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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SONOMA

CALIFORNIA RIVER WATCH, an IRA Section 501(c)(3), non-profit public benefit corporation, Petitioner, v. CITY OF HEALDSBURG, Respondent. COMSTOCK HEALDSBURG, LLC, Real Party in Interest.	Case No. SCV-264647 NOTICE OF ENTRY OF JUDGMENT DENYING PETITION FOR WRIT OF MANDATE ASSIGNED FOR ALL PURPOSES TO: JUDGE PATRICK M. BRODERICK COURTROOM 16 Action Filed: June 18, 2019 Hearing on Petition: February 7, 2020 (CEQA Action)

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD HEREIN:

PLEASE TAKE NOTICE that the Court in the above-captioned matter (per the Honorable Patrick Broderick) entered and filed on May 18, 2020, its "Judgment Denying Petition for Writ of Mandate" (the "Judgment"). A true and correct filed-endorsed copy of said Judgment

(including the Judgment's own Exhibit A) is attached hereto and incorporated as Exhibit A.

Dated: June 12, 2020

MILLER STARR REGALIA

By: 

ARTHUR F. COON
Attorneys for Real Party In Interest COMSTOCK HEALDSBURG, LLC

EXHIBIT A

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SONOMA

CALIFORNIA RIVER WATCH, an IRA Section 501(c)(3), non-profit public benefit corporation, Petitioner, v. CITY OF HEALDSBURG, Respondent. COMSTOCK HEALDSBURG, LLC, Real Party in Interest.	Case No. SCV-264647 ~~[PROPOSED]~~ JUDGMENT DENYING PETITION FOR WRIT OF MANDATE Judge: Hon. Patrick M. Broderick Date: February 7, 2020 Time: 9:00 a.m. Dept.: 16 (CEQA Action)

The "Verified Amended Complaint for Declaratory and Injunctive Relief and Petition for Writ of Mandate" (the "Petition") filed by Petitioner CALIFORNIA RIVER WATCH ("Petitioner") in the above-captioned matter, came on regularly for hearing on the merits on February 7, 2020, at 9:00 a.m., in Department 16 of the above-entitled Court, Judge Patrick M. Broderick, presiding. Despite its title, the Petition sought only a writ of administrative mandate and set forth four causes of action, all under the California Environmental Quality Act ("CEQA"; Pub. Resources Code § 21000 et seq). Jerry Bernhaut appeared on behalf of Petitioner; Anna

Shimko and Deborah Kartiganer of Burke Williams & Sorenson, LLP appeared on behalf of Respondent City of Healdsburg; and Matthew Henderson of Miller Starr Regalia appeared on behalf of Real Party in Interest Comstock Healdsburg, LLC. The Court having reviewed and considered the papers and evidence filed in support of and in opposition to the Petition; having heard oral argument thereon; having entered and filed on April 28, 2020, its 31-page "Decision After Hearing on Amended Complaint for Declaratory Relief And Petition for Writ of Mandate" ("Decision"), which Decision ordered that the Petition be denied and a copy of which Decision is attached hereto and incorporated by reference as Exhibit A; and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. The Petition and each and every cause of action and claim or request for relief therein shall be, and hereby is, DENIED in its entirety, for the reasons set forth in the attached Decision.

2. Final Judgment in this case denying the Petition and all relief sought therein, is hereby entered in favor of Respondent City of Healdsburg and Real Party in Interest Comstock Healdsburg, LLC, and against Petitioner.

3. Costs are awarded to Respondent City of Healdsburg and Real Party in Interest Comstock Healdsburg, LLC as prevailing parties, and against Petitioner, to the extent provided by applicable law, and are to be determined upon the filing of a timely post-judgment memorandum or memorandums of costs.

IT IS SO ADJUDGED.

DATED: 5-18-, 2020

Patrick Broderick

HON. PATRICK M. BRODERICK
JUDGE OF THE SUPERIOR COURT

APPROVED AS TO FORM.

Dated: May 12, 2020

By: _____
JERRY BERNHAUT
Attorneys for Petitioner CALIFORNIA RIVER WATCH

Dated: May ____, 2020

BURKE WILLIAMS & SORENSON, LLP

By: _____
ANNA SHIMKO
Attorneys for Respondent CITY OF HEALDSBURG

APPROVED AS TO FORM.

Dated: May ____, 2020

By: _____
JERRY BERNHAUT
Attorneys for Petitioner CALIFORNIA RIVER WATCH

Dated: May 12, 2020

BURKE WILLIAMS & SORENSON, LLP

By: _____
ANNA SHIMKO
Attorneys for Respondent CITY OF HEALDSBURG

EXHIBIT A

HON. PATRICK M. BRODERICK
JUDGE OF THE SUPERIOR COURT
Courtroom 16
3035 Cleveland Avenue
Santa Rosa, CA 95403
(707) 521-6729

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SONOMA

CALIFORNIA RIVER WATCH,

Petitioner,

v.

CITY OF HEALDSBURG,

Respondent.

COMSTOCK HEALDSBURG, LLC,

Real Party in Interest.

Case No. SCV-264647

DECISION AFTER HEARING ON AMENDED COMPLAINT FOR DECLARATORY RELIEF AND PETITION FOR WRIT OF MANDATE

The Amended Petition for Writ of Mandate filed June 28, 2019, came on regularly for hearing on February 7, 2020, before the Honorable Patrick M. Broderick, Judge, presiding. Counsel Joseph Jerry Bernhaut was present on behalf of Petitioner. Counsel Deborah Kartinger and Anna C. Shimko were present on behalf of Respondent. Counsel Matthew C. Henderson was present on behalf of Real Party In Interest.

Upon consideration by the court of the papers and evidence filed in support of and in opposition to the Petition, and having heard and considered the oral argument of counsel, the Court renders the following decision:

Amended Petition for Writ of Mandate Denied.

Factual Background

Petitioner California River Watch ("Petitioner") challenges the May 20, 2019 approval and adoption, by Respondent City of Healdsburg ("Respondent") of the North Entry Area Plan ("NEAP" or "Project") and the environmental impact report ("EIR") for the Project. Petitioner names Comstock Healdsburg, LLC ("Real Party in Interest" or "RPI") as real party in interest because Respondent proposes to implement the NEAP on property which RPI owns and is attempting to develop in accord with the NEAP. Petitioner contends that the analysis of greenhouse gas emissions ("GHGs") in the Project EIR is insufficient and violates CEQA with respect to one aspect of the NEAP, the proposed and envisioned hotel project. Petitioner argues that the GHG analysis regarding the hotel violates CEQA because 1) it lacks sufficient estimation of vehicle miles traveled ("VMT") due to the failure to include trans-boundary, long-distance travel, specifically air travel, involving visitors to the region; 2) it fails to analyze the consistency of the Project with statewide goals in a clear and appropriate manner; and 3) it includes inadequate mitigation measures which are improperly deferred and lacking sufficient performance standards.

In two resolutions on May 20, 2019, Respondent adopted the Project as part of the Healdsburg 2030 General Plan and certified the Final EIR ("FEIR") for the Project. AR 4-47. On May 21, 2019, Respondent issued a Notice of Determination ("NOD"). AR 1-3.

The EIR identified three significant unavoidable impacts, all traffic impacts, none of which is at issue in this litigation: 1) vehicle circulation performance at Highway 101 off-ramp; 2) traffic safety due to excessive queuing in a lane at the Highway 101 ramp intersection; and 3) cumulative impacts on vehicle circulation performance and traffic safety. It included a statement of overriding considerations justifying Respondent's approval of the Project despite these unavoidable significant impacts.

The NEAP Project is an overall planning project to govern development in the area it covers, a plan to "provide policy guidelines and development standards for the

future construction and operation of a mixed-use community on the North Village site" and this includes certain allowed development. The Project itself does not include actual approval of a hotel or any specific development. Instead, it sets forth the types of development allowed, not allowed, and preferred, as well as the overall guidelines to govern the development of the area and what standards the development must meet. It states that a hotel project is not only expressly allowed but is envisioned and among the preferred development choices to be included within the guidelines.

Request for Judicial Notice

Petitioner seeks judicial notice of this Court's order granting a petition for writ of mandate in SCV-259242, *California River Watch v. County of Sonoma* ("Prior CRW Action") and specific findings which this court made in that decision. Respondent and RPI oppose the request for judicial notice because 1) the Prior CRW Action is not precedent; 2) the Court may not judicially notice factual findings. These arguments in opposition to the request are unpersuasive. The Court may judicially notice the order and that the order made certain findings. This Court may not judicially notice the truth or correctness of any factual assertions made therein, but it may judicially notice the fact that the findings were made. Respondent and RPI are correct that the Prior CRW Action is not precedent for this case or otherwise controlling or binding directly in this case but that does not prevent the Court from judicially noticing it. Taking judicial notice of the Prior CRW Action may ultimately have no impact or bearing on the decision in this case but it is not improper.

Respondent and RPI seek judicial notice of applicable GHG plans and protocols: the State of California Air Resources Board ("CARB") *California's 2017 Climate Scoping Plan* ("Scoping Plan"); the CARB *Local Government Operations Protocol – For the Quantification and Reporting of Greenhouse Gas Emissions Inventories*; the CARB *California Greenhouse Gas 2000-2017 Emissions Trends and Indicators Report 2000-2017 – California Greenhouse Gas Inventory by Scoping Plan Category*; and the ICLEI *U.S. Community Protocol for Accounting and Reporting of GHG Emissions*. Petitioner

does not oppose this request and the Court finds that these are judicially noticeable and appropriate to consider here.

CEQA

The ultimate mandate of CEQA is "to provide public agencies and the public in general with detailed information about the effect [of] a proposed project" and to minimize those effects and choose possible alternatives. Public Resources Code ("PRC") section 21061. After all, the public and public participation hold a "privileged position" in the CEQA process based on fundamental "notions of democratic decision-making." *Concerned Citizens of Costa Mesa, Inc. v. 32nd District Agricultural Association* (1986) 42 Cal.3d 929, 936. As stated in *Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376, at 392, "[t]he EIR process protects not only the environment but also informed self-government."

An EIR is required for a project which substantial evidence indicates may have a significant effect on the environment. Guidelines for the Implementation of CEQA (Guidelines), 14 CCR section 15063(b) ("Guidelines"); PRC sections 21100, 21151. In the words of the California Supreme Court, the EIR is "'the heart of CEQA.' [Citation.] An EIR is an 'environmental "alarm bell" whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.' [Citations.] The EIR is also intended 'to demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action.' [Citations.]" *Laurel Heights Improvement Assn. v. Regents of the University of California* (1988) 47 Cal.3d 376, 392 (*Laurel Heights I*).

The burden of investigation rests with the government and not the public. *Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal.App.4th 1170, 1202.

As a result, "error is prejudicial 'if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting

the statutory goals of the EIR process.'" *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, at 721-722, quoting *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, at 712.

Standard of Review

PRC section 21168 governs CEQA actions under Code of Civil Procedure section 1094.5 challenging administrative decisions, those "made as a result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in a public agency." Code of Civil Procedure section 1094.5. *Friends of the Old Trees v. Dept. of Forestry and Fire Protection* (1997) 52 Cal.App.4th 1383, 1389.

The reviewing court must determine if Respondent abused its discretion by 1) failing to proceed in the manner required by law, or 2) because its decision is not supported by substantial evidence. PRC 21168; *Laurel Heights I, supra*, 47 Cal.3d 392, fn.5. These two standards vary greatly and apply to different issues, so "a reviewing court must adjust its scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of improper procedure or a dispute over the facts." *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.

As the court explained in *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412 at 435

> [A]n agency may abuse its discretion under CEQA either by failing to proceed in the manner CEQA provides or by reaching factual conclusions unsupported by substantial evidence. (§21168.5.) 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" [Citation], we accord greater deference to the agency's substantive factual conclusions.

Agency actions are presumed to comply with applicable law unless the petitioner presents proof to the contrary. Evidence Code section 664; *Foster v. Civil Service Commission of Los Angeles County* (1983) 142 Cal.App.3d 444, 453. The petitioner in

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a CEQA action thus has the burden of proving that an EIR is insufficient. *Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners* (1993) 18 Cal.App.4th 729, 740.

The court must resolve reasonable doubts in favor of the findings and decision. *Id.* The findings of an administrative agency are presumed to be supported by substantial evidence. *Taylor Bus. Service, Inc. v. San Diego Bd. of Education* (1987) 195 Cal.App.3d 1331.

Nevertheless, courts must 'determine de novo whether the agency has employed the correct procedures, "scrupulously enforc[ing] all legislatively mandated CEQA requirements"....' *Vineyard Area Citizens for Responsible Growth, supra*, 40 Cal.4th 435, citing *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564. Therefore, failure to include required information is a failure to proceed in the manner required by law and demands strict scrutiny. *Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1236; *Vineyard Area Citizens for Responsible Growth, supra*, 40 Cal.4th 435.

The substantial-evidence test does not apply, therefore, to a claim that an EIR failed to include mandatory information or elements. *Vineyard Area Citizens*, 435, citing *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564. Failure to include required information is a failure to proceed in the manner required by law and demands strict scrutiny. *Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1236; *Vineyard Area Citizens*, 435. Courts must determine such a question de novo. *Vineyard Area Citizens*, 435. In *Sierra Club*, 7 Cal.4th at 1236, the Supreme Court found that an agency had abused its discretion and failed to proceed in the manner requiring in approving THPs based on a record which lacked information on the presence of old-growth-dependent species.

Determining whether a claim that a CEQA document lacks certain information is a failure to proceed in a manner required by law or is merely an issue of whether there is substantial evidence is not always clear and there has historically been some dispute. Thus, despite the discussion in *Sierra Club*, 7 Cal4th, at 1236, the court in *Barthelemy*

v. Chino Basin Munic. Water Dist. (1995) 38 Cal.App.4th 1609, at 1620, found that a claim that the EIR lacks *sufficient* information regarding an issue should be treated as an argument that the EIR is not supported by substantial evidence. Similarly, in *National Parks and Conservation Association v. County of Riverside* (4th Dist.1999) 71 Cal.App.4th 1341, at 1353 (*National Parks II*), found that challenges to the scope of the analysis, the methodology for studying an impact, and the reliability of accuracy of the data present factual issues, so such challenges must be rejected if substantial evidence supports the agency's decision as to those matters ...."

By contrast, other courts have taken a different approach, as set forth in *Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, at 1392; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, at 721-722; and *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, at 712. The court in *Association of Irritated Residents* rejected the analysis in *Barthelemy* and *National Parks II* that "claims that information has been omitted from an EIR essentially should be treated as inquiries whether there is 'substantial evidence to support [the] decision ....'" It reasoned that such an approach "fails to acknowledge the important public informational purpose" of an EIR. As stated in *Kings County Farm Bureau*, "error is prejudicial 'if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process.'" In *Madera Oversight Coalition v. County of Madera* (2011) 199 Cal.App.4th 48, at 101-102, the court again determined that where the petitioner's assertion is that information has been omitted from an EIR, "independent review will apply if the information ... is required by CEQA and necessary for an informed discussion. In contrast, if the asserted error concerns the amount or type of information that is not required by CEQA and necessary for an informed discussion, then the substantial evidence standard applies." In *Save Round Valley v. County of Inyo* (2007) 157 Cal.App.4th 1437, at 1465, the court ruled that where an EIR included "only the barest of facts regarding the BLM parcel, vague and

unsupported conclusions about aesthetics, views, and economic objectives, and no independent analysis whatsoever of relevant considerations," the agency "failed to proceed in the manner required by law."

Under the substantial-evidence test, the court must uphold the decision if it is supported by substantial evidence in the record as a whole. *Bowman v. City of Petaluma* (1986) 185 Cal.App.3d 1065, 1075; see, *River Valley Preservation Project v. Metropolitan Transit Dev. Bd.*(1995) 37 Cal.App.4th 154, 166; see, *Santa Teresa Citizen Action Group v. City of San Jose* (2003) 114 Cal.App.4th 689, 703. The court must focus upon the THP's "sufficiency as an informative document." *Laurel Heights I*, 47 Cal.3d 393. The evidence must be sufficient to allow one to make an intelligent, informed decision, i.e., sufficient to make clear the analytic route of the agency. *Concerned Citizens of Costa Mesa, Inc. v. 32nd District Agricultural Association* (1986) 42 Cal.3d 929, 936; *Al Larson Boat Shop Inc. v. Bd. of Harbor Commissioners* (1993) 18 Cal.App.4th 729, 749; *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 513-514, 522.

When applying the substantial-evidence standard, in other words, the court must focus not upon the "correctness" of a report's environmental conclusions, but only upon its "sufficiency as an informative document." *Laurel Heights I*, 47 Cal.3d 393. The court must resolve reasonable doubts in favor of the findings and decision. *Id.* The findings of an administrative agency are presumed to be supported by substantial evidence. *Taylor Bus. Service, Inc. v. San Diego Bd. of Education* (1987) 195 Cal.App.3d 1331.

Substantial evidence is not simple "uncorroborated opinion or rumor" but "enough relevant information and reasonable inferences" to allow a "fair argument" supporting a conclusion, in light of the whole record before the lead agency. 14 CCR section 15384(a); PRC section 21082.2; *City of Pasadena v. State of California* (2nd Dist.1993) 14 Cal.App.4th 810, 821 822. Other decisions define "substantial evidence" as that with "ponderable legal significance," reasonable in nature, credible, and of solid value. *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144.

Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts. PRC section 21082.2(c); see also Guidelines 15064(g)(5), 15384. It does not include argument, speculation, unsubstantiated opinion or narrative, clearly incorrect evidence, or social or economic impacts not related to an environmental impact. Guideline 15384.

Dispute Over the Standard of Review

Petitioner argues that the defect it raises is a failure to include required information or elements and thus that the court must apply the de novo independent-review standard. Respondent and RPI counter that Petitioner is actually claiming only that the discussions of GHGs and related mitigation measures lack sufficient information and thus the court must apply the more deferential substantial-evidence test. Ultimately, Petitioner appears to be correct here with one possible exception.

Petitioner claims that the EIR lacks certain information about GHG and that this information was required to be considered; the EIR fails to include a coherent analytical route or properly address thresholds and state standards; and the EIR includes defective mitigation measures which are deferred and lack performance standards. These alleged defects are not defects in the sufficiency of evidence to support the EIR's conclusions but instead arguments that the EIR lacks certain required information and elements. With respect to the first point, Petitioner is not claiming that Respondent's determination that there would be no significant impacts regarding GHGs is not based on substantial evidence but instead argues that the analysis completely lacks necessary information on a certain GHG issue and that this failure to include this information, in the words of *Kings County Farm Bureau*, "precludes informed decisionmaking and informed public participation." Similarly, with respect to the claim of insufficient analysis of compliance with applicable policies and thresholds, Petitioner contends that the analysis lacks a clear analytical route to allow for informed decisionmaking and improperly rejects consideration of some standards while presents an incoherent and jumbled discussion of various different standards. Finally, as to mitigation measures, Petitioner

again does not challenge the sufficiency of Respondent's conclusions but instead contends that Respondent failed to comply with CEQA's mandate that mitigation measures not be deferred and include enforceable performance standards.

The one exception is the extent to which Petitioner, instead of challenging the failure to include trans-boundary VMT information in the chosen methodology, is actually arguing that the adopted methodology is incorrect. Respondent and RPI correctly argue that the substantial-evidence test applies to determinations about choice of methodology. *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1198 ("The substantial evidence standard is applied to conclusions, findings and determinations. It also applies to challenges to ... the methodology used for studying an impact and the reliability or accuracy of the data upon which the EIR relied ...."); *Santa Monica Baykeeper v. City of Malibu* (2011) 193 Cal.App.4th 1538, 1546 ("CEQA challenges concerning the amount or type of information contained in the EIR, the scope of the analysis, or the choice of methodology are factual determinations reviewed for substantial evidence."); *Residents Against Specific Plan 380 v. County of Riverside* (2017) 9 Cal.App.5th 941, 968 (quoting *Santa Monica Baykeeper*).

It is not entirely clear whether, or to what extent, Petitioner is trying to challenge the choice of methodology or simply claiming that the analysis applying the chosen methodology should have included the information on trans-boundary VMT. While there is some dispute over this, the court finds that that Petitioner is actually not truly attacking the choice of methodology, specifically the CalEEMod methodology, but arguing that the analysis should have included a methodology also for considering trans-boundary VMT. In the end, the Court is addressing both arguments and considerations and notes expressly that under both approaches, and even the standard of review more favorable to Petitioner based on its claim that it is attacking a failure to include required information, Petitioner is unpersuasive.

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Exhaustion of Administrative Remedies

Respondent and RPI argue that Petitioner failed to exhaust administrative remedies on the "exact issue" of the claim that the EIR's assumptions about VMT are "absurd." This argument is not addressed to the other two arguments regarding the sufficiency of the analysis showing compliance with applicable standards and plans, or mitigation measures.

According to PRC section 21177, "[a] person shall not maintain an action or proceeding unless that person objected to the approval of the project orally or in writing during the public comment period provided by this division or prior to the close of the public hearing on the project before the filing of the notice of determination." This does not, however, bar an association or organization formed after approval from raising a challenge which one of its constituent members had raised, directly or by agreeing with or supporting another's comments. PRC section 21177(c). Moreover, someone may file a legal challenge based on an issue as long as "any person" raised that issue during the review process. PRC section 21177(a); see, *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 267-268. It also does not apply to any grounds of which the agency did not give required notice and for which there was no hearing or opportunity to be heard. PRC section 21177(e).

A party challenging a decision under CEQA cannot, to exhaust administrative remedies, rely merely on "general objections" or "unelaborated comments." *Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 535; *Coalition for Student Action v. City of Fullerton* (1984) 153 Cal.App.3d 1194, 1197. However, "[l]ess specificity is required to preserve an issue for appeal in an administrative proceeding than in a judicial proceeding ...." *Citizens Association for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 163.

Respondent and RPI are unpersuasive on this point. Petitioner notes in its reply that it submitted several pages of comments raising GHGs, specifically those involving VMT and tourists staying at the envisioned hotel, specifically mentioning the failure to

account for trans-boundary VMT GHGs by guests at the hotel with methodology presented and legal discussion. AR 6701-6709. This discussion in the record at AR 6701-6704 focuses repeatedly and expressly on long-distance travel of guests from point of origin to Healdsburg and back. Petitioner argued the issue in different terms, expressly stating that the NEAP includes "no accounting ... for ... (GHG) emissions resulting from tourists ... traveling from their point of origin to Healdsburg and returning." It is immaterial whether Petitioner specifically asserted that the EIR's assumptions about "VMT" are "absurd." To the extent that Petitioner is now focusing, as Petitioner argues in the Opening Brief ("OB") at 9:16-17, on "[t]he failure ... to account for ... emissions from long distance travel," Petitioner clearly has exhausted administrative remedies. Petitioner does not appear to raise any other issues for which it may have failed to exhaust administrative remedies.

Authority on GHG Analysis

California established GHG reduction and annual carbon sequestrations goals in AB 32, the California Global Warming Solutions Act of 2006 ("CGWSA").

The CGWSA requires the California Air Resources Board ("CARB" or "ARB") to reduce GHG emissions to 1990 levels by 2020, SB 32 of 2016 requires reduction to 40% below 1990 levels by the end of 2030, and Executive Order No. S-3-05 requires reduction to 80% below 1990 levels by 2050. See, *Sierra Club v. County of San Diego* (2014) 231 Cal.App.4th 1152, at 1168; *Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal.4th 204, at 215-231 (*Newhall Ranch I*); *Cleveland National Forest Foundation v. San Diego Association of Governments* (2017) 3 Cal.5th 497.

Guideline 15064.4 governs determinations of the significance of impacts from GHGs. It sets forth a framework for estimating GHGs, how to choose appropriate methodologies, and how to determine impacts by comparison to baselines and thresholds of significance. Subdivision (a) requires lead agencies to "make a good-faith effort, based to the extent possible on scientific and factual data, to describe, calculate or estimate the amount of greenhouse gas emissions" of a project but clarifies that they

"shall have discretion to determine, in the context of a particular project, whether to" quantify GHGs "and/or" rely on a qualitative analysis or performance based standards.

Within the framework of AB 32, the CARB creating the Climate Change Scoping Plan (Scoping Plan) setting forth measures to reduce GHG emissions in the state to 1990 levels by 2020, and the emission reductions needed. CARB, Climate Change Scoping Plan (Dec. 2008) Executive Summary, p. ES-1; *Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 3 Cal.5th 497, 505; *Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal.4th 204, at 215-216 (*Newhall Ranch I*).

In *Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal.4th 204 (*Newhall Ranch I*), the court noted three criteria by which one could assess GHG impacts by comparing the impacts to business as usual, consistency with the goals of AB 32, etc., and existing GHG thresholds of significance. This reflects Guideline 15064.4(b). The court noted that it is proper to use consistency with the state reduction goals as a criterion but ruled that the mere fact that a project reduces GHG by 31% compared to levels under business-as-usual standards does not necessarily show compliance with the statewide reduction targets and the analysis still requires substantial evidence to support that conclusion. Both Guideline 15064.4 and *Newhall Ranch I* make it clear that it is permissible but not mandatory to use these as thresholds of significance since the statewide targets "represent appropriate thresholds."

In *Cleveland National Forest Foundation v. San Diego Association of Governments* (2017) 3 Cal.5th 497, the Supreme Court rejected a petitioner's argument that CEQA GHG analysis requires a consideration of the consistency with statewide targets such as Executive Order No. S-3-05.

Guideline 15130(b) makes it clear that, as in other aspects of CEQA, studies of cumulative impacts are guided by "standards of practicality and reasonableness." According to Guideline 15364, "'[f]easible" means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic,

environmental, legal, social, and technological factors.' Thus, "[a]n evaluation of the environmental effects of a proposed project need not be exhaustive, but the sufficiency of an EIR is to be reviewed in the light of what is reasonably feasible .... The courts have looked not for perfection but for adequacy, completeness, and a good faith effort at full disclosure." Guideline 15151; see also *Citizens to Preserve the Ojai v. County of Ventura* (1985) 176 Cal.App.3d 421, 429. An agency is "not required to engage in sheer speculation as to future environmental consequences [Citations], [but an] EIR [is] required to set forth and explain the basis for any conclusion that analysis of the cumulative impact of offshore emissions [is] wholly infeasible and speculative." *Citizens to Preserve the Ojai*, 430.

Failure to Analyze Trans-Boundary GHGs

Petitioner's first argument is that the EIR omits any accounting of reasonably foreseeable GHGs from long-distance, trans-boundary VMT by tourists as a result of the hotel envisioned. In this argument, Petitioner contends that the EIR's VMT calculations are "based on a grossly unrepresentative range of VMT limited to trips by hotel guests while they are staying at the hotel, trips by employees and vendors, and guest arrivals and departures from local and nearby points of origin" and that this resulted in an "absurdly unrealistic estimate that the average length of trips associated with a planned wine country destination hotel will be 7.3 miles" as noted in the EIR at AR 1005. OB 9: 2-5. More specifically, Petitioner contends that the EIR violates CEQA on this point because of "[t]he failure of the EIR to account for ... emissions from long distance travel," by ground or air. OB 9:8-27.

The parties, particularly Respondent and RPI, raise several different arguments regarding the propriety of the failure to include such long-distance travel in estimating VMT and thus final GHG totals, and these arguments somewhat muddle the real issue and core dispute. In the end, however, this seems to be an assertion that Respondent failed to proceed in the manner required by law because Petitioner attacks not the conclusions about VMT but the failure to include, estimate, or even discuss long

distance, air-travel VMT and contends that doing so omitted required information necessary for informed decisionmaking.

In brief, although each side is persuasive on certain specific arguments, and the court finds it appropriate to apply the "failure to proceed" standard, Respondent and RPI ultimately seem to be correct that the EIR did not need to include this information in the VMT analysis because the Scoping Plan documents say that it may be excluded.

Preliminarily, Petitioner in part relies on the Prior CRW Action but while that decision is relevant for the argument that it is improper for the EIR to rely on the thresholds and standards which the County sought to establish in the project at issue in that case, it is not relevant to the issue of whether this EIR improperly failed to consider long-distance travel in VMT calculations. The Prior CRW Action involved a CEQA challenge to the county's approval of a Programmatic EIR (the PEIR) and Climate Action Plan (CAP), a planning-level document to guide overall analysis of the GHG impacts of future projects in the county. The court's decision was based on the specific facts in the record in that case, including, amongst others, the respondent's claim that including the missing information would have been infeasible while admitting in the record that there were available feasible methodologies for quantifying the missing GHG data but merely contended that it was difficult. None of this is part of the analysis in this case, the Prior CRW Action is not precedent, and its determinations, for this point, have no direct bearing on the analysis here.

In one of their arguments supporting their position, Respondent and RPI contend that the EIR properly did not consider long-distance, air-traffic information in the VMT because Respondent had made factual determinations that the Project would not cause any changes in air traffic.

Countering this, Petitioner relies on "common knowledge" about the region's role as a tourist destination and findings of the Sonoma County Economic Development Board showing that destination spending and related tax receipts "are the highest that Sonoma County has seen in the last decade" while travelers "are flocking" hither from

around the world. OB 11:4-7, 9-16. These points, however, seem reasonable but in of themselves lack any clear evidence to show that the Project may actually cause a change or increase in such traffic.

Respondent's response in the record to Petitioner's comment on this point states the conclusion that it will not study these long-distance GHGs because the evidence demonstrated no change in air traffic. AR 6711-6714. Respondent and RPI correctly note that Petitioner does not point to anything in the record showing that the hotel will cause an increase in tourism, and thus VMT, or which otherwise actually refutes the conclusion regarding air traffic; the record shows that the area already experiences strong tourist activity; Respondent reasoned that the tourists would already visit the area with or without the hotel and that the tourists who visit the area come for the region, its wine, and other reasons rather than because of any specific hotel; and Respondent in fact used the CalEEMod model to generate estimates of VMT associated with the hotel. AR 6711-6712.

At AR 251, the EIR stated that because the Initial Study had determined that the Project would not cause a change in air traffic, then there would be no impact related to air traffic and that it was not going to consider the issue further. The Initial Study is at AR 6761, et seq., with the traffic discussion at AR 6840-6841. It states that the Project will not result in a change in air traffic but merely explains that the Project will not cause changes in air traffic patterns because of its distance from the Healdsburg Municipal Airport and discusses this in terms of local air traffic patterns and safety risks, specifically at that airport. It provides no evidence and discussion on whether the Project could generate or alter air traffic in the sense of trips and visits and it is entirely unrelated to the issues of whether it will have any effect on such trans-boundary trips.

Thus, from what the record shows as far as it is currently possible to discern, the Initial Study found that the Project would not change the local air patterns, with an emphasis on safety, because of local air traffic needs only. It made no determination on whether the Project would actually cause an increase in visits or trips, by air or

otherwise, and the only evidence mentioned related to the vicinity of the local airport, nothing more. The EIR's Transportation and Traffic section then used this statement from the Initial Study to determine that it would not alter air traffic at all so refused to consider it further; and then in the response to comments, most notably at AR 6712, Respondent used this in part to support its finding that the Project would not cause an increase in air traffic and thus VMT. That conclusion on the face of the record cannot be based on the Initial Study since the Initial Study never actually addressed that. Respondent otherwise, in both the response to comment and in its opposition, cites to absolutely no evidence or analysis of any sort which would support its assumptions and conclusions that the Project would not lead to an increase in visits by air or otherwise. It logically reasons that the envision hotel would merely serve people who would already be in the area or visit for other reasons, but admits the analysis "assumed" this while it provides nothing to support this assumption.

Nonetheless, Respondent and RPI properly assert that the methodology is appropriate, and the failure to consider the long-distance and air-travel VMT immaterial, because in the end the EIR appropriately bases its decisions on compliance with the Scoping Plan and that under the Scoping Plan, GHGs related to international and interstate flights are excluded. In the record, at AR 1566, the CARB 2014 GHG inventory states that aviation related GHGs include only those emissions for intrastate flights while interstate and international flights 'are included as an information item, but their [GHGs] are not counted ... in California's overall inventory." The 2007 CARB staff report for AB 32 and the Scoping Plan likewise notes that "[k]ey exclusions [from the state GHG inventory] are interstate and international flights, as well as ships operating outside of California waters." AR 1363. Similarly, an "Important Note" to the 2000-2017 11th Edition of the California Greenhouse Gas Inventory for the Scoping Plan, excludes such international aviation traffic and also states that because this raises a question of how to treat emissions from interstate flights, the ARB staff determined that such GHGs should be estimated for information purposes only but not included in the emissions at

issue in determining compliance with the GHG mandate. See RJN, Ex. C, p. 1. The CARB reports note that the California inventory is consistent with international and national guidelines and protocols to the greatest extent possible." See, e.g., AR 1357. Petitioner does not challenge this.

With respect to the ICLEI protocols on which Petitioner relies, the Scoping Plan states "[i]n developing local plans, local government should refer to "The U.S. Community Protocol for Accounting and Reporting of Greenhouse Gas Emissions"' which is an ICLEI publication. RJN, Ex. A, p. 100; RJN, Ex. D. This adds that "these plans should disclose all emissions within the defined geographical boundary, even those over which the local government has no regulatory authority to control, and then focus the strategies on those emissions that the jurisdiction controls. For emissions from transportation, the community protocol recommends including emissions from trips that extend beyond the community's boundaries." *Ibid.* However, these are not part of the emissions which must be included. This document, in section 2.4, the section discussing which GHG sources and activities to include in an analysis beyond those mandated, provides a list of those items which local governments are "strongly encouraged" to include. In this section, it states that local governments may focus on those GHG sources and activities over which they have "significant influence" but also notes that they may find it appropriate to include "trans-boundary air and rail travel." Section 2.4.1, RJN, Ex. D, p. 29. While this clearly encourages agencies to estimate these GHGs, it is also clear that this is not mandatory under these protocols and that even to the extent that they should be reported, the emphasis for them is on information purposes only rather than truly factoring them into analysis on compliance with GHG thresholds.

The related ICLEI Local Government Operations Protocol states that in considering their own GHG activities, it is only optional for local governments to report Scope 3 business travel, Scope 3 travel being the very category at issue and which Petitioner claims the EIR fails to consider. RJN, Ex. B, p. 174. It explains that "no

widely accepted calculation methodologies for transportation modes such as airline travel yet exist."

As noted, not only does the Scoping Plan provide a framework for GHG analysis in California which agencies may use to determine GHG impacts under CEQA, but the EIR's analysis is expressly based compliance with the Scoping Plan. See, e.g., AR 350-362.

Respondent and RPI also point out that in relying on CalEEMod, the EIR also uses a "well-accepted methodology" and the record supports this. This factor, combined with clear indications under the Scoping Plan and other protocols that such VMT need not be considered and is typically excluded, the fact that Petitioner has pointed to nothing in the record which would actually demonstrate that the Project would cause an increase in such VMT, and the fact that Petitioner has pointed to nothing showing that this VMT should actually be included in the analysis, indicates that Respondent did not need to include this information under CEQA or to allow for informed decisionmaking. The record and the applicable documents regarding the Scoping Plan and protocols make it clear that the missing VMT did not need to be, and is generally excluded from, analysis in determining compliance with applicable thresholds of significance. If that is so, it was not required for informed decisionmaking.

Petitioner argues that under *Newhall Ranch I, supra*, the Scoping Plan does not necessarily establish an appropriate framework for considering GHG impacts, the threshold needs to be tailored to the specific project in order to use Scoping Plan methodology, and this project "calls out" for inclusion of trans-boundary VMT despite the Scoping Plan methodology. *Newhall Ranch I*, as noted, made it clear that the Scoping Plan is not a mandatory framework for GHG analysis but is generally an appropriate one, stating at 62 Cal.4th 223, the very citation on which Petitioner itself relies,

> Neither A.B. 32 nor the Scoping Plan establishes regulations implementing, for specific projects, the Legislature's statewide goals for reducing greenhouse gas emissions. Neither constitutes a set of "regulations or requirements adopted to implement" a statewide reduction plan within the meaning of Guidelines section 15064.4, subdivision (b)(3).

> That guideline, however, does not expressly or impliedly prohibit a lead agency from using the A.B. 32 goals themselves to determine whether the project's projected greenhouse gas emissions are significant. As noted by the Natural Resources Agency in its amicus curiae brief, "a discussion of a project's consistency with the State's long-term climate stabilization objectives ... will often be appropriate ... under CEQA," provided the analysis is "tailored ... specifically to a particular project." Indeed, to proceed in this manner is consistent with CEQA's "inherent recognition ... that if a plan is in place to address a cumulative problem, a new project's incremental addition to the problem will not be 'cumulatively considerable' if it is consistent with the plan and is doing its fair share to achieve the plan's goals." [Citation.] For this reason as well, we conclude DFW's choice to use that criterion does not violate CEQA. The only published Court of Appeal decisions to consider this question have reached the same conclusion, albeit with little discussion. [Citation.]

Petitioner is thus correct that the Supreme Court noted that use of the Scoping Plan methodology should be "tailored ... specifically to a particular project," but this GHG discussion on its face is tailored to this specific project and Petitioner fails to explain how it is not. The EIR's GHG discussion does not simply rely generally on the Scoping Plan but specifically and clearly notes and considers the specific issues of this Project. In claiming that it does not, Petitioner provides no explanation other than the issues discussed above as to the need to include long-term VMT because this region is a tourist destination. Petitioner's claim that this Project "calls out" for inclusion of VMT is wholly unsupported. Petitioner provided nothing more at the hearing aside from the contention that it is appropriate to consider VMT in line with the Scoping Plan methodology explained above because here Respondent has "authority" over trans-boundary VMTs and emissions, but this is unpersuasive and unclear. Petitioner's only apparent explanation is that Respondent has such authority because it could deny the permit for the Project, which has nothing to do with controlling the VMT or GHGs. Clearly, Respondent has no authority at all over how many people may travel to or from the city, much less the county or region, how they may travel, what fuel they may use, or the like. Being able to deny the permit is simply control over whether it will allow the Project, not whether it could have any control over the VMT or GHG emissions.

Petitioner vaguely argued at the hearing, in a development of a claim made in the papers and discussed above, that Respondent could access data on tourism and

determine how the hotels relate to that. However, Petitioner has made no showing whatsoever of how that could actually lead to any more specific and non-speculative, to say nothing of meaningful, determinations as to how simply building a hotel in a region that is tourist destination could actually generate trans-boundary VMT and GHG, much less how Respondent could possibly have any control over those. Petitioner claims that "common sense" dictates that building a hotel will increase tourism and thus VMT but this is merely an assumption without any support and based on the record "common sense" does not indicate either way. As Respondent and RPI contend, Petitioner's proffered "common sense" conclusion appears to be similar to that analysis which the court rejected in *San Franciscans for Livable Neighborhoods v. City and County of San Francisco* (2018) 26 Cal.App.5th 596, at 619-620, where petitioner challenged the EIR for a housing project in part on the failure to study GHGs related to an increase in population. In rejecting this argument, the court explained that the project there was growth-accommodating rather than growth-inducing. Here, nothing shows that this Project is growth inducing and on its face it merely appears to accommodate tourists who will come to the region anyway. At the very least, that is a reasonable conclusion, based on the record, and there is no support for Petitioner's argument that this is incorrect or lacking in substantial evidence merely because tourists flock to the region.

The record indicates that the CalEEMod methodology employed is an accepted model and methodology, a point which Petitioner fails to dispute. Petitioner has claimed that a different methodology was rejected but Petitioner cites to nothing in the record showing that anyone actually set forth a feasible methodology considering trans-boundary VMT, which Respondent rejected. Petitioner's proposal seems to have been to draw up and look at purely hypothetical itineraries of made-up visitors, wholly lacking in authority or actual methodology. AR-E 2282-2284.[1] In its e-mail, Petitioner argued "we believe the FEIR ... could have provided a reasonable estimate of travel[-]induced

[1] The Court notes that these e-mail comments were initially not provided with the lodged record but the parties stipulated that they should have been and they thus filed them with a joint stipulation adding them to the record.

GHG emissions" and "[t]here are analytical models for providing a reasonable estimate of GHG emissions attributable to a 130[-]room hotel ...." Petitioner did not clarify what these are or how they would work, providing no other information aside from giving the hypothetical examples of different theoretical travelers and claiming that doing so "is an example of feasible methodology." Petitioner did not in that e-mail explain how this is a feasible methodology rather than sheer speculation, which is all that it appears to be. Petitioner has not at any point in this litigation pointed to, or mentioned, any other methodology or any other basis for finding this example to be a feasible methodology instead of sheer speculation.

In its e-mail, and in argument before the Court, Petitioner argued that it is "not the public's burden to gather enough information to provide an accurate project description," but while a generally correct statement of the law, this is inapplicable to the situation before the Court. This case does not involve a failure to provide a project description or, indeed, any other effort by Respondent to put the burden on the public. Instead, Petitioner is claiming that Respondent failed to employ a possible methodology for determining impacts which it did not consider, for which Petitioner claims there is a feasible methodology. The EIR adopted a methodology which appears facially reasonable and supported by substantial evidence, Petitioner does not actually appear to challenge that methodology in of itself, the Scoping Plan expressly excludes the type of trans-boundary VMT which Petitioner wants considered, and the record demonstrates nothing but speculation as a method to account for trans-boundary VMT. In light of these facts, Petitioner may not simply claim that there is a feasible methodology to assess missing data, provide mere speculation, and then claim that Respondent must do the research to find a feasible methodology. Respondent's decision not to study the trans-boundary VMT is not improperly putting the burden on the public, but instead a proper refusal to adopt Petitioner's proposed methodology on the basis that it is speculative. See *Rodeo Citizens Assn. v. County of Contra Costa* (2018) 22 Cal.App.5th 214, 225-228 (where agency "reasonably concluded that quantification of

downstream emissions would be speculative ... no further analysis was required"). Respondent had no obligation to then try to find another methodology based on Petitioner's conclusory, unexplained, and unsupported claim such may exist. As noted above, Guideline 15064.4(a) makes it clear that an agency's efforts to study GHGs must be "based to the extent possible on scientific and factual data" and, consistent with CEQA's principles in general, provides no room for speculation.

As noted above in the section on standard of review, Respondent and RPI argue that the standard of review for determining an agency's choice of methodology, the substantial-evidence test, should apply to the choice of methodology and that there is substantial evidence for this determination. As the Court noted, however, that does not appear to be the thrust of Petitioner's argument, which seems focused on whether the EIR fails to consider information that was required. Rather than attacking the chosen methodology, Petitioner seems to be, and claims that it is, arguing that Respondent rejected adoption of an additional methodology specifically for including trans-boundary VMT. Nonetheless, under this approach as well, the Court finds that there is substantial evidence that the EIR employed an appropriate methodology consistent with the statewide standards, Scoping Plan, and methodological approach, that Petitioner has failed to demonstrate any basis to the contrary or that anyone actually put forth a feasible methodology considering trans-boundary VMT effects, and that Respondent improperly rejected the proffered methodology which on its face was based on pure speculation.

Finally, whether it is feasible to include the trans-boundary VMT is not even material unless Petitioner can demonstrate that reliance on the Scoping Plan was in some manner an abuse of discretion and this it has failed to do. The Scoping Plan expressly excludes this VMT information and by complying with it, Respondent therefore did not need to consider the trans-boundary VMT. Doing so may even have been improper in light of the Scoping Plan's framework and approach because it would have conflicted with the Scoping Plan approach.

Nothing Petitioner has provided in papers or at the hearing demonstrates that it is improper to rely on the Scoping Plan methodology, which expressly excludes consideration of such trans-boundary VMT at issue here.

In the end, although the EIR contains no support for the conclusions that it did not need to include long-distance, air-traffic data in the VMT calculation because the Project would not cause any, the record does demonstrate that in accord with the Scoping Plan such VMT information did not need to be included in the EIR. Respondent therefore did not fail to proceed in the manner required by law.

Consistency with Statewide Emission Goals

Petitioner next argues that the EIR does not adequately consider consistency with statewide emission goals and instead relies on standards from the county's invalidated Climate Action Plan ("CAP"). Petitioner notes that the EIR rejects basing the analysis on Respondent's 2030 General Plan ("2030 Plan") because that plan's GHG section notes that it will cause significant, unavoidable consequences. Petitioner then notes, and criticizes, the reliance on the CAP because it had been invalidated and the section discussing compliance with the Scoping Plan because the conclusions are based on insufficient VMT information while the discussion is "confusing" and "obfuscated."

Petitioner appears to claim that it is improper or confusing for the EIR to avoid considering compliance with Respondent's 2030 Plan but this is not persuasive. The EIR explains that the 2030 Plan fails to comply with the Scoping Plan and state standards on GHG thresholds and reduction. It thus validly and logically explains that there is no point in determining compliance with the 2030 Plan since it would be meaningless or improper as a basis for determining thresholds of significance or GHG impacts.

Petitioner's CAP argument is unpersuasive. Nothing shows that the reliance on the CAP standards and thresholds was improper or violates CEQA for two significant reasons. First, even though the county's CAP was itself invalidated in the Prior CRW

Action, Respondent later, in a March 2018 resolution, adopted its own standards and climate plan based on and using the CAP, and the EIR is clear that it is actually basing its analysis on the CAP as adopted by Respondent, an adoption that was not invalidated. AR 352, 363, 373. This means that the invalidation of the county's CAP is immaterial and that Respondent is in fact using a valid, standing plan as the framework for analysis. The fact that the standards in Respondent's own adopted plan are taken from, and may be even the same as, those in the county's CAP does not make Respondent's own plan improper.

Petitioner at the hearing reiterated the argument that Respondent should not be able to rely on standards from the County CAP simply because that CAP had been invalidated in a prior CEQA action but admitted that Respondent had itself adopted the standards used here and that there had been no challenge to Respondent's adopted standards. Petitioner only added that it is difficult to understand how this could make sense but Petitioner fails to take into account the nature of the court's role here and the bases for its decision. A court in a CEQA petition does not rule on the "correctness" of an EIR but only on whether it complies with the law in light of the record. *Laurel Heights I, supra*, 47 Cal.3d 393. The mere fact that the standards or content which Respondent adopted are the same as those in the invalidated County CAP is alone immaterial. Respondent's adopted standards were never challenged and thus it is appropriate for Respondent to consider them as adopted standards, regardless of their similarity to standards in another agency's plan which was invalidated. Moreover, nothing about the invalidation of the County CAP in of itself indicates that other agencies could be forbidden from using the same standards themselves and this is an issue which courts simply do not have the power to consider in determining compliance with CEQA in light of the record on the project before them.

Second, nothing shows that this causes any prejudice, particularly since Respondent is not using the reliance on this CAP approach in lieu of compliance with the Scoping Plan. The EIR is very clear that it is separately considering compliance

with both the Scoping Plan and the CAP standards. AR 350-353. The fact that the EIR finds compliance with Respondent's adoption of the CAP standards *in addition to* compliance with the State Scoping Plan does not in some manner invalidate or corrupt the reasoning that the Project complies with the Scoping Plan standards, or obfuscate the issues or reasoning; it is simply comparing the Project to additional GHG standards and explaining that it complies with both.

Petitioner is similarly unpersuasive in its attack on the determinations of compliance with the Scoping Plan. The EIR sets forth clear information, clearly explains that it is determining compliance with the Scoping Plan by using the Bay Area Air Quality Management District ("BAAQMD") thresholds of significance, clearly explains how the Project's GHG impacts, without mitigation, would potentially exceed the BAAQMD thresholds and thus violate the Scoping Plan; and then clearly explains that the adopted mitigation measure will remedy this by reducing any potential GHG levels to below the BAAQMD thresholds of significance. AR 350-363. As explained further below in the section on the mitigation measure, it clearly demonstrates that this is so because the mitigation measure actually requires all projects within the ambit of NEAP to meet the BAAQMD thresholds of significance either with or without various measures, and demonstrate proof of such compliance. Although Petitioner, as discussed below, attacks the mitigation measure as improperly deferred and lacking clear performance standards, that is a separate issue and does not itself invalidate the analysis regarding the Scoping Plan and BAQMD thresholds.

Finally, Petitioner provides no explanation supporting its conclusory argument that this analysis "presents a confusing, obfuscated thought process." Its only explanation is that this is so because Respondent rejected compliance with its own 2030 Plan, a rejection which all parties seem to agree was proper since it by definition does not comply with the Scoping Plan or state requirements otherwise, and relies on both the BAAQMD thresholds as well as Respondent's own adopted standards from the CAP. This does not make the discussion confusing and in fact the discussion on its

face seems to be clear and straightforward and it presents a clear analytical route demonstrating how it reached its conclusion.

The opposition also correctly notes, as explained above, that it is permissible for an agency to use the Scoping Plan as a basis for GHG analysis and determining thresholds of significance. *Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal.4th 204 (*Newhall Ranch I*). Petitioner also does not seem to dispute the appropriateness of relying on the Scoping Plan, however, and instead claims merely that the EIR fails to demonstrate properly how the Project complies with it.

Mitigation Measures

Finally, Petitioner challenges the EIR's mitigation measures as related solely to GHGs, arguing that Respondent improperly adopted deferred mitigation measures lacking clear performance standards as required.

Authority on Mitigation Measures

Ensuring that an agency adopts sufficient mitigation measures is one of the key roles of CEQA. PRC section 21002 states that "it is the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives *or feasible mitigation measures available* which would substantially lessen the significant environmental effects ...." The Supreme Court decided that considering alternatives is one of the most important functions of an EIR. *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 197. In fact, "[t]he core of the EIR is the mitigation and alternatives sections." *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564, 566 (*Goleta II*).

CEQA is thus recognized as not merely a "procedural" statute but one that contains a "substantive mandate" that agencies not approve projects if feasible alternatives or mitigation measures can substantially reduce those impacts. *Mountain Lion Foundation v. Fish and Game Comm.* (1997) 16 Cal.4th 105, 134; see also Remy,

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et al., Guide to the California Environmental Quality Act (10th Ed.1999) Chapter I, pp.2-3.

It is well-established that it is improper for an agency to rely on *deferred* mitigation. *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296; *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275-1276.

The court in *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359 found a negative declaration ("ND") defective because it improperly relied on deferred formulation of specific mitigation measures. The city required the applicant to comply with any existing ordinance protecting the Stephens' kangaroo rat and allowed the city to require a biological report on the rat and compliance with any recommendations in the report. The court found this insufficient because it, like the approval in *Sundstrom*, based the approval on compliance with a report that had not yet even been performed.

By contrast, the court in *Schaeffer Land Trust v. San Jose City Council* (1989) 215 Cal.App.3d 612, upheld an ND for a general plan amendment for a parcel of land which, regarding traffic issues, required any future development to comply with applicable "level of service" standards. Unlike the other cases mentioned above, the mitigation measures were delayed because the development and impacts were not concrete, but the mitigation was fixed to set performance standards which, by definition, ensured that there would be no significant impact.

As a result, "[d]eferral of the specifics of mitigation is permissible where the local entity commits itself to mitigation and lists the alternatives to be considered, analyzed and possibly incorporated in the mitigation plan." *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275-1276; see also, *Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1028-1030. This applies where "mitigation is known to be feasible, but where the practical considerations prohibit devising such measures early," so that "[w]here future action to carry a project forward is contingent on devising means to satisfy such criteria, the agency should be able to rely on its commitment as evidence

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that significant impacts will in fact be mitigated." *Sacramento Old City Assn., supra*, 1028-1029.

Mitigation with deferred specifics was found to satisfy CEQA where the lead agency had committed to mitigation meeting a specified range of criteria and project approval required the developer to obtain permits and adopt seven itemized measures in coordination and consultation with relevant agencies. *Defend the Bay, supra*, 1276.

A mitigation measure that required replacement habitat preservation was similarly found to satisfy CEQA even though the specifics were not fully determined but where the approval set forth *specific possibilities and parameters that the mitigation needed to meet. Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 794. The EIR "set[] out the possibilities - on-site or off-site preservation of similar habitat at a ratio of at least two to one, or one of several possible habitat loss permits from relevant agencies."

The court in *Coastal Hills Rural Preservation v. County of Sonoma* (2016) 2 Cal.App.5th 1234, at 1258, upholding this trial court's order denying a CEQA petition for writ of mandate, explained that although "CEQA usually requires mitigation measures to be defined in advance" and not deferred, "deferral [of mitigation measures] is permitted if, in addition to demonstrating some need for deferral, the agency (1) commits itself to mitigation; and (2) spells out, in its environmental impact report, the possible mitigation options that would meet "specific performance criteria" contained in the report."

In *Sundstrom, supra*, the county required future hydrological studies as conditions of a use permit and required that any mitigation measures that the study suggested would become mandatory. The court found this to be improper because the impacts and mitigation measures were not determined.

In *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, the court found a mitigation measure that required replacement habitat preservation to satisfy CEQA even though the specifics were not fully determined but

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where the approval set forth specific possibilities and parameters that the mitigation needed to meet. *Endangered Habitats League*, 794.

The Mitigation Measures at Issue

The measures at issue, which Petitioner cites at OB 18-19, are found at AR 362-363. The EIR admits that GHG impacts would be significant absent the mitigation but at AR 374 cites to and relies on the mitigation measures to support the conclusion that, with the mitigation measures, the Project's GHG impacts would be reduced to less than significant.

The measure is actually one mitigation measure with various options on how to achieve it. It states that each developer shall "provide documentation to the City ... demonstrating that the proposed development would meet the BAAQMD recommended threshold of significance ... or would achieve additional GHG ... reductions sufficient to meet the recommended threshold through a combination of one or more" measures. It then lists several measures which may be used and add that the measures used may include "comparable" ones "approved by the City."

Petitioner is correct that this is open ended in the details and mechanics and leaves significant uncertainty over exactly what will be done to reduce any GHGs. However, as Respondent and RPI note, it sets what appears to be a mandatory and clear performance standard: any development must, regardless of what actual mitigation approaches it employs, or whether it employs any at all, "meet the BAAQMD recommended threshold of significance." This is a clear performance standard and it is apparently mandatory. It also by definition would mean that there will be no significant impact since it by definition requires that all development meet the applicable threshold of significance. Petitioner does not take issue with this performance standard but instead attacks the specifics of each method for achieving this performance standard, which is immaterial. What matters ultimately is that there is a clear, mandatory performance standard and that in some fashion each development must meet it.

Accordingly, the Amended Petition for Writ of Mandate is denied.

IT IS SO ORDERED.

DATED: 4-28-2020

PATRICK M. BRODERICK
Judge of the Superior Court

SCV-264647

PROOF OF SERVICE BY MAIL

I certify that I am an employee of the Superior Court of California, County of Sonoma, and that my business address is 600 Administration Drive, Room 107-J, Santa Rosa, California, 95403; that I am not a party to this case; that I am over the age of 18 years; that I am readily familiar with this office's practice for collection and processing of correspondence for mailing with the United States Postal Service; and that on the date shown below I placed a true copy of the attached Decision After Hearing on Amended Complaint for Declaratory Relief and Petition for Writ of Mandate in an envelope, sealed and addressed as shown below, for collection and mailing at Santa Rosa, California, first class, postage fully prepaid, following ordinary business practices.

Date: April 28, 2020

Arlene Junior
Clerk of the Court

By: Cynthia Gaddie
Cynthia Gaddie, Deputy Clerk

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PROOF OF SERVICE

California River Watch v. City of Healdsburg, et al.
Sonoma County Superior Court, Case No. SCV-264647

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Contra Costa, State of California. My business address is 1331 N. California Blvd., Fifth Floor, Walnut Creek, CA 94596.

On May 12, 2020, I served true copies of the following document(s) described as **[PROPOSED] JUDGMENT DENYING PETITION FOR WRIT OF MANDATE** on the interested parties in this action as follows:

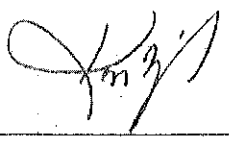
SEE ATTACHED SERVICE LIST

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the document(s) to be sent from e-mail address karen.wigylus@msrlegal.com to the persons at the e-mail addresses listed in the Service List.

BY ELECTRONIC SERVICE: I electronically filed the document(s) with the Clerk of the Court by using the Odyssey eFileCA system. Participants in the case who are registered users will be served by the Odyssey eFileCA system. Participants in the case who are not registered users will be served by mail or by other means permitted by the court rules.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 12, 2020, at Walnut Creek, California.



Karen Wigylus

SERVICE LIST -EService

California River Watch v. City of Healdsburg, et al.
Sonoma County Superior Court, Case No. SCV-264647

Jack Silver Law Office of Jack Silver 708 Gravenstein Hwy, No. #407 Sebastopol, CA 95472 Tel: 707 528 8175 Email: jsilverenvironmental@gmail.com Attorney for Petitioner CALIFORNIA RIVER WATCH ***Via E-Service***	Jerry Bernhaut 23 Woodgreen Street Santa Rosa, CA 95409 Tel: 707 595 1852 Email: j3bernhaut@gmail.com Attorney for Petitioner CALIFORNIA RIVER WATCH ***Via E-Service***
Samantha W. Zutler Gail E. Kavanagh Anna C. Shimko Burke, Williams & Sorensen, LLP 101 Howard Street, Suite 400 San Francisco, CA 94105 Tel: 415 655 8100 Fax: 415 655-8099 Email: szutler@bwslaw.com gkavanagh@bwslaw.com ashimko@bwslaw.com Attorneys for Respondent CITY OF HEALDSBURG ***Via E-Service***	

PROOF OF SERVICE

California River Watch v. City of Healdsburg, et al.
Sonoma County Superior Court, Case No. SCV-264647

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Contra Costa, State of California. My business address is 1331 N. California Blvd., Fifth Floor, Walnut Creek, CA 94596.

On June 12, 2020, I served true copies of the following document(s) described as **NOTICE OF ENTRY OF JUDGMENT DENYING PETITION FOR WRIT OF MANDATE** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the document(s) to be sent from e-mail address karen.wigylus@msrlegal.com to the persons at the e-mail addresses listed in the Service List.

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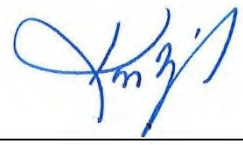
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 12, 2020, at Walnut Creek, California.



Karen Wigylus

SERVICE LIST -EService

California River Watch v. City of Healdsburg, et al.
Sonoma County Superior Court, Case No. SCV-264647

Jack Silver Law Office of Jack Silver 708 Gravenstein Hwy, No. #407 Sebastopol, CA 95472 Tel: 707 528 8175 Email: jsilverenvironmental@gmail.com Attorney for Petitioner CALIFORNIA RIVER WATCH ***Via E-Service***	Jerry Bernhaut 23 Woodgreen Street Santa Rosa, CA 95409 Tel: 707 595 1852 Email: j3bernhaut@gmail.com Attorney for Petitioner CALIFORNIA RIVER WATCH ***Via E-Service***
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