NATURAL RESOURCES DEFENSE COUNCIL, et al., v. RECLAMATION BOARD OF THE RESOURCES AGENCY OF THE STATE OF CALIFORNIA, et al., Case No. 06 CS 01228:

The following shall constitute the Court's tentative ruling on the petition for writ of mandate, set for hearing in Department 19 on Friday, April 27, 2007. The tentative ruling shall become the final ruling of the Court unless a party wishing to be heard so advises the clerk of this Department no later than 4:00 p.m. on the court day preceding the hearing, and further advises the clerk that such party has notified the other side of its intention to appear.

In the event that a hearing is requested, oral argument shall be limited to no more than 20 minutes per side.

I. Introduction

In this action, petitioners challenge respondent Reclamation Board's approval of two permits (specifically, Permits Nos. 18018-1 and 18018-2), referred to in this action as the "fill and encroachment permits". Both permits are related to the development of a large area of land, known as the River Islands at Lathrop project, located on the Stewart Tract in Lathrop, California. The project area lies within the region known as the Sacramento-San Joaquin Delta.

The so-called "fill permit" (Permit No. 18018-1), a copy of which is in the administrative record lodged with the Court (A.R. pages 13405-13412), allowed the permittees (the real parties in interest) to place fill between pre-existing federal project levees on the outer edge of the Stewart Tract and an interior private levee recently constructed by the developers, with the goal of constructing a so-called "super levee" approximately 300 feet in width.

The so-called "encroachment permit" (Permit No. 18018-2), a copy of which is not in the administrative record, apparently because it has been approved but not yet actually issued, defines flood control easements over a portion of the new super levee and (by excluding much of the top of the levee from the easements) permits the developers to place structures on top of another portion of the levee.

Petitioners' claims in this action are two-fold. Primarily, they allege that respondent Reclamation Board violated the California Environmental Quality Act ("CEQA") in various respects when it approved the permits. In addition, they allege that the Board violated applicable state regulations requiring easements on and adjacent to levees when it approved the encroachment permit.

Real parties in interest made a motion to dismiss the petition on the ground that it was moot because work on the super levee had been completed, and on the further ground that petitioner's real litigation objective, which was to block all development of the Stewart Tract, could not be achieved through any relief that could be granted in this action. On April 13, 2007, the Court denied the motion to dismiss. Some of the arguments advanced in support of the motion to dismiss have been repeated in real parties' opposition to the petition. Since the Court addressed those arguments in ruling on the motion to dismiss, those arguments will not be addressed here.

II. Preliminary Evidentiary Issue—Motion to Strike

Respondent has made a motion to strike certain documents from the administrative record and to preclude petitioners from citing to or relying upon such documents in their argument. The documents are found at pages 22317, 22320, 22321, 22327 and 22328 of the administrative record, and appear to be copies of e-mail communications between respondent's counsel and various members of respondent's staff.

Respondent's motion is denied on the ground that respondent has not demonstrated that it made any reasonable effort to ensure that no privileged materials were disclosed in the administrative record, and did not move promptly to secure the return of the documents once they were included in the record. (See, *State Compensation Insurance Fund v. WPS, Inc.* (1999) 70 Cal. App. 4th 644, 653.) The record in this case was lodged on January 19, 2007. On February 23, 2007, petitioners filed their opening brief, in which they cited to and relied upon some of the documents that are the subject of this motion. Nevertheless, respondent did not promptly meet and confer with counsel for petitioners on this issue, and did not file a motion regarding the documents until March 23, 2007, with hearing set for the same day as the hearing on the merits of the petition, April 27, 2007. Moreover, as petitioners point out, there are other documents in the record that could legitimately be considered to be privileged and confidential, but which are not included in this motion, and respondent itself has cited at least one document in its brief (A.R. 11215) that might be considered confidential and privileged on the same basis as the documents at issue here. The present motion therefore appears to have been brought for tactical reasons rather than to redress a real, inadvertent waiver of privilege.

III. Summary of Petitioners' Claims

The petition for writ of mandate states six separate claims, expressed in the petition as separate causes of action. The first four allege violations of CEQA and may be summarized as follows:

1. First Cause of Action: Respondent violated CEQA by failing to assume a lead agency role in its approval of the fill and encroachment permits, and by failing to prepare a full subsequent or supplemental Environmental Impact Report.

2. Second Cause of Action: Respondent violated CEQA by failing to make findings on the approval of the fill and encroachment permits until after it had reached a decision on the project.

3. Third Cause of Action: Respondent violated CEQA by failing to make required findings for each of the significant environmental impacts of the fill and encroachment permits.

4. Fourth Cause of Action: Respondent violated CEQA by failing to comply with the CEQA regulatory Guidelines, which are applicable to respondent's actions through its own regulations.

The remaining two causes of action allege that respondent's approval of the encroachment permit violated its own regulations relating to levees. Those two causes of action may be summarized as follows:

5. Fifth Cause of Action: Respondent violated regulations prohibiting construction of new structures within an adopted plan of flood control on a levee section or within ten feet of a levee "toe", as defined in the regulations.

6. Sixth Cause of Action: Respondent violated regulations requiring the dedication of a flood control easement upon, over and across the property to be occupied by proposed flood control works, including the area within the proposed floodway, the levee section, and the area ten feet in width adjacent to the landward levee toe.

IV. Standard of Review

Because a hearing was required before respondent before approval of the permits, the petition for writ of mandate is brought under Code of Civil Procedure section 1094.5. A lengthy administrative record has been lodged with the Court. In general, the standard of review applicable to this matter is whether respondent abused its discretion, either by failing to proceed in the manner required by law, by failing to support its decision with adequate findings, or because the findings are not supported by substantial evidence in the record. (See, *Save San Francisco Bay Association v. San Francisco Bay Conservation and Development Commission* (1992) 10 Cal. App. 4th 908, 919.) The precise application of this general standard of review to petitioner's claims varies somewhat from one claim to another; thus, the Court will describe the applicable standard of review in its discussion of each claim.

V. Discussion

A. Petitioners' CEQA Claims

1. First Cause of Action

Petitioners' first cause of action alleges that respondent violated CEQA by failing to assume a lead agency role in its approval of the fill and encroachment permits, and by failing to prepare a full subsequent or supplemental Environmental Impact Report before approving the permits. Petitioners' claim has two aspects. First, they allege that further environmental review was required because the project had changed by virtue of the omission of a key element of the flood control and protection plan. Second, they allege that further review was required to take into account new information regarding the impact of climate change on the region in which the project is located.

In order to evaluate this claim, it is necessary to place respondent's actions in the context of the entire River Islands at Lathrop project. The levees which were the subject of respondent's actions were merely one part of a much larger project to develop the Stewart Tract into a residential, commercial and recreation center. The project has been in the works in one form or another since at least 1989, but took its current form in 2002.

At all times relevant to this action, the laboring oar in the environmental review of the project under CEQA has been assigned to the City of Lathrop, which acted as the so-called "lead agency" under CEQA. In this role, the City prepared a full EIR for all of the aspects of the project in its original form in 1995-1996, and another full EIR in 2003 after the project changed into its current form. The latter document was entitled a "Supplemental EIR" (referred to herein as "SEIR"); a copy of the SEIR is in the record in this action. (See, A.R. 7296-9230.) The adequacy of those documents under CEQA is not at issue in this action. As an agency that had

discretionary approval power over one aspect of the larger project, namely, the super levees, respondent acted as a so-called "responsible agency" under CEQA. (See, 14 C.C.R. section 15381.)

Given the location of the project, flood control and protection have been a major concern from the outset. Accordingly, the developers proposed a flood protection system that featured, as relevant to this case, a system of levees that included the so-called "super levees" that are at issue here, as well as a system of improvements on an undeveloped flood plain and water channel area adjacent to the project known as "Paradise Cut". The SEIR analyzed the environmental impacts of constructing this flood protection system. The SEIR recognized that constructing levees around the developed area of the project had the potential to increase flood stage elevations in downstream areas during severe flood events. This was because the developed area occasionally had flooded during severe events in the past, but no longer would; thus, the waters would have to go elsewhere, potentially putting more pressure on downstream levees. The SEIR concluded, however, that the actual impact would be less than significant, largely because the improvements to the Paradise Cut area, which would create additional flood storage capacity and increase flood flows, would be constructed in tandem with the removal of the developed area from the flood plain. (See, for example, the following sections in the SEIR: Project Description, Section 3.4.2, regarding Flood Protection elements of the project, A.R. 7676-7686; discussion of Impact 4.8-m, Hydrology and Water Quality--Surrounding Flood Stage Elevations, A.R. 7968-7972; and discussion of Cumulative Impacts, A.R. 8271.)

After the certification of the SEIR, the developers of the River Island project proposed to change the sequence of construction of the flood protection system. Specifically, the developers proposed to first build a portion of the levee system around the initial area to be developed, thus removing the developed area from the flood plain, and construct the Paradise Cut improvements later. Apparently, this change was felt to be necessary because the levee system only required approval by a state agency (respondent Board), while the Paradise Cut improvements had to be approved by a federal agency (the U.S. Army Corps of Engineers), and the federal process was likely to take substantially more time than the state process. The developers therefore presented a "phasing" proposal to the City.

Still acting as the lead agency for the project, the City determined that this change made the project sufficiently different that it should perform a review of its environmental effects under CEQA. The City therefore prepared and certified a document entitled "Addendum to Subsequent Environmental Impact Report", dated July 1, 2005. (A.R. 7114-7179.) The Addendum to the SEIR analyzed the flood-related effects of removing the developed area of the project from the flood plain without building the Paradise Cut improvements at the same time and concluded that the impacts that had been considered to be less than significant in the SEIR would remain less than significant under the new phasing. This conclusion was based on a number of factors, including the fact that only a portion of a "cross levee" projected to be built on the Stewart Tract would be constructed in phase 1, that only a portion of the area eventually to be developed was being taken out of the flood plain in phase 1, and that soil being removed from the phase 2 area in order to construct the levees for phase 1 would create extra flood storage capacity in the interim period. (See, A.R. 7152-7153.)

Following the certification of the Addendum to the SEIR, the developers proceeded to seek permission from respondent to build the super levees through the permits at issue here. During the course of the administrative proceedings related to the permits, petitioners appeared before respondent and raised the concerns they have raised in this action: whether building the

super levees without building the Paradise Cut improvements at the same time would create a significant risk of downstream flooding; and whether the potential effects of climate change (global warming) had been considered adequately in analyzing the environmental impacts of the project. Petitioners asked respondent to perform a new CEQA environmental review of the effects of the super levees.

Respondent did not do so. Instead, respondent determined that it was acting as a responsible agency under CEQA, rather than a lead agency, and on that basis determined that it was entitled to rely on the environmental review of the project the City of Lathrop had done as the lead agency in the SEIR and the Addendum to the SEIR. Respondent thus approved the fill and encroachment permits without a new environmental review. (See, respondent's Resolution 06-26, "Resolution Adopting Findings Related to Encroachment Permits No. 18018-1 & 18018-2", approved July 21, 2006, A.R. 12378-12379 (the text of the resolution); A.R. 13324; 13349 (excerpts from the transcript of the Board meeting at which the resolution was adopted, including the final vote); 13355-13356 (Minutes of Board's July 21, 2006 meeting).)

In this action, petitioners argue that CEQA required respondent to perform its own review of the potential environmental impacts of the super levees, because there had been two significant developments in relation to the project since the time of the prior environmental review in the SEIR and the Addendum to the SEIR. The first such development is alleged to be that the project approved by respondent does not include the Paradise Cut improvements, which "recent information indicates...may never be implemented." (Petition, paragraph 28.) The second such development is alleged to be new information regarding the effects of climate change on the Delta showing that the project either will have significant new impacts not discussed in earlier reviews, or that significant impacts previously examined will be substantially more severe than shown in previous reviews. (Petition, paragraphs, 29-30.)

The governing statute under CEQA is Public Resources Code section 21166, which provides that when an environmental impact report has been prepared for a project, no subsequent or supplemental EIR shall be required by a lead agency or any responsible agency unless one or more of the following events occurs: (a) substantial changes are proposed in the project which will require major revisions of the EIR; (b) substantial changes occur with regard to the circumstances under which the project is being undertaken which will require major revisions in the EIR; (c) new information becomes available, which was not known and could not have been known at the time the EIR was certified as complete.

With regard to petitioners' claim that the project has changed by virtue of the alleged omission of the Paradise Cut improvements, the standard of review is that the court will uphold the agency's decision if the administrative record as a whole contains substantial evidence to support the determination that the changes in the project or its circumstances were not so substantial as to require major modifications to an EIR previously done for the project. This is a relatively deferential standard that reflects the fact that an in-depth review of the project already has taken place. (See, *Santa Teresa Citizen Action Group v. City of San Jose* (2003) 114 Cal. App. 4th 689, 703.) The reviewing court may not substitute its judgment for that of the agency, and must resolve reasonable doubts in favor of the agency's decision. (See, *A Local and Regional Monitor v. City of Los Angeles* (1993) 12 Cal. App. 4th 1773, 1800.) The agency's decision is presumed to be correct, and the challenger has the burden of demonstrating otherwise. (See, Evidence Code section 664; *State Water Resources Control Board Cases* (2006) 136 Cal. App. 4th 674, 723.)

Having applied that standard of review to this first aspect of petitioners' claim, the Court finds that respondent's decision not to perform its own environmental review in connection with approval of the fill and encroachment permits is supported by substantial evidence in the record. That evidence consists of the City's SEIR and the Addendum to the SEIR. The latter document in particular concluded that deferring the Paradise Cut improvements to a later phase would not change the impact of the project on surrounding flood elevations as previously analyzed in the SEIR. The Addendum to the SEIR was not challenged by these petitioners (or any others); in fact, petitioners admit in the petition that the time for any such challenge has passed. (See, Petition, paragraph 27.) Thus, under the CEQA and the CEQA regulatory Guidelines, which have the force of law, the Addendum to the SEIR is conclusively presumed to comply with CEQA for purposes of its use by responsible agencies such as respondent, and the information therein may constitute substantial evidence in the record to support the agency's action on the project if its decision is challenged in court. (See, Public Resources Code section 21167.2; 14 C.C.R sections 15231; 15121(c).)

The only exception to this rule is where the provisions of Public Resources Code section 21166 are applicable, that is, where there has been a substantial change in the project. Petitioners have not demonstrated that such a change occurred here. To the extent that deferral of the Paradise Cut improvements was a substantial change to the project, that change already has been analyzed in the Addendum to the SEIR, a document that is now conclusively presumed to have complied with CEQA. Petitioners have not demonstrated that any of the factors upon which the Addendum to the SEIR relied in reaching its conclusion have changed, such as partial construction of the "cross levee", removal of only a portion of the eventual development area from the flood plain, or excavation of some phase 2 areas to provide material for building the levees. Respondent therefore was not required to do a new analysis of the effects of deferring the improvements.

Although petitioners now attempt to allege a subsequent change to the project based on the theory that the Paradise Cut improvements have been omitted, or will never actually be built, there is no evidence that this is so. In fact, all of the substantial evidence is to the contrary. The Addendum to the SEIR, which is the most recent evidence of the scope of the project, shows that the Paradise Cut improvements are still part of the project, although deferred to a second phase. (See, A.R. 7132.) No evidence in the record has been cited to show that the developers have cancelled their plans to build the improvements. Instead, the record shows that the developers are currently seeking approval to build them from the federal agency with jurisdiction over that portion of the project, and that the federal agency will perform its own environmental review of the improvements under federal law. (See, for example, A.R. 11477; 11776-11777.) In contrast, petitioners have cited only to a few testimonial statements in the record expressing a view, or concern, that the Paradise Cut improvements might be delayed for years as a result of this process, or possibly never built at all. (See, for example, A.R. 9808.) By themselves, such statements are nothing more than speculation and therefore are not substantial evidence that the improvements will not be built. (See, *Citizen Action to Serve All Students v. Thornley* (1990) 222 Cal. App. 3d 748, 756.)

To the extent that petitioners claim that the projected delay in obtaining approval for the Paradise Cut improvements is itself a change in the project not analyzed in the Addendum to the SEIR, it is worth nothing that the analysis contained therein does not appear to rely on any particular timetable for constructing the improvements. The Addendum merely states that the improvements will be constructed in phase 2, without indicating in any way when that will occur. Thus, its conclusion regarding no change in impact does not appear to depend upon timing, but

rather on the other factors related to the construction of phase 1 of the project noted above. Unless those factors change (and, as noted above, petitioners have not demonstrated that they have), the Addendum's conclusion apparently would hold indefinitely. Petitioners may feel that this conclusion is wrong, but it is beyond challenge now.

The Court therefore finds that petitioners have not demonstrated that there has been any substantial change in the project related to the Paradise Cut improvements such that respondent was required to perform its own environmental review of the impact of the super levees pursuant to Public Resources Code section 21166.

In their reply brief, petitioners shift ground somewhat, arguing that the relevant change in the project for purposes of analysis here is not just the deferral of the Paradise Cut improvements, but the fact that the super levees themselves were not part of the phasing proposal the City analyzed in the Addendum. Instead, petitioners argue that the project as analyzed therein consisted only of building a new interior ring levee, which would protect the area to be developed, and which would be physically separate and distinct from any existing levees, while leaving all activities related to strengthening or altering existing levees (i.e., the construction of the super levees) to phase 2, along with the Paradise Cut improvements. Thus, they argue, when the developers applied for the fill permit they had changed the project yet again, and such change required respondent to perform a new environmental review because the flood-related effects of the super levees would be significantly greater than those of the interior ring levee alone.

The Addendum does contain language suggesting that only the construction of an interior ring levee, and not the super levees at issue here, was contemplated and analyzed by the City at that time. (See, for example, A.R. 7135-7136, 7149, 7153-7154.) Even the project description the developers submitted in support of their application for the fill permit suggests as much, by referring to the super levees as part of "Phase 2A" of the project, and not the "Phase 1" discussed in the Addendum. (See, A.R. 11300.) There is thus some evidentiary support in the record for the concept that the project had changed yet again.

Before addressing the merits of this issue, the Court must resolve the question of whether this issue is properly before it. First, with regard to alleged significant changes in the project, the petition does not allege that the super levees themselves amounted to such a change; it concentrates entirely on the alleged omission of the Paradise Cut improvements. (See, Petition, paragraphs 1, 28.) Second, petitioners' opening brief did not present the argument that the super levees themselves were the significant change in the project, except possibly in very cursory form; once again, they concentrated on the alleged omission of the Paradise Cut improvements. The alleged omission of the Paradise Cut improvements also was the focus of petitioners' presentation at respondent's public hearing on the permits. (See, e.g., A.R. 11539-11540; 11549; 11565.) Detailed argument and citations to the record focusing on the super levees themselves as a significant change in the project occurring after the certification of the Addendum appears for the first time in the reply brief. Ordinarily, points raised for the first time in a reply brief need not be considered by the court. (See, *Reichardt v. Hoffmann* (1997) 52 Cal. App. 4th 754, 764.) Nevertheless, in this case the Court finds that it would be in the interests of justice to address and resolve petitioner's claim, because it is without merit.

As noted above, Public Resources Code section 21166(a) requires an agency to prepare a subsequent or supplemental environmental impact report where "[s]ubstantial changes are proposed in the project which will require major revisions of the environmental impact report." Here, petitioners have not demonstrated that construction of the super levees is so significant a

change in the project beyond the interior ring levees that were analyzed in the Addendum that major revisions of the Addendum would be required.

Petitioners' allegation that such changes occurred is based on the theory that construction of the super levee increased potential downstream flood impacts, which is in turn based on the following chain of logic: the pre-existing federal project levees were likely to fail during severe flood events, thus sending flood waters onto the Stewart Tract; such waters therefore would not increase downstream flood elevations and consequent pressure on downstream levees; strengthening the federal project levees into super levees means that they will no longer fail; thus, flood elevations during severe events will increase downstream, and levee failures and flooding are more likely to occur downstream as a result. This is the manner in which petitioners presented the issue to respondent at the public hearing on the permits. (See, e.g., A.R. 11547-11548; 11569.)

This chain fails at the first link, because substantial evidence in the record does not support the concept that the pre-existing levees were likely to fail, but rather indicates the contrary. With regard to those pre-existing levees, the Addendum states: "…a breach of these levees is considered unlikely because it has never occurred before, and because the existing levees are at least 4 feet above the elevation of the 200-year flood." (A.R. 7153-7154.) If the levees were not likely to fail in any event, then strengthening them would not create a significant new risk to downstream locations. The administrative record as a whole therefore contains substantial evidence to support the determination that any change in the project in the form of the construction of the super levees was not so substantial as to require major modifications to the prior environmental review done for the project. (See, *Santa Teresa Citizen Action Group v. City of San Jose* (2003) 114 Cal. App. 4th 689, 703.)

With regard to petitioner's claim that new information regarding the effect of climate change on the Delta should have compelled respondent to do its own further environmental review of the super levees, three requirements must be satisfied in order to trigger preparation of a new EIR. Those requirements are: 1) new information of substantial importance becomes available; 2) such new information was not known and could not have been known at the time the EIR was certified; and 3) the new information shows either that the project will have one or more significant effects not previously discussed or that significant effects previously examined will be substantially more severe than shown in the EIR. If any one of these three requirements is not satisfied, the agency is prohibited from requiring a subsequent EIR. (See, *A Local and Regional Monitor v. City of Los Angeles* (1993) 12 Cal. App. 4th 1773, 1800.)

In this case, the alleged new information petitioners rely upon all relates to the projected impact of climate change on conditions in the Delta region, particularly projections regarding more frequent and more severe flood episodes. Five sources of that new information are cited in petitioners' brief:

1. The California Department of Water Resources California Water Plan Update, dated December, 2005. (Petitioners cited this report in a letter briefing submitted to respondent, providing a URL at which the report could be found on the Internet, but the report itself apparently was not submitted to respondent and it is not in the record before this Court. See, Supplemental A.R. 22392.)

2. The CalEPA Climate Action Team Report to Governor Schwarzenegger and the California Legislature dated March 2006. (Again, petitioners cited this report in a letter briefing

submitted to respondent, providing a URL at which the report could be found on the Internet, but the report itself apparently was not submitted to respondent and it is not in the record before this Court. See, Supplemental A.R. 22392.)

3. Testimony of California Department of Water Resources Director Lester Snow to the Subcommittee on Water Power, Committee on Resources of the U.S. House of Representatives, April 6, 2006. (See, A.R. 11658-11660.)

4. California Department of Water Resources Report entitled "Progress on Incorporating Climate Change into Management of California's Water Resources", dated July 2006. (See, A.R. 11991-12347, and, in particular, Section 2.6.2.3: Flooding Risk in the Sacramento-San Joaquin Delta, A.R. 12077-12081; Chapter 6: Climate Change Impacts on Flood Management, A.R. 12245-12283.)

5. A statement by the U.S. Environmental Protection Agency, which is working on a federal Environmental Impact Statement for the Paradise Cut improvements, that it will consider climate change and its effects on California hydrology and that existing analyses in the EIRs for the River Islands project will not be sufficient. (A.R. 11904.)

Petitioners' claim that the information presented in these materials required respondent to perform a new environmental analysis of the impacts of the super levees is not persuasive for two reasons.

The first reason is that the concept that climate change is occurring and will have an impact on the hydrology of the Delta in general, and on the frequency and severity of flood episodes in particular, is not really "new information" under Public Resources Code section 21166. As respondent and real parties have demonstrated, such concepts were known to petitioners, the public at large, and presumably to California public agencies as well, prior to mid-2005, the date of the Addendum to the SEIR. If the City should have taken such matters into account in the Addendum to the SEIR but did not, such failure, if any there was, is now beyond review now under CEQA. (See, Public Resources Code section 21167.2.) Of course, another way of posing the issue is to say that the issue of climate change as related to this specific project could have been presented to the City at that time, but apparently was not, by petitioners or anyone else.

The second reason petitioners' claim is unpersuasive is that, even if it is assumed that the scientific and political consensus regarding the existence and potential effects of climate change has grown significantly since mid-2005, petitioners have not presented any real new information that has emerged regarding the specific effects that are to be expected in the area of the Delta where this project is being built. The studies or documents petitioners cite primarily contain generalized information regarding the potential effects of climate change on the State or the Delta region as a whole, or projections that relate to other areas of the Delta with conditions that differ significantly from those at the project site, rather than projections that are specific to the project site itself.

At most, petitioners have argued that these generalized studies suggest that certain higher-severity events analyzed in the SEIR and the Addendum to the SEIR (such as 1-in-100 year or 1-in-200 year floods) are likely to be more frequent than may have been assumed in those documents, which in turn would lead to more significant effects from the project than have been analyzed.

The problem with this argument is that it is based on two propositions, only one of which appears to be supported by information in the cited studies.

The first proposition is that there will indeed be an increase in the frequency of such events. The Department of Water Resources December 2005 study apparently does suggest that this may be the case, with, for example, 1-in-100 year events potentially becoming 1-in-10 year events. (See, petitioner's opening brief, page 32, footnote 117.)

The second proposition is that a general increase in the frequency of certain events necessarily results in an increase in the impact of this particular project, located on this particular site. On this point, however, petitioners have not presented any specific new information which would permit the increase in high-severity events to be quantified for this site, for this project, in a way that could lead to a conclusion that overall impacts of the project would be significantly increased as the result of climate change. This is true as to both 1-in-100 year and 1-in-200 year events, which petitioners specifically cite in their brief. For example, with regard to 1-in-100 year events, in relation to which the effects of the project have been found to be less than significant, petitioners do not cite any specific new information tending to demonstrate that an increase in the frequency of such events, by itself, would make the impact more severe. Second, in the case of "extremely rare" 1-in-200 year events that the City's SEIR and Addendum thereto recognize could have discrete impacts when they occur (such as the potential for increased water flow velocities causing significant erosion to levees), but which, because of their rarity and the conservative nature of the hydraulic model used for analysis (see, A.R. 7972), are evaluated in an overall sense as less than significant, there is, again, no quantification of the potential increase in such events that would lead to the conclusion that the impact must now be seen as more significant.

The Court therefore finds that petitioners have not demonstrated that significant new information has become available with regard to climate change and its effect on this particular project, such that respondent should have performed a full environmental review under CEQA before approving the fill and encroachment permits. This ruling is a narrow one, and is not a ruling that the effects of potential changes in climate are not a proper subject for consideration under CEQA. Petitioners have made a persuasive showing that there is a growing consensus on the issue that has caused state environmental agencies to give it closer attention. As the projected effects of climate change become clearer and can be related to specific sites, there is little doubt that those effects will have to be factored into the analysis of many projects under CEQA. The present ruling in no way detracts from that reality. All the Court is deciding here is that, applying CEQA as it exists, and applying, as it must, a standard of review in which the public agency's actions are presumed to be in accordance with law and reasonable doubts are to be resolved in its favor, petitioners have not demonstrated that significant new information had become available with regard to the effects of climate change on this project between the certification of the Addendum to the SEIR and the approval of the fill and encroachment permits that was sufficient to require additional environmental review under Public Resources Code section 21166.

2. Second Cause of Action

In the second cause of action, petitioners allege that respondent violated CEQA in several respects when it adopted its findings with regard to the prior environmental review of the River Islands project in connection with the approval of the fill and encroachment permits. (See,

respondent's Resolution 06-26, "Resolution Adopting Findings Related to Encroachment Permits No. 18018-1 & 18018-2", approved July 21, 2006, A.R. 12378-12379.)

Petitioners' claim has three aspects. First, they allege that respondent improperly failed to make any findings regarding compliance with CEQA until after it had reached its decision to approve the permits, and then made the findings as a post-hoc rationalization of the decision already taken. Second, they allege that respondent improperly relied upon its staff to review the City's SEIR and Addendum to the SEIR and failed to perform its own independent review and consideration of those documents. And third, petitioners allege that the record lacks substantial evidence to support the findings respondent adopted.

The first two aspects of petitioners' claim raise the issue of whether respondent complied with the law in the procedure it followed in considering and approving the permits. Those contentions therefore raise issues of law, on which the Court exercises its independent judgment. (See, *Galante Vineyards v. Monterey Peninsula Water Management District* (1997) 60 Cal. App. 4th 1109, 1117.) As stated above, respondent's action is presumed to be in accordance with the law, and the challenger has the burden of demonstrating otherwise. (See, Evidence Code section 664; *State Water Resources Control Board Cases* (2006) 136 Cal. App. 4th 674, 723.)

The Court has reviewed the record as it relates to the manner in which respondent proceeded in considering and approving the permits, and has exercised its independent judgment on the evidence in the record. On the basis of such evidence, the Court finds that the record does not support petitioners' contention that respondent made after-the-fact findings and failed to perform its own independent review and consideration of the earlier environmental documents.

Instead, the record demonstrates that respondent addressed this matter at two separate public meetings, first considering evidence relating to the permits and making findings, and thereafter having the findings put into formal written form to be adopted at the second meeting.

Thus, the record shows that at the first public meeting, on June 16, 2006, respondent heard and considered testimony from its own staff and outside witnesses on two primary topics: that the action it proposed to take (approval of the super levees) would not have a significant effect on Delta hydrology; and that prior environmental reviews by the City of Lathrop (which had been reviewed by respondent's staff) had already reached the conclusion that the project would not have a significant effect on Delta hydrology. On the basis of that testimony, respondent determined that CEQA had been complied with (thus implicitly determining that no further environmental review was required), and directed staff to prepare formal written findings which would be adopted at a subsequent public meeting. (See, e.g., A.R. 11480, 11549-11553; 11586-11592; 11630; 11641-11643.)

The record further shows that at the second public meeting, on July 21, 2006, respondent formally adopted the written findings that had been prepared by its staff counsel. (See, e.g., A.R. 13349.)

Taken as a whole, therefore, the record demonstrates that respondent considered the evidence before making its decision on the permits, made the CEQA findings when making that decision, and thereafter confirmed the findings in written form. The fact that the individual members of respondent Board appear to have relied on staff recommendations and testimony regarding the City's prior environmental review, rather than reading the SEIR and the Addendum to the SEIR themselves, does not amount to a violation of CEQA. The substance of those prior

documents was before respondent through the staff recommendation and testimony. Petitioners have not demonstrated that the substance or findings of the prior environmental documents were in any way misrepresented to the members of respondent Board. Respondent was free to adopt or reject the staff recommendation, and heard and considered contrary testimony from representatives of petitioners and others. Thus, the Court does not find that respondent failed to independently consider the substance of the prior environmental review in making its decision.

Petitioners attempt to attack the findings by arguing that there is no evidence in the record to demonstrate that the Addendum to the SEIR actually had been received and considered by the Board's Environmental Review Committee, which made the staff recommendation regarding CEQA compliance, prior to the date of the approval of the permits. In support of this argument, petitioners cite to the staff report for the June 16, 2005 meeting (A.R. 11286-11288), and to the Environmental Review Committee memorandum dated February 6, 2006 (A.R. 11323-11329), and to certain internal e-mail communications (such as the July 20, 2006 message at A.R. 22328), which were the subject of respondent's separate motion to strike.

None of these documents specifically list the Addendum to the SEIR as being among the documents that had been reviewed. This omission may be curious, but the Court does not find it to be determinative, because the substance of the Addendum's conclusions, if nothing else, clearly was before respondent when it approved the permits. At the June 16, 2006 hearing, Sean Bechta, a representative of EDAW, the entity that performed the environmental review of the River Islands project on behalf of the City of Lathrop, specifically testified as to the existence and conclusions of the Addendum. (See, A.R. 11586-11592.) Petitioners have not demonstrated that this testimony in any way misrepresented the substance of the Addendum; in fact, it is confirmed by the Addendum, which is in the record before the Court. Thus, respondent was not deprived of the information contained in the Addendum that was relevant to the issues before it.

Thus, even if the Court were to find that respondent technically erred by acting without having the Addendum in its possession, any such error was not prejudicial. An error is prejudicial where it results in the omission of material information necessary to informed decisionmaking and informed public participation. (See, *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal. App. 4th 931, 946.) Here, accurate information regarding the conclusions of the Addendum was before respondent (and was aired at a public hearing) when respondent acted. Moreover, since the Addendum was never challenged in court, respondent was legally bound to accept its conclusions in the absence of changes in the project or significant new information. Thus, respondent could not have reached any different conclusion regarding further environmental review based on the facts present here.

Finally, respondent's written findings were not mere "boilerplate", but instead, succinctly described what was done: that the permits were approved after a thorough review of the environmental effects of the project, including that which had been done in connection with the SEIR and the Addendum to the SEIR. Nor did the findings amount to a mere *post hoc* rationalization of a decision already taken; instead, they reflected in writing the rationale respondent and staff articulated on the record at the June 16, 2006 meeting. (See, *La Costa Beach Homeowners' Association v. California Coastal Commission* (2002) 101 Cal. App. 4th 804, 819-820.) Petitioners therefore have not demonstrated that this procedure violated the law.

The third aspect of petitioners' claim in the second cause of action, that respondent's findings are not supported by substantial evidence, is very similar to the claim set forth in the first cause of action, and is subject to the same standard of review discussed in connection with that

cause of action. In light of the Court's ruling on the first cause of action, no extended discussion is necessary here. As discussed above, respondent's finding that CEQA had been complied with through the City's environmental review of the River Islands project is supported by substantial evidence in the form of the SEIR and the Addendum to the SEIR. Moreover, as noted above, respondent heard and considered testimony from its own staff and outside witnesses to the effect that approval of the permits would not create any new or additional environmental impact. Such testimony is substantial evidence in support of respondent's findings, notwithstanding the fact that there also may be contrary evidence in the record; the Court does not re-weigh the evidence in applying the substantial evidence test. (See, *Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal. 3d 376, 393.)

3. Third Cause of Action

In the third cause of action, petitioners allege that respondent violated CEQA by not making written findings with a brief explanation supported by substantial evidence in the record for each of the significant effects identified in the EIR within its jurisdiction. Presumably this is a reference to effects that had been identified in the City's prior environmental review documents. Petitioners specifically mention significant impacts that had been identified related to seismic hazards, corrosive soils and the shrinking and swelling of soils. (See, Petition, paragraph 40.)

In their briefing, petitioners argue that respondent's findings, as expressed in its July 21, 2006 Resolution, lack sufficient specificity to satisfy CEQA, being "wholly conclusory" and thereby failing to "disclose the analytic route the agency traveled from evidence to action". (Petitioners' opening brief, page 38:11-16, citing *Village Laguna of Laguna Beach, Inc. v. Board of Supervisors* (1982) 134 Cal. App. 3d 1022, 1034-1035.)

This argument is not persuasive. The findings clearly disclose that respondent approved the fill and encroachment permits without a new environmental review after reviewing the CEQA documents prepared by the City of Lathrop and finding that those documents had covered all potential environmental impacts related to the super levees. As described above in connection with the Court's ruling on the first cause of action, in the absence of significant changes to the project or significant new information, respondent was legally required to do so. The findings expressed in the Resolution adequately describe this process and therefore meet the requirement that they be sufficiently specific to reveal the analytic route respondent traveled from evidence to final action. (See, *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal. 3d 506, 515.) Even if a more detailed presentation could have been done, the rule applicable to CEQA findings is that technical perfection is not required; instead of looking for an exhaustive analysis, courts look for adequacy, completeness and a good faith effort at full disclosure. Respondent's findings satisfy that standard.

Petitioners further argue that, even if the findings are sufficiently specific, they are not supported by substantial evidence. Here, petitioners focus on the statement in the Resolution that respondent's Environmental Review Committee had "...determined that all environmental impacts within the responsibility of the Board had been mitigated or avoided". (A.R. 12378.) The argument is based upon citations to documents in the record that petitioners contend demonstrate the following: that the Committee made its determination only one day after receiving the EIR, and therefore did not have sufficient time to review the City's environmental documents before making its determination; that the Committee acted prematurely because it made its recommendation before knowing the true scope of the project (i.e., the work to be done under the fill and encroachment permits); and that all the Committee really determined was that a prior EIR

had been done, not whether it actually dealt with the relevant impacts. (See, record evidence cited in petitioners' opening brief, page 39, footnotes 135-136.) The Court notes that the cited evidence does not necessarily prove the points petitioners advance. More fundamentally, however, petitioners' argument is somewhat beside the point. As set forth above, the Addendum to the SEIR specifically found that building levees to remove a portion of the area to be developed from the flood plain without building the Paradise Cut improvements at the same time would not cause any significant environmental impacts in terms of hydrology and flooding. Those are the impacts within the responsibility of respondent. The Addendum is therefore substantial evidence in support of the challenged finding that all environmental impacts within the responsibility of the Board had been mitigated or avoided. This is true no matter what the Environmental Review Committee did.

The issue petitioners raise regarding seismic hazards, corrosive soils and the shrinking and swelling of soils requires a more extended discussion.

In the SEIR, the City identified each of these impacts as being significant before mitigation, and less than significant after mitigation. In each case, the mitigation measure that reduced the impact to less than significant was the requirement that a design-level geotechnical study should be completed for each project development, specifically including each levee segment, before a construction permit (referred to in the SEIR as a "grading permit") was issued. The issues to be addressed specifically in the geotechnical studies are set forth in the SEIR. (See, SEIR, Summary of Impacts 4.7-e, 4.7-f and 4.7-g, p. 2-37--2-38, A.R. 7606-7607; and 4.7-21—4.7-22, A.R. 7907-7908.)

The Addendum to the SEIR found that the new phasing scenario for the project would not change the analysis of impacts in these areas. (See, Addendum to SEIR, p. 3-7, A.R. 7147.) Thus, the Addendum carried forward the conclusion that impacts in these areas would be less than significant if mitigated as set forth in the SEIR, i.e., through preparation of geotechnical studies.

Respondent's findings, as expressed in its July 21, 2006 Resolution, state, on the basis of the City's CEQA documents and other substantial evidence it received and considered, that all environmental impacts within its area of responsibility had been "…mitigated or avoided as the result of changes, alterations and mitigation measures incorporated into the project". (See, A.R. 12378-12379.) Because respondent was, in effect, acting on the construction permit for the super levees, this finding must be interpreted, in connection with the three impacts at issue here, as a finding that such impacts had, in fact, been mitigated to a level of less than significant through the preparation of geotechnical studies addressing the areas of concern set forth in the SEIR.

The issue before the Court, then, is whether that finding is supported by substantial evidence in the record in the form of such geotechnical studies.

Where, as here, an administrative decision is challenged as being unsupported by substantial evidence in light of the record as a whole, it is the challenger's burden to demonstrate that the administrative record does not contain sufficient evidence to support the decision. A one-sided presentation that recites only the evidence that supports the challenger's position is not the demonstration contemplated by this rule. Instead, if petitioners contend that some particular issue of fact is not sustained, they are required to set forth in their brief all the material evidence on the point and not merely their own evidence. Unless this is done, the error is deemed to be waived. (See, *State Water Resources Control Board Cases* (2006) 136 Cal. App. 4th 674, 749-750.)

Petitioners' presentation on this issue is not in accordance with the rule. In their opening brief, petitioners cite only to evidence that they contend supports their position that impacts related to potential earthquakes and soil stability had not been addressed. (See, petitioners' opening brief, page 41 and footnotes 141-143.) No reference is made to any evidence that might support the finding, even though the evidence petitioners cite appears to make reference to some such materials, including the following: a Preliminary Levee Evaluation for the project prepared by ENGEO, Inc., dated March 26, 2002 (see, A.R. 5561); ENGEO, Inc.'s Response to Review Comments on the preliminary levee evaluation and a preliminary geotechnical study for the project, dated May 11, 2005 (see, A.R. 5561-5581); additional geotechnical studies referred to in the previous document that were projected to be done thereafter; and a revised slope stability model for the cross levee (see, A.R. 21210). There may well be other materials relevant to these issues somewhere in the 22,000+ page administrative record, but petitioners mention none, not even for the purpose of refuting them. Any error in respondent's findings is therefore deemed to be waived.

Moreover, at least one of the documents petitioners cite does not really support their position that seismic impacts, at least, have not been mitigated or avoided. The March 28, 2006 e-mail message from Ryan Olsen to Ron Heinzen states: "I understand that much of the existing levee will be buttressed and built up to a width of approximately 300 feet. Where this is the case, we feel that this will provide adequate protection even in the case of an earthquake." (See, A.R. 21210.)

Finally, without addressing the evidence that might support the finding and demonstrating that it does not, in fact, do so, petitioners, at most, have shown that there is a disagreement among experts on the issue of whether these particular impacts have been mitigated. It is not the task of the courts to re-weigh evidence and resolve disputes over the adequacy of mitigation measures. (See, *Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal. 3d 376, 393.)

The Court therefore finds that petitioners have not demonstrated that respondent violated CEQA in any of the ways alleged in the third cause of action.

4. Fourth Cause of Action

The fourth cause of action alleges that respondent violated its own regulations by failing to comply with CEQA in approving the permits. Respondent's regulations incorporate the CEQA regulatory guidelines and make them applicable to its actions. (See, 23 C.C.R. 191.) Thus, to the extent that respondent violated CEQA regulatory guidelines, it also violated its own regulations. This cause of action contains nothing new of substance relating to alleged violations of CEQA that has not been discussed and resolved in connection with the first three causes of action. The Court's ruling on this cause of action is therefore embraced within its rulings on the first three causes of action, set forth above.

B. Petitioners' Regulatory Claims: Fifth and Sixth Causes of Action

The fifth and sixth causes of action may be analyzed together, because both allege that respondent violated applicable law when it granted the encroachment permit (Permit No. 18018-2). The alleged violation of law is two-fold: 1) respondent did not require dedication of a flood control easement over the entire super levee plus ten feet beyond the landward levee "toe"; 2)

respondent's requirement of a limited easement will have the effect of allowing structures to be built on top of a portion of the levee, which is prohibited by law unless respondent grants a variance.

As noted above, there is no actual Permit No. 18018-2 in the administrative record. Although respondent has approved the permit on the record at a public meeting, the physical permit apparently has not yet been completed by respondent's staff. Nevertheless, it is possible to determine the terms of the permit from the record. (See, A.R. 11873-11900: Transcript of respondent's hearing dated June 26, 2006 and Minutes thereof.)

Essentially, respondent decided to require an easement made up of two "zones", denominated Zone A and Zone B. Zone A was described as consisting of the "…typical Reclamation Board easement consistent [sic] of a three-to-one water-side slope, 20-foot crown width, two-to-one slope on the levee along the land side down to the original ground, plus a ten-foot easement beyond that…." (A.R. 11873.) Zone B was described as an "…excavation easement that would allow us to reach, since there's being placed over top of what the Board is responsible for, would allow us to reach the area that is required in the Board's regs as defined by Zone A at anytime in the future." (A.R. 11874.) No encroachments or structures would be permitted in Zone A, while non-habitable structures would be permitted in Zone B (subject to removal in case of need to excavate). (A.R. 11900.) The parties agree that the effect of approving this proposal was that a large part of the top of the super levee was not covered by the easement, and thus would not be considered to be within respondent's regulatory jurisdiction, meaning that structures such as houses could be built on that portion of the levee top without respondent's approval.

Resolution of the claims contained in the fifth and sixth causes of action requires the Court to interpret and apply the applicable law, specifically, respondent's own regulations regarding flood control easements and structures on levees. Petitioners' contentions therefore raise issues of law, on which the Court exercises its independent judgment. (See, *Galante Vineyards v. Monterey Peninsula Water Management District* (1997) 60 Cal. App. 4th 1109, 1117.) Even so, courts may give great weight to an administrative agency's interpretation of its own regulations where the subject matter is technical, obscure, complex, open-ended, or entwined with issues of fact, policy and discretion. (See, *Simi Corp. v. Garamendi* (2003) 109 Cal. App. 4th 1496, 1504-1505.) The agency's interpretation of the regulations is not entitled to any particular weight, however, where it is clearly erroneous or unauthorized. (See, *Overaa Construction v. California Occupational Safety and Health Appeals Board* (2007) 147 Cal. App. 4th 235, 244-245.)

The law governing easements and structures on flood control levees is found in regulations promulgated by respondent.

Easements are governed by 23 C.C.R. section 120(a)(5), which provides that when levees are "constructed, reconstructed, raised, enlarged or modified", the builder shall provide respondent with a permanent easement, which must include "…the levee section, and the area ten (10) feet in width adjacent to the landward levee toe if the area is not presently encumbered by a board easement."

Structures on levees are governed by 23 C.C.R. section 113(b)(6)(a), which states that structures "…may not be constructed on a levee section or within ten (10) feet of a levee toe." (Respondent has authority to grant a variance under 23 C.C.R. section 11.)

The term "levee section" is defined in 23 C.C.R. section 4(r) to mean "the physical levee structure from the landward toe to the waterward toe".

The term "levee toe" is defined in 23 C.C.R. section 4(s) to mean "the point of intersection of the levee slope with natural ground".

Applying this law to the action respondent took with regard to the easement, the Court finds that respondent did not comply with the law. By placing fill in between the existing federal levees and the internal private levee to create a larger "super levee", the developers either "reconstructed", "enlarged" or "modified" the existing levee. That reconstruction/enlargement/modification resulted in a new levee with a new landward toe. Under the plain meaning of the cited regulations, respondent should have required the builders to provide an easement over the entire physical levee structure from one toe to the other, and ten feet beyond the new landward toe. Respondent did not do so. Instead, it retained an easement over only a portion of the enlarged levee, apparently on the theory that the easement was proper as long as it still covered the whole of the original federal levee. The regulations not only provide no explicit support for this approach, they explicitly seem to rule it out, by providing that an easement must cover the entire physical levee structure when a levee is "enlarged". That is exactly what occurred here. There is no regulatory exception permitting easements over only a portion of larger levees.

For similar reasons, respondent did not comply with the law when it effectively permitted structures to be built on a portion of the top of the super levee. The plain meaning of the applicable regulations is that no structures may be built on the physical levee structure from one toe to the other. The only apparent exception would be where a variance is properly granted. There is no regulatory exception for enlarged or oversized levees.

To the extent that respondent's decision in this situation represents an administrative interpretation of the applicable regulations, the Court finds that it is clearly erroneous and unauthorized because it contravenes the plain meaning of the regulations. Such interpretation is therefore entitled to no particular weight or deference. Moreover, there is no evidence in the record that respondent ever has applied the easement regulations in this manner in any other situation. To the extent that there is any evidence in the record regarding respondent's interpretation of the regulation before granting this permit, it is to the contrary. See, for example, the testimony of respondent's Chief Engineer at respondent's November 15, 2002 meeting (A.R. 1477-1489); and the document entitled "Staff Discussion—Landside Levee Embankment Fill", dated December 8, 2003 (A.R. 13599).

C. Defenses of Ripeness and Laches

In addition to arguing that this matter is moot, real parties in interest assert two other defenses to the petition.

The first defense is based on the contention that this matter is not yet ripe, because petitioners' challenge, insofar as it relates to the flood-related impacts of the super levees, must be seen as actually directed at the still-to-be completed environmental review of the Paradise Cut improvements. This contention is not persuasive. Petitioners' challenge is narrowly focused on the approval of the fill and encroachment permits. The issues petitioners have raised regarding easements and structures on the super levee are entirely separate from any issue of hydrology or

flood-related impacts. Moreover, this defense is essentially moot as to petitioner's CEQA claims in light of the Court's ruling that they have not prevailed on those claims.

The second is based on the allegation of laches, and asserts that petitioners unreasonably delayed in challenging the project until the developers had spent significant sums on it in reliance on respondent's approval of the fill permit, in particular, on the construction of the super levee. Even though it appears to be true that a considerable expenditure has been made, the Court finds that laches does not provide a basis for denying the petition. It is really only petitioners' CEQA claims that could have in any way put general development expenditures or those made to construct the super levee at risk, since it was only those claims that theoretically could have resulted in that work having to be stopped or undone. Petitioners have not prevailed on those claims. The Court's ruling regarding the regulatory claims, on the other hand, affects only what can be done on top of the super levees. There is no showing that the real parties in interest have spent any significant sums on development atop the levees. Thus they have not shown that petitioners' regulatory claims should be barred by laches.

VI. Conclusion

For the reasons set forth above, the Court finds that petitioners have not demonstrated that respondent violated CEQA in connection with its approval of the fill and encroachment permits. The Court therefore denies the petition for writ of mandate with regard to petitioner's CEQA claims. The Court does find, however, that respondent violated applicable regulatory law in connection with its approval of the encroachment permit when it failed to require an easement over the entire physical levee structure from one toe to the other, and ten feet beyond the new landward toe, and thereby permitted structures to be built atop a portion of the levee. The petition for writ of mandate is therefore granted with regard to petitioners' regulatory claims.

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In the event that this tentative ruling becomes the final ruling of the Court, counsel for petitioners is directed to prepare the final order and judgment granting the petition in part and denying it in part, as set forth above, and an appropriate writ of mandate, according to the procedures set forth in Rule of Court 3.1312.