)

With regard to Northern California black walnut, the MND provides:

Its historic range includes the southern Inner North Coast Ranges, southern Sacramento Valley, northern San Joaquin Valley, and San Francisco Bay Area (CNPS 2019, Jepson Flora Project 2019), but only three, possibly four extant

occurrences in Contra Costa, Sacramento, and Napa counties have been confirmed to occur prior to extensive European settlement of California, and only these have generally been accepted as indigenous. Only one of these occurrences is considered a viable population (Potter, et al. 2018). It is presumed extirpated from Sacramento, Solano, and Yolo counties. It typically grows in riparian forest and riparian woodland (CNPS 2019). The microhabitat for Northern California black walnut includes deep alluvial soil associated with creeks or streams (CDFW 2019). Threats to this species include hybridization with orchard trees, urbanization, and conversion to agriculture (CNPS 2019). This species has moderate potential to occur within the Study Area based on the presence of potentially suitable habitat. (AR 151)

With regard to shipwrecks, the MND provides:

There are at least 100 historic shipwrecks known from archival research that occurred in the Sacramento River between Sacramento City and Sherman Island alone. Many of these have not been relocated, with only rough estimations as to their locations established by the Shipwreck Database and previous research by the California State Lands Commission (CSLC 1988; CSLC 2019); however, some historical shipwrecks have been encountered during previous projects, and locations of these have been recorded in the California Historical Resources Information System (CHRIS). The potential for encountering historical material is higher than for prehistoric within submerged contexts due to a tendency of poor preservation of organic material in water. (AR 172)

This project is unique, in that Respondent does not yet have legal access to the sites upon which the project will take place. None of the case authority cited by the parties directly addresses such a circumstance, and Petitioners have not provided any authority to support a contention that a CEQA document, in this case an MND, is legally deficient if the approving agency does not physically visit or inspect the project site before certification. The question before the Court is whether substantial evidence supports the MND's description of baseline conditions. (See *Fat v. City of Sacramento* (2002) 97 Cal.App.4th 1270, 1278.) The Court finds the answer to this question is yes, as the MND contains sufficient detailed information from numerous other sources as to the general conditions that exist in the large geographic area encompassed by the project, even without physical access to the project site.

While a site by site visit prior to certification of the MND *may* have obtained additional information, the fact remains that CEQA does not require the agency to gather an exhaustive database of *all* evidence to determine the baseline. The Court finds the MND's description of the baseline is supported by substantial evidence.

#### D. The Project Description – Project Permitting and Consultation Requirements

Petitioners argue the MND violates CEQA because it “fails to provide an adequate project description by omitting how other agencies would exercise their permitting authority over sensitive natural resources that could be impacted by the project.” (Op. Br., p. 20.) Petitioners



maintain Respondent would need to consult with the U.S. Army Corps of Engineers regarding compliance with the National Environmental Policy Act, as well as the California Department of Fish and Wildlife's process for permitting the take of special-status species.

Respondent argues the MND describes the regulatory context in Section 1.2, "Regulatory requirements, permits, and approvals," including approvals required from California Department of Fish and Required Wildlife, and the U.S. Army Corps of Engineers. (AR 32-33, 553) Specifically with regard to the Army Corps of Engineers, the MND provides:

Proposed Project will require a Section 404, Clean Water Act, Nationwide Permit, which DWR is in the process of obtaining (see p. 2). This permit requires the USACE to comply with Section 106 of the National Historic Preservation Act and Section 7 of the Endangered Species Act. (AR 436)

Respondent argues the MND contains a thorough consultation protocol, and that the MND is not prepared in compliance with the National Environmental Policy Act. (AR 441)

"NEPA applies to projects which are carried out, financed, or approved in whole or in part by federal agencies." (14 C.C.R. § 15220.) There is no evidence before the Court that Respondent had an obligation under CEQA to comply with NEPA or to ensure a federal agency complied with NEPA before certifying the MND. The Court has reviewed the MND's discussion of "regulatory requirements, permits, and approvals" and finds it thorough. Petitioners have not identified substantial evidence that there are permitting issues that the MND ignores.<sup>2</sup>

#### E. The Project Description – The Delta Reform Act

Petitioners argue the project is a covered action within the meaning of the Delta Reform Act, and therefore the MND must include a certification that the project is consistent with the coequal goals identified in the Delta Plan. The failure to include a consistency determination, Petitioners maintain, makes the MND an "informationally deficient document." (Op. Br., p. 22.)

Respondent argues the project is not a covered action under Water Code section 85057.5, because it will not have a "significant impact on achievement of one or both of the coequal goals or the implementation of government-sponsored flood control programs to reduce risks to people, property, and state interests in the Delta." The co-equal goals are: "providing a more reliable water supply" and "protecting, restoring, and enhancing the Delta ecosystem." (Wat. Code § 85054.) Respondent notes that projects exempted from CEQA are defined as not having a significant impact on the coequal goals, and the geotechnical studies as issue in this project are exempt under CEQA's "information collection" exemption. (14 C.C.R. § 15306, Pub. Res. Code § 21084.) Respondent argues the MND reinforces this exempt status by "assuring no potentially significant environmental impacts." (Oppo., p. 21.)

For purposes of the Delta Reform Act, Water Code section 85057.5 defines "covered action" as a project that meets all of the following conditions:

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<sup>2</sup> Petitioners' reply brief is silent as to this issue.

- (1) Will occur, in whole or in part, within the boundaries of the Delta or Suisun Marsh.
- (2) Will be carried out, approved, or funded by the state or a local public agency.
- (3) Is covered by one or more provisions of the Delta Plan.
- (4) Will have a significant impact on achievement of one or both of the coequal goals or the implementation of government-sponsored flood control programs to reduce risks to people, property, and state interests in the Delta.

The certification of an MND is the agency's determination that the project, via revisions and mitigation measures, will have no significant environmental impacts. (See 14 C.C.R. § 15070.) As detailed throughout this ruling, the Court finds substantial evidence supports the agency's conclusion that there is *not* substantial evidence of a fair argument that the proposed plan might have significant adverse environmental effects even after mitigation. (See *San Bernardino Valley Audubon Society v. Metropolitan Water Dist.* (1999) 71 Cal.App.4th 382, 390.) As the proposed project will not have significant adverse environmental impacts, the Court agrees with Respondent that the project will not have a "significant impact on achievement" of the coequal goals. Accordingly, the Delta Reform Act does not require a consistency determination.

#### F. Impact Analysis – Future Surveys

Petitioners argue the MND impermissibly defers Respondent's duty to investigate and analyze the site-specific impacts on all of its on-land and overwater sites (a total of 331) by delaying site investigations until "several days or weeks prior to conducting a proposed activity at a proposed investigation location site." (AR 37) These visits are referred to as reconnaissance level and will be the initial physical visits to a project location to "determine the overall existing conditions on the ground and determine the final Impact Area." Petitioners cite to similar investigations for overwater sites. (AR 54) Petitioners argue that without site-specific data, it is impossible to properly identify the significance of a given impact.

Respondent argues "the record [] details the methods used to analyze impacts to the project area, and the sites within it, including available aerial imaging, and searches of available resources such as databases for biological, historical, geological, cultural, and other information regarding existing conditions, as identified in Section 1.3 of the MND." (Oppo., p. 22, AR 421) Respondent argues:

without voluntary agreements for entry onto private property or a court entry order under Code of Civil Procedure section 1245.010, DWR and its experts do not have access to the private property... The MND's adoption precedes any site entry or activity... Once DWR obtains an access order or voluntary agreement, site conditions will be confirmed by the appropriate team of engineers, Native American tribal representatives, archeological and historical cultural specialists familiar with the region, wildlife biologists, botanists and wetland specialists. (Oppo., p. 23, AR 419)

Respondent asserts the reconnaissance surveys will be used to apply mitigation and assure performance of mitigation at individual sites, once access is gained.

The Court finds the use of reconnaissance level site visits to determine actual environmental conditions shortly before project activity commences, is not, by itself, a CEQA violation. Petitioners have not cited to any authority that, when an agency does not have legal access to numerous locations comprising the project sites, the agency must perform in-person inspections of each location prior to certification of an MND. In this case, the Court has already determined the project baseline was supported by substantial evidence, despite the absence of site specific in-person inspections. The question remains, however, whether there is substantial evidence of a fair argument the project will, despite mitigation, result in significant environmental impacts. This analysis must be specific to the environmental resources at issue. The Court undertakes such analysis in the sections that follow.

#### G. Impacts to Utilities

Despite concluding there would be “no impact” to several resources, the MND set forth mitigation measures for these impacts. Petitioners assert this demonstrates that the MND improperly declares “no impact” when in fact there are significant impacts. Specifically, Petitioners cite to the Geology and Soils section of the MND wherein the MND declares there would be “no impact” for unstable soil, but indicates that “if the soil is deemed unstable by a geologist during the reconnaissance site visits required as part of the Proposed Project...the Impact Area will be moved to decrease potential of an on- or off-site landslide, lateral spreading, subsidence, liquefaction, or collapse.” (AR 185) Petitioners reiterate their argument that Respondent could not determine there would be “no impact” without first analyzing baseline conditions at each site.

Petitioners further cite to the MND’s discussion of utilities impacts, which also finds “no impact.” (AR 234-235) The MND discusses the reconnaissance level site visits and notes “if the team observes utility...concerns within the Impact Area or associated resource buffer, the location will be shifted the minimum distance necessary to reduce the potential for utilities...impacts to a less than significant level without increasing impacts to other resources. If a suitable location cannot be determined within adjacent areas, then the soil investigation at that location will not be conducted.” (AR 34) Petitioners argue this again demonstrates that Respondent could not determine there would be “no impact” without first investigating the subject sites. Petitioners also reiterate their argument that there are mitigation measures discussing utilities, thus belying the assertion that there will be “no impact” to utilities. (AR 237)

Respondent argues there is no “reasonable possibility” that a significant environmental impact could occur as the reconnaissance inspections will assure mitigation. Respondent cites to the MND discussion of utilities (AR 234-235) and the discussions of wastewater and water supply systems, solid waste, and underground utilities (AR 237-238). Respondent maintains Petitioners have failed to cite any substantial evidence in the record that the project will impact utilities.

The Court finds Petitioners have failed to demonstrate that substantial evidence supports a fair argument that the project may have a significant effect on utilities. The Court understands Petitioners' argument that there may be utilities of which Respondent is unaware because it did not conduct on-site visits prior to certifying the MND. However, the MND provides that if there are utility concerns within the Impact Area or associated resource buffer, the location will be shifted to reduce impacts to less than significant. Further, "if a suitable location cannot be determined within adjacent areas, then the soil investigation at that location will not be conducted." (AR 34) There is no evidence before the Court that, with regard to utilities, this approach is not feasible, or that significant environmental impacts will have already occurred by the time utility concerns become apparent.

#### H. Impacts to Agricultural Resources

Petitioners argue that the MND violates CEQA because it failed to analyze whether the project's activities would result in the loss of usable farmland or interfere with agricultural operations. Petitioners maintain there is a fair argument that "the use of wheeled and tacked vehicles to transport heavy equipment over farmland would damage crops and impact productivity" as 173 of the drilling sites are located on prime farmland. (Op. Br., p. 27, AR 3843)

In support of their arguments, Petitioners cite to a January 2020 memorandum prepared by Gilbert Cosio, Jr., P.E. from MBK Engineers, the District Engineer to 33 reclamation districts in the Delta. (AR 1678) Petitioners maintain this document establishes that heavy equipment through the Delta can result in compressed farmland and decreased crop productivity. (AR 1678) Petitioners argue the MND was required to consider this impact and failed to do so. The letter provides:

Through our many years as District Engineer, we have experienced problems associated with borings and CPT's that have impacted the ability of RD's to perform their responsibilities. These problems, mainly artesian flow and seepage, have led to increased drainage costs, lost farm income, and levee damage. Even if sealed, as described in the IS/MND, we have found that, over time, these seals become compromised and result in seepage. Also, the weight of drill rigs compresses the farm ground which reduces its productivity.

Respondent argues impacts to agriculture were analyzed in MND Section 3.2. (AR 60) The MND noted "a variety of databases were accessed" to determine existing conditions including "the California Department of Conservations Important Farmland Data, California Department of Forestry and Fire Protections Assessment of Forests and Rangelands, and the County self-reported Williamson Act Data." (AR 469) The MND concluded there would be no conversion of farm land and any impact would be brief. (AR 61) Despite this, the MND includes mitigation measure AGR-1, which provides:

Any proposed soil investigation activities that occur on agricultural lands will be grouted with materials that conform to ANSI and ASTM standards from the full depth to five feet (1.5 meters) below the surface. The final five feet (1.5 m)

of topsoil will be replaced to return the Impact Area to as close to pre-activity conditions as possible. The backfill procedure will be consistent with State of California Bulletin 74-81/74-90 and local county standards. (AR 8)

Respondent maintains Petitioners have failed to cite evidence of any potentially significant environmental impact to farmland.

On reply, Petitioners argue they have provided substantial evidence of a fair argument that the impact from borings, CPTs, and the transportation of heavy equipment would result in decreased crop activity. In support of this assertion, Petitioners again cite to the MBK letter.

Petitioners maintain these statements, from an expert familiar with the activities that will occur as part of the project, establish substantial evidence of a fair argument that the project may create agricultural impacts. As such, Petitioners argue it was improper for Respondent to certify the MND and conclude that there is no evidence of the potential for significant impacts. (See *Citizen Action to Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748, 754) (“If there was substantial evidence that the proposed project might have a significant environmental impact, evidence to the contrary is not sufficient to support a decision to dispense with preparation of an EIR and adopt a negative declaration...[Citation]”).

The Court finds the letter from MBK does not constitute substantial evidence of a fair argument that the project will result in significant agricultural impacts. The letter vaguely describes that seals may become “compromised and result in seepage” and that drill rigs compress farm ground which “reduces its productivity.” It is unclear from this letter whether the assertion about a reduction in farm land productivity is enough to constitute a significant environmental impact, or whether it merely expresses an economic concern. There is no indication for how long certain farm land would be less productive, what the actual reduction in productivity would be, and no evidence to support how this determination was made. With regard to “seepage” it is again unclear what level of seepage may result, and the letter does not describe the “borings and CPT’s” the author has previously seen in order to form the opinion that seepage will occur as a result of the current project.

Petitioners have failed to demonstrate substantial evidence of a fair argument that the project will result in significant agricultural impacts.

#### I. Impacts to Biological Resources

Petitioners argue the MND violates CEQA because the mitigation measures are inadequate to reduce the impacts to Green Sturgeon, Delta Smelt, Central Valley DPS Steelhead, Spring- and Winter-run Chinook Salmon and Longfin Smelt to less than significant. Petitioners point to Mitigation Measure BIO-14 which provides that over-water activities will only occur during “the fish window (August 1-October 31)...” (AR 119) Petitioners argue Delta Smelt and green sturgeon and steelhead will still occur in the project area during this time, and therefore the mitigation measure does not lessen the potential impacts to these species. (AR 528, 1635, 14516-19, 11485) Petitioners further argue that there is nothing limited about water boring because it involves six barges placed throughout the Delta performing overwater drilling for eight hours a

day, five days a week for three months. (AR 37, 362) Petitioners assert this daily schedule, along with the potential presence of fish in the area, is substantial evidence of a fair argument that there could be significant impacts to green sturgeon and other species due to overwater drilling.

Petitioners also maintain the MND fails to consider the federal Marine Mammal Protection Act and the project's potential to harass sea lions. Petitioners argue the increased activity, noise and human presence may result in sea lion harassment, and the MND failed to discuss whether the project would require consultation with the National Marine Fisheries Service or an incidental harassment authorization.

Respondent argues merely noting that certain fish may be present in the project area is not substantial evidence of an impact. Respondent cites to the MND's discussion of green sturgeon (AR 117) and smelt (AR 119). The MND notes project impacts will be "minor in scope and would not result in degradation of aquatic habitat or water quality conditions and any potential effects related to potential increase in suspended sediment concentrations and contaminants due to disturbance of the river bed would be negligible." (AR 119) Respondent maintains the timeframes for work provided in mitigation measure BIO-14 would reduce fish exposure to in-water work activities (AR 119) and that BIO-1 combines with HYD-1<sup>3</sup> and HAZ-1 through 4, to reduce sediment and hazardous material exposure. Respondent argues Steelhead and Chinook salmon, Sacramento splittail, and Longfin Smelt are also addressed in detail in the MND. (AR 120-126, 542) Respondent asserts Petitioners have failed to identify substantial evidence that the project may "substantially reduce" a particular fish population.

With regard to potential marine mammal harassment, Respondent argues the MND provided scientific facts supporting the effectiveness of noise mitigation to reduce substantial impacts, including specifically with regard to sea lions. (AR 539-542) In response to comments, the MND provides:

Regarding marine mammals, while it is true that California sea lions are found throughout the Delta, the specific actions proposed to be undertaken in the project are very limited in size and duration and they do not require a mitigation measure above MM BIO-1. The SEL threshold for drilling for California sea lion is 219 dB, which is below the levels that will be generated by this Project (See Response to Comment 221; Section 3.4.2.1 (d) of the Final IS/MND). Additionally, each boring will be limited in duration and will not cause any impedance of movement for marine mammals. As with the on-land activities, over water activities will be monitored and the qualified biologist will have the same stop-work authority during any soil investigation activities. (AR 542)

On reply, Petitioners cite to a letter dated April 3, 2009, which letter they submitted in connection with their own comments on the MND in this matter. (AR 1159, 1229) The 2009 letter is addressed to the U.S. Army Corps of Engineers and is from the National Marine

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<sup>3</sup> HYD-1 provides, in subdivision (f): During overwater soil investigations a qualified environmental monitor will watch for colored plumes (an indication that drilling fluid or other material is entering the water and may affect water quality). If found, activities will cease until appropriate corrective measures have been completed or it has been determined that the environment will not be harmed.

Fisheries Service. It addresses the Service's "review of the proposed construction and operation of the Non Physical Barrier (NPB) as part of the South Delta Temporary Barriers Program (TBP) in San Joaquin County for the 2009 operational season by the California Department of Water Resources" and its effects on Chinook salmon, steelhead, and green sturgeon. (AR 1229) Specifically, Petitioners refer to the following statement:

In the aquatic environment, most anthropogenic chemicals and waste materials including toxic organic and inorganic chemicals eventually accumulate in sediment (Ingersoll 1995). Direct exposure to contaminated sediments may cause deleterious effects to listed salmonids or the threatened green sturgeon. This may occur if a fish swims through a plume of the resuspended sediments or rests on contaminated substrate and absorbs the toxic compounds through one of several routes: dermal contact, ingestion, or uptake across the gills. (AR 1230)

Petitioners maintain there is substantial evidence in the record that the types of plumes that can cause "deleterious effects" may result from overwater drilling activities. (AR 1637-41). Thus, Petitioners argue there is substantial evidence of a "fair argument" that there may be significant impacts to salmonids and green sturgeon due to the project.

With regard to sea lions, Petitioners argue on reply that the MND confirms there is not a specific noise mitigation for impacts to sea lions, and that the project would produce noise at levels about 100 dba, and that sea lions are found throughout the Delta.

Petitioners have failed to identify substantial evidence of a fair argument that the project will result in significant impacts to biological resources. The 2009 letter concerning the Non Physical Barrier states that exposure to contaminated sediment may cause deleterious effects to salmonids or the green sturgeon if a fish swims through a plume of the resuspended sediments. (AR 1230.) The letter does not opine on the project at issue, and it is not clear that it even opines on a similar project. Further, the MND directs that work should occur during a time when fish are less likely to be present in the impact area. Public Resources Code section 21068 defines "significant effect on the environment" as a "substantial, or potentially substantial, adverse change in the environment." The evidence before the Court is that there *may* be plumes, and that if these plumes are spotted, project activity shall cease until appropriate corrective measures have been completed. There is no evidence before the Court that enough fish could be exposed to these plumes and be harmed by this exposure such that a substantial or potentially substantial adverse change in the environment would occur.

The same analysis applies to Petitioners' arguments that substantial evidence supports a fair argument of significant environmental impacts to sea lions. Petitioners have identified evidence that sea lions *may* be in the impact areas, and that the project would produce noise at levels of 100 dba. The Court agrees with Respondent that any assertion that the project may violate the Federal Marine Mammal Protection Act is not an issue for resolution through CEQA claims unless Petitioners also demonstrate that such a violation meets the threshold of being a significant environmental impact. Petitioners have not identified any evidence that the project's noise is of such a level that there is substantial evidence of a fair argument that sea lions will experience harassment sufficient to constitute a significant environmental impact.

## J. Degradation of Water Quality

Petitioners argue the MND concedes a fair argument that the project could significantly degrade water because it contains a mitigation measure requiring an environmental monitor to watch for colored plumes. The measure indicates this would be an "indication that drilling fluid or other material is entering the water and may affect water quality" at which time activities would cease until corrective measures are completed. (AR 250) In support of this assertion Petitioners cite to drilling activity undertaken in 2009-2010 during which plumes were observed. Petitioners maintain "no evidence is presented to explain how operations under the current project are any different...[than those] which led to spills previously." (Op. Br., p. 31, AR 1637-41)

Respondent argues potential water quality impacts are mitigated to insignificant as a potential impact, escaping drilling fluids or stirred water sediment was identified (AR 200), analyzed (AR 54-55, 202-203), and mitigation was detailed (AR 201, HYD-1). Respondent argues Petitioners acknowledge the mitigation, but fail to acknowledge that mitigation itself eliminates the potential significant impact.

On reply Petitioners argue HYD-1 does not mitigate the potential significant impacts, but instead is akin to a remediation measure. HYD-1 provides that a monitor will "watch for colored plumes" and that these plumes are an indication that drilling fluid is entering the water and "may affect water quality." Once this is observed, activities will cease to allow for corrective measures to be completed. Petitioners maintain this is not a measure that avoids impacts to the environment, as the very presence of a plume negatively impacts fish and degrades water quality. Thus, Petitioners argue, substantial evidence supports a fair argument of significant environmental impacts that cannot be sufficiently mitigated.

The documents Petitioners refer to concerning prior drilling activity do not constitute substantial evidence of a potential significant environmental impact. Petitioners have not established that the prior project used identical drilling methods, occurred in similar environmental settings, or was otherwise similar to the project at issue sufficient to establish that the prior outcomes are likely to be repeated here. Further, Petitioners have not identified evidence that *any* plume, not matter how short in duration, may result in significant environmental impacts. While HYD-1 does allow for the possibility of colored plumes, it indicates that activities will cease upon observation of such conditions.

Petitioners have not identified substantial evidence to contradict the MND's conclusion that HYD-1 mitigates any potential significant impacts.

## K. Performance Standards

Petitioners argue Respondent failed to comply with CEQA Guidelines section 15126.4, subdivision (a)(1)(B) by not adopting specific performance standards, in that the reconnaissance teams will "shift" locations the "minimum distance necessary to reduce the potential for ... impacts to less than significant..." (AR 33-34) Petitioners maintain terms like "minimum



distance necessary” do not provide performance standards sufficient for a mitigation measure, and fails to provide guidance as to what impacts are significant and in need of mitigation. Petitioners assert this is a “wholesale deferral of the identification of the unique environmental resources at any of the 300-plus sites and the identification of standards to determine whether impacts to those resources are ‘significant’ and in need of mitigation.” (Op. Br., p. 34.)

Of the numerous mitigation measures provided in the MND, Petitioners identify BIO 1-(b), BIO-1(d), BIO-3, BIO-5, BIO-8(b), and BIO-15(b) as containing language that is so vague as to not provide enforceable performance standards.

Mitigation Measure BIO-1(b) provides:

As stated in the project description, all on-land soil investigation Impact Areas will be located outside of wetlands as defined in the Corps of Engineers Wetlands Delineation Manual (USAGE 1987). Evaluation of conditions at each site will be conducted by qualified wetland delineators. If after review of applicable data sources, nearby aquatic resources are identified for on-land soil investigation sites, including those that meet the Corps definition of wetlands or non-wetland waters, wetland delineators will participate in the site surveys for those sites and relocate them outside of the boundaries of observed aquatic resources. (AR 8)

Petitioners argue the language “outside the boundaries of observed aquatic resources” does not establish any objective standards for what makes an aquatic resource “nearby” or the “boundaries” of aquatic resources. Further, there is no explanation as to how these determinations will be made and no evidence that the measure would be effective in mitigating significant environmental impacts.

Mitigation Measure BIO-1(d) provides:

A qualified team of biologists will conduct a habitat assessment and reconnaissance level surveys approximately two weeks prior to the onset of ground disturbing soil investigation activities for any special status plants and wildlife that have the potential to occur within the project area. If the biologists identify the potential for special status wildlife impacts within the Impact Area and associated standard species buffers based on the site reconnaissance, the location will be shifted the minimum distance necessary to reduce the potential for biological impacts to a less than significant level without increasing impacts to other resources to above a level of significance. If a suitable location cannot be determined within adjacent areas, then the soil investigation at that location will not be conducted. (AR 9)

Petitioners again maintain this is an impermissibly deferred mitigation measure without performance standards, as a biologist must make a subjective determination as to where a site should be located.

Mitigation Measure BIO-3 provides:

**Western pond turtle**

- a. In areas with the potential for western pond turtle to occur, pre-activity presence/absence surveys for western pond turtle shall occur within 48 hours prior to the onset of project activities at any Impact Area.
- b. If Western pond turtles are observed on land during the pre-activity surveys, the area within 328 feet (100 meters) of the boundary of the aquatic habitat will be flagged and avoided if feasible.
- c. If western pond turtles are observed within the Impact Area during a pre-activity survey or during project activities, they will be relocated outside of the Impact Area to appropriate aquatic habitat by a qualified biologist. (AR 11)

Petitioners argue the language “if feasible” renders the mitigation measure unenforceable.

Mitigation Measure BIO-5 provides:

**Rookery Birds**

To minimize and avoid the potential impacts to special-status rookery birds that may occur within the Study Area the following general measures will be implemented:

- a. A pre-activity survey for active rookeries will be conducted (during nesting season between February 1 - August 31) a maximum of 72 hours prior to the onset of soil investigation field activities. The qualified biologist(s) must, at a minimum, have experience conducting surveys to identify the specific rookery bird species and associated habitat that could occur on site.
- b. If any active rookeries are identified within or adjacent to an Impact Area, a buffer will be put in place to ensure that the birds are not disturbed during work activities. This buffer will be up to 50 feet (15 meters), but can be smaller, dependent on-site conditions and at the discretion of the qualified biologist. (AR 11-12)

Petitioners argue the language “dependent on-site conditions” and “at the discretion of the qualified biologist” does not establish performance standards and is too vague to be enforceable.

Mitigation Measure BIO-8 provides:

**Nesting Birds**

To minimize and avoid the potential impacts to nesting birds (non-raptor) protected by the MBTA and Fish and Game Code that may occur within the Study Area the following general measures will be implemented:

a. For soil investigation field activities that will occur February 1 - August 31, a pre-activity survey for actively nesting birds will be conducted a maximum of 72 hours prior to the onset of soil investigation activities by a qualified biologist. The qualified biologist(s) must, at a minimum, have experience conducting surveys to identify the specific species and associated habitat that could occur on site.

b. If any active nests are identified within or adjacent to an Impact Area, a buffer will be put in place to ensure that no take (as defined by MBTA), and no take, possession, or needless destruction (as prohibited under the Fish and Game Code) occurs. This buffer will be up to 50 feet (15 meters), but can be smaller, dependent on-site conditions and at the discretion of the qualified biologist (AR 13)

Petitioners again argue the language "dependent on-site conditions and at the discretion of the qualified biologist" does not establish performance standards and is too vague to be enforceable.

Mitigation Measure BIO-15 provides:

#### Special-Status Bats

To minimize and avoid the potential impacts to special-status bats that may occur within the project area, the following general measures will be implemented:

a. Pre-activity roosting special-status bat surveys and an evaluation of roosting habitat suitability for bats will be conducted by a qualified biologist familiar with the species that could potentially occur within the Impact Area. The qualified biologist should, at a minimum have experience conducting roosting bat surveys and be able to identify the presence of guano and urine stains.

b. Any identified roosts of special-status bats will be avoided, and a buffer of up to 100 feet (30 meters) will be established based on-site conditions and at the discretion of the biologist, to ensure that the roosting bats are not disturbed. If a nursery colony is identified, additional measures may be required including a larger buffer, to ensure no disturbance. Such additional measures will be determined and monitored by a qualified biologist. (AR 16)

Petitioners argue the language "based on on-site conditions and at the discretion of the biologist" does not establish performance standards and is too vague to be enforceable.

Respondent argues all of the cited mitigation measures are enforceable and contain specific performance objectives in compliance with CEQA Guidelines section 15126.4. Specifically, BIO-1(b) “has a commitment that ‘all on-land soil investigation Impact Areas will be located outside of wetlands,’ and [sets] forth USACE standards for defining those wetlands. (Oppo., p. 28, AR 8) BIO-1(d) states “quite unambiguously that should special species be found at a site, biologists will ensure activities do not impact them, ending all activity if necessary.” (Oppo., p. 28, AR 9) Respondent further asserts Bio-3, 5, 8(b) and 15 all include concrete steps to be taken to avoid impacts with provisions for adjustment if necessary. (AR 11, 13)

CEQA Guidelines section 15126.5 provides that an EIR shall describe feasible measures which could minimize significant adverse impacts. “The specific details of a mitigation measure... may be developed after project approval when it is impractical or infeasible to include those details during the project’s environmental review provided that the agency (1) commits itself to the mitigation, (2) adopts specific performance standards the mitigation will achieve, and (3) identifies the type(s) of potential action(s) that can feasibly achieve that performance standard and that will [sic] considered, analyzed, and potentially incorporated into the mitigation measure.” (14 C.C.R. § 15126.4, subd. (a)(1)(B).)

“When, for practical reasons, mitigation measures cannot be fully formulated at the time of project approval, the lead agency may commit itself to devising them at a later time, provided the measures are required to satisfy specific performance criteria articulated at the time of project approval.” (*Center for Biological Diversity v. Dept. of Fish & Wildlife* (2015) 234 Cal.App.4th 214, 241.) For example, an “agency goes too far when it simply requires a project applicant to obtain a biological report and then comply with any recommendations that may be made in the report. (*Ibid.*) Further, a mitigation measure violates CEQA when one person has discretionary decisions, with no objective criteria to ensure this discretion will result in real “quantifiable, verifiable, enforceable” mitigation. (*Golden Door Properties, LLC v. County of San Diego* (2020) 50 Cal.App.5th 467, 525.)

Mitigation Measure BIO-1(b) indicates that all on-land investigation sites will be located outside of wetlands as defined in the Corps of Engineers Wetlands Delineation Manual. However, the measure requires a site to be relocated only if “nearby aquatic resources are identified for on-land soil investigation sites.” There is no definition given for what constitutes “nearby” and thus it appears to be solely in the discretion of the wetland delineator to determine when an aquatic resource is “nearby” sufficient to require relocation of the subject site. It is unclear whether this mitigation measure will achieve the performance standard of making sure all sites are, for example, at least twenty feet away from an aquatic resource, or whether it will achieve the performance standard of ensuring all sites are at least one hundred feet away from an aquatic resource. There is no evidence before the Court that any particular distance is necessary to successfully mitigate potential significant environmental impacts. However, the measure itself suggests it is not enough for sites to merely be “located outside of wetlands” as this requirement is already included in the project description. Thus, for the mitigation measure to have a performance standard it must be clear what the “mitigation will achieve.”

Mitigation Measure BIO-1(d) indicates that if biologists identify the potential for special status wildlife impacts within the impact area and associated standard buffers, the "location will be shifted the minimum distance necessary to reduce the potential for biological impacts to a less than significant level without increasing impacts to other resources to above a level of significance." Thus, this measure seeks to reduce biological impacts to a "less than significant level." However, there is no indication in the measure itself as to what constitutes a "less than significant level" for special status plants and wildlife. It appears from the language of the measure that the team of biologists will have the discretion to determine what is a "less than significant level." Respondent has not identified any evidence in the record establishing a level of significance for special status plants and wildlife.

Mitigation Measure BIO-3 indicates that if a western pond turtle is observed on land, the area within 328 feet of the boundary of the aquatic habitat will be flagged and avoided if feasible. However, BIO-3 goes on to state that if western pond turtles are observed within the impact area they will be "relocated outside of the Impact Area to appropriate aquatic habitat by a qualified biologist." While the flagging of a boundary is only to occur and the area avoided "if feasible," the measure goes on to *require* relocation of any pond turtle observed within the impact area to an area outside the impact area. This is a clear performance standard, such that the mitigation measure is designed to prevent any western pond turtles from being present in the impact area during any project activities.

Mitigation Measure BIO-5 indicates that a pre-activity survey for active rookeries will be conducted no more than 72 hours before site activities, and if any rookeries are within or adjacent to an impact area, a buffer will be put in place "to ensure that the birds are not disturbed during work activities." While the size of the buffer is left up to the discretion of the biologist, the performance standard is that no birds are disturbed during work activities.

Mitigation Measure BIO-8 indicates that if active nests for birds protected by MBTA and the Fish and Game Code are observed within or adjacent to an impact area, a buffer will be put in place to "ensure that no take (as defined by MBTA), and no take, possession, or needless destruction (as prohibited under the Fish and Game Code) occurs. Again, the buffer size may be adjusted at the discretion of the biologist, but the performance standard is clear that the measure will prevent any take, possession, or needless destruction as defined by MBTA and the Fish and Game Code.

Mitigation Measure BIO-15 indicates that if special-status bat roosts are identified in the impact area, the roosts will be avoided, and a buffer will be established to "ensure that the roosting bats are not disturbed." The buffer size may be adjusted at the discretion of the biologist, including a special provision allowing the biologist to enlarge the buffer beyond the maximum 100 feet if a nursery colony is identified in the impact area. Again, while the buffer size is discretionary, the performance standard the measure will achieve is preventing the disturbance of any roosting bats.

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L. Improper Deferral of the Geotechnical Exploration Phase of the Tunnel Project

Petitioners argue this project is part of the “whole of an action” that makes up the Tunnel Project and accordingly should be evaluated under CEQA in a single document along with all other phases or components of the Tunnel Project. (Op. Br., p. 37.) Petitioners maintain not only has Respondent piecemealed the geotechnical phase from the remainder of the Tunnel Project, but has also chopped up the geotechnical phase into several pieces. “[T]he soil investigations included in the MND, while vast in number, are only a small portion of the totality of soil investigations reasonably expected to be required to support and complete the design and construction of the Tunnel project” (Op. Br., p. 38.) Petitioners argue:

In order to avoid violating CEQA’s fundamental prohibition against chopping up review of the “whole of the action”, it was incumbent upon DWR to either explain why the instant soil investigation constitute the totality of soil investigations necessary to complete the design and construction of the Tunnel project, or to include within DWR’s environmental review of the instant soil investigations the dozen or hundreds of additional soil investigations DWR reasonably anticipates will be required to complete the design and construction of the Tunnel project. (Op. Br., p. 39.)

In support of Petitioner’s argument, they cite to *Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214:

One way to evaluate which acts are part of a project is to examine how closely related the acts are to the overall objective of the project. The relationship between the particular act and the remainder of the project is sufficiently close when the proposed physical act is among the “various steps which taken together obtain an objective.” [Citation.] (*Id.*, at p. 1226.)

Petitioners argue the soil investigations are among the various steps that obtain the objective of gathering the information necessary to complete the design and construction of the Tunnel Project, and therefore the entire project must be evaluated in one document. Petitioners also argue the Tunnel Project was required to be included in the MND’s cumulative projects list as it is a future project as contemplated by CEQA that had already begun environmental review at the time the MND was released.

Respondent argues the geotechnical studies and the Delta Conveyance Project are independent endeavors, part of a larger plan to provide reliable water to the State, but are not integral parts of the same project. Even if the conveyance project is never built, the geotechnical studies will move forward and merely generate data on the physical condition of the Delta. Respondent further argues Petitioners cannot cite to any potentially significant impact from the subject studies that would necessitate an EIR.

In support of its argument, Respondent cites to Code of Civil Procedure section 1245.010, and argues the MND withstands piecemealing scrutiny under the “independent utility test.” Respondent maintains the geotechnical studies serve “the useful purpose of information

gathering...” (Oppo, p. 30.) Respondent also cites to *Laurel Heights Improvement Assn. v. Regents of the University of California* (1988) 47 Cal.3d 376, and asserts the conveyance project is not a reasonably foreseeable consequence of the geotechnical studies as the studies do not mandate a future water conveyance project. “Any policy decision to proceed with the [conveyance project] will be wholly independent of the proposed information gathering project and will be based on a myriad of other factors, including analysis in a separate CEQA document and a balancing of competing interests.” (Oppo., p. 32.)

Respondent also argues Petitioners’ piecemealing argument is barred by collateral estoppel, as the issue was already addressed by the Sacramento Superior Court in its decision in *Central Delta Water Agency, et al. v. Cal. Dept. Water Resources* (Nov. 2, 2011, Case No. 34-2010-80000698.)

Piecemealing is the impermissible chopping of a project into smaller components in order to understate environmental effects which, were the project taken as a whole, could be significant. (See, e.g., *Aptos Council v. County of Santa Cruz* (2017) 10 Cal.App.5th 266, 277-278.) Piecemealing can occur when “the purpose of the reviewed project is to be the first step toward future development,” or “when the reviewed project legally compels or practically presumes completion of another project.” (*Id.*, at pp. 279-280.) Accordingly, environmental review “must include an analysis of the effects of future expansion or other action if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects. Absent these two circumstances, the future expansion need not be considered in the EIR for the proposed project.” (*Id.*, at p. 279.) There is no piecemealing when “projects have different proponents, serve different purposes, or can be implemented independently.” (*Id.*, at p. 280, footnote omitted.)

In *Laurel Heights*, the university purchased property for relocation of a biomedical research facility. (*Laurel Heights I* (1988) 47 Cal.3d. 376) The EIR only analyzed the environmental impacts of using 100,000 square feet of the 354,000 square foot building, even though the EIR acknowledged that the university would occupy the entire building when the space became available, the amount of faculty, staff, and students that would occupy the entire building, and the uses to which the remaining space would be put. (*Id.*, at p. 396.) Our Supreme Court noted that there was telling evidence that at the time of EIR preparation, the university had “made decisions or formulated reasonably definite proposals as to future uses of the building. At a minimum, it is clear that the future expansion and the general types of future activity at the facility are reasonably foreseeable.” (*Id.*, at p. 397.) The court concluded the EIR should have discussed “at least the general effects of the reasonably foreseeable future uses of the Laurel Heights facility, the environmental effects of those uses, and the currently anticipated measures for mitigating those effects.” (*Id.*, at p. 398.)

In *Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214, the city approved a project to construct a commercial retail building along with associated parking, landscaping and street improvements. (*Id.*, at p. 1219.) The city prepared an MND, and the planning commission approved the site plan subject to a number of conditions concerning road realignments. (*Id.*, at p. 1220.) These road realignments were not

considered as part of the MND. The Fifth District Court of Appeal determined the road realignment should have been considered as part of the commercial retail project because the road realignment was a condition to the approval of the retail project. Thus, the road project was a "contemplated future part of" the retail project. (*Id.*, at pp. 1230-1231.)

The Court has already addressed and rejected Respondent's collateral estoppel argument in ruling on its demurrer. The Court will not repeat its analysis other than to say it again finds that the piecemealing argument is not barred by collateral estoppel. However, the Court does find that no piecemealing occurred.

The MND describes the proposed project as, "Activities to determine the composition, location, and geotechnical properties of soil materials commonly found in the Delta which would inform the design, environmental analysis, and development of alternatives for a potential Delta conveyance project and contribute to DWR's overall understanding of Delta geology." (AR 4) Further, the MND provides that the "primary objective" is to determine the geotechnical properties of soil materials as "there is a lack of geotechnical data at relevant depths, available to the Department of Water Resources in the Study Area." (AR 6) In a separate "Background" section the MND acknowledges again that Respondent is "pursuing a new environmental review and planning process for a single tunnel solution to modernize water infrastructure in the Delta. To inform this future process, DWR is proposing soil investigation to gather data on the physical properties of the soils and other typical geologic and geotechnical parameters that will be used to inform and evaluate future alternatives for a proposed single-tunnel Delta conveyance (requiring a separate California Environmental Quality Act (CEQA) process)." (AR 32)

There is no denying that part of the purpose of the geotechnical studies at issue is to evaluate options for a future single-tunnel Delta Conveyance project. However, the Court finds that the impacts that would result from a nebulous "single-tunnel Delta conveyance" were not reasonably foreseeable at the time the MND was certified. Unlike *Laurel Heights I*, there is not detail in the MND as to the configuration of a tunnel project, the location, amount of water to be transported, etc. That is to say, other than indicating that the Governor has issued an order (Executive Order N-10-19) that planning occur for a single tunnel project, there are no details about a future project significant to make it reasonably foreseeable or to allow for meaningful studying of potential environmental impacts connected to such a potential speculative project. (See *Berkeley Jets Over the Bay Com. V. Board of Port Comrs.* (2001) 91 Cal.App.4th 1344 [airport EIR could omit future projects that "existed only as concepts in long-range plans that were subject to constant revision"]; *National Parks & Conservation Assn. v. County of Riverside* (1996) 42 Cal.App.4th 1505 [landfill project did not need to include discussion of potential material recovery facilities because this was a speculative future project].) The mere fact that an agency contemplates a long-range potential project does not make that project a "reasonably foreseeable consequence of the initial project." (*Laurel Heights I, supra*, at p. 396.)

Further, unlike *Tuolumne*, completion of a tunnel project is not a requirement for the geotechnical project. The geotechnical project can be completed, and no tunnel conveyance project may ultimately be constructed. The approval of one project, does not mandate the pursuit of the other. Respondent has also identified evidence that the geotechnical studies serve



informational purposes independent of the potential construction of a conveyance tunnel in the Delta.

**M. Adoption of the Addendum**

Petitioners argue the addendum changed the location of 60 soil investigation sites, with many new sites located in different counties than originally proposed, and removing two soil borings of 125-200 feet and replacing them with two borings up to 250 and 300 feet. (ARA 7-8) Petitioners maintain the addendum's conclusion that the resource analysis is unchanged from the MND is "without merit and unsupported by evidence in the record." (Op. Br., p. 46.)

Respondent argues the addendum would employ the same study methods analyzed in the MND and merely removed the location of 60 study sites and replaced them with 60 new sites, generally within two miles of the MND approved sites. (ARA 6, 8) The map identifies that the changed locations all remain in the Study Area. (ARA 10-13) Respondent argues Petitioners provide no evidence from the record raising any fair argument of potential environmental impacts arising from the addendum's site adjustments.

CEQA Guidelines provide, "an addendum to an adopted negative declaration may be prepared if only minor technical changes or additions are necessary or none of the conditions described in Section 15162 calling for the preparation of a subsequent EIR or negative declaration have occurred. Section 15162 requires a subsequent EIR if the lead agency determines, "on the basis of substantial evidence in the light of the whole record, one or more of the following:

- (1) Substantial changes are proposed in the project which will require major revisions of the previous EIR or negative declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects;
- (2) Substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions of the previous EIR or negative declaration due to the involvement of new significant, environmental effects or a substantial increase in the severity of previously identified significant effects; or
- (3) New information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified as complete or the negative declaration was adopted, shows any of the following:
  - (A) The project will have one or more significant effects not discussed in the previous EIR or negative declaration;
  - (B) Significant effects previously examined will be substantially more severe than shown in the previous EIR;

(C) Mitigation measures or alternatives previously found not to be feasible would in fact be feasible and would substantially reduce one or more significant effects of the project, but the project proponents decline to adopt the mitigation measure or alternative; or

(D) Mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative.

The Addendum provides that the proposed changes are:

The removal of:

- 25 soil borings between 125 feet to 200 feet deep (38 - 61 meters),
- 22 CPTs up to 200 feet deep (61 meters), and
- 13 overwater soil borings up to 200 feet deep (61 meters),

The replacement with:

- 23 soil borings between 125 feet to 200 feet deep (38 to 61 meters),
- 2 soil borings up to 250 feet (61 meters) and 300 feet (91 meters) deep, respectively
- 22 CPTs up to 200 feet deep (61 meters), and
- 13 overwater soil borings up to 200 feet deep (61 meters). (ARA 7-8)

The soil samples are to be collected using the same methods described in the MND, "with the addition of rock coring samplers that are anticipated to be needed at the two deeper boring locations...and may also be used at other locations in that same region as needed...While rock coring samplers utilize a different downhole sample tool, the collection of that sample would not be significantly different than sampling methods described in section 2.1.1 of the [MND]." (ARA 8-9) Also, additional downhole testing will occur at the two deeper borings. (ARA 9) The duration of soil investigation activities for borings and CPTS remain as described except for the two deeper borings which will take 20 workdays instead of 13 workdays. The Addendum includes maps showing the removed locations and the newly proposed locations. (ARA 10-13)

Petitioners do not cite to any evidence in the record demonstrating that Respondent's determination to adopt an Addendum was in violation of section 15162. While the Addendum includes site locations not previously identified in the MND, the nature of this project is such that the general geographic area of the Delta was considered in analyzing the project in the first instance. None of the new site locations appear to be outside this general geographic area such that substantial evidence supports a determination that section 15162 requires preparation of a subsequent negative declaration.

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#### **IV. Conclusion**

The petition for writ of mandate is **GRANTED in part**, with respect to the Court's findings concerning Mitigation Measures BIO-1(b) and BIO-1(d). Pursuant to the Court's analysis above, the remainder of the requested relief is **DENIED**.

A judgment shall be issued in favor of Petitioners, and against Respondent, and a peremptory writ shall issue commanding Respondent to take action specially enjoined by law in accordance with the Court's ruling, but nothing in the writ shall limit or control in any way the discretion legally vested in Respondent. Respondent shall make and file a return within 60 days after issuance of the writ, setting forth what has been done to comply therewith.

In accordance with Local Rule 1.06, Petitioners' counsel is directed to prepare an order granting the petition, incorporating this ruling as an exhibit to the order, a writ of mandate, and a separate judgment; submit them to opposing counsel for approval as to form in accordance with CRC 3.1312(a); and thereafter submit them to the Court for signature and entry in accordance with CRC 3.1312(b).