



December 11, 2013

Chairperson Felicia Marcus
and Members of the Board
Eric Oppenheimer
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RE: Groundwater Workplan Concept Paper (Discussion Draft)

Dear Chairperson Marcus, Mssrs. Oppenheimer, Linck, and Water Board Members and Staff:

Thank you for the opportunity to provide comment on the SWRCB Draft Discussion Groundwater Workplan Concept Paper (October 4, 2013).

I am providing comments on behalf of the Center for Biological Diversity (“the Center”), a national non-profit environmental advocacy organization; my work as a Staff Attorney in the Center’s San Francisco office is focused primarily on California water matters.¹ The comments and recommendations contained in this letter focus on how the Board may exercise its constitutional authority to protect and preserve groundwater quantity and supply. In connection with these comments, I accept the Board’s generous offer to meet with and continue discussion of the comments and recommendations included in this letter.²

1. Regional Leadership

¹ While I frequently review and comment on state groundwater matters, my experience is largely based on three matters:

- (1) I represent non-profit interests challenging the diversion of interconnected groundwater in the matter of Water Rights Application for El Sur Ranch (No. 30166);
- (2) I am the lead non-profit attorney challenging the Cadiz groundwater mining project in the Mojave desert; and
- (3) As a water law fellow at Environmental Law Foundation, I petitioned the SWRCB for triennial review of the State Antidegradation Policy and co-drafted the original complaint in the *AGUA* anti-degradation case.

² I have included as attachments to these comments selected briefing for the ongoing litigation challenging the Cadiz groundwater mining project. This briefing offers important context for improvements necessary to achieve statewide consistency in application of overdraft and safe yield, insight into the practical functions and limitations of local groundwater ordinances such as the San Bernardino County Desert Groundwater Management Ordinance, and opportunities for SWRCB guidance and oversight in connection therewith. Please see sections in the briefing regarding misuse of “overdraft” and “waste” in connection with the County ordinance and its mitigation and monitoring requirements for more detailed information. (Opening Brief at pp. 18-21 and 27-37.)

The final clause of the bolded second sentence is potentially the most important for this paper:

where local and regional management efforts are backed-up by State support and oversight, where needed.

The Center supports the Board's efforts to create the most robust "support and oversight" possible to "back up" local and regional management of groundwater, in order to ensure consistent, state-wide safe yields and avoidance of long-term overdraft. The Board should provide maximum oversight through exercising the authority provided to it under the state Constitution's reasonable and beneficial use provisions and the water-quality connected provisions of the State Anti-Degradation Policy.

As explained in greater detail below, the Board should create clear "oversight guidelines" with specific numerical objectives, thresholds and enforcement mechanisms to ensure that reasonable and beneficial use is maintained. At minimum, the Board should create a series of standardized criteria for finding overdraft in a groundwater basin. This information should then be made easily accessible to the public, and the Board should require additional notice of any such findings for all local residents potentially impacted by such a condition. Correspondingly, when such a finding is made, an evaluation of potential unreasonable use should be undertaken by Board staff. A numerical threshold should be created for unsafe yield and undesirable results, which could be defined as sustained withdrawals over 10% in excess of natural recharge. Such a finding should also cause an unreasonable use investigation by Board staff.

In sum, setting enforceable standards which trigger "support and oversight" by the Board would act as both carrot and stick, enabling local and regional agencies to create stronger, more robust standards of their own. Likewise, setting these standards and providing an enforcement/investigative backstop reinforces the balance between local and regional primary regulation and statewide support and oversight.

2. Implementing the Vision

Amplifying the Board's Unreasonable Use Authority

From a water supply management perspective, the second sentence contains the single most important assertion in the entire document:

[...] the State Water Board has broad constitutional authority to prevent waste and unreasonable use of the State's water resources (including groundwater).

This crucial source of Board authority requires far greater explanation and amplification than currently provided in the draft groundwater workplan. At minimum, the Board should:

1. Provide guidance regarding the Board's authority to assert jurisdiction under Constitutional reasonable use provisions over basins experiencing severe

- overdraft, unsafe yield and/or undesirable results. Explain how, where necessary, the Board may intervene, conduct reasonable use investigation, and impose corrective measures to ensure aquifers are not in a state of overdraft or exporting unsafe yields of groundwater. The Board should clarify when it is appropriate to petition the Board to take action, versus when it is appropriate to seek judicial relief.
2. Enhance the Board website to outline this authority and make it easily accessible; and
 3. Most importantly, provide public guidance regarding how and when citizens may petition the Board to assert their authority to protect against unreasonable use. A thorough review of the Board website reveals almost zero information regarding when and how a public citizen may bring a complaint to the water board on the basis of unreasonable use. This process should be further clarified to distinguish neighboring basin users experiencing loss of wells as the basis for unreasonable use claims, and for citizens asserting environmental harm as the basis for such claims. The procedures should be described in sufficient detail so that a member of the public may initiate this process without having esoteric knowledge of Board procedure.

Water Management Principles (p.2)

The Board should draft comprehensive guidance on these various principles described at the bottom of Page 2, specifically:

The definitions underlying sustainable thresholds (management principle #1) should be clarified (as detailed in the next section) with guidance for their standardized and consistent application, so that local entities and water users may not re-define and corrupt the underlying definitions to create *de facto* conditions of severe chronic overdraft and unsafe yields in a given groundwater basin.

Monitoring and assessment (MP #2) should also receive guidance entailing standardized methods and approaches as approved and employed by the United States Geological Survey (USGS) to ensure that (a) monitoring and assessment are not based on exotic non-standard approaches, and (b) are sufficient to prevent overdraft and unsafe yield conditions before these conditions actually occur. This requires establishment of “early warning” monitoring wells and effective “early warning” triggers that actually curtail pumping in the event that an undesirable result is detected. Monitoring should also be enhanced for activities related to hydraulic fracturing.

Guidelines for management mechanisms (MP #3) should be established to ensure that regulated entities have sufficient independent oversight and are not entirely self-regulated. The increasing reliance on joint powers authorities and mutual water companies to oversee groundwater extraction (as in the Cadiz project) effectively allows for *de facto* self-regulation with little or no ability to practically enforce against severe overdraft and/or unsafe yield conditions. The Board

should require independent agencies (such as Counties or municipalities) to retain enforcement authority above and beyond any proposed management structure.

Oversight and enforcement (#5) should be emphasized and expanded, as outlined the final section of these comments.

Groundwater Management Strategy (Figure/Chart)

The “Strategy” figure/chart appears to endlessly pass on responsibility and authority for groundwater management on to the next entity, without holding any entity accountable. This is not a responsible approach for “implementing the vision” of effective groundwater management. Instead of a circular management concept, there should be a clear line of authority and responsibility: local regulations and ordinances are supplemented and guided by regional initiatives and basin plans, which are all under the oversight and enforcement authority of the SWRCB. Along these lines, the Regional Water Board Basin Plans should be specifically identified as a regional-level source for additional oversight and authority.

3. Management Elements and Potential Actions

3.1 Sustainable Thresholds

Establishment of sustainable thresholds is critically important for maintaining healthy aquifers across the state. The Center strongly agrees with the Board on this point and supports creation of thresholds with “quantifiable triggers” based on findings of overdraft, unsafe yield and/or undesirable results. However, in order to meet the objectives set forth by the Board in the workplan, these triggers must be based on standardized definitions established by the Board to ensure consistent use across the state. Moreover, such triggers should do more than “signal a threat or problem.” Rather, such triggers should actually “trigger” enforcement procedures, which should be backstopped by Board jurisdiction and oversight under its Constitutional reasonable use provisions.

Along these lines, conspicuously missing under “existing thresholds” for the Water Board is the assertion of authority to correct overdraft and unsafe yield based on the reasonable use protections of the state Constitution—even though the presumption of such a standard is incorporated into the reasonable use proceedings described in the Board’s “existing Enforcement and Oversight activities” in Section 3.5. Establishing such a threshold is moreover relatively simple: a use which creates sustained detriment to the reasonable water use by other users, and/or the environment, carries a presumption of unreasonable use.

3.1.1 Potential Water Board Actions

1. State Anti-degradation Policy

The 2012 *AGUA* decision enhanced the Board’s existing jurisdiction over groundwater under the state anti-degradation policy, enabling the Board to measure impacts and require mitigation

for groundwater against a baseline of “high quality” water. (*Asociacion de Gente Unida por el Agua [AGUA] v. Central Valley Regional Water Quality Control Board* (2012) 210 Cal.App.4th 1255.) The Board should embrace this authority and resist any proactive limitations, including any corresponding attempts before the Regional Water Boards to constrain the authority provided by *AGUA* and the state antidegradation policy as it applies to groundwater.

AGUA established a presumption of high quality groundwater based on the time the anti-degradation policy was promulgated as the baseline threshold for assessment of detrimental impacts. The Board should keep this assumption intact in any future actions related to anti-degradation policy, and analyze actions for impacts to groundwater as if such water were presumptively high-quality, regardless of the existing water quality at the time a given WDR is proposed. The Board should then require mitigation measures sufficient to ensure that such high quality water is protected and maintained.

The Center supports the Board’s assertion of authority under the state anti-degradation policy regarding effects related to quantity of groundwater, such as recharge. There are two ways to interpret this assertion of authority, and the Center supports both interpretations. First, the Board’s authority over “effects related to... recharge” may be interpreted as limited to water *quality* impacts to groundwater resulting from man-made recharge, such as groundwater recharge and/or water banking projects. The Center supports a broader interpretation of Board authority which includes the Board’s authority over recharge-related impacts to groundwater *quality*, and recommends that the Board require an anti-degradation analysis for any project in which man-made recharge may affect groundwater quality.

Second, the Board’s authority may be broadly interpreted as ensuring that basin extractions do not exceed *natural* recharge. The Center supports this interpretation as well, and supports establishment of an enforceable policy that ensures extraction from an aquifer does not exceed recharge, and to incorporate this concept into the Board’s definition of “high quality waters of the state.” Ensuring adequate rates of recharge in turn should be explicitly premised on adoption and use of accepted USGS methodologies for establishing recharge rates. Moreover, large-scale water extraction projects should be required to conduct an anti-degradation analysis, subject to Board review and approval, that ensures high quality waters will be maintained and that aquifer extraction is not in significant excess of the natural rate of recharge.

Finally, the Board’s authority under the state antidegradation policy includes jurisdiction over hydraulic fracturing impacts to groundwater. The Board’s authority extends to both the drilling activities themselves and the subsequent injection of wastewater underground. Both the “fracking” process itself and the wastewater injection present a substantial likelihood of impacting high quality groundwater and resulting in degradation of groundwater quality. The Board should require antidegradation analysis for new drilling activities including fracking and other types of pressure drilling techniques, as well as proposed sites for injection of wastewater underground. Given DOGGR’s structure and historical resistance to environmental review and

oversight, the Board should conduct antidegradation reviews of fracking-related activities independently of DOGGR.

3. Approaches to Basin Management Objectives

Basin management objectives (BMO's) should be qualitatively evaluated, not just summarized, so that future basin plans may choose the most effective and enforceable thresholds.

The Board should review existing ordinances and rate them qualitatively in at least the following three categories:

1. Are the BMO's consistent with standard groundwater concepts, including overdraft, safe yield, and undesirable results?
2. Are the BMO's sufficiently monitored?
3. Are the BMO's sufficiently enforceable?

In the context of ensuring high quality BMO's, the Board should again establish standard terms to apply across different basins and regions for overdraft, safe yield and undesirable results.

3.2 Monitoring and Assessment

In order to achieve the objectives described in the groundwater workplan, another action should be added to "Potential Water Board Actions": The Board should promulgate guidance for monitoring and assessment of groundwater aquifers to ensure consistent methods and principles are applied across the state, particularly in areas where monitoring and enforcement is carried out under local ordinance or regulation. The contents of such guidance should cover how to define and then perform rigorous monitoring consistent with USGS practices to prevent against overdraft, unsafe yield and undesirable results before these harmful conditions can occur, and ensure that monitoring and assessment is not purely self-conducted but rather is subject to oversight by independent third party agencies.

The Center supports all of the listed "Potential Water Board Actions" in this section and in particular strongly supports the creation of a comprehensive monitoring and oversight scheme for activities related to hydraulic fracturing (No.2). However, to-date DOGGR has not presented itself as an agency capable of evaluating and reacting to environmental impacts, and has consistently distanced itself from exercising any such authority. The Board should clarify that SWRCB holds the primary responsibility for ensuring state groundwater quality, and should provide both detailed guidance and invest resources in the ongoing oversight of fracking-related monitoring activities. The Board should also advocate for requiring Environmental Impact Reports (EIR's) to be prepared under CEQA for each new fracking project, in order to ensure adequate site-specific monitoring and assessment.

3.3 Governance and Management

The Board's existing and potential actions described in this section assume some degree of direct Board oversight in groundwater management, but the Board itself acknowledges that local and regional agencies frequently exercise primary management authority over groundwater resources. Thus, in order for the Board to meet the stated objectives in the Groundwater

Workplan for this section, an additional workplan component should consist of creating appropriate guidance for monitoring and management where the Board is not directly supervising such activities, but rather functioning in an advisory and/or oversight capacity.

A key shortcoming with current governance and management structures in local groundwater basins is improper reliance on self-regulation and enforcement by the extracting or polluting entities. Groundwater management plans (GMP's or GMMMP's) may feature entities created and controlled by the exporting entity (e.g. joint powers authorities or mutual water companies) to control monitoring, management and enforcement of any potential mitigation. While such an approach may violate CEQA, it is not clear if such an approach also violates current SWRCB guidance for local groundwater management. The existing management structures relying on self-regulation in turn encourages non-compliance and/or discourages effective monitoring and enforcement, as such authority is vested in the same entit(ies) responsible for groundwater extraction. The Board should create guidance designed to insure outside enforcement authority is maintained by counties, municipalities or other local government bodies existing independently from the extractive agency and (in particular) any control by joint powers authorities or mutual water districts.

3.4 Funding

The Center supports funding of local groundwater management planning. An additional Board activity not identified in the draft workplan is to condition funding made available through SWRCB-administered programs on acceptance of statewide groundwater management concepts, including the prevention of overdraft, maintenance of safe yield and prevention of undesirable results.

3.5 Oversight and Enforcement

The Center strongly supports the Board's increased oversight and enforcement as the most important action the Board can take to improve administration of the state's groundwater aquifers. Therefore, the Center answers in the affirmative the Board's inquiry at the beginning of this section regarding whether enforcement and oversight based on constitutional reasonable use authority should be added to the workplan. Indeed, enhancing and amplifying the Board's authority in this area should be the single greatest focus of the workplan, along with the creation of guidance to create stronger oversight on the local and regional levels. The Center likewise agrees that the Board should assert and define its scope of authority to protect interconnected groundwater under the common law public trust doctrine as part of the workplan.

a. Create detailed guidelines for submitting and processing reasonable use complaints based on groundwater overdraft and/or unsafe yield.

As the Board acknowledges, it has the authority to address and correct instances where groundwater users experience loss of well productivity due to neighboring users' dramatically increasing their withdrawals, thus constituting an act of unreasonable use. Likewise, courts have

held that application of water to drainage-impaired soils constitutes waste; it follows that such application of groundwater would likewise constitute waste and unreasonable use.

Recommendation: The Board should add a component to its workplan that outlines how citizens may petition the Board to address claims of unreasonable use and/or waste, based on both neighboring users' over-extraction causing well loss and detrimental environmental impacts.

b. Increase Oversight and Enforcement of Activities Related to Hydraulic Fracturing

Hydraulic fracturing presents substantial risks to groundwater, both during the drilling process itself and during the subsequent injection of fracking wastewater underground.

Recommendation: The Board should increase oversight of these activities and exercise its enforcement authority in instances where fracking and/or underground wastewater injection causes aquifer contamination, as detected by an enhanced, Board-approved monitoring regime, as recommended above.

c. Create SWRCB guidance for consistent groundwater concepts and definitions

California water law incorporates many broadly-accepted water law concepts, such as overdraft, safe yield and undesirable results. These definitions apply to groundwater as well as surface water, and are included in various definitions within the California Water Code. But while such definitions exist, there is no clear guidance in the Water Code to apply these concepts in the context of local groundwater projects. Due to this lack of clarity in application of water law terms, the entities responsible for the Cadiz water mining project re-defined overdraft, safe yield and undesirable results in order to permit long-term aquifer drawdown without creating (self-defined) conditions of overdraft, unsafe yield and undesirable results. Please see the attached court documents from Center for Biological Diversity et al. for more information.

Recommendation: the Water Board should issue statewide guidance on proper definitions of overdraft, safe yield and undesirable results in order to avoid their manipulation and misuse.

d. Clarify the application of "Waste" to Groundwater Evaporation

The Cadiz project justified its long-term overdraft of Mojave aquifers by claiming the Project "conserved" water that would otherwise be lost to surface evaporation, which it characterized as "waste." The Cadiz proponents maintained in superior court proceedings (currently pending) that water in underground aquifers is "wasted" when it evaporates on the surface. The Cadiz proponents then claimed that it was *required* under the Reasonable Use provisions of the California Constitution to withdraw sufficient water to offset this "waste." However, there is no presumption in California water law (or elsewhere) that water taking its natural course in underground aquifers constitutes "waste" when lost through surface evaporation.

Recommendation: The SWRCB should issue guidance concerning "waste" that aquifers in their natural state do not "waste" water through natural surface evaporation.

e. Clarify the Application of "Temporary Surplus" for Overdraft Conditions

The Cadiz project proponents superimposed the concept of "Temporary Surplus" to the definitions of overdraft, safe yield, and undesirable results in order to justify long-term aquifer

drawdown and avoid what would otherwise be considered severe overdraft of the relevant Mojave aquifers. The Cadiz proponents justified chronic, long-term overdraft through reliance on the holdings of *Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199. While *San Fernando* permitted Los Angeles to overdraft its basin, the *San Fernando* case clearly applies only in situations where lack of storage space in an aquifer creates “a probable waste of water.” (*Id.* at 279.)

Recommendation: The SWRCB should clarify that cases such as *San Fernando* do not provide justification for chronic, long-term overdraft absent the specific circumstances present in such cases.

f. Review and Comment on Local Groundwater Ordinances to Ensure Consistency and Enforceability

SWRCB should provide guidance for drafting local ordinances that requires adherence to commonly accepted groundwater concepts of overdraft, safe yield and undesirable results. The Board should also review proposed county ordinances to ensure that the permitting terms are enforceable. For example, there is current debate over whether the San Bernardino groundwater ordinance’s relevant definitions and terms are applicable when a project receives an exemption. The Board should advocate for promulgation of local ordinances where protective measures would be applicable regardless of whether a permit or exemption is applied for and/or granted.

Thank you for reviewing these comments. Please see the attached briefing for more information regarding current groundwater extraction projects (specifically the Cadiz project), its novel and destructive application of water law concepts, and its attempted exemption from the local groundwater ordinance without compliance with the permitting terms contained therein.

Sincerely,

A handwritten signature in black ink, appearing to read "ALazar", with a stylized flourish at the end.

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17 **COUNTY OF ORANGE, CIVIL COMPLEX CENTER**
18

19 CENTER FOR BIOLOGICAL DIVERSITY,
et al.

20
21 Petitioners,

22 vs.

23 COUNTY OF SAN BERNARDINO, et al.

24 Respondents;
25

26 CADIZ, INC., et al.

27 Real Parties in Interest.
28
29
30

Case No. 30-2012-00612947

Assigned for all purposes to:

Judge Gail L. Andler

Dept: CX-101

**CBD PETITIONERS’
OPENING BRIEF IN SUPPORT OF
PETITION FOR WRIT OF
MANDATE**

Action Filed: August 31, 2012

Hearing Date: December 3, 2013

Time: 10:00 AM

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	Cal. Code Regs., tit. 14, § 15126.6(a).....	42
13	Cal. Code Regs., tit. 14, § 15126.6(a)-(f)	43
14	Cal. Code Regs., tit. 14, § 15126.6(b).....	43, 45
	Cal. Code Regs., tit. 14, § 15364	44
15	Cal. Code Regs., tit. 14, § 15378	24
16	Cal. Code Regs., tit. 14, § 460	40
	<u>County Ordinance</u>	
17	San Bernardino County Code, art. 5, § 2206551	25
18	San Bernardino County Code, art. 5, § 33.0655	10
	San Bernardino County Code, art. 5, § 33.06551(a)-(c).....	29
19	San Bernardino County Code, art. 5, § 33.06553(i)	30
20	San Bernardino County Code, art. 5, § 33.06553(j)	30

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1 **I. INTRODUCTION**

2 This action challenges the arbitrary, unlawful, and highly prejudicial approval of the Cadiz
3 Project (Project), potentially the region’s largest groundwater mining operation.

4 The Cadiz Project will drain the groundwater aquifers underlying the easternmost desert of
5 San Bernardino County (County), home to the Mojave National Preserve, rare wildlife and plants.
6 But despite the County’s permitting authority over the subject groundwater, the County did not assert
7 its role as lead agency for environmental review. Rather, the developer, Cadiz., Inc, (Cadiz) joined
8 with Santa Margarita Water District (District), a water district in southern Orange County, to carry
9 out environmental review for the Project under the California Environmental Quality Act (CEQA).
10 The District’s approval and certification of the Project Environmental Impact Report (EIR) and
11 groundwater management plan constitutes prejudicial error under CEQA.

12 The County was the proper lead agency under CEQA. Under its own ordinance, the County
13 had the principal role in approving the Project, a groundwater extraction program developed and
14 marketed by Cadiz. The District’s assumption of lead agency duties was prejudicial because it
15 deprived the citizens of San Bernardino County of public accountability, while depriving the County
16 of the hard look at impacts required under CEQA.

17 The EIR’s project description repeatedly misstates and misleads: the Project does not
18 conserve water; it does not prevent waste of water; it is not limited to 50,000 acre-feet a year average,
19 or 2.5 million acre-feet total; and it will not last only 50 years. The EIR’s inaccurate Project
20 description is not merely misleading: these flawed assumptions are the building blocks for the EIR’s
21 evaluation of Project impacts.

22 The Project was approved and findings were made without a final mitigation and monitoring
23 plan required by CEQA. The County had not approved the plan when the District approved the EIR
24 and the findings, and the DEIR only evaluated an earlier draft plan that omitted many key terms for
25 the Project’s mitigation and monitoring. The failure to include and fully evaluate a final mitigation
26 and monitoring plan foreclosed adequate review of impacts in the EIR and provided inadequate
27 support for the agency’s findings.

28 The Project’s mitigation and monitoring program is inadequate and unsound. As
29 implemented through the Project’s groundwater management plan, the mitigation and monitoring is
30 based on extravagant legal theories to justify rejection of basic water law concepts such as aquifer

1 overdraft, aquifer safe yield, and undesirable results. Instead, the EIR and groundwater plan justify
2 the intentional overdraft of the aquifer with an exotic interpretation of “temporary surplus,” a concept
3 utterly inapplicable to the present Project. As a result, the Project’s substantive mitigation measures
4 are inadequate to prevent harm to the aquifer and wildlife, and are ill-equipped to detect such harm
5 before it occurs.

6 The EIR also lacked a sufficient alternatives analysis. Too many alternatives considered
7 extract the same amount of water as the Project, while reasonable alternatives that would extract less
8 water were summarily dismissed.

9 Taken together, these problems undermined the integrity of the Project’s environmental
10 review under CEQA, and demonstrate the need for a full, unbiased environmental review to be
11 performed by the County—a review that complies with both CEQA and the County’s own laws.

12 **II. STATEMENT OF FACTS**

13 Cadiz Inc. owns land in the County overlying the Fenner Valley aquifer in the Mojave Desert.
14 (14:15(a):5062.)¹ The Project proposes to construct 34 new wells on Cadiz’s land to extract at least
15 2.5 million acre-feet of groundwater (815 Billion gallons) and claims it will withdraw an average of
16 50,000 acre-feet every year from the aquifer for at 50 years. Although some of that extracted
17 groundwater would be reserved for use in the County (139:849:52399), most of it would be conveyed
18 to the Colorado River Aqueduct (CRA) through a new 43-mile pipeline for use by numerous water
19 service providers outside the County who have committed to buy the groundwater from Cadiz. One
20 of those providers is the District. (2:9:394-97.)

21 **A. Previous Versions of the Cadiz Project and Creation of the County Ordinance**

22 Cadiz has attempted to export its underlying groundwater for sale since at least 1997, when it
23 began negotiating with Metropolitan Water District of Southern California (Metropolitan) to develop
24 the Project aquifers. (Cadiz Inc. 10-K (2000) 154:1014.g:58371.) This version of the Project issued
25 its EIR in 1999. Due to Metropolitan’s ownership of the Colorado River Aqueduct, necessary to
26 deliver Project water, Metropolitan acted as CEQA lead agency, and the Bureau of Land
27 Management, whose would have the Project’s pipeline from Cadiz land to the Colorado Aqueduct run
28 through its land, was the federal lead agency under NEPA. (*Id.*)

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¹Citations to the Administrative Record are to volume, tab, and page numbers.

1 The 2001-2002 Cadiz Project was designed to extract far more water in dry years—150,000
2 acre-feet—but it also featured a much stronger mitigation and monitoring plan. Under the 2001 plan,
3 pumping would stop if a series of early warning monitoring wells, established upgradient of the
4 Project wellfield, detected any impacts to affected springs before those impacts reached the
5 boundaries of Mojave National Preserve. (Metropolitan/BLM September 2001 FEIR, Groundwater
6 Monitoring and Management Plan, 154:1014.g:58134). In addition, the 2001 plan included long-term
7 monitoring of at least 8 springs, the use of 15 observation wells, and two additional clusters of
8 observation wells “within the immediate project area.” (154:1014.g:58141-42; 58149-50 [detailed
9 map of monitoring wells]) These wells would first be monitored in the pre-production phase to
10 establish the rate of spring discharge into the aquifers. (154:1014.g:58154.) The Project would then
11 be subject to “action criteria” that would stop Project exports if there was any water level change in
12 excess of 1 foot in any of the early warning monitoring wells. (154:1014.g:58169.) The National
13 Parks Service clearly identified all of the previous Project’s mitigation and monitoring features for
14 the District in its comments on the current Project’s DEIR and FEIR. (11:13a:3457-58;
15 155:1023:58879.)

16 Due in part to the previous Project’s strict mitigation and monitoring requirements,
17 Metropolitan decided not to approve the Cadiz project. In explaining the agency’s rationale, the
18 Metropolitan Staff Report cited “the growing realization that significant quantities of native
19 groundwater may not be available for export from this project as a result of public opposition and the
20 limitations of the groundwater monitoring and management program.” (136:795:51605; *see also*
21 BLM summary of rejection, *Id.* at 51609, emphasis added.) Tellingly, Cadiz then sued Metropolitan
22 over its disapproval, citing a “breach of contract” despite Metropolitan’s discretionary approval right
23 under CEQA. (Cadiz Inc. 10-k (2007) 155:1014.h:58561.)² The Sacramento Bee’s editorial on the
24 rejection, “Dead in the Desert,” concluded that the Project was “one of the loonier water ideas
25 Southern California has ever come up with -- to pay a politically connected entrepreneur millions
26 upon millions of dollars to pump a corner of the Mojave Desert.” (136:795:51625.)

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30 ² Cadiz settled the suit with Metropolitan after “the presiding Superior Court Judge held that any breach of duty that may have been committed by Metropolitan is subject to the bar of Government immunity and thus there would be no liability.” (155:1014.h: 58587)

1 In response to this 2001-2002 attempt, the County enacted its Desert Groundwater
2 Management Ordinance (Ordinance). (S.B. County Code Art. 5, § 330655 et seq.) The Ordinance
3 was enacted because there was limited or no jurisdiction over the groundwater. (CITE ORD) To
4 remedy this, the Ordinance created a permitting scheme for new groundwater projects located in the
5 Project area. As there was no prior regulation, the County’s Ordinance made it the only government
6 agency with regulatory authority over the subject groundwater. (47:168:17614.)

7 The Ordinance required that Cadiz obtain the County’s approval to extract the groundwater
8 either (i) by permits, or (ii) under a Groundwater Management, Monitoring, and Mitigation Plan
9 (GMMMP) and a Memorandum of Understanding (MOU).

10 In 2006 and 2007, Cadiz followed this procedure to obtain a permit, filing an application
11 under the County’s permitting scheme required by the Ordinance. (155:1014.h:58561.) Prior to
12 submitting the permit application, Cadiz initiated CEQA review with the County acting as lead
13 agency. (155:1014.h:58562.) Curiously, the environmental review and permit application are not
14 mentioned once in the 10-K from one year later, 2008. (155:1014.h: 58599) Without any
15 explanation, the County’s CEQA review of the Project and Cadiz’ permit application under the
16 Ordinance disappeared into thin air.³

17 **B. The Current Version of the Cadiz Project**

18 The current iteration of the Project appeared first in 2009; Cadiz’ 10-K for that year states that
19 “in June 2009 we executed Letters of Intent LOI with five Southern California water providers. As
20 part of the LOIs Cadiz and the water providers will develop a cost-sharing agreement, finalize terms
21 of pricing, design, and capital allocation, and work towards implementation of the Project.”
22 (155:1014.h: 58612.)

23 This time, Cadiz chose not to apply for a County permit, but rather to apply for an exemption
24 from the Ordinance. Accordingly, the proper procedure for processing the Project was for Cadiz to
25 first apply to the County for approval of a groundwater management plan (the “GMMMP”) to
26 establish the parameters and conditions for the groundwater extraction. The County would then have
27 prepared an EIR as lead agency, and if it approved the groundwater plan and MOU, the District and
28 the other water providers then could have tiered off the County EIR in determining whether they
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³ Twelve pages of the 2007 application are contained in the District’s records.

1 wanted to contract with Cadiz to purchase a portion of the Project groundwater. What’s more, the
2 County had already acted as lead agency on the Project in 2007.

3 Instead, Cadiz chose the District to serve as the lead agency for the Project. To accomplish
4 that objective, Cadiz and the District reversed the approval process so that the District, rather than the
5 County, would be the agency first to act on the Project, purportedly to comply with CEQA Guidelines
6 section 15051(c): where more than one agency equally meet the criteria for lead agency, the agency
7 which will act first on the project shall be the lead agency. Thus, even though Cadiz could not extract
8 any groundwater without the core County entitlements—a groundwater plan and a memorandum of
9 enforcement—Cadiz first sought the District’s approval of an Option Agreement under which Cadiz
10 would sell to the District a portion of the Project’s groundwater.

11 The District’s Board initially questioned the Project proposal. One member said it was
12 “unusual” for the District to be the lead agency (17:36:5949); another asked what was keeping
13 another agency from stepping forward. (17:36:5951.) The District’s General Manager responded
14 that that “no one has been willing to step up and be the lead agency, probably due to bureaucratic
15 malaise” (*id.*), thus implying that the District was taking on the role by default.

16 By October, 2010, however, the County asserted that it would be lead agency and strongly
17 disagreed with the District asserting that role. (73:322:26960; 102:352:38253-55.) The County
18 explained its position in a comprehensive letter-brief to the District, detailing why CEQA and case
19 law mandated that the County, not the District, must act as lead agency. (102:352:38253-55.) Yet
20 when a District board member asked why the County thought it should be lead agency, the District
21 Manager responded: “it probably has to do with money and litigation measures that could control the
22 revenue for the County.” (*Id.*) This explanation completely discounted the numerous reasons cited
23 by the County based on CEQA and case law.

24 In June, 2011, after Cadiz offered the County free water and 20% of the Project’s exports
25 (17:42:6003; 139:849:52398), the County reversed its position and entered into an agreement with the
26 District, under which it would act only as a responsible agency, and the District would be the lead
27 agency. In May, 2012, well after the draft EIR was published and public comments were due, the
28 County entered into a Project MOU with Cadiz and the District, which was supposed to constitute the
29 memorandum of enforcement under the Ordinance—except the groundwater plan, which was
30 supposedly the thing being enforced by the MOU, was incomplete and unapproved. Worse, the

1 MOU functions as the opposite of the enforcement memorandum required by the Ordinance: the
2 MOU actually forces the County to go through arbitration and then to court to enforce a curtailment
3 in pumping. (14:15.a.5067.) The MOU also changed the terms of the Project’s groundwater plan and
4 added Fenner Valley Mutual Water Company (Fenner Valley) as an actor to the Project.
5 (14:15(a):5062.) The District only released an updated groundwater management plan two weeks
6 before its board met to approve the Project., providing precious little time for public review and
7 comment. (140:935:52781.) After two days of contentious hearings, the District approved the
8 Project EIR on July 31, 2012, along with a Water Purchase and Sale Agreement. (1:8:206.)

9 **C. Changes from Previous to Current Cadiz Project**

10 The current Project differs markedly from the 2001-2002 Project in two primary areas: it
11 segregates the storage component into a future, unapproved “phase” of the Project, and it removes
12 nearly all of the Previous Project’s mitigation and monitoring criteria, including the early warning
13 wells, most monitoring wells and the 1-foot-drop trigger point, which has morphed into an 80-foot
14 trigger point: a difference of seventy-nine feet. The National Parks Service heavily criticized the
15 new Project’s exaggerated evaporation and recharge rates, which were estimated at three to sixteen
16 times the rates established by the United States Geological Survey. (155:1023:58874-75.) The NPS
17 comments also detailed the lack of mitigation and monitoring for the Project, contrasting these
18 measures with the previous Project:

19 In contrast, the present Groundwater Management, Monitoring, and Mitigation Plan
20 (Vol. 7, Appendix B) concludes a priori that there will be no impact to surface water
21 resources from project operations and therefore early warning monitoring is
22 unnecessary. This conclusion, repeated throughout the EIR, was based on
23 assumptions and model results, but with no new data collection and no new
24 knowledge that was unavailable during the development of the original monitoring
25 plan (Cadiz Groundwater Storage and Dry-Year Supply Program FEIR/FEIS, Report
26 No. 1174, 2001).

27 [...]

28 The absence of evidence of a connection, as the FEIR states, in the absence of any
29 field-based investigation, is not a demonstration of the absence of any connection. We
30 repeat our request for a field-based study of selected springs. As currently
constructed, should monitoring at any "indicator spring" observe impacts from project
operations, it would be too late to prevent damage to the resource. Furthermore, the
review, recommendation, and decision-making process described in the [GMMMP]
should emphasize a scientifically-based approach and not the personal judgment of a
representative who may or may not have a thorough understanding of the technical
issues.

1 (155:1023:58875) (emphasis added).

2 CBD Petitioners submitted timely written and oral comments objecting to the Project EIR,
3 groundwater management plan and MOU. (134:788:50756; 135:788a:50907; 136:788b:51308;
4 137:800:51807 [written comments]; 18:53: 6255 and 6296 [oral comments at District’s July 31, 2012
5 board meeting])

6 **III. STANDARD OF REVIEW**

7 **A. Environmental Review Under CEQA**

8 “CEQA is a comprehensive scheme designed to provide long-term protection to the
9 environment.” (*Mountain Lion Found. v. County of Kern* (1997) 16 Cal.4th 105, 112.) “Its purposes
10 are manifold, but chief among them is that of providing public agencies and the general public with
11 detailed information about the effects of a proposed project on the environment.” (*San Franciscans*
12 *for Reasonable Growth v. City and County of San Francisco* (1984) 151 Cal.App.3d 61, 72.)

13 Environmental protection is the guiding concept in interpreting CEQA. “The foremost principle
14 under CEQA is that the Legislature intended the act ‘to be interpreted in such manner as to afford the
15 fullest possible protection to the environment within the reasonable scope of the statutory
16 language.’” (*Laurel Heights Improvement Ass’n of San Francisco v. Regents of the University of*
17 *California* (1988) 47 Cal.3d 376, 390 (“*Laurel Heights I*”) [citation omitted].)

18 “The EIR is the primary means of achieving the Legislature’s considered declaration that it is
19 the policy of the state to ‘take all action necessary to protect, rehabilitate, and enhance the
20 environmental quality of the state.’” (*Laurel Heights I, supra*, 47 Cal.3d at p. 392 [citation omitted].)
21 The EIR is therefore the “heart of CEQA” and an “environmental ‘alarm bell’ whose purpose it is to
22 alert the public and its responsible officials to environmental changes before they have reached the
23 ecological points of no return.” (*Id*) “The EIR is also intended to demonstrate to an apprehensive
24 citizenry that the agency has, in fact, analyzed and considered the ecological implications of its
25 action.” (*Id*) Thus, the EIR is an accountability document and the EIR process “protects the
26 environment but also informed self-government.” (*Id*)

27 An EIR must identify the significant effects on the environment of a project, identify
28 alternatives to the project, and indicate the manner in which those significant effects can be mitigated
29 or avoided. (Pub. Resources Code, § 21002.1(a).) Public agencies may not approve projects as
30 proposed if there are feasible alternatives or feasible mitigation measures available which would

1 substantially lessen or avoid the project’s significant environment effects. (Pub. Resources Code, §
2 21001; Guidelines, § 15065 (c)(3).)

3 **B. Standard of Review Under CEQA**

4 In evaluating an EIR for CEQA compliance, a reviewing court must determine whether the
5 agency has prejudicially abused its discretion. (Pub. Resources Code, § 21168.5.) “An abuse of
6 discretion is established if the agency has not proceeded in a manner required by law or if the
7 determination or decision is not supported by substantial evidence.” (*Id*) The California Supreme
8 Court has clarified that “failure to proceed” and “substantial evidence” are two distinct legal
9 standards for finding that the agency abused its discretion under CEQA, each of which has a
10 significantly different standard for determining error. (*Vineyard Area Citizens for Responsible*
11 *Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435 (“*Vineyard Area Citizens*”); *Save*
12 *Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 131.) “In evaluating an EIR for CEQA
13 compliance ... a reviewing court must adjust its scrutiny to the nature of the alleged defect,
14 depending on whether the claim is predominantly one of improper procedure or a dispute over the
15 facts.” (*Vineyard Area Citizens, supra*, 40 Cal.4th at p. 435.)

16 Challenges to an agency’s failure to proceed in the manner required by CEQA, such as the
17 failure to act as lead agency or to disclose information about a project’s environmental effects, are
18 subject to a less deferential standard than challenges to an agency’s substantive factual conclusions.
19 (*Vineyard Area Citizens, supra*, 40 Cal.4th at p. 435.) In reviewing these claims, the court must
20 “determine de novo whether the agency has employed the correct procedures, ‘scrupulously
21 enforc[ing] all legislatively mandated CEQA requirements.’” (*Id*) In reviewing whether the agency
22 proceeded in the manner required by CEQA, the court must determine whether the EIR is sufficient
23 as an informational document. (*Dry Creek Citizens Coalition v. County of Tulare* (1999) 70
24 Cal.App.4th 20, 26) Thus, as a matter of law, courts reject EIRs that do not “provide certain
25 information mandated by CEQA and [] include that information in the environmental analysis.”
26 (*Vineyard Area Citizens, supra*, 40 Cal.4th at p. 435; *see also Communities for a Better Environment*
27 *v. City of Richmond* (2010) 184 Cal.App.4th 70, 83 (“*Communities for a Better Environment*”)
28 [conclusion the project would not result in capacity to process lower quality crude oil not adequately
29 supported by facts and analysis]; *Berkeley Keep Jets Over the Bay Com. v. Board of Port Cmrs.*
30 (2001) 91 Cal.App.4th 1344, 1371 (“*Berkeley Keep Jets*”) [EIR failed to support conclusory

1 statements with scientific or objective data]; *Sunnyvale West Neighborhood Assn. v. City of*
2 *Sunnyvale* (2010) 190 Cal.App.4th 1351, 1383 [agency used incorrect baseline to evaluate
3 environmental effects].) Instead of according the agency deference under the substantial evidence
4 test, courts determine de novo whether the agency has employed the correct procedures and enforce
5 all CEQA requirements required by law. (*Citizens of Goleta Valley v. Board of Supervisors* (1990)
6 52 Cal.3d 553, 564.)

7 When a public agency fails to comply with procedures required by law, as with the present
8 Project, the decision must be set aside as presumptively prejudicial, regardless of whether a different
9 outcome would have resulted if the agency had complied with those procedures. (*Riverwatch v.*
10 *Olivenhain Mun. Water Dist.* (2009) 170 Cal.App.4th 1186, 1199.) In contrast, the substantial
11 evidence standard of review applies to factual disputes such as a dispute over a finding that mitigation
12 measures adequately mitigate project impacts. (*Vineyard Area Citizens, supra*, 40 Cal.4th at p. 435.)
13 While a court reviewing an agency’s decisions under CEQA does not pass on the correctness of an
14 EIR’s environmental conclusions, it must determine whether these conclusions are supported by
15 substantial evidence, which includes “facts, reasonable assumptions predicated upon facts, and expert
16 opinion supported by facts” and excludes “[a]rgument, speculation, unsubstantiated opinion or
17 narrative, [and] evidence which is clearly inaccurate or erroneous...” (Pub. Resources Code, §
18 21082.2(c); *see also Californians for Alternatives to Toxics v. Dept. of Food and Agric.* (2005) 136
19 Cal.App.4th 1, 17 “[C]onclusory statements do not fit the CEQA bill.”.)

20 **IV. ARGUMENT**

21 **A. THE COUNTY OF SAN BERNARDINO WAS THE PROPER LEAD AGENCY** 22 **FOR THE PROJECT.**

23 **1. The County Is the Only Lead Agency Choice Under CEQA.**

24 CEQA defines a lead agency as “the public agency which has the principal responsibility for
25 carrying out or approving a project which may have a significant effect upon the environment.” (Pub.
26 Resources Code, § 21067.) CEQA Guidelines §15051 apply when two or more agencies are involved
27 with a project. “If the project is to be carried out by a nongovernmental person or entity, the lead
28 agency shall be the public agency with the greatest responsibility for supervising or approving the
29 project as a whole.” (14 Cal. Code Regs., §15051(b) (CEQA Guidelines), emphasis added; *Eller*
30 *Media Co. v. Community Redev. Agency* (2003) 108 Cal.App.4th 25, 38.)

1 Cadiz Inc., is the entity principally responsible for, and thus, actually carrying out the project.
2 Cadiz owns the Project’s primary site with the underlying aquifers, has repeatedly created, negotiated
3 and controls contractual rights, and will ultimately profit from the project. Accordingly, Guidelines §
4 15051 provides that the County is the proper lead agency because the Project is being carried out by a
5 nongovernmental entity, and has the greatest responsibility for supervising or approving the Project
6 as a whole. Despite the District’s various maneuvers to accord itself additional Project
7 responsibilities, it cannot overcome a basic hurdle: without Cadiz, there is simply no water for the
8 Project.

9 Here, the only other agency besides the County which has a role in supervising or approving
10 this Project is Metropolitan Water District of Southern California (Metropolitan). Metropolitan’s
11 letter to the District describes that agency’s extensive involvement in carrying out this Project:
12 Metropolitan owns and operates the Colorado River Aqueduct which will be used to transport Project
13 water to its purchasers, and “must approve use and all appurtenant conditions of such use in order for
14 the Project to become operational.”⁴ (Metropolitan Comments on DEIR, 10:13:3256; FEIR,
15 155:1020:58867.) As the operator of a key conveyance of Project water to its intended customers,
16 Metropolitan is the only other public agency with a direct role in the operational aspect of the Project
17 other than the County. Metropolitan also acted as co-lead agency under CEQA for a previous
18 iteration of the Project in 2000-2002, but ultimately rejected that project (Cadiz then sued).
19 However, Metropolitan expressed “concerns” over the current Project, and has yet to consent to the
20 Project’s use of the aqueduct. (155:1020:58868.) Metropolitan did not assert a lead agency role for
21 this Project, so the County is the only other agency who could act as lead agency under CEQA.

22 **a. The County Had Principal Responsibility for Approving the**
23 **Project.**

24 The County is the proper lead agency under Guidelines § 15051(b) because it has principal
25 responsibility for approving (or exempting) the Project under its Desert Groundwater Management
26 Ordinance (Ordinance) (San Bernardino Cty. Code, Art. 5 § 33.0655, DAR 5074.) The Ordinance
27 was created because of the Cadiz project, and particularly because of its size and potential impacts to
28 County resources. (Declaration of John Goss, former Assistant City Manager, 155:1014.h:58698.)

29 ⁴ Even though the use of the aqueduct and the pipeline connecting the aqueduct are necessary components of the Project,
30 the EIR did not evaluate the tie-in of Project facilities to the Metropolitan facilities, in violation of CEQA’s requirement
to identify, analyze and mitigate reasonably foreseeable project impacts. (*Laurel Heights I, supra*, 47 Cal.3d at p.396;
Vineyard, supra, 40 Cal.4th at p.428.)

1 Although the District now claims the County created a valid exemption from the Ordinance, the terms
2 for an exemption are contained within the Ordinance itself, and the Project remains subject to the
3 Ordinance and County action. Whether reviewed as a potentially permitted or exempted project, the
4 Cadiz Project was subject to review by the County under CEQA because it had the primary
5 discretionary approval authority under the Ordinance. This approval authority also explains why the
6 groundwater management plan (or “GMMMP”) needed to be approved first: in a tie, the County
7 would be guaranteed to be first actor under the Ordinance when approving the groundwater plan. As
8 a result, the County had principal approval authority for the Project under Guidelines §15051(b).

9 **b. The County Is the Agency Supervising the Project As a Whole.**

10 In addition to its primary permitting authority, the County is the sole proper CEQA lead
11 agency because it is the only agency who maintains a direct supervisory role during the operational
12 phase of the project, providing the greatest supervisory role of the Project as a whole. The May 2012
13 Project MOU specifically states that the County “will retain full authority and discretion to modify
14 project operations (including but not limited to the institution of mitigation measures or the
15 curtailment or cessation of Project-related groundwater pumping) as necessary to avoid Overdraft or
16 Undesirable Results.” (14:15.a:5065). The MOU declares that County will also “exercise the power
17 of enforcement” and retains the power to enter the Project lands. (14:15.a:5067.) The MOU specifies
18 that the County also retains the authority to determine whether any provision of the Project MOU,
19 groundwater plan or the Ordinance are being “adhered to.” (14:15.a:5067.) Thus the County, and
20 only the County, retains a supervisory role over the Project as a whole.

21 **c. The County Acted First on the Project.**

22 The question of who acted first on the Project should be irrelevant under CEQA unless two
23 agencies have an equal claim to being lead agency. (Guidelines, § 15051(c). Since only the County
24 has a claim to being lead agency (because Metropolitan declined to participate), this provision is
25 inapplicable. However, the County was also the agency that acted first. The County was the first to
26 act on the Cadiz operations when it approved a Conditional Use Permit in 1993 authorizing
27 withdrawal of water for agricultural uses. (*See* Option Agreement Recital “D,” 15:19:5114.) The
28 County also issued environmental documents on Cadiz in the past, including an EIR for the 1993
29 withdrawal of groundwater. (15:19:5101.) The County acted a third time on the Project when it was
30 tasked to provide CEQA review for another iteration of the Project in 2007—at the same time Cadiz

1 submitted a permit application under the Ordinance (Desert Groundwater Management Permit
2 Application (2007), 56:212:21138.) Both the 1993 and 2007 actions occurred before the District
3 ever became involved with the Project.

4 **2. Cadiz, not the District, is “Carrying Out the Project.”**

5 Section 15051 of the CEQA regulations (“Guidelines”) provides the criteria governing the
6 determination of the proper lead agency “when two or more public agencies will be involved with a
7 project”:

8 (a) If the project will be carried out by a public agency, that agency shall be the lead
9 agency even if the project would be located within the jurisdiction of another
public agency.

10 (b) If the project is to be carried out by a nongovernmental person or entity, the lead
11 agency shall be the public agency with the greatest responsibility for supervising
or approving the project as a whole.

12 (Guidelines § 15051, emphasis added.)

13 Under CEQA, the proposed Cadiz Project is being “carried out” by a nongovernmental entity,
14 Cadiz. Cadiz owns the primary Project site, which it calls its “primary asset” for the Cadiz company,
15 whose “primary business is to acquire and develop land and water resources.” (Cadiz Inc. 2010 Form
16 10-K, 155:1014.h:58633, 58635.) The Project thus forms the very heart and soul of Cadiz’ business.
17 The 2010 Option Agreement between the District and Cadiz states that Cadiz “will operate the
18 program,” (15:19:5114), and the 2012 Project MOU confirms that Cadiz owns the Project site and
19 was the party who proposed the Project to “appropriate groundwater from wells to be located on the
20 Cadiz Project” in order to “deliver that groundwater for municipal and industrial uses via the
21 Colorado River Aqueduct.” (MOU Recital “C,” 14:15.a:5062.) Cadiz has owned, does own, and will
22 continue to own the right to market the Project water for export, which is the whole point of the
23 Project: extracting water from under the property of Cadiz. Cadiz even selected the entity to perform
24 environmental review of the Project and retained the “qualified experts.” (Environmental Cost-
25 Sharing Agreement, 14:17:5104.)⁵

26 Cadiz claims it will delegate some Project functions to Fenner Valley Mutual Water Company
27 (Fenner Valley), although the purchase and sale agreement (PSA) makes clear that this will occur
28 only after the Project is constructed. (Water Purchase and Sale Agreement, Recital “C”, 1:8:206.)

29 _____
30 ⁵ Even after the District approved these documents, Cadiz still continues to act as the marketer of Project water, most recently in presentations to San Diego and Needles, CA. These post-decisional acts activities by Cadiz are self-evidently not reflected in the District record, but are, in fact, a matter of public record.

1 Fenner Valley was actually created by Cadiz, expressly to manage the administrative oversight of the
2 project, (MOU Recital “D”, 14:15.a.:5062). Although the MOU declares Cadiz is creating Fenner
3 Valley, the MOU also makes clear that only the County (and not Fenner Valley) “will retain full
4 authority and discretion to modify project operations [...]” (14:15.a:5065.)

5 Further, it is Cadiz, and not Fenner Valley or the District, who necessarily “carries out” the
6 Project because it is the only entity with the authority to enter into water delivery agreements with the
7 parties, and is the only entity which will from profit the Project. Neither the District nor Fenner
8 Valley have the power to allocate themselves water from the Project without the express consent of
9 Cadiz. According to the Option Agreement, Cadiz itself is the party which owns the Project land
10 (Recital “A”), “causes” the completion of watershed analysis and technical evaluation (Recital “I”),
11 will reserve conserved water for the County (Recital “J”), and, perhaps most importantly, is the entity
12 which “desires to grant an option” for water to Project participants (Recital “K”). (15:19:5115.)

13 Cadiz is also paying for the costs of the Project. The Project’s Option Agreement with the
14 District contains a “No Additional Fees” clause which states that Cadiz will not impose, and the
15 District will not be responsible for, any additional fees and costs other than as expressly set forth in
16 this agreement and price schedule” (15:19:5118), and the Option Agreement does not require the
17 District to pay for anything beyond the cost of the transport and water itself. (Option Agreement
18 Exhibit C, “Price Schedule,” 15:19:5127-8.) As this agreement requires the participants to pay only
19 for pipeline capacity and the purchase price of the water itself, no other party is responsible for
20 Project costs other than Cadiz.

21 The party responsible for the creation of the project is the party carrying out the project under
22 CEQA. (*County Sanitation District No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1633-4.)
23 In *County Sanitation District*, the court found that two agencies were considered “lead agencies”
24 because they both would carry out the essential components of the proposed waste treatment Project,
25 and that their status remained as lead agencies “even though they carry out that responsibility by
26 contracting with other entities to handle the physical aspects of hauling and disposing of the biosolids
27 generated.” (*Id.* at 1634.) This holding parallels the facts of the present case, where Cadiz owns and
28 is constructing the Project, but claims it will carry out the administrative aspects of Project water
29 delivery by delegating those responsibilities to Fenner Valley. Thus, under *County Sanitation*
30

1 *District*, Cadiz is the entity carrying out the project under CEQA even though it intends to delegate
2 certain responsibilities to Fenner Valley. (MOU Recital “D.” 14:15.a:5062)

3 **3. The District Does Not Have A Colorable Claim to Lead Agency Status.**

4 The District claims it is lead agency under CEQA Guidelines for two reasons: (a) it claims it
5 is “carrying out the project,” which would make it lead agency under § 15051(a), and (b) it claims it
6 “has the greatest approval role,” which would at least give the District a claim to lead agency under §
7 15051(b) or (d). (FEIR Response to Comments, 12:14:4159-4160.) Unfortunately for the District,
8 neither claim is supportable: the District is not carrying out the project, and it does not have any direct
9 approval role beyond certifying the EIR. The District does not qualify as lead agency under §
10 15051(a) or (b), and lacks any colorable claim to enter into an agreement with the County to act as
11 lead agency under § 15051(d).

12 **a. The District Is Not “Carrying Out the Project” Under CEQA.**

13 The District claims it is “carrying out the project” because (1) it will hold the largest share in
14 Fenner Valley, and (2) (the District claims) it will contribute to future stages of Project development.
15 (Response to Comments, 12:14:4159.) These arguments fail for three reasons: first, Fenner Valley is
16 the entity designated to manage certain aspects of future Project operations, and not the District;
17 second, Fenner Valley is not “carrying out the project” under CEQA, Cadiz is; and third, the claims
18 that the District and Fenner Valley will participate in future Project activities are speculative and not
19 supported by the EIR, which only evaluated Phase I, or the District, which only approved Phase I.

20 First, the District is not Fenner Valley, and Fenner Valley is not a proxy for the District. If the
21 two were the same, then Cadiz would have just contracted the District to operate the project—but it
22 didn’t. Instead, Fenner Valley was created by Cadiz as a legally distinct entity whose shares will be
23 owned proportionate to its purchasing water concerns. (MOU Recital “D”, 14:15.a:5062.) The
24 District does not “carry out” the Project through an imagined transitory power of CEQA. The added
25 layers of legal devices—a mutual water company, and a future, heretofore unformed, joint powers
26 authority—only distance the District from actually carrying out the Project.

27 The District has now entered into an agreement which purports to give it a controlling interest
28 in Fenner Valley. Aside from Fenner Valley’s questionable role, the District has no guarantee it will
29 retain a controlling interest. To meet the Project capacity, Cadiz will have to contract with additional
30 purchasers, and by the terms of Fenner Valley’s formation, additional purchasers of Project water will

1 further dilute the District’s share of Fenner Valley. When Cadiz contracts for sale of the remaining
2 Project capacity, it will again be “carrying out” another aspect of the project, while potentially
3 reducing the District’s share of Fenner Valley. As it stands, the District’s 15,000 acre-foot
4 commitment represents only 30% control of Fenner Valley.

5 Second, the District’s relationship to Fenner Valley is irrelevant because Fenner Valley is not
6 carrying out the Project; that task is left to its owner, Cadiz, Inc. As explained above, the Option
7 Agreement states that Cadiz owns and controls the land, Cadiz has acquired the right of way for the
8 pipeline, and most importantly, “Cadiz will operate the Program”. (Option Agreement, Recitals “A,”
9 “E,” and “H”, 15:19:5114.) As for Fenner Valley, the Option Agreement states that Cadiz “intends to
10 facilitate the implementation of the agreement through the Fenner Valley Mutual Water Company.”
11 (15:19:5115) The Option Agreement thus clearly states that it is Cadiz who: (1) owns the project, (2)
12 owns the right of way, (3) will operate the project, (5) chose the environmental review professionals,
13 (4) will pay for most costs, and (5) has created Fenner Valley only to “facilitate the implementation
14 of the [option] agreement.” It is thus abundantly clear that it is Cadiz, not Fenner Valley, who is
15 “carrying out” the project under CEQA. Even the Purchase and Sale Agreement (PSA) still states
16 that “Cadiz will develop, construct and finance all Project facilities necessary for the production and
17 delivery of Project water and will transfer a possessory interest in the Project Facilities to Fenner
18 Valley Water Authority.” (1:8:206) Thus Cadiz will still own, develop, design and construct the
19 Project; only after the Project’s construction will a “possessory interest” be transferred to a heretofore
20 unformed JPA. Even with the PSA, Cadiz is still carrying out the project.

21 The District now claims it is participating because it intends to participate in the future,
22 storage “phase” of the Project (12:14:4159)—the same phase of the project deemed too speculative
23 by the District to receive project-level review in the EIR. The second Phase of the project was not
24 approved by the District; only Phase I was approved. (1:8:24.) Thus the District is claiming a role in
25 this Project based on its participation in a future Project which the District did not approve, and may
26 never occur. Metropolitan also declares that Phase II cannot occur with the District’s present
27 approvals (and confirms that the County should be lead agency):

28 The description of [Phase II] states that no participants for this component of the Project
29 have been identified, but that such participants must have either Colorado River or State
30 Water Project water rights. Santa Margarita Water District has neither. It is inappropriate
for [SMWD] to assume the role of lead agency for a project in which it may not be a
participant. [...] The proper lead agency for such analysis of the storage component
facilities would be the County[...]

1 (10:13:3534.)

2 The District cannot claim lead agency status, nor even make a substantial claim to such
3 status, due to the mere possibility that a speculative future phase of the Project may--or may not—be
4 built.

5 **b. The District’s Assumption of Lead Agency Role Violates *PCL v. DWR*.**

6 The District and the County now claim that they may enter into an agreement for the District
7 to act as lead agency under CEQA Guidelines § 15051(d), which provides that “Where the provisions
8 of subdivisions (a), (b), and (c) leave two or more public agencies with a substantial claim to be lead
9 agency, the public agencies may by agreement designate an agency as lead agency.” (emphasis
10 added.)

11 This attempt to claim a “shared principal responsibility” mirrors the actions taken in *Planning*
12 *and Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 905 (“*PCL*
13 *v. DWR*.) There, the court rejected respondents’ theory of “so-called shared principal
14 responsibility,” and emphasized CEQA’s preference for a lead agency with broad “perspective and
15 expertise.” (*PCL v. DWR, supra*, 83 Cal.App.4th at 907.) Here, San Bernardino County has the
16 broad perspective and expertise to objectively evaluate all aspects of Project impacts, whereas
17 SMWD, a specialized water agency in Southern Orange County, does not. This is why, under
18 Guidelines § 15051(b)(1), the lead agency “will normally be the agency with general governmental
19 powers, such as a city or county, rather than an agency with a single or limited purpose such as an air
20 pollution control district or a district which will provide a public service or public utility to the
21 project.” (emphasis added.) The *PCL* court echoed its earlier conclusion in *City of Sacramento v.*
22 *State Water Resources Control Board*, (1992) 2 Cal.App.4th 960, that under CEQA, the lead
23 agency’s “responsibility extends beyond water pollution to include the *total* environment. Thus,
24 because the underlying purpose of an EIR is to analyze and inform regarding adverse effects to the
25 environment as a whole (Public Resources Code § 21061), [the lead agency] is in the best position to
26 make such an assessment.” (*PCL v. DWR, supra*, 83 Cal.App.4th at p. 907 [citing *City of*
27 *Sacramento*, 2 Cal.App.4th at p. 973, emphasis in original].) As in *City of Sacramento*, the County’s
28 responsibility extends beyond water to include the total environment; the County should have been
29 lead agency.

30 In finding that the Department of Water Resources was the proper lead agency, the *PCL* court
observed that it was the Department of Water Resources who will “carry out the negotiations and

1 execute the [Project’s] amended agreements.” (*PCL v. DWR, supra*, 83 Cal.App.4th at p. 904.) Here,
2 Cadiz is carrying out the negotiations and executing the agreements—just like DWR. The District
3 (via Fenner Valley) cannot claim to operate the Cadiz Project because it does not control the basic
4 function of the Project: to develop Cadiz’ underlying aquifers. For this essential Project purpose,
5 only Cadiz is a necessary party. The *PCL v. DWR* court found that the California Dept. of Water
6 Resources was the appropriate lead agency based on the fact that DWR was the necessary party to all
7 State Water Project contract amendments, not just the contract with CCWA, and the fact that CCWA,
8 who acted as lead agency, was merely a party to one of those contracts. (*PCL v. DWR, supra*, 83
9 Cal.App.4th at p. 904.) The *PCL* court repeated the trial court’s findings that there was “no evidence
10 in the record that CCWA will be responsible for negotiating the amendments with the contracting
11 agencies.” (*Id.*)

12 Here, the District also is not responsible for Project negotiations. This is because the
13 “Project” is not the control of Fenner Valley, or some heretofore-unformed Joint Powers Authority ,
14 but the development and sale (and possible future storage) of Mojave groundwater, a project
15 developed and marketed—including now, and including in the future-- by Cadiz Inc. The District is
16 not purchasing Cadiz, and has no power to make contracts for the sale of Cadiz water—only Cadiz
17 has that power. Despite its claimed management of certain Project operations, Cadiz remains the *de*
18 *facto* owner and retains the profits, while the County “enforces” the Project mitigation and
19 monitoring. The District, who has bravely accorded itself Fenner Valley’s tasks, has failed to
20 transform itself into lead agency by doing so. The *PCL v. DWR* court found CCWA to be the wrong
21 lead agency because it did not have principal responsibility for implementing the Project, “although it
22 may have a substantial stake in seeing it implemented.” (*PCL v. DWR, supra*, 83 Cal.App.4th at p.
23 906.) Likewise, Cadiz has principal responsibility for implementing the project, for if Cadiz
24 withdraws, there is no project. Under *PCL v. DWR*, the District may very well have a “substantial
25 stake” in seeing the Project implemented, but cannot be considered to be responsible for or carrying
26 out the Cadiz project, and cannot be lead agency under law. As in *PCL v. DWR*, neither the language
27 of the statute nor the facts of this case support the District’s appointment.

28 **4. The County May Not Delegate its Role as Lead Agency.**

29 Because the District and the County had no right to “agree” to let the District act as lead
30 agency, the County has entered into an illegal agreement to delegate its role as lead agency to the

1 District. The delegation was illegal because CEQA prohibits delegation of this task to another
2 agency. This prohibition was articulated *PCL v. DWR*, citing *Kleist v. City of Glendale* (1976) 56
3 Cal.App.3d 770, 779: “Neither the CEQA nor the state guidelines authorize the city council to
4 delegate its review and consideration function to another body. Delegation is inconsistent with the
5 purpose of the review and consideration function since it insulates the members of the council from
6 public awareness and possible reaction to the individual members’ environmental and economic
7 values. Delegation is inconsistent with the purpose of the EIR itself.” (*PCL v. DWR, supra*, 83
8 Cal.App.4th at p.907.)

9 The District’s claims to lead agency are ultimately betrayed by the transparency of its
10 scheming: all of these legal devices—inventing the mutual water company, then proposing a
11 prospective joint powers agreement between the mutual and the District—why is any of this
12 necessary if the District is actually carrying out the Project? In addition to all of the other reasons
13 described above, the District can’t claim to be carrying out the project because it has already created
14 two layers between itself and the Project—layers which, even if these other entities were somehow
15 construed to “carry out” the project, preclude its claim to being lead agency.

16 **B. THE EIR CONTAINS AN INACCURATE AND MISLEADING PROJECT**
17 **DESCRIPTION.**

18 An “accurate, stable and finite project description is the *sine qua non* of an informative and
19 legally sufficient EIR.” (*Cnty. of Inyo v. City of Los Angeles*, (1977) 71 Cal.App.3d 185, 193 (*Cnty.*
20 *Of Inyo*.) An inaccurate or truncated project description is prejudicial error because it fails to
21 “adequately apprise all interested parties of the true scope of the project.” (*See City of Santee v. Cnty.*
22 *of San Diego*, (1989) 214 Cal.App.3d 1438, 1454-55.)

23 **1. The Project Objectives Are Misleading and Deceptive.**

24 A legally sufficient project description must include a “clearly written statement of
25 objectives” that accurately explains “the underlying purpose of the project.” (Guidelines § 15124(b).)
26 Misleading project objectives give “conflicting signals to decisionmakers and the public about the
27 nature and scope of the activity being proposed.” (*San Joaquin Raptor Rescue Ctr. v. Cnty. of Merced*
28 (2007) 149 Cal.App.4th 645, 655-56.) An EIR is therefore flawed when an “enigmatic or unstable
29 project description draws a red herring across the path of public input,” because “[o]nly through an
30

1 accurate view of the project may affected outsiders and public decision-makers balance the proposal's
2 benefit against its environmental cost.” (*Cnty. of Inyo, supra*, 71 Cal.App.3d at p. 198, 192.)

3 **a. The Use of “Conservation” In the Project Title and Objectives Is**
4 **Contradictory and Misleading**

5 The Cadiz Project’s very title turns common sense on its head: a water mining project pitched
6 as “conservation.” The EIR claims the Project’s principal objective is to conserve water, but it should
7 painfully obvious that there are other, less elaborate means to conserve water than extracting the
8 contents of two Mojave aquifers. What’s more, the EIR admits the project is not in fact conserving
9 water, as it claims to export 18,000 acre-feet per year more than the Project’s (very questionable)
10 claimed evaporation rate, and Respondents are in fact quite open about selling it for consumptive
11 use—exactly the opposite of the common use of the term “conserve.” The Project Objectives
12 declares: “[*t*]he *fundamental purpose of the Project* is to save substantial quantities of groundwater
13 that are presently wasted.” (Project Objectives, EIR § 3.2, 2:9:465 (underline and italics in original).)
14 The EIR based this statement on the claim that “the Project would conserve up to 2 million AF of this
15 water,” (*Id.*). However, the EIR later states that “the aquifer will lose over one million acre-feet of
16 water.” (FEIR §3.15.3, 12:14:4199.) The Objectives claim the Project will merely “conserv[e] water
17 that would otherwise be wasted,” (2:9:467) However, the District’s own models predict the water
18 ‘saved’ from evaporation will amount to only 19-80 percent of the total extracted. (*Compare* 2:9:467
19 *with* 3:9a:854.)

20 The EIR claims the Project objectives are not misleading: “rather than depleting the
21 groundwater basin . . . almost 2 MAF of water would be kept from evaporating over the 100-year
22 Project period, resulting in a net depletion of only 220,000 AF.” (12:14:4365.) This justification only
23 repeats the fallacy that exporting Project water is somehow the same as “conserving” it. Worse, even
24 this apparent justification still admits the Project will consume 220,000 AF of water beyond what the
25 District claims will evaporate; even using the District’s upside-down definitions, the Project is not
26 “conserving” but using water.

27 The Project objectives are deceptive because the EIR’s definition of “conservation” is not the
28 accepted use of the term, but precisely its opposite. The District makes the bizarre and contradictory
29 assertion that its ‘conservation’ objective “adequately describes the intent of both phases of the
30 Project, to extract groundwater.” (13:14a:4467). The District’s admission that the true intent of the

1 Project is to extract groundwater directly contradicts the stated Project objective to “conserve” water.
2 Indeed, the Response to Comments acknowledges conservation is typically defined as protecting
3 natural resources, or reducing the consumptive use of a resource. (12:14: 4195.)

4 The District argues in its Response to Comments that California recognizes a novel third
5 definition, which it explains as “conservation of [evaporated] water via extraction.” (12:14:4199.)
6 The District cites the first few words of § 10902 of the Water Code to support its definition (12:14:
7 4196), but the full Water Code definition of conservation is the “reduction of the amount of water
8 irretrievably lost to saline sinks, moisture-deficient soils, water surface evaporation, or noncrop
9 evapotranspiration in the process of satisfying an existing beneficial use.” (Wat. Code, § 10902(c)
10 (emphasis added).) The Water Code clearly distinguishes “water surface” from groundwater, and
11 moreover, makes clear that conservation does not occur if conservation is not occurring “in the
12 process of satisfying an existing beneficial use.” Here, the extraction of Project water is not
13 satisfying an existing beneficial use because the Project water has not reached its intended customers
14 when it is pumped. Whether a use is considered “beneficial”—and therefore, whether water is being
15 “conserved,” must be established when it is consumed, not when it is extracted from the ground. (*See*
16 *Definition of Beneficial Use*, Water Code § 1240 [“The appropriation must be for some useful or
17 beneficial purpose” emphasis added]; *See also* 23 Cal. Code Regs., §§659-672 [describing types of
18 beneficial use-- consumption not listed].) As the statutory and regulatory definitions make clear,
19 water extraction unto itself is not a beneficial use but rather the term is applied to the water’s purpose,
20 so “conservation” cannot result from mere extraction of water from the ground.

21 The District also selectively cites language in State Water Board permit decisions that
22 “suppression of evaporative losses” is considered conservation. (12:14:4196, fn.5.) However, the
23 decisions cited contain only a boilerplate provision in all water rights permits, declaring that the
24 Water Board maintains continuing authority to “impos[e] further limitations on the diversion and use
25 of water by the permittee” including “suppressing evaporation losses from water surfaces.” (*See*,
26 *e.g.*, *In the Matter of Application 31212*, (2008) SWRCB Order WR 2008-0013-DWR at p. 5.) These
27 permits are for surface waters, and do not assert that “conservation” occurs when groundwater is
28 extracted; not one of the decisions cited actually involves a groundwater project. Instead, the
29 District’s authorities merely demonstrate that California recognizes the standard definition of
30 conservation—the reduction of consumptive use.

1 Likewise, the District’s definition of waste is not supported by substantial evidence. The
2 District bases its claim on the California Constitution provision that “the waste ... of water be
3 prevented.” (12:14:4196, *citing* Cal. Const., art. X, § 2.) Yet the District provides no authority to
4 suggest that the natural evaporation process, an integral function of the water cycle, constitutes waste.
5 Indeed, the California Supreme Court has recognized the opposite, holding that “[t]o permit water
6 thus to pursue its natural course is not the wasting of water in a legal sense.” (*Meridian, Ltd., v. San*
7 *Francisco* (1939) 13 Cal.2d 424, 448.) The *Meridian* Court explained that the constitutional
8 definition of waste is “to use without serving a purpose,” and evaporation is not a use. (*Id.*) Because
9 the objectives state the “fundamental purpose” of the project is to prevent waste and the District’s
10 definition of “waste” is not supported by substantial evidence, this EIR does not provide a “clearly
11 written statement of objectives” that accurately explained “the underlying purpose of the project” as
12 required by CEQA. (*See* Guidelines, § 15124(b).)

13 The District argues that “[r]egardless of the terminology used . . . [the] impacts are adequately
14 described and analyzed” and “[t]he terminology used does not affect the analysis in any way.”
15 (13:14.a:4377.) While this is wrong—the terminology forms the very basis for the EIR’s analysis—
16 the objectives themselves “vitiates [the] EIR process as a vehicle for intelligent public participation,”
17 even if “the informative quality of the EIR’s environmental forecasts is not affected by the ill-
18 conceived, initial project description.” (*See Cnty. of Inyo, supra*, 71 Cal.App.3d at p.197.) Thus this
19 Project’s EIR is inadequate because its misleading and inaccurate project objectives failed to
20 “adequately apprise all interested parties of the true scope of the project.” (*See City of Santee, supra*,
21 214 Cal.App.3d at pp.1454-55.)

22 **b. The EIR’s Claimed Project Duration is Inaccurate and**
23 **Misleading.**

24 The EIR’s project description states that groundwater extraction would be limited to a “long-
25 term annual average of 50,000 AFY over the 50-year term of the Project.” (2:9:473.) Consequently,
26 the District relied exclusively on a groundwater models that estimated the impact of extraction “over
27 a period of 50 years of groundwater production at 50,000 AFY, followed by 50 years of recovery (no
28 groundwater production).” (3:9a:828, emphasis added.) In response to public comments, the District
29 repeatedly assured the public that production levels would not exceed 50,000 AFY and extraction
30

1 would immediately cease after 50 years. (*See, e.g.*, 12:14:4219, 4223, 4236, 4242, 4252, 4314, 4367,
2 *and* 13:14a:4374, 4382, 4424, 4429, and 4608.)

3 However, the record does not support the claimed duration of the Project. Nothing in the EIR,
4 the MOU, the Option Agreement or the Environmental Cost-Sharing Agreement actually limits the
5 Project to this 50-year term. In fact, the EIR admits that extraction will *not* cease after the 50 year
6 timeframe. In the EIR’s introduction, the District briefly explained that “[i]n the event that
7 circumstances beyond the control of the Project operator required additional time to complete
8 contracted water deliveries, the Project term may be extended for a limited time under the terms of
9 the agreements.” (2:9:440.) No other portion of the EIR alerts the public that extraction would
10 continue past 50 years. Additionally, the Project’s Closure Plan does not guarantee that groundwater
11 extraction will cease after 50 years. (14:15.a:5065 [Project’s “currently anticipated term of which is
12 50 years”].)

13 Worse, when Petitioners criticized the Project’s open-ended nature, the District provided an
14 alarming response: “post-closure groundwater pumping under this Project, if approved, would be
15 expected to be maintained at rates at or below the rate of recharge.”⁶ (12:14:4137.) While the models
16 used to assess environmental impacts assume that extraction will cease after 50 years, the District
17 admits the Project may continue extraction up to (what it considers) the rate of recharge— an
18 indefinite extension of the Project of over 30,000 AFY. By the terms of the EIR itself, the Project’s
19 pumping is not ending in 50 years, but may continue indefinitely. The District’s water purchase and
20 sale agreement confirms this: “the District may elect, in its discretion, to extend the Initial Term for
21 an additional 40-year term and for whatever additional future extensions may be authorized under
22 then applicable laws[...]” (1:8:227.) To judge by the District’s own repeated admissions, the Project
23 is nowhere near limited to 50 years.

24 If the “post-closure” period extracts water at the rate of claimed recharge (a rate Petitioners
25 assert is far too high), then by definition no recharge to the Project aquifers can occur. This directly
26 contradicts the basic premise of the EIR’s impact models, which assume that full recharge will occur
27 after the 50-year term. No other portion of the EIR alerts the public that the “post-closure” phase of
28

29 ⁶ SMWD rejected alternatives to pump at or below the natural recharge rate because it stated the impact on groundwater
30 storage would increase. SMWD responded that “limiting pumping to the natural recharge rate through the Fenner Gap
would not effectively reduce evaporation. Therefore, the amount of water leaving the groundwater basin annually
would include the Project extraction as well as the evaporation.” (12:14:4098-99.)

1 the project will not recharge the aquifer—and such information is wholly absent from the models
2 used by the District and Cadiz to estimate impacts, which all assume no pumping after a 50 year
3 period (3:9a:828.) The claimed duration of the Project is misleading and unsupported by the
4 evidence, and using this duration in the Project’s impacts analysis fundamentally and prejudicially
5 undermines the EIR’s evaluation of impacts to the aquifer and the environment.

6 **c. The Claimed Withdrawal Is Inaccurate and Misleading.**

7 Despite the EIR’s assurances of a 50,000 acre-foot average withdrawal, there is no contractual
8 limitation not to exceed this amount over a fifty year period. Neither the Option Agreement, nor the
9 MOU, nor the Water Purchase and Sale Agreement limit the Project extraction to 50,000 AFY or 2.5
10 million acre-feet total. For this amount to be a serious estimate of average withdrawal, Cadiz would
11 have to contractually obligate itself to limit withdrawals to an average 50,000 AFY. But Cadiz has
12 done no such thing, and in fact, plainly states that it expects to deliver an additional 25,000 AF to
13 either the County of Inland Empire Utilities Agency (14:15.a:5068), and an additional 20% reserved
14 for the County (*Id.*), over and above the stated 50,000 AF average. We know this because the Water
15 Purchase and Sale Agreement explains how the 50,000 AFY average is reached—and this amount
16 does not include either the 25,000 AF or the 20%. (1:8:231.) There is no reason why the Project
17 could not extract the maximum 105,000 AF capacity of the 43-mile conveyance pipeline. Likewise,
18 without providing a basis for this limitation, the GMMMP and MOU explain the Project “would
19 extract and convey groundwater at an initial average rate of up to 50,000.” (13:15:4708 and 5065
20 (emphasis added).) There is no indication of how long the “initial” period would last, or if the rate
21 will be raised after the ambiguous “initial” period has passed.

22 The District responded to concerns that it would not be limited to a 50,000 AFY average by
23 claiming “[p]umping beyond this rate and term would require new agreements, administrative review
24 and discretionary approvals, as stated on page 1-4.” (13:14.a:4375.) But the only “discretionary
25 approvals” needed are approvals of additional contracts to deliver water; neither page 1-4 nor any
26 other record evidence suggests that the Project would require new approvals to pump beyond 50,000
27 AFY. The only relevant statement on page 1-4 actually undermines the District’s claim: “[o]ther
28 participating entities may join the Project at any time until the established Project capacity is
29 reached.” (2:9:440, emphasis added).) However, the Project’s claimed “capacity” is not 50,000 AFY,
30 but 105,000, though the EIR often claims that 75,000 AF is the capacity. (3:9.a:788.) By the EIR’s

1 own admission, then, the Project may be expanded to 105,000 AFY at any time. In the Response to
2 Comments, the District countered with misinformation: “this Project’s pipeline capacity [is] an
3 average 50,000 AFY.” (12:14:4134.) This response is plainly incorrect. Despite the open admission
4 that “entities may join the Project at any time until the established Project capacity is reached,” the
5 EIR failed to evaluate impacts at the Project capacity.

6 In fact, the EIR suggests that the Project will not be limited to a 50,000 AFY average over 50
7 years. The EIR states that “post-closure” extraction may occur indefinitely—a basic contradiction
8 that extraction will immediately cease after 50 years. None of the Project’s environmental impacts
9 are analyzed with models beyond a 50,000 AFY average over 50 years. Because of the inaccurate and
10 truncated project description, the EIR does not “adequately apprise all interested parties of the true
11 scope of the project.” (*See, e.g., City of Santee v. Cnty. of San Diego, supra*, 214 Cal.App.3d at p.
12 1454-55 [temporary project’s EIR was flawed because it “cast some doubts on the removal of the
13 project”]; *San Joaquin Raptor Rescue Ctr. v. Cnty. of Merced, supra*, 149 Cal.App.4th at p.657
14 [mining project’s EIR was flawed because it assured production levels at one rate “while on the other
15 hand, it provides for substantial increases in mine production”].)

16 Moreover, even if the Project may require a “discretionary approval” to go beyond the scope
17 and size of the described Project, this is not an excuse to avoid evaluating the foreseeable impacts of
18 the Project. An EIR must describe “the whole of an action . . . which may be subject to several
19 discretionary approvals by governmental agencies.” (Guidelines, § 15378, emphasis added.)
20 Discretionary approvals thus do not limit the scope and duration of a Project’s environmental review.
21 The Cadiz EIR should have analyzed environmental impacts beyond a 50,000 AFY average over 50
22 years, even though it is “contingent on the happening of certain occurrences,” because it is reasonably
23 foreseeable that the Project will exceed the stated duration and size of exports. (*See Laurel Heights*
24 *Improvement Assn., supra*, 47 Cal.3d at p.396.)

25 **C. THE GROUNDWATER MITIGATION, MANAGEMENT AND MONITORING**
26 **PLAN APPROVED BY THE DISTRICT VIOLATES CEQA.**

27 The fundamental goals of environmental review under CEQA are information,
28 participation, mitigation, and accountability. (*Lincoln Place Tenants Assn. v. City of Los Angeles*
29 (2007) 155 Cal.App.4th 425, 443-444, emphasis added.) Here, the District was required to adopt all
30 feasible mitigation measures to substantially lessen or avoid the otherwise significant adverse

1 environmental impacts of the Cadiz Project. (Pub. Resources Code §210002.) Specifically, CEQA
2 required the District to adequately consider mitigation measures and alternatives to the Project, to
3 adopt all feasible mitigation measures, to determine that proposed mitigation measure will or will not
4 be effective in avoiding or substantially lessening the Project’s significant environmental impacts,
5 and ensure that mitigation measures are enforceable. (Pub. Resources Code, §§ 21002.1(b),
6 21100(b)(3), 21081.6(b); CEQA Guidelines §§ 15092 and 15093.) The Project EIR failed to meet
7 each of these obligations.

8 **1. A Revised Mitigation, Management and Monitoring Plan was Approved**
9 **after the EIR was Certified, in Violation of CEQA.**

10 The District certified the FEIR on July 31, 2012. (1:8:24.) The Project EIR relied heavily on
11 the Groundwater Management, Monitoring and Mitigation Plan (GMMMP), which was prepared to
12 satisfy the exemption requirements of the Ordinance as well as the mitigation and monitoring
13 requirements of CEQA. (Pub. Resources Code, § 210002; San Bernardino County Code, art. 5 §
14 3306551 et seq.) However, the groundwater plan remained “subject to the County’s discretionary
15 review and approval as a responsible agency under CEQA” at the time of the District certification of
16 the FEIR. (1:8:33.)

17 This convoluted process was contemplated and approved in the May, 2012 MOU.
18 (14:15a:5063 [“Following certification of the Final EIR, the GMMMP will be subject to County
19 approval and a discretionary consistency determination’ that the GMMMP conforms to this MOU and
20 the County Ordinance...”].) The inverted process resulted in vital information missing from the
21 DEIR about how the Project would be managed and mitigated, including a floor for the maximum
22 groundwater drawdown level, a projected annual rate of decline in the groundwater table, and a limit
23 on the migration of hyper-saline water. (See 1:8:334, 1:8:326.) Although these thresholds were
24 eventually included in the FEIR, that document was made available a mere two weeks before the
25 District met to approve the Project. (140:935:52781.) This narrow window to review key elements
26 of the mitigation plan undermines CEQA’s requirements to allow informed decision making and
27 meaningful public participation. (*Laurel Heights I, supra*, 47 Cal.3d at p.407) Yet even with these
28 changes in place, at the time of the FEIR’s certification, the Project lacked a finalized mitigation and
29 management plan.

1 Analysis requiring formulation of mitigation measures at a future time violates the rule that
2 members of the public and other agencies must be given an opportunity to review mitigation
3 measures before project approval. (*See Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d
4 296, 308.) Here, the missing mitigation and monitoring measures made it impossible for the public to
5 comment on the adopted parameters and mitigation mechanisms, thereby thwarting the EIR’s process
6 and purpose. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*
7 (2007) 40 Cal.4th 412, 441 [“CEQA’s information purpose is not satisfied by simply stating
8 information will be provided in the future”].)

9 The FEIR’s reliance on an incomplete and uncertain plan for mitigation and monitoring of the
10 Project prevented the public and the District from fully analyzing and making an informed decision
11 on the scope of the Project environmental impacts. For example, missing from the draft plan were the
12 adoption of an 80-feet-below-baseline elevation as the maximum groundwater drawdown in the
13 Project well-field; the maximum annual rate of decline in groundwater table of 1.6 feet per year; and
14 6,000 feet established as the saline-freshwater boundary for migration. (1:8:326; 1:8:334.) More
15 generally, since the 2011 draft mitigation plan, monitoring features were changed in the decision-
16 making process and action criteria triggering implementation of mitigation measures, referred to as
17 “corrective measures” in the GMMMP. (*Compare* 2:9:381-1167; 4:10:1168-1561 *with* 1:8:318-336.)
18 Some of the criteria were still missing even after the FEIR was published, including mitigation
19 measures targeted at third-party wells, land subsidence, and area springs. Such deferral of evaluation
20 of environmental impacts, including specifics of mitigation measures until after project approval,
21 amounts to a post hoc rationalization and violates required procedure for public review and agency
22 scrutiny of potential impacts. (*See POET, LLC v. State Air Resources Bd.* (2013) 217 Cal.App.4th
23 1214, 1244 [“In short, the policy declaration in [CEQA] section 21002 implies that an evaluation of
24 environmental issues, such as feasible alternatives and mitigation measures, should occur *before* an
25 agency approves a project”].)

26 Courts have repeatedly found that deferring analysis of specific mitigation strategies and
27 enforcement mechanisms until after a project approval violates CEQA. (*See Communities for a*
28 *Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 92-3 (CBE) [“An EIR is
29 inadequate if ‘[t]he success or failure of mitigation efforts ... may largely depend upon management
30 plans that have not yet been formulated, and have not been subject to analysis and review within the

1 EIR”]; (*Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1396 [conditioning a permit on
2 “recommendations of a report that had yet to be performed” constituted improper deferral of
3 mitigation]; *Quail Botanical Gardens Foundation, Inc. v. City of Encinitas* (1994) 29 Cal.App.4th
4 1597, 1605, fn. 4 [city is prohibited from relying on “post approval mitigation measures adopted
5 during the subsequent design review process”].)

6 Courts have permitted limited deferral of specific performance criteria or mitigation measures
7 only if (i) mitigation is known to be feasible; (ii) it is not feasible to prescribe specific mitigation
8 measures in the EIR itself; and (iii) the EIR articulates specific performance criteria for future
9 mitigations. (*CBE, supra*, 184 Cal.App.4th at p. 94.) However, as demonstrated further below, none
10 of these exceptions apply here as the feasibility of mitigation measures remains unknown, the
11 mitigation or “corrective” measures included in the final GMMMP could have been disclosed during
12 the draft EIR process, and the EIR did not include specific performance criteria for future mitigation.
13 By failing to disclose a complete mitigation plan, the EIR prejudicially prevented adequate analysis
14 of the long-term groundwater management and mitigation of the Project by both the public and the
15 District. (*San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 672
16 (“*San Joaquin Raptor*”).) Therefore, the District’s approval of the EIR with an uncertain and
17 incomplete mitigation plan was arbitrary and capricious and not in accordance with law.

18 **2. The Measures Included within the Mitigation, Management and**
19 **Monitoring Plan are Inadequate under CEQA.**

20 The mitigation, management and monitoring plan included in the FEIR failed to include the
21 necessary elements required by CEQA. In particular, the plan failed to address and mitigate all
22 potentially significantly impacts including long-term aquifer drawdown, lacked effective enforcement
23 mechanisms, failed to consider all reasonable mitigation measures, relied upon ill-defined terms and
24 employed a flawed enforcement framework.

25 **a. The EIR’s mitigation and monitoring plan relies on re-defined**
26 **and/or misapplied terms.**

27 The EIR and, in particular the mitigation plan, rely on novel, modified definitions of key
28 terms to justify the Project’s inadequate mitigation and monitoring plan. These are terms of
29 particular import for the EIR and its review of the Project’s mitigation and monitoring, because they
30 were used to determine whether the Project will result in significant environmental impacts and if the
Project is in compliance with the mitigation and monitoring plan. In part because of the

1 misapplication of key terms, the District made no finding of potentially significant impact or
2 unavoidable significant impact, and instead concludes, “the Project will not substantially deplete
3 groundwater supplies or interfere with groundwater recharge” despite the fact that the Project allows
4 extractions of at least 50,000 AFY over a 50 year period and in certain years, up to 75,000, even
5 though the District’s estimate of annual natural recharge was 32,000 AFY. (2:9:396-7, 469; 1:8:96;
6 *see* 1:8:35; 1:8:129.) The EIR and its mitigation plan disregarded and failed to address the negative
7 environmental impacts of depleting the aquifer; only by misconstruing and re-defining key water law
8 terms was the EIR able to distort the significance of the impacts of the Project and justify the
9 District’s adoption of an inadequate mitigation and monitoring plan.

10 **i. The mitigation and monitoring plan depend on misapplied**
11 **terms to justify Project extraction levels.**

12 The EIR and GMMMP rely upon on redefined and misapplied terms of “temporary surplus,”
13 “overdraft,” and “undesirable result” to justify its failure to mitigate the massive pumping of
14 groundwater at a level that far exceeds the aquifer’s natural recharge rate. The MOU definitions
15 differ from the definitions used in the Ordinance and Water Code, even though the Ordinance
16 requirements were the very reason the MOU was originally signed by the parties. (14:15.a:5063
17 [“Implementation and compliance with the GMMMP and this MOU arc intended to satisfy the
18 requirements of the Ordinance and exclude the Project from the permitting requirements of the
19 Ordinance”].)

20 The MOU then goes on to define “temporary surplus,” which appears in neither the Ordinance
21 nor the California Water Code, as:

22 Temporary surplus means the planned removal of groundwater from storage pursuant
23 to the GMMMP necessary to create underground storage space for the capture and
24 beneficial use of natural recharge without causing Undesirable Results.
(14:15.a:5064.)

25 The MOU then incorporates “temporary surplus” into the definition of overdraft:

26 Overdraft’ means the condition of a groundwater supply in which the average annual
27 amount of water withdrawn by pumping exceeds (i) the average annual amount of
28 water replenishing the aquifer in any ten year period, and (ii) groundwater that may
29 be available as Temporary Surplus.

30 (14:15.a:5064, emphasis added.) The EIR mentions the concept of temporary surplus only briefly,
when discussing the legal framework for groundwater recharge and the impacts to groundwater
supplies from the Project. (3:9:844.) However, coupled with the MOU’s definition used for

1 overdraft, “temporary surplus” as used in the EIR allows for the depletion of an aquifer’s
2 groundwater beyond its recharge rate indefinitely. Most troubling, this drawdown of groundwater is
3 not considered an adverse impact, but as a “beneficial use” of water. (2:9:395.) Therefore, under this
4 characterization of these water law terms, no mitigation for drawdown of groundwater is needed
5 because drawdown is not an “undesirable result”:

6 Undesirable Results means any of the following: (i) the progressive decline in
7 groundwater levels and freshwater storage below a "floor" to be established by the
8 County through the GMMMP; (ii) the progressive decline in groundwater levels and
9 freshwater storage at a rate greater than the rate of decline to be established by the
10 County through the GMMMP where the decline signifies a threat of other physical
11 impacts enumerated in this subparagraph 2(k); (iii) land subsidence, (iv) the
12 progressive migration of hyper-saline water from beneath the Cadiz or Bristol Dry
13 Lakes toward the Project well sites; (v) increases in air quality particulate matter; (vi)
14 loss of surface vegetation; or (vii) decreases in spring flows.

15 (14:15.a:5064.) This narrow definition of “undesirable results” adopted in the MOU and applied in
16 the Project’s groundwater plan fails to include the most basic of potential negative consequences of
17 the Project: a drawdown of the aquifer. Instead, ill-defined and arbitrary thresholds serve as the basis
18 for determining whether “undesirable results” have occurred, while the Project may overdraft the
19 aquifer by 80 feet and still not trigger a finding of “undesirable results.”

20 **ii. The EIR and groundwater plan employ definitions at odds
21 with the Ordinance, the Water Code, and common use.**

22 In order to ensure “that the extraction of groundwater does not exceed the safe yield of the
23 affected groundwater aquifers” and County groundwater is thus protected, the Ordinance lays out
24 clear definitions for safe yield and overdraft. (San Bernardino County Code art. 5, § 33.06551(a)-
25 (c).) The Ordinance defines groundwater safe yield as:

26 The maximum quantity of water that can be annually withdrawn from a groundwater
27 aquifer (i) without resulting in overdraft (ii) without adversely affecting aquifer health
28 and (iii) without adversely affecting the health of associated lakes, streams, springs
29 and seeps or their biological resources. The safe yield of an aquifer can be increased
30 by management actions such as artificial recharge, including infiltration and other
similar actions.”

(San Bernardino County Code art. 5, § 33.06553(i), emphasis added.) Overdraft is then defined in
the Ordinance as:

The condition of a groundwater supply in which the average annual amount of water
withdrawn by pumping exceeds the average annual amount water replenishing the
aquifer in any ten (10) year period, considering all sources of recharge and
withdrawal.

1 (San Bernardino County Code art. 5, § 33.06553(j).)

2 Together, these Ordinance terms ensure that extraction of groundwater from an aquifer does
3 not lead to its depletion. These definitions are also consistent with the California Water Code, which
4 defines “annual overdraft” as “the amount, determined by the board, by which the production of
5 water from ground water supplies within the district or any zone or zones thereof during the water
6 year exceed the natural replenishment of such ground water supplies in such water year.” (Wat.
7 Code, § 75506.) Additionally, these definitions are consistent with the common law concept of
8 overdraft and temporary surplus as they are used in *City of Los Angeles v. City of San Fernando*. (See
9 *City of Los Angeles v. San Fernando* (1975) 14 Cal.3d 199, 278 (“*San Fernando*”) [“The trial court
10 defined ‘surplus’ and ‘overdraft’ in terms of ‘safe yield.’ The findings state that ‘[surplus] is that
11 condition which exists when the draft on the ground water supply is less than the safe yield,’ and that
12 overdraft exists when such draft ‘exceeds the safe yield’”].) *San Fernando* also found that “the
13 phrase ‘undesirable result’ is understood to refer to a gradual lowering of the ground water levels
14 resulting eventually in depletion of the supply,” in contrast to the far narrower definition of
15 “undesirable results” adopted by the Project’s mitigation plan. (See *San Fernando, supra*, 14 Cal.3d
16 at p. 278 [citing *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 929].)

17 Therefore, under both the Ordinance and the common definition of overdraft and groundwater
18 safe yield, groundwater extraction that exceeds the natural annual recharge of the aquifer is by
19 definition overdraft. Here, the Project claims it will extract an average of 50,000 AFY over a 50 year
20 period and 75,000 in some years. (2:9:396-7.) The current estimate of annual natural recharge
21 according to the EIR is 32,000 AFY, a number far below the permitted extraction levels. (2:9:469.)
22 Under the Ordinance and Water Code definitions then, this Project permits dangerous levels of
23 overdraft that will progressively deplete the aquifer at a minimum rate of 18,000 AFY.

24 Nonetheless, the EIR and GMMMP reject these definitions and adopt far more permissive
25 ones for “temporary surplus,” “safe yield” and “overdraft.” Under these misapplied and overly broad
26 definitions, depletion is acceptable if the excessive extraction is from “temporary surplus.” The EIR
27 then judges the effectiveness of mitigation and monitoring based on the presumption that an 18,000
28 AFY rate of depletion is an acceptable rate of decline, despite the depletion violating the Water Code
29 and the Ordinance. (EIR 1:8:334-6.)

30 **iii. The District’s reliance on *San Fernando* is unfounded.**

1 The District primarily relies on *San Fernando*, *supra*, 14 Cal.3d. 199, to justify its approach to
2 overdraft, temporary surplus and undesirable results, as well as impacts to groundwater supplies.
3 (See 2:9.d:844 [“As is the case with the Project, the form of waste sought to be addressed by the
4 management strategy employed in the *San Fernando* opinion, included the curtailment of high
5 groundwater levels that resulted in a waste of groundwater].)

6 However, the District’s reliance on *San Fernando* to support its flawed definitions of safe
7 yield, overdraft, temporary surplus and undesirable result is entirely unjustified. In *San Fernando*,
8 defendants claimed prescriptive rights against the City of Los Angeles to groundwater. After
9 determining the 5-year prescriptive period did not begin until the basin was in overdraft, the court
10 stated that “overdraft” is defined commonly in terms of “safe yield,” or net groundwater recharge
11 minus losses, and “undesirable result” is commonly defined as the lowering of groundwater levels
12 resulting in depletion of water supply. (*San Fernando*, *supra*, 14 Cal.3d. at p. 278-79.) There to
13 prevent an undesirable result, extractions should be kept to levels below or at safe yield to prevent
14 overdraft.

15 The court in *San Fernando* then examined the specific facts in the case and found that because
16 groundwater basin levels were already relatively high, storage space in the basin was limited, leading
17 to waste during wet years. (*San Fernando*, *supra*, 14 Cal.3d. at p. 279.) The court in *San Fernando*
18 went on to state that extraction of water over the safe yield is only justified when “a taking of the kind
19 of temporary surplus we are considering here does not reduce but increases the total available supply
20 by eliminating waste emanating from insufficient storage space.” (*Id.* at 280, emphasis added.)
21 Therefore, the court found that to justify extraction of temporary surpluses beyond the natural
22 recharge rate, there must be: (1) an absence of storage space, (2) a probable waste of water and (3) no
23 negative impact on a basin’s safe yield. (*Id.*)

24 None of these three criteria apply to the Project. The Project claims to allow an average of
25 50,000 AFY over a 50 year period, and in certain years, up to 75,000, even though the District’s
26 current estimate of annual natural recharge is 32,000 AFY. (2:9:396-7, 2:9:469.) Rather than
27 creating needed storage space by extracting temporary surpluses, the Project will overdraft the
28 aquifer’s groundwater in order to “cause existing groundwater gradients to reverse so that the Project
29 will retrieve substantial quantities of potable groundwater located to the south and east of the
30 wellfield that would otherwise flow into the saline groundwater underlying the Dry Lakes and

1 evaporate.” (7:12.d:2433.) In other words, the District plans to reduce the water table by 80 feet, by
2 extracting more than the natural recharge rate to reverse the gradient and have groundwater “flow
3 uphill” rather than be lost to evaporation. (1:8:334; 1:8:138 [“Pumping at or below the average
4 natural recharge rate would not maximize conservation because fresh groundwater currently existing
5 south and west of the Project wellfield would continue to move towards the saline sinks of the Dry
6 Lakes and evaporate”].)

7 **iv. The Project does not meet any of the three criterion**
8 **established in *San Fernando* to justify withdrawal of**
9 **“temporary surplus” while still maintaining safe yield**

10 As noted above, withdrawal of temporary surpluses (without threatening safe yield) is
11 justified only if it is used to prevent waste, provide needed storage space and capture recharge, none
12 of which apply to the Project. (*See San Fernando, supra*, 14 Cal.3d at p. 280.) The Project seeks to
13 lower groundwater levels in the aquifer to change the flow of water otherwise lost to evaporation.
14 (2:9:485.) However, water lost to evaporation to support consumptive uses, such as Tetra’s brine
15 mining operation at the Dry Lakes, and for non-consumptive uses, such as maintaining the desert
16 ecosystem and preventing subsidence, does not qualify as wasted water. (*Meridian, supra*, 13 Cal.2d
17 at p. 428.) Conversely, as noted above, capture of water that would otherwise evaporate is not per se a
18 beneficial use. (*See* Section IV, Part B(1)(a), *infra*.) The EIR does not include substantial evidence
19 for this assertion and ignores the concerns raised by the public about removing desert water otherwise
20 subject to evaporation. (*See* 133:701:50209 [National Park Service expressed concern and disagreed
21 with the characterization that all natural evaporation is waste]; *see also* 18:53:6338 [comments by
22 Native American Land Conservancy]; 17:51:6140, 17:51:6235-56 [comments by local residents
during public hearing on July 25, 2012].)

23 Similarly, the Project fails to meet the second requirement under *San Fernando*: providing
24 needed storage space. Phase I of the Project, which was the only part approved, doesn’t even include
25 storage. Moreover, current groundwater levels are low, ranging from 180 feet to 400 feet below
26 surface, and the aquifer has approximately 1 million acre-feet of unused storage capacity already in
27 the aquifer. (5:11:1172, 5:11:1287.) Unlike in *San Fernando*, where “evidence showed that when
28 ground basin levels were relatively high, and storage space correspondingly diminished, waste
29 occurred,” here there is no evidence that increased storage capacity in dry years is needed to prevent
30 waste from surface water runoff during wet years. (*San Fernando, supra*, 14 Cal.3d at p. 279.) The

1 aquifer can take in more water right now, without requiring groundwater extractions beyond its
2 natural recharge levels.

3 Additionally, the Project does not meet the final requirement under *San Fernando*: the Project
4 is not intended to extract “temporary surpluses” from the aquifer to capture recharge that would
5 otherwise be lost from the absence of storage space. Instead, as noted above, the Project’s intends
6 reduce the water table by 80 feet by extracting more than the natural recharge rate to reverse the water
7 gradient and have groundwater “flow uphill.” (1:8:244.) The intent of the Project’s extraction is
8 clear from the mitigation plan’s establishment of a baseline value of 80 feet. (1:8:344.) Reducing
9 groundwater levels by 80 feet is not needed to capture potentially lost recharge, but instead is
10 supposedly intended “to, among other things, set a designated maximum drawdown elevation in the
11 Project wellfield and help assess trends and operate the Project in a manner that avoids Undesirable
12 Results or other physical impacts enumerated in the MOU (including saline water migration).” (*Id.*)
13 The withdrawals beyond the natural recharge rate are also not “temporary” or linked to specific
14 conditions as in *San Fernando*. Instead, an average extraction of at least 50,000 AFY (or 18,000
15 AFY over the estimated natural recharge rate of 32,000 AFY) will be permitted over the course of the
16 Project, no matter the conditions.

17 Therefore, the form of “safe yield” and use of “temporary surplus” adopted by the EIR and its
18 mitigation plan for this Project was not contemplated by the court in *San Fernando* and was in no
19 way endorsed by the court. Instead, *San Fernando* permitted withdrawals of “temporary surpluses”
20 to prevent waste, provide needed storage space, or capture recharge. Rather than permitting
21 occasional withdrawals of a “temporary surplus” to increase natural recharge as in *San Fernando*, this
22 Project will allow ever growing depletions of the aquifer and prevent natural recharge to maintain
23 groundwater levels. A project that anticipates full recovery of an aquifer in 117 years—itsself a
24 flawed assumption—is not relying on temporary surplus as envisioned in *San Fernando*. (1:8:277
25 [“full recovery in Year 117 or 67 years after cessation of pumping”].) Only by redefining “overdraft”
26 and misapplying the term “temporary surplus” could the District equate *San Fernando* with the
27 Project. Therefore, the District’s reliance on *San Fernando* does not justify either the use of
28 “temporary surplus” or the deviation from the Ordinance and California Water Code.

29 **b. The misapplied terms result in an inadequate and incomplete EIR**
30 **and mitigation plan.**

1 The EIR relies upon its definition of “overdraft,” “beneficial use” and “temporary surplus” to
2 state that “declines in groundwater levels and storage are anticipated to be a condition resulting from
3 management of the basin for beneficial uses that would recover to current pre-Project conditions over
4 time” without then providing any mitigation measures for this depletion in groundwater levels.
5 (2:9:487.) Under the EIR’s application of these terms, the lowering of the groundwater level in the
6 aquifer is not an adverse impact that needs to be mitigated, but instead, a benefit to the environment
7 because it allows the Project to “intercept natural recharge and to retrieve the migratory groundwater
8 below the wellfield, so that it may be conserved and made available for the highest and best use.”
9 (2:9:485.) Yet this conclusion is not only unsupported by substantial evidence, it is also not justified
10 by relevant statute or case law, and undermines the entire environmental review of the Project and its
11 mitigation measures. Specifically, the District’s re-definition and distortion of key water law terms
12 lead to disregarding a key environmental impact—the drawdown of aquifer levels during the course
13 of the Project—and absence of any mitigation measures to address environmental impacts. Therefore,
14 the EIR’s misapplication of the terms “overdraft” “beneficial use” and “temporary surplus” were
15 arbitrary, capricious and not in accordance with law.

16 **c. The EIR fails to address all potentially significant impacts and**
17 **provide adequate mitigation for the Project.**

18 As explained above, the EIR and its associated mitigation plan (GMMMP) will damage the
19 County’s limited groundwater resources by allowing extraction levels that exceed natural recharge
20 levels by at least 18,000 AFY. Yet these key CEQA documents contain scant discussion of the
21 environmental impacts or mitigation measures to address long-term aquifer drawdown. The current
22 estimate of annual natural recharge according to the EIR is 32,000 AFY, a number far below the
23 claimed extraction levels, and only a third of the maximum. (2:9:469.) In fact, the natural recharge
24 rate used in the EIR was strongly challenged by many commenters (12:14:4067), which was set at
25 three to sixteen times the estimated natural recharge rate for the aquifer done in 2002 by the USGS:
26 The recharge estimates provided in 2000 by the USGS in its technical review of the
27 former Cadiz Project, which were computed by a variety of methods, ranged from
28 2,000 — 10,000 AFY. These values, computed by a scientific agency with no
29 financial stake in the proposed project, peer reviewed and made available to the
30 public, provide a reasonable range of recharge estimates for the Project area. This
range of values should be used to guide evaluation of the proposed Cadiz Project.

(133:701:50204)

1 Therefore, as currently permitted, the Project would drain the subject aquifers at a rate far in
2 excess of the rate of natural recharge, resulting in a depletion of water resources that would require
3 decades for water levels to recover under even the most optimistic recharge rates—rates that, given
4 the Project will continue after “closure,” will never be achieved. (14:15.a:5065 [Project’s “currently
5 anticipated term of which is 50 years”]; see also, Section IV Part B.2, *infra*.) Despite this potentially
6 alarming result, the EIR and GMMMP provide little discussion and few mitigation measures that are
7 triggered by reduced water levels in the aquifer or lower natural recharge levels. In fact, the
8 GMMMP’s key mitigation measures associated with depletion of the aquifer are linked to
9 management of the groundwater floor of 80 feet within the first ten years and potentially 100 feet
10 after 15 years of operation. (1:8:335-6.) Mitigation measures in response to the aquifer groundwater
11 levels dropping below the designated floor are triggered only by “trends in groundwater levels that
12 demonstrate that the designated floor elevation will be exceeded within 10 years.” (1:8:336.)
13 Potential mitigation measures in response would be reduction in pumping, revising pumping
14 locations, and “stoppage of groundwater extraction for a duration necessary to correct the predicted
15 impact.” (1:8:337.) The groundwater level management floor is cited with no substantial evidence to
16 support its use, and no mitigation measures are provided for reduced water levels that are less than 80
17 feet—a full seventy-nine feet below the trigger level set for the 2002 Project.

18 Instead, the GMMMP focuses on extolling the benefits of lowering groundwater levels in the
19 aquifer. (13:15:4702.) In response to the possibility that recharge rates will be lower than anticipated
20 due to changes in precipitation levels, the EIR cites mitigation measures AQ-5, GEO-1, HYDRO-2,
21 HYDRO-3, and MIN-1 as addressing resulting adverse impacts. (13:15:4078.) Yet none of these
22 measures directly reduce extraction in the face of reduced recharge, but instead focus on addressing
23 environmental impacts from groundwater level reduction on the environment. By failing to address
24 the likely reduced groundwater level at levels higher than anticipated by the Project, the EIR fails to
25 consider all potential significant impacts to the Project.

26 **d. The Project fails to provide effective enforcement of mitigation.**

27 As part of the enforcement process, mitigation measures are subject to monitoring and
28 reporting to ensure the measures will be implemented. (*Lincoln Place Tenants Assn. v. City of Los*
29 *Angeles* (2007) 155 Cal.App.4th 425, 446 [citing Pub. Res. Code, § 21081.6(a)].) Mitigation
30 measures must be accompanied by an enforcement process “designed to ensure compliance during

1 project implementation.” (Pub. Resources Code, § 21081.6(a).) “The purpose of these [monitoring]
2 requirements is to ensure that feasible mitigation measures will actually be implemented as a
3 condition of development, and not merely adopted and then neglected or disregarded.” (*Federation of*
4 *Hillside & Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1261
5 (“*Federation of Hillside*”).)

6 The Project MOU clearly states that the “County will exercise power of enforcement.”
7 (14:15.a:5067.) Yet despite CEQA requiring not only all feasible mitigation measures but also
8 enforceable mitigation measures be included in the EIR, the Project’s EIR and GMMMP provide
9 little to no opportunity for the County to enforce the Project’s mitigation and monitoring. First, many
10 mitigation measures have a decade-long delay period before any enforcement can begin. (See
11 1:8:324; 1:8:327; 1:8:331; 1:8:336.) Second, the Project requires an 80-foot drop in the aquifer
12 before enforcement of mitigation measures related in groundwater level drawdown begins—which
13 may be well after Project impacts will be experienced. (1:8:331-336; 155:1023:58875-80.) Third,
14 monitoring reports and recommendation on whether to mitigation measures should be implemented
15 rely on the personal judgment of individuals chosen by Project participants, who have no interest in
16 seeing the Project curtailed. (1:8:337-41;*see also* 155:1023:55880.)

17 The groundwater plan suggests that the County may take an active enforcement role in
18 protecting the Project aquifers. For example, the County may provide an “administrative order” to
19 FVMWC and the District questioning FVMWC’s assessments of adverse impacts from the Project or
20 requesting implementation of a mitigation measure. (1:8:341-2.) However, the Project MOU—the
21 document supposedly created to enforce the GMMMP—contains multiple provisions that effectively
22 prevent the County from actually enforcing such an order. First, if informal resolution of “any issues,
23 claims, or disputes that may arise under the GMMMP, the Ordinance, or this MOU” is unsuccessful,
24 then the dispute must go through arbitration; the County may not simply enforce a disputed order
25 otherwise. (*Id.*; 14:15.a.:5067.) Worse, “Disputes involving immediate or irreparable injury to any
26 Party, including enforcement actions by the County necessary to avoid Overdraft or Undesirable
27 Results, shall be subject to direct judicial review after prior written notice to the Parties and the
28 expiration of a reasonable cure period. (14:15.a.:5067., emphasis added.) This provision in the
29 MOU would allow any Party’s claim of immediate or irreparable injury, such as loss of Project
30

1 income due to reduced pumping, to be subject to direct judicial review, thereby delaying or even
2 preventing implementation of mitigation measures.

3 In other words, the County must ultimately obtain leave from a Court to enforce the
4 mitigation and monitoring plan, even if all of these other extreme conditions—waiting 10 years and
5 waiting for an 80-foot drop—are met. As the process is laid out in the EIR and groundwater plan,
6 such mitigation measures would only be enforceable long after the environmental impacts have
7 occurred and cannot be undone. (10:13:3498.) Therefore, the mitigation measures cannot be
8 implemented by the County to actually mitigate the impacts of the Project, rendering the measures
9 ineffective and inadequate under law. (*Federation of Hillside, supra*, (2000) 83 Cal.App.4th at p.
10 1261.)

11 **e. The EIR’s mitigation measures are inadequate.**

12 Even if mitigation measures could be enforced through this difficult and expensive process,
13 the mitigation measures themselves are ineffective. CEQA requires an agency to include specific
14 performance standards for mitigation measures before significant environmental impacts occur.
15 (*Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1119 (“*Gray*”).) CEQA also requires that
16 adopted mitigation measures are feasible, or “capable of being accomplished in a successful manner
17 within a reasonable period of time, taking into account economic, environmental, social, and
18 technological factors.” (*Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 279
19 [citing Pub. Resource Code, § 21061.1].) When analyzing feasibility, courts should look to whether a
20 specific mitigation measure “will actually work as advertised,” whether it “can ... be carried out,”
21 and whether its “success ... is uncertain.” (*California Native Plant Society v. City of Rancho*
22 *Cordova* (2009) 172 Cal.App.4th 603, 622

23 Here, however, beyond simply hoping to avoid undesirable results, the EIR’s mitigation plan
24 provides little analysis or guidelines on the efficacy and specifics of mitigation measures used to
25 address the Project’s environmental impact on San Bernardino County. Specifically, the EIR’s
26 mitigation plan fails to provide details on the timeline for corrective measures in case of unanticipated
27 environmental impacts, what alternative water sources would be available if needed, who would fund
28 improvements to the Project and its various components if needed. Most troubling, the EIR fails to
29 adequately address potential impacts of mitigation measures and their implementation, even though it
30 is required to do so under CEQA. (*Gray, supra*, 167 Cal.App.4th at p. 1118-9 [EIR mitigation

1 considered inadequate because failed to address potentially significant impacts associated with
2 mitigation measures].) For example, when addressing the issue of land subsidence, the mitigation
3 plan includes vague and unspecific action criteria such as “a trend in subsidence which, if continued,
4 would be of a magnitude within 10 years that impacts existing infrastructure within the Project area.”
5 (1:8:324.) While some mitigation measures are listed, there is little guidance on which mitigation
6 measure would be adopted, no timeline for such mitigation measures, and no criteria for evaluating
7 whether the mitigation measures would be successful. (1:8:324.) To meet CEQA’s mitigation
8 requirements, an agency cannot commit to a specific mitigation goal, such as preventing subsidence,
9 without including specific performance standards for the measure. (*San Joaquin Raptor, supra*, 167
10 Cal.App.4th at p. 1118-19 [EIR is inadequate because it included only “generalized goal of maintain
11 the integrity of the vernal pool habitats” and left the public “in the dark about what land management
12 steps will be taken, or what specific criteria or performance standards will be met...”].)

13 Similarly, when addressing the issue of groundwater level management, many ambiguities
14 and uncertainties remain in the FEIR’s mitigation plan. Mitigation measures are potentially only
15 triggered if the floor of 80 feet is crossed, even though environmental impacts may occur well
16 beforehand. (1:8:334-8.) Additionally, the incursions below the floor that occur for 3 consecutive
17 years are considered acceptable under certain conditions, and after 15 years even the 80-foot floor
18 may be lowered. (*Id.*) However, there is no discussion about the potential impacts of these
19 management practices or details on available mitigation measures if these modifications occur.
20 Additionally, while several mitigation measures are provided, there is no detail on which mitigation
21 measures will actually be adopted or how one will be chosen amongst the options, how the
22 effectiveness of the mitigation measures will be evaluated, or additional steps to take if the mitigation
23 measures are found to be unfeasible or inadequate. (*Id.*) This approach is the same approach rejected
24 in *Gray* as inadequate under CEQA. (*Gray, supra*, 167 Cal.App.4th at p. 1118-9 [EIR committing to
25 a “mitigation goal” of remedying an adverse impact rather than to a specific performance standard is
26 improper.])

27 Additionally, many of the mitigation measures involve stopping pumping or reducing
28 pumping of the aquifer only after negative environmental consequences become apparent. (*See*
29 2:9:406; 2:9:414; 2:9:417; 2:9:418; 2:9:420.) However, once the groundwater system is disturbed or
30 altered, the impacts of those changes ripple outward throughout the larger ecosystem. (10:13:3498.)

1 Therefore, observation of an adverse impact will likely occur long after negative environmental
2 impacts have begun; this is why the previous version of the Project included so many early-warning
3 wells. The EIR provides no substantial evidence to support the theory that simply stopping extraction
4 of groundwater will undue all adverse impacts—nor, of course, does it promise that it will actually
5 stop extraction. The viability and feasibility of the mitigation measures that rely on stopping
6 extraction only after indications of adverse impacts are unsupported and inadequate under CEQA.

7 Just as the court in *Gray* found that feasibility and viability of mitigation measures must be
8 assured under CEQA for a mitigation plan to be compliant with the statute, this court should find the
9 mitigation plan adopted by the District inadequate because of the absence of thorough analysis of the
10 viability and feasibility of its mitigation measures. (*Gray, supra*, 167 Cal.App.4th at p.1120.)

11 **f. The EIR lacks necessary mitigation measures to protect the desert kit fox.**

12 The EIR failed to adequately address and include mitigation measures in response to likely
13 adverse impacts to sensitive plant and wildlife species, particularly the Desert Kit Fox. This failure
14 was an abuse of discretion and not in accordance for with the law.

15 Desert kit foxes (*Vulpes macrotis*) and their dens are found throughout the Project site.
16 (2:9:589.)⁷ Under California Fish and Game Regulation, the take, or killing, of desert kit foxes is
17 strictly prohibited. (Guidelines, § 460.)⁸ Here, the Project has the potential to cause take through
18 canine distemper disease among Kit Foxes due to displacement by Project construction.
19 (144:1004.b.: 54516; *see also* 134:788:50788-89.)

20 Nonetheless, the DEIR's only mention of the desert kit fox is to acknowledge that the fox is
21 present in the Project area and fails to note that the desert kit fox is a protected species. (2:9:589; 611-
22 14.) Similarly, the FEIR merely reiterates that kit fox are present, but does not address any impacts to
23 that species, refuses to consider kit fox relocation, and merely refers to the burrowing owl discussion
24 identifying numerous desert kit fox dens within the Project area despite acknowledging that the

25 _____
26 ⁷ The EIR identified a total of at least 149 Kit Fox dens on the Project site during the Project's biological surveys.
27 DAR1798 (Project surveys detected 61 kit fox dens along the Pipeline Alignment/ARZC ROW); 1781 (desert kit fox are
28 common predators in Project area); 1799 (surveys detected 88 desert kit fox dens within the wellfield areas); 1829-52;
1883.

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1883.

1 Project will displace the protected species. (13:14.a:4401, 4405; 16:34:5926 (“kit foxes are common
2 to the area and that the temporary disturbance may cause them to move from the area temporarily”).
3 Despite the likelihood that the Project may take desert kit foxes, the FEIR does not include any
4 discussion or analysis of that impact and, as a result, whether any mitigation is appropriate.

5 In its responses to comments concerning impacts to the kit fox, the District has suggested that,
6 unless a species, such as the desert kit fox, is a “special status species”, it need not evaluate the
7 Project’s impacts to that “common” species. (2:9:589.) However, where a local or regional policy of
8 general applicability, such as a regulation, is adopted in order to avoid or mitigate environmental
9 effects, a conflict with that policy in itself indicates a potentially significant impact on the
10 environment under CEQA. (*Pocket Protectors v. Sacramento* (2005) 124 Cal.App.4th 903, 930-31;
11 CEQA Guidelines § 15125(a), (d).) Indeed, any inconsistencies between a proposed project and
12 applicable policies or regulations must be discussed in an EIR. (*See* Pub. Resources Code §
13 21100(b)(1), (c); Guidelines, § 15125(d); *see also City of Long Beach v. Los Angeles Unif. School*
14 *Dist.* (2009) 176 Cal.App.4th 889, 918.) Therefore, by not addressing the Project’s impacts to the
15 desert kit fox and failing to include any mitigation measures despite the “no take” protection afforded
16 to these animals by Guidelines § 460, the EIR proceeded in a manner inconsistent with law.

17 **3. The EIR failed to consider all reasonable mitigation measures.**

18 In addition to failing to include effective mitigation measures, the EIR also failed to consider
19 all reasonable mitigation as required by CEQA. “CEQA’s substantive mandate that public agencies
20 refrain from approving projects for which there are feasible alternatives or mitigation measures.”
21 (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 134.) This obligation to
22 describe mitigation measures is one of the procedural requirements of CEQA, and is “intended to
23 assist public agencies in systematically identifying both the significant effects of proposed projects
24 and the feasible alternatives or feasible mitigation measures which will avoid or substantially lessen
25 such significant effects.” (*POET, LLC v. State Air Resources Bd.* (2013) 217 Cal.App.4th 1214, 1244
26 89-90, [citing Pub. Resources Code, § 21002].)

27 Here, the EIR fails to analyze numerous mitigation measures that would lessen the
28 environmental effects of the Project, including measures to prevent overdraft, establishment of
29 adequate monitoring of enough early warning wells, and most important, limiting groundwater
30 extraction to natural recharge levels. (133:701:50206; 133:701:50225-50237; 155:1023:58875-80.)

1 Additionally, the District failed to include adequate monitoring of nearby springs that will be likely
2 impacted by the Project, including Orange Blossom Wash, Clipper Wash, south of Bonanza Spring,
3 and Schulyer Wash. (155:1023:58879.) Rather than including monitoring for potential impact to
4 spring flow within Mojave National Preserve and all other springs located on BLM-managed lands
5 within the affected watersheds, the mitigation plan now only intends to monitor Bonanza, Whiskey,
6 and Vontrigger Springs. (1:8:344.) Additionally, the EIR dismisses use of “early-warning”
7 observation wells to monitor groundwater-level fluctuation in the aquifer system before such impacts
8 result in adverse impacts. (155:1023:58879.) These measures were included in the 2002 version of
9 the Project, but were discarded for this iteration, despite the absence of any new data collection or
10 new knowledge. (*Id.*)

11 Because “an agency may not approve a project that will have significant environmental
12 impacts if there are feasible alternatives or feasible mitigation measures that would substantially
13 lessen those effects,” the approval of the Project without consideration of all feasible mitigation
14 measures is not in accordance with the law. (*Lincoln Place Tenants Assn. v. City of Los Angeles*
15 (2007) 155 Cal.App.4th 425, 445.) “The requirement ensures there is evidence of the public agency's
16 actual consideration of alternatives and mitigation measures, and reveals to citizens the analytical
17 process by which the public agency arrived at its decision.” (*Mountain Lion Foundation v. Fish &*
18 *Game Com.* (1997) 16 Cal.4th 105, 134.) Therefore, “when a project is approved that will
19 significantly affect the environment, CEQA places the burden on the approving agency to
20 affirmatively show that it has considered the identified means of lessening or avoiding the project's
21 significant effects and to explain its decision allowing those adverse changes to occur. (*Citizens for*
22 *Quality Growth v. City of Mt. Shasta* (1988) 198 Cal.App.3d 433, 440-44.)

23 The District has not met this burden, failing to fully analyze all significant environmental
24 impacts from the Project and all reasonable mitigation measures. The District approved EIR and its
25 associated mitigation plan did not include an adequate analysis of all mitigation measures,
26 particularly those mitigation measures addressing groundwater drawdown within the aquifer. The
27 EIR’s failure to meet its CEQA mitigation obligations allows for groundwater extraction at a level
28 that exceeds the aquifer’s safe yield and causes unnecessary harm to the environment. By permitting
29 billions of gallons of water to be extracted and shipped from the Mojave Desert’s aquifer system
30 without adequate review or mitigation, the EIR has failed to ensure that the withdrawal will not

1 irreparably harm the aquifer and its surrounding environment. Therefore, the District’s approval and
2 certification of the EIR was arbitrary, capricious and not in accordance with law.

3 **D. THE ALTERNATIVES ANALYSIS IS INADEQUATE.**

4 **1. EIR Does Not Provide Sufficient Information Regarding the Alternatives.**

5 An EIR must contain sufficient information about each alternative to allow the reviewing
6 agency and the public to properly evaluate the merits of the alternatives and the project. (Guidelines,
7 § 15126.6(a); *King County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692.)

8 The analysis must include concrete information about each alternative to allow a fact-based
9 comparison between the alternatives and the project. (Guidelines, § 15126.6(d); *Laurel Heights 59*
10 Cal.App.3d 869, 892 [EIR’s analysis of alternatives must have enough specificity to allow agency to
11 make an informed decision and the public to participate].) An EIR must “reflect the analytic route the
12 agency traveled from evidence to action” and cannot rest merely on the conclusions of the agency,
13 but must contain facts and analysis. (*King County Farm Bureau v. City of Hanford* (1990) 221
14 Cal.App.3d 692, 733, 736 (“*King County*”).) An EIR that does not have adequate information
15 regarding alternatives “cannot achieve the dual purpose served by the EIR, which is to enable the
16 reviewing agency to make an informed decision and to make the decisionmaker’s reasoning
17 accessible to the public, thereby protecting informed self-government.” (*King County, supra*, 221
18 Cal.App.3d at p. 733.)

19 Here, the EIR fails to provide specific information or evidentiary support for its conclusory
20 statements regarding project alternatives. For example, the EIR summarily rejected the Other Supply
21 Sources Alternative from consideration without providing substantial evidence to support its
22 exclusion. The EIR concludes that “if other water supply projects are implemented, they would likely
23 have similar or greater impacts than the Project.” (3:9.a:1090.) Yet the EIR fails to identify which
24 impacts would be similar or greater, and does not provide any evidence to support this statement.
25 Similarly, the EIR states “[n]or does this Alternative meet several other objectives,” but it does not
26 state which objectives it fails to meet. (3:9.a:1090.) The lack of specific information in the EIR
27 hinders both the agency and the public’s ability to make an informed decision regarding the Project.

28 **2. The EIR Does Not Present a Reasonable Range of Alternatives.**

29 An EIR must “describe a range of reasonable alternatives to the project . . . which would
30 feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any

1 of the significant effects of the project, and evaluate the comparative merits of the alternatives.”
2 (Guidelines, §15126.6(a); *see also* Pub. Resources Code, § 21001(g).) The range of alternatives in an
3 EIR should allow informed decision-making and public participation. (Guidelines, § 15126.6(a)-(f).)
4 The alternatives discussed should provide a reasonable choice of alternatives for lessening
5 environmental impacts. (*San Bernardino Valley Audubon Soc’y v. County of San Bernardino* (1984)
6 155 Cal.App.3d 738.) The EIR must focus on alternatives to the project that “are capable of avoiding
7 or substantially lessening any significant effects of the project, even if [those] alternatives would
8 impede to some degree the attainment of the project objectives, or would be more costly.”
9 (Guidelines, § 15126.6(b).) An EIR must contain a meaningful discussion of alternatives that have
10 the potential to reduce any significant impact of a project, whether or not those impacts can be
11 rendered less than significant through the imposition of mitigation measures. (*Laurel Heights I,*
12 *supra*, 47 Cal.3d at 403-408.)

13 A close examination of the Project EIR makes clear that the range of alternatives presented is
14 far from reasonable. Except for the no project alternatives, the majority of the alternatives presented
15 in the EIR scarcely differ from the Project. Three of the alternatives (facilities alternatives) merely
16 alter the location of the pipeline or the wellfield, and even the project operation alternatives do not
17 differ much from the Project. (3:9a:1105-1119.) The Project With Agriculture Alternative does not
18 actually alter the Project operations, but merely assumes greater agricultural operations on the Cadiz
19 property. (3:9.a:1117-1119.) The Phased Project Alternative has similar or greater impacts than the
20 Project in all areas. (3:9.a:1098.) Given the nature of the Project and that significant impacts would
21 occur as a result of the amount of water being extracted, the EIR should have considered an
22 alternative that would extract reduced quantities of water over the same period of time as the Project.
23 (*See Watsonville Pilots Ass’n v. City of Watsonville* (2010) 183 Cal.App.4th 1059) [EIR that only
24 included alternatives with same level of increased developed as proposed project but did not consider
25 reduced development alternatives was inadequate].)

26 The EIR rejects from consideration the Average Natural Recharge Rate Alternative,
27 concluding that it would not meet most of the basic Project objectives, would not reduce or avoid any
28 significant environmental impacts and would not be feasible. (12:14:4193.) However, there is no
29 evidence to support this statement. First, “feasible” is defined as “capable of being accomplished in a
30 successful manner within a reasonable period of time, taking into account economic, environmental,

1 legal, social, and technological factors.” (Guidelines, § 15364.) Other than reduced pumping rates,
2 the Average Natural Recharge Rate Alternative is similar to the Project and is capable of being
3 accomplished. Second, the EIR rejects this alternative from consideration concluding, without
4 supporting evidence, that it does not meet project objectives. (12:14:4192-94.) While this alternative
5 would not pump as much water as the Project, it would still meet the majority of the Project
6 objectives – it would still develop a long term source of water, reduce dependence on imported water,
7 enhance dry-year water supply reliability within the service areas of the District, enhance water
8 supply opportunities, and support operation water needs of the ARZC. (12:14:4192-94.) An agency
9 is not excused from analyzing an alternative simply because it will not a meet a project object. “It is
10 virtually a given that the alternatives to a project will not attain *all* of the project’s objectives.”
11 (*Watsonville Pilots Ass’n v. City of Watsonville* (2010) 183 Cal.App.4th 1059, 1087, emphasis in
12 original.) An EIR is required “to consider those alternatives that will ‘attain most of the basic
13 objectives’ while avoiding or substantially reducing the environmental impacts of the project.”
14 (*Watsonville Pilots Ass’n v. City of Watsonville* (2010) 183 Cal.App.4th 1059, 1087.) Furthermore,
15 by limiting the extraction rates, this alternative would have a reduced impact on water recharge
16 Therefore, it would have less of an impact than many of the alternatives selected for the EIR.

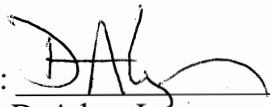
17 Furthermore, the alternatives analyzed are not aimed at reducing the impacts of the Project;
18 nearly all of the alternatives analyzed in the EIR have similar or greater impacts. For example, the
19 Phased Project Alternative would not have a lesser environmental impact in any category, and the
20 Project Plus Existing Agriculture would only have a lesser impact on agriculture and forestry
21 resources. (3:9.a:1098.) Similarly, the West of Danby Pipeline Alternative and the Wellfield
22 Location Alternative would only have lesser impacts in two categories. (3:9.a:1098.) The EIR does
23 not focus on alternatives that are capable of substantially lessening the impacts of the Project as
24 required by the CEQA Guidelines. (Guidelines, § 15126.6(b).) The EIR fails to provide sufficient
25 information about the alternatives rejected from consideration and fails to consider a reasonable range
26 of alternatives, thereby undermining the EIR’s purpose of serving as an informational document.
27 These failures violate CEQA.

28 **V. CONCLUSION**

29 The District certified and approved an EIR and groundwater management plan that featured
30 the wrong lead agency, an inaccurate and misleading project description, an incomplete and

1 misguided groundwater management plan, ill-defined and inadequate mitigation and monitoring, and
2 a flawed choice of Project alternatives. Each of these errors is prejudicial, and renders the EIR and
3 its certification inadequate and not in accordance with law. For the foregoing reasons, a writ should
4 issue decertifying the EIR, negating any and all associated Project approvals, and directing the
5 County to prepare a new EIR as lead agency, along with an effective groundwater plan that complies
6 with both CEQA and County law.

7
8
9 DATED: August 30, 2013

BY: 
D. Adam Lazar
Attorney for CBD Petitioners

1
2 **PROOF OF SERVICE**

3 **STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO**

4 I, D. Adam Lazar, declare: I am and was at the times of the service hereunder mentioned,
5 over the age of (18) eighteen years, and not a party to the within cause. My business address is:
6 Center for Biological Diversity, 351 California Street., Suite 600, San Francisco, California 94104.

7 On August 30, 2013 I caused to be served the below listed document(s) entitled:

8 **CBD Petitioners' Opening Brief in Support of Petition for Writ of Mandate**

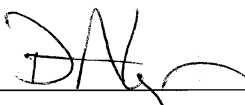
9 To be sent to:

10 **See Attached Service List**

11 X BY ELECTRONIC SERVICE on August 30, 2013 at San Francisco, California,
12 pursuant to the Court's stipulated order and local court rules, by placing an original or X a true
13 copy thereof in an electronic mail message addressed to all parties and/or through the Court-
14 approved third-party online service and filing system (OneLegal).

15 Executed on August 30, 2013, at San Francisco, California.

16 I declare that I am employed as a member of the bar at whose direction the service was made.
17 I declare under penalty of perjury that the foregoing is true and correct.

18 
19 _____
20 D. Adam Lazar

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Service List
Center for Biological Diversity et al. v. County of San Bernardino et al.
Orange County Superior Court No. 30-2012-00612947

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