

public hearings on the EIR/EIS coinciding in part with the EIR/EIS public comment period, during which time the EIR/EIS preparers testified and were cross examined. (AA:47:292:12739; RT-5/1/08:4:918, 933; Vol-5:Tab-88:AR3:CD18:523809-523986; Vol-6:Tab-93:AR3:CD18:526057; Vol-5:Tab-76:AR2:CD3:08721-08723; Vol-5:Tab-81:AR3:CD11:200098-200101; Vol-5:Tab-82:AR3:CD11:200088-200090; Vol-5:Tab-77:AR2:CD6:27944.) Comments during the SWRCB proceeding became comments to the SWRCB and to lead agency IID that put the EIR/EIS into evidence during the SWRCB proceeding. (RT-5/1/08:4:918-919.)

The Air District submitted written comments on the Water Order about the EIR/EIS's defective methodology for addressing air quality impacts, which were also submitted to IID. (Vol-6:Tab-93:AR3:CD18:526057-526062; RT-5/1/08:4:933.) The Air District testified at the SWRCB hearing in October 2002, about air quality impacts resulting from the water transfers. (Vol-6:Tab-94:AR3:CD18:524231-524266.) The Air District also filed a request for reconsideration of the Water Order. (Vol-6:Tab96:AR3:CD16:526590-529598.) SWRCB revised the Water Order, in part, to address the Air District's comments. (Vol-6:Tab-112:AR3:CD18:526892-526916.) All of these activities occurred before IID approved a project or issued an NOD. When IID certified the EIR/EIS and PEIR on June 28, 2002, no project was approved; there were also no CEQA findings, statement of overriding considerations, MMRP, or NOD. (Vol-5:Tab-86:AR3:32097-32098; Vol-5:Tab-87:AR3:CD3:32099-32100.)

The Air District then timely challenged in Case 83 the first agency's (SWRCB) reliance on the EIR/EIS to approve a project and adopt findings. (Supp.RA:1:1:1-7.) IID later rejected the EIR/EIS, PEIR, and transfer project. (Vol-6:Tab-101:AR3:CD3:31314-31315; Vol-6:Tab-102:AR3:CD3:31290-31292.) Case 83 was stayed for almost a year because IID had not approved a project. (Supp.RA:1:2:8-15; Supp.RA:1:3:16-20.) When

IID finally did so on October 2, 2003, the EIR/EIS and PEIR were readopted as amended by the 2003 Addenda, but were not recirculated.

Section 21177 specifically refers to close of the public hearing on project approval before issuance of the NOD, *not* certification of the EIR. Therefore, a petitioner need only object during the public comment period *or* prior to the close of the final public hearing on the project before the NOD is issued. (*Bakersfield Citizens for Local Control*, 124 Cal.App.4th at 1199.) The administrative record shows the Air District exhausted its administrative remedies under Section 21177 because its comments on the EIR/EIS were made before the October 2, 2003, approval of the transfer project and QSA. The trial court therefore erred, and the Air District should be afforded petitioner status in Cases 1653 and 1656.

C. **The Exhaustion Requirement Does Not Apply When the Public Does Not Have An Opportunity to Review the Environmental Documents.**

The trial court inaccurately applied the exhaustion requirement to the EIR/EIS and PEIR Addenda. The exhaustion requirement is inapplicable when the public does not have an opportunity to review and comment on the environmental document or know what the final project is. (Pub. Res. Code, § 21177(e).) The EIR/EIS and PEIR Addenda and final QSA-Contracts were never made available to the public for review and comment before they were approved by the IID Board on October 2, 2003, thereby depriving the public of any opportunity to object to the content of the documents, or the lack thereof.⁴²

After the trial court incorrectly determined the Air District did not exhaust its administrative remedies, it changed its position and finally acknowledged there was no opportunity to exhaust administrative remedies.

⁴² IID's conduct was a violation of its promise in Resolution 18-95 that no agreement would be approved until the public had an opportunity to comment. (Vol-1:Tab-9:AR3:CD15:505525.)

In Contested Matter 146, the trial court recognized that “[t]here is evidence...that supports the...contention that the public may not have been provided an opportunity to review, or sufficient time to meaningfully review and comment on the relevant documents [the 2003 addendum].” (AA:25:180:06649.) The trial court further stated:

The public is entitled to see the environmental documents for a project. *It would be unreasonable to expect a member of the public to articulate specific CEQA objections where he or she is not provided a reasonable opportunity to see the CEQA document(s) at issue in advance.* The Court is troubled by the lack of evidence of when the 2003 Transfer Addendum first became available to the public. The moving parties, aligned in this case with IID, are in a much better position than the Morgan Petitioners to have produced such evidence, but did not.

(AA:25:180:06649 [emphasis added].)⁴³ The trial court confirmed this finding a second time in the statement of decision. (AA:47:292:12722-72723, 12740-12741.)

The trial court invited the Water Agencies to identify evidence in the record showing the public had an opportunity to review the CEQA documents, but they never did, presumably because there was none. It is likely that because the QSA deal was not reached (even in principle) until September 23, 2003, the EIR preparers scrambled to draft the CEQA documents and contracts before the October 12, 2003, deadline. This scenario is supported by evidence showing the CEQA documents and QSA contracts were presented to IID’s Board on October 1, 2003, only one day before it certified the EIR/EIS and PEIR Addenda. (Vol-8:Tab-156:AR3:CD14:400303-400304.) The PEIR Addendum was electronically transmitted to MWD at 8:16 a.m., on September 23, 2003. (Vol-7:Tab-

⁴³ CVWD argued that “[w]hether the documents were available to the public is really neither here nor there...” (RT-8/20/09:7:1792.)

142:AR4-08-1029-35153.) The MWD Board “considered” the Addendum one hour later at 9:20 a.m. (Vol-8:Tab-144:AR4-08-1028-35143/35152.)

Imperial County Counsel and members of the public requested at the September 23, 2003, IID public hearing, copies of the CEQA documents and QSA in advance of the October 2, 2003, approval. (Vol-7:Tab-141:AR3:CD14:400258-400267; Vol-8:Tab-150:AR3:CD7: 70101-70102; Vol-8:Tab-157:AR3:CD7:70073-70075; Vol-8:Tab-151:AR3:CD7:70067-70069.) But, the documents were not produced, and therefore the public could not review and comment on them.

As of October 8, 2003, six days *after* IID’s certification of the Addenda and project approval, the public still had not seen the final documents, presumably because some of the contracts’ deal points were being changed. (Vol-8:Tab-163:AR4-08-1055-35347; AA:47:292:12740.) The PEIR was not sent to the County until November 3, 2003, well after IID certified the document. (Vol-9:Tab-179:AR4-08-1071-35543/35545.) Thus, the Air District could not have feasibly exhausted its administrative remedies with respect to the EIR/EIS or PEIR Addenda which recertified the underlying CEQA documents. To require any party to first object to the CEQA documents before filing a claim under these circumstances violates notions of fairness and constitutional due process.

The courts have consistently held that error is prejudicial if there is uninformed decisionmaking and public participation. (*Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1106; *Rural Land Owners Ass’n v. City Council* (1983) 143 Cal.App.3d 1013, 1022.) CEQA requires that decisionmakers and the public be fully informed of the environmental effects of a proposed project *before* the project is approved. (*Id.*) Here, the failure to provide decisionmakers with sufficient time to review the Addendum before adopting it is a prime example of an improper “rubber-stamp” approval

(*Redevelopment Agency v. Norm's Slauson* (1985) 173 Cal.App.3d 1121), in violation of CEQA's core requirements that decisions are based on thoughtful analysis, and that the public is adequately informed of the agency's thought process in arriving at a decision to approve an environmental document. (*San Joaquin Raptor Rescue Center et al., v. County of Merced* (2007) 149 Cal.App.4th 645, 685.)

2. **THE TRIAL COURT ERRED IN FAILING TO VOID AND SET ASIDE THE ENVIRONMENTAL DOCUMENTS AND APPROVALS WHEN IT INVALIDATED THE QSA-JPA.**

If this Court upholds the trial court's determination that the QSA-JPA is invalid, then it should also declare the EIRs void as a matter-of-law because the mitigation in the EIR/EIS and PEIR will no longer satisfy CEQA's enforceability requirements. If this Court finds the QSA-JPA valid, then it must withstand scrutiny under CEQA, which it cannot.

A. **The ECSA and QSA-JPA Are Designed to Implement the EIR/EIS and PEIR Mitigation Measures.**

The mere inclusion of mitigation measures in an EIR does not bind the lead agency to later adopt and carry out the measures. (*Native Sun/Lyon Communities v. City of Escondido* (1993) 15 Cal.App.4th 892, 908.) Rather, CEQA requires mitigation be fully enforceable through permit conditions, agreements, or legally binding instruments. (Pub. Res. Code, §§ 21081(a)(1), 21081.6(b); CEQA Guidelines, §§ 15091, 15126.4(a)(2); *Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1186-1187.) The QSA-JPA was intended to be a "binding" mechanism. (Vol-8:Tab-172:AR3:CD1:10458 ["Neither the QSA or these conserved water transfers could be implemented without compliance with extensive state and federal environmental laws, and this [QSA-JPA] including the State Obligation is the principal mechanism for ensuring that required mitigation under those laws for these transfers will be fully paid for"].)

The ECSA and the QSA-JPA set forth the responsibility to implement and pay for EMRs, the mitigation in CEQA nomenclature.⁴⁴ (Vol-8:Tab-173:AR3:CD1:10539-10544; Vol-8:Tab-172:AR3:CD1:10457-10468.) The EMRs are *any* measure required as a result of *any* Environmental Review Process for activities a part of, or in furtherance of, the water transfers or project described in the EIR/EIS and Addendum (except for inapplicable exclusions). (Vol-8:Tab-173:AR3:CD1:10540-10541; Vol-8:Tab-172:AR3:CD1:10459.)

“Environmental Review Process” is *any* environmental review required by CEQA, NEPA or other state or federal environmental regulations. (Vol-8:Tab-173:AR3:CD1:10541; Vol-8:Tab-172:AR3:CD1:10459.) The project in the PEIR is part of, and in furtherance of, the project described in the EIR/EIS. (Vol-5:Tab-74:AR4-06-435-27216, 27228-27231, 27316-27330.) Further, the PEIR is intended to be the program level analysis for the water transfers. (Vol-3:Tab-51:AR3:CD10:101804_0131; Vol-5:Tab-74:4-06-435-27317/27318.) The EMRs therefore include mitigation in both the EIR/EIS and PEIR.

B. The QSA-JPA Is Likely Insufficiently Funded Without the State’s Unconditional Obligation.

The QSA-JPA created a separate agency, the Authority, to collect funds from the Water Agencies to pay for the EMRs and allocate mitigation responsibility among its members. (Vol-8:Tab-172:AR3:CD1:10458, 10460-10462.) Payment for the EMRs is divided between CVWD, IID and SDCWA; MWD does not pay *anything*. (Vol-8:Tab-172:AR3:CD1:10467.) Under the QSA-JPA, the total amount of money that CVWD, IID and SDCWA pay is \$133 million⁴⁵ – this is considered the Environmental

⁴⁴ EMRs also include costs to comply with federal Endangered Species Act, federal Clean Water Act, and CAA. (Vol-8:Tab-173:AR3:CD1:10539.)

⁴⁵ The reference to \$133 million was the then present (2003) value. (Vol-

Mitigation Cost Limitation. (Vol-8:Tab-172:AR3:CD1:10459.) The Water Agencies would not have executed the QSA-Contracts without the State's unconditional obligation. (AA:47:292:12740-12742; Vol-8:Tab-173:AR3:CD1:10542; Vol-8:Tab-172:AR3:CD1:10457-10458.)

At the time the QSA-Contracts were executed it was clear the EMRs' costs could exceed \$133 million: the ECSA estimated the EMRs' costs at \$178 million (Vol-8:Tab-173:AR3:CD1:10558-10572; AA:47:292:12741); MWD queried the Governor's Advisor about funding the \$193 million EMRs-price tag (Vol-7:Tab-134:AR3:CD7: 70265-70267; AA:13:92:3316; AA:14:92:3319); and, the QSA principles developed for the Katz/Machado negotiations estimated mitigation costs at \$200 million. (AA:14:192:3343.)

Also, everyone involved in the SWRCB proceeding knew mitigating the environmental devastation caused by water transfers at Owens Lake cost about \$300 million (for air pollution alone), plus costs of mitigation water (about \$16 million to \$17 million annually) and maintenance (\$10 million annually before infrastructure, and \$25 million annually after infrastructure). (Vol-4:Tab-69:AR3:CD18:522452-522454.) According to ARB, the \$300 million mitigated only 50-60 percent of the 30-square miles of exposed Owens lakebed, and the potential exposed playa at the Salton Sea could be twice as large. (Vol-4:Tab-73:AR3:CD12:205224-205225.)

The QSA-JPA allocates Salton Sea restoration costs to the State. (Vol-8:Tab-172:AR3:CD1:10458.) As pointed out in the Morgan-Holtz Parties' respondents' brief, the Carter version of the QSA-JPA approved by IID's Board on October 2, 2003, at the time the QSA documents were certified, included Salton Sea restoration as a mitigation measure. (RJN:10:155, 160.) If mitigation included restoration (an issue that the

8:Tab-172:AR3:CD1:10459.)

court did not resolve (AA:47:292:12739), then the cost would be upwards of \$8.9 billion. (Supp.AA:123:1221:30531.)⁴⁶

IID is under the delusion that air quality mitigation costs for a “shrinking” Salton Sea could be eliminated or reduced by a “rapidly dying Salton Sea” and that once the project ends, the need to pay for mitigation also ends. (IID AOB, pp. 42, 45, 51.) The QSA and water transfers will *permanently* alter the Salton Sea ecosystem forever transforming California’s largest lake (with a surface area of approximately 364 square miles or over 233,000 acres) into a dusty and barren wasteland. (Vol-3: Tab-51:AR3:CD10:101804_0214, _0290; Vol-4:Tab-73:AR3:CD12: 205476-205477.) Once the shoreline and playa are exposed, these areas will be susceptible to wind erosion and, thus, an on-going potential source of PM10 emissions, for potentially hundreds of years until natural processes stabilize the exposed surfaces. (Vol-3:Tab-51:AR3:CD10: 101804_0701; Vol-4:Tab-73:AR3:CD17:520450-520451, 520455.)

The mere stoppage of the transfers and QSA will not reverse the environmental damage. It will be necessary to continuously implement mitigation and maintain the mitigation once it is in place even after the transfers and QSA stop. (*See e.g.*, Vol-3:Tab-59:AR2:CD7:32953-32967 [including maintenance costs for a portion of the 110 square mile Owens Lake].) A mitigation scheme that fails to ensure adequate mitigation for as long as the project impacts exist is fatally flawed. (Pub. Res. Code, §§ 21002.1, 21081(a), 21100(b)(3); CEQA Guidelines, § 15126.4.)

⁴⁶ At MWD’s September 23, 2003, meeting, Director Harris expressed concerns about a “broke” State’s ability to fund excess mitigation above the \$133 million cap, and noted that projected costs in keeping the Salton Sea from “turning into a dust bowl” exceeded \$2.5 billion or more. (Vol-8:Tab-144:AR4:CD8:4-08-1028-35151.) DOI and DFG estimated Salton Sea restoration in the billions of dollars. (AA:14:92:3359-3361, 3390.)

C. **Appellants' Opposition to the Constitutionality Claims Revealed Conflicting Interpretations of the State's Obligation in the QSA-JPA.**

Appellants' opposition to claims that the QSA-JPA was unconstitutional revealed the signatories' lack of a mutual agreement as to the State's commitment and how it would be satisfied. (See Morgan-Holtz Parties' and Barioni-Krutzsch Parties' respondents' briefs regarding the signatories' failure to reach a meeting-of-the-minds.) Mitigation is essential to protecting public health; thus, the County Agencies believe a full vetting of the legal sufficiency of the QSA-JPA is necessary. The parties must know: Will there be sufficient funding to pay for the necessary mitigation until the impacts cease? Is the State's commitment legally enforceable by third parties when the money becomes due? If the answer to either of these questions is no, then the QSA-Contracts must be invalidated.

Appellants would have this Court validate the contracts now, and only after the damage to public health and the environment occurs, determine whether the State's obligation is legal and enforceable. Contract enforceability goes to its validity, which is the issue in this proceeding. (*CVWD*, 111 F.Supp. at 177-179.) If the QSA-JPA is declared valid, then the County Agencies will have every right to expect the State will write a check for whatever it costs to fully mitigate the impacts of the QSA.

The State's obligation to pay for EMRs costing in excess of \$133 million is set forth in Section 9.2 of QSA-JPA:

The State is solely responsible for the payment of the costs of and liability for Environmental Mitigation Requirements in excess of the Environmental Mitigation Cost Limitation. The amount of such costs and liabilities shall be determined by the affirmative vote of three Commissioners, including the Commissioner representing the State, which determination shall be reasonably made. The State obligation is an unconditional contractual obligation of the State of

California, and such obligation is not conditioned upon an appropriation by the Legislature, nor shall the event of non-appropriation be a defense.

(Vol-8:Tab-172:AR3:CD1:10459, 10467-10468; Vol-8:Tab-173:AR3:CD1:10539, 10542.) The State's unconditional commitment required it to pay all costs in excess of \$133 million irrespective of how high the eventual price tag. (AA:47:292:12741, 12747.) There is nothing ambiguous in section 9.2 to suggest the promise was, as the State now contends, to merely seek an appropriation from the Legislature. The ECSA confirms that the State's commitment was unconditional and not dependant on any further State action. (Vol-8:Tab-173:AR3:CD1:10542.)

The trial court recognized the Salton Sea as the *most* significant environmental issue facing the QSA, and the State's obligation as key in the parties' executing the QSA. (AA:47:292:12738, 12741-12741; Vol-8:Tab-172:AR3:CD1:10458; Vol-8:Tab-173:AR3:CD1:10542.) IID, SDCWA and CVWD relied on the State's obligation to contract with third parties to produce the conserved water that would be transferred under the QSA. (Vol-8:Tab-172:AR3:CD1:10458; Vol-8:Tab-173:AR3:CD1:10542; AA:47:292:12741-12742.)

Importantly, IID's Board would not have executed the QSA if the State's obligation was anything less than full payment of mitigation costs exceeding \$133 million. (RJN:5:114-132; RJN:6:133-137; Section III.4. B.i.) DOI would likely not have executed the CRWDA, which approved the QSA, if it believed mitigation was contingent upon future funding. (Vol-1:Tab-15:AR2:CD3:07021.) As the trial court observed, "[e]veryone negotiating the QSA JPA Agreement would have reasonably understood that now the State itself was purporting to unconditionally commit to pick up the entire tab for mitigation costs exceeding the capped contribution of the other QSA parties, notwithstanding the amount of these costs – even if

they ultimately amounted to millions or billions of dollars – and not withstanding the State’s budget, appropriations, or other controls over expenditures.” (AA:47:292:12741.)

Therefore, it was astonishing when the State, in response to Cuatro del Mar’s MSJ asserting the QSA-JPA violated the constitutional debt limit, conceded that section 9.2 of the QSA-JPA assigned the State sole responsibility for liability and costs for the EMRs in excess of \$133 million as an unconditional obligation, but denied California was unconditionally obligated to pay for mitigation that exceeds \$133 million or to restore the Salton Sea contrary to QSA-JPA. (AA:22:119:5614-15615.) The State claimed the contract language was in error and the contract was not a legal commitment. (AA:22:119:5614-5615 [Section 9.2 “imposes no contractual obligation, but is merely a representation – albeit an incorrect one. It does not and cannot purport to state a legal commitment...”].) The State claimed its only real contractual obligation was to “seek” an appropriation. (*Id.*)

IID asserted a contrary defense, that section 9.2 meant the State did *not* need to seek an appropriation, claiming there was a continuing appropriation in the Preservation Fund that (as IID pointed out in its brief and RJNs below), is now non-existent.⁴⁷ (AA:46:265:12297-12301;

⁴⁷ The trial court described IID’s argument relying upon the non-existent continuing appropriation as “pure fantasy.” (AA:47:292:12745.) Yet, IID re-raises this argument in its brief, asking this Court to indulge the fantasy one more time. Even if IID was correct, it is doubtful the fund could be relied upon to pay all future mitigation costs because, according to IID, it is “historically underfunded.” (IID AOB, p. 31.) As if one fantasy was not enough, Appellants now argue that the Water Agencies’ \$30 million contribution to the Restoration Fund could be used to pay for mitigation at the Salton Sea and reduce the State’s obligation even though, as Appellants readily admit, Fish and Game Code section 2932.5 now prohibits using the money for mitigation that the State does not undertake. (SDCWA/CVWD/MWD AOB, p. 55.) The EIR/EIS identifies the ECSA, not the State, as the entity responsible for mitigation. (Vol-7:Tab-136:AR3:

AA:23:127:5989; AA:35:211:9566.) IID wrongly complains the trial court refused to address the legal significance of a continuing appropriation. The trial court did determine it was not a reasonable reading of the Section 9.2 language to conclude the parties thought the existence of a continuing appropriation in the Fish and Game Fund was the State's unconditional contractual obligation. (AA:47:292:12747.)

At trial, the court asked the State's attorney about the tension between its statement in opposition to Cuatro's MSJ that its only contractual obligation is to "seek an appropriation" and IID's assertion at trial that there is a continuing appropriation. (AA:42:250:11356-11357.) The State's response asserted *both* that its statement in opposition to Cuatro's MSJ was a mistake and that the State's section 9.2 obligations were to merely seek an appropriation. (AA:42:250:11359.)

Later at trial, the court asked the State's attorney "if there is any need, the State is contractually committed to step forward and pay all of the Environmental Mitigation Costs, no matter how high they may go, even if it's billions of dollars. That's the contractual obligation that you say the State has made, and that they are not looking to take any position different, then." The State's attorney responded "yes." (RT-11/24/09:10:2858; AA:42:250:11361; AA:47:292:12743.) But, as the trial court noted, "[t]hat same attorney, however, declined to commit to the State's representative on the QSA-JPA Agreement being precluded from voting against mitigation, and thereby preventing the expenditure, if mitigation is necessary but there isn't any 'money' in the checkbook for the State."⁴⁸ (AA:47:292:12743;

CD14:400128_182-400128_201.) "Because an EIR cannot be meaningfully considered in a vacuum devoid of reality" the Court needs to consider these facts in determining the validity of the QSA-JPA to assure mitigation implementation. (*Laurel Heights Imp. Assn.*, 47 Cal.3d at 420.)

⁴⁸ To avoid the logical conclusion that these conflicting assertions demonstrate there was no meeting-of-the-minds, SDCWA, MWD and

AA:42:250:11362.) Not only do the parties to the contract have conflicting interpretations, but the State cannot decide whether or not it has a commitment. The briefing in this Court has not resolved the QSA-JPA signatories' conflicting positions about the State's commitment.⁴⁹

The briefing revealed another unbelievable twist in the State's interpretation of its obligation: *the State's obligation to pay for mitigation costs exceeding \$133 million is only for the first 15-years of the QSA and water transfers.* (State AOB, pp. 23-24.) According to the State, after 2017 there will be no need for mitigation because either there will be a restoration plan or, if not, the Sea cannot be saved and "it would be pointless to try to arrest part of the Sea's decline if it is going to disappear altogether." Nowhere in the QSA-JPA is the State's obligation so defined and, in fact, is contrary to the QSA-JPA termination provisions. (Vol-8: Tab-172:AR3:CD1:10462; Vol-8:Tab-173:10547 [obligation to pay for the EMRs "shall continue as long as the Environmental Mitigation is necessary to mitigate any continuing impacts that last beyond termination"].)

D. The Invalidity of the QSA-JPA Results in the EIR/EIS and PEIR Violating CEQA's Mitigation Requirements.

Voiding the QSA-JPA eliminates the legally binding instrument required to find that adverse effects have been mitigated. (Pub. Res. Code, §§ 21081(a)(1), 21081.6; CEQA Guidelines, §§ 15091, 15126.4(a)(2).) In *Federation of Hillside and Canyon Ass'n v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, the court found that a mitigation scheme relying on an inadequate assurance of funding violated CEQA because the agency must

CVWD ask this Court to disregard the parties' interpretations as only the "mere representations of counsel at trial."

⁴⁹ SDCWA, MWD and CVWD claim "[t]he fundamental goal of interpretation of a contract is to give effect to the mutual intention of the parties." But, how is that done here where the parties to the contract do not themselves agree on the interpretation?

ensure “that measures to mitigate or avoid significant effects on the environment are fully enforceable through permit conditions, agreements, or other measures.” (*Id.* at 1255-1256, 1260-1261.) According to the court, the purpose of this requirement is to ensure that feasible mitigation measures will actually be implemented as a condition of development, and not merely adopted and then neglected or disregarded. (*Id.*; Pub. Res. Code, § 21002.1(b).)

Without the QSA-JPA there is no legal structure in place to allocate the responsibilities for implementing mitigation, collect money from the Water Agencies, and pay for the mitigation. IID will not implement the mitigation without the QSA-JPA because it will not be funded. (Vol-8:Tab-167:AR3:CD1:11357.) As such, the adopted mitigation measures will be disregarded contrary to CEQA mandates. The QSA and water transfers cannot move forward without assuring the mitigation will be implemented.

E. The Current QSA-JPA Structure Also Violates CEQA’s Mitigation Requirements.

Even if this Court declares the QSA-JPA valid, it nevertheless does not comply with CEQA because, irrespective of the constitutionality of the State’s obligation, its structure does not ensure sufficient funding or implementation of the mitigation. (*Federation of Hillside*, 83 Cal.App.4th at 1260-1261.) There must be substantial evidence in support of the expectation that the balance of funds owed by the State will be paid. (*Anderson First Coalition*, 130 Cal.App.4th at 1186-1189.)

If the State’s obligation is only to seek an appropriation or reliance on a fund with no appropriation, then mitigation cannot be assured because funding will be dependent on the Legislature’s discretion. The courts will not order the Legislature to make an appropriation. (*City of Sacramento v. California State Legislature* (1986) 187 Cal.App.3d 393.) According to IID, “[i]f the State cannot pay and the Water Agencies are legislatively and

contractually capped, then no further mitigation is required until there is an appropriation.”⁵⁰ (AA:22:125:5836.)

CEQA is also violated when there is no assurance mitigation will be performed. (*Federation of Hillside*, 83 Cal.App.4th at 1260-1262.) IID is responsible for implementing the mitigation, but IID’s obligation is subject to reimbursement by the QSA-JPA. (Vol-8:Tab-167:AR3:CD1:11357.) To reimburse IID, the Authority’s payment schedule must generate sufficient funds when mitigation is needed, and the Authority also has to budget the expenditure and agree to reimburse IID. Whether the Authority agrees to budget and pay for the mitigation is, according to Appellants, dependent upon the State voting for the expenditure. (Vol-8:Tab-172:AR3:CD1:10460-10462, 10465-10469.) Thus, assuming Appellants are correct, the State’s veto power is a critical component of this QSA-JPA.

The veto power appears to have been added in response to the DFG Director’s October 6, 2003 E-Mail expressing concern over entering into an agreement that would amount to writing a “blank check” on behalf of the State.⁵¹ (AA:13:92:3288; AA:47:292:12741.) In other words, veto power is intended to be exercised as a cost containing method. (AA:22:119:5601.) As the State confirmed in its brief, its obligation may never materialize because “[i]f the State’s representative does not agree to

⁵⁰ The trial court rejected this position, and IID’s other attempts to create from unequivocal language (like the word “unconditional”) an ambiguous interpretation of the QSA-JPA, thereby disregarding CEQA and other environmental laws. (AA:47:292:12743, 12745, 12747.)

⁵¹ The trial court viewed this contractual voting arrangement as an item of significant substantive legal effect that did not exist when IID formally voted to approve the contracts on October 2, 2003. (AA:47:292:12744.) Creating essential elements of mitigation after the EIR is certified undermines CEQA’s purpose of informing the public and its responsible officials of the environmental consequences of their decisions before they are made. (*Berkeley Keep Jets Over the Bay Committee v. Board of Port Com’rs (Berkeley Jets)* (2001) 91 Cal.App.4th 1344, 1354-1355.)

mitigation expenses over the limit, then the State's obligation will not be triggered." Mitigation may go unfunded not because it is not worthy or unnecessary, but simply because the State does not want its obligation to be triggered. (AA:16:187:6924-6925.) SDCWA and IID agreed the State's veto authority can be used to reduce funding for mitigation. (AA:15:104:3713; AA:27:190:7007-7008; AA:22:125:5820-5821.) Thus, the inclusion of the State's power to veto mitigation expenditures means there is no assurance to implement mitigation. (Pub. Res. Code, §§ 21081(a)(1), 21081.6(b); CEQA Guidelines, §§ 15091, 15126.4(a)(2).)

3. **THE TRIAL COURT ERRED IN DETERMINING THAT THE ENVIRONMENTAL CLAIMS AND DEFENSES ARE MOOT.**

A. **The Trial Court Erred in Finding the EIRs to be Moot Because the EIRs Are Still Presumed Valid.**

Whether the trial court erred in declaring the environmental claims moot without voiding the EIRs presents questions of law subject to this Court's independent de novo review. Under this standard, the Court gives no deference to the trial court's ruling or the reasons for its ruling, but instead decides the matter anew. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799; *Topanga & Victory Partners, LLP v. Toghia* (2002) 103 Cal.App.4th 775, 780-781.)

CEQA compliance is not moot until the court renders a decision on the legal sufficiency of the EIR/EIS and PEIR. CEQA's statutory provisions provide that when an EIR is certified for a project it is conclusively presumed valid unless a lawsuit is filed *and* the court determines otherwise. (Pub. Res. Code, § 21167.2; *Snarled Traffic Obstructs Progress v. City and County of San Francisco* (1999) 74 Cal.App.4th 793, 797; *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1993) 6 Cal.4th 1112, 1130.)

Even when lawsuits have been filed, CEQA allows responsible agencies to assume the EIR complies with CEQA and continue to approve the project until a court grants the relief sought. (Pub. Res. Code, § 21167.3(b); CEQA Guidelines, § 15233.) This situation already occurred when the County Agencies challenged the EIR/EIS in January 2003 (Cases 82 and 83), but the EIR/EIS was nevertheless recertified and used by IID in approving the QSA and transfers in October 2003 because no judgment had been entered in Cases 82 or 83 declaring the document invalid and void.

Because an EIR can survive a judicial determination that the project is invalid, courts will adjudicate the merits of CEQA compliance even when the underlying project is deemed void or the project approval is invalidated. (*See County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 731, 741; *Fullerton Joint Union High School Dist. v. State Board of Education* (1982) 32 Cal.3d 779, 798, overruled on other grounds in *Board of Supervisors of Sacramento County v. Local Agency Formation Commission of Sacramento County* (1992) 3 Cal.4th 903.) Thus, CEQA compliance cannot be moot when the challenged CEQA document can arguably be relied upon for project approvals.

When it became clear, after the tentative ruling invalidating the QSA-JPA, that the trial court intended to dismiss the environmental claims and defenses as moot, the County Agencies requested the following language be included in the judgment:

IT IS FURTHER ORDERED that cases 1653, 1656, and 1658, including claims brought under the California Environmental Quality Act, National Environmental Policy Act, and the Clean Air Act, are dismissed *without prejudice*, as moot for this validation proceeding only, and *the following approvals set aside* without the Court reaching the merits of the issues presented . . . [listing the CEQA approvals].”

(AA:47:303:12878 [emphasis added].)

The purpose of the County Agencies' request was to void the EIR approvals so that the challenged EIRs would not be considered valid under Public Resources Code section 21167.2 and relied upon after the validation judgment was entered. The trial court erred by not voiding the approvals to truly moot the claims.

B. The Trial Court Had Jurisdiction and an Obligation to Adjudicate the Environmental Claims Because it Could Grant Effective Relief.

The trial court incorrectly believed it could not adjudicate the environmental claims after invalidating the QSA-Contracts. (RT-11/30/09: 10:2966-2967.) This constitutes reversible error. (*Fletcher v. Superior Court* (Oakland Police Dept.) (2002) 100 Cal.App.4th 386, 392 [failure to exercise a discretion conferred and compelled by law constitutes a denial of a fair hearing and a deprivation of fundamental procedural rights, and thus requires reversal]; *Marriage of Gray* (2007) 155 Cal.App.4th 504, 515 [trial court's failure to exercise its discretion is "itself an abuse of discretion"].)

The environmental claims and defenses are not moot because the trial court could (and this Court can) grant effective relief by voiding the EIRs. An issue is moot *only* when it is impossible for the court to grant any effective relief. (*Cucamongans United For Reasonable Expansion v. City of Rancho Cucamonga* (2000) 82 Cal.App.4th 473, 479; *Giraldo v. Cal. Dept. of Corrections and Rehabilitations* (2008) 186 Cal.App.4th 231, 257 [issue becomes moot when some event has occurred which deprives the controversy of its life]; *Lincoln Place Tenants Ass'n v. City of Los Angeles* (2007) 155 Cal.App.4th 425, 453-454 [case moot only when a court ruling can have no practical effect or cannot provide parties with effective relief].)

CEQA issues are not moot when relief can be granted. In *Woodward Park Homeowners Ass'n v. Garreks, Inc.* (2000) 77 Cal.App.4th 880, 888, the court declined to consider the CEQA issues moot on the

ground that the project was already operating at the time the writ petition was filed. The court stated that “[t]his case does not present a situation where a ruling by this court can have no practical impact or not provide the parties relief. To the contrary, our ruling can afford WPHA effective relief...[and] could result in modification of the project to mitigate adverse impacts or even removal of the project altogether.” (*Id.*)

A final judgment on one issue does not necessarily moot remaining and unresolved issues. (*Lincoln Place Tenants Ass’n*, 155 Cal.App.4th at 453-454.) In *Lincoln Place Tenants Ass’n*, the court determined that the CEQA issues were not moot even though the petitioner could raise certain affirmative defenses in related unlawful detainer proceedings:

The City misconstrues the mootness doctrine; a final judgment does not render an issue moot. Rather, a case becomes moot when a court ruling can have no practical effect or cannot provide the parties with effective relief. Here, nothing in the unlawful detainer proceedings can or will resolve the issue of CEQA compliance; therefore, this court’s ruling will have a practical effect on compliance with the mitigation conditions and provide relief to the tenants.

(*Id.* at 454 [internal citations omitted].)

This Court can order an effective remedy by either: determining the EIRs and approvals are void as a result of invalidation of the QSA-JPA; or, adjudicating the issues on the merits and then setting aside and voiding the EIRs and approvals after finding that the EIR/EIS and PEIR do not comply with applicable environmental laws. A remedy is not only possible, but *necessary* to prevent prejudice to the parties that timely challenged the EIR/EIS and PEIR, and the conferral of an unjust benefit to the Appellants by allowing them to continue to rely upon the same defective EIRs when new QSA contracts are signed. (*Temecula Band of Luiseno Mission Indians v. Rancho Cal. Water Dist.* (1996) 43 Cal.App.4th 425, 434.)

C. **This Court Can and Should Adjudicate the Merits of the Environmental Claims and Defenses Even if it Determines the Issues are Moot.**

Even if this Court believes the environmental issues are moot (which the Air District disputes), exceptions to the mootness doctrine apply because: this case presents an issue of broad public interest; there is likely to be a recurrence of the controversy between the parties; and, a material question remains for the Court's determination. (*Cucamongans United For Reasonable Expansion*, 82 Cal.App.4th at 479-480.)

i. ***This Case Presents an Issue of Broad Public Interest.***

CEQA compliance is an issue of broad public interest justifying adjudication of a moot issue. (*Friends of Cuyamaca v. Lake Cuyamaca Recreation and Park Dist.* (1994) 28 Cal.App.4th 419, 425; *Lincoln Place Tenants Ass'n v. City of Los Angeles* (2005) 130 Cal.App.4th 1491, 1503, fn. 10; *Mountain Lion Coalition v. Cal. Fish and Game Commission* (1989) 214 Cal.App.3d 1043, 1045, fn. 2.)

Water transfers involve disputes of major importance and present the types of issues that compel merits resolution initially in the courts of appeal or Supreme Court. (*National Audubon Society v. Superior Court (Dept. of Water & Power)* (1983) 33 Cal.3d 419; *California Trout, Inc. v. Superior Court* (1990) 218 Cal.App.3d 187; *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795 (*Inyo I*); *County of Inyo v. City of Los Angeles* (1976) 61 Cal.App.3d 91 (*Inyo II*)). This Court in the *Inyo* proceeding explained why: a CEQA challenge to the export of substantial water resources from a remote rural region to the urban coastal plain

represents a dispute of major importance, socially, economically and environmentally. It poses competition between two legitimate and weighty public needs - preservation of the environmental quality of the [rural] [v]alley against the

burgeoning water requirements of California's largest population center. The public interest requires early resolution of the dispute.

(Inyo II, 61 Cal.App.3d at 95.)

The EIR is the "heart" of CEQA; it is the environmental "alarm bell" whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return. *(Inyo I, 32 Cal.App.3d at 810.)* The California Supreme Court, citing this Court, added that

[t]he EIR is also intended to demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action. Because the EIR must be certified or rejected by public officials, it is a document of accountability. If CEQA is scrupulously followed, the public will know the basis on which its responsible officials either approve or reject environmentally significant action, and the public, being duly informed, can respond accordingly to action with which it disagrees. The EIR process protects not only the environment but also informed self-government. (Internal citations and quotations omitted.)

(Laurel Heights Improvement Assn. v. Regents of University of California (1988) 47 Cal.3d 376, 392.)

The subject of the *Inyo* cases is no less important to this case than the principle it espoused. Spanning nearly two decades and five appellate decisions, the *Inyo* cases chronicle the County of Inyo's struggles to secure complete and accurate public disclosure of, and accountability for, the harm caused by Los Angeles' diversion of water. By the time this Court was presented with the first case, Los Angeles had already constructed an aqueduct to convey Owens Valley water and turned Owens Lake into a toxic dust bowl; an alarming forecast of what could become of the Salton Sea as a result of the QSA and water transfers. This Court took original

jurisdiction in the *Inyo* cases and rejected the City's interpretations of CEQA that did not afford the fullest possible protection to the environment.

This case involves the largest agricultural-urban water transfers, the quantification of Colorado River water allocations, the State's unconditional commitment to fund perhaps billions of dollars of mitigation, the creation of the nation's most severe air quality and public health crisis in Imperial and Riverside counties, and the future of the Salton Sea, which all independently – but in this case collectively – constitute issues of broad public interest that the Air District implores this Court not to ignore. This Court is familiar with the background of the QSA and acknowledged in *County of Imperial*, 152 Cal.App.4th at 18, that

California and water are inextricably linked in a battle royal waged over distribution of this precious resource among competing interests. No other resource is as vital to California's cities, agriculture, industry and environment as this liquid gold. Predictably, no other resource generates such heated controversy as this commodity sometimes referred to as the "oil of the 21st century."

ii. There is Likely to Be a Recurrence of the Controversy Between the Parties.

Courts can exercise discretion to adjudicate claims on the merits if the issue is likely to arise again in the future, particularly between the same parties. (*Cucamongans United For Reasonable Expansion*, 82 Cal.App.4th at 480.)⁵² It is likely the QSA will re-emerge. According to the Water Agencies in their supersedeas petition (pp. 2-3, 5), only one sentence in one contract was found illegal, and the QSA, which "took years of negotiations" is "central to the peaceful sharing of the Colorado River and

⁵² See also *Friends of Cuyamaca*, 28 Cal.App.4th at 425; *County Sanitation Dist. No. 2 of Los Angeles County v. County of Kern* (2005) 127 Cal.App.4th 1544, 1631; *San Diego Trust & Savings Bank v. Friends of Gill* (1981) 121 Cal.App.3d 203, 209.

necessary for Southern California to have a sufficient water supply” and to “protect the Bay Delta from additional water supply demands;” and, the invalidation of the QSA puts “in jeopardy water supply and water right protections for Southern California and the Colorado River Basin.”

The trial court stated that its “crystal ball was shattered years ago” and would not consider the probable ramifications of its failure to render a decision on environmental compliance. (RT-11/30/09:10:2968.) Respectfully, the trial court was wrong not to consider the ramifications of its decision that were pointed out by the County Agencies at trial and in response to the statement of decision. As discussed in Section IV.3.A., the ramifications are set by statute; the EIRs are valid until voided. The issues are ripe for adjudication as they were fully briefed twice in the trial court, and are briefed a third time for this Court’s consideration.

iii. A Material Question Remains for the Court’s Determination.

Environmental compliance is a material, unresolved question in the QSA Coordinated Proceeding. Validation is supposed “to settle *all* questions about the validity of” the QSA-Contracts. (*Friedland*, 62 Cal.App.4th at 842.) The trial court’s failure to adjudicate the merits of the environmental claims and defenses has left unresolved questions about the insufficiencies of the EIR/EIS and PEIR, despite timely challenges and the inclusion of CEQA compliance in the Validation Action.

Also, with respect to the writ cases, Cases 1653, 1656, and 1658, the remedy sought is not directed solely at the “validity” of the contracts but, rather, includes voiding and setting aside the environmental documents for failing to comply with CEQA. Had the writ cases not been “coordinated” with the validation action, there would be no question that the CEQA issues were not moot.

4. **THIS COURT SHOULD WITHOUT REMAND AND ON ITS OWN ADJUDICATE THE MERITS OF THE ENVIRONMENTAL CLAIMS AND DEFENSES.**

If this Court does not invalidate the EIR/EIS and PEIR based on the invalidity of the QSA-Contracts, it should adjudicate the environmental claims and defenses on the merits. The trial court did not want to adjudicate the environmental claims, and instead deferred the matter to this Court to do so. (RT-11/30/09:10:2966-2967.)

A. **The Issues Presented Must Be Resolved Promptly.**

California appellate courts will consider the merits of a case when “the issues presented are of great public importance and must be resolved promptly.” (*Dept. of Personnel Administration v. Superior Court* (1992) 5 Cal.App.4th 155, 166, superseded by statute in *Professional Engineers in Cal. Government v. Schwarzenegger* (2010) 5 Cal.App.4th 155; *Hogya v. Superior Court* (1977) 75 Cal.App.3d 122, 129-30; *County of Sacramento v. Hickman* (1967) 66 Cal.2d 841, 845.)⁵³ For six years in this proceeding, the County Agencies made every effort, including requesting a hearing, briefing the merits twice, and petitioning this Court in December 2008 to compel the trial court to adjudicate their environmental claims, to prevent an Owens-like ecological disaster. (*See* Supp.AA:153:1519:38121-38130; RA:4:55:1065-01115; RA:5:57:1126-1177; RJN:3:55-59, 77-84.) To date, no court has adjudicated the CEQA claims.

During the six-year judicial process below, the Water Agencies continued to transfer water out of Imperial County, causing, in part, the Salton Sea’s elevation to decline and massive dust storms that threaten public health. Remanding CEQA back to the trial court will only further unnecessarily delay a decision on the merits that will inevitably be appealed

⁵³ Where this standard is met, even an alternate remedy would not preclude this Court from asserting original jurisdiction. (*Hogya*, 75 Cal.App.3d at 129-30.) Public importance was addressed in Section IV.3.C.i.

and returned back to this Court for resolution. While this case is ping-ponging between the trial court and this Court, water that would have flowed to the Salton Sea will continue to be diverted to San Diego and Coachella. Another six years of litigation could spell the end of the Salton Sea and its transition to toxic dust bowl, as 2017 marks the end of mitigation water being sent to the Salton Sea. (Vol-6:Tab-113:AR3:CD18:526964-526968.) Thus, the pace of this litigation and no decision on the merits may seal the future fate of the Salton Sea if this Court does not adjudicate the environmental claims.

B. This Court's Adjudication of the Environmental Issues on the Merits is Consistent with the Applicable Standard of Review.

This Court will apply the same standard of review as the trial court because the agency's action, not the trial court's decision, is reviewed; thus, appellate judicial review is *de novo*. (*San Joaquin Raptor Rescue Center*, 149 Cal.App.4th at 653; *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 80.) The Court will independently determine whether the administrative record demonstrates any legal error by the agency. (*Vineyard Area Citizens For Responsible Growth, Inc. v. City of Rancho Cordova (Vineyard)* (2007) 40 Cal.4th 412, 427.)

Under Public Resources Code section 21168.5, the test is whether the lead agencies committed a prejudicial abuse of discretion. A prejudicial abuse of discretion may be shown if the agency has not proceeded in a manner required by law *or* if the determination or decision is not supported by substantial evidence. (Pub. Res. Code, § 21168.5; *Communities for a Better Environment*, 184 Cal.App.4th at 80.)

Judicial review under the "failure to procedure in the manner required by CEQA" prong differs significant from review under the substantial evidence standard because a court determines "*de novo*"

whether an agency has complied with CEQA's legal requirements, "scrupulously enforcing all legislatively mandated CEQA requirements." (*Vineyard*, 40 Cal.4th at 426, 435.)

California law is clear that omission of significant environmental information from an EIR or the violation of a procedural requirement is presumed to be prejudicial. Public Resources Code section 21005 states:

The Legislature finds and declares that it is the policy of the state that noncompliance with the information disclosure provisions of [CEQA] which precludes relevant information from being presented to the public agency, or noncompliance with substantive requirements of this division, may constitute a prejudicial abuse of discretion within the meaning of Sections 21168 and 21168.5, regardless of whether a different outcome would have resulted if the public agency had complied with those provisions.

(*See also Bakersfield Citizens for Local Control*, 124 Cal.App.4th at 1220.)

On appeal, it is irrelevant whether substantial evidence existed to support an agency's action when the court is assessing a violation of CEQA's information disclosure provisions. (*Communities for a Better Environment*, 184 Cal.App.4th at 82-83 [if EIR does not apprise interested parties of the true scope of the project for intelligent weighing of impacts, informed decisionmaking cannot occur and the EIR is inadequate as a matter-of-law].) The courts have consistently held that error is prejudicial if an EIR omits material that is essential to informed decisionmaking and informed public participation. (*Protect the Historic Amador Waterways*, 116 Cal.App.4th at 1106.)

5. **THE ENVIRONMENTAL DOCUMENTS DO NOT COMPLY WITH CEQA.**

A. **The PEIR and EIR/EIS Violate the Very Core of CEQA Because an Improper and Inaccurate Baseline Was Used.**

i. ***A Proper Baseline is Established at the Time the Notice of Preparation is Published.***

If the EIR is the “heart” of CEQA, then the baseline is the EIR’s “heartbeat.” The baseline is the core by which all impacts, mitigation, and project alternatives are measured. (*Communities for a Better Environment*, 184 Cal.App.4th at 89; *County of Amador*, 76 Cal.App.4th at 953.) The importance of a proper baseline is paramount because without it, “analys[is] of impacts, mitigation measures, and project alternatives become impossible.” (*County of Amador*, 76 Cal.App.4th at 952-953; CEQA Guidelines, §§ 15125, 15126.2(a).)

CEQA Guidelines section 15125(a) establishes the requirement for the baseline as follows:

An EIR must include a description of the physical environmental conditions in the vicinity of the project, *as they exist at the time the notice of preparation is published...*This environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant...” (Emphasis added.)

(*See also County of Amador*, 76 Cal.App.4th at 953-954.)

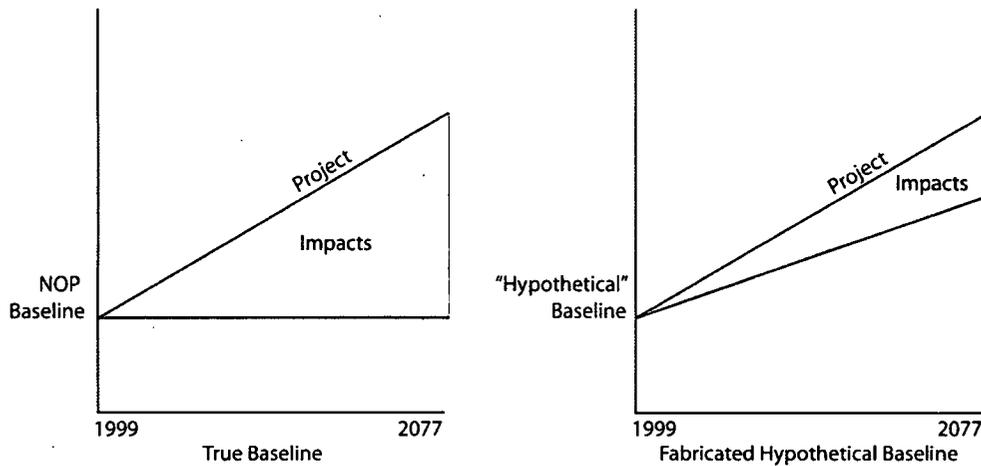
Under CEQA, the physical existing condition at the time the NOP is published constitutes the “baseline physical conditions” for measuring impacts. (*City of Carmel-by-the Sea v. Board of Supervisors* (1986) 183 Cal.App.3d 229, 246; *Envtl. Planning & Info. Council v. County of El Dorado* (1982) 131 Cal.App.3d 350, 354; *Galante Vineyards*, 60 Cal.App.4th at 1122; *Woodward Park Homeowners Ass’n, Inc. v. City of Fresno* (2007) 149 Cal.App.4th 892, 691.)

ii. *The Baseline Used in the PEIR and EIR/EIS Was a Projected Hypothetical Baseline and Did Not Reflect the “Existing Conditions” When the NOP was Published.*

The co-lead agencies published the NOP for the PEIR on June 6, 2000. (Vol-2:Tab-41:AR4-03-174-13110.) However, the baseline was not determined as of the NOP date for all affected resources as required by CEQA Guidelines section 15125(a). (Vol-5:Tab-74:AR4-06-435-27338/27340.) The NOP and NEPA Notice of Intent for the EIR/EIS was issued in September 1999. (Vol-3:Tab-51:AR3:CD10:101804_0139.) Likewise, the baseline in the EIR/EIS was not determined as of the NOP dates for all resource areas.⁵⁴ (Vol-3:Tab-51:AR3:CD10:101804_0214-101804_0215.)

⁵⁴ BOR’s NEPA “guru” identified as potentially fatal flaws the fact that resource areas were not analyzed consistently against the same baseline. (RJN:11(B):190-197.) For example, in the PEIR air quality impacts at IID and CVWD service areas were compared to the NOP baseline (Vol-5:Tab-74:AR4-06-435-27478) and impacts at the Salton Sea were compared to the hypothetical baseline (Vol-5:Tab-74:AR4-06-435-27481); water impacts involving water flows at the All-American Canal and ground water were compared to the existing baseline, but water quality was compared to the hypothetical baseline (Vol-5:Tab-74:AR4-06-435-27368, 27370, 27375); recreational impacts in the IID and CVWD service areas were compared to the existing baseline and impacts at the Salton Sea were compared to the hypothetical baseline (Vol-5:Tab-74:AR4-06-435-27463); the same is true for aesthetics (Vol-5:Tab-74:AR4-06-435-27518/ 27519). In the EIR/EIS impacts to biological resources were analyzed using an existing baseline for wildlife, vegetation, fish, and aquatic habitat (Vol-3:Tab-51:AR3:CD10:101804_0466/101804_0467, 101804_0473), but the hypothetical baseline was used for fish and avian life regarding salinity impacts (Vol-3:Tab-51:AR3:CD10:101804_0476) and wetlands (Vol-3:Tab-51:AR3:CD10:101804_0515). The resulting hodgepodge of differing assessments renders the environmental documents internally inconsistent and thwarts public disclosure of the impacts; an approach rejected in *Woodward Park*, 149 Cal.App.4th at 707-708.

Diagram 5



Instead, the Water Agencies produced internally inconsistent EIRs by fabricating a hypothetical baseline for the Salton Sea – which assumed its decline and demise.⁵⁵ (Vol-5:Tab-74:AR4-06-435-27338/27340, 27364, 27381; Vol-3:Tab-51:AR3:CD10:101804_0213/101804_0215.) As Diagram 5 shows, this has the effect of making the environmental impacts appear less severe than if compared to the existing conditions at the time the NOPs were published. Notably, *Appellant DFG*, as well as EPA and ARB, objected to the use of the hypothetical baseline. (Vol-5:Tab-74:AR4-06-435-27753/27755; Vol-4: Tab-73:AR3:CD12:205202, 205204, 205224).

The hypothetical baseline provided a false basis for measuring and analyzing environmental effects, understated the impacts and necessary mitigation, and obstructed full disclosure. As the court in *Bakersfield Citizens for Local Control*, declared:

[T]he danger created by providing understated information subverts an agency’s ability to adopt appropriate and effective mitigation measures, skews its perspective concerning the benefits of the particular projects under consideration and precludes it from gaining a

⁵⁵ The Addenda relied on the same flawed baseline. (Vol-7:Tab-136:AR3:CD14:400128_37-400128_44; Vol-7:Tab-137:AR3:CD14:400131_22-400131_29.)

true perspective on the consequences of approving the project.

(Bakersfield Citizens for Local Control, 124 Cal.App.4th at 1217.)

CEQA does not permit a baseline to factor in assumptions, projections, or hypothetical scenarios about what may occur in the future. *(County of Amador, 76 Cal.App.4th at 955.)* Rather, future projections and assumptions should be part of the no-project alternative analysis in an EIR. (CEQA Guidelines, § 15126.6(e)(2).) The baseline environmental setting cannot be premised, in whole or in part, on hypothetical conditions, even if they were otherwise allowable under existing plans. *(San Joaquin Raptor Rescue Center, 149 Cal.App.4th at 658.)*

Shortly after trial, the Supreme Court published its seminal baseline decision, *Communities for a Better Environment, 48 Cal.4th 310*, rejecting Appellants' arguments below. The Court stated that by comparing the proposed project to what could happen, rather than to what was actually happening, the baseline was set not according to "established levels of a particular use," but by "merely hypothetical conditions." *(Id. at 322.)* An approach using hypothetical allowable conditions as the baseline should be rejected because "it results in 'illusory' comparisons that 'can only mislead the public as to the reality of the impacts and subvert full consideration of the actual environmental impacts,' a result at direct odds with CEQA's intent." *(Id.)* This case settles the issue in favor of the County Agencies.

iii. The Use of the Hypothetical Baseline Results in Understated Impacts.

The Salton Sea's elevation at the time the NOP was published for the PEIR was -227 msl (Vol-5:Tab-74:AR4-06-435-27340) and for the EIR/EIS -228 msl (Vol-3:Tab-51:AR3:CD10:101804_0214/101804_0215). This is the NOP baseline CEQA requires that the impacts, mitigation, and project alternatives be measured against.

Instead, by manipulating assumptions and fabricating futuristic hypothetical scenarios, impacts are measured from a declining Salton Sea elevation of approximately -234 to -237 msl for the PEIR (Vol-5:Tab-74:AR4-06-435-27340, 27381) and -235 msl in the EIR/EIS (Vol-3:Tab-51:AR3:CD10:101804_0214/101804_0215). In comparing the NOP baseline condition of the Salton Sea's elevation to the hypothetical baseline used in the PEIR and the EIR/EIS, a -7 msl to -10 msl difference in the shoreline evaluation results. A -7 msl difference results in approximately 16,000-acres more of exposed playa that is missing from the analysis and mitigation plan.⁵⁶ Measuring the project's impacts by comparing it to a hypothetical situation instead of the actual circumstances results in misleading reporting. (*Woodward Park*, 149 Cal.App.4th at 691, 707-708.)

Table 1

Comparison of Salton Sea Existing Baseline, Future Baseline, and Proposed Project Impacts at the Salton Sea

	Elevation (feet msl)			Surface Area (acres)			Salinity (mg/L)		
	Existing Baseline	Future Baseline	Proposed Project	Existing Baseline	Future Baseline	Proposed Project	Existing Baseline	Future Baseline	Proposed Project
2001	-227	NA	NA	235,000	NA	NA	44,000	NA	NA
2077	NA	-234 to-237	-245 to -250	NA	211,600 to 219,600	167,800 to 186,400	NA	80,000 to 90,000	129,700 to 165,300

Source: IID and USBR 2002.

(Vol-5:Tab-74:AR4-06-435-27340.)

Table 1 from the PEIR illustrates the effect of not using the NOP baseline. The impacts should be based on a 18 to 23 foot decline and not

⁵⁶ Vol-3:Tab-51:AR3:CD10:101804_0618. [16,000 acres results from subtracting 217,000 acres (year 2077) from 233,000 acres (year 2002); Vol-3:Tab-51:AR3:CD10:101804_0344. ARB expressed this same concern, stating that “[u]sing this uncertain future baseline could over time present unclear accountability for mitigation of environmental impacts associated with the exposed lakebed.” (Vol-4:Tab-73:AR3:CD12:205224.)

the 11 to 13 feet decline analyzed. The reduction in the Salton Sea's surface area should be based on 48,600 to 166,765 acres instead of the 33,200 to 43,800 acres analyzed. The impacts of increasing salinity should be analyzed based on 85,700 to 121,300 mg/L instead of the 49,700 to 75,300 mg/L analyzed.

Table 2 below shows in **boldface** how Table 1-1 from the EIR/EIS would look if it complied with CEQA by using the NOP baseline instead of the hypothetical baseline to measure impacts. (Vol-4:Tab-73:AR3:CD12:204905.) As Table 2 shows, the hypothetical baseline in the EIR/EIS underestimated the amount of exposed shoreline at the Salton Sea by about 16,000 acres.

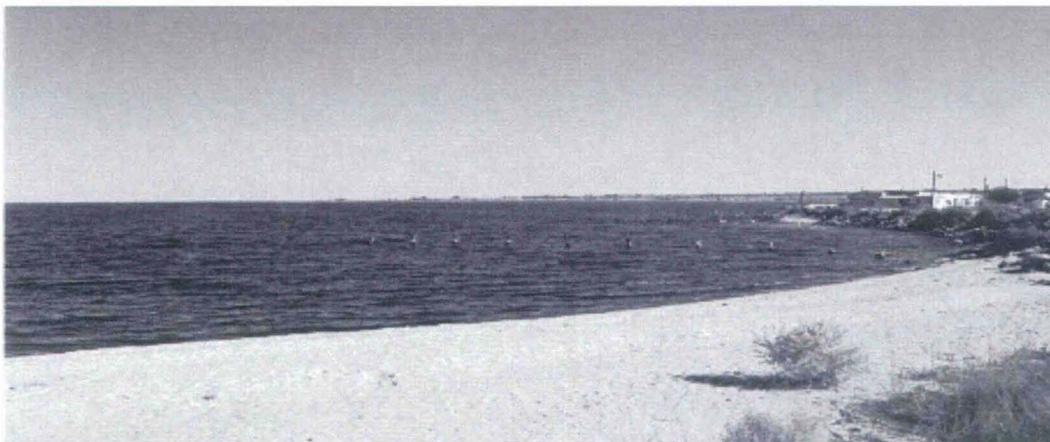
Table 2

Table 1-1 As Revised To Comply With CEQA

	Without Implementation of the Salton Sea Habitat Conservation Strategy		With Implementation of the Salton Sea Habitat Conservation Strategy	
	Elevation	Exposed Area	Elevation	Exposed Area
Existing Setting	-228 msl (2000-2002)	0		
Projected Baseline	-235 msl (2077)	16,000 acres (existing setting compared to projected baseline)		N/A
300 KAFY to San Diego (Assumes on-farm & water delivery system conservation measures)	-250 msl (2077)	66,000 acres (projected baseline compared to project) 82,000 acres (existing setting compared to the project)		N/A
300 KAFY to San Diego (Assumes fallowing)	-241 msl (2077)	32,000 acres (projected baseline compared to project) 48,000 acres (existing setting compared to the project)	-240 (2077)	16,000 acres (projected baseline compared to project) 32,000 acres (existing setting compared to the project)

The following photographs from the EIR/EIS depict an “on the ground” perspective to show the magnitude of these baseline differences.⁵⁷

Photograph 2



NOP Baseline

Photograph 3



Hypothetical Baseline

Photographs 2 and 3 are both of the Salton Sea looking southeast. Photograph 2 (Vol-3:Tab-51:AR3:CD10:101804_0780) shows the view of the Salton Sea shoreline as it existed when the environmental documents were prepared. Photograph 3 (Vol-3:Tab-51:AR3:CD10:101804_1985) shows the same view, but modified to reflect the shoreline under the hypothetical baseline.

⁵⁷ See also Diagrams 1-4, *supra*.

The impacts analysis improperly relied upon this hypothetical baseline for the following areas:

- 1) water (Vol-5:Tab-74:AR4-06-435-27364, 27370, 27381; Vol-3:Tab-51:AR3:CD10:101804_0313/_0314);
- 2) biology (Vol-5:Tab-74:AR4-06-435-27415/27416; Vol-3:Tab-51:AR3:CD10:101804_0476, _0515, _0518/_0526);
- 3) recreation (Vol-5:Tab-74:AR4-06-435-27467; Vol-3:Tab-51:AR3:CD10:101804_0645/_0647, _0652/_0661);
- 4) air quality (Vol-5:Tab-74:AR4-06-435-27481; Vol-3:Tab-51:AR3:CD10:101804_0690/_0701);
- 5) aesthetics (Vol-5:Tab-74:AR4-06-435-27521; Vol-3:Tab-51:AR3:CD10:101804_0788/_0789); and,
- 6) cultural (Vol-5:Tab-74:AR4-06-435-27496).

The conclusions of whether an impact is significant or its severity violates CEQA when it proceeds from a faulty baseline. (*Woodward Park*, 149 Cal.App.4th at 731; *San Joaquin Raptor Rescue Center*, 149 Cal.App.4th at 657-59.) The use of a faulty baseline reveals that the Water Agencies' claims that the environmental analysis represented a "worst case" scenario were inaccurate. (IID AOB, pp. 40-41; SDCWA/CVWD/MWD AOB, pp. 57-58.)

iv. Alternatives Were Not Properly Assessed Because of the Faulty Baseline.

The alternatives analysis is flawed because it relied upon a faulty hypothetical baseline. (Vol-5:Tab-74:AR4-06-435-27604, 27621; Vol-3:Tab-51:AR3:CD10:101804_1786, _1795/_1796; *County of Amador*, 76 Cal.App.4th at 953.)

B. The PEIR and EIR/EIS Failed to Adequately Analyze Environmental Impacts.

Proper identification of a project's significant environmental effects is necessary to ensure agencies do not approve projects without feasible mitigation measures. (Pub. Res. Code, §§ 21002, 21002.1(a).)

i. The PEIR and EIR/EIS Failed to Include Critical Information and Analysis About Air Quality Impacts.

An agency must use best efforts to find out and disclose all that it reasonably can. (CEQA Guidelines, §§ 15151, 15144.) When it does not, as here, the agency fails to proceed in accordance with the law. (*Berkeley Jets*, 91 Cal.App.4th at 1371.)

a. There was no quantitative air quality analysis of the impacts resulting from the deterioration of the Salton Sea.

A quantitative emission threshold standard for determining significance was utilized in the PEIR and EIR/EIS, but the analysis necessary to compare the project to that standard was not performed. (Vol-3:Tab-51:AR3:CD10:101804_0690/_0693, 101804_0697/_0698; Vol-5:Tab-74:AR4-06-435-27478, 27481.) Thus, decisions about the significance of impacts were made without sufficient analyses. (Vol-5:Tab-74:AR4-06-435-27487; Vol-3:Tab-51:AR3:CD10:101804_0703, Vol-4:Tab-73:AR3:CD12:204968_15-204968_16.)

ARB informed BOR and IID that a comprehensive quantitative air quality and health risk analysis was necessary. (Vol-2:Tab-34:AR3:CD10:100496-100497; Vol-4:Tab-73:AR3:CD12:205224.) SWRCB proceeding testimony revealed that quantification of PM10 emissions from exposed playa at the Salton Sea was feasible:

- CH2MHill, the EIR/EIS consultant, quantified PM10 emissions at Owens Lake when it worked with GBUAPCD. (Vol-4:Tab-70:AR3:CD18:522493-522495.) Ted Schade of GBUAPCD testified there was absolutely no reason why air quality modeling could not be used to estimate emissions at the Salton Sea. (Vol-4:Tab-64:AR3:CD17:520454.)

- The 1994 SWRCB decision relied upon air quality modeling conducted in 1991 to quantify and predict PM10 emissions from Mono Lake's exposed shoreline. (Vol-4:Tab-67:AR3:CD18:521287, 522448; Vol-1:Tab-7:AR3:CD17:520449, 520475-520476.)
- Air quality modeling and wind tunnel studies could be used to collect data to quantify PM10 emissions. (Vol-4:Tab-69:AR3:CD18:522456-522457, 522489, 522561-522562; Vol-1:Tab-6:AR3:CD20:705409-705429.)
- Air quality models exist to analyze PM10 emissions from exposed lakebed surfaces. (Vol-4:Tab-70:AR3:CD18:522494-522495.)

SCAQMD's 1993 CEQA Air Quality Handbook, relied upon in the EIR/EIS (Vol-3:Tab-51:AR3:CD10:101804_0689), also included methodologies for estimating PM10 emissions from fugitive dust. (Supp.AA:207:1932:51592-51595; Supp.RA:4:19:735, 742-743.) SCAQMD submitted comments on the EIR/EIS that the project emissions must be quantified and provided additional guidance on how to do so. (Vol-4:Tab-73:AR3:CD12:205450, 205453.) ARB even offered assistance. (Vol-2:Tab-34:AR3:CD10:100497.)

Failing to conduct an analysis when the evidence shows it was possible represents a failure to proceed as required by CEQA. (*Berkeley Jets*, 91 Cal.App.4th at 1350, 1364-1371; *Citizens To Preserve the Ojai v. County of Ventura* (1985) 176 Cal.App.3d 421, 432; *Los Angeles Unified School Dist. v. City of Los Angeles* (1997) 58 Cal.App.4th 1019, 1030.) Comments from responsible experts or other agencies that disclose the project's impacts were not fully evaluated may not be ignored. (*Berkeley Jets*, 91 Cal.App.4th at 1367.)

The misleading statements in the EIR/EIS that a quantitative analysis could not be performed (Vol-4:Tab-73:AR3:CD12:204968_04/_07) and the failure to perform such analysis was not a reasoned and good faith effort and prevented “decisionmaker[s] and the public from gaining a true understanding of one of the most important environmental consequences of [the project].” (*Berkeley Jets*, 91 Cal.App.4th at 1366-67; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 734-737.) An agency fails to proceed in a manner required by law when the EIR does not adequately apprise all interested parties of the project’s true scope for intelligent weighing of its environmental consequences. (*Communities for a Better Environment*, 184 Cal.App.4th at 82.)

Here, quantification would reveal a more severe environmental and human health hazard. If the exposed shoreline at the Salton Sea results in only 1% of the emissions caused by the exposed Owens Lakebed, the emissions would be significant possibly resulting in 24-hour concentrations of PM10 between 300 to 4,000 $\mu\text{g}/\text{m}^3$, far exceeding the federal health based standard of 150 $\mu\text{g}/\text{m}^3$. (Vol-4:Tab-64:AR3:CD17:520450, 520455; Vol-4:Tab-70:AR3:CD18:522486-522487, 522489; Vol-4:Tab-73:AR3:CD12:205224-205225; 42 U.S.C. §§ 7408-7409; 40 C.F.R. Part 50.6.)

PM10 is a public health concern because it affects the respiratory system (including worsening asthma) and can cause lung tissue damage *and premature death*. (*Vigil v. Leavitt* (2004) 381 F.3d 826, 830; Vol-1:Tab-11:AR3:CD23:715982.) Imperial County was classified by EPA as non-attainment for PM10 and had the highest asthma hospital discharge rate in California before the QSA. (Vol-3:Tab-60:AR2:CD6:27970; Vol-4:Tab-68:AR2:CD6:29117-29120; Vol-3:Tab-51:AR3:CD10:101804_0680-101804_0681; Vol-5:Tab-72:AR4-06-435-27481.)

b. The Salton Sea air quality analysis is not compared to the significance criteria.

The PEIR and EIR/EIS include criteria for determining whether air quality impacts are significant, but the air quality analysis for the Salton Sea is never compared to these criteria. (Vol-5:Tab-76:AR:4-06-435-27478/27485; Vol-3:Tab-51:AR3:CD10:101804_0690-101804_0691, 101804_0697-101804_0703.) “The EIR must contain facts and analysis, not just the bare conclusions of the agency.” (*Santiago Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 831.) This fundamental flaw prevented the public and decisionmakers from understanding how the project compares to the significance criteria. (*Id.* at 829-831.) Instead, the EIR/EIS summarily concludes that air quality impacts remain significant, even after mitigation.⁵⁸ (Vol-6:Tab-112:AR3:CD18:526901; Vol-3:Tab-51:AR3:CD10:101804_0077; Vol-7:Tab-136:AR3:CD14:400128_122.)

The *Berkeley Jets* Court rejected the idea that an assessment can be excused by simply declaring the impact significant, stating: “[t]his approach has the process exactly backward and allows the lead agency to travel the legally impermissible easy road to CEQA compliance...The EIR’s approach of simply labeling the effect ‘significant’ without accompanying analysis of the project’s impact on the health of the Airport’s employees and nearby residents is inadequate to meet the environmental assessment requirements of CEQA.” (*Berkeley Jets*, 91 Cal.App.4th at 1371.) The public must be informed of the severity of the impact. (*Id.*) Mere acknowledgment that the impact is significant is insufficient. (*Galante Vineyards*, 60 Cal.App.4th at 1123.) If it is

⁵⁸ The final EIR/EIS concluded air quality impacts from the exposed Salton Sea shoreline were significant and unavoidable after mitigation. (Vol-4:Tab-73:AR3:CD12:205016-205017; compare with different conclusion in draft EIR/EIS at Vol-3:Tab-51:AR3:CD10: 101804_0077 and text changes at Vol-4:Tab-73:AR3:CD12:205128-205129.)

reasonably possible to analyze the environmental consequences, the agency is required to perform that analysis. (*Citizens to Preserve the Ojai*, 176 Cal.App.3d at 432.)

Not only was the public misinformed, it was provided contradictory conclusions. Within minutes, the IID Board certified the PEIR, concluding the air quality impacts were reduced to a level of less than significant with mitigation,⁵⁹ and then certified the EIR/EIS that concluded the air quality impacts remain significant even after mitigation. (Vol-5:Tab-74:AR4-06-435-27234/27235, 27274, 27487; Vol-6:Tab-112:AR3:CD18:526901; Vol-4:Tab-73:AR3:CD12:205016; Vol-7:Tab-136:AR3:CD14:400128_122-400128_123.) The public cannot be considered informed when it is left guessing about which EIRs' conclusions were accurate.

c. The impacts to the Salton Sea were understated because project components were omitted from the analysis.

In addition to creating water for the transfer, additional conservation activities are considered in the EIR/EIS to create 59,000 afy of water to pay back past inadvertent overuse of Colorado River water (called the IOP in the project description⁶⁰) and in the PEIR and EIR/EIS to create mitigation water to be sent to the Salton Sea. (Vol-3:Tab-51:AR3:CD10: 101804_0698; 101804_0700; Vol-5:Tab-74:AR4-06-435-27423.) CEQA requires the impacts of these actions be analyzed. (CEQA Guidelines, § 15126.2.)

⁵⁹ In the uncirculated PEIR Addendum the air quality impacts were changed to significant. (Vol-7:Tab-137:AR3:CD14:400131_120-400131_121.)

⁶⁰ This method of paying back past overuse of Colorado River water conflicts with the PEIR. According to the PEIR overruns for Priorities 1 (PVID), 2 (Yuma Project), and 3b (CVWD) will be paid back by MWD and IID's water take from the Colorado River of 3.1 mafy would be reduced to payback past overuse per the IOP. (Vol-5:Tab-74:AR4-06-435-27217, 27295, 27302-27303, 27322, 27384.) The IOP is part of Project Component A in the PEIR that is not analyzed for environmental impacts. (Vol-5:Tab-74:AR4-06-435-27302/27303, 27382, 27416-27417, 27482.)

The analysis to determine the decrease in the Salton Sea's elevation and increase in salinity levels did not include these actions. (Vol-5:Tab-74:AR4-06-435-27229/27230; Vol-3:Tab-51:AR3:CD10:101804_0701, 101804_0320-101804_0321, 101804_0690; Vol-4:Tab-73:AR3:CD12:204905.) The October-2002 EIR/EIS confirms the June-2002 EIR/EIS certified by IID and used by SWRCB underestimated the amount of land that could be fallowed for the project – 90,300 acres instead of 84,800 acres – because project components were missing; thus, air quality impacts were underestimated. (Vol-3:Tab-51:AR3:CD10:101804_0074; Vol-5:Tab-92:AR3:CD13:301247.)

The omission of project elements hides important ramifications of the proposed project. (*Santiago County Water Dist.*, 118 Cal.App.3d at 829; *Laurel Heights*, 47 Cal.3d at 396.) Because of these key omissions, the public and decisionmakers were not fully informed and not able to consider the selection of less impactful alternatives to creating water for these purposes, such as using Colorado River water IID is entitled to,⁶¹ but does not divert for farmland irrigation.⁶²

d. There was no air toxics analysis or analysis of the impacts to human health.

Toxic chemicals exist in the upper foot of the Salton Sea sediment. (Vol-4:Tab-67:AR3:CD18:521338-521340; Vol-4:Tab-69:AR3:CD18:

⁶¹ Under the Seven Party Agreement IID is entitled to 3.85 mafy of water minus amounts used by Priorities 1 and 2 (3.38 mafy) and under the QSA project IID reduced its entitlement to 3.1 mafy minus the water transfers. (Vol-5:Tab-75:AR3:CD11:203221; Vol-3:Tab-51:AR3:CD10:101804_0117/_0120; Vol-7:Tab-136:AR3:CD14:400128_28.) If IID does not take all of the water it is entitled to the junior appropriator, MWD, claims it takes the water instead. (Vol-4:Tab-73:AR3:CD12:205443.)

⁶² Paying back overruns of Colorado River water by reducing water IID subsequently takes was the method DOI assumed would be used to payback overruns in its IA EIS. (Vol-5:Tab-75:AR3:CD11:203226-203227.)

522237-522241; Vol-2:Tab-36:AR3:CD23:713434-713435; Vol-2:Tab-26:AR3:CD22:707196-707200, 707205-707208.) When the Salton Sea shoreline sediments are exposed these toxics can become airborne. (Vol-4:Tab-64:AR3:CD17:520455.) The QSA and water transfers may cause this impact. (Vol-4:Tab-67:AR3:CD18:521338; Vol-4:Tab-69:AR3:CD18:522240; Vol-4:Tab-64:AR3:CD18:520455.)

Even though EPA objected to the lack of data and rigorous analysis of the potential to cause human health and environment impacts, rating the EIR/EIS insufficient, (Vol-5:Tab-74:AR4-06-435-27664, 27671/27674; Vol-4:Tab-73:AR3:CD12:205177-205180, 205191-205193, 205208), no attempt was made in the EIR/EIS and PEIR to analyze air toxics. (Vol-5:Tab-74:AR4-06-435-27481; Vol-4:Tab-73:AR3:CD12:204968_17/_20; Vol-4:Tab-73:AR3:CD12:205331.) The failure to perform an air toxics analysis prevented the public and decisionmakers from understanding the human health risks from inhaling toxic chemicals in the exposed shoreline (there are populated areas less than five miles from the shoreline) (Vol-4:Tab-62:AR3:CD17:518177; Vol-3:Tab-51:AR3:CD10:101894_0884/_0886, 101804_0612/_0616) and the effects of toxic laden sediments blowing over agricultural fields. (Vol-5:Tab-74:AR4-06-435-27478/27485; Vol-4:Tab-64:AR3:CD17:520455; Vol-4:Tab-62:AR3:CD17:518169-518170; Vol-4:Tab-71:AR3:CD18:522988-522989; Vol-4:Tab-67:AR3:CD18:521287, 521339; Vol-4:Tab-70:AR3:CD18:522489.)

As the court stated in *Bakersfield Citizens for Local Control*, 124 Cal.App.4th at 1219-1220, it is well known that air pollution adversely affects human respiratory health. Failing to correlate adverse air quality impacts to adverse health effects violates CEQA. (CEQA Guidelines, § 15126.2(a).) Thus, the Water Agencies failed to proceed in accordance with the law. (*Bakersfield Citizens for Local Control*, 124 Cal.App.4th at 1197-1198.)

e. There was no analysis of the impacts of the QSA and water transfers on the Salton Sea Restoration Project.

The reductions in inflows to the Salton Sea from the QSA and water transfers affect Salton Sea restoration feasibility. (Vol-6:Tab-113:AR3:CD18:526961-526962.) The lack of analysis of the project's impacts on Salton Sea restoration was the focus of vehement objections by the SWRCB and Salton Sea Authority. Both agencies expressed concerns that the project would significantly increase restoration costs (possibly until it is cost-prohibitive) and render restoration impossible. (Vol-4:Tab-61:AR3:CD17:517194-517197; Vol-3:Tab-58:AR3:CD17:517229; Vol-3:Tab-55:AR3:CD15:517372; Vol-4:Tab-63:AR3:CD23:517224; Vol-4:Tab-73:AR3:CD12:205212, 205261-205267, 205476, 205484, 205486, 205518-205519; Vol-5:Tab-84:AR3:CD11:200127; Vol-5:Tab-74:AR4-06-435-28129/28130; *see also* concerns by Department of Parks and Recreation, Vol-4:Tab-73:AR3:CD12:205336-205337, and the Colorado River Water Quality Board, Vol-4:Tab-165:AR2:CD8:34985-34987; Vol-3:Tab-56:AR2:CD3:08497-08498.)⁶³

SWRCB determined the project could foreclose the possibility of restoring the Salton Sea. (Vol-6:Tab-113:AR3:CD18:526962.) However,

⁶³ According to EPA: "We are concerned with the public review process for the environmental documentation for the QSA, Department of Interior's Implementation Agreement (IA) [CRWDA], which enables implementation of the QSA, and the IID/SDCWA water transfer. Although the IA, QSA, and IID/SDCWA water transfer are inextricably linked, the comment deadline dates are not related or in a logical sequence (i.e., programmatic to project-specific level of evaluation). Thus, it is difficult for the public, local, state and Federal entities to provide comprehensive comments on all three actions. In addition, other actions such as the Salton Sea Restoration Project and Coachella Valley Water Management Plan, which are directly relevant to the potential impacts of the QSA and IID/SDCWA water transfer and which can only be fully evaluated within the context of these projects, has not yet been released for public review." (Vol-4:Tab-73:AR3:CD12:205177.)

the Water Agencies summarily rejected these concerns in the PEIR and EIR/EIS claiming the Salton Sea restoration project was speculative and unfunded, and that any significant impacts would be mitigable in some undefined way. (Vol-5:Tab-74:AR4-06-435-27569, 27580; Vol-4:Tab-73:AR3:CD12:204998; Vol-2:Tab-35:AR4-03-130-12039/12047.) This omission was an unreasonably narrow interpretation of CEQA and an abuse of discretion. (*San Franciscans for Reasonable Growth v. City and County of San Francisco* (1984) 151 Cal.App.3d 61, 74; *City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438, 1452-1453.)

While claiming the asserted “speculative” nature of restoration prevented an impact analysis, ironically these same agencies used the prospect of a restoration plan to reduce IID’s obligation to send mitigation water to the Salton Sea. (Vol-6:Tab-113:AR3:CD18:526964-526968; *see also* Section IV.5.B.ii.c.) The impacts of the project on Salton Sea restoration was a key issue that had to be resolved before the Water Agencies would agree to the QSA. (Vol-7:Tab-132:AR4-08-1000-34903/34909.) Eventually, the project description was modified to provide funding, albeit wholly insufficient, for Salton Sea restoration. (Vol-7:Tab-137:AR3:CD14:400131_16/_29; Vol-6:Tab-99:AR3:CD3:32110_08-32110_25.) Yet, the Addenda prepared for the modified project still avoided disclosing the ugly truth that the project could very well ruin any opportunity for restoration. (*Id.*) The failure to analyze impacts to restoration prevents full disclosure of the project’s impacts. (*Santiago County Water Dist.*, 118 Cal.App.3d at 829.)

f. There was an improper conclusionary “analysis” of cumulative air quality impacts.

CEQA requires an EIR discuss the cumulative effect on the environment of the project in conjunction with other closely related past,

present and reasonably foreseeable probable future projects. (Pub. Res. Code, § 21083; CEQA Guidelines, §§ 15130, 15355.) Here, the entire cumulative air quality “analysis” in the EIR/EIS consisted of conclusionary statements that the incremental effect was not substantial. (Vol-3:Tab-51:AR3:CD10:101804_0948/_0950.) There was no basis for concluding in the PEIR that mitigation would reduce potentially significant cumulative impacts to less-than-significant. (Vol-5:Tab-74:AR4:-06-435-27597/27598.) Describing the projects in generalities and perfunctory references do not constitute an analysis useful to a decisionmaker in deciding whether, or how, to alter the program to lessen cumulative environmental impacts. (*Communities for a Better Environment*, 103 Cal.App.4th at 120.)

The SWRCB, its regional boards, and *Appellant DFG* agreed with the Air District that the cumulative impact analysis was inadequate. (Vol-5:Tab-74:AR4-06-435-27761, 28129; Vol-4:Tab-73:AR3:CD12:205308-205309.) The standards for a cumulative impact analysis were not met; thus, the Water Agencies did not proceed in accordance with the law. (*Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4th 859, 868-872.)

The PEIR⁶⁴ and EIR/EIS also declared no significant cumulative impact for air quality and water resources at the Salton Sea. (Vol-3:Tab-51:AR3:CD10:101804_0948-101804_0950; Vol-5:Tab-74:AR4-06-435-27596/27598.) Yet, in the EIR/EIS, the project is declared individually significant in these impact areas. (Vol-3:Tab-51:AR3:CD10:101804_

⁶⁴ The PEIR cumulative air quality impact section does not discuss the Salton Sea at all. (Vol-5:Tab-74:AR4-06-435-27597.) This is particularly egregious since the purpose of the PEIR was to evaluate the aggregate impacts of the water transfers, water exchanges, water conservation measures, and other changes identified in the QSA estimated to involve water transfers totaling 700,000 afy. (Vol-5:Tab-74:AR4-06-435-27216; Vol-4:Tab-73:AR3:CD12:205001; RJN:9:152.)

0077.) The failure to consider the incremental effects cumulatively significant where the project alone is significant has been soundly rejected in *Kings County Farm Bureau* (221 Cal.App.3d at 720), and *Los Angeles Unified School Dist.* (58 Cal.App.4th at 1025).

ii. *The “Project” Analyzed Was Not The “Project” That Was Selected.*

In addition to the water transfers, the project in the EIR/EIS included an HCP approved by DFG and FWS for the Salton Sea – which was both a part of the transfer project *and* a mitigation measure. (Vol-3:Tab-51:AR3:CD10:101804_0052, 101804_0077, 101804_0130-101804_0133, 101804_0136-101804_0137, 101804_1100-101804_1102.) The draft EIR/EIS included two possible HCP approaches: (1) establishment of a fish hatchery and habitat replacement; and, (2) providing additional water inflow to the Salton Sea equal to the entire project-related reduction in inflow to the Salton Sea for the duration of the project. (Vol-3:Tab-51:AR3:CD10:101804_0190-101804_0193.) A similar mitigation strategy, called “Mitigation Strategy-1 and -2” was included in the draft PEIR. (Vol-3:Tab-52:4-04-334-20254.)

In the draft EIR/EIS HCP approach-2 would avoid altogether significant air quality impacts at the Salton Sea and accordingly no exposed shoreline was identified. (Vol-3:Tab-51:AR3:CD10:101804_0077, 101804_0703.) The draft PEIR made a similar claim. (Vol-3:Tab-52:4-04-334-20322/20323.)

In the final EIR/EIS HCP approach-1 was eliminated and approach-2 modified and renamed the SSHCS. (Vol-4:Tab-73:AR3:CD12:204904-204905, 205057-205058.) Under the SSHCS, IID would send water to the Salton Sea until 2030 to replace inflows to the Sea for the entire project plus or minus water necessary to maintain the target salinity trajectory, that is, to assure the Sea does not reach 60 ppt until 2030. (Vol-4:Tab-

73:AR3:CD12:204937, 204959-204960.) IID would not have to discharge water to the Sea during years in which the Sea was at or above the elevation established by the hypothetical baseline and could cease delivering water before 2030 if a Salton Sea restoration project was implemented or if it could be demonstrated that tilapia (fish) were no longer successfully reproducing.⁶⁵ (Vol-4:Tab-73:AR3:CD12:204961.)

The final EIR/EIS concluded that providing mitigation water to the Salton Sea through the SSHCS until 2030 would result in the Sea's elevation not falling below the hypothetical baseline until 2035, and the 60 ppt salinity level not reached until 2030. (Vol-4:Tab-73:AR3:CD12:204905, 204962, 204968_15; Vol-5:Tab-88:AR3:CD18:523849, 523899-523900.) However, as a result of limiting the implementation of the SSHCS to 2030, now, after 2035, 16,000 acres of Salton Sea shoreline would be exposed and the salinity level would reach 136 ppt, compared to no impacts identified in the draft EIR/EIS. (Vol-4:Tab-73:AR3:CD12:204968_07; Vol-3:Tab-51:AR3:CD10:101804_0369.) The final EIR/EIS then concluded that several environmental impact areas would have *reduced* impacts because of the SSHCS implementation. (Vol-4:Tab-73:AR3:CD12:204907, 204912, 204962, 204964, 204968, 204968_07.) The mitigation measures were in turn based on an assumption that 16,000 acres is the expected amount of exposed shoreline at the Salton Sea after 2035 and reaching 60 ppt; an under estimation, as discussed below. (Vol-4:Tab-73:AR3:CD12:204959-204962, 204968_06-204968_07; *see* Table 1-1 in Section IV.5.A.iii.)

⁶⁵ There was no analysis of the implications to the air quality if the exceptions to the mitigation water obligation occurred, such as less water needed to maintain the Salton Sea's salinity trajectory or tilapia no longer successfully reproducing.

Unfortunately, the IID-certified June 2002 EIR/EIS did not analyze the SSHCS for alternatives 2 and 3. (Vol-5:Tab-92:AR3: CD13:301224.) The October 2002 EIR/EIS, which IID never considered, did. (*Id.*) As a result of this analysis, the determination of the environmentally superior alternative under CEQA changed from Alternative 2 in the June 2002 EIR/EIS to Alternative 3 in the October 2002 EIR/EIS, demonstrating that the omission of critical information meant the decisionmakers did not know which alternative caused the least impacts. (Vol-3:Tab-51:AR3:CD10:101804_0074; Vol-5:Tab-92:AR3:CD13:301237.)

Like the final EIR/EIS, Mitigation Strategy-1 was eliminated in the final PEIR. (Vol-5:Tab-74:4-06-435-27423.) Mitigation Strategy-2 in the final PEIR was not changed from the version in the draft as was done in the final EIR/EIS. (Vol-5:Tab-74:4-06-435-27423.) Rather, the final PEIR retained the original Mitigation Strategy-2 as a feasible measure.⁶⁶

The impact analysis and mitigation in the final EIR/EIS was determined based on three critical facts: (1) water for the transfer would be created by fallowing farmland only; (2) the project involved the non-QSA alternative of a 300,000 afy water transfer to San Diego only; and (3) implementation of the SSHCS would involve sending mitigation water to the Salton Sea until the year 2030 to offset the impacts of a 300,000 afy water transfer to San Diego. (Vol-5:Tab-74:AR3:CD12:204905, 204960-204961.) There was no analysis of Mitigation Strategy-2 in the PEIR, so the public and decisionmakers have no idea what was assumed. (Vol-5:Tab-74:4-06-435-27422/27423.)

The reliance on these facts was misplaced, as shown in Table 3 below, and resulted in underestimating impacts and mitigation needed. Thus, the EIR/EIS did not provide the public and decisionmakers with a

⁶⁶ This created yet another serious contradiction between EIRs certified by IID on the same day.

reasonable, good faith analysis and disclosure of the project’s environmental impacts. (CEQA Guidelines, § 15151; *Laurel Heights*, 47 Cal.3d at 392.) The reproduction of Table 1-1⁶⁷ from the final EIR/EIS (Vol-4:Tab-73:AR3:CD12:204905) shown in Table 3 below, with the project that was analyzed in the EIR/EIS highlighted in yellow, illustrates the fatal flaws:

Table 3

	<i>Without</i> Implementation of the Salton Sea Habitat Conservation Strategy			<i>With</i> Implementation of the Salton Sea Habitat Conservation Strategy		
	Elevation	Year 60 ppt Salinity Reached	Exposed Area	Elevation	Year 60 ppt Salinity Reached	Exposed Area
Projected Baseline	-235 msl (2077)	2023	0	N/A		
300 KAFY to San Diego (Assumes on-farm & water delivery system conservation measures)	-250 msl (2077)	2012	66,000 acres (projected baseline compared to project)	N/A ¹		
300 KAFY to San Diego (Assumes fallowing)	-241 msl (2077)	2017	32,000 acres (projected baseline compared to project)	-240 msl (2077)	2030	16,000 acres (projected baseline compared to project)

¹ “Implementation of the Salton Sea Habitat Conservation Strategy in concert with on-farm and system-based conservation measures is not currently considered to be practicable. These so-called efficiency conservation measures require a 1-to-1 ratio of mitigation water to the Sea. That is, for every acre-foot (AF) of water conserved for transfer, an AF would need to be provided to the Sea in order to meet the obligations of the Salton Sea Habitat Conservation Strategy. This mitigation water would be provided by additional fallowing or water from other sources. The combination of conservation required to produce 300 KAFY for transfer plus conservation by fallowing to produce the related amount of mitigation water to meet the obligations of the Salton Sea Habitat Conservation Strategy has not been assessed in this Draft EIR/EIS. It is noted, however, that the source of mitigation water to implement the Salton Sea Habitat Conservation Strategy is not

⁶⁷ This is the same table as Table 2 in Section IV.5.A.iii, but left uncorrected for the baseline.

limited to fallowing or other Colorado River water provided by IID. If IID elects to pursue implementation of efficiency conservation together with the Salton Sea Habitat Conservation Strategy, additional environmental analysis may be required, depending on the quantity and source of mitigation water. However, some combination of efficiency conservation measures and fallowing could be implemented with the Salton Sea Habitat Conservation Strategy although the amount of each that would be required to satisfy the Salton Sea Habitat Conservation Strategy has not been determined.” (Emphasis added.)

a. The false reliance on fallowing.

The method of creating conserved water affects the impacts at the Salton Sea because each conservation method affects the inflow to the Salton Sea differently and, thus, the amount of mitigation water that needs to be sent to the Salton Sea to offset the reduction in inflow. (Vol-4:Tab-73:AR3:CD12:204905, 204908.) As discussed below, the EIR/EIS analysis assumed fallowing as the conservation method, but this was not the project eventually selected.

Table 3 above is divided into “with” and “without” the implementation of the SSHCS. The two alternative scenarios in Table 3 under the “without” the SSHCS column were not selected because the project and mitigation included the SSHCS. Table 3 shows two alternative scenarios in the “with” the SSHCS column: 300,000 afy transfer to San Diego assuming water created by on-farm and water delivery system conservation measures and a 300,000 afy transfer to San Diego assuming water would be created by fallowing only.

The implementation of the SSHCS in concert with on-farm/delivery conservation (scenario 1) was not considered practicable due to the required 1-to-1 ratio of mitigation water and *rejected*. (Vol-4:Tab-73:AR3:CD12:204905.) Thus, the impact of this scenario was never analyzed having being declared “N/A or not applicable.” (See “N/A” and corresponding footnote 1 in Table 3; RJN:11(H):217-218.) According to the EIR/EIS “[i]f IID elects to pursue implementation of efficiency conservation together with the [SSHCS], additional environmental analysis

may be required, depending on the quantity and source of mitigation water.” (Vol-4:Tab-73:AR3:CD12:204905.)

The only remaining scenario, Scenario 2 with the SSHCS, could not be implemented because at the time of the EIR/EIS, the IID-SDCWA agreement and IID resolutions *prohibited* fallowing farmland to conserve water for transfer.⁶⁸ (Vol-3:Tab-51:AR3:CD10:101804_0062, 101804_0171-101804_0173; Vol-1:Tab-18:AR3:CD15:505519-505522, 505526-505531; Vol-1:Tab-14:AR3:CD1:11195.) Thus, the project description, impact analysis, and mitigation were based upon a project and HCP mitigation strategy that was legally prohibited. CEQA does not permit an analysis of the project’s impacts to be diluted by assuming unlawful or unapproved plans. (*County of Amador*, 76 Cal.App.4th at 949-951 [project analyzed under CEQA cannot be predicated on unadopted general plan].) In sum, there was no feasible or legal project described in the EIR/EIS.

The project eventually approved more than a year *after* IID certified the EIR/EIS and SWRCB approval provided that water for the transfers would be created by fallowing in the early years and by on-farm/delivery conservation in the later years.⁶⁹ (Vol-7:Tab-136:AR3:CD14:400128_16,

⁶⁸ The project did not include changing the prohibition against fallowing in the IID-SDCWA agreement or IID’s resolutions. It was not until after IID certified the EIR/EIS in June 2002 that it considered a fallowing plan. (Vol-5:Tab-89:AR3:CD7:71439-71441.)

⁶⁹ Imperial County urged SWRCB to hold off on its approval until a final project description was settled upon fearing a different project would be approved from that analyzed in the EIR/EIS. (Vol-6:Tab-113:AR3:CD18:526980.) Its concerns were rejected because according to SWRCB the “one flaw in Imperial County’s argument is that IID is not likely to change the project description to more specifically define the combination of conservation measures when it approves the project under CEQA.” (Vol-6:Tab-113:AR3:CD18:526980.) SWRCB then approved a water order for a project that had yet to be decided or approved by the lead agency. History has proven the County’s fears were justified and SWRCB’s reasoning erroneous.

400128_35; Vol-4:Tab-73:AR3:CD12:204905; *see* Table 3 above.) This combination of conservation methods instead of fallowing only would create more impacts because less water drains to the Salton Sea when water for the transfer is created by on-farm/delivery conservation methods than by fallowing.⁷⁰ (Vol-4:Tab-73:AR3:CD12:204905, 204908.)

The EIR/EIS analysis assumed implementation of the SSHCS (which was declared impracticable with on-farm/delivery conservation methods) and mitigation based on 16,000 acres of exposed shoreline instead of 66,000 acres that would occur with the on-farm/delivery conservation and without the SSHCS. (Vol-4:Tab-73:AR3:CD12:204905, 204907, 204968_07.) This conservation combination was not analyzed in the Addendum because it wrongly concluded no further analysis was required. (Vol-7:Tab-136:AR3:CD14:400128_37-400128_38; RJN:11(G):213-215; RJN:11(I):221.) IID had an affirmative duty to identify and describe the direct and indirect significant effects of its changed project; its failure to do so violates CEQA. (CEQA Guidelines, § 15126.2(a).)

The absence of an analysis and public process when the project was changed allowed the Water Agencies to forego the required one acre-foot of mitigation water for each acre-foot conserved the EIR/EIS declared was necessary when on-farm/delivery conservation was used. (Table 1-1; Vol-4:Tab-73:AR3:CD12:204905.) Instead, the changes to the project described in the Addendum further reduced inflow to the Salton Sea over the project described in the EIR/EIS, and the amount of mitigation water to

⁷⁰ IID's assertion that the mere fact the analysis was based on transferring 300,000 af of water out of the Salton Sea basin constitutes a "worst case" scenario is wrong. According to the EIR/EIS, "[Salton Sea] [e]levation decline is driven first by the method of conservation and secondly by the amount of conservation. Alternatives that utilize fallowing have the least impact on elevation." (Vol-4:Tab-73:AR3:CD12:204908.) As discussed in Section IV.5.B.ii., the EIR/EIS assumes fallowing instead of these more impact-causing on-farm/delivery conservation methods.

be sent to the Salton Sea was actually decreased by the “refined” SSHCS, instead of increased to account for the reduced inflow. (Vol-7:Tab-136:AR3:CD14:400128_16, 400128_38.)

b. The false reliance on a non-QSA project.

The analysis shown in Table 3, *supra*, also assumes under both scenarios that the project is the water transfer of 300,000 afy to San Diego only without the QSA.⁷¹ However, this was not the project eventually approved.⁷² In the uncirculated Addendum, the project was changed to provide for the water transfer under the QSA. (Vol-7:Tab-136:AR3:CD14:400128_18.) Under the QSA, the water transfer to SDCWA was reduced from 300,000 afy to 200,000 afy, and 100,000 afy was provided to CVWD and/or MWD instead. (Vol-7:Tab-136:AR3:CD14:400128_28-400128_35.) In addition, the new project included an increased water transfer of 1.6 million af of water and sale of the Salton Sea mitigation water to MWD through the IID-DWR-MWD Contracts discussed in Section III.4.A.i.

The EIR/EIS admitted that a project level analysis of sending water to CVWD was not performed; rather, the analysis was expected to be described in a future program EIR prepared by CVWD for its Coachella Valley Water Management Plan. (Vol-4:Tab-73:AR3:CD12:204936, 205003.) CEQA review cannot be postponed by deferring the analysis to another EIR or inserting conditions in a contract for CEQA compliance. (*City of Santee*, 214 Cal.App.3d at 1452-1453; *Communities for a Better*

⁷¹ This was the same EIR/EIS relied upon by the SWRCB which approved a water transfer different from that analyzed of 200,000 afy to SDCWA and 100,000 afy to CVWD and MWD. (Vol-6:Tab-113:AR3:18:526977.)

⁷² CVWD informed IID right before it released the draft EIR/EIS that the scenario for a transfer to SDCWA absent the QSA was in violation of its contract with the Secretary. (RJN:11(C):200-202.)

Environment, 184 Cal.App.4th at 85-89; *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 132-139; *Vineyard*, 40 Cal.4th 412, 440.) The failure to analyze the QSA scenario that included transfers to CVWD and MWD resulted in significant effects that were not clearly identified and described, thereby depriving the public and decisionmakers of knowing the full project impacts. (CEQA Guidelines, § 15126.2(a.) *CVWD agreed.* (RJN:11(C):200-202.)

Without analysis, the EIR/EIS stated that if CVWD used Colorado River water for agricultural uses in-flows to the Salton Sea would increase. (Vol-4:Tab-73:AR3:CD12:204937.) If, however, CVWD used Colorado River water to recharge its aquifer, little if any water would be observed at the Salton Sea for approximately 25 years. (*Id.*) CVWD elected the latter course under the QSA and is using the Colorado River water IID transfers to it for aquifer recharge and watering golf courses in Coachella Valley (that appears to be located outside the District 1 area where Colorado River water can be used) and not for agricultural purposes where it could flow to the Salton Sea. (RJN:8:143-150.) In complete disregard to the EIR/EIS, the Addendum adopts a conflicting position claiming that the reason for not offsetting water transfers to CVWD is because up to one-third or 80,000 afy transferred to CVWD may return as drainage water to the Salton Sea offsetting inflow reductions. (Vol-7:Tab-136:AR3:CD14:400128_16.) The PEIR made a similar claim. (Vol-7:Tab-137:AR3:CD14:400131_20.)

As to MWD, despite the fact the project included QSA contracts allowing for IID to transfer water to MWD (Vol-8:Tab-169:AR3:CD1:10357-10358, 10367), a transfer to MWD was not analyzed in the EIR/EIS and the Addendum concluded that if MWD acquired water, it would be subject to a subsequent environmental analysis. (Vol-7:Tab-136:AR3:CD14:400128_16, 400128_35.) Deferring an analysis to a future environmental document violates CEQA. (*Vineyard*, 40 Cal.4th at 440-

441.) IID further admitted that before water could be transferred to MWD, unspecified mitigation would be required. (IID AOB, p. 41.) Deferred mitigation also violates CEQA. (*Communities for a Better Environment*, 84 Cal.App.4th at 91-96.)

The water delivery schedule for the transfers was also adjusted *after* the EIR/EIS and PEIR were certified such that less water was conserved and transferred when an obligation exists to send mitigation water to the Salton Sea, and the amount of water transferred increased when there was no obligation to send mitigation water to the Salton Sea. (Vol-7:Tab-136:AR3:CD14:400128_19, 400128_23.) As a result, impacts would be more severe than described in the EIR/EIS and PEIR. The fundamental purpose of providing the public and decisionmakers with detailed information about a project's effect on the environment is defeated when the EIR/EIS does not adequately identify and analyze them. (*San Joaquin Raptor Rescue Center*, 149 Cal.App.4th at 660; Pub. Res. Code, § 21100(b); CEQA Guidelines, § 15126.2(a).)

c. *The False Reliance on the SSHCS.*

The SWRCB relied upon the EIR/EIS that determined sending mitigation water to the Salton Sea until the year 2030 was a feasible project component and mitigation measure. (Vol-4:Tab-73:AR3:CD12:204962; Vol-6:Tab-113:AR3:CD18:526962-526964, 526977.) The SWRCB unilaterally reduced the requirement in the EIR/EIS that mitigation water be sent to the Salton Sea for 28 years (until 2030) to 15-years. (Vol-6:Tab-113:AR3:CD18:526964-526968.) The SWRCB failed to analyze this change in violation of CEQA.⁷³ (CEQA Guidelines, § 15126.2(a); *San Joaquin Raptor Rescue Center*, 149 Cal.App.4th at 660.)

⁷³ This may explain why the State, CVWD, MWD, and SDCWA *denied* in their answers to the validation complaint that the SWRCB's approval was conditioned upon extensive environmental mitigation. (AA:5:3:1092;

The uncirculated Addendum abandoned the version of the SSHCS in the Final EIR/EIS that was relied upon by the SWRCB. (Vol-6:Tab-113:AR3:CD18:526945.) Instead of sending an amount of water to the Salton Sea that would replace inflows to the Sea for a 300,000 afy transfer plus or minus water necessary to maintain the target salinity trajectory until 2030 as set forth in the final EIR/EIS, the Addendum replaced this obligation with a “refined” SSHCS that was simply a water delivery schedule now specifying a lesser amount of water (to ostensibly offset the transfer to SDCWA and not to CVWD and MWD) to be sent to the Salton Sea until 2018.⁷⁴ (Vol-7:Tab-136:AR3:CD14:400128_16, 400128_35.) There was no analysis to show that the water delivery schedule equated to offsetting the reductions in inflow to the Salton Sea as set forth in the SSHCS in violation of CEQA.⁷⁵ (CEQA Guidelines, § 15126.2(a); *San Joaquin Raptor Rescue Center*, 149 Cal.App.4th at 660.)

AA:6:22:1331; AA:6:21:1310; AA:6:24:1350.)

⁷⁴ In fact, the SSHCS was “refined” out of existence. The purpose of the SSHCS was to serve as an HCP to support incidental take permits issued under the state and federal Endangered Species Acts. (Vol-7:Tab-136:AR3:CD14:400128_25.) Before IID certified the EIR/EIS it became apparent that FWS may not be able to approve an HCP. Impacts would be more severe without an HCP, which BOR believed was not adequately disclosed in the EIR/EIS. Thus, BOR required the October 2002 EIR/EIS to analyze these undisclosed impacts. (RJN:11(A):188.) The October 2002 EIR/EIS was not publicly distributed or considered by SWRCB before it issued the Water Order or ever certified by IID. In the Addendum the SSHCS defined in the EIR/EIS (Vol-3:Tab-51:AR3:CD10:101804_1244-101804_1282) was reduced to a water delivery schedule (Vol-7:Tab-136:AR3:CD14: 400128_35) and the commitment to prepare a HCP was reduced to a mere promise to try and do so in the future (Vol-7:Tab-136:AR3:CD14: 400128_25-400128_26).

⁷⁵ The EIR/EIS Addendum incorrectly claims the impact of this change was within the range of impacts (-240 msl to -250 msl) analyzed in the EIR/EIS. (Vol-7:Tab-136:AR3:CD14:400128_38; BOR’s comments: RJN:11(E): 208-210; RJN:11(F):211-212; RJN:11(I): 220-221.) As EIR/EIS Table 1-1 shows (Vol-4:Tab-73:AR3:CD12: 204905), the -250 msl elevation for the

The negative environmental effect of the “refined” SSHCS water delivery schedule set forth in the Addendum was staggering. The project in the EIR/EIS with the “unrefined” SSHCS was predicted to lower the Salton Sea’s elevation to -240 msl and reduce the salinity level to 60 ppt in 2030. (See Table 1-1 above.) The revised project and “refined” SSHCS in the Addendum was predicted to lower the Salton Sea’s elevation to -247 msl – a 7 foot drop in elevation – and reach a salinity level of 60 ppt in 2019 – 11 years earlier.⁷⁶ (Vol-7:Tab-136:AR3:CD14:400128_38.)

Mitigation Strategy-2 (now called Mitigation Strategy-2a) was also “refined” in the PEIR Addendum, but in a manner different from the SSHCS in the EIR/EIS Addendum. Under Mitigation Strategy-2a water conserved by fallowing would be created at a ratio of 1/2 unit of “make-up” water for each unit of water exported for the first 15-years of the project.

Salton Sea and 2030 year for reaching 60 ppt was associated with a 300,000 afa water transfer to San Diego assuming on-farm and water delivery system conservation measures (not fallowing) and *without* implementation of the SSHCS. The resulting 66,000 acres of exposed shoreline resulting from a -250 msl elevation and 2012 year of reaching 60 ppt was not used in the impact analysis or to determine appropriate mitigation; rather 16,000 acres was used and the year 2030 for reaching 60 ppt. (Vol-4:Tab-73:AR3:CD12:204905, 204937, 204959-204960, 204968_06-204968_07.)

⁷⁶ An additional seven foot drop in the Salton Sea’s elevation could result in another 16,000 acres of exposed shoreline that is not addressed in an impact analysis or mitigation measures. (See Section IV.5.A.iii.) Further, the EIR/EIS relied upon the SSCHS to reduce the severity of the air quality impacts. (Vol-4:Tab-73:AR3:CD12:204904-204907, 204962.) The changes in elevation and salinity also affect biological resources. According to the EIR/EIS, elevation reductions affect wetlands and shoreline strand, and increases in salinity reduce fish resources and affect birds, impact nesting/roosting sites and habitat. (Vol-3:Tab-51:AR3:CD10:101804_0389-101804_0392, 101804_0514-101804_0537.) Many of these biological impacts also relied upon the implementation of the SSHCS to reduce the impacts to less than significant. (Vol-3:Tab-51:AR3:CD10:101804_0389-101804_0392.) Yet, the Addendum ignores the potential impacts claiming without analysis no impact or impacts less than significant. (Vol-7:Tab-136:AR3:CD14: 400128_57-400128_61.)

(Vol-7:Tab-137:AR3:CD14:400131_19-400131_20.) Water transferred to CVWD would be excluded, but not water transferred to SDCWA and MWD (because water sent to MWD would be exported out of the Salton Sea watershed). (Vol-7:Tab-137:AR3:CD14:400131_20.) The data in the Addendum for the PEIR shows that the implementation of Mitigation Strategy-2a would result in more severe environmental impacts. (Vol-7:Tab-137:AR3:CD14:400131_23-400131_24.) Table 1.7-1 from the PEIR Addendum (Vol-7:Tab-137:AR3:CD14:400131_24), reproduced below in Table 4, summarizes the impacts. CEQA prohibits an addendum when the impacts would be more severe. (Pub. Res. Code, § 21166; CEQA Guidelines, §§ 15153(d), 15162.)

Table 4
Comparison of Salton Sea Impacts

Implementation year	ELEVATION (FEET MSL)				SALINITY (MG/L)			
	<i>Proposed Project</i>	<i>Changed Project</i>	<i>Mitigation Strategy 2</i>	<i>Mitigation Strategy 2A</i>	<i>Proposed Project</i>	<i>Changed Project</i>	<i>Mitigation Strategy 2</i>	<i>Mitigation Strategy 2A</i>
15	-239.2	-235.6	-231.9	-231.9	75.2	61.4	56.4	57.2
75	-249.8	-249.6	-235.3	-247.5	162.3	147.6	86.4	143.3

Table 4 shows that the effect of changing from Mitigation Strategy-2 to Mitigation Strategy-2a would lower the Salton Sea’s elevation to -247.5 msl – a 12.2 foot drop in elevation from Mitigation Strategy-2 – and reach a salinity level of 143.3 ppt instead of the 86.4 predicted if Mitigation Strategy-2 was retained. (Vol-7:Tab-137:AR3:CD14:400131_24.) Further, it is expected that implementing Mitigation Strategy-2a would accelerate the increase in salinity to 60 ppt by four years in comparison to Mitigation Strategy-2. (Vol-7:Tab-137:AR3:CD14:400131_24.) Again, there are serious discrepancies in the impacts analysis in the PEIR and EIR/EIS, both approved by IID on the same day, within minutes. The PEIR Addendum

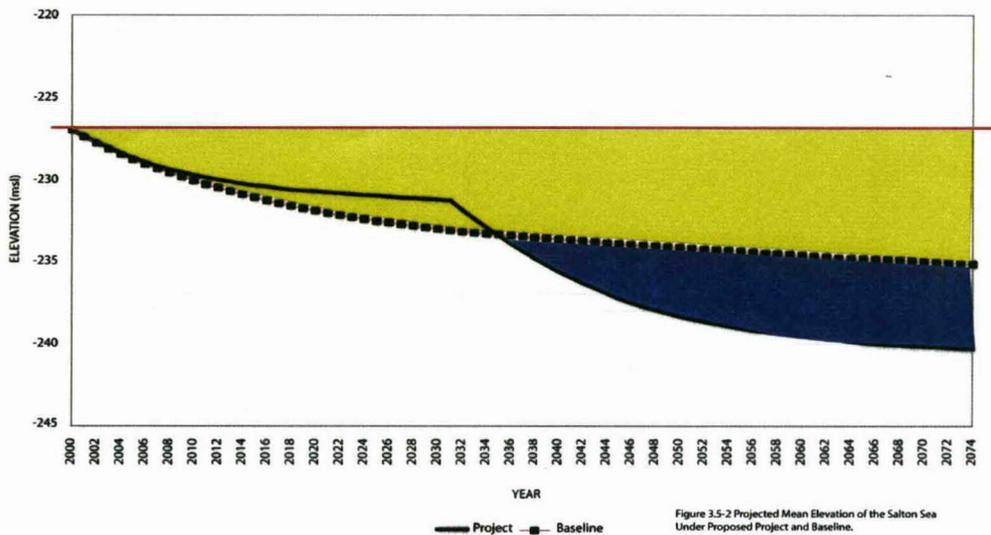
disregards the results in Table 1.7-1, wrongfully concluding the changes have no impact. (Vol-7:Tab-137:AR3:CD14:400131_24-400131_29.)

iii. Mitigation was Insufficient Having Been Based on Underestimated Impacts.

“Mitigation Strategy-2” (in the PEIR) and SSHCS (in the EIR/EIS) are likewise flawed for their reliance on the faulty baseline. (Vol-5:Tab-74:AR4-06-435-27423; Vol-3:Tab-73:AR3:CD12:204959-204962.⁷⁷) These measures are applied to mitigate several resources, including:

- 1) biology (Vol-5:Tab-74:AR4-06-435-27423; Vol-4:Tab-73:AR3:CD12:205011);
- 2) recreation (Vol-5:Tab-74:AR4-06-435-27472; Vol-4:Tab-73:AR3:CD12:205011-205014);
- 3) air quality (Vol-5:Tab-74:AR4-06-435-27487; Vol-4:Tab-73:AR3:CD12:205015); and,
- 4) aesthetics (Vol-5:Tab-74:AR4-06-435-27525; Vol-4:Tab-73:AR3:CD12:205024).

Diagram 6



⁷⁷ Mitigation Strategy-2 in the PEIR was for the 75-year duration of the project (Vol-5:Tab-74:AR:4-06-435-27423, 27741-27744) like the HCP2 in the draft EIR/EIS (Vol-4:Tab-73:AR:3:CD12:204960-204962).

Under Mitigation Strategy-2/SSHCS water would be sent to the Salton Sea to maintain elevation and salinity on the hypothetical baseline trajectory.⁷⁸ (Vol-5:Tab-74:AR4-06-435-27423, 27741-27744; Vol-4:Tab-73:AR3:CD12:204904, 204959-204962.) As shown in Diagram 6 (Vol-6:Tab-113:AR3:CD18:526964; Vol-4:Tab-73:AR3:CD12: 204961), water would be sent to the Salton Sea to make up the difference between the project (bold line) and the hypothetical baseline (dashed line) shown in blue. The red line is the proper existing baseline. The yellow area represents the total impacts that are not mitigated by Mitigation Strategy-2. If the true impacts had been identified, then a strategy that purports to fully mitigate the project's impacts, as Mitigation Strategy-2 does, would have included sending enough water to the Salton Sea to make up the difference between the project (bold line) and the existing setting (red line).

iv. The Impacts of the QSA Contracts Involving DWR were Not Analyzed in the EIR/EIS or PEIR Addenda.

The “project” in the EIR/EIS and PEIR Addenda was expanded to include two additional transfers by IID of 800,000 af increments of conserved water (a total of 1.6 million af) to DWR for MWD to purchase. (Vol-9:Tab-177:AR3:CD1:10893-10912; Vol-9:Tab-176:AR3:CD1:10080-10091; Vol-7:Tab-136:AR3: CD14:400128_22-400128_24; Vol-8:Tab-155:AR3:CD2:20072; Vol-7: Tab-137:AR3:CD14:400131_16-400131_17.) The first 800,000 af increment is referred to as “(c)(1) water” and the second 800,000 af increment is referred to as “(c)(2) water” for Fish and Game Code section 2081.7 that discusses this water.

⁷⁸ This strategy was later modified in the uncirculated PEIR and EIR/EIS Addenda. (Vol-7:Tab-137:AR3:CD14:400131_19-400131_20; Vol-7:Tab-136:AR3:CD14:400128_16-400128_18.) But, revised Mitigation Strategy-2A/SSHCS were still based on the defective hypothetical baseline.

Importantly, the (c)(2) water was the mitigation water that IID was obligated under the Water Order, EIR/EIS, PEIR, and Addenda to deliver to the Salton Sea. (Vol-7:Tab-136:AR3:CD14:400128_22; Vol-7:Tab-137:AR3:CD14:400131_16-400131_17.) This change to the project allows IID to instead sell the Salton Sea's mitigation water to DWR for re-sale to MWD, thereby undermining the environmental impact analysis and eliminating mitigation of Salton Sea impacts. (Vol-7:Tab-136:AR3:CD14:400128_22; Vol-7:Tab-137:AR3:CD14:400131_16/_17.) DWR thus became a willing partner in a project that would cause damage to the Salton Sea, contradicting its commitment to the U.S. House of Representatives that it would "not approve an action that further jeopardizes the Sea's already fragile ecosystem." (Vol-5:Tab-77:AR2:CD6:27946.)

There was no analysis in the Addenda of this changed project because according to the Addenda the use of the (c)(2) water mitigation water in a manner inconsistent with the refined SSHCS and Mitigation Strategy-2a was "speculative" and "not feasible." (Vol-7:Tab-136:AR3:CD14:400128_22; Vol-7:Tab-137:AR3:CD14:400131_17-400131_18.) IID admits this on pages 21-22 of its opening brief. Yet, this so-called speculative and infeasible use of mitigation water was made a contractual legal obligation in the QSA and a part of the project in the EIR/EIS and PEIR. (Vol-9:Tab-177:AR3:CD1:10893-10912; Vol-9:Tab-176:AR3:CD1:10080-10091; Vol-7:Tab-136:AR3:CD14:400128_18/_24; Vol-7:Tab-137:AR3:CD14:400131_16/_19.) The Addenda made the same claim about the (c)(1) water. (Vol-7:Tab-136:AR3:CD14:400128_24; Vol-7:Tab-137:AR3:CD14:400131_18.)

The Addenda and QSA promised an assessment of the impacts would be completed sometime in the future. (Vol-7:Tab-136:AR3:CD14:400128_22-400128_24; Vol-7:Tab-137:AR3:CD14:400131_17-400131_18; Vol-9:Tab-177:AR3:CD1:10896; Vol-9:Tab-176:AR3:

CD1:10082-10084.) Deferring an analysis to a future environmental document is legally improper under CEQA. (*Vineyard*, 40 Cal.4th at 440-441; *Communities for a Better Environment*, 184 Cal.App.4th at 85-89; *Los Angeles Unified School Dist.*, 58 Cal.App.4th at 1030.) The conditions in the QSA requiring a future analysis does not constitute CEQA compliance. (*Save Tara*, 45 Cal.4th at 132-139.)

C. **The EIR/EIS and PEIR Failed To Include Adequate Mitigation.**

An EIR/EIS must propose feasible mitigation measures to minimize the significant environmental effects. (Pub. Res. Code, § 21100(b)(3); CEQA Guidelines, § 15126.440.) Agencies must adopt all feasible mitigation measures to reduce or avoid significant environmental impacts. (Pub. Res. Code, §§ 21002, 21081(a), 21002.1(a).) The EIR/EIS and PEIR failed to comply with these statutory mandates.

i. ***The Successive Reductions in the Obligation to Send Mitigation Water to the Salton Sea Violated CEQA.***

CEQA prohibits an agency from deleting mitigation without showing it is infeasible, and the decision must be supported by substantial evidence. In *Lincoln Place Tenants Ass'n*, 130 Cal.App.4th at 1508-1509, the court stated:

‘[w]hen an earlier adopted mitigation measure has been deleted, the deference to governing bodies with respect to land use planning decisions must be tempered by the presumption that the governing body adopted the mitigation measure in the first place only after due investigation and consideration. We therefore hold that a governing body must state a legitimate reason for deleting an earlier adopted mitigation measure, and must support that statement of reason with substantial evidence. If no legitimate reason for the deletion has been stated, or if the evidence does not support the governing body’s finding, the land use plan, as modified by the deletion or deletions, is invalid and cannot be

enforced.’ The court further held a previously adopted mitigation measure cannot be deleted ‘without a showing that it is infeasible.’

The draft EIR/EIS identified one measure to mitigate air quality impacts resulting from the exposed shoreline at the Salton Sea. (Vol-3:Tab-51:AR3:CD10:101804_0703.) HCP approach-2 (referred to as SSHCS in the final EIR/EIS), required water inflow to the Salton Sea to be maintained equal to the rate of the hypothetical baseline for the project’s 75-year duration. (*Id.*) In the final EIR/EIS, the amount of mitigation was reduced and limited to 30-years in the renamed SSHCS, resulting in the exposure of 16,000 acres of new shoreline after the year 2035. (Vol-4:Tab-73:AR3:CD12:204905, 204962; *see* Section IV.5.B.ii.)

After the final EIR/EIS was certified, the Water Agencies privately evaluated other alternatives for mitigating Salton Sea impacts, thereby eviscerating CEQA’s public process principles. (Vol-5:Tab-90:AR2:CD3:08899-08911.) The privately negotiated agreement that was reached reduced the obligation to send mitigation water to the Salton Sea to 15-years, causing more severe impacts than disclosed in the EIR/EIS and, according to BOR, would “almost certainly require recirculation” of the EIR/EIS. (RJN:11(E):209-210.)

SWRCB adopted the SSHCS with the 15-year mitigation water obligation when it approved the Water Order even though IID’s EIR/EIS it relied upon was based on the 30-year version of the SSHCS. (Section IV.5.A.ii.) SWRCB never analyzed, let alone made the finding required by *Lincoln Place Tenants Ass’n* that the original 30-year Salton Sea mitigation water measure in the EIR/EIS it relied upon was infeasible. In fact, mitigating impacts of water diversions on lakes by maintaining elevation levels was a feasible mitigation measure previously adopted by SWRCB for Mono Lake. (Vol-4:Tab-64:AR3:CD17:520449; Vol-1:Tab-7:AR17:CD3:

520459-520480.) EPA strenuously objected to the adverse impacts caused by this change and that the 15-year plan did not undergo any public review. (AR3:CD11:200190-200194.)

In the EIR/EIS Addendum, the SSHCS was replaced with a water delivery schedule that further reduced the amount of mitigation water sent to the Salton Sea and removed the obligation to timely complete the SSHCS as an HCP to support the issuance of incidental take permits by FWS and DFG.⁷⁹ (Section IV.5.A.ii.c.) The effect of these changes resulted in an additional 7 foot drop in the Salton Sea's elevation and reaching a salinity level of 60 ppt 11 years earlier. (Section IV.5.A.ii.c.) As previously discussed, the project was also modified to allow for the sale of the Salton Sea's mitigation water to DWR and then MWD so that no mitigation water may be sent to the Salton Sea. (Section IV.5.B.iv.) IID never analyzed the impacts of these changes or made the finding required by *Lincoln Place Tenants Ass'n* that the original Salton Sea mitigation water measure in the final EIR/EIS was infeasible.

As discussed in Section IV.5.B.ii., the draft PEIR included a similar mitigation measure, Mitigation Strategy-2, which required sending water to the Salton Sea to offset reductions in inflow as a result of the project to maintain salinity and elevation changes on the baseline trajectory. (Vol-3:Tab-52:AR4-04-334-20254.) Unlike the SSHCS in the EIR/EIS, Mitigation Strategy-2 was not reduced in scope in the final PEIR. (Vol-5:Tab-74:AR4-04-435-27423.) Thus, literally *minutes* after IID certified the more robust version of the Salton Sea mitigation water measure in the final PEIR, IID certified the reduced version in the final EIR/EIS. Yet, IID never made any finding as required by *Lincoln Place Tenants Ass'n* that the

⁷⁹ Seven years later, the HCP has never been completed and neither DFG nor FWS has demanded its completion.

Salton Sea mitigation water measure it adopted in the PEIR was infeasible before it adopted the EIR/EIS or explain the discrepancy.

Mitigation Strategy-2 was “refined” in the PEIR Addendum, but differently from the SSHCS in the EIR/EIS Addendum that were again adopted within minutes of one another. (Section IV.5.B.ii.a.) Now called Mitigation Strategy-2a, the amount of mitigation water to the Salton Sea was significantly reduced. (Vol-7:Tab-137:AR3:CD14: 400131_19-400131_20.) Unlike the water delivery schedule in the EIR/EIS Addendum, this measure called for the amount of mitigation water sent to the Salton Sea water to be based on method of conservation. If water was conserved by fallowing then the mitigation water sent to the Salton Sea would be at a ratio of one-half unit of water for each unit of water exported. (Vol-7:Tab-137:AR3:CD14:400131_20.) For water conserved by on-farm/delivery conservation, the mitigation water sent to the Salton Sea would be equal to the amount of water conserved. (*Id.*)

The effect of these changes in the PEIR Addendum resulted in an additional 12.2 foot drop in the Salton Sea’s elevation and a higher salinity level of 143.3 ppt. instead of 86.4 ppt. (Section IV.5.B.ii.c.) The project was also modified to allow for the Salton Sea’s mitigation water to be sold under the IID-DWR-MWD Contracts. (Section IV.5.B.iv.) The Water Agencies never analyzed, let alone made any finding as required by *Lincoln Place Tenants Ass’n* that the Salton Sea mitigation water measure they adopted in the final EIR was infeasible.

CEQA requires “[e]ach public agency [to] mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so.” (Pub. Res. Code, § 21002.1(b).) Without demonstrating that the original and predecessor versions of the SSHCS and Mitigation Strategy-2a were infeasible, findings that all feasible mitigation measures that would substantially lessen the significant

environmental effects of the project were adopted could not be made. (Pub. Res. Code, §§ 21002, 21081.)

ii. The 4-Step Mitigation Plan in the Environmental Documents Did Not Comply with CEQA.

A new mitigation measure, AQ-7 (i.e., the 4-Step Plan), was added to the final EIR/EIS. (Vol-4:Tab-73:AR3:CD12:205016-205017.) This measure was not included in the draft EIR/EIS. An abbreviated version of the 4-Step Plan from the EIR/EIS was added for the first time to the PEIR Addendum. (Vol-7:Tab-137:CD14:400131_21.)

The 4-Step Plan was simply a “wish list”.⁸⁰ For example, under Step-1, access to the exposed shoreline would be limited to prevent disturbances to the extent legally and practicably feasible by installing fencing and posting notices. (Vol-4:Tab-73:AR3:CD12:204968_05.) But, there was no assessment of whether these obstacles would render this measure infeasible and whether fencing and posting notices would be effective in deterring unwanted access. The efficacy of mitigation must be considered so its viability can be assured. (*Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1116-1119.)

Step-2 called for the development of an undefined research and monitoring program as the Sea recedes to define the potential for future problems. If potential problems were identified, then more studies would be conducted to identify potential dust control measures. (Vol-4:Tab-73:AR3:CD12:204968_05.) Merely studying a problem is not consistent with CEQA’s goal to mitigate or avoid environmental harm. (*Laurel Heights*, 47 Cal.3d at 402.) Mitigation must be specifically described and not left for future formulation, like in Step-2. (CEQA Guidelines, § 15126.4(a))

⁸⁰ IID admits mitigation requirements were not fixed and subject to change. (IID AOB, p. 43.) This amorphous approach violates CEQA’s mandates of disclosure, certainty, and enforceability.

(1)(B); *Vineyard*, 40 Cal.4th at 442-445; *Gray*, 167 Cal.App.4th at 1119-1120.) This measure must include definitive triggers to actual mitigation.

Under Step-3, the Water Agencies would negotiate with the Air District and SCAQMD to develop an air pollution credit trading program to generate PM10 ERCs that could be purchased in lieu of reducing emissions at the Salton Sea. (Vol-4:Tab-73:AR3:CD12:204968_05-204968_06; Vol-5:Tab-88:AR3:CD18:523895; Vol-7:Tab-136:AR3:CD14:400128_56, 400128_122-400128_123, 400128_171; Vol-7:Tab-137:AR3:CD14:400131_21, 400131_62, 400131_121, 400131_185.) Yet, the Air District and SCAQMD never agreed to adopt this ERC Rule. Rather, it was simply assumed that the same air districts that sued the SWRCB, IID and SDCWA over the inadequacy of the EIR/EIS would nevertheless agree to adopt an ERC Rule based on this same flawed EIR/EIS. CEQA is not satisfied by an EIR/EIS that “assumes a solution” to a problem or relies on future negotiations. (*Vineyard*, 40 Cal.4th at 430-431.) Without an agreement, the Water Agencies could not make the required finding that another public agency would adopt Step-3. (Pub. Res. Code, § 21081(a)(2).)

The Air District believes the ERC Rule was inappropriate because its feasibility was not even tangentially evaluated. There was no analysis to determine whether it was even possible to create enough “excess” PM10 emissions to offset emissions at the Salton Sea. (*Gray*, 167 Cal.App.4th at 1116-1119.) There was also no consideration of the resulting environmental and socio-economic impacts if available offsets required for new and expanding businesses were instead assigned to the Salton Sea, or the implications of not mitigating toxic laden sediment at the Salton Sea. (*Citizens for Quality Growth v. City of Mount Shasta* (1988) 198 Cal.App.3d 433, 446; CEQA Guidelines, §§ 15064(e), 15126.2(d).) Further, all offsets must be “real,” “quantifiable,” “permanent,” “enforceable” and “surplus,” which the Water Agencies’ claimed was

impossible. (42 U.S.C. § 7503(a); *Cal. Unions for Reliable Energy v. Mojave Desert Air Quality Mgmt. Dist.* (2009) 178 Cal.App.4th 1225, 1233; 42 U.S.C. § 7410(a)(2)(A); Vol-4:Tab-73:AR3:CD12:204968_01.)

Step-4 called for future development of a *plan* for reducing fugitive dust at the Salton Sea. (Vol-4:Tab-73:AR3:CD12:204968_06.) Mitigation must be described specifically and not left for future formulation as was done in Step-4. (CEQA Guidelines, § 15126.4(a)(1)(B); *Communities for a Better Environment*, 184 Cal.App.4th at 91-96.) Merely committing to a mitigation goal of remedying the impacts and listing various mitigation alternatives is not sufficient. (*Gray*, 167 Cal.App.4th at 1119-1120.)

The required specific performance standards and list of mitigation alternatives that can remedy the environmental problem were missing from Step-4. (*Id.*) An agency cannot base its analysis on the presumed success of mitigation measures that have not been formulated at the time of project approval. (*Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 306-309.) This measure could have been developed. Others (including the same consultants preparing the EIR/EIS) had experience mitigating similar impacts at Mono Lake and Owens Lake. (Vol-1:Tab-12:AR2:CD7:32836-32893; Vol-4:Tab-64:AR3:CD17:520449-520457; Vol-1:Tab-21:AR2:CD7:32917-32940; Vol-4:Tab-70:AR3:CD18:522493-522495.)

iii. The Implementation of Mitigation was Improperly Deferred.

The deferral of decisions regarding whether and when to implement mitigation measures to agency staff after an EIR is certified violates CEQA. (*Communities for a Better Environment*, 184 Cal.App.4th at 91-96; *Sundstrom*, 202 Cal.App.3d at 306-309.) In the adopted mitigation scheme, agency staff decides whether to implement mitigation or to replace mitigation without disclosure to the public or the decisionmakers' approval. Some examples include:

- The EIR/EIS vested the HCP IT with discretion to determine how and when the SSHCS would be implemented. (Vol-3:Tab-51:AR3:CD10:101804_1109, 101804_1244; Vol-4:Tab-73:AR3:CD12:204966-204967.) The HCP IT's authority was expanded to make mitigation decisions for all mitigation funded by the QSA-JPA. (IID AOB, p. 15.) Each year IID, DFG, and FWS meet as the HCP IT and decide how mitigation should be modified and whether it should be funded by the QSA-JPA. (*Id.*, pp. 15, 41.) As such, the HCP IT can delay, modify, or choose not to implement mitigation.

- The SWRCB unconditionally delegated its decisionmaking responsibilities to the Chief of the Division of Water Rights to determine, after EIR/EIS certification, whether any of the AQ-7 (i.e., 4-Step Plan) mitigation measures were feasible. (Vol-6:Tab-112:AR3:CD18:526903-526904; Vol-6:Tab-113:AR3:CD18:526992, 527008-527009.) Under this scheme, the Chief can decide not to implement AQ-7.

- The SWRCB reserved continuing authority to add, delete or modify conditions 5 and 6 in its order. (Vol-6:Tab-113:AR3:CD18:527008.) This reservation of authority allows for its staff to make wholesale changes to these conditions and other mitigation.

- DFG staff was granted veto power under the QSA-JPA over whether to fund mitigation measures as discussed in Section IV.2.E. (Vol-8:Tab-172:AR3:CD1:10460-10462, 10465-10449.)

iv. Salton Sea Restoration was an Omitted Feasible Mitigation Measure.

The Salton Sea restoration project was declared speculative in the PEIR and EIR/EIS because no preferred alternative had been selected, and there was no authorization, approval or funding. (Vol-5:Tab-74:AR4-06-435-28134, 28136; AR3:CD10:101804_0929.) Yet, SWRCB relied upon the implementation of a restoration plan to reduce IID's obligation to send

mitigation water to the Salton Sea from 2030 to 2018. (Vol-6:Tab-113:AR3:CD18:526964-526965, 526968; Sections IV.5.B.ii.c. and IV.2.B.)

Under CEQA, a mitigation measure is “feasible” if it is “capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors.” (Pub. Res. Code, § 21061.1; CEQA Guidelines, § 15364.) Restoration met the characteristics of “feasible” mitigation.

SWRCB apparently believed restoration was possible within 15-years when it reduced the scope of IID’s obligation to send mitigation to the Salton Sea from 30-years. The State later assumed responsibility to undertake and fund restoration. (Vol-8:Tab-172:AR3:CD1:10457-10459, 10461, 10471-10472, 10484; Fish & G. Code, § 2081.7(e).) If restoration was a feasible mitigation measure then it was wrongfully omitted as such in the CEQA documents. (Pub. Res. Code, §§ 21002, 21081, 21002.1(b).) Conversely, if restoration was not feasible, then SWRCB and the Water Agencies could not lawfully reduce IID’s feasible mitigation water obligation in reliance upon an infeasible restoration plan. (*Lincoln Place Tenants Ass’n*, 130 Cal.App.4th at 1508-1509.)

v. *No Mitigation Monitoring Program was Adopted.*

CEQA requires that lead agencies adopt an MMRP to ensure mitigation will actually be monitored and enforced as a condition of the project, and not simply adopted and ignored or neglected. (Pub. Res. Code, § 21081.6(a); CEQA Guidelines, §§ 15091, 15097; *Lincoln Place Tenants Ass’n*, 155 Cal.App.4th at 446.) If mitigation is included in an EIR without an accompanying MMRP, the EIR *and* project must be vacated because the EIR lacks substantial evidence that the mitigation will be monitored and enforced. (*Federation of Hillside and Canyon Associations*, 83 Cal.App.4th 1252, 1260-1261.) No MMRP was adopted for the EIR/EIS or

PEIR in violation of CEQA. (Vol-5:Tab-79:AR4-05-379-25300/25301; Vol-5:Tab-80:AR4-05-380-25302/25303; Vol-5:Tab-83:AR4-05-381-25304/25305; Vol-5:Tab-87:AR3:CD3:32099-32100.) The SWRCB adopted some mitigation measures, but also no MMRP. (Vol-6:Tab-113:AR3:CD18:527007-5270012.)

The MMRP adopted for the EIR/EIS Addendum was legally insufficient. A public agency may only delegate reporting or monitoring responsibilities to *another public agency or to a private entity* which accepts the delegation. (CEQA Guidelines, § 15097(a).) The designation of a contract, the ECSA, as the responsible “agency” in the EIR/EIS Addendum (Vol-7:Tab-136:AR3:CD14: 400128_154-400128_157, 400128_169-400128_171) was not permissible under CEQA. The ECSA was not even executed and the draft was substantially changed⁸¹ from when the EIR/EIS was certified. (Vol-8:Tab-173:AR3:CD1:10539; Vol-8:Tab-162:AR3:CD2:20042.)

D. No Findings Were Made For Environmental Impacts and Mitigation Measures.

CEQA requires the lead agency make findings, and if the mitigation measures or project alternatives are infeasible, to also adopt a statement of overriding considerations for significant impacts giving specific reasons to support proceeding with the project. (Pub. Res. Code, § 21081(a); CEQA Guidelines, §§ 15091, 15093; *Citizens for Quality Growth*, 198 Cal.App.3d at 438.) *No* findings or statement of overriding considerations for significant unavoidable impacts were adopted by IID for the EIR/EIS⁸² or

⁸¹ Compare, for example, the changes in section 1.2(23) regarding the State Obligation. (Vol-8:Tab-173:AR3:CD1:10542 with Vol-8:Tab-162:AR3:CD2:20045.)

⁸² The County requested these documents and the MMRP that the EIR/EIS stated would be adopted, but they were not produced because they did not exist. (Vol-4:Tab-73:AR3:CD12:204901; Vol-5:Tab-85:AR3:CD11:

by the co-lead Water Agencies for the PEIR. (Vol-5:Tab-79:AR4-05-379-25300/25301; Vol-5:Tab-80:AR4-05-380-25302/25303; Vol-5:Tab-83:AR4-05-381-25304/25305; Vol-5:Tab-86:AR3:CD5:32097-32098; Vol-5:Tab-87:AR3:CD3:32099-32100.) The failure to adopt the required findings is fatal to the EIR. (*Protect Our Water v. County of Merced* (2003) 110 Cal.App.4th 362, 372-373.)

The obligation to make findings cannot be delegated. (CEQA Guidelines, § 15025(b); *Vedanta Soc’y v. California Quartet, Ltd.* (2000) 84 Cal.App.4th 517, 526-530.) Yet, this is exactly what IID did when it relinquished its responsibilities to SWRCB.⁸³ The absence of findings meant the public was denied knowing whether the IID Board used its independent judgment or merely rubberstamped the preparers’ and staff’s recommendations, and the logic of the Board’s decision. (CEQA Guidelines, § 15091(a); *Citizens for Quality Growth*, 198 Cal.App.3d at 440-442.) After all, IID’s attorney agreed its consultant could decide whether CEQA recirculation standards were met. (RJN:11(M):229.)

The administrative record is also devoid of any evidence showing MWD ever certified the PEIR or made findings in June 2002. MWD’s two-page June 24, 2002, staff report “recommends” the Board certify the PEIR. (Vol-5:Tab-79:AR4-05-379-25300/25301.) However, there are no findings in or attached to the staff report. The administrative record also

200081-200082.)

⁸³ In a process that is truly worthy of the distinction of “turning CEQA on its head” the SWRCB agreed to the QSA and its findings before the public proceeding. (Vol-2:Tab-33:AR3:CD2:20611-20616, 20634-20637.) The SWRCB was also the first to approve the transfer project and adopt findings and statements of overriding considerations for the EIR/EIS, but declared itself merely a “responsible agency” that relied wholly upon IID’s EIR presuming it was correct instead of independently reviewing the analysis as required by CEQA. (Pub. Res. Code, § 21069; Vol-6:Tab-113:AR3:CD18:526977-526982.)

does not appear to include a resolution or minutes from the June 24, 2002, Board meeting showing that the PEIR was certified at the meeting.

MWD's failure to formally certify the PEIR and adopt findings voids all of the co-lead agencies' approvals. (Pub. Res. Code, § 21168.9.) Indeed, the failure to properly inform the public of the lead agency's reasoning and analysis in certifying an EIR renders the EIR defective and void. (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 516-517 [agency must set forth findings that bridge the analytic gap between the raw evidence and the ultimate decision].)

The failure to adopt findings is not saved by the inclusion of so-called findings in the uncirculated Addenda. Without findings, the underlying EIR/EIS and PEIR were invalid, and an addendum cannot be made to an invalid document. (*Galante Vineyards*, 60 Cal.App.4th at 1124-1125.) Further, the purpose of findings is defeated when the public is not allowed to review the proposed findings before they are made. The court in *Citizens for Quality Growth* explained the reason for findings, as follows:

'Thus, when a project is approved that will significantly affect the environment, CEQA places the burden on the approving agency to affirmatively show that it has considered the identified means of lessening or avoiding the project's significant effects and to explain its decision allowing those adverse changes to occur. The writing of a perfect EIR becomes a futile action if that EIR is not adequately considered by the public agency responsible for approving a project. Indeed, it is almost as if no EIR was prepared at all. . . . Additionally, even though the board may have fully considered the EIR and made a wise and eminently rational decision in approving the proposed project, the board's thinking process, its "analytic route," has not been revealed. Only by making this disclosure can others, be they courts or constituents, intelligently analyze the logic of the board's decision.'

(*Citizens for Quality Growth*, 198 Cal.App.3d at 441, *citing Village Laguna of Laguna Beach, Inc. v. Board of Supervisors* (1982) 134 Cal.App.3d 1022, 1034-1035 [internal symbols omitted].)

The administrative record also lacks evidence showing that MWD formally adopted an MMRP in connection with the PEIR Addendum, or that it adopted a statement of overriding considerations. (Vol-5:Tab-79:AR4-05-379-25300/25301.) MWD's September 23, 2003, staff report "recommends" that the Board certify the PEIR Addendum. (Vol-7:Tab-143:AR4-07-513-30473.) The Addendum, findings of fact, statement of overriding considerations, and MMRP are not attached to the staff report. (Vol-7:Tab-143:AR4-07-513-30475.) There are no accompanying resolutions, findings, statements of overriding considerations, MMRP, or evidence of any formal action by the MWD Board with regard to certification of the PEIR Addendum.⁸⁴ The minutes from MWD's September 23, 2003, meeting also do not state what the Board approved. (Vol-8:Tab-144:AR4-08-1028-35143/35152.)

6. **THE SECRETARY'S VIOLATION OF THE CAA VOIDS THE CRWDA AND STATE-QSA.**

Under the CAA and Rule 925, before the Secretary could lawfully execute the CRWDA and approve the QSA and water transfers, the Secretary was required to conduct an analysis and make a determination that the approval conformed to the SIP. (42 U.S.C. § 7506(c)(1); Rule 925(A)(1) [Supp.AA:184:1808:45880].) The record shows that the Secretary failed to make the required conformity determination, resulting in a violation of the CAA and Rule 925. (Vol-9:Tab-178:AR3:CD1:10042-

⁸⁴ Neither MWD nor the other Water Agencies refuted the Air District's arguments on this issue below; in fact, their trial briefing supported the conclusion that the record contains no evidence of any such actions or approvals by MWD. (RA:10:113:2508; RA:10:114:2540; RA:10:115:2582; RA:10:116:2624-2625.)

10061.) As such, the QSA-Contracts cannot be validated as complying with federal and state environmental laws.

A. CAA Conformity Overview.

At the heart of the CAA program are the NAAQS promulgated by the EPA. (42 U.S.C. § 7409.) The CAA requires EPA to identify air pollutants that endanger the public health and welfare and to formulate NAAQS that specify the maximum permissible concentrations of those pollutants in the ambient air. (42 U.S.C. §§ 7408-7409.) The NAAQS are health-based standards. (42 U.S.C. § 7409(b)(1).)

EPA established NAAQS for PM₁₀. (40 C.F.R. Part 50.6.) The states, or regions within the state, are designated as either “attainment” or “nonattainment” areas depending on whether the area meets the NAAQS for a particular pollutant. (42 U.S.C. § 7407(d).) The Salton Sea is located in Riverside and Imperial Counties. (Vol-3:Tab-51:AR3:CD10:101804_0675-101804_0676.) The Coachella Valley, which includes the Riverside County portion of the Salton Sea, was classified as a serious nonattainment area under the federal CAA for PM₁₀. The Imperial Valley, which includes the Imperial County portion of the Salton Sea, was classified as a moderate nonattainment area under the federal CAA for PM₁₀. (Vol-3:Tab-51:AR3:CD10:101804_0673, 101804_0680/_0681.)

The CAA requires the SIP set forth all possible emission controls and sources to the extent necessary to attain the NAAQS. (42 U.S.C. § 7410(a)(1)-(2).) The CAA also requires in Section 176(c) that “[n]o department, agency, or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to an implementation plan [SIP].” (42 U.S.C. § 7506(c)(1); Rule 925(A.) [Supp.AA:184:1808:45880].)

In the 1990 amendments to the CAA, Congress strengthened the conformity requirements so that “conformity” means that a federal approval must conform to the SIP’s

purpose of eliminating or reducing the severity and number of violations of the national ambient air quality standards and achieving expeditious attainment of such standards; and that such activities will not cause or contribute to any new violation of any standard in any area; increase the frequency or severity of any existing violation of any standard in any area; or delay timely attainment of any standard or any required interim emission reductions or other milestones in any area.

(42 U.S.C. § 7506(c)(1)(A)-(B)(i)-(iii).) “[T]his integration of Federal actions and air quality planning is intended to protect the integrity of the SIP by helping to ensure that SIP growth projections are not exceeded, emissions reduction progress targets are achieved, and air quality attainment and maintenance efforts are not undermined.” (*Environmental Defense Fund, Inc. v. E.P.A.* (D.C. Cir. 1996) 82 F.3d 451, 468.)

If an activity is not *categorically* exempt, an applicability analysis must be performed to determine whether the activity exceeds the standards requiring a full-scale analysis. (Rule 925(D)(7) [Supp.AA:184:1808:45888-45889].) A full-scale conformity analysis is triggered by either of two standards: (1) if the total of the direct and indirect PM10 emissions exceed 100 t/y (*de minimis* threshold)⁸⁵; or, (2) if the PM10 emissions

⁸⁵ As the Secretary noted on October 9, 2003, before she executed the CRWDA, the United States Court of Appeal for the Ninth Circuit issued an opinion directing EPA to reclassify the Imperial Valley as a serious non-attainment area. (*Sierra Club v. U.S. E.P.A.* (9th Cir. 2003) 346 F.3d 955.) The ROD states that the implications for the ruling are unclear. (Vol-9:Tab-178:AR3:CD1:10057.) One implication is clear. The reclassification of the Imperial Valley as a serious non-attainment area for PM10 means that the *de minimis* threshold for conformity is reduced from 100 tons a day of PM10 to 70 tons a day of PM10 emissions. (Vol-3:Tab-51:AR3:CD10:101804_0691-101804_0692; Rule 925(D)(2)(a) [Supp.AA:184:1808:

represent 10 percent or more of the non-attainment area's total PM10 emissions (*i.e.*, constitutes a regionally significant action). (Rule 925(D)(2), (D)(9) [Supp.AA:184:1808:45884-45885, 45890].) A full-scale conformity analysis must comply with the procedures in Rule 925 sections F-K to determine whether the action conforms to the SIP. The Secretary did not perform an applicability analysis or a full-scale conformity analysis, even though the evidence in the EIR/EIS showed the PM10 emissions exceeded the 100 t/y *de minimis* threshold. (Vol-3:Tab-51:AR3:CD10:101804_0077; Vol-4:Tab-73:AR3:CD12:20497.)

The Air District seeks to ensure compliance with the CAA's conformity requirements not for the sake of mere analysis, but because adherence to the conformity requirements will prevent federal approvals from causing a violation of the PM10 NAAQS. If the full-scale conformity analysis shows that the action does not conform to the SIP, the federal agency is prohibited from engaging in, supporting in any way or providing financial assistance for, licensing or permitting, or approving the action. (Rule 925(A) [Supp.AA:184:1808:45880].) There is no provision in Rule 925 or the CAA that allows a federal agency to defer this statutory obligation to some other time or event.⁸⁶ Because of this prohibition, the Water Agencies want to avoid the federal governments' performance of a full scale conformity analysis.

45884-45885].)

⁸⁶ The EIR/EIS and Addendum included compliance with the conformity requirements as mitigation measure AQ-4, after the project was approved as some unidentified future date. (Vol-3:Tab-51:AR3:CD10:101804_0698-101804_0699; Vol-7:Tab-136:AR3:CD14:400128_170.) The Secretary cannot defer conformity as contemplated by AQ-4.

B. The Secretary Failed to Make a CAA Conformity Determination and Therefore Lacked Authority to Execute the CRWDA.

The CAA's statutory scheme expressly places the determination of conformity as an affirmative responsibility on the head of the federal agency. (42 U.S.C. § 7506.) The ROD is the final administrative decision which represents that the government has complied with all statutory requirements and allows the project to move forward. (*City of South Pasadena v. Slater* (C.D. Cal. 1999) 56 F.Supp.2d 1106, 1112.)

The purpose of statutes such as Section 4(f), NEPA, and the CAA is to require decisionmakers, in a public forum, to consider the impacts a project will have on public health, safety, the environment, and historic and natural resources. The ROD, *inter alia*, is a statement that the government has met its obligations under the applicable statutes and regulations.

Where the government issues a ROD and has not complied with the applicable statutes and regulations there is a possibility of irreparable injury, except in unusual circumstances. Allowing the government to act upon a ROD where the government does not appear to have fully considered all environmental, public health and safety, and Section 4(f) resource consequences of a project is antithetical to the purpose and intent of these statutes and regulations.

(*Id.* at 1143.)

Here, the ROD confirms it is the document that effectuated the approval of the CRWDA, which implements the QSA and water transfers. (Vol-9:Tab-178:AR3:CD1:10044.) The ROD does *not* reference or include a conformity analysis or determination. (Vol-9:Tab-178:AR3:CD1:10054.) The ROD cannot lawfully be silent on conformity. (*Crickon v. Thomas* (9th Cir. 2009) 579 F.3d 978 [agency's reasoning cannot be inferred from mere silence].)

The Secretary must supply a reasoned analysis for her decision, and if an agency glosses over or swerves without discussion “it may cross the line from the tolerably terse to the intolerably mute.” (*Northwest Environmental Defense Center v. Bonneville Power Admin.* (9th Cir. 2007) 477 F.3d 668, 687-688.) It is well settled administrative law that unsupported conclusions are not proper evidence. (*Burlington Truck Lines, Inc. v. U.S.* (1962) 371 U.S. 156, 168 [there must be findings and an articulated rational connection between the facts found and the choice made]; *Natural Resources Defense Council, Inc. v. E.P.A.* (9th Cir. 1992) 966 F.2d 1292, 1306 [rejecting *de minimis* exemption because of “lack of data” to show that regulation would be of “trivial or no value”].) Unless the agency describes the standard under which it arrived at its conclusion to exempt certain sources, supported by a plausible explanation, the court has no basis for exercising its responsibility to determine whether or not the agency’s decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. (*American Lung Ass’n v. EPA* (D.C. Cir. 1998) 134 F.3d 388, 392-93.)

Rule 925 only relieves a federal agency of the obligation to conduct a full-scale conformity analysis in narrow circumstances, for example, if the project is not “regionally significant” (Rule 925(D)(9) [Supp.AA:184:1808:45890]), will result in at most *de minimis* emissions of criteria pollutants (Rule 925 (D)(2) [Supp.AA:184:1808:45884-45885]), or is exempt or comes within one of the categories in the agency’s list of actions presumed to conform (*e.g.*, Rule 925 (D)(3)(b), (D)(6) [Supp.AA:184:1808:45885-45888]). The Secretary cannot presume the emissions impact of the CRWDA and QSA are under the conformity *de minimis* threshold or is not regionally significant unless there is prior

compliance with Rule 925(D)(6)-(8) [Supp.AA:184:1808:45888-45889], and there clearly was none.⁸⁷

When the action is *not* categorically exempt or presumed to conform, as is the case here, an applicability analysis must be conducted to demonstrate that the total of the direct and indirect emissions will not exceed the conformity *de minimis* level or that the PM10 emissions are not regionally significant to avoid a full-scale conformity analysis and determination. (Rule 925 (D)(2); *City of Las Vegas v. F.A.A.* (9th Cir. 2009) 570 F.3d 1109, 1117; *County of Delaware v. Department of Transp.* (D.C. Cir. 2009) 554 F.3d 143, 145.) The Secretary did not do this. (Vol-9:Tab-178:AR3:CD1:10054.) Instead, the evidence in BOR's EIR/EIS showed that the PM10 emissions from the exposed Salton Sea shoreline were alone sufficient to exceed the general conformity *de minimis* threshold, and would remain significant after mitigation. (Vol-3:Tab-51:AR3:CD10:101804_0077; Vol-4:Tab-73:AR3:CD12:204907.) Thus, a full-scale conformity analysis was required before the Secretary could lawfully execute the CRWDA and approve the QSA and water transfers. (42 U.S.C. § 2506(c)(1); Rule 925(A)(1) [Supp.AA:184:1808:45880].)

V. CONCLUSION.

Seven years is enough. The people of Imperial and Riverside counties must have their day in court on the fatal flaws of the CEQA documents and failure comply with the CAA to prevent Appellants from

⁸⁷ The only presumptions permitted by Rule 925 (D)(6) are for a limited scope of actions that individual federal agencies have proven meet criteria in subsection Rule 925(D)(7)(a) or (D)(7)(b), and where the agency complies with procedures in subsection Rule 925(D)(8), including publication in the Federal Register of the list of activities presumed to conform and the basis for the presumptions. The record does not show that the Secretary performed this analysis, made these findings, or published such a list in the Federal Register.

starving the Salton Sea and leaving as a legacy environmental devastation, unhealthful air, and no money or resources to remedy the problems created by the QSA. This Court can bring finality to this litigation by:

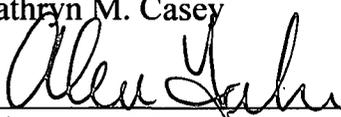
- Affirming the judgment invalidating the QSA-Contracts;
- Reversing the denial of the intervention motions and granting the Air District party status in Cases 1653 and 1656;
- Reversing the mootness determination, voiding the unlawful CEQA documents, and granting the County's requested relief;
- Awarding attorneys fees and costs to the Air District under Code of Civil Procedure section 1021.5 in an amount to be determined by the trial court.

Dated: November 23, 2010

Respectfully submitted,

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CERTIFICATION OF WORD COUNT

Under California Rule of Court 8.204(c)(1), the undersigned appellate counsel hereby certifies that, according to the word count of the computer program used to prepare the Imperial County Air Pollution Control District's Joint Respondent's and Cross-Appellant's Opening Brief, the Brief contains 37,937 words (excluding the caption page, table of contents, table of authorities, glossary of defined terms, certification of word count, attachment, and proof of service). On October 8, 2010, the Court issued an order granting the Air County Agencies' joint application to each file a brief exceeding the authorized word limit, permitting the Air District to file a brief up to a maximum of 38,000 words.

Dated: November 23, 2010

Respectfully submitted,

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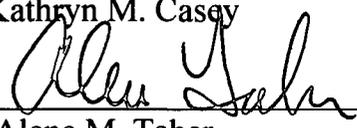
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