NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

ALBERT THOMAS PAULEK et al,
Plaintiffs and Appellants,

v.

COUNTY OF RIVERSIDE et al.,
Defendants and Respondents;

NUEVO DEVELOPMENT COMPANY, LLC et al.,
Real Parties in Interest and Respondents.

CENTER FOR BIOLOGICAL DIVERSITY et al,
Plaintiffs and Appellants,

v.

COUNTY OF RIVERSIDE et al.,
Defendants and Respondents;

NUEVO DEVELOPMENT COMPANY, LLC et al.,
Real Parties in Interest and Respondents.

E075154

(Super.Ct.No. RIC 1800517 & RIC1800722)

OPINION

APPEAL from the Superior Court of Riverside County. Raquel A. Marquez, Judge. Affirmed in part and reversed in part.

The Law Office of Susan Nash and Susan Nash for Plaintiffs and Appellants, Albert Thomas Paulek et al.

Center for Biological Diversity, John P. Rose, Ross Middlemiss, and Jonathan Evans for Appellants, Center for Biological Diversity, Sierra Club and San Bernardino Audubon Society.

Gregory P. Priamos, County Counsel and Melissa R. Cushman, Deputy County Counsel, for Defendants and Respondents County of Riverside et al.

Monchamp Meldrum, Amanda Monchamp, Joanna Meldrum, Rob Taboada, and Peter Landreth for Respondents, County of Riverside and Real Party in Interest, Nuevo Development Company.

This appeal arises out of two lawsuits filed under the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.; "CEQA") challenging a development known as The Villages of Lakeview. Two groups of appellants, one with the Center for Biological Diversity, Sierra Club, and the San Bernardino Valley Audubon Society (the "Center" appellants), and one with Albert Paulek, Friends of the Northern San Jacinto Valley, and Keep Nuevo Rural (the "Paulek" appellants), each argue that the latest environmental impact report (EIR) prepared for the project violates CEQA.

We agree with two of the claims raised by the Center appellants: that one of the mitigation measures in the EIR was inadequate and that the EIR failed to address the environmental effects of supplying water to the project. Thus, in the case filed by the Center appellants, we reverse the judgment and remand for further proceedings. In the Paulek case, we reject the arguments raised and affirm the judgment.[1]

I. BACKGROUND

In 2004, real party in interest Nuevo Development Company, LLC (Nuevo) submitted an application for The Villages of Lakeview, denominated as Specific Plan No. 342, with respondent County of Riverside (County). The project, located in an unincorporated area of Riverside County between the cities of Perris and San Jacinto, proposed the development of an approximately 3,000 acre community containing a mix of 11,350 dwelling units, 500,000 square feet of commercial uses, new K-8 schools, and over 1,000 acres of parks and open space. In 2010, the County's Board of Supervisors (together with Nuevo and the County, "respondents") adopted the specific plan and certified the related EIR. The Board of Supervisors also approved related actions, including various general plan amendments.

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[1] Undesignated statutory references are to the Public Resources Code. All references to "Guidelines" are to the CEQA Guidelines (Cal. Code Regs., tit. 14, § 15000 et seq.).

The validity of the 2010 EIR was challenged in multiple lawsuits that were later consolidated. In 2012, the trial court found that the 2010 EIR was deficient in a number of areas and issued a peremptory writ of mandate ordering the County and the Board of Supervisors to vacate the 2010 approvals.

In 2016, the County released a revised draft EIR (DEIR) prepared by Nuevo's consulting firm. The DEIR discussed an alternative, Alternative 7, which the DEIR noted was created in response to the trial court's 2010 decision and which was described as having "a smaller development footprint" than the original project.[2] Among other features, Alternative 7 would allow a maximum of 8,725 dwelling units, as opposed to the 11,350 proposed for the original project. A new specific plan reflecting Alternative 7 was released along with the DEIR.

The County released a final revised EIR (FEIR) in July 2017. Later that year, the Board of Supervisors denied Specific Plan No. 342 as originally proposed by Nuevo, tentatively approved Alternative 7 as Specific Plan No. 342 instead, and then later adopted that specific plan and certified the FEIR. The Center appellants and the Paulek appellants both sought writs of mandate. In 2020, the trial court denied both petitions.

[2] The DEIR states that "Alternatives 1-6 . . . were previously considered in the EIR that was certified in 2010."

II. DISCUSSION

"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 (*Laurel Heights*).) An EIR is "'an informational document'" whose purpose "'is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project.'" (*Id.* at p. 391.)

"Under CEQA, the public is notified that a draft EIR is being prepared [citation], and the draft EIR is evaluated in light of comments received. [Citations.] 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. [Citations.] The lead agency must certify that the final EIR has been completed in compliance with CEQA and that the information in the final EIR was considered by the agency before approving the project. [Citation.] 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." (*Laurel Heights*, *supra*, 47 Cal.3d at p. 391, footnote omitted.)

"A court may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable. [Citation.] A court's

task is not to weigh conflicting evidence and determine who has the better argument when the dispute is whether adverse effects have been mitigated or could be better mitigated." (*Laurel Heights*, *supra*, 47 Cal.3d at p. 393.) This is because a court has "neither the resources nor scientific expertise to engage in such analysis." (*Ibid.*) Thus, "a court's inquiry in an action to set aside an agency's decision under CEQA 'shall extend only to whether there was a prejudicial abuse of discretion.'" (*Id.* at p. 392.)

"'Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence.'" (*Laurel Heights*, *supra*, 47 Cal.3d. at p. 392.) "'Judicial review of these two types of error differs significantly: While we determine de novo whether the agency has employed the correct procedures, "scrupulously enforc[ing] all legislatively mandated CEQA requirements" [citations], we accord greater deference to the agency's substantive factual conclusions.'" (*Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 512 (*Sierra Club*).) Whether a discussion in an EIR is sufficient "presents a mixed question of law and fact" and is therefore "generally subject to independent review," although "underlying factual determinations" warrant deference. (*Id.* at p. 516.) No error under CEQA is presumed to be prejudicial. (§ 21005, subd. (b).)

A. *Center Appellants*

We begin with the Center appellants, who raise three challenges. They contend that the discussion of mitigation measure MM Bio 11 was inadequate, that the EIR failed to analyze the impacts of Alternative 7's water usage, and that the EIR failed to reflect

the Board of Supervisors' independent judgment. As we explain, we agree that MM Bio 11 was inadequate and that the EIR failed to analyze the impacts of Alternative 7's water usage.

1. *MM Bio 11*

a. *Additional Background*

The DEIR included MM Bio 11, which was aimed at reducing the potential impacts of the project on adjacent conservation areas—in its words, "[t]o reduce direct and indirect impacts due to edge effects." It applied to both the proposed project and to Alternative 7. It called for an "Environmental Stewardship Program" that would provide community education along with a fund, administered by the "Lakeview Community Services Organization," some portion of which would go to local agencies in their effort to manage the nearby wildlife area.[3]

[3] As initially proposed, MM Bio 11 reads: "In order to increase public awareness and knowledge about local environmental issues and reduce potential significant indirect effects of development near to [c]onservation [a]reas, the [m]aster [d]eveloper of the proposed project shall provide an Environmental Stewardship Program. The program will include methods of community education such as interpretive and directional signs, pamphlets and demonstrations. The types of information presented shall include, but not be limited to: lighting, noise, keeping on trails, wildlife, plants, habitats, barriers, domestic animals, toxics such as pesticides, and invasive species. The Environmental Stewardship Program shall include a fund to be administered by the Lakeview Community Services Organization and a portion of the fund shall be used for [San Jacinto Wildlife Area] management items, including feral animal trapping, removal of trash, invasive species removal and enforcement. The budget will be developed in consultation with the California Department of Fish and Wildlife."

The United States Fish and Wildlife Service and the California Department of Fish and Wildlife (CDFW) jointly submitted comments on the DEIR. One of those comments focused on Bio MM 11. It stated:

"There is insufficient information on MM Bio 11 to determine if sufficient funds are available for the Environmental Stewardship Program that includes a community education program, enforcement and [San Jacinto Wildlife Area[4]] management issues. The funding source and amount of funding is not identified. Please provide additional information, with a detailed budget, that identifies staffing levels, tasks, and roles and responsibilities of all parties involved in this program. The funding mechanism should include a non-wasting endowment. This information is needed to determine the adequacy of the funding mechanisms for the Environmental Stewardship Program (MM Bio-11)."[5]

The FEIR responded to that comment by stating: "Compliance with MM Bio 11 will be a binding requirement on the project. The funding entity has been identified as a community services organization such as a Homeowners' Association, and provides the public with additional information about how the project will limit its indirect impacts to

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[4] The northwest portion of the project boundary shares a border with the San Jacinto Wildlife Area.

[5] Although CDFW is not a party to the litigation, the Center appellants may contend that an EIR is insufficient on a ground someone else raised so long as they have also objected on the same or other grounds, as the Center appellants have done here. (§ 21177; *Maintain Our Desert Environment v. Town of Apple Valley* (2004) 124 Cal.App.4th 430, 439 [section 21177 "permits any person who objected to raise any ground asserted as an objection by any other objecting party"].)

the [San Jacinto Wildlife Area]. Funding for the [Environmental Stewardship Program] does not affect the EIR's analysis or conclusions." The FEIR revised MM Bio 11 only to state that the types of information that the Environmental Stewardship Program would provide to the public would include vector-borne disease prevention.

CDFW continued to voice its concern about MM Bio 11 following the release of the FEIR. In October 2017, a few months after the FEIR was released, CDFW submitted a comment letter stating that there continued to be "no details on how much money will be generated for the Environmental [Stewardship] Program fund or whether those funds will be sufficient to address the increased management costs that will come with the addition of close to 30,000 people" to the surrounding area. That "lack of detail," CDFW staff warned, would "set[] the stage for future conflict" between CDFW, the San Jacinto Wildlife Area staff, and the Lakeview Community Services Organization." (Underlining omitted.) The CDFW stated that MM Bio 11 needed "more detail on how the fund is established, how CDFW will participate in this process, and" that the mitigation measure "should identify a minimum amount that will be provided to" surrounding agency staff. CDFW noted that it did "not believe that sufficient detail ha[d] been provided to evaluate whether [MM Bio 11] will offset increased management needs that will come with [the] project." (Underlining omitted.)

The County responded to CDFW's comments in November 2017. The County noted that at a September 2017 meeting, Nuevo had requested that CDFW provide "detailed costs of operating budgets and expected increases in CDFW budgets" but that

CDFW's response remained pending. The County went on to state that, although it was "not possible at this time, without knowing CDFW operation costs, to determine a specific budget," the County would revise MM Bio 11 to state that "The Lakeview [Community Services Organization's] budget directed towards the [San Jacinto Wildlife Area] and Lakeview Mountains interface issues shall be a priority and the appropriate percentage of the Lakeview [Community Services Organization's] fund directed towards the [San Jacinto Wildlife Area] and Lakeview Mountains will be developed in consultation with the California Department of Fish and Wildlife [San Jacinto Wildlife Area] Staff and the [Regional Conservation Authority]." (Underlining omitted.)

In December 2017, before the Board of Supervisors meeting to certify the FEIR, CDFW staff sent the County an e-mail noting that "how much funding comes to the [San Jacinto] Wildlife Area appears to be subject to determination by the" Lakeview Community Services Organization. The e-mail also "request[ed] that sufficient and predictable annual funds [be] provided directly to CDFW to address future management costs associated with the project." In response, the County noted that CDFW staff had estimated (during an earlier meeting) that it would need "around $60,000," and reiterated that Nuevo had "requested some clarification as to what would be covered under that amount." It stated: "It seems reasonable for the applicant to ask for some level of annual accounting for services that are yet to be quantified or even estimated or even determined if necessary." It also confirmed that the Lakeview Community Services Organization would have control over the funding: "The [Lakeview Community Services

Organization] is the mechanism the applicant has proposed to facilitate and fund programs and services not covered elsewhere. As such, the discretion of distribution of funds rests entirely with that entity."

As adopted by the Board of Supervisors soon thereafter, MM Bio 11 stated that "[p]rior to issuance of building permit[s] for the 500th residential unit, the developer shall initiate with California Fish & Wildlife staff for them to submit an initial budget of work necessary to offset recognized impacts of the Specific Plan development on the San Jacinto Wildlife Area to the [Lakeview Community Services Organization] and County of Riverside. Budgets shall continue to be requested by the developer and submitted to the California Fish & Wildlife on an annual basis. Quarterly meetings shall be held with the [Lakeview Community Services Organization], California Fish & Wildlife, and County staff to review the budget, work needed at the San Jacinto Wildlife Area, and provision of funding by the [Lakeview Community Services Organization] to California Fish & Wildlife." MM Bio 11 also now stated that "[t]o assist initial funding of the Environmental Stewardship Program, the developer shall provide funding to the program in the amount of $200 per unit for the first 500 units" and that "[s]uch proof of funding shall be provided prior to building permit issuance for the first 500 units." In other words, that the Environmental Stewardship Program would be initially funded with $100,000.

b. *Analysis*

"Public Resources Code section 21002 requires agencies to adopt feasible mitigation measures to substantially lessen or avoid otherwise significant adverse environmental impacts." (*Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1027.) "For each significant effect, the EIR must identify specific mitigation measures." (*Ibid.*) "For projects for which an EIR has been prepared, where substantial evidence supports the approving agency's conclusion that mitigation measures will be effective, courts will uphold such measures against attacks based on their alleged inadequacy." (*Ibid.*)

Here, no substantial evidence supports the County's conclusion that MM Bio 11 will be effective, as there is no assurance that any substantial portion of the Environmental Stewardship Program's funds would go toward code enforcement, trash removal, and other wildlife area management issues that agency staff have been tasked with mitigating.

MM Bio 11's goal was to reduce "edge effects," partly through community education and partly through increased funding to local agencies. As CDFW emphasized during the EIR approval process, its concern was that there was no guarantee that the funding provided to those agencies would be stable.

The County's first response made little sense. By stating that funding for the Environmental Stewardship Program would "not affect the EIR's analysis or conclusions," the County all but opined that the program, and hence the mitigation

measure as whole, was insignificant, unless the expectation was that the Environmental Stewardship Program would achieve all of its directives for free. Under the County's logic, MM Bio 11 would have been either unnecessary, because it would not have mitigated any significant environmental impact, or unrealistic, if the goals were seen as important but the funding was not. (See *Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 17 Cal.App.5th 413, 433 ["Unrealistic mitigation measures . . . do not contribute to a useful CEQA analysis"].)

The County's later responses did not repeat this position, but they also validated CDFW's concern about the lack of stable funding. Even though MM Bio 11 was amended to state that the budget "shall be a priority," the County confirmed to CDFW that "the discretion of distribution of funds" would "rest[] entirely with" the Lakeview Community Services Organization." Thus, agencies tasked with management items that were now deemed important would have to rely on an organization that was not obligated to provide funding to them under any concrete terms.

Moreover, how the Lakeview Community Services Organization would operate remained unclear. The only information that the County provided about the organization's structure was that it would be "a community services organization such as a Homeowners' Association." And although MM Bio 11 ultimately stated that the Lakeview Community Services Organization would be initially provided with $100,000, there remained no details on where future funds would come from.

The lack of detail surrounding the proposed Lakeview Community Services Organization was perhaps best shown by the disagreement over just whose responsibility it was to provide additional details. The joint letter from CDFW and the United States Fish and Wildlife Services asked that the County "provide additional information, with a detailed budget, that identifies staffing levels, tasks, and roles and responsibilities of all parties involved in this program." The County neither provided such a budget nor explained why it wasn't doing so (except by stating that the funding wasn't important), but later on, the County chided CDFW for *its* lack of clarification for why it needed approximately $60,000, stating that "[i]t seems reasonable for the applicant to ask for some level of annual accounting for services that are yet to be quantified or even estimated or even determined if necessary."

What this record demonstrates, then, is that MM Bio 11 was a substantially undeveloped idea, the current implementation of which could not have reasonably been expected to achieve its goals. The County provided no clarity as to how the Lakeview Community Services Organization would be organized or how it would function. There were no details of how the organization would get money beyond its initial funding, and by confirming that the organization would retain full discretion over the funds, the County disclaimed any guidance or oversight of how much of any continued funding should be allocated to one priority over another. MM Bio 11 obligated CDFW to submit budgets, but when the County was asked that the Environmental Stewardship Program itself produce a budget, the County waived off the request, saying essentially that the

funding (and hence the mitigation measure) was not important. "Mitigation measures need not include precise quantitative performance standards, but they must be at least partially effective . . . ." (*Sierra Club*, *supra*, 6 Cal.5th at p. 523.) Here, no substantial evidence demonstrates to us that this untested[6] mitigation measure would even be partially effective. (See *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 92 ["An EIR is inadequate if '[t]he success or failure of mitigation efforts . . . may largely depend upon management plans that have not yet been formulated, and have not been subject to analysis and review within the EIR"]; *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 281 [mitigation measure was inadequate where "EIR does not state, nor is it readily apparent, why specifying performance standards or providing guidelines for the active management of [an endangered species] within the preserve was impractical or infeasible at the time the EIR was certified"]; *Golden Door Properties, LLC v. County of San Diego* (2020) 50 Cal.App.5th 467, 520 [mitigation measure violates CEQA when it "sets a generalized goal" whose achievement "depends on implementing unspecified and undefined" protocols]; see also *California Oak Foundation v. City of Santa Clarita* (2005) 133 Cal.App.4th 1219, 1244 ["the EIR failed to present a reasoned analysis in response" to comments "pointing out the uncertainty attending the [c]ity's reliance" on a water

[6] Respondents have not pointed us to any mitigation measure that is similar to MM Bio 11.

entitlement," and "[w]ithout the . . . entitlement, substantial evidence of sufficient water supplies does not exist"].)

In response, respondents point to an e-mail sent to CDFW staff from Nuevo's parent corporation. There, an individual from the parent corporation stated that the Lakeview Community Services Organization would be "funded by the assessment of a transfer fee upon the sale of a home in the community." "The transfer fee is 1/8 of 1% on the initial transfer of the home from the builder to the first homebuyer," while "[s]ubsequent transfers are assessed a fee of 1/4 of 1%." Based on those transfer fees, the e-mail states that the Lakeview Community Services Organization "would generate several hundred thousand dollars annually."

The problem, though, is that nothing in the FEIR or the mitigation monitoring and reporting plan that the Board of Directors adopted requires this. For purposes of "bringing [an EIR] in conformance with CEQA," information contained elsewhere is "'irrelevant . . . because the public and decision makers did not have the [information] available at the time the project was reviewed and approved.'" (*Sierra Club*, *supra*, 6 Cal.5th at p. 521; see also *Laurel Heights*, *supra*, 47 Cal.3d at p. 405 ["'"[W]hatever is required to be considered in an EIR must be in that formal report; what any official might have known from other writings or oral presentations cannot supply what is lacking in the report"'"].) Unlike the County's e-mail stating that the Lakeview Community Services Organization would have full discretion over its funds, which merely confirmed what the text of MM Bio 11 already allowed, the e-mail describing transfer fees would have

imposed new, specific requirements onto the mitigation measure. It therefore needed to have been in the EIR, and because it was not, we will not consider it here.[7]

Respondents also emphasize that the County is entitled to a presumption that it will act in good faith and enforce MM Bio 11. This is true so far as it goes. (See *Bus Riders Union v. Los Angeles County Metropolitan Transportation Agency* (2009) 179 Cal.App.4th 101, 108 ["'[a]ll presumptions of law are in favor of the good faith of public officials'"].) However, whatever the Lakeview Community Services Organization will be, it will presumably not be a public agency, and there is little that the County can do under MM Bio 11 as currently described if the organization construes its funding priority in a way the County disagrees with.

Accordingly, MM Bio 11 was a deficient mitigation measure.

2. *Impacts of Water Supply*

CEQA requires that projects comply with sections 10910 through 10915 of the Water Code. (§ 21151.9.) Those sections "require the city or county considering a project to obtain, at the outset of the CEQA process, a water supply 'assessment' from the applicable public water system," which "is then to be included in any CEQA document the city or county prepares for the project." (*Vineyard Area Citizens for*

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[7] For the same reason, we will also not consider the County's contention, made in passing and for the first time on appeal, that the funding CDFW requested would not be an issue because of increased user fees the department might get under section 1765 of the Fish and Game Code. We note, however, that in any event, stable funding for the Environmental Stewardship Program (and the Lakeview Community Services Organization) is not the same as stable funding for the CDFW and San Jacinto Wildlife Area staff tasked with many of the measure's mitigation items.

Responsible Growth, Inc. v. City of Rancho Cordova (2007) 40 Cal.4th 412, 433 (*Vineyard*).)

The Center appellants do not take issue with the water supply assessment that was prepared for the project here. Rather, they contend that, under CEQA, an EIR must discuss more than supply projections when it comes to water; it must, to some degree, consider the significant environmental impacts caused by fulfilling those projections. We agree.

An EIR must "include a detailed statement setting forth" "[a]ll significant effects on the environment of the proposed project." (§ 21100, subd. (b); see also Guidelines, § 15126.2, subd. (a) ["An EIR shall identify and focus on the significant effects of the proposed project on the environment"].) "Direct and indirect significant effects of the project on the environment shall be clearly identified and described, giving due consideration to both the short-term and long-term effects." (Guidelines, § 15126.2, subd. (a).) Direct effects are those "caused by the project and occur at the same time and place," while indirect effects are those "caused by the project and are later in time or farther removed in distance, but are still reasonably foreseeable." (*Id.*, § 15358, subd. (a)(1)-(2).) Indirect effects also include "effects related to induced changes in the pattern of land use, population density, or growth rate, and related effects on air and water and other natural systems, including ecosystems." (*Id.*, § 15358, subd. (a)(2).)

"'When reviewing whether a discussion is sufficient to satisfy CEQA, a court must be satisfied that the EIR [] includes sufficient detail to enable those who did not participate in its preparation to understand and to consider meaningfully the issues the proposed project raises.'" (*Buena Vista Water Storage Dist. v. Kern Water Bank Authority* (2022) 76 Cal.App.5th 576, 593, citing *Sierra Club*, *supra*, 6 Cal.5th at p. 510.)

As the EIR observes, the Metropolitan Water District of Southern California (MWD) "supplies imported water, primarily from the State Water Project[8] . . . and from the Colorado River," to multiple member agencies, one of which is the Eastern Municipal Water District (EMWD). The EMWD gets approximately two-thirds of its water from the MWD. The Villages of Lakeview project is expected to require 4,843 acre-feet, or over 1.57 billion gallons, of water per year, which will be provided by EMWD. Alternative 7 would slightly reduce that demand to 4,684 acre-feet per year.

In a comment letter on the DEIR, the Center for Biological Diversity stated that "the DEIR does not adequately analyze the impacts of extracting water from other areas in order to support the water needs" of the project. It continued: "Drawing more water from the already-depleted Colorado River . . . will have foreseeable impacts on water quality and wildlife, including reduced instream flows. The DEIR does not appear to

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[8] The State Water Project is one of two "major exporter[s]" of "Bay-Delta water." (*In re Bay-Delta etc.* (2008) 43 Cal.4th 1143, 1154.) "California's two largest rivers, the Sacramento and the San Joaquin Rivers, meet to form a delta . . . near the City of Sacramento, and their combined waters, if not diverted, flow through the [d]elta, Suisun Bay, and San Francisco Bay, to the Pacific Ocean. The flow of water through this region, commonly known as the Bay-Delta, forms the largest estuary on the West Coast of the United States." (*Id.* at p. 1151.)

analyze these foreseeable impacts." In response, the County stated: "Analyzing the environmental impacts of more extraction from the Colorado River and State Water Project by EMWD or MWD is beyond the scope of the EIR."

To comply with CEQA, the EIR here needed to address, with "'sufficient detail to enable those who did not participate in its preparation to understand and to consider meaningfully,'" the project's effects on the environment due to increased water extraction. (*Buena Vista Water Storage Dist. v. Kern Water Bank Authority*, *supra*, 76 Cal.App.5th at p. 593; see *Santiago County Water District v. County of Orange* (1981) 118 Cal.App.3d 818, 829 [EIR insufficient where there were no "facts from which to evaluate the pros and cons of supplying the amount of water that the [project] will need"]; *Stanislaus Natural Heritage Project v. County of Stanislaus* (1996) 48 Cal.App.4th 182, 197 [EIR insufficient where there was "'no analysis of the potential impacts of the eventual long-term supply' of water"].) As our Supreme Court has noted, in terms of an EIR's discussion of supplying water, "[t]he ultimate question under CEQA . . . is not whether an EIR establishes a likely source of water, but whether it adequately addresses the reasonably foreseeable *impacts* of supplying water to the project." (*Vineyard*, *supra*, 40 Cal.4th at p. 434.) The EIR made no attempt to do so. And because of the EIR's omission here, "some important ramifications of the proposed project remained hidden from view at the time the project was being discussed and approved," which "frustrates one of the core goals of CEQA." (*Santiago County Water District v. County of Orange*, *supra*, at p. 830.)

Of course, "[i]t is the adequacy of the EIR with which we are concerned, not the propriety of the [B]oard of [S]upervisors' decision to approve the project." (*Santiago County Water District v. County of Orange*, *supra*, 118 Cal.App.3d at p. 831.) What this means is that the County could have determined that the environmental effect the project would have due to increased extraction from the State Water Project and the Colorado River was not significant. If it was going to, however, it needed to at least briefly describe why. (Guidelines, § 15128 ["An EIR shall contain a statement briefly indicating the reasons that various possible significant effects of a project were determined not to be significant and were therefore not discussed in detail in the EIR"].) Alternatively, the County could have concluded that increased extraction would have had a significant environmental impact that could not be mitigated, but that other, overriding considerations merited project approval anyway. (§ 21081, subd. (b).) However, a flat response that the impact was "beyond the scope of the EIR," as the County provided, does not further CEQA's informational goals.

In contending that the EIR was sufficient, respondents at times conflate the EIR's discussion of whether there will be enough water with a discussion of the environmental effects of providing that water. For instance, respondents contend that the EIR complied with the framework our Supreme Court laid out in *Vineyard*. But whether or not the EIR here complied with *Vineyard*'s four-part test does not address the Center appellants' point, as the *Vineyard* test resolved the "principal disputed issue [of] how firmly future water supplies for a proposed project must be identified." (*Vineyard*, *supra*, 40 Cal.4th at

p. 428.) That test[9] was not primarily about when an EIR must discuss environmental effects of providing water.

Even so, other parts of *Vineyard* did highlight the necessity of discussing the environmental impacts resulting from a given water supply. *Vineyard* underscored that "[t]he ultimate question under CEQA . . . is not whether an EIR establishes a likely source of water, but whether it adequately addresses the reasonably foreseeable *impacts* of supplying water to the project." (*Vineyard*, *supra*, 40 Cal.4th at p. 434.) Thus, "[i]f the uncertainties inherent in long-term land use and water planning make it impossible to confidently identify the future water sources, an EIR may satisfy CEQA if it acknowledges the degree of uncertainty involved, discusses the reasonably foreseeable alternatives—including alternative water sources and the option of curtailing the development if sufficient water is not available for later phases—and *discloses the significant foreseeable environmental effects of each alternative*, as well as mitigation measures to minimize each adverse impact." (*Ibid.*, italics added.)

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[9] "First, CEQA's informational purposes are not satisfied by an EIR that simply ignores or assumes a solution to the problem of supplying water to a proposed land use project. . . . Second, an adequate environmental impact analysis for a large project, to be built and occupied over a number of years, cannot be limited to the water supply for the first stage or the first few years. . . . Third, the future water supplies identified and analyzed must bear a likelihood of actually proving available; speculative sources and unrealistic allocations ('paper water') are insufficient bases for decisionmaking under CEQA. . . . Finally, where, despite a full discussion, it is impossible to confidently determine that anticipated future water sources will be available, CEQA requires some discussion of possible replacement sources or alternatives to use of the anticipated water, and of the environmental consequences of those contingencies." (*Vineyard*, *supra*, 40 Cal.4th at pp. 430-432.)

Vineyard noted that CEQA "does not require a city or county" "to reinvent the water planning wheel" "each time a new land use development comes up for approval." (*Vineyard*, *supra*, 40 Cal.4th at p. 434.) However, this language from *Vineyard* does not help respondents. *Vineyard* observed, in the same paragraph, that urban water suppliers must periodically "prepare and periodically update an 'urban water management plan,'" and that "[w]hen an individual land use project requires CEQA evaluation, the urban water management plan's information and analysis may be incorporated in the water supply and demand assessment required by both the Water Code and CEQA '[i]f the projected water demand associated with the proposed project was accounted for in the most recently adopted urban water management plan.'" (*Ibid.*, citing Wat. Code, § 10910, subd. (c)(2).) However, that paragraph, and the Water Code provision linking CEQA to the Water Code that the Court was focusing on, speaks only in terms of what the water supply assessment requires. (See Wat. Code, § 10910, subd. (c)(2) ["If the projected water demand associated with the proposed project was accounted for in the most recently adopted urban water management plan, the public water system may incorporate the requested information from the urban water management plan in preparing the elements of the assessment required to comply with" other subdivisions].) As noted, the Center appellants take no issue with the water supply assessment prepared for the EIR here. They also have not raised any concerns about the sufficiency of the urban water management plan that provided the basis for the water supply assessment's numbers. Their argument is that an EIR's discussion of significant environmental effects

may need to include a discussion of the availability of water *and* the environmental effects of supplying that water, an argument supported by *Vineyard*.

Respondents also rely on *Vineyard*'s rejection of the notion that the EIR at issue needed to repeat a previously performed environmental impact analysis for new water supplies. (*Vineyard*, *supra*, 40 Cal.4th at p. 442 ["We do not hold or suggest that the Sunrise Douglas FEIR needed to reproduce or repeat an environmental impact analysis for new surface water supplies already performed in connection with the Water Forum proposal."].) They do not, however, identify anything in the record showing that an environmental impact analysis for the project's projected water supply has ever been undertaken. As respondents state, the EMWD's most recent urban water management plan accounts for the project's anticipated demand. However, "accounting for" something is not necessarily the same as analyzing and disclosing the environmental impacts of something. Urban water management plans are exempt from CEQA, and hence are not obligated by CEQA to discuss the environmental impacts of increased water supplies. (Wat. Code, § 10652; see also Waterman, *Addressing California's Uncertain Water Future by Coordinating Long-Term Land Use and Water Planning: Is a Water Element in the General Plan the Next Step* (2004) 31 Ecology L.Q. 117, 163 [urban water management plans "may be less realistic documents . . . because the environmental consequences of future projects can be left for others to consider, with less opposition from the public"].) And although other water district projects may be subject to CEQA and thus require an EIR, respondents have not shown us any EIR that

specifically covers the increased water extraction that would supply this project. Respondents' oblique references in urban water management plans (from EMWD and MWD) to other EIRs hardly satisfy the Center appellants' concern, which is that the environmental impacts of this increase in extraction might have escaped public scrutiny altogether.[10] (See Guidelines, § 15150, subd. (c) ["Where an EIR . . . uses incorporation by reference, the incorporated part of the referenced document shall be briefly summarized where possible or briefly described if the data or information cannot be summarized"].) This case is unlike *Vineyard*, where after stating that the FEIR there did not "need[] to reproduce or repeat an environmental impact analysis . . . already performed," the Court stated that another EIR the final EIR heavily relied on "*did* discuss the impacts of the planned additional diversions of American River water; indeed a *summary* of [those] impacts and the proposed mitigation measures occupie[d] 85 pages of that EIR." (*Vineyard*, *supra*, 40 Cal.4th at p. 442, first italics added; see *id.* at p. 423.)

Respondents' reliance on other cases does not help it either. Respondents say this case is analogous to *Habitat & Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277 (*Habitat*) because neither project involves drawing more water from

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[10] In contending at oral argument that the environmental impacts of providing water to the project have already been discussed, the County cited to another EIR that is part of the record. However, the citation was to the EIR in general, not to any discussion of environmental impacts of increased water that it might contain. Furthermore, none of the other citations that the County provided at oral argument discuss the environmental impacts of supplying water to the project.

The County had opportunities to show us specifically where in the more than 190,000 page record the required discussion of water impacts would be located but has not done so.

existing sources. (*Id.* at p. 1295.) The argument appears to boil down to the notion that because the EIR in *Habitat* had a discussion of water supply that was upheld on appeal, the County's discussion should also be held sufficient. But the Villages at Lakeview *would* require drawing more water; it's just that EMWD says it can handle the increased demand. As a result, *Habitat* is not analogous, as it does not shed much light on whether the environmental impacts of extracting more river water need to be discussed in an EIR.[11] *Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4th 859 is inapposite for the same reason; the court there held that the EIR did not need to discuss diversions from the Eel River's effect on salmonid species in the river as a significant environmental impact caused by the project because the project "neither approve[d] nor ma[de] any change to Eel River diversions." (*Id.* at p. 875.) But here, supplying water to the project would ultimately result in greater diversions.

Although we agree with the Center appellants that the environmental effects of supplying water to the project needed to have been accounted for in at least some form in the EIR, we reject their other claims about the adequacy of the EIR's water supply analysis. They contend, for example, that the EIR is internally inconsistent because EMWD says it can supply the project's water needs even though the EIR's *cumulative*

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[11] To the extent *Habitat* is a case about the broader point of whether environmental impacts of supplying water to a project need to be discussed, it supports the Center appellants. The lead agency in *Habitat* proposed the "possible construction of a desalination facility" as one way to help supply the proposed project's water supply needs. (*Habitat*, *supra*, 213 Cal.App.4th at p. 1295.) The court noted elsewhere in the opinion that the "environmental impacts of the construction of the proposed desalination facility" had been previously discussed. (*Id.* at p. 1288.)

impact analysis concludes that "impacts to water supply are significant and unavoidable." (Bold omitted.) However, there is no internal inconsistency; "a cumulative impact consists of an impact which is created as a result of the combination of the project evaluated in the EIR together with other projects causing related impacts." (Guidelines, § 15130, subd. (a)(1).) The seeming discrepancy simply means that even though the cumulative impact of multiple projects will have a significant effect on water supply, the project's impact on water supply is insignificant.

The Center appellants also contend that the EIR's cumulative impact analysis on water supply failed to adequately address the severity and likelihood of those impacts. The Guidelines state that "[t]he discussion of cumulative impacts shall reflect the severity of the impacts and their likelihood of occurrence, but the discussion need not provide as great detail as is provided for the effects attributable to the project alone." (Guidelines, § 15130, subd. (b).) The EIR's discussion on this point was sufficient. As the Center appellants concede, the EIR noted that significant reductions on existing users may need to imposed due to drought.

Finally, the Center appellants contend that the EIR needed to "apply its general discussion of drought and cumulative water supply impacts to specific impacts on the" project. However, nothing in CEQA requires general or cumulative impact analyses to be "applied to" specific impacts. *Sierra Club*, which the Center appellants rely on here, held that the EIR was insufficient because it did not make "a reasonable effort to discuss . . . the connection between . . . the general health effects associated with a

particular pollutant and the estimated amount of that pollutant the project will likely produce," in part because the Guidelines state that an EIR should discuss "'relevant specifics of . . . health and safety problems caused by the physical changes'" from a proposed project. (*Sierra Club*, *supra*, 6 Cal.5th at pp. 521, 520, citing Guidelines, § 15126.2, subd. (a).) It does not stand for the broader proposition that general or cumulative impact discussions must be connected to ones about specific impacts.

"The preparation and circulation of an EIR is more than a set of technical hurdles for agencies and developers to overcome. The EIR's function is to ensure that government officials who decide to build or approve a project do so with a full understanding of the environmental consequences and, equally important, that the public is assured those consequences have been taken into account. [Citation.] For the EIR to serve these goals it must present information in such a manner that the foreseeable impacts of pursuing the project can actually be understood and weighed, and the public must be given an adequate opportunity to comment on that presentation before the decision to go forward is made." (*Vineyard*, *supra*, 40 Cal.4th at pp. 449-450.) Here, the EIR was deficient for the additional reason that it lacked a sufficient discussion about the potential environmental effects of supplying water to the project.

3. *The County's Independent Judgment*

The Center appellants' final contention is that the County violated the requirement that an EIR reflect the lead agency's independent judgment by allowing the DEIR and FEIR to be drafted by a consulting firm Nuevo hired, a firm that had no contractual relationship with the County. We reject the contention.

At issue is the proper interpretation of section 21082.1. Section 21082.1, subdivision (a) states that "[a] draft environmental impact report [or] environmental impact report . . . shall be prepared directly by, or under contract to, a public agency." Subdivision (b) states that "[t]his section does not prohibit, and shall not be construed as prohibiting, a person from submitting information or other comments to the public agency responsible for preparing an environmental impact report[or] draft environmental impact report . . . . The information or other comments may be submitted in any format, shall be considered by the public agency, and may be included, in whole or in part, in any report or declaration." Subdivision (c) states in part that "[t]he lead agency shall do all of the following: [¶] (1) Independently review and analyze any report or declaration required by this division. [¶] (2) Circulate draft documents that reflect its independent judgment. [¶] (3) As part of the . . . certification of an environmental impact report, find that the report . . . reflects the independent judgment of the lead agency."

In *Friends of La Vina v. County of Los Angeles* (1991) 232 Cal.App.3d 1446 (*La Vina*), disapproved on other grounds in *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 570, fn. 2, 572, the Court of Appeal held that "an agency may

comply with CEQA by adopting EIR materials drafted by the applicant's consultant, so long as the agency independently reviews, evaluates, and exercises judgment over that documentation and the issues it raises and addresses." (*La Vina*, *supra*, at p. 1452.) Its decision was based on an analysis of section 21082.1's text (*La Vina* at p. 1453 ["In the same breath as it requires agency 'preparation' of the EIR, the statute specifically authorizes the agency not only to consider outside comments and information but to include them in the EIR"]), its legislative history (*ibid.* ["the history of the bill that enacted section 21082.1 reflects that after the 'preparation' language alone was proposed, the Assembly deleted it, and then reinstated and approved it only with the addition of the further language authorizing outside input"]), the Guidelines (*La Vina* at p. 1453. [noting that section 15084, subdivision (d)(3) of the Guidelines allows the lead agency to "'[a]ccept[] a draft prepared by the applicant, a consultant retained by the applicant, or any other person'"], prior caselaw (*id.* at pp. 1454-1455), the fact that the practice was "common" and "routine[]" (*id.* at p. 1454), and its rejection of the view, espoused by the trial court (and adopted by a dissenting justice), that "'general principles of conflict of interest'" was a proper basis for finding otherwise (*id.* at p. 1456; see *id.* at pp. 1458-1459 (dis. opn. of Gates, J.) [adopting trial court's statement of decision]). No appellate opinion has disagreed with this portion of *La Vina* in the 30-plus years since it was decided.

Moreover, at the time *La Vina* was decided, section 21082.1 did not expressly say that its requirements applied to draft EIRs. (See *La Vina*, *supra*, 232 Cal.App.3d at p. 1453, fn. 4 [restating former section 21082.1].) However, two months after *La Vina*, the Legislature amended section 21082.1 to clarify that it applied to draft EIRs as well. (Stats. 1991, ch. 905, § 1.) Because "[t]he Legislature is deemed to be aware of existing laws and judicial decisions construing the same statute in effect at the time legislation is enacted, and to have enacted and amended statutes ""'in the light of such decisions as have a direct bearing upon them,'"'" the effect of the amendment was to expand *La Vina* and remove any doubt that it applied to both draft and final EIRs. (*Viking Pools, Inc. v. Maloney* (1989) 48 Cal.3d 602, 609.) Since then, section 21082.1 has been amended three other times; none of those amendments were aimed at overruling *La Vina*. (Stats. 2002, ch. 1052, § 1; Stats. 2016, ch. 476, § 1; Stats. 2021, ch. 97, § 2.) "'The failure of the Legislature to change the law in a particular respect when the subject is generally before it and changes in other respects are made is indicative of an intent to leave the law as it stands in the aspects not amended.'" (*Estate of McDill* (1975) 14 Cal.3d 831, 837-838.) We therefore follow *La Vina* and accordingly reject respondents' claim.[12]

[12] We grant respondents' request for judicial notice of legislative history documents relating to the various amendments to section 21082.1. However, the documents do not persuade us that the Legislature intended to restrict or overturn *La Vina*.

Respondents contend that *La Vina* is not controlling here because it did not address whether section 21082.1 "requires any contractual relationship between the preparer of the EIR and the lead agency, or whether CEQA requires the EIR preparers to owe a legal duty to the lead agency." In their view, CEQA requires as much. However, regardless of whether it expressly framed its holding in terms of contractual relationships or legal duties, *La Vina* forecloses the argument that respondents want us to adopt. *La Vina* explains that "the 'preparation' requirements of CEQA . . . turn not on some artificial litmus test of who wrote the words, but rather upon whether the agency sufficiently exercised independent judgment over the environmental analysis and exposition that constitute the EIR." (*La Vina*, *supra*, 232 Cal.App.3d at p. 1455; see also *id.* at p. 1456 ["In short, in accordance with consistent practice and judicial application, the independent review, analysis and judgment test, not the proposed physical draftsmanship test, applies to the EIR as a whole, including responses to comments"].) So long as the lead agency independently reviews the EIR—regardless of who prepares it, what contracts the preparer has with the lead agency, or what duties it owes to the lead agency—this CEQA requirement is satisfied. Additionally, requiring that the preparer of an EIR have a contractual relationship with or owe a legal duty to the lead agency would contravene section 21083.1, which states that "[i]t is the intent of the Legislature that courts, consistent with generally accepted rules of statutory interpretation, shall not interpret [CEQA or the Guidelines] in a manner which imposes procedural or substantive requirements beyond those explicitly stated in [CEQA or the Guidelines]." (See *Berkeley*

Hillside Preservation v. City of Berkeley (2015) 60 Cal.4th 1086, 1107 [the purpose of section 21083.1 "was to 'limit judicial expansion of CEQA requirements' and to '"reduce the uncertainty and litigation risks facing local governments and project applicants by providing a 'safe harbor' to local entities and developers who comply with the explicit requirements of the law"'"].) We therefore find that the County and Board of Directors satisfied section 21082.1 here.

B. *Paulek Appellants*

The Paulek appellants contend that the project description in the EIR was not accurate, stable and finite and that it excluded discussion of certain endangered species in its significant environmental impacts analysis. We disagree as to the first contention and find that claim preclusion applies to the second.

1. Accurate, Stable and Finite Project Description

The requirement that a project description be "accurate, stable and finite" was first stated in *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 193 (*County of Inyo*). There, the Court of Appeal addressed the fluctuating descriptions of a City of Los Angeles project extracting subsurface water in the Owens Valley. (*Ibid.*) The project "expand[ed] and contract[ed] from place to place within the EIR," including in one section of the EIR entitled "'Recommended Project.'" (*Id.* at p. 190.) There, what started as a "narrow project description" of "'develop[ing] a water source that can supplement surface flow . . . to supply the uses of water on City of Los Angeles lands'" later "adopt[ed] a somewhat broader stance" before "transition[ing] to a yet wider

description" of "'operat[ing] the Los Angeles Aqueduct System in an environmentally sensitive manner to benefit the citizens of Los Angeles and the people of Inyo County." (*Id.* at p. 190 & fns. 3-4.) Noting that "an accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR," the court held that the agency did not proceed in a manner required by law. (*Id.* at pp. 199-200.)

A later case relied on *County of Inyo* to hold that an EIR violated CEQA. In *Washoe Meadows Community v. Department of Parks & Recreation* (2017) 17 Cal.App.5th 277 (*Washoe Meadows*), the court held that a draft EIR that "did not identify a proposed project, but described five very different alternative projects" without identifying a preferred one violated the requirement that a project description be accurate, stable and finite. (*Id.* at pp. 281, 283.) "Rather than providing inconsistent descriptions of the scope of the project at issue," the court noted, the draft EIR at issue in *Washoe Meadows* "did not describe a project at all." (*Id.* at p. 288.)

Here, the EIR project descriptions in the EIR were accurate, stable and finite. The DEIR described the project as "the development of 11,350 dwelling units, 500,000 square feet of commercial uses concentrated in a Mixed-Use Town Center area located immediately south of the Ramona Expressway, up to three new K-8 schools, 150 acres of passive and active parks, and approximately 1,000 acres of open space/conservation that is proposed for permanent protection and conservation." The FEIR repeats the same project description verbatim. As there was an actual, proposed project, this case is unlike *Washoe Meadows*. As we have not been pointed to anything in the record suggesting that

the scope of the project "expand[ed] and contract[ed] from place to place within the EIR," *County of Inyo* does not apply either. (*County of Inyo*, *supra*, 71 Cal.App.3d at p. 190.)

Moreover, the project descriptions remained accurate, stable and finite even with the inclusion and discussion of Alternative 7 in the DEIR and FEIR. This is for the simple reason that "project descriptions" and "alternatives" are distinct concepts under CEQA. One of the Guidelines describes what the project description must contain, while another describes what a discussion of alternatives requires. (Guidelines, §§ 15124 [project description], 15126.6 [alternatives].) The separate requirements for each is presumably why *County of Inyo* separated its discussion of the EIR's deficient project description from its discussion of the EIR's discussion of alternatives, which the court also found lacking. (*County of Inyo*, *supra*, 71 Cal.App.3d at pp. 192-200 [project description], 200-203 [alternatives].)

The Paulek appellants' contentions to the contrary are unmeritorious. Many of their contentions have not been properly presented to this court due to a lack of citation to legal authority or the factual record. At one point while arguing that the project description was not accurate, stable or finite, the Paulek appellants contend that Alternative 7 "is not an Alternative as defined by CEQA," but they omit any discussion (or citation to legal authority) of what a proper alternative must contain. At another point in the same discussion, the Paulek appellants support a factual claim with a "passim"

citation, essentially asking this court to pore through the record—all 190,000 pages or so of it—to find support for them.

"It is the appellant's responsibility to support claims of error with citation and authority; this court is not obligated to perform that function on the appellant's behalf." (*Keyes v. Bowen* (2010) 189 Cal.App.4th 647, 656; see also Cal. Rules of Court, rule 8.204(a)(1)(C) [briefs must "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears"]; *Harshad v. Nasir Corp. v. Global Sign Systems, Inc.* (2017) 14 Cal.App.5th 523, 527, fn. 2 ["We are not required to scour the record in search of support for a party's factual statements and may disregard such unsupported statements"].) Importantly, "[t]he larger and more complex the record, the more important it is for the litigants to adhere to appellate rules." (*City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 287.) Accordingly, we disregard the Paulek appellants' unsupported contentions here and elsewhere.

As to the issues which the Paulek appellants have adequately briefed, we find no error. They contend, for instance, that requiring the public to go through over 19,000 pages of appendices in each of the EIRs makes the EIRs even more inadequate than the EIR in *Washoe Meadows*. However, *Washoe Meadows* made clear that it was the failure to identify a proposed project *combined* with five very different alternative projects that made the EIR inadequate. (See, e.g., *Washoe Meadows*, *supra*, 17 Cal.App.5th at pp. 281 ["[t]he draft EIR in this case did not identify a proposed project, but described five very different alternative projects"], 288 ["the DEIR did not describe a project at all"; "[a]

description of a broad range of possible projects, *rather than a preferred or actual project*, presents the public with a moving target"], italics added.) Here, there is no dispute that there was an actual project, so the rationale of *Washoe Meadows* does not apply.

The Paulek appellants also contend that because there were 19,000 pages of appendices in the EIR, it should have specified which appendices applied only to the project and which applied to both the project and Alternative 7. They concede, however, that the EIR stated which of the appendices specifically applied to only Alternative 7. In light of this concession as well as the lack of any discussion of how the public would have been misled or confused by the appendices, we find no prejudicial error based on how the appendices were identified.

2. Endangered Species

The Paulek appellants contend that the EIRs failed to properly discuss certain endangered species from their analyses of the project's significant impacts to biological resources. The trial court found the Paulek parties barred by claim preclusion from making the argument at all, and that in any event the argument failed on the merits. We agree with the trial court that claim preclusion applies and therefore do not reach the merits here.

"Claim preclusion 'prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them.' [Citation.] Claim preclusion arises if a second suit involves: (1) the same cause of action (2) between the

same parties (3) after a final judgment on the merits in the first suit. [Citations.] If claim preclusion is established, it operates to bar relitigation of the claim altogether." (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824, italics removed.) "[C]laim preclusion bars 'not only...issues that were actually litigated but also issues that could have been litigated.'" (*Planning & Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210, 226 (*Castaic Lake*).) However, claim preclusion does not apply when "'there are changed conditions and new facts which were not in existence at the time the action was filed upon which the prior judgment is based.'" (*Id.* at p. 227.)

The DEIR and FEIR here are distinct from the 2010 EIR that the trial court found deficient in 2012. The main difference was the inclusion of Alternative 7. However, as the trial court noted, no new issues relating to endangered species are engendered by Alternative 7. In arguing (in both their opening and reply briefs) that claim preclusion does not apply, the Paulek appellants do not contend that their arguments about the EIR's purported deficiencies with regard to endangered species are specific to Alternative 7. We therefore agree with the trial court that the requirement of the same cause of action is met here. (See also *Atwell v. City of Rohnert Park* (2018) 27 Cal.App.5th 692, 702 [holding, in CEQA action, that second petition was "not based on changed material facts and raises the same claims as raised" earlier] (*Atwell*).)

There is privity between the Paulek appellants and the petitioners in the earlier action as well. There is no real dispute that the alleged harm is to the community, and, importantly, the trial court noted that none of the Paulek appellants "alleged any harm

apart from that incurred by the community," a conclusion the Paulek appellants do not contest on appeal. "Accordingly, when an alleged harm impacts the public rather than a specific entity, the privity analysis must focus on the 'community of interest' rather than the relationship between the parties." (*Atwell*, *supra*, 27 Cal.App.5th at p. 703; see also *id.* at p. 704 ["Despite their claims of personal harm, appellants do not allege any such harm apart from that incurred by the community"].) We find that the privity requirement is satisfied here. (Accord, *id.* at p. 704.)

Finally, there is no dispute that the third requirement for claim preclusion has been satisfied.

The Paulek appellants' arguments that claim preclusion does not apply are unpersuasive. First, they assert that the respondents' brief "failed to cite any reference to the 2010 EIR which shows the 2010 EIR failed to comply" with the applicable requirements, thereby failing to show that the issue could have been raised in 2010. However, this flips the burden of persuasion on appeal. The trial court has determined that the issue could have been raised in 2010, so it is the Paulek parties' appellate burden to demonstrate otherwise. (See *Herrera v. Doctors Medical Center of Modesto, Inc.* (2021) 67 Cal.App.5th 538, 546.) As discussed, they have made no attempt to show that their arguments relate only to Alternative 7 and hence could not have been raised earlier.

Second, the Paulek appellants claim that the so-called "public interest" exception to claim preclusion applies. Under the exception, "'"when the issue is a question of law rather than of fact, the prior determination is not conclusive either if injustice would

result or if the public interest requires that relitigation not be foreclosed."'" (*Atwell*, *supra*, 27 Cal.App.5th at p. 705.) The exception, however, is "extremely narrow" and "is only to be applied in exceptional circumstances." (*Arcadia Unified School Dist. v. State Dept. of Education* (1992) 2 Cal.4th 251, 259.) More importantly, the exception was not raised in trial court, and "'"'[g]enerally, issues raised for the first time on appeal which were not litigated in the trial court are waived."'" (*Premier Medical Managements Systems, Inc. v. California Ins. Guarantee Association* (2008) 163 Cal.App.4th 550, 564.)

We therefore find that claim preclusion bars the Paulek appellants' contention regarding endangered species.

III. DISPOSITION

In case RIC1800722, the judgment is reversed in part and affirmed in part. Paragraphs C and E under the heading "Center Petitioners" in Exhibit A of the judgment are reversed. All other paragraphs are affirmed.

The case is remanded to the trial court with instructions to (1) vacate its March 12, 2020 order denying the petition for writ of mandate as to the claims for the CEQA violations identified in this opinion; (2) enter a modified order granting those claims; (3) enter a modified judgment; and (4) issue a peremptory writ of mandate for corrective action that is not inconsistent with this opinion. The modified judgment and the peremptory writ of mandate shall direct the Board of Supervisors to set aside the certification of the EIR. The parties shall bear their own costs on appeal.

In case RIC1800517, the judgment is affirmed. Respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAPHAEL
J.

We concur:

CODRINGTON
Acting P. J.

SLOUGH
J.