



Los Angeles Regional Water Quality Control Board

March 17, 2023

State Water Resources Control Board
c/o Philip G. Wyels, Assistant Chief Counsel **[via email]**

Re: Response to Petition of Cynthia Grimes, John Brunot, Agua Dulce Neighbors, and Susan Turner For Review Of Water Quality Order No. R4-2022-066, Waste Discharge Requirements For The Agua Dulce Residential Development Project, Agua Dulce, County Of Los Angeles; Issued By The Los Angeles Regional Water Quality Control Board (SWRCB/OCC FILE A-2799)

Dear State Water Resources Control Board,

Please accept this response to the above petition contesting adoption of Order No. R4-2022-066. As discussed in the attached response brief, the State Water Resources Control Board should uphold the Order, which is based upon substantial evidence in the record and complies with relevant sections of the Porter-Cologne Water Quality Control Act and the California Environmental Quality Act.

We are also coordinating with your staff to produce the administrative record via an ftp site. The record will be available under the folder "Agua Dulce Administrative Record" at the following location, using the following passcode:

<https://ftp.waterboards.ca.gov/WebInterface/login.html>

Username: rb4ftp

Password: cez3qY

We note that the following documents are relevant to the Applicant's submission arguing mootness, which is related to events occurring after adoption of the Order. These records have been bates-labeled for ease of reference, but are extra-record evidence. We respectfully request the State Water Board's consideration on the following grounds:

Evidence	Grounds for Consideration
Post-order site inspection (AR005941-5955, Site Inspection (February 16, 2023))	Relevant to the Applicant's mootness arguments; official record of the Los Angeles Water Board
Financial assurances, Letter of Credit (AR003853-3855, Financial Assurances)	Relevant to the Applicant's mootness arguments; official record of the Los Angeles Water Board
Financial assurances letter of approval (AR003847, Financial Assurances)	Relevant to the Applicant's mootness arguments; official record of the Los Angeles Water Board

Thank you in advance for your consideration. Please do not hesitate to let me know if we can provide any additional information for the State Water Board's consideration.

Respectfully submitted,

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Response In Support of Order No. R4-2022-066 (Agua Dulce Waste Discharge Requirements)
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Response In Support of Order No. R4-2022-066 (Agua Dulce Waste Discharge Requirements)

I. INTRODUCTION

The question before the Los Angeles Regional Water Quality Control Board (Los Angeles Water Board) was whether to approve the dredge and fill of 0.677 acres of waters of the State found within Phase 1 of the proposed Agua Dulce Residential Development Project (Project)¹ located in Acton (Site), as described in the application submitted by RTG Investments, LLC (Applicant). (Administrative Record, Agua Dulce Development WDR – 000001 et seq.²)

The Los Angeles Water Board properly exercised its authority to issue waste discharge requirements under the California Porter-Cologne Water Quality Control Act (California Water Code section 13000 et seq.)³ when it adopted Order No. R4-2022-066 (Order) on February 10, 2022, governing dredge and fill activities in waters of the State located in Phase 1 of the Project.

The Los Angeles Water Board also properly determined that no new information required preparation of a subsequent Environmental Impact Report (EIR) pursuant to the California Environmental Quality Act (CEQA); the Los Angeles Water Board properly acted as a responsible agency; and there is no “piecemealing” of approvals here, where a prior certification of an EIR contemplated construction of a wastewater treatment plant and the details of any proposed future wastewater treatment plant are unknown at this time. The Los Angeles Water Board relied on substantial evidence in reaching these conclusions, and in contrast, the petition misuses CEQA and makes only unsubstantiated and speculative claims as a basis for requesting additional environmental review. The law does not support requiring subsequent environmental documents in these circumstances.

¹ As explained in *Committee for a Progressive Gilroy v. State Water Resources Control Bd.* (1987) 192 Cal.App.3d 847, 863, “a ‘project’ does not refer to each subsequent discretionary approval by multiple government agencies, but rather the initial underlying activity being analyzed.” Thus, in this response to the Petition, “Project” refers to the entire development project and “Order” refers to the proposed waste discharge requirements/water quality certification considered by the Los Angeles Water Board and adopted as Order No. R4-2022-066.)

² Administrative records page numbers will be referenced as ARxxxxxx herein.

³ Under federal guidelines for Clean Water Act section 404, the Los Angeles Board was under no legal obligation to issue a Clean Water Act section 401 water quality certification. Given the changing landscape concerning federal regulation of “wetlands” as part of waters of the United States, however, the Order was written to prophylactically ensure compliance with section 401 and corresponding regulations, to ensure there is no gap in coverage should the federal definition of “waters of the United States” be altered to encompass the Site and the US Army Corps of Engineers exercise jurisdiction. We note that Section 401 of the Clean Water Act and the 404(b)(1) Guidelines (40 C.F.R. Part 230 et seq.) are relevant to dredge and fill governed by a 401 water quality certification, but largely duplicate the Dredge or Fill Procedures, and so are not discussed in any detail here.

According to the Applicant's January 6, 2023 letter to the State Water Board, the grading is complete and Petitioner's request for relief is moot. Numerous courts have declined to require additional environmental review when, as here, that review would have no purpose. While the State Water Board should reject any arguments concerning the need for additional environmental review of the grading, however, it should also reject Petitioner's request to rescind and cancel the Order, which continues to require best management practices (BMPs), financial assurances and other protections that minimize or eliminate impacts to water quality and the surrounding environment.

Based on the facts and law, the State Water Board should find that the action of the Los Angeles Water Board was appropriate and proper under Water Code section 13320, consistent with the State Water Board's "State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State" ("Dredge or Fill Procedures" or "Procedures"), and complied with CEQA. For these reasons, the Los Angeles Water Board respectfully requests the State Water Board uphold Order R4-2022-066.

II. BACKGROUND

A. Facts Relevant to the Los Angeles Water Board Decision.

In preparing the Order, Los Angeles Water Board staff reviewed applicable County of Los Angeles environmental documents, conducted site reconnaissance to verify the extent of wetlands, and performed their own independent analyses applying the Dredge or Fill Procedures and CEQA.

Los Angeles County Department of Regional Planning certified an Environmental Impact Report ("EIR") for the Project in June 1994 (AR001060 et seq., 4.1, 1994 EIR) and certified a Final Supplemental EIR revising Phase II of the Project on March 30, 2007 (AR002027 et seq., 4.3, 2007 SEIR). Project approvals to date include:

May 1994: EIR, Tentative tract map No. 50385, Conditional Use Permit, Oak Tree permit approval (creating 339 single family lots, 3 public facility lots and 5 open spaces lots). (AR001912, 4.1 1994, tr50385_tentative-map-approval-1994, PDF p. 856 of 953; AR001363, 4.1 1994, CEQA-NOD_1994, PDF p. 307 of 953.)

January 2002: Tentative tract map 50385 amendment (authorizing five off-site detention basins, the elimination of a reservoir (water tank) lot 345). (AR002014, 4.2 2002, tr50385_amendment-approval-2002, PDF p. 5 of 17.)

April 2007: Supplemental EIR, Revised Vesting Tentative Tract Map No. 50385, Conditional Use permit, Oak tree permit (which included 247 single-family lots, four open space lots, four debris basin lots and one water reclamation plant lot on 742 gross acres). (AR 002139, Los Angeles County Dept. of Reg. Planning Approval Package, 4.3 2007, tr50385_approval-package-20070413, PDF p. 113 of 395; AR002126, 4.3 2007, CEQA-NOD_2007, PDF p. 100 of 395.)

10/26/21: California Department of Fish and Wildlife Streambed Alteration Agreement. (AR000656, 3.2 CDFW, CDFW [EXECUTED 102621], PDF p. 40 of 116.)

The Los Angeles Water Board is unaware of any legal challenges to the 1994 EIR or 2007 Supplemental EIR. (See also AR002841, 10.2 Board Meeting, Board Package - Developer Response to LARWQCB Inquiry, PDF p. 69 of 935 [“No lawsuits were filed to contest the validity of either the 1994 EIR or the 2007 SEIR”].)

On August 12, 2020, the Applicant submitted an application for Waste Discharge Requirements, to authorize the dredge and fill of waters of the State located within Phase 1 of the Project. The United States Army Corps of Engineers declined to exercise jurisdiction. (AR000589 et seq., 3.1 USACE, Approved Jurisdictional Determination.) The amount of grading at issue is less than that governed by the State Water Resources Control Board’s (State Water Board) Construction General Permit. (See State Board Order 2009-0009-DWQ, as amended by 2010-0014-DWQ and 2012-0006-DWQ [regulates construction, including grading, of areas greater than one acre].) Nonetheless, The Los Angeles Water Board assigned its most experienced staff member, Valerie Zara,⁴ to assess the potential impacts, ensure that the jurisdictional determination was accurate, and ensure that any dredge and fill activities impacting waters of the State were consistent with the Dredge or Fill Procedures.

Ms. Zara has been trained in Wetland Delineation and has experience utilizing methods described in the Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Arid Southwest Region (Version 2.0) (AR005215, 15. References, PDF, pp. 1-134 of 490) for settings such as this one, which is categorized as a “difficult or problematic site,”⁵ due to an absence of typical wetland indicators. The original application identified seven impacted drainages, leading to total impacts of 0.139 acres and 2,510 linear feet of waters of the State. (AR000071, 1.1 Application, Technical Memorandum, Jurisdictional Delineation, PDF, p. 75 of 113.) After performing a site visit, however, Ms. Zara determined that, consistent with the

⁴ Ms. Zara, a California State licensed Professional Geologist, has over 21 years of experience in the 401 Certification Program of the Board’s Standards and TMDL Unit. She has performed hundreds of delineation reviews throughout Los Angeles and Ventura Counties, including those for Caltrans, County of Los Angeles and the Ventura County Watershed Protection Division. (AR005950, 16. Other Citations, Valerie Zara Resume.)

⁵ According to the Manual, “some wetlands can be difficult to identify because wetland indicators may be missing due to natural processes or recent disturbances. [...] Problem area wetlands are naturally occurring wetland types that lack indicators of hydrophytic vegetation, hydric soil, or wetland hydrology periodically due to normal seasonal or annual variability, or permanently due to the nature of the soils or plant species on the site. Atypical situations are wetlands in which vegetation, soil, or hydrology indicators are absent due to recent human activities or natural events. [...] In general, wetland determinations on difficult or problematic sites must be based on the best information available to the field inspector, interpreted in light of his or her professional experience and knowledge of the ecology of wetlands in the region.” (AR005311, 15. References, Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Arid West Region (Version 2.0), Chapter 5 Difficult Wetland Situations in the Arid Southwest, PDF p. 97 of 490). In settings where hydric soils may not exhibit typical indicators, other visual methodologies may be utilized, such as understanding the landscape setting and determining if the “area is in a landscape position that is likely to collect or concentrate water.” (AR005324, 15. References, Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Arid West Region (Version 2.0), Chapter 5 Difficult Wetland Situations in the Arid Southwest, PDF pp. 110-111 of 490). According to general guidance, vegetated sand and gravel bars within floodplains are one of the indicators of problematic soil situations. If present, the soil should be considered hydric. (AR005325, 15. References, Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Arid West Region (Version 2.0), Chapter 5 Difficult Wetland Situations in the Arid Southwest, PDF p. 109 and 111 of 490).

Dredge or Fill Procedures, several additional drainages should be included as part of the waters of the State delineation, and requested that the applicant submit a revised application. Following this request, impacts were revised to total 0.677 acres and 6,975 linear feet. (AR000434, 1.4 Correspondence with Applicant During Permitting, M. Al-Marayati 10-27-2020 - Revised Impacts Table, PDF p. 255 of 350.)

In preparing the draft Order, Los Angeles Water Board staff evaluated previously certified environmental documentation prepared by the County of Los Angeles concerning the Project and, in particular, documentation concerning the proposed dredge and fill elements (grading), which was the subject of the application and proposed Order before the Los Angeles Water Board. Staff determined that no substantial changes occurred in the Project or the circumstances under which the Project would be undertaken that would cause new significant effects or increase the severity of effects already considered. Given those circumstances, staff determined that no subsequent EIR would be necessary, and proceeded as a responsible agency under CEQA. (See section III.C. for legal definitions and purview of the Los Angeles Water Board as a responsible agency.)

Staff reviewed the proposed grading plan, which remains largely unchanged from that proposed in the original EIR which was certified in 1994 (see AR001057, 1994 EIR). Staff specifically reviewed and contemplated areas within the Los Angeles Water Board's jurisdiction, potential effects of the dredge and fill activities and the following mitigation relevant to this permitting action:

- Recommendations contained in the project Revised Drainage Concept and Hydrology Study, subject to the approval of the Los Angeles County Department of Public Works, will be implemented to control soil erosion. (AR001076, 4.1 1994 EIR, PDF p. 20 of 953.)
- The original Drainage Concept Study was submitted to and approved by the County Engineer. In response to community concern, the project was revised and a detention facility was added in the western portion of the site to maintain peak bulk flows, and now erosive capacity to a level equal to, or below the pre-development condition at the downstream boundary. (AR001078, 4.1 1994 EIR, PDF p. 22 of 953.)
- Los Angeles County Department of Regional Planning developed a Revised Drainage Concept and Hydrology Study. Proposed flood-control facilities exceed County standards. An additional drainage study (Appendix L of the 1994 EIR) concluded that pre and post-development runoff for 1-, 10-, 25-, and 50-year storm events would be minor; however, an additional detention basin has been included in the project on Lot 341 (Appendix M of the 1994 EIR). (AR001078, 4.1 1994 EIR, PDF p. 22 of 953.)
- Another drainage study (Appendix N of the 1994 EIR) confirms that a percolation basin could feasibly be constructed, and is proposed as part of the revised project, in the easternmost project area (Lot 7) to detain and percolate runoff from the project flowing in that direction. (AR001078, 4.1 1994 EIR, PDF p. 22 of 953.)
- The revised development drainage concept reduces volume and debris content of runoff leaving the site. (AR001078, 4.1 1994 EIR, PDF p. 22 of 953.)

- Grading of the proposed project will occur in 12 phases, minimizing impacts. (AR001078, 4.1 1994 EIR, PDF p. 22 of 953.)
- Within 180 days of the completion of grading for each phase, the applicant will hydroseed all residential pads to reduce erosion and initiate the installation of plant materials on all slopes and other open space areas as called for in the revegetation plan. (AR001078, 4.1 1994 EIR, PDF p. 22 of 953.)
- All desilting basins, catch basins, and spillways will be constructed to County standards and will be concrete-lined to prevent water from migrating into areas of compacted fill. (AR001078, 4.1 1994 EIR, PDF p. 22 of 953.)
- The proposed project will include an approximately 3.9-acre temporary detention basin (on Lot 341) for flood waters that will further reduce runoff. The detention basin will be designed and built according to County standards. This includes limiting the amount or time standing water will be held in the basin to prevent any health risks. The detention basin will hold water for less than 36 hours. Water in the detention basin will be piped over or under the fill to prevent erosion or the fill. As agreed, one of the open space lots shall be developed as a detention basin (retention basin with flow metering) which shall be designed to maintain peak flood bulk flows and flow erosive capability at pre-development levels at the down-stream boundary (near Lot 154) to the degree which can be reasonably calculated considering 10-, 25- and 50-year intensities. (AR001078, 4.1 1994 EIR, PDF p. 22 of 953.)
- Maintenance of the retention facility will be performed by an entity other than the Los Angeles County Flood Control District (e.g., Community Service District) with a funding mechanism provided to the satisfaction of the Department of Public Works. (AR001079, 4.1 1994 EIR, PDF p. 23 of 953.)
- The proposed project will include an approximately 600 square-foot percolation basin (on Lot 7) to detain runoff flowing to the southeast. (AR001079, 4.1 1994 EIR, PDF p. 23 of 953.)
- Rip-rap and piping will be placed in areas of discharge from the project site and where needed along channels to prevent channel erosion. The remainder of the drainage courses will be retained in a natural state as open water courses. (AR001079, 4.1 1994 EIR, PDF p. 23 of 953.)
- Subdrains will be installed in key filled slopes during grading. All proposed cut-and-fill slopes shall be landscaped or restored to a near-natural vegetative state to reduce potential erosion and increased runoff. (AR001079, 4.1 1994 EIR, PDF p. 23 of 953.)
- Onsite ponding problems will be corrected by providing an onsite subsurface storm drainage system to handle flows at low points and to direct flows away from structures. A drainage system of pipelines and detention basins will be constructed on the project site. In open areas between buildings, basins will intercept runoff at the lower elevations and direct it toward a drainage pipeline. Desilting basins will be placed where large debris flows could potentially occur. Basins will be monitored and maintained by a Maintenance District established by the County of Los Angeles. (AR001080, 4.1 1994, 1994 EIR, PDF p. 24 of 953.)

- Flows into the County storm drainage facilities shall be maintained at the existing, or lower rate. (AR001081, 4.1 1994 EIR, PDF p. 24 of 953.)
- The Conditional Use Permit (CUP) will mandate the maintenance responsibility of the detention basin(s) to the Homeowners' Association, Maintenance Organization, or the County. (AR001080, 4.1 1994 EIR, PDF p. 24 of 953.)
- The County Department of Public Works, Land Development Division-Drainage and Grading Section approved the original drainage concept prepared for the proposed project under the condition that the following actions be completed to the satisfaction of the Director of Public Works:
 - Prior to the filing of the final map, the applicant shall place a note of flood hazard on the final map and delineate the areas subject to flood hazard. The applicant shall dedicate the right to the County to restrict the erection of buildings in the flood hazard areas.
 - The applicant shall comply with the requirements of the revised drainage concept to the satisfaction of the Department of Public Works.
 - Prior to final map approval, the applicant shall submit deed restriction letters to restrict parking within dual-access roads.
 - The Land Development Division has conditioned the proposed project for ultimate buildout of the site. However, because the approved drainage concept did not analyze the separate phases of development, a separate drainage concept shall be submitted for each phase to be reviewed by the Land Development Division. (AR001080, 4.1 1994 EIR, PDF p. 24 of 953.)
- Project area open space has been increased from approximately 87 acres to over 157 acres. This will allow 62 additional acres of natural habitat to remain undisturbed. (AR001087, 4.1 1994 EIR, PDF p. 31 of 953.)
- Implementation of the project will induce a loss of undisturbed or minimally disturbed areas, cause habitat fragmentation, and other impacts. Wider roads may increase road kills in hillside areas. Seven oak trees will be removed from the site. (AR001087, 4.1 1994 EIR, PDF p. 31 of 953.)
- Wide, open culverts shall be used where roads cross natural or man-made drainage channels to permit safe crossing by wildlife species. Channelization and paving of drainage channels will be avoided so that drainages will retain a natural character (natural slope, soils, and vegetation). All open space areas should contain buffers between streambed or canyon bottom and adjacent development. Native plant species common to the area should be utilized in the buffer area. Sensitive or rare plant species, such as Peirson's morning glory, shall be used in appropriate revegetation and planting areas. Secondarily, compatible non-invasive, drought-tolerant plant species may be used as a minor component of the plant community to be established in these areas. (AR001087, 4.1 1994 EIR, PDF p. 31 of 953.)
- The portions of the following lots that exceed a grade of 2:1 will be restricted against removal of vegetation or revegetated plant materials, except for fire protection purposes or as required for the preparation of building sites. Vegetation can be

removed if it is replaced with vegetation consistent with the approved plant palette. (AR001087, 4.1 1994 EIR, PDF p. 31 of 953.)

- No alteration of any designated blue-line drainage should occur prior to the notification of the CDFG and the obtaining of a Section 1603 Streambed Alteration Agreement. This agreement will require the replacement of any streambed-associated wildlife habitat values lost as a result of the proposed project. (AR001090, 4.1 1994 EIR, PDF p. 34 of 953.)
- No fill should be placed in any blue-line drainage under the jurisdiction of the U.S. Army Corps of Engineers exceeding one acre in area without first obtaining a Section 404 permit, pursuant to the Clean Water Act. (AR001091, 4.1 1994 EIR, PDF p. 35 of 953.)

The Los Angeles Water Board is unaware of any litigation challenging the certification of the 1994 EIR or the sufficiency of the above mitigation measures. (AR002841, 10.2 Board Meeting, Board Package - Developer Response to LARWQCB Inquiry, PDF p. 69 of 935 [“No lawsuits were filed to contest the validity of either the 1994 EIR or the 2007 SEIR”].)

Staff also reviewed the 2007 Supplemental EIR. (AR003399-3411, 10.2 Board Meeting, Board Package - Response to Comments, PDF pp. 627-639 of 935 [in particular, sections 9.1, Outdated CEQA Documentation and 9.2, Adequacy of CEQA Documentation] and AR003747-3748, Order [CEQA Finding].) To ensure that all potential environmental effects had been considered, staff requested, and the Applicant provided, additional information on potential environmental effects related to Greenhouse Gas emissions, Wildfire Risk and Tribal Issues. (AR002840-AR002844, 10.2 Board Meeting, Board Package - Developer Response to LARWQCB Inquiry Section, PDF pp. 68-74 of 935.) Staff independently evaluated the submission and performed its own CEQA analyses, ultimately determining there were no substantial changes in the Project or the circumstances under which the Project would be undertaken, and there was no new information requiring a subsequent EIR. The letter was included in the Board package. (*Ibid.*)

Consistent with the Dredge or Fill Procedures, the draft Order required actions to minimize adverse effects (BMPs) (AR002821-2823, 10.2 Board Meeting, Board Package - Revised Tentative Order, PDF p. 49-51 of 935) and compensatory mitigation for losses of aquatic resources by the purchase of mitigation credits at a 2.8:1 ratio (AR002823-2824, 10.2 Board Meeting, Board Package, Revised Tentative Order, PDF p. 51-52 of 935).

There has been no shortage of public notice and input regarding the Los Angeles Water Board’s tentative Order. Initially, staff proposed to have the matter heard at the December 2021 Board meeting. (AR002517, 10.2 Board Meeting, Board Meeting Agenda - December 2021, PDF p. 3 of 935.) Due to concerns about appropriate notice, and in an effort to ensure public participation, staff removed the matter from the agenda and allowed an additional opportunity for public comment, from December 22, 2021, to January 21, 2022. (AR002740, 10.1 Public Notice, Notice of Hearing and Opportunity to Comment – Feb 10 Board Meeting (December 22, 2021), PDF p. 71 of 103.) In addition, the Los Angeles Water Board held a public informational meeting on January 14, 2022, to provide the community with additional information and allow an opportunity for feedback related to the tentative Order. (AR002656, 9. Public Information

meeting- Jan 14 2022, Notice of Public Meeting – WDRs for the Agua Dulce Residential Development Project (January 4, 2022), PDF p. 26 of 39.) 61 participants registered to attend the meeting. (See AR002654, 9. Public Information meeting- Jan 14, 2022, List of participants – January 14, 2022 Public Meeting, p. 24 of 39.)

The Los Angeles Water Board considered the tentative Order at the February 10, 2022 meeting, during which numerous members of the public commented on the proposed Order. (AR002778, Board Meeting Agenda - February 2022, PDF p. 6. of 935.) Staff's consideration of the need for additional CEQA analysis was directly addressed:

We've looked at situations under which you would need to issue a subsequent, supplemental or addendum. We considered the question whether additional CEQA documentation was necessary. And as part of that consideration, we reached out to the Developer and asked for additional information concerning parts of the CEQA checklist that were not part of the 1994 EIR. The Developer did respond, they correctly observed that CEQA guidelines are forward looking only. Nonetheless, they did provide additional information concerning, for example, greenhouse gasses and wildfire hazards which we heard a lot about today. Staff considered that additional information, it's been included in your packet for consideration, and the additional information that was provided verified that mitigation measures are already in place that ensure no [new significant effects on] the environment.

(AR003506, 10.2 Board Meeting, Transcript, PDF p. 734 of 935). Members of the Los Angeles Water Board actively participated in a meaningful discussion and extensive deliberation of the public comments, including the CEQA concerns. (AR003446-3571, 10.2 Board Meeting, Transcript, PDF pp. 674-799 of 935.) Board members addressed concerns that the Site would be graded and abandoned without revegetation by proposing and adopting amendments to the Order to include additional protective measures such as financial assurance requirements (AR003545-3571, 10.2 Board Meeting, Transcript, PDF pp. 773-799 of 935) and modifying reporting requirements from annual to semi-annual (AR003749, 11. Final WDR, Order, PDF p. 42 of 66). (See AR003564, 10.2 Board Meeting, Transcript, p.792 of 935.) The Board adopted the final Order with these additional protective measures to ensure the Site would not be abandoned once graded:

Failure to put in place appropriate BMPs and/or replant poses a potential nuisance and/or threatened discharge to waters of the state. The Permittee shall submit to the Los Angeles Water Board evidence of financial assurance sufficient to ensure that any maintenance, restoration, mitigation, monitoring and reporting, and other obligations related to mitigation and stormwater controls imposed by this Order, shall be supported by a demonstration of financial assurance. The financial assurance may be in the form of a performance bond, escrow account, letter of credit or other appropriate instruments, subject to the approval of the Executive Officer.

(AR03758, 11. Final WDR, Order, PDF p. 51 of 66.) These are the relevant facts pertaining to adoption of the Order.

B. Facts That Are NOT Relevant to the Los Angeles Water Board's Decision

The public comments openly attack the entire residential development, but have little to do with the question before the Los Angeles Water Board, which was the very limited dredge and fill of a portion of the waters of the State on the Site. (AR003747, 11. Final WDR, Order, PDF p. 40 of 66.) As detailed below, each of the unrelated concerns raised in the proceeding before the Los Angeles Water Board was previously addressed in environmental documents certified by Los Angeles County.

1. The Attacks on the Project Primarily Pertain to Preserving a Way of Life and Do Not Address the Environmental Impacts Related to Dredging and Filling 0.667 Acre of Waters of the State.

The community spoke loudly and clearly in support of preserving their “open space,” their “way of life.” Virtually every comment emphasized “preservation of a rural community” and asked the Los Angeles Water Board to stop the development.⁶ The Los Angeles Water Board staff, and subsequently the Board members themselves, have repeatedly sympathized with the community, but emphasized the very limited nature of the draft Order, and the fact that the Los Angeles Water Board does not make land use decisions.⁷

⁶ AR002857, Comment from Agua Dulce Neighbors (concerns about neighborhood being “overrun by housing developments”); AR002860, AR002863, Comment from Anja Sonderling (urging the Board to protect the secluded rural character of the community); AR002869, Comment from Ariel Hale-Johnson (family and neighbors are committed to the rural lifestyle); AR002886, Comment from Deborah Bryan (development will ruin rural town); AA002891, Comment from Elaine Macdonald, (planned housing density will disrupt quiet character of the community); AR002917, Comment from Justine Turner (moved to Agua Dulce because of the low density, rural community); AA003127, Comment from Lawrence Sonderling (we want to preserve the rural environment here); AR003326, Comment from Marcy Winter (preserve rural lifestyle); AR003130, Comment from Lizette Garcia and Mike McQuade (moved to get away from the city); AA003243, Comment from Patty Saldana (moved away from the city for ranch life); AA003246, Comment from Raya Shanazarian (concerns about traffic, noise, pollution); A003252, Comment from Scott Pierce (concerned about massive development and exacerbation of traffic problems); AA003259, Comment from Susan Turner Casting (we paid for a rural community); AR003373, Comment from Tracy Dulle (“It will ruin our town and our rural way of life”); AR003374, Comment from Ubaldo Garcia (proposed development would disrupt the peaceful, natural environment); and AR003375, Comment from Yvette McQuade (moved to get away from crowded city).

⁷ AR003511-3512, Transcript, pp. 88-89, Comments by Board Member Camacho (acknowledging community input and need to focus on “protection of water quality for a development that has already been approved by another entity.”); AR003508, Transcript, p. 85, Comments by Board Member Munoz (considerate of community worries about change, but recognizing jurisdictional limitations); AR003517, Transcript, p. 94, Comments by Board Member Christiansen (same); AR003528-3530, Transcript, pp. 105-107, Comments by Vice Chair Stahl (acknowledging community concerns; emphasizing limited purview over the development; committing to carefully review any future proposals regarding discharges of wastewater); AR003509-3510, Transcript, pp. 86-87, Comments by Jenny Newman, Assistant Executive Officer (noting the Los Angeles Water Board’s authority to “protect the water quality using all of our authority under [the] California Water Code”); and AR003509, Transcript, p. 86, Comments by LB Nye, Regional Programs Section Manager (“We don’t decide land use ... that’s really the County Board of

2. Each of the Concerns Attacking the Larger Project Have Previously Been Analyzed in Prior CEQA Documents

Each of the commenters' key concerns (only a subset of which are addressed in the petition) was previously raised and addressed in the context of previously certified environmental documents, including, but not limited to the following:

Subject	Los Angeles Water Board Response to Comment	Prior Environmental Document
Impacts to groundwater from sewers, installation of lawns and attendant use of herbicides, and grey water	1.1-1.4, 1.7	<p>1994 EIR: AR001124, PDF p. 68 (sewers); AR001111, PDF p. 55 (gray water); AR001236, PDF p. 180 (application of pesticides).</p> <p>2007 SEIR: AR002095, PDF p. 69 (mitigation measures related to pesticides); AR002100-AR002101, PDF pp. 74-75 (mitigation measures related to wastewater and recycled water impacts on groundwater).</p>
The community seeks a rural lifestyle	1.5, 7.1	<p>1994 EIR: AR001087-1093, PDF pp. 31-37 (open space, rural lifestyle, traffic); AR001095-101, PDF pp. 39-45 (open space, aesthetics, rural character); AR001208-1213, PDF pp. 152-157 (traffic, open space).</p> <p>2007 SEIR: AR00270, PDF p. 44 (traffic); AR002073-AR002076, PDF pp. 47-50 (traffic, acreage); AR002077, PDF p. 51 (traffic, rural lifestyle); AR002080, PDF p. 54 (traffic); AR002081, PDF p. 55 (lot size, traffic); AR002082, PDF p. 56 (open space); AR002083-AR002084, PDF pp. 57-58 (traffic, rural lifestyle and community); AR002085, PDF p. 59 (traffic, rural lifestyle); AR002104-AR002105, PDF pp. 78-79 (mitigation measures related to "rural character"); and AR002110-AR002111, PDF pp. 85-86 (traffic).</p>
Concerns about groundwater sustainability/ adequacy of water supplies	1.9-2.5	<p>1994 EIR: AR001111-1112, PDF pp. 55-56; AR001211, PDF p. 155. See also AR001334, 4.1 1994 EIR, Appendix O (approval of Master Service Agreement annexing area to Waterworks District No. 37 Acton).</p> <p>2007 SEIR: AR002077 and AR002081, PDF pp. 51 and 55.</p>

Supervisors who made that critical decision. We're here with authority in order to protect the quality of the water"). See also AR003376, Response to Comments, p. 18, Comment No. 7.1.

Subject	Los Angeles Water Board Response to Comment	Prior Environmental Document
Concerns about the use of septic systems	3.1 and 3.2	1994 EIR: AR001082-1086, PDF pp. 26-30; AR001112-1117, PDF pp. 56-61; AR001123-1124, PDF pp. 67-68; AR001152, PDF p. 96; AR001211, PDF p. 155; AR001226-1233, PDF pp. 170-177; AR001252-1258, PDF pp. 196-202. 2007 SEIR: AR002039-AR002040, PDF pp. 14-15.
Concerns about potential impacts from any future wastewater treatment plant	4.1 and 4.2	1994 EIR: AR1079-1083, PDF pp. 23-27; AR001171, PDF p. 115; AR001211, PDF p. 155; AR001258, PDF p. 202. 2007 SEIR: AR002038-AR002039, PDF pp. 13-14; AR002077, PDF p. 51; AR002080, PDF p. 54.
Water supply and egress issues related to fire; wind and fire danger related to building	6.1-6.3	1994 EIR: AR001106-1109, PDF pp. 50-53; AR001251-1252, PDF pp. 195-196. 2007 SEIR: AR002093-AR002094, PDF pp. 67-68 (fire protection); AR002105-AR002107, PDF pp. 79-81 (mitigation measures related to fire protection).
Development is being done for pure greed ⁸	11.16	2007 SEIR: AR002074, PDF p. 48 (developer's profit margin); AR002083, PDF p. 57 (greedy developer).

The vast majority of the petition is devoted to issues concerning the potential impacts either septic systems or a wastewater treatment system will have on the underlying aquifer. (See generally, Petition.) Additional concerns focused on the available water supply. (Petition at PDF pp. 2-3, 5-15.)

Neither the authorization of septic tanks nor the authorization of a wastewater treatment facility was before the Board, however. Both the use of septic tanks and the potential future wastewater treatment plant have been the subject of previous environmental analysis, however.

For the first three phases of the proposed development, wastewater disposal will be through individual septic tanks on each of the 68 residential lots.

(AR001070, 4.1 1994 EIR, PDF p. 14 of 953.)

⁸ Also unrelated to water quality, the petition and many commenters suggested that the developer is tied to Russia, is a known Russian criminal, and accuse the developer of having a shell company participating in money laundering. (Petition at PDF p. 15 of 19 and AR003421-3422, 10.2 Board Package, Response to Comments at PDF pp. 649-650 of 935.) The petition states that the matter has been referred to the "appropriate departments within the Federal Government for Investigation" and the Response to Comments document advises parties to contact the District Attorney with any evidence of criminal acts. (*Ibid.*) Given the absence of any connection between these comments and any water quality issue, we do not address these comments beyond this footnote.

The remaining 271 lots will utilize a regional sewer system sewage treatment plant for wastewater treatment and disposal.

The sewage treatment plant will provide tertiary treatment, and will be designed, constructed, and operated to meet the water quality and air quality standards of the RWQCB, State Department of Health Services, and Los Angeles County Department of Health Services.

(AR001070, 4.1 1994 EIR, PDF p. 14 of 953. See also AR001082-1086, PDF pp. 23-27 [establishing mitigation measures for septics and a wastewater treatment plant; determining level of significance after mitigation was “Less-than-significant”] and AR001111-1117, PDF pp. 55-61 [same].)

Comments on the 1994 EIR raised the concern that the use of septics could impact groundwater:

The proposed project is in an area of potentially impaired groundwater. Septic systems on the entire site will contribute to further groundwater degradation, and may result in a significant, cumulative adverse impact to water quality in the Agua Dulce groundwater basin.

(AR001123, 4.1 1994 EIR, PDF p. 67 of 953.) The Responses to Comments section of the 1994 EIR addressed this issue thoroughly, noting that the potential discharge from septic systems would occur in the Santa Clara River basin, and not the Agua Dulce Groundwater Basin (which has lower groundwater quality). (See AR001123-1124, 4.1 1994 EIR, PDF pp. 67-68 of 953 [Topical Comment 4].) The Los Angeles Water Board submitted a comment letter to the County of Los Angeles which highlighted the agency’s concerns regarding the potential impacts from septic systems to groundwater. (AR001177-1178, 4.1 1994 EIR, PDF pp. 121-122 of 953.) The Los Angeles Water Board noted that additional authorizations would be required, which at the time would have involved waste discharge requirements adopted by the Board. (*Ibid.*) The County’s EIR Response to Comments addressed the Los Angeles Water Board’s concerns, reiterating that the installation of septics for Phase 1, *outside* the Agua Dulce groundwater basin, and agreement to install a sewage treatment plant to address the wastewater disposal needs of future phases (which would overlie the Agua Dulce groundwater basin) would “preclude[e] significant local and cumulative impacts on groundwater.” (*Id.* at AR001152, PDF p. 96 of 953.)

Additional comments noted that the sewer treatment plan was not yet designed or approved and had its own potential impacts:

Oral Comment 21:

The sewer treatment facility is yet to be approved. You cannot have an agreement for further mitigation as a DEIR mitigation measure. The sewage treatment plant will be growth-inducing.

(AR001143, 4.1 1994 EIR, PDF p. 87 of 953.) The EIR's response provided legal authorities supporting the County's decision to allow the first phases of the development to proceed without additional environmental analysis of the wastewater treatment plant, which would only be used in future phases:

Response to Oral Comment 21:

California law provides that mitigation measures can properly involve items for which future approvals will be necessary (Sacramento Old City Association v. City Council of Sacramento, 229 Cal.App.3d 1011 (1991)). In the Sacramento case, the court stated that "where future action to carry a project forward is contingent on devising means to satisfy [specific performance] criteria, the agency should be able to rely on its commitment as evidence that significant impacts will in fact be mitigated."

A precedent exists for approval of projects under similar conditions. The Sierra Colony II project (Tentative Tract 48786) was tentatively approved pending completion of the regional treatment plant. In addition, a modification was made to the proposed project and mitigation measures were attached to support this modification. The project modification is as follows:

A total of 68 lots in Phases I, II, and III have been granted approvals for septic systems by the Regional Water Quality Control Board, Los Angeles Region. The remaining 271 lots will hook up to the regional sewage treatment plant proposed as a component of Tentative Tract 50259. The treatment plant will be assessed under separate environmental documentation. Building permits will not be issued for any lot in Phases IV through XII without evidence of adequate sewage treatment capacity.

Plans for a wastewater treatment plant were not completed as of the certification of the 1994 EIR, which recognized, as the above section mentions, that future analysis of potential impacts would occur in the future:

Prior to construction of the local sewage treatment plant, environmental review will take place in order to: (1) analyze in greater detail the potential impacts of the sewage treatment plant on the Santa Clara River, on the unarmored threespine stickleback native to the Santa Clara River, and other environmental resources (e.g. air quality, noise, risk of upset), and (2) devise appropriate mitigation measures to reduce the impacts, where feasible, to a level of insignificance.

(AR001124, 4.1 1994 EIR, PDF p. 68 of 953.)

The 2007 SEIR further contemplated a wastewater treatment system, and evaluated the potential impacts to groundwater. (AR002035, 4.3 2007 SEIR, PDF p. 9 of 395 [groundwater quality, impacts from on-site reclamation and propose recycled irrigation, air quality, biological resources, and sewage disposal]; AR002035, PDF p. 13 of 395 [noting the wastewater treatment

system was considered “conceptual” at that time and final design would be determined during a later detailed design phase].) The 2007 SEIR determined that the wastewater treatment plant’s environmental effects were “less than significant,” both before and after proposed mitigation. (*Id.* at AR002035, PDF p. 13 of 395.)

Despite the fact that the 1994 EIR and 2007 SEIR documents clearly contemplated a future wastewater treatment system and evaluated related environmental impacts, the Los Angeles Water Board is unaware of any “piecemealing” or other CEQA challenge to either the 1994 EIR or 2007 SEIR. (See also AR002841, 10.2 Board Meeting, Board Package - Developer Response to LARWQCB Inquiry, PDF p. 69 of 935 [“No lawsuits were filed to contest the validity of either the 1994 EIR or the 2007 SEIR”].)

C. Petitioner Incorrectly Accuses Staff of Misrepresenting Environmental Documents.

The petition misstates and disregards the history and current status of availability of potable water and plans for wastewater treatment and alleges that the Los Angeles Water Board relied on staff misrepresentations in adopting the Order. Of key importance, the evidence before the Board is that environmental impacts of *either* septics for Phase 1 *or* a subsequent connection to a wastewater treatment plant have been contemplated in previously certified environmental documents. So, too, has the availability of a water supply to the proposed development. These are the primary considerations in determining whether a subsequent environmental document is necessary.

Before proceeding with an analysis of the legal claims, however, we first address a number of the misstatements that are foundational to Petitioner’s claims. The petition asserts the adoption of the Order was based upon alleged misrepresentations of the “approved planning documents”:

- The impact of the proposed wastewater treatment, a key environmental consideration necessary for the operation of the Project, on the community of Agua Dulce’s groundwater supply and the potential of the Project to impair the ground water supply if constructed with on-site septic systems as proposed
- The availability of sufficient groundwater locally in the Acton Agua Dulce groundwater basin to sustain the projected potable and, as yet unquantified, wastewater treatment needs⁹ of the Project
- The absence of a wastewater treatment entitlement that permits the Project to be implemented as presently contemplated by the discharger and misrepresented by agency staff during the meeting
- The absence of an approved final plan for the onsite wastewater treatment plant, a key facility necessary for the operation of the Project, to be sited on an

⁹ The Los Angeles Water Board routinely regulates wastewater treatment plants and is unfamiliar with the use of potable water in any significant amount to “operate” wastewater treatment facilities. The petition fails to describe this alleged need for potable water in any detail, so this response will focus on the need for potable water, generally, and evidence demonstrating its availability.

unrecorded portion of the Project site for which the unrecorded map expires in October 2022

(Petition at PDF p. 2 of 19.) The petition contends that the alleged misstatements “contradict the content of the Project’s approved documents prepared under CEQA” and therefore the Board’s approval was “based on purported entitlements and unmitigated environmental impacts that are inconsistent with those described and required in the approved environmental documents for the Project.” (Petition at PDF p. 3 of 19.) This is incorrect.

Notably, the petition presents no evidence of “misstatements” concerning the potable water supply, so the availability of potable water and its relevance to the Order will be addressed below in Section III.B.2.a. (no new information regarding proposed water supply). With respect to septic systems and the wastewater treatment plant, a closer reading of documents in the record, combined with clarifying testimony during the hearing, support the staff interpretation and presentation to the Board that Phase 1 will include construction of 68 residences with septic systems, and a wastewater treatment system will be constructed in conjunction with a later phase of development, subject to a separate authorization process that will entail additional CEQA evaluations.

The petition alleges that the 2007 SEIR modified the prior Project such that the septic systems would no longer be built on the first phase of the Project, citing the following documents:

- 2006 Supplemental EIR Notice of Preparation – Page 2 ‘Project Background’
“The revision entails providing an on-site water reclamation facility instead of the previously planned septic systems for the 68 residential lots and the previously-planned off-project water reclamation facility for the remaining residential lots.”
- March 2007 Staff report to planning commission – Page 1 ‘Project overview’
“Water Reclamation: Previously, an offsite water reclamation facility was approved for the project. The revised map proposes an onsite water reclamation facility in lieu of the previously planned septic systems for the 68 residential lots and offsite water reclamation facility.”
- April 2007 Final Bound SEIR – Page 2-2 ‘Grading and Construction Program’
“The wastewater reclamation facility, which can begin operation with a service area of 50 homes, would begin as soon as Phase 2 of tract 50385 is approved and recorded. Development of the homes will begin in June 2008, with buildout estimated for June 2014. Construction of the recorded portion of the site could occur at any time; however, as connection to the wastewater treatment plant is now proposed, this supplemental EIR assumes that portion will be constructed within the same timeframe as Phase 2 of Tract 50385.

(Petition at PDF p. 6 of 19.) Reading these excerpts, and nothing more, could understandably lead to the confusion posited by the petition that the 68 lots in Phase 1 would no longer be connected to septic systems. Many sources of evidence, however, including those cited in the petition, lead to the opposite conclusion - consistent with the staff presentation - that the 68 lots in Phase 1 would initially be connected to septic systems, and *later* connected to a future

wastewater treatment system construction, in conjunction with future phases of development. To the extent there was any confusion about the documents, Board members clarified those issues through questions posed to the Applicant's counsel during the Board hearing.

It is helpful to begin with the 1994 EIR, which separates out Phase 1 from the rest of the project:

For the first three phases of the proposed development, wastewater disposal will be through individual septic tanks on each of the 68 residential lots... The remaining 271 lots will utilize a regional sewer system sewage treatment plant for wastewater treatment and disposal.

(AR001070, 4.1 1994 EIR, PDF p. 14 of 953.) The 1994 EIR Response to Comments responded to the Los Angeles Water Board's comment letter, similarly aiding the reader in understanding that Phase 1 would be dependent upon septic systems, and any wastewater treatment plant would be tied to the future phases of development:

As stated in Table 1-1 of the DEIR, (see also Response to Topical Comment 4 and Response to RWQCB Comment I, above) septic tanks were expected to be approved at the time of Draft EIR publication (and have since been approved) for the first 68 lots as they lie outside the Agua Dulce Groundwater Basin. *Wastewater disposal for the remaining project site was unresolved at the time of Draft EIR publication...* Since that time, however, the applicant and the County have agreed to *utilize the regional sewage treatment plant* proposed for Tentative Tracts 50259 and 48786 for the wastewater disposal needs of Phases IV through XII, thereby precluding significant local and cumulative impacts on groundwater.

(AR001152, 4.1 1994 EIR, PDF p. 96 of 953 [emphases added].)

Particularly helpful in untangling the Petition's bullet points is the SEIR Summary of Project Description, which clearly states that the 2007 SEIR *pertains only to subsequent* phases of the development, *not* the 68 residences on the 163 acres – Phase 1 - that is the subject of the Order (see AR000003, 1.1 Application, 401 Application, PDF p. 3 of 113):

Los Angeles County certified the previous Final EIR for Agua Dulce Residential project and approved the project in 1994 for 339 single-family residential lots along with open space lots and water tank lots on 908 acres. [Footnote omitted.] *Subsequently, a 68-unit (approximately 163-acre) portion of the project was recorded. Currently, the project applicant, B&C Land and Water, LLC, is proposing a revision to the remaining 745-acre, unrecorded portion of the project.*

(AR002033, 4.3 2007 SEIR, PDF p. 7 of 395 [emphases added].) At the time of preparing the 2007 SEIR, Phase 1 was recorded, so the "unrecorded portion of the project" could not have included Phase 1. (AR001912-1913, 4.1 1994 EIR, PDF p. 856-57 of 953 [Vesting Tentative Tract Map].) Footnote 3 on page 2-7 of the 2007 SEIR similarly clarified the phases nomenclature:

Currently, *Phase I* of Tract 50385 *refers to the 68 previously recorded units*, which were referred to as "initial phase of the project" (previous Draft EIR pg. 4-24) and

"first phase" (previous Draft EIR pg. 4-27), and clarified as Phases I, II, and III of the twelve phases originally planned for the project. *Currently, Phase II of Tract 50385 refers to the remainder of the project (271 units at the time of the previous Final EIR, now reduced to 247 units).*

(AR002039, 4.3 2007 SEIR, PDF p. 13 of 395 [emphases added].) The Petition itself concedes that any discussion of wastewater treatment was *irrelevant* to Phase 1 of the Project, which contemplated septic systems for 68 residences. (Petition at PDF p. 6 of 19.)

The 2007 SEIR has a section entitled "Grading and Construction," which is cited in the petition, but Petitioner ignores language that parses out Phase 1 from future development. That language suggests the wastewater treatment plant would not be built until *after* construction of Phase 1:

The 68-unit recorded portion was recorded as Phase I of Tract 503 85, and the remaining portion of the site will be addressed in Phase II of Tract 50385. Construction of the entire project is anticipated to occur over an approximate six-year period. *The wastewater reclamation facility, which can begin operation with a service area of 50 homes, would begin as soon as Phase II of Tract 50385 is approved and recorded.*

(AR002034, 4.3 2007 SEIR, PDF p. 8 of 395 [emphases added].) That same paragraph notes that "Construction of the recorded portion of the Site [aka Phase 1] could occur at any time,"¹⁰ (*ibid.*), which inherently suggests that the 68 lots in Phase 1 would necessarily be built with septic systems, given the conceptual nature of the wastewater treatment plant at the time of the 2007 SEIR:

The project wastewater facilities plan in the Supplemental Draft EIR, *considered conceptual at this point in time*, provides capacity for 400 units and 90-day wet weather storage capacity for the project. The final design, including confirmed selection/design of treatment equipment, sizing of tank/reservoirs, layout of facilities, and design of the recycled water distribution/irrigation system, shall be determined during the detailed design phase to the satisfaction of the County Department of Public Works (DPW) ... The project shall comply with all County DPW, Regional Water Quality Control Board (RWQCB), and California Department of Health Services requirements.

(AR002099-AR002100, 4.3 2007 SEIR, PDF pp. 73-74 of 395 [emphasis added].)

Los Angeles Water Board staff eliminated the confusion by going directly to the primary sources of information, the County and the Applicant:

¹⁰ That same sentence "assumes" that the recorded portion (i.e. Phase 1) would be constructed at the same time as Phase II (*ibid.*), but there is nothing in the 2007 SEIR or related approval that *requires* connection of Phase 1 to a sewer immediately upon construction.

Staff has confirmed with RTG Investments and the County of Los Angeles, that individual septic systems will be used to treat domestic wastewater for the 68 proposed homes on the project site until the treatment plant is built in a later phase of the development.

(AR003387, 10.2 Board Meeting, Board Package - Response to Comment, PDF p. 615 of 935.)

While the Tentative Order does not address wastewater treatment, staff has [confirmed] with RTG Investments, LLC and the County of Los Angeles, that [the Applicant is] planning to install individual septic systems to treat domestic wastewater for the 68 proposed homes in Phase 1 of the proposed site.

(AR003458, 10.2 Board Meeting, Transcript, p. 686 of 935 (C. Gallon, Standards and TMDL Unit Supervisor). See also AR003466, 10.2 Board Meeting, Transcript, p. 694 of 935.) At the hearing, Board members recognized that there was confusion around this issue and resolved the matter by asking the Applicant's counsel to clarify:

So, wastewater treatment, if you want to go back to this state which is the 68 homes, the [EIR] states for the first three phases of the growth and development, which is the 68 homes you're talking about, waste water disposals through the individual septic tanks on each of those 68 residential lots, and the Phase 2 residential lots will utilize regional Sources of sewage treatment plants, or wastewater treatment and disposal.

BOARD MEMBER NAHAI: The contemplation, though, is septic initially and then a sewage treatment plant sometime down the line? Do I understand that correctly?

MR. CHADWICK: That's correct.

(AR003527-3528, 10.2 Board Meeting, Transcript, PDF pp. 755-756 of 935. See generally, *id.* at AR003523-3528, pp. 100-105 [discussion regarding future agency approvals, including wastewater treatment systems].)

The Los Angeles Water Board staff relied on evidence – previously certified environmental documents and conversations with County officials and the Applicant's representatives – in representing to the Board that Phase 1 would be dependent upon septic systems initially, and later connected to any future constructed wastewater treatment plan. The record negates the petition's accusations of misrepresentations.

III. ARGUMENT

Petitioner has requested that the State Water Board cancel and rescind the Order, but now that the Site has been graded, it is imperative that the State Water Board uphold the Order's protective measures, which ensure that the Site is properly revegetated and otherwise managed to prevent impacts to water quality. In reviewing the propriety of the Order, the State Water Board will find that the Los Angeles Water Board considered the necessary factual circumstances at the Site and applied relevant guidance and laws, including the Porter-Cologne

Water Quality Control Act and the State Water Board's Dredge or Fill Procedures, in crafting the Order.

Should the State Water Board disregard the Applicant's contention that any claims concerning CEQA are now moot, and review the Los Angeles Water Board's CEQA analysis, the State Water Board should agree with the Los Angeles Water Board's determination that there was no new information concerning additional environmental effects that would support the need for a subsequent EIR.

The State Water Board should reject the Petitioner's arguments and speculation, which are not based on evidence, and similarly reject allegations of piecemealing, where the purportedly piecemealed aspect of the project – the wastewater treatment plant – was clearly contemplated in previously certified environmental documents.

As described in the Background section, *supra*, and as described in the Order itself, Los Angeles Water Board staff reviewed the County of Los Angeles' previously certified environmental documents and found they adequately evaluated environmental effects within the Los Angeles Water Board's purview as a responsible agency.¹¹ Moreover, Los Angeles Water Board staff conducted their own independent research on potential new environmental effects, and provided the results of that investigation – no new significant effects requiring a subsequent EIR – to the public during the public informational meeting, in the Response to Comments document, and again during the Board hearing.

As a responsible agency, the Los Angeles Water Board was not required to make a determination on the adequacy of the previously certified CEQA documents. Rather, an EIR prepared and certified by a lead agency is conclusively presumed to comply with CEQA for purposes of use by responsible agencies (Pub. Resources Code § 21167.2; *Communities for a Progressive Gilroy v State Water Resources Control Bd.* (1987) 192 Cal. App. 3d 847, 859 (*Progressive Gilroy*); *Friends of the College of San Mateo Gardens v San Mateo County Community College Dist.* (2016), 1 Cal.5th 937, 956 (*San Mateo Gardens*).) The environmental effects of grading were described in the 1994 EIR and the mitigation measures identified. To the extent that the mitigation measures did not suffice to protect water quality from the dredge and fill activities, the Los Angeles Water Board acted appropriately in its role as a responsible agency and required additional mitigation in the Order. (Cal. Code Regs., tit. 14, § 15096, subd. (g)(2) [role of responsible agency]. See also AR003755, 11. Final WDR, PDF p. 48 of 66 [CEQA finding].) This is where the inquiry should end.

The vast majority of Petitioner's contentions are unrelated to the Board's Order, but the petition blithely suggests that those contentions somehow trigger a subsequent EIR. The petition speculates as to the adequacy of a potable water supply and offers conjecture as to the effects on groundwater from 68 septic systems and potential future operation of a wastewater treatment facility that has yet to be proposed or designed. The table in Section II.B.2.

¹¹ See Cal. Code Regs., tit. 14, § 15096 (actions a responsible agency must take if it finds the EIR is not adequate for its use).

addresses each of these issues and provides numerous citations to the evaluation of these issues in the prior environmental documents.

Despite having no relationship to the proposed Order, staff evaluated each and every extraneous concern presented, to ensure that no significant changes had occurred that would cause environmental impacts not previously addressed. Board members similarly delved into these issues during the hearing, vetting each thoroughly. Having done so, and having made an evidence-based determination that no subsequent or supplemental EIR is required, the State Water Board should uphold the Los Angeles Water Board's conclusion. Interests in finality must prevail and the State Water Board should similarly find that no subsequent EIR was necessary.

Here, where the primary goals of CEQA have been met –the agency has considered and addressed potential significant environmental effects and public participation was ensured – the State Water Board should uphold the Order.

A. The Los Angeles Water Board Properly Disclosed, Evaluated and Mitigated the Environmental Impacts of the Proposed Dredge and Fill Activities

1. The Los Angeles Water Board Properly Conditioned Dredge and Fill Activities on Requirements Reflecting the Dredge or Fill Procedures

The State Water Board requested that the parties brief “whether the Los Angeles Water Board evaluated the appropriate scope of potential water quality impacts associated with the project in accordance with its responsibilities under the Porter-Cologne Water Quality Control Act (Water Code section 13000 et seq.)....” (Letter from Philip G. Wyels (Jan. 6, 2023).)

The matter before the Los Angeles Water Board was a tentative Order authorizing dredge and fill of 0.667 acres of waters of the State. The primary authorities governing regulation of dredge and fill activities are Water Code section 13263 and the State Water Board's Dredge or Fill Procedures. Water Code section 13263 requires the regional water boards to prescribe requirements governing discharges that implement relevant water quality control plans, take into consideration the beneficial uses to be protected and related water quality objectives, and the need to prevent nuisance. Here, the Order makes findings as to each of these requirements. (AR003746-3747, 11. Final WDR, Order at VI and VII, PDF pp. 39-40 [identifying project impacts and the relevant beneficial uses] and AR003749-3758, Order at PDF pp. 42-51 of 66 [establishing requirements to ensure protection of beneficial uses and avoidance of nuisance].) The petition does not challenge any of these findings.

The stated purpose of the Dredge or Fill Procedures is to protect wetlands by ensuring that they are properly identified, protected and mitigated for any loss, consistent with the No Net Loss Policy (Executive Order W-59-63). (See generally, AR005350, et seq., 15. References, Dredge or Fill Procedures.) As described in the Background section, the Los Angeles Water Board properly identified waters of the State at the Site, evaluated impacts and required mitigation consistent with the Dredge or Fill Procedures, which require that:

- a. A sequence of actions has been taken to first avoid, then to minimize, and lastly compensate for adverse impacts that cannot be practicably avoided or minimized to waters of the state;
- b. The potential impacts will not contribute to a net loss of the overall abundance, diversity, and condition of aquatic resources in a watershed (or multiple watersheds when compensatory mitigation is permitted in another watershed as set forth in section IV.B.5(d));
- c. The discharge of dredged or fill material will not violate water quality standards and will be consistent with all applicable water quality control plans and policies for water quality control; and
- d. The discharge of dredged or fill material will not cause or contribute to significant degradation of the waters of the state.

(AR005360, 15. References, Dredge or Fill Procedures, PDF p. 146 of 490.) As discussed in the Background, staff first identified waters of the State, utilizing methods described in the Army Corps of Engineers Arid Southwest Supplement, as recommended in the Dredge or Fill Procedures to delineate waters of the state. (*Id.* at AR005354, PDF p. 140 of 490).

In order to avoid and minimize impacts, the Order requires a series of BMPs to be implemented (AR003755, 11. Final WDR, Order, PDF p. 48 of 66), consistently with the guidance provided in Appendix A of the Dredge or Fill Procedures (AR005373, et seq., 15. References, Dredge or Fill Procedures, subpart H, PDF p. 159, et seq., of 490).

To compensate for adverse impacts and comply with the No Net Loss Policy, the Order requires compensatory mitigation for permanent impacts at a 2.8:1 ratio, through the purchase of credits from a mitigation bank (AR003757, 11. Final WDR, Order, PDF p. 50 of 66; AR002433, 6. Mitigation Credits, Petersen Ranch Mitigation Bank Agreement, Bill of Sale and Payment Receipt [Executed], PDF p. 1 of 11). This is greater than the minimum 1:1 ratio required by the Dredge or Fill Procedures. (AR005362, 15. References, Dredge or Fill Procedures, PDF p. 148 of 490.)¹²

Consistent with the Dredge or Fill Procedures (AR005363, 15. References, Dredge or Fill Procedures, section IV.B.7, PDF p. 149 of 490), the Order also includes monitoring and reporting requirements (AR003749 et seq., 11. Final WDR, Order, PDF p. 42 et seq. of 66) to ensure the discharge will not violate water quality standards and will be consistent with all applicable water quality control plans and policies for water quality control.

¹² We note that additional California Department of Fish and Wildlife mitigation requirements also apply and the applicant will purchase an additional 1.35 acres of Chaparral and 1.26 acres Cismontane/Pinyon-Juniper Woodland credits to offset impacts for the Project. (AR003725, 11. Final WDR, Order, PDF p. 18 of 66; AR000672, 3.2 CDFW, CDFW [Executed 102621], PDF, p. 56 of 116.)

The Los Angeles Water Board also required financial assurances for the Project, which are contemplated in the Dredge or Fill Procedures, ordinarily in relation to compensatory mitigation plans. (AR005363, 15. References, Dredge or Fill Procedures, Section B.5.f, PDF p. 149 of 490.) In this case, financial assurance requirements were added to the Order to specifically address public comments concerning potential abandonment of the project that could leave the land graded and unprotected for an indeterminate period, posing a threat of discharge to waters of the State. (AR003758, 11. Final WDR, Order, PDF p. 51 of 66.)

As discussed in the hearing, the Los Angeles Water Board properly exercised its numerous authorities governing water quality in adopting the Order. (AR003510-3511, 10.2 Board Meeting, Transcript, PDF pp. 738-739 of 935 [Assistant Executive Officer Newman and Executive Officer Purdy's recitation of authority pertaining to water quality protection.]) The petition does not challenge the jurisdictional determination or any of the required tasks or mitigation measures. The State Water Board should therefore uphold each and all of the Order's findings and related requirements conditioning the authorized dredge and fill.

2. Petitioner's Alleged Concerns About Water Quality Impacts Have Been Addressed.

The petition identifies a number of water quality impacts that were purportedly unaddressed. Most do not relate to the Order, which had a limited scope involving conditional authorization of dredge and fill of 0.667 acres of waters of the State, but are addressed here nonetheless.¹³

a. Water Quality Concerns Related to Septic Systems

Petitioner contends:

In the event that the discharger does not pursue future phases of development, "the septic systems (if ever permitted) for the first 68 dwellings would also become permanent. The environmental impact of this eventuality on the groundwater supply has never been considered in any of the approved planning documents adopted for the Project.

(Petition at PDF p. 11 of 19. See also p. 10 ["The impact on the groundwater supply water quality by allowing the construction of the first 68 dwellings with onsite septic systems"].) Contrary to the above quote, the 1994 EIR evaluated the environmental impacts and established mitigation measures associated with the installation of septic systems for the 68 residences in Phase 1. (AR001064, AR001082-1087, 4.1 1994 EIR, PDF pp. 8, 26-31 of 953, ultimately determining there would be a less than significant impact. (See also II.B.2, *supra*

¹³ The Los Angeles Water Board staff and Board members fully considered these comments, even if unrelated to the Order, to ensure that there were no substantial changes to the Project or significant new environmental effects that would require a subsequent environmental document. (See II.B.2 [table identifying responsive sections of the Response to Comments document and demonstrating no new effects were present].) Nonetheless, any identified water quality concerns are presented in this section to fully address the State Water Board's inquiry into "whether the Los Angeles Water Board evaluated the appropriate scope of potential water quality impacts associated with the project." (Letter from Philip G. Wyels (Jan. 6, 2023).)

[table cross-referencing the EIR and 2007 SEIR, demonstrating no new effects were present] and III.B.2.b [no new environmental effects regarding septic systems], *infra.*)

The Los Angeles Water Board's Response to Comments document addressed the concern regarding potential impacts to groundwater caused by septic systems, and notes that any future septic systems will be regulated by the Local Area Management Program, which has been approved by the Los Angeles Water Board and complies with the requirements of the State Water Board's *Water Quality Control Policy for Siting, Design, Operation and Maintenance of Onsite Wastewater Treatment Systems* (OWTS Policy). (AR003387, 10.2 Board Meeting, Board Package - Response to Comments, PDF p. 615 of 935.) Assistant Executive Officer Newman made these same assurances during the public hearing. (AR003510, 10.2 Board Meeting, Transcript, PDF p. 739 of 935.)

Beyond an allegation that impacts *could* happen, the petition fails to provide any evidence supporting an assertion that water quality *will* be impacted from either the construction or inability to construct septic systems. This is only argument and speculation. (See Cal. Code Regs., tit. 14, § 15384 [speculation is not substantial evidence].) In short, there is no evidence that could form a basis for overturning the Los Angeles Water Board's determination on this basis.

b. Concerns that the Project Will Compromise the Groundwater

Petitioner contends:

Written Comment Section 2 notes the concerns that the Project may compromise the local groundwater basin for which the Los Angeles Regional Board is responsible.

(Petition at PDF p. 14 of 19.)

During the meeting, Verbal Comments outlining these concerns were made by Lynn Plambeck [at 1:24:05], John Bruno [at 1:33:55], Stuart Souki [at 1:34:55], Pris Tisza [at 1:40:31], Marcy Winter [at 1:46:00] and Marcy Calnan [at 1:49:38].

(Petition at PDF p. 14 of 19.)

The petitioner is concerned that if the Project is delivered as incorrectly contemplated by Board staff and the discharger during the meeting that the Project will result in contamination of the local groundwater supply with excessive levels of nitrates and chlorides a risk that was acknowledged in the EIR and SEIR.

(Petition at PDF p. 3 of 19)

Here Petitioner refers to the commenters' concern that the development may impact groundwater quality or quantity, both of which are addressed in the Los Angeles Water Board's Response to Comment document in sections 1 (groundwater quality) and 2 (water supply). (AR003377-3386, 10.2 Board Meeting, Board Package – Response to comments, pp. 605-614 of 935. See also Section II.B.2, *supra* [potential for the Project to impact groundwater previously

considered in environmental documents and Response to Comments document].) Los Angeles Water Board staff addressed each of these concerns. (*Ibid.*) The Petition does not identify any evidence to rebut staff's responses. Here, the *only* evidence is that which is cited and relied upon by the Board. *None* of the cited testimony provided any *evidence* that the Los Angeles Water Board could have considered in reaching its decision:

- Ms. Plambeck made unsubstantiated statements that expressed her concern about potential water shortages, impacts from septic tanks and failure of regulatory agencies to perform, but there were no documents or evidence to contradict the statements in the Response to Comments document. (AR003480-3483, 10.2 Board Meeting, Transcript at PDF pp. 708-711 of 935.)
- Mr. Brunot expressed concerns related to potential fires. (AR003485-3487, 10.2 Board Meeting, Transcript at PDF pp. 713-715 of 935.)¹⁴
- Mr. Souki "posited" that the aquifer would be depleted as a result of the development. He also mentioned "adverse effects of water quality," without identifying any cause of those effects. (AR003487-3489, 10.2 Board Meeting, Transcript at PDF pp. 715-717 of 935.) The issue of aquifer depletion was addressed in the Response to Comments document, as were numerous potential sources of impacts to groundwater quality. (AR003383, 10.2 Board Meeting, Board Package- Response to Comments, PDF p. 611 of 935.) Mr. Souki did not provide any evidence contradicting the Response to Comments document.
- Ms. Tisza stated her desire to maintain a rural lifestyle, questioned whether the proposed development would fit within the existing landscape, discussed concerns about fires, but her only comment relevant to water quality was a concern that the wastewater treatment plant would cause damage to wells. (AR003490-3491, 10.2 Board Meeting, Transcript at PDF pp. 718-719 of 935.) The Response to Comments document addressed this issue. (AR003381, 10.2 Board Meeting, Board Package - Response to Comments, PDF p. 609 of 935)
- Similar to other commenters, Ms. Winter had concerns about her quality of life, potential damage to groundwater, sources of potable water and concerns that the developer would not complete construction. (AR003494-3496, 10.2 Board Meeting, Transcript, pp. 722-724 of 935.) These comments largely repeat those above. The Los Angeles Water Board responded to the concern about the potential failure to complete construction by amending the Order to require financial assurances that would ensure restoration if the construction was not completed.
- Ms. Calnan had concerns about whether a discharger can be trusted to implement self-monitoring provisions, adequacy of water supplies and demonstration of BMPs. The Response to Comments document addresses each of these issues. (See 10.2 Board Meeting, Board Package - Response to Comments at AR0003380, PDF p. 608 [self-

¹⁴ These are not water quality concerns, but it is worth noting that the 1994 EIR had already evaluated fire hazards and established substantial mitigation measures to address them. (AR001106, 4.1 1994 EIR at PDF p. 50 of 953.)

monitoring]; AR0003383, PDF p. 611[water supplies]; and AR003422, PDF p. 650 [demonstration that BMPs will be implemented].) The Order includes reporting requirements at page 8 (AR003749, 11. Final WDR, Order, PDF p. 42 of 66), in particular semi-annual reporting, which includes the implementation status of BMPs. (AR003769, 11. Final WDR, Appendix C of the Order, PDF p. 62 of 66.) Neither the Petition nor Ms. Calnan identified any evidence contradicting the Response to Comments document.

(See also Section III.B.1 [no new information] and III.D [Board need not consider speculation], *infra*.)

Finally, with respect to the concerns about nitrates and chlorides, the petition's citation to the 1994 EIR and 2007 SEIR is evidence that these issues have already been considered. (See Petition at p. 3 of 19.) As discussed above, the Response to Comments document addressed these concerns (AR003376, 10.2 Board Meeting, Board Package – Response to Comments at PDF p. 604 of 935) and Assistant Executive Officer Jenny Newman also addressed these concerns at the hearing, noting the Local Area Management Plan and the State Water Board Onsite Wastewater Treatment Systems Policy were adopted to protect groundwater from discharges from septic systems. (AR003510, 10.2 Board Meeting, Transcript, PDF p. 738 of 935.)

In short, the Los Angeles Water Board considered and addressed each and every concern related to water quality in full, and modified the Order to address water quality concerns. There is no evidence to the contrary and the Los Angeles Water Board need not address speculation. (See Section III.D., *infra*, [speculation] and Cal. Code Regs., tit. 14, § 15384 [speculation is not substantial evidence].)

c. Concerns that the Hillside Will Be Permanently Scarred If the Project is Not Completed

The petition identified one issue that the Los Angeles Water Board agreed was pertinent to the project – the concern that the authorized grading might proceed and then the project could be abandoned, resulting in permanent destruction of waters of the State. Petitioner contends:

By allowing the petitioner to perform grading before the previously agreed requirements of the approved planning documents have been applied for and secured, the petitioner is concerned that the discharger may subsequently abandon the Project if these requirements cannot be obtained for any reason, resulting in the permanent destruction of ephemeral streams on the Project site and the unrecoverable grading of undisturbed rural hillsides and vistas.

(Petition at PDF p. 3 of 19.)

Should the unrecorded map where the required wastewater treatment facility is located expire, there can be no guarantee that the discharger will be able to secure a renewed map due to the prevailing environmental considerations that will apply to such a new application. This has profound environmental impacts on the community of Agua Dulce and would result in the permanent destruction of

the ephemeral streams located on the Project site covered by the order. In this scenario, the community of Agua Dulce, of which the petitioner is part, are left with permanently scarred rural hillsides and vistas resulting from the grading performed to create the pads, storm drains and streets for the first 68 dwellings that cannot be restored.

Petition at PDF p. 16 of 19.) Los Angeles Water Board members were sympathetic to this concern and addressed it by requiring a financial assurance mechanism. (AR003758, 11. Final WDR, Order, PDF p. 51 of 66.) The Board also added requirements to specifically address potential abandonment of the project that could leave the land graded and left unprotected for an indeterminate period:

17. If grading is complete and construction is not anticipated to commence during the following storm season (November through March), the Permittee shall put in place additional erosion control BMPs before the storm season to ensure protection of water quality. These measures may include replanting the affected riparian zone with native species. The erosion/planting plan shall be submitted for written acceptance by Los Angeles Water Board staff. The plan shall include: a planting palette with plant species native to the Project area; seed collection location; invasive species management; performance standards; and maintenance requirements (e.g., watering, weeding, and replanting).

(AR003757, 11. Final WDR, Order, PDF p. 50 of 66. See also 10.2 Board Meeting, Transcript at AR003512, AR003533, AR003544, AR003546, AR003549, AR003552, AR003554, AR003561-3571, PDF pp. 740, 761, 772, 774, 777, 780, 782, 789-799 of 935.) The Applicant has complied with the requirement and provided the required financial assurance mechanism. (AR003853, 12. Financial Assurances, Letter of Credit, PDF p. 80 of 696; AR003847, 12. Financial Assurances, Celine Gallon 09 27 2022 – approval of financial assurances, PDF p. 74 of 696.)

Petitioner's valid concerns regarding the potential for abandonment have been adequately addressed. The petition fails to identify any deficiencies in these requirements. Rescinding the Order, as Petitioner requests, would revoke these protective measures and allow desertion of the graded areas, as Petitioner fears.

B. The Los Angeles Water Board Properly Determined No Subsequent CEQA Analysis Is Necessary

The State Water Board has asked for additional briefing on "whether the Los Angeles Water Board properly concluded that a subsequent or supplemental environmental impact report was not required for the project in accordance with California Code of Regulations, title 14, section 15162, subdivision (c)."¹⁵ (Letter from Philip G. Wyels (Jan. 6, 2023).) The referenced section of

¹⁵ The petition contends that the Los Angeles Water Board should have prepared a "Supplemental" EIR and cites CEQA Guideline section 15162. (See Petition at PDF pp. 1, 8 and 10 of 19). The Wyels Letter (Jan. 6, 2023) similarly requests briefing regarding compliance with section 15162. For these reasons, this response brief addresses

the CEQA Guidelines establishes the analysis for public agencies who grant discretionary approvals after the initial EIR has been adopted and project approved:

Information appearing after an approval does not require reopening of [the initial] approval. If after the project is approved, any of the conditions described in subdivision (a) occurs, a subsequent EIR or negative declaration shall only be prepared by the public agency which grants the next discretionary approval for the project, if any. In this situation no other responsible agency shall grant an approval for the project until the subsequent EIR has been certified or subsequent negative declaration adopted.

(Cal. Code Regs., tit. 14, § 15162, subd. (c).) The cross reference to subdivision (a) is a list of three “triggering” events that would require preparation of a subsequent EIR. When an EIR has been certified, no subsequent EIR *shall be prepared* for that project unless the lead agency determines, on the basis of substantial evidence in the light of the whole record, one or more of the following:

- (1) *substantial changes* are proposed in the Project that will require *major revisions* due to *new or more severe significant environmental effects*;
- (2) substantial changes occur in the circumstances under which the Project is being undertaken that will require major revisions in the previous EIR due to *new or more severe significant environmental effects*; or
- (3) *new information* of substantial importance to the Project becomes available that was not known and could not have been known at the time the EIR was certified as complete, and that information *shows significant effects*, previous *significant effects will be substantially more severe*, mitigation measures or alternatives previously found infeasible are in fact feasible, or the project proponent declines to adopt considerably different mitigation measures or alternatives that would substantially reduce significant effects on the environment.

(Pub. Resources Code, § 21166; Cal. Code Regs., tit. 14, § 15162, subd. (a); *Progressive Gilroy, supra*, 192 Cal.App.3d at p. 863 [citing Pub. Resources Code, §§ 21080.1, 21166 and 21167.2].) Unless the Los Angeles Water Board found one or more of the above triggers applied, the Los Angeles Water Board was not required to prepare a subsequent EIR.

The burden rests upon Petitioner to demonstrate that the Los Angeles Water Board’s decision was not supported by substantial evidence. (*Committee for Re-Evaluation of T-Line Loop v. San Francisco Municipal Transportation Agency* (2016) 6 Cal.App.5th 1237, 1247 (*T-Line Loop*), citing *Latinos Unidos de Napa v. City of Napa* (2013) 221 Cal.App.4th 192, 206.) As discussed in detail throughout, substantial evidence supported the Los Angeles Water Board’s determination that

compliance with section 15162, although we note that section 15162 governs *subsequent* EIRs (not Supplemental EIRs, which are discretionary under section 15163). See also Section II.A, *supra*, and footnote 17, *infra*, discussing the additional environmental evaluations the Los Angeles Water Board undertook.

the underlying, certified, unchallenged CEQA documents adequately addressed the Project and no substantial changes in the project and no new or more severe environmental effects would require a subsequent EIR. Written and oral comments provided no evidence of any of the above triggers. The petition is similarly barren. Petitioner omits any discussion of the evidence supporting the Los Angeles Water Board's decision, thus failing to meet its burden under *T-Line Loop*. In these circumstances, the law and the facts support the Los Angeles Water Board's determination, and the State Water Board should uphold it accordingly.

1. No New Information or Significant Change in Environmental Effects Warranted a Subsequent EIR – A Review of the Law

The purpose of CEQA and development of EIRs is to provide the agency and the public with information about potential environmental effects, evaluate alternatives and ways to minimize significant effects. (Pub. Resources Code, § 21061.) “The central purpose of CEQA is to ensure that agencies and the public are adequately informed of the environmental effects of proposed agency action. The subsequent review provisions ... are accordingly designed to ensure that an agency that *proposes changes to a previously approved project* ‘explore[s] environmental impacts *not considered in the original environmental document.*” (*San Mateo Gardens, supra*, 1 Cal.5th at p. 951 [emphases added].)¹⁶ “The event of a change in a project is not an occasion to revisit environmental concerns laid to rest in the original analysis. Only changed circumstances ... are at issue.” (*Id.* at pp. 949–950 [emphasis added].) As described in the Background, *supra*, in this case, all environmental impacts related to grading were adequately described in the 1994 EIR. In addition, to the extent that commenters raised additional concerns regarding the overall Project (as distinct from the proposed Order), the table in the Background section demonstrates that each of those issues were vetted in the 1994 EIR and 2007 SEIR and addressed in the Response to Comments document.

Numerous cases emphasize that the types of changes requiring a subsequent or supplemental EIR are “substantial” and require “major revisions” of the previous EIR. (See, e.g., *San Mateo Gardens, supra*, 1 Cal.5th at p. 943, citing Pub. Resources Code § 21166.) For example, the Court in *T-Line Loop* upheld an agency determination that “changes in a neighborhood do not constitute a change in circumstances that requires a new EIR under section 21166, unless the changes require “major revisions” to an existing EIR.” (*T-Line Loop, supra*, 6 Cal.App.5th at p. 1255 [citing Pub. Resources Code § 21166, subd. (a); and Cal. Code Regs., tit. 14, § 15162, subd. (a)(2)].) In that case, as here, the EIR anticipated an increase in residential use and other development and analyzed the impacts of construction in residential areas, so no subsequent EIR was required. (*Ibid.* See also AR002037, 4.3 2007 SEIR, PDF p. 11 of 395 [cumulative growth in the region].)

Laurel Heights Improvement Assn. v. Regents of University of California discussed the concepts of “significant new information” or “substantial changes” in the context of the trigger to recirculate an EIR. (*Laurel Heights Improvement Assn. v. Regents of University of California*

¹⁶ Note that *Friends* cites to *Save Our Neighborhood v. Lishman* (2006) 140 Cal.App.4th 1288, which has received subsequent negative treatment, but the holding in *Friends* remains good law.

(1993) 6 Cal.4th 1112, 1129 (*Laurel Heights 1993*). See also *Moss v. County of Humboldt* (2008) 162 Cal.App.4th 1041, 1061–1062 [Guidelines require “that the new information be ‘of substantial importance’”].) The case interpreted CEQA Guideline section 15162, so the analysis is useful here, even though recirculation is not at issue. The factual circumstances in *Laurel Heights* involved a discovery that a project encroached upon wetlands, where the draft EIR indicated the wetlands would remain undeveloped, a change the Court ruled was a “substantial change in circumstances.” (*Laurel Heights 1993, supra*, 6 Cal.4th at pp. 1131-1132, citing *Mira Monte Homeowners Assn. v. County of Ventura* (1985) 165 Cal.App.3d 357, 365.) Similarly, additional public comment was required in another case where it was revealed that “a street would be extended through a ridge line resulting in a previously unidentified adverse visual impact.” (*Laurel Heights 1993, supra*, 6 Cal.4th at p. 1132, citing *Stevens v. City of Glendale* (1981) 125 Cal.App.3d 986, 998–999.) In contrast to these decisions, there is no allegation of any previously unidentified environmental effect like the encroachment upon wetlands or the new information about the impacts to the ridgelines. As discussed in the Background, *supra*, each and all of the concerns raised in the comments were previously addressed in the 1994 EIR and/or the 2007 SEIR.

Laurel Heights examined *City of San Jose v. Great Oaks Water Co.* (1987) 192 Cal.App.3d 1005, 1017, a case involving water supply, an issue the petition also raises. In that case, additional CEQA analysis was necessary where the City did not consider a change in the source of water to proposed new wells in an area with groundwater contamination. In contrast, there has been *no change* in the proposed water supply for the Project here. Staff contacted both the County and the Applicant to verify the availability of potable water as contemplated in the 1994 EIR (AR001070, 4.1 1994 EIR, PDF p. 14 of 953), so there is no new information concerning water supply that would trigger a subsequent EIR. (See also see also AR001334, 4.1 1994, 1994 EIR, Appendix O (approval of Master Service Agreement), PDF p. 278 of 953.)

Notably, in *Laurel Heights* itself, the community association seeking recirculation of the EIR had presented the Regents with *evidence*, including:

- (1) new noise studies; (2) new studies of potential toxic emissions; (3) clarification of the number of loading docks to be used for certain purposes; (4) recognition of “night lighting glare” as an insignificant impact; and (5) an expanded analysis of the alternative of adding to the existing facilities at the Parnassus campus.

(*Laurel Heights 1993, supra*, 6 Cal.4th at p. 1136.) Each of those items – studies, new information, analyses – is a form of evidence. In this case, however, Petitioner provides only speculation and conjecture, with no citations to evidence of any new information regarding environmental effects. The Court in *California State Water Resources Control Board v. Federal Energy Regulatory Commission* (9th Cir. 2022) 43 F.4th 920 held that “[s]ubstantial evidence cannot be based upon an inference drawn from facts which are uncertain or speculative and which raise only a conjecture or a possibility.” (*Id.* at p. 930, citing *Woods v. United States* (9th Cir. 1984) 724 F.2d 1444, 1451. See also *Sierra Club v. Tahoe Regional Planning Agency* (E.D. Cal. 2013) 916 F.Supp.2d 1098, 1124–1125.) Similarly, here, the State Water Board should reject the petition for its absence of factual underpinnings and affirm

the Order, which was based entirely upon substantial evidence in the record. Finally, it is important to note that the CEQA Guidelines err on the side of *not* preparing a subsequent EIR, *unless* one or more of the specified conditions have been met (Cal. Code Regs., tit. 14, § 15162(a) and (c).) The alternative Petitioner proposes – reopening CEQA any time there is new information of any kind, and not necessarily tied to an environmental effect – would restart the CEQA process every time plans or circumstances change, a principle that “would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made.” (*San Mateo Gardens, supra*, 1 Cal.5th at p. 956 [citing *Marsh v. Oregon Natural Resources Council* (1989) 490 U.S. 360, 373 and *Laurel Heights Improvement Ass’n of San Francisco, Inc. v. Regents of the University of California* (1998) 47 Cal.3d 376, 396 (*Laurel Heights 1988*) [original environmental review process included consideration of reasonably foreseeable future expansions; subsequent EIRs are only necessary when evaluating future action *not* considered in the initial review].) Given that regional water boards frequently act as responsible agencies, and as frequently rely upon original CEQA documents and determinations, Petitioner’s proposed remedy invites the State Water Board to step onto the slipperiest of CEQA slopes. The State Water Board should reject this invitation to re-open CEQA documents every time a regional water board acts as a responsible agency in favor of the California Supreme Court’s bias toward finality:

Once a project has been subject to environmental review and received approval, section 21166 and CEQA Guidelines section 15162 limit the circumstances under which a subsequent or supplemental EIR must be prepared. These limitations are designed to balance CEQA’s central purpose of promoting consideration of the environmental consequences of public decisions with interests in finality and efficiency.

(*San Mateo Gardens, supra*, 1 Cal.5th at p. 949 [citing *Bowman v. City of Petaluma* (1986) 185 Cal.App.3d 1065, 1074]. See also *Laurel Heights 1993, supra*, 6 Cal.4th at p. 1130 [Once an EIR has been certified, “the interests of finality are favored over the policy of encouraging public comment”].) As applied here, the 1994 EIR and 2007 SEIR explored all relevant environmental effects.¹⁷ The petition offers no new information regarding environmental effects to warrant a subsequent EIR.

¹⁷ To the extent the State Water Board is inclined to find, contrary to the above authorities, that a CEQA “update” was necessary, that occurred. As described in the Background, *supra*, staff requested and the Applicant provided additional information concerning potential environmental effects concerning, e.g., greenhouse gases and tribal cultural resources, and that information was considered and made available to the public and the Board. This is sufficient, as the Court found in *Hixon v. County of Los Angeles* (1974) 38 Cal.App.3d 370, 380 (emphasis added):

We believe that the respondent successfully met the requirements of the Guidelines in setting out the ingredients of their decision. In this latter sense it made a reviewable record by which we mean that *it conveyed sufficient information to the public as to why it had determined that no significant impact was present. Respondent proceeded in a manner required by law.*

2. No New Information or Significant Change in Environmental Effects – A Review of the Facts

The petition asserts, with no supporting evidence identifying new information or changes in circumstances, that a supplemental EIR should have been prepared:

The action was taken to approve the order in contravention of the California Environmental Quality Act Section 15378 and the Project requires a Supplemental Environmental Impact Report pursuant to the California Environmental Quality Act Section 15162....

(Petition at PDF p. 1 of 19.) Petitioner bears the burden to demonstrate that further CEQA analysis is necessary (*T-Line Loop, supra*, 6 Cal.App.5th at p. 1256) and has failed to do so here. Most illustrative of the type of comments the Los Angeles Water Board received is the following, which vaguely suggests there are more impacts, but fails to identify a single one, let alone any evidence that would support a decision to pursue a subsequent environmental analysis:

So, what we're asking you is to delay this so that CEQA can be done because, really, on both grounds, that's been answered in CEQA whether it's a severe, significant environmental effect trigger, or the evidence and information was not available at the time and could not have been known at the time of the EIR. Both of those should be triggering a CEQA review. So, I don't know what we need to do to demonstrate to this Board that the information they have is inadequate.

(AR003498, 10.2 Board Meeting, Transcript, PDF p. 726 of 935.) In short, no new or more severe environmental effects have been identified and accordingly, no subsequent EIR is necessary.

Petitioner's invocation of Public Resources Code section 15162 appears to be focused solely on the expiration of authorizations related to the septic systems. (See Petition, PDF pp. 7-8 of 19 [section 7.4] and 10 of 19 [section 7.6].) We note, however, that other sections of the Petition appear to identify purportedly changed circumstances with respect to each of the petition's three main issues: water supply, septic systems and a wastewater treatment plant. This response will therefore address each, even though the arguments concerning section 15162 do not directly address the water supply or wastewater treatment plant. For each topic, we note that the courts are not concerned with *any* change but rather only those *substantial changes* in the circumstances under which the Project is being undertaken that will require major revisions in the previous EIR *due to new or more severe significant environmental effects*. (Pub. Resources Code, § 21166; Cal. Code Regs., tit. 14, § 15162; *Progressive Gilroy, supra*, 192 Cal.App.3d at p. 863 [citing Pub. Resources Code, §§ 21080.1, 21166 and 21167.2].) Petitioner fails to identify any such circumstances here.

a. **Petitioner Offers No New Information Regarding Environmental Effects Related to the Proposed Water Supply**

The Petition questions potable water demand and available resources, including water needed to operate the reverse osmosis wastewater treatment system. (Petition at PDF p. 14 of 19.)

The petition alleges, without any reference to evidence, that recent years of drought will result in the Project “rely[ing] excessively on the local groundwater supply for potable water during drought years ... likely result[ing] in nearby homeowners and the petitioner losing the water supply in their private wells,” compounded with claims that arsenic levels will increase if groundwater levels drop. (Petition, PDF at p. 3 of 19. See also pp. 13-14 of 19.)

Impacts to groundwater and adequate water supply were fully vetted in the original CEQA process. As discussed below, the evidence in the record is that the 1994 EIR identified available water for the development, Los Angeles Water Board staff independently verified that the development had a water supply, and the Applicant’s attorney testified to the existence of water supplies. Finally, Petitioner fails to provide any evidence or documentation supporting conjecture about the effects of the drought or water allocations on the specific water supply dedicated to the development.

i. **The 1994 EIR Contemplated Water Supply**

The petition suggests that the County of Los Angeles is “working towards a County Water Plan.” (Petition, PDF p. 14 of 19.) This is not new information. Since 1983, the law has required urban water suppliers to prepare and adopt an Urban Water Management Plan, which must be updated every five years. (Water Code §§ 10620 and 10621. See also AR005708, et seq., 16. Other Citations, LA County 2020 Urban Water Management Plan.) The California Supreme Court makes a similar observation about water planning within the realm of CEQA:

Moreover, CEQA, in our understanding, does not require a city or county, each time a new land use development comes up for approval, to reinvent the water planning wheel. Every urban water supplier is already required to prepare and periodically update an “urban water management plan,” which must, inter alia, describe and project estimated past, present, and future water sources, and the supply and demand for at least 20 years into the future. (Wat. Code, §§ 10620–10631.)

(*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 434-435 (*Vineyard*). See also Pub. Resources Code § 21151.9 [CEQA provision requiring counties to comply with the above sections of the Water Code].) The 1994 EIR reflects compliance with these statutory requirements in describing the planned water supply for the Project and responding to concerns - virtually identical to those here - regarding the adequacy of those supplies, going so far as to attach a Master Service Agreement annexing the area to Waterworks District No. 37 Acton to demonstrate the existence of an adequate water supply. (See AR001111-1112, 4.1 1994 EIR, PDF pp. 55-56, and AR001211, p. 155 of 953; see also AR001334, 4.1 1994 EIR, Appendix O (approval of Master Service Agreement), PDF p. 278 of 953; and AR002077, 4.3 2007 SEIR, PDF pp. 51 and AR002081, p. 55 of 395.) Although

Petitioner questions whether the water supply will come to fruition, and speculates that future residents will drill additional groundwater wells, there is no evidentiary support for either of those conjectures in the record.

Petitioner is not the first to attack a proposed development on the basis that “paper water” does not make for a dependable supply. In *Vineyard*, the California Supreme Court lists numerous such cases and notes that “unrealistic allocations are insufficient bases for decisionmaking under CEQA.” (*Vineyard, supra*, 40 Cal.4th at p. 432, citing *Santa Clarita Organization for Planning the Environment v. County of Los Angeles* (2003) 106 Cal.App.4th 715.) Such a challenge must occur in the first instance, however, and not in a later administrative process, nearly two decades after certification of the original EIR. Petitioner acknowledges that “a final EIR prepared by a lead agency ... shall be conclusively presumed to comply with CEQA... As such, the content of the approved EIR and SEIR ... are clearly understood to govern the scope of the decisions that responsible agencies, including the Los Angeles Water Board, can make.” (Petition at PDF p. 5 of 19.) We agree. The failure of Petitioner to litigate the approval of those documents forecloses the ability to raise those same issues today. (Cal. Code Regs., tit. 14, § 15231 [final EIR adopted by a lead agency conclusively presumed to comply with CEQA unless litigated]. See also Cal. Code Regs., tit. 14, §§ 15230, 15112 and Pub. Resources Code § 21167 [time limits to file suit]. See also *Laurel Heights 1993, supra*, 6 Cal.4th at p. 1130 [the presumption of validity precludes reopening the CEQA process, “even if the initial EIR is discovered to have been fundamentally inaccurate and misleading in the description of a significant effect or the severity of its consequences. After certification, the interests of finality are favored over the policy of encouraging public comment.”].) In these circumstances, the law protects the finality of the EIR and does not require reopening the environmental analysis. (*Bowman v. City of Petaluma* (1986) 185 Cal.App.3d 1065, 1082 [in rejecting objections to the environmental document, the court noted, “None of these supposed flaws in the proceedings arose from the project modifications; the criticisms are equally applicable to the original EIR, which stood unchallenged for nearly five years before the present action was filed”].)

The petition suggests that drought is a new factor to consider. (Petition, PDF at p. 3, 13-14 of 19.)¹⁸ The record does not support that argument either. Fundamentally, drought is not new to California. Relevant to this particular project, as the Court observed in *Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 900–901, “California entered a fifth year of drought” in 1991, immediately prior to drafting and adoption of the 1994 EIR. State Water Board records concerning State Water Project allocations confirm that the water allocations in 1991 through 1993, immediately prior to the adoption of the EIR, are similar to allocations in recent years. (See Historical data, AR005934, 16. Other Citations, [SWP Table A allocations 1967 - 1995](#), PDF p. 230 of 236 [frequent allocations of 0-30%] and

¹⁸ The petition references Ms. Calnan’s testimony regarding water supply (found at Transcript pages 74-75). Although the transcript is of poor quality, it reflects Ms. Calnan’s testimony that District 37 only received 58% of its water allocation from the State Water Project. This information was unsupported, but allocations are addressed herein nonetheless.

Current data, AR005705, 16. Other Citations, 1996-2023 Allocation Progression , PDF p. 1 of 236 [frequent allocations of 0-30% allocated in 2019 through 2022].)

ii. Los Angeles Water Board Staff and Members Verified the Water Supply

Although the 1994 EIR adequately addressed the availability of a water supply, in response to these same concerns, Los Angeles Water Board staff took the initiative to verify with the County of Los Angeles that nothing has changed. (See AR002840, 10.2 Board Meeting, Board Package - Developer Response to LARWQB Inquiry, PDF p. 68 of 935 and enclosures; AR003367, 10.2 Board Meeting, Board Package - Response to Comments, PDF p. 604 of 935.) In addition, the subject was discussed at the hearing, during which Board members verified with the Applicant's counsel that the development has a dedicated water supply:

BOARD MEMBER NAHAI: So, the first question that was talked about and is like top of mind for everybody is where the water supply is going to come from. And I know that staff has responded to that question, but I want to get your response on the record in order to allay the concerns of the community as to where the water is going to come from. Has it been secured? Do you have signed commitments?

MR. CHADWICK: Thank you, Board Member Nahai. Staff's Responses to Comments are entirely correct, and while this is obviously not relevant to the permit before the Regional Board today, the Emerald Valley-East Kern Water Agency (AVEK) will provide the wholesale water supplies to LA County Water Board's District 37. District 37 is the Regional Water Purveyor which purchases water from AVEK on a wholesale basis and provides the water directly to customers for use ... District 37 have already committed to provide water to the project and, in fact, the water has already been paid for... [staff confirmed] those facts with Los Angeles County. And so water supply for the project, again, not relevant to this permit before us, but that has been confirmed and we're happy to answer that question for the public.

(AR003511-3512, 10.2 Board Meeting, Transcript, PDF pp. 739-740 of 935.) Substantial evidence in the record supported the Los Angeles Water Board's determination that the matter of water supply to the Project had previously been considered and no new information supported reopening the prior CEQA determinations.

iii. Argument or Speculation Regarding Arsenic Levels Are Not Substantial Evidence.

The suggestion that arsenic will increase in wells as a result of additional demand on the groundwater and related drawdown is simply unsupported and only raised for the first time in the petition. (Petition, PDF p. 3 of 19.) "Argument, speculation [or] unsubstantiated opinion" does not constitute new information or substantial evidence concerning water supply that would require a subsequent EIR. (Cal. Code Regs., tit. 14, § 15384. See also § 15162, subd. (a))

[standard for subsequent EIR].) In addition, having failed to raise this issue in comment letters and/or testimony at the hearing, Petitioner is precluded from doing so now. (*Greene v. Cal. Coastal Com.* (2019) 40 Cal.App.5th 1227, 1237 [administrative exhaustion requires petitioner to state “sufficiently specific” facts and legal arguments and “present the exact issue[s]” at the administrative level that they assert in litigation].) Further, Petitioner does not claim that they were unable to raise this issue to the Los Angeles Water Board, and they cannot do so now.

b. Petitioner Offers No New Information Regarding Environmental Effects Related to Septic Systems or a Wastewater Treatment Plant

The petition focuses on the claim that *authorizations* for septic systems have expired, as have maps which contemplated the proposed wastewater treatment plant. (Petition, PDF p. 5 and 7-8 of 19 [prior Los Angeles Water Board order authorizing septic systems] and 12-13 of 19 [expiration of unrecorded map means a delay in authorization of the wastewater treatment plant].)¹⁹ That is, at the time of the 1994 EIR, the document contemplated that the discharge from septic systems would be regulated pursuant to the then-operative Order 81-84 (Los Angeles Water Board Conditional Waiver of Waste Discharge Requirements relating to onsite wastewater treatment systems, or septic systems). That permit is no longer operative. As discussed in the Background, and Section III.A.2.a., *supra*, any future septic systems will be regulated by the Local Area Management Program, which has been approved by the Los Angeles Water Board and complies with the requirements of the State Water Board’s *Water Quality Control Policy for Siting, Design, Operation and Maintenance of Onsite Wastewater Treatment Systems* (OWTS Policy). (AR003387, 10.2 Board Meeting, Board Package - Response to Comments, PDF p. 615 of 935.)

The fact that a different agency may regulate these authorizations, or a different authorization will be necessary, is *not* a change in the *environmental effects* discussed in the 1994 EIR and 2007 SEIR. Here, the fundamental purposes of CEQA – agency and public consideration of *significant environmental effects* and mitigation of those effects - have been accomplished. (*Laurel Heights 1988, supra*, 47 Cal.3d at p. 391 [provide public agencies and the public in general with detailed information about environmental effects, minimize those effects and

¹⁹ The petition also cross-references the following testimony, which is substantively addressed in this response brief:

- Petition PDF p. 7 of 19 (Section 7.3, Wastewater Treatment Instead of Septic Systems) cross-references AR003480-83, 10.2 Board Meeting, Transcript, PDF pp. 708-711 (Plambeck) and AR003470-72, 10.2 Board Meeting, Transcript, PDF pp. 698-700 (J. Turner);
- Petition PDF p. 8 of 19 (Section 7.4, Septic System Permits Terminated) cross-references AR003492-93, 10.2 Board Meeting, Transcript, PDF pp. 720-721 (Ayer);
- Petition PDF p. 12 of 19 (Section 7.6, OnSite Septic Systems Require Supplemental EIR) cross-references AR003470-72, 10.2 Board Meeting, Transcript, PDF pp. 698-700 (J. Turner) and AR003496-99, 10.2 Board Meeting, Transcript, PDF pp. 724-727 (Calnan); and
- Petition PDF p. 13 of 19 (section 7.7, Unrecorded Map for Wastewater Treatment Plan Expires in 2022) cross-references AR003480-83, 10.2 Board Meeting, Transcript, pp. 708-711 (Plambeck) and AR003493-96, 10.2 Board Meeting, Transcript pp. 721-724 (Winter).

consider alternatives] [citing Pub. Resources Code § 21061 and Cal. Code Regs. tit. 14, § 15003, subds. (b)–(e).]

For the sake of argument, we consider both: 1) the possibility that Phase 1 will be constructed using septic systems; and 2) the possibility that Los Angeles County representatives and Applicant’s counsel were wrong, and construction of houses in Phase 1 can only occur if and when a wastewater treatment plant is constructed. The critical question the State Water Board posed – applicable to either scenario - is whether subsequent environmental evaluation is necessary. The evidence in the record is that certified and unchallenged CEQA documents contemplated *both* a development of 68 residences, dependent upon septic systems and 271 homes connected with a regional sewer treatment plant (AR001064, 4.1 1994 EIR, PDF p. 8 of 953) *and* the alternative situation in which all residences would be connected to a wastewater treatment system (AR002034, 4.3 2007 SEIR at PDF p. 8 of 395.). In short, the possibility that Phase 1 would be constructed with septic systems *was contemplated, evaluated, and circulated to the public* – all in keeping with CEQA. (See generally, AR001060, 4.1 1994 EIR, PDF p. 4 of 953.) Similarly, the eventuality of the residences in Phase 1 being connected to a wastewater treatment system *was contemplated, evaluated, and circulated to the public* – all in keeping with CEQA. (See generally, AR002027, 4.4 2007 SEIR, PDF p. 1 of 395.)

The petition raises another possible iteration where *neither* the septic systems nor the wastewater treatment system will be authorized, the site will be graded and unbuilt for years, susceptible to erosion and inhospitable to wildlife.²⁰ While clearly not desirable to either the Los Angeles Water Board or the community, this also is not new information that would warrant a subsequent EIR. Abandonment of developments is a potential environmental effect that could have been anticipated at the time of certification of the 1994 EIR. (*Cf.* Cal. Code Regs. tit. 14, § 15162, subd. (a)(3) [new information, which was not known and *could not have been known with the exercise of reasonable diligence* at the time the previous EIR was certified as complete].) Nonetheless, acting in its role as a responsible agency, however, the Los Angeles Water Board addressed this possibility in adopting additional mitigation requirements for financial assurances and revegetation/restoration BMPs related to a failure to complete construction.

C. The Los Angeles Water Board Acted Properly as a Responsible Agency

Having determined that there were no substantial changes to the Project or new information concerning substantial environmental effects not previously considered, the Los Angeles Water Board exercised its ordinary role in these types of permitting scenarios, that of a responsible

²⁰ In the convoluted discussion of the expiration of tract maps (Petition at PDF pp. 12-13 of 19) and absence of authorization for septic systems (*id.* at pp. 7-8), there is no actual conclusion to this effect. We are connecting the dots between these sections and the statement in the introduction that:

By allowing the petitioner to perform grading before the previously agreed requirements of the approved planning documents have been applied for and secured, the petitioner is concerned that the discharger may subsequently abandon the Project if these requirements cannot be obtained for any reason, resulting in the permanent destruction of ephemeral streams on the Project site and the unrecoverable grading of undisturbed rural hillsides and vistas.

(Petition at PDF p. 3 of 19.)

agency. (See Cal. Code Regs., tit. 14, § 15096.) As indicated in the Order, the Los Angeles Water Board, in its capacity as a responsible agency, considered the 1994 EIR and 2007 SEIR. (AR003747, 11. Final WDR, Order at PDF p. 40 of 66.) The Los Angeles Water Board was not required to make a determination on the adequacy of the previously certified CEQA documents. Rather, an EIR prepared and certified by a lead agency is conclusively presumed to comply with CEQA for purposes of use by responsible agencies (Petition at PDF p. 4 of 19. See also Pub. Resources Code § 21167.2; *Progressive Gilroy, supra*, 192 Cal. App. 3d at p. 859; *San Mateo Gardens, supra*, 1 Cal.5th at p. 956.)

As a responsible agency, “[w]hen determining whether a subsequent or supplemental EIR is required, the agency need only take into account environmental issues that are within the scope of the discretionary decision that it is considering. The agency is not required to assess environmental impacts that are outside the scope of its discretionary authority.” (Kostka & Zischke, *Practice Under the Cal. Environmental Quality Act* (Kostka), § 19.39 (Cont. Ed. Bar.2d ed.) [citing *San Diego Navy Broadway Complex Coal. v. City of San Diego* (2010) 185 Cal. App. 4th 924].) As noted in the Responses to Comments, the Los Angeles Water Board’s discretionary approval did not regulate the quantities of groundwater extracted from production wells, nor did it relate to construction of or discharge from septic systems or a wastewater treatment plant. (AR003383, 10.2 Board Meeting, Board package - Response to Comments at PDF p. 611 [water supply]; AR003387, PDF p. 615 [septic systems]; and AR003387, PDF p. 616 [wastewater treatment plant].) Rather, the Los Angeles Water Board’s discretionary approval was limited to waste discharge requirements controlling discharges of sediment from grading in and adjacent to waters of the State as part of the construction project. (AR003744, 11. Final WDR, Order, at PDF p. 37 of 66.)

In compliance with the CEQA Guidelines, the Los Angeles Water Board exercised its authority as a responsible agency by requiring best management practices and compensatory mitigation. (See Cal. Code Regs., tit. 14, § 15096, subd. (g)(2) [agency shall not approve the project²¹ as proposed if there are feasible mitigation measures within the responsible agency’s jurisdiction that would substantially lessen any significant effects]. See also AR003755 and AR003757, 11. Final WDR, Order at PDF pp. 48 and 50 of 66 [requiring BMPs and mitigation].) As described in the CEQA Guidelines, there is a rule of reason that governs the types of conditions the Los Angeles Water Board may impose: CEQA Guideline section 15096, subdivision (g), limits the role of the Responsible Agency to “mitigating or avoiding only the direct or indirect environmental effects of those parts of the project which it decides to carry out, finance, or approve.” (*Id.* at § 15096, subd. (g)(1).)

Even if the Los Angeles Water Board, as a responsible agency, had discretion to conduct subsequent CEQA review concerning matters outside its jurisdiction, such as traffic or noise

²¹ Note that a “project,” in the context of a responsible agency, is not the same thing as a “project” contemplated by a lead agency. (See footnote 1, *supra*. See also *Committee for a Progressive Gilroy, supra*, 192 Cal.App.3d at p. 863 [Project “refers to the underlying activity” and not “each of the several approvals sequentially issued by different agencies”]. Cf. Petition at PDF p. 2 of 19, which focuses solely on the meaning of “project” as it pertains to a lead agency.)

impacts from the construction of additional homes, the Los Angeles Water Board would not be able to impose mitigation or disapprove the project based on those impacts. (Kostka, *supra*, § 3.31 [“A responsible agency’s authority to mitigate impacts, however, is more limited than a lead agency’s authority; a responsible agency may require changes in a project only to lessen or avoid the direct or indirect environmental effects of that part of the project to be carried out or approved by the responsible agency.”]; see also 14 Cal. Code Regs., tit. 14, §§ 15041, 15096, subd. (g)(1); *Sierra Club v. California Coastal Com.* (2005) 35 Cal.4th 839, 860.)

D. “Piecemealing” Is Not Applicable Here and the Los Angeles Water Board Need Not Engage in Speculation

Petitioner contends that approval of the grading could not occur without also addressing the wastewater treatment systems for future phases of the Project, citing CEQA Guideline section 15378 which pertains to piecemealing. (Petition at PDF p. 2 of 19. See also *id.* at pp. 8-10 of 19.) Here, however, where Petitioner is asking the Los Angeles Water Board to consider the environmental effects of a future abstract or speculative aspect of the Project, numerous authorities find that no such environmental analysis is necessary. *Laurel Heights*, squarely addresses this concept: “no purpose can be served by requiring an EIR to engage in sheer speculation as to future environmental consequences.” (*Laurel Heights 1988, supra*, 47 Cal.3d 376 at p. 395 [citing *Lake County Energy Council v. County of Lake* (1977) 70 Cal.App.3d 851, 854–855 and noting that “environmental resources and the public fisc may be ill served if the environmental review is too early”]. See also *Citizens for a Sustainable Treasure Island v. City and County of San Francisco* (2014) 227 Cal.App.4th 1036, 1058–1059 [where “an EIR cannot provide meaningful information about a speculative future project, deferral of an environmental assessment does not violate CEQA”] [citations omitted] and Cal. Code Regs., tit. 14, § 15145 [EIR need not engage in speculation].)

Towards Responsibility In Planning v. City Council (1988) 200 Cal.App.3d 671 (*TRIP*) presents an analogous fact pattern, in which a citizen group (*TRIP*) challenged a San Jose City Council zoning decision, claiming that the decision was premature without first preparing design and financing plans for a new sewage treatment plant to support additional growth. The Court rejected these claims, finding that:

It would be unreasonable to expect this EIR to produce detailed information about the environmental impacts of a *future regional facility whose scope is uncertain and which will in any case be subject to its own environmental review...* The EIR addressed the environmental concerns posed by the expansion of the WPCP and *provided information to the extent it was available at the time.* CEQA requires nothing more. (Guidelines, § 15151.)

(*TRIP, supra*, 200 Cal.App.3d at pp. 681–682 [emphases added].) Here, the wastewater treatment plant serves a similar regional purpose as the wastewater treatment system in *TRIP*. The 1994 EIR and 2007 SEIR both evaluate the potential effects of any future wastewater treatment plant. (See generally, AR001070, 4.1 1994 EIR and AR002034, 4.3 2007 SEIR.) To the extent that a Report of Waste Discharge is filed with the Los Angeles Water Board for a proposed wastewater treatment plant, the Los Angeles Water Board will comply with its CEQA

obligations at that time. The holding in *TRIP* therefore applies, and the State Water Board should find that the Los Angeles Water Board need not engage in “sheer speculation” or “prophecy” in attempting to perform a detailed assessment of environmental effects of a facility that Petitioner admits is “conceptual” and may never exist. (Petition at PDF p. 12 of 19 [conceptual] and 13 of 19 [developer’s counsel testified “I honestly don’t know when that permit will be submitted to this board for consideration” and “the developer could let the map expire on the second phase”] and [“no work has been done to prepare the wastewater treatment plant plans”]. See also, *Laurel Heights 1988, supra*, 47 Cal.3d at p. 398; *TRIP, supra*, 200 Cal.App.3d at pp. 681-82.)

Laurel Heights discussed two criteria that would trigger review of future projects: 1) whether it is a “reasonably foreseeable consequence” of the initial project; and (2) the future expansion will likely change the initial project or its environmental effects, in which case, “it will have to be discussed in a subsequent EIR before the future action can be approved under CEQA.” (*Laurel Heights 1998, supra*, 47 Cal.3d at p. 396 [emphasis added].) Here, Petitioner cites the developer’s counsel, who stated that the future phases of the project may not occur, that is, *are not* necessarily a “foreseeable consequence” of the development of the first phase of the Project. (Petition at PDF p. 10 of 19.) The Los Angeles Water Board clearly understood the speculative nature of the wastewater treatment plant:

I can assure you that when the WDRs, or if they come with regard to onsite treatment systems, septic tanks, and wastewater treatment plants, that I'll look at that extremely carefully, as I believe every Board Member will... So, as I said before, I'm looking at the powers that we have in terms of the permit that is before us and not thinking—head to what -- and not second guessing what will be submitted to us, but evaluated at the time based on the facts.

(Transcript, pp. 105-107.) In this case, where the Los Angeles Water Board would require a crystal ball to forecast environmental effects, no such CEQA analysis is required and the State Water Board should so find.

E. Although Grading Has Already Occurred, the Order’s Protective Measures Should Be Upheld.

Petitioner requests that the State Water Board “rescind[] and cancel[] the previous approval of Water Quality Order No. R4-2022-066 Waste Discharge Requirements.” According to the Applicant’s letter to the State Water Board, however, the grading authorized by the Order has already occurred.²² (Letter from G. Braiden Chadwick, Grounds for Dismissal of Petition A-2799 (Jan. 6, 2023), pp. 1 and 4 [“Because the dredge and fill of mapped ephemeral streams and rough hillside grading has already been accomplished, Petitioner’s claims are no longer ripe for consideration.”].)

Courts routinely support the proposition that a CEQA challenge is rendered moot when the challenged activity, causing environmentally detrimental effects, has already occurred. In

²² Absent any granted request to stay the Order, the Applicant was authorized to proceed with these activities. (See Cal. Code Regs., tit. 23, § 3869, subd. (d).)

Parkford Owners for a Better Community v. County of Placer (2020) 54 Cal.App.5th 714 (*Parkford*), members of a community opposed construction of an expansion to a storage facility. As in the instance case, wherein the Petitioner did not sue the County or any other agency on any prior or parallel approvals, the community members in *Parkford* did not challenge the initial 1987 EIR concerning the Treelake Village development project (over 1000 residential units and various amenities including a storage facility), a conditional use permit authorizing construction of the storage unit in the 1990s, nor did they challenge an expansion in the early 2000s, which was similarly based upon the conditional use permit from the 1990s. (*Id.* at pp. 717-719.) The community opposed and sued to prevent construction of yet another expansion in 2016/2017, which was also rooted in the 1996 conditional use permit. (*Id.* at p. 719.) After the October 2016 approval, construction ensued and a certificate of occupancy granted in October 2017. (*Id.* at pp. 718-719.) The Court was “persuaded the completion of the Treelake Storage expansion has rendered moot Parkford’s challenge to the building permit authorizing construction of the expansion.” (*Id.* at p. 721.)

Perhaps the most oft-cited CEQA case evaluating mootness, *Hixon v. County of Los Angeles* (1974) 38 Cal.App.3d 370, considered a challenge to a negative declaration concerning the removal and replacement of 32 trees in the County of Los Angeles. Similar to *Parkford*, the tree removal occurred before the Court heard the matter, and the Court held that, “The project is ended, the trees are cut down and the subject is now moot insofar as resort to a planning or informational document, which is what an EIR is.” (*Id.* at p. 378.) *Feldman v. Bomar* (9th Cir. 2008) 518 F.3d 637, is yet another example of a Court who dismissed a CEQA appeal as moot. That case involved eradication of feral pigs from Santa Cruz Island. The Court observed:

Because we cannot resurrect the pigs, nor retroactively remedy any pain that they might have felt from being shot, nor take any other action to prevent or undo the eradication at issue here, we lack the power to grant any effective relief.

(*Id.* at p. 643.) The circumstances underlying the petition are similar to *Santa Monica Baykeeper v. City of Malibu* (2011) 193 Cal.App.4th 1538, in which Baykeeper challenged an EIR’s analysis of impacts to groundwater from irrigation of a proposed park. The Court found the case moot because the construction was complete:

We agree with City that Baykeeper’s claims regarding construction-phase impacts are now moot. Not only has the construction phase ended, but the entire project is complete and open to the public.

(*Id.* at pp. 1550.) Of particular note, both here and in the *Santa Monica Baykeeper* case, is the absence of any suggestion as to how the Court (or in this case, the State Water Board) could provide effective relief:

Baykeeper does not suggest specifically how we may provide effective relief regarding construction impacts under these circumstances. This is not a situation ... in which the public entity and developer attempted to bypass the CEQA

environmental review process. The EIR includes extensive mitigation measures to address construction-phase impacts.

(*Id.* at pp. 1550.) Here, where the petition fails to identify any additional measures to address the environmental effects of the decision before the Los Angeles Water Board – the proposed Order – the State Water Board should deny additional review.

The Los Angeles Water Board agrees with the Applicant that the request for relief is moot insofar as it asks the State Water Board to require additional CEQA analysis before allowing the dredge and fill activities to occur. The Applicant has provided evidence that grading has already occurred, and staff has independently verified that fact. (Chadwick letter, Attachment 1, Site Status Report; AR005941, 17. Site Inspection February 16, 2023, Inspection Report.)

Unlike the above cases, however, the State Water Board should ensure the Order’s viability, because the most important provisions of the Order - protecting water quality – remain operative. Best management practices and the financial assurances mechanism – the protective measures ensuring protection of water quality – remain in effect. (AR003755-3758, 11. Final WDR, Order, PDF pp. 48-51 of 66 [BMPs, mitigation and financial assurance mechanisms].) Significantly, the petition does not challenge any of these conditions, and a number of the provisions were added in response to public comments. (See II.A. Facts Relevant to the Los Angeles Water Board Decision, *supra.*) Granting the requested relief and rescinding the Order would leave the site graded with none of the protections in place, an untenable result that is contrary to Petitioner’s purported goals of protecting the environmental conditions at the Site. (See Petition at p. 16 of 19 [concerns about permanent destruction resulting from grading and failure to complete the Project].) These authorities would support a decision by the State Water Board to decline to review the Order’s validity, to the extent it authorizes grading (on the basis of mootness), and decline review to the remaining operative and protective provisions (on the basis that they are uncontested).

IV. CONCLUSION

The petition has two requests for relief and, based upon the foregoing arguments, the State Water Board should deny both. The first asks the State Water Board to rescind and cancel the Order. The effect of that will be to remove all protections from the now-graded Phase 1 area, an outcome that Petitioner itself argues against. (Petition at PDF p. 3 of 19 [concerns about the potential abandonment of the Project, resulting in permanent destruction of ephemeral streams and hillsides].) As discussed herein, the adoption of the Order, protecting against this very outcome, is supported by substantial evidence and should be upheld.

Petitioner’s second request for relief appears to ask the State Water Board to require development of plans for a wastewater treatment plant, approval of those plans and recording of the map where the plant would be sited, prior to applying for the waste discharge requirements discussed herein. (Petition at PDF p. 4 of 19.) We read this request to ask the water boards to require submission of plans for a wastewater treatment plant *for a future development phase* as a prerequisite to allowing grading of 0.667 acre of waters of the State in Phase 1 (grading that Los Angeles Water Board staff confirmed has already occurred). The

evidence in the record supports the conclusion that the proposed wastewater treatment plant is pertinent to a future phase of development, however, not the current one, and even the petition cites evidence that the second phase of development could potentially not occur. To the extent that any future wastewater treatment plant is proposed, with or without a future phase of development, approvals related to any such plant will assuredly present an additional opportunity for public input, including any required environmental review, and is the proper time and venue to evaluate potential effects, avoiding the speculation necessarily involved in conducting such a review at this time.

For all of the reasons discussed herein, the State Water Board should uphold the Los Angeles Water Board's Order as adopted because it was appropriate and proper under Water Code section 13320, and complied with relevant provisions of CEQA, including CEQA Guidelines 15162 and 15096.