Case No. H046932

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

Landwatch Monterey County and Meyer Community Group,
Petitioners, *Respondents*, and *Cross-Appellants*,

v.

County of Monterey,
Respondent, *Appellant*, and *Cross-Respondent*,

Harper Canyon Realty, LLC,
Real Party in Interest, *Appellant*, and *Cross-Respondent.*

Appeal from the Superior Court of California, County of Monterey
Case No. M131913 (Consolidated with Case No. M131893)
Honorable Thomas Wills, Judge of the Superior Court

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND [PROPOSED] *AMICUS CURIAE* BRIEF OF CALIFORNIA STATE ASSOCIATION OF COUNTIES AND LEAGUE OF CALIFORNIA CITIES

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* Christian L. Marsh (SBN 209442)
Hina Gupta (SBN 303096)
Monica M. Browner (SBN 329717)
DOWNEY BRAND LLP
455 Market Street, Suite 1500
San Francisco, California 94105
Telephone: (415) 848-4830
cmarsh@downeybrand.com

Attorneys for *Amici Curiae*
CALIFORNIA STATE ASSOCIATION OF COUNTIES and
LEAGUE OF CALIFORNIA CITIES

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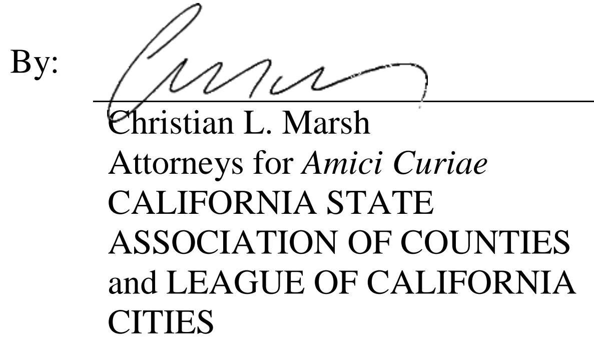
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

There are no interested entities or persons that must be listed under California Rules of Court, Rule 8.208.

Dated: September 22, 2020

Downey Brand LLP

By: 

Christian L. Marsh
Attorneys for *Amici Curiae*
CALIFORNIA STATE ASSOCIATION OF COUNTIES and LEAGUE OF CALIFORNIA CITIES

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APPLICATION FOR LEAVE TO FILE
***AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANTS**

TO THE HONORABLE PRESIDING JUSTICE OF THE CALIFORNIA COURT OF APPEAL, SIXTH APPELLATE DISTRICT:

The California State Association of Counties ("CSAC") and the League of California Cities ("League") (collectively, "*Amici Curiae*") respectfully apply for leave to file the accompanying *amicus curiae* brief in support of Appellants County of Monterey and Harper Canyon Realty, LLC ("Appellants"). This application is timely, filed within fourteen (14) days after the last appellant's reply brief was or could have been filed. (Cal. Rule of Court 8.200(c)(1).)

INTERESTS OF AMICI CURIAE

Amici Curiae submit this brief as representatives of local public agencies and municipalities throughout the State of California, which agencies have a vital interest in clarifying the appropriate standards for review of agency action and the trial court's interpretation of what constitutes "significant new information" in triggering recirculation of a draft environmental impact report ("EIR") under the California Environmental Quality Act ("CEQA"). The trial court's broad interpretation of Section 15088.5(a)(4) of Title 14 of California Code of Regulations ("Guidelines") will cloud the standards for recirculation and, if upheld, will compel cities and counties to recirculate draft EIRs at enormous time and expense, even when unwarranted under Guidelines Section 15088.5(a)(1) through (a)(3)—i.e., when there is no new or more severe significant environmental impact to address.

CSAC is a non-profit corporation with a membership consisting of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of

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California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the State. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a significant matter affecting all counties in California and is worthy of amicus support.

The League is an association of 476 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

THE *AMICUS CURIAE* BRIEF WILL ASSIST THE COURT IN DECIDING THIS MATTER

This case concerns the thresholds for determining whether new information added after public review is so "significant" as to mandate recirculation of a draft EIR under Public Resources Code Section 21092.1 and Guidelines Section 15088.5(a)(4). Guidelines Section 15088.5(a)(4) compels recirculation under extraordinarily limited circumstances, where "[t]he draft EIR was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded." Amici Curiae are uniquely situated to comment on the trial court's determination of what constitutes "significant new information" triggering recirculation because CSAC and League members often serve as the "lead agency" tasked with making the determination of whether to revise or recirculate a particular EIR in the later stages of the CEQA public review process. Further, counties and cities also serve as responsible agencies or plaintiffs in CEQA cases, challenging the lead agency's

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decisions and determinations to forgo recirculation. Because cities and counties wear these different hats in the CEQA process, they are particularly qualified to advise the Court on the practical and legal implications of the trial court's broad application of Guidelines Section 15088.5(a)(4) to new information added after public review of the draft EIR where, as here, project impacts remain less than significant.

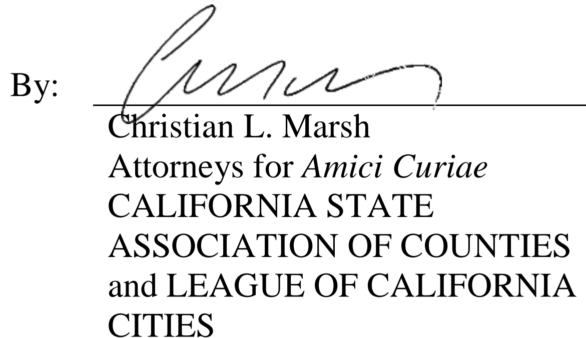
Amici Curiae respectfully request that the Court accept and consider the accompanying Amicus Curiae brief in support of Appellants.

CERTIFICATION

No party or counsel for a party in this appeal authored this proposed *amicus* brief, in whole or in part, or made a monetary contribution intended to fund the preparation or submission of this brief. Moreover, no person or entity made any monetary contribution intended to fund the preparation of submission of the proposed *amicus curiae* brief, other than the *Amici Curiae* submitting this proposed brief, its members, and its counsel in the pending appeal. There are no interested entities or persons that must be listed under California Rule of Court 8.208.

Dated: September 22, 2020

DOWNEY BRAND LLP

By: 

Christian L. Marsh
Attorneys for *Amici Curiae*
CALIFORNIA STATE
ASSOCIATION OF COUNTIES
and LEAGUE OF CALIFORNIA
CITIES

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AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT

INTRODUCTION

Amici curiae League of California Cities ("League") and California State Association of Counties ("CSAC"), collectively, "Amici," file this amicus brief in support of appellants County of Monterey ("County") and Harper Canyon Realty, LLC, collectively "Appellants." The issues in this case are of great concern to all counties and cities throughout the State of California who are charged with approving projects that require compliance with the California Environmental Quality Act ("CEQA"). Representing the majority of cities and all the counties throughout the State of California, Amici will be directly impacted by the outcome of this case.

The trial court in this case made three errors fundamental to the standards governing recirculation under CEQA. First, the trial court failed to adhere to the "highly deferential" substantial evidence standard when it reviewed the County's decision not to recirculate the EIR. (*Residents Against Specific Plan 380 v. County of Riverside* (2017) 9 Cal.App.5th 941, 960 [applying the substantial evidence standard of review to an agency's decision not to recirculate].) It is well established that where, as here, recirculation hinges on the agency's substantive factual conclusions, courts will review the agency's decision under the deferential substantial evidence standard. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435 ("*Vineyard*").)

Second, the trial court erroneously determined that Guidelines Section 15088.5(a)(4) triggered recirculation of the Final EIR. Recirculation of an EIR is intended to be the exception, not the rule. Guidelines Section 15088.5(a)(4) of Title 14 of California Code of Regulations ("Guidelines") thus applies only in the narrowest of circumstances, when an EIR is fundamentally conclusory or devoid of any

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base analysis of such conclusions. Here, the Draft EIR included a detailed discussion and analysis of groundwater. As the trial court appears to acknowledge, the Final EIR provided new information, but that information ultimately supported the same conclusion—that the Project's impacts on the groundwater basin would remain less than significant. Under this circumstance—where both the draft and final EIR provide analysis, and the latter ultimately supports the conclusions—that is not an occasion to repeat a significant portion of the CEQA process.

Third, it is not enough to show error—Landwatch Monterey County and Meyer Community Group (the "Petitioners" below) must show that the error was prejudicial. This rule applies equally to recirculation. Here, the Draft EIR provided base information and analysis, and the public also had the opportunity to meaningfully review and comment on the information before certification of the Final EIR. Petitioners have not shown how any material information would have been presented to the County, and therefore cannot show prejudice.

Amici respectfully urge this Court to reverse the trial court's ruling and hold that: (1) in ordering recirculation of the Draft EIR's groundwater analysis, the trial court did not appropriately defer to the County and its factual findings under the substantial evidence standard of review; (2) Guidelines Section 15088.5(a)(4) does not compel recirculation of the County's EIR; and (3) Petitioners failed to show prejudice where the draft and final EIR fostered meaningful public review and comment prior to the County's certification of the EIR and approval of the Project.

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ARGUMENT

I. A Lead Agency's Decision Regarding Recirculation of an EIR Under CEQA is Subject to Substantial Evidence Standard of Review.

A lead agency's decision on whether or not to recirculate an EIR based on changes made to the EIR after public review is governed by the substantial evidence standard. (Guidelines, § 15088.5(e); *Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1133-1135 ("*Laurel Heights II*").) Indeed, "an agency's explicit or implicit decision not to recirculate is given 'substantial deference' and is presumed 'to be correct.'" (*San Francisco Baykeeper, Inc. v. State Lands Com.* (2015) 242 Cal.App.4th 202, 224 [citing *Citizens for a Sustainable Treasure Island v. City and County of San Francisco* (2014) 227 Cal.App.4th 1036, 1063-1064].) And on review for substantial evidence, "the reviewing court may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable for, on factual questions, [the court's] task is not to weigh conflicting evidence and determine who has the better argument." (*Vineyard, supra,* 40 Cal.4th at 435) [internal quotations omitted]; Guidelines, § 15384(a).)

Here, late in its decision, the trial court explicitly found that substantial evidence supported the County's determinations that the new information provided in the Final EIR was not significant and that the Project would not substantially deplete groundwater resources. (See, e.g., JA 1436, 1438.) However, the trial court earlier in its decision did not seem to give the County the benefit of the doubt or presumption of correctness. (JA 1413-1429.) Petitioners on appeal contend, relying on *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502 ("*Sierra Club*"), that an agency's decision not to recirculate should be reviewed *de novo*, without

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deference to the agency. But the California Supreme court in *Sierra Club* applied the *de novo* standard to overturn an EIR because the EIR's analysis failed to meet established CEQA legal standards—it was entirely lacking and conclusory in its treatment of health risks. (*Id*. at 519, 521-522.) *Sierra Club* did not address the need to recirculate, and the issue here does not turn on whether the County employed the correct CEQA standards. Cases are not authority for propositions not considered. (*May v. City of Milpitas* (2013) 217 Cal.App.4th 1307, 1335.) The issue of whether the Final EIR contained significant new information requiring recirculation is entirely fact-based and thus warrants substantial evidence review. (See, e.g., *Laurel Heights II*, *supra*, 6 Cal.4th at 1134-1135.)

In concluding that the Draft EIR needed to be recirculated, the trial court claimed to have used the correct substantial evidence standard of review. (JA 1410.) But the trial court did not defer to the County's decision. As Appellants point out in their Joint Opening Brief, the trial court instead conducted its own "independent assessment of the technical adequacy of the Draft EIR's setting, scope, and analysis of cumulative groundwater impacts." (Appellants Opening Brief ("AOB") at 42, 47-60.) Such independent analysis on review of an agency's decision not to recirculate is inappropriate. (See *North Coast Rivers Alliance v. Marin Municipal Water District* (2013) 216 Cal.App.4th 614, 654-655 ("*North Coast Rivers*") [reversing a trial court ruling on recirculation based on the final EIR's addition of an infeasible project alternative, finding that the trial court impermissibly conducted its own "water supply calculation and analysis"].) Here, as in *North Coast Rivers,* this Court should reverse the trial court's order to recirculate the EIR because the trial court impermissibly applied an independent assessment of the Draft EIR's discussion of groundwater impacts.

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II. The Trial Court Misapplied Guidelines Section 15088.5(a)(4).

Once a draft EIR has been circulated for public review, CEQA does not require any additional public review before the lead agency certifies the final EIR, except in rare circumstances. (*Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, 223.) Recirculation is only required when the lead agency adds "significant new information." (Pub. Resources Code, § 21092.1; Guidelines, § 15088.5(a).) New information is considered significant when it reveals:

> (1) A new significant environmental impact would result from the project or from a new mitigation measure proposed to be implemented.
>
> (2) A substantial increase in the severity of an environmental impact would result unless mitigation measures are adopted that reduce the impact to a level of insignificance.
>
> (3) A feasible project alternative or mitigation measure considerably different from others previously analyzed would clearly lessen the significant environmental impacts of the project, but the project's proponents decline to adopt it.
>
> (4) The draft EIR was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded.

(Guidelines, § 15088.5(a); *San Francisco Baykeeper, supra,* 242 Cal.App.4th at 224.) However, given that CEQA encourages public comment on the draft EIR and requires responses thereto, "the final EIR will almost always contain information not included in the draft EIR." (*Laurel Heights II*, *supra*, 6 Cal.4th at 1124.) Thus, "[r]ecirculation is intended to be the exception, rather than the general rule" and "is not intended 'to promote endless rounds of revision and recirculation of

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EIRs.'" (*Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 133-134 ("*Save Our Peninsula*") [quoting *Laurel Heights II*, *supra*, 6 Cal.4th at 1132].)

With those base principles in mind, Guidelines Section 15088.5(a)(4) provides an extraordinarily narrow circumstance for triggering recirculation. Petitioner must show that "[t]he draft EIR was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded." (Guidelines, § 15088.5(a)(4) [emphasis added]; *Mountain Lion Coalition v. Fish & Game Com.* (1989) 214 Cal. App.3d 1043, 1050 ("*Mountain Lion Coalition*").)

The current case bears no resemblance to the limited cases applying Section 15088.5(a)(4). For example, *Mountain Lion Coalition*—the case that prompted the addition of sub-section 15088.5(a)(4)—involved a draft EIR comprised of bare conclusions, with absolutely no detail on how it arrived at its conclusion that a proposed regulation would have no significant effect on the environment. (*Mountain Lion Coalition, supra*, 214 Cal. App.3d at 1050; also cf. *Ukiah Citizens for Safety First v. City of Ukiah* (2016) 248 Cal.App.4th 256, 266-267 [EIR completely devoid of energy impacts analysis, and post-EIR addendum could not remedy the error]; *Pesticide Action Network North America v. Department of Pesticide Regulation* (2017) 16 Cal.App.5th 224, 252 [finding recirculation required as draft EIR lacked any analysis or explanation of conclusions about direct or indirect significant adverse environmental impacts of new pesticide labels and environmental analysis also completely devoid of identification or analysis of alternatives or cumulative impacts].) Thus, the cases applying Section 15088(a)(4) further reinforce that this ground is applicable only in those rare situations in which a draft EIR omitted altogether or contained only conclusory statements with little to no analysis.

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It is well settled that information that “clarifies” information in the draft EIR does not trigger recirculation. (Guidelines, § 15088.5(b); *Mount Shasta Bioregional Ecology Ctr. v. County of Siskiyou* (2012) 210 Cal.App.4th 184, 221 [recirculation not required where new noise data was added to the EIR].) Moreover, “[n]ew information . . . is not ‘significant’ unless the EIR is changed in a way that deprives the public of a meaningful opportunity to comment upon a *substantial adverse environmental effect*….” (Guidelines, § 15088.5(a) [emphasis added].) Here, the Final EIR merely updated and further clarified the nomenclature of the basin and subbasin in response to public comments and based on studies relying on data updated after the publication of the Draft EIR. None of the changes to the Draft EIR resulted in new or substantially more severe significant impacts to groundwater resources or in any new mitigation. (AOB at 56.) Thus, unlike *Mountain Lion Coalition*, the Draft EIR here did not contain mere conclusory statements, but articulated in detail the basis for its cumulative impact conclusions which included ample studies, data, and analysis. (AOB at 26-27.) The trial court here nevertheless concludes that the Draft EIR should have been recirculated due to a change in the geographic reference of cumulative impacts and the fact that the Final EIR provided new rationales for the same conclusions—that the Project’s impact on the groundwater basin would be less than significant. (JA 1424.) These facts do not match the facts of *Mountain Lion Coalition* or the handful of other cases in which courts ordered recirculation under Guidelines Section 15088.5(a)(4).

As a further note, the trial court’s comparison to *Save our Peninsula* and *Spring Valley Lake Assn. v. City of Victorville* (2016) 248 Cal.App.4th 91 (“*Spring Valley Lake*”) are equally inapposite. As a threshold matter, these two cases were decided not under Section 15088.5(a)(4), but under Section 15088.5(a)(1) through (a)(3). Consequently, neither applies the

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high bar for recirculation set forth under Section 15088.5(a)(4). The court in *Save Our Peninsula, supra,* 87 Cal.App.4th at 131-134, found that recirculation of an EIR was necessary after information was uncovered of a *new mitigation measure with potentially significant impacts* that had not been analyzed. The final EIR had also introduced new information about the applicants' riparian rights as a basis for a new water supply, with no analysis whatsoever about the associated impacts. (*Ibid*.)

The circumstances in *Spring Valley Lake*, *supra*, 248 Cal.App.4th at 108-109, are equally distinguishable. There, the court ordered recirculation of an EIR because significant new information was added to the project's air quality impacts analysis and hydrology and water quality impacts analysis. The air quality analysis in particular disclosed a new substantial adverse environmental effect. (*Id*. at 108.) And the revision to the hydrology and water quality analysis was described by the court as "a *complete redesign* of the project's stormwater management plan," which consisted of the replacement of "26 pages of the EIR's text with 350 pages of technical reports and bald assurance that the new design is an environmentally superior alternative[.]" (*Id*.)

Here, the County's EIR did not introduce any new mitigation measures or new source for water supply. The source of water in both the Draft and Final EIR remained the same; only basin nomenclature was updated and clarified. (AOB at 47-50.) Additionally, the information added to the Final EIR does not rise to the level of a complete redesign of the plan or introduce any new substantial adverse environmental effects not previously disclosed. In contrast to cases decided under Guidelines Section 15088.5(a)(4), courts in cases decided under Sections 15088.5(a)(1) through (a)(3), such as *Save Our Peninsula* and *Spring Valley Lake*, do not evaluate the inadequacy of the draft EIR itself but instead analyze newly acquired information learned after the circulation of a draft EIR. By

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applying *Save Our Peninsula* and *Spring Valley Lake* to the case at bar, but then relieving Petitioners of the obligation to show new or more severe environmental impacts broadens the scope of Section 15088.5(a)(4) well beyond its original confines.

Cal. Oak Foundation v Regents of Univ. of Cal. (2010) 188 Cal.App.4th 227, 267, further demonstrates that section 15088.5(a)(4) is not and should not be interpreted so broadly. The appellants in this case argued that an EIR should be recirculated because the draft EIR failed to include significant new information consisting of seismic studies prepared for an athletic center located within an earthquake fault zone. (*Id*. at 266.) The court first determined that this report and the letters did not fall into the categories of Sections 15088.5(a)(1) through 15088.5(a)(3). (*Id*. at 267.) After finishing its analysis, the court concluded that recirculation was not warranted. (*Id*. at 267-268.) But the court never moved on to analyze the recirculation issue under Section 15088.5(a)(4). The appellants in *California Oak* took issue with new information that made its way into the final EIR—they did not contend that the draft EIR was initially devoid of adequate analysis. (*Cal. Oak Foundation, supra,* 188 Cal.App.4th at 266.) The court's absent examination of Guidelines section 15088.5(a)(4) supports the notion that Section 15088.5(a)(4) is only meant to be used in rare cases in which a draft EIR lacks any requisite analysis of environmental impacts and mitigation measures.

Moreover, the Draft EIR here clearly fostered meaningful public comment, as those comments helped prompt the clarifications and further study in the Final EIR. Here, the County's Final EIR was presented to the public for nearly 18 months prior to its certification, and was the result of more than 14 years of study and analysis. (AOB at 27.) Thus, the public and Petitioners had ample time to review and meaningfully comment. In fact, here the record shows that the Draft EIR's analysis of groundwater

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resources did result in submission of public comments on the very issues that the trial court found were lacking in the Draft EIR, and that the resulting changes in the Final EIR were made in response to those comments. (AOB 27-30.) Thus, the trial court failed to demonstrate under Guidelines Section 15088.5(a)(4) that lack of analysis in the Draft EIR in any way prevented meaningful public review and participation.

Overall, adding information in the Final EIR that clarified and echoed the studies and conclusions in the Draft EIR, especially where meaningful public review was not precluded, is not a ground for recirculation under Section 15088.5(a)(4).

III. Petitioners Must Also Show Prejudicial Error.

Finally, even if Petitioners can establish legal or factual error, it must also show that the error was "prejudicial," for "[n]oncompliance with CEQA's information disclosure requirements is not per se reversible. . . ." (*Assn. of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1385, 1391; *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 463-465.) Here, even if the County's EIR satisfied the criteria for recirculation under Guidelines section 15088.5(a)(4), such failure to recirculate does not constitute prejudicial error because the public had a meaningful opportunity to comment on both the Draft and Final EIRs and Petitioners have failed to show that altering the nomenclature and expanding the geographic scope of cumulative impacts analysis in the Final EIR somehow omitted material information that should have been considered in the CEQA process. (See *San Francisco Baykeeper, supra*, 242 Cal.App.4th at 230-232 [no prejudice where petitioner failed to present proof that error "resulted in the omission of pertinent information from the environmental review process"].)

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First, the public and Petitioners had ample time to review both the Draft and Final EIRs before certification. The County's Final EIR was presented to the public for nearly 18 months prior to its certification, and was the result of more than 14 years of study and analysis. (Appellants Reply Brief ("ARB") at 27.)

Second, the public and Petitioners commented extensively on the very issues that the trial court found were lacking discussion in the Draft EIR, and the resulting changes in the Final EIR were made in response to those very public comments. (AOB at 68-69; ARB at 27, 40-42.) And based on the comments received, there does not seem to be any confusion regarding the project impacts because of the updated basin nomenclature. (AOB at 68.) Petitioners also testified at seven of the eight hearings on the final EIR. (AOB at 69.)

Third, the trial court explicitly held that substantial evidence supported the County's determination that, as in the Draft EIR, cumulative impacts on the groundwater basin would remain less than significant in the Final EIR. (JA 14138-1439.) Petitioners have not shown that the Draft EIR's description and analysis of groundwater impacts resulted in the omission of pertinent information from the environmental review process or resulted in any prejudice.

CONCLUSION

Recirculation of a draft EIR is the exception, not the rule, and is reserved for the limited circumstances expressed in Section 15088.5(a)(1) through (a)(4). The trial court here wrongly applied Guidelines Section 15088.5(a)(4) as the court relied on its independent assessment of the changes to the EIR rather than deferring to the lead agency, and failed to demonstrate how the referenced omissions led to a lack of meaningful

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public review of the Draft EIR. There was no showing of prejudice to the Petitioners. Thus, the trial court's order of recirculating the Draft EIR based on Guidelines Section 15088.5(a)(4) should be reversed.

Dated: September 22, 2020

DOWNEY BRAND LLP

By:

Christian L. Marsh
Attorneys for *Amici Curiae*
CALIFORNIA STATE ASSOCIATION OF COUNTIES and LEAGUE OF CALIFORNIA CITIES

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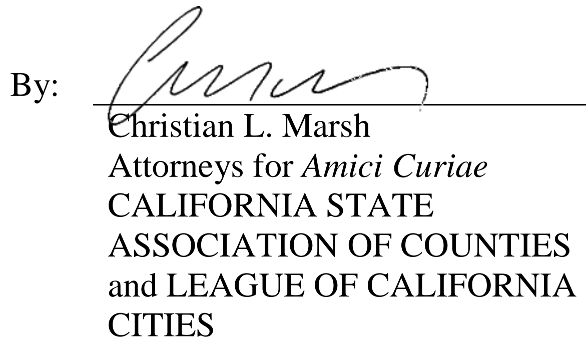
CERTIFICATION OF WORD COUNT

Counsel of record hereby certifies that pursuant to Rule 8.204(c)(1) of the California Rules of Court, the brief of *Amici Curiae* California State Association of Counties and the League of California Cities was produced using 13-point Roman type, including footnotes, and contains approximately *4694* words, according to the word count of the computer program used to prepare this brief.

Dated: September 22, 2020

DOWNEY BRAND LLP

By: 

Christian L. Marsh
Attorneys for *Amici Curiae*
CALIFORNIA STATE ASSOCIATION OF COUNTIES and LEAGUE OF CALIFORNIA CITIES

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I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 621 Capitol Mall, 18th Floor, Sacramento, California, 95814. On the date below, I served the within document:

Application For Leave To File Amicus Curiae Brief And [Proposed] Amicus Curiae Brief of California State Association of Counties And League of California Cities

VIA TRUE FILING:

John Hawks Farrow M R Wolfe & Associates, P.C. 580 California St., Ste. 1200 San Francisco, CA 94104	Richard H. Rosenthal Law Office of Richard Rosenthal 26364 Carmel Rancho Ln., Ste. 201 Carmel, CA 93923
Alexander T. Henson 13766 Center Street, Suite 27 Carmel Valley, CA 93924	Kelly Lynn Donlon, County Counsel 168 W. Alisal St., Floor 3 Salinas, CA 93901
Matthew David Francois, et al. 5 Palo Alto Square 3000 El Camino Real, Ste. 200 Palo Alto, CA 94306	Michael D. Cling 313 South Main Street, Suite D Salinas, CA 93901
VIA FEDERAL EXPRESS	
Honorable Thomas W. Wills Monterey Co. Superior Court 1200 Aguajito Rd., 2nd Floor Monterey, CA 93940	Office of the Attorney General 455 Golden Gate Ave., Ste. 11000 San Francisco, CA 94102-7004

I am readily familiar with the firm's practice of collection and processing express courier packages. I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed September 22, 2020, at Sacramento, California.

/s/ *Karen Scott*

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