Filed 11/2/05

**CERTIFIED FOR PARTIAL PUBLICATION***

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

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| CALIFORNIA OAK FOUNDATION, et al.,<br><br>Plaintiffs and Appellants,<br><br>v.<br><br>CITY OF SANTA CLARITA,<br><br>Defendant and Respondent,<br><br>and<br><br>GATE KING PROPERTIES,<br><br>Real Party in Interest. | B175580<br><br>(Los Angeles County<br>Super. Ct. No. BS084677) |

APPEAL from a judgment of the Superior Court for the County of Los Angeles. Dzintra Janavs, Judge. Reversed with directions.

Law Offices of Babak Naficy and Babak Naficy for Plaintiffs and Appellants California Oak Foundation and Santa Clarita Organization for Planning the Environment.

Burke, Williams & Sorensen and Stephen R. Onstot for Defendant and Respondent City of Santa Clarita.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts III and IV.

Morrison & Foerster and Anne E. Mudge for Real Party in Interest Gate King Properties.

Rossmann and Moore, Antonio Rossmann, Roger B. Moore and David R. Owen for *Amicus Curiae* Planning and Conservation League.

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**SUMMARY**

This appeal arises under the California Environmental Quality Act, Public Resources Code section 21000 et seq. (CEQA).[1] The California Oak Foundation and the Santa Clarita Organization for Planning the Environment (collectively, SCOPE) petitioned the trial court for a writ of mandate. The petition requested the trial court to order the City of Santa Clarita (City) to set aside its certification of the final environmental impact report (EIR) and related resolutions approving an industrial development project proposed by Gate King Properties.

The trial court denied SCOPE's petition, and SCOPE appeals, arguing that:

- Insufficient evidence exists to support the EIR's conclusion that sufficient water supplies exist for the project.
- The City violated its Ridgeline Preservation and Hillside Development Ordinance by granting the project an exemption from the ordinance as an "innovative development" alternative.
- The EIR was defective because it did not require adequate surveys of the site to determine the presence or absence of several rare plant species prior to certification of the project, and otherwise failed to require adequate mitigation measures with respect to these plant species.

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[1] All statutory references are to the Public Resources Code, unless otherwise specified.

We conclude the trial court erred in approving the EIR because the section of the EIR discussing water supplies is inadequate. We find no other defects in the EIR, and further conclude that the City did not violate its ridgeline preservation ordinance.

## FACTUAL AND PROCEDURAL BACKGROUND

Gate-King Industrial Park is a proposed industrial/business park. The project as originally proposed involved the subdivision of 584 acres of developed and undeveloped land in the southern portion of Santa Clarita. The greater part of the site, historically known as Needham Ranch, is undeveloped, natural terrain containing more than 10,000 oak trees. Site elevations range from about 1,350 feet to 1,900 feet above mean sea level. A north-south running primary ridgeline extends along the central portion of the site, and two secondary ridgelines extend east-west toward Sierra Highway and the Metropolitan Transit Authority rail line.[2]

Gate King Properties proposed to subdivide the 584-acre project site. Gate King's original proposal involved the development of 170.1 acres, accommodating about 4.45 million square feet of industrial/commercial development, with an additional 64.3 acres consisting of rights-of-way (including public streets) and water wells. The remaining 349.6 acres were to include a combination of slopes, trails and areas within the industrial/commercial lots that would remain undeveloped due to the presence of large oak groves, as well as 220.6 acres of dedicated open space.[3] The project called for

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[2] The site is west of the Antelope Valley Freeway and is bounded by Sierra Highway to the east and San Fernando Road to the north. Pine Street and the Metropolitan Transit Authority (MTA) right-of-way are located along the western boundary, and undeveloped mountainous terrain is located to the south. Approximately 23% of the site is developed with a variety of uses, including cemetery facilities, oil well production facilities, a city disposal site, a storage facility, a concrete recycling facility and associated access roads, about three acres of residential uses, an MTA disposal site, and oil and gas rights-of-way and access roads.

[3] The commercial and industrial buildout of the site required amending the land use designations and zoning for parts of the site. Before the changes, approximately 58% of

extensive grading, affecting the primary and secondary ridgelines traversing the site, with total earth movement of 7.24 million cubic yards. The project as proposed also called for the removal of at least 1,709 oak trees, including two heritage oak trees.

After circulation of a draft EIR for public review, the project was modified. As ultimately approved by the City, the site size was reduced to 508.2 acres (75.8 acres having been donated to the City). The buildable area of the project was reduced to 161 acres, accommodating about 4.2 million square feet of industrial/commercial development, and 207.6 acres of dedicated open space. Grading was also reduced, with earth movement totaling 5.7 million cubic yards, and the number of oak trees to be removed was reduced by 465 trees.

The City certified the final EIR on June 24, 2003, and SCOPE sought a writ of mandate decertifying the EIR. Judgment was entered denying SCOPE's petition for a writ of mandate on March 22, 2004. The relevant details of the EIR, and SCOPE's challenges to the City's actions in approving the project, will be set out in the course of our discussion.

**DISCUSSION**

We first describe the settled principles guiding our review in CEQA cases, and then address each of the challenges SCOPE interposes to the adequacy of the final EIR and to the City's application of the ordinance governing ridgeline preservation and hillside development.

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the site was designated for industrial/commercial uses; 21% for residential use; 16% for open space; and 5% for community commercial (retail) uses. The general plan's land use designation and zoning changes required by the project eliminated the residential and commercial designations from the site, increased the area designated for industrial uses slightly, and increased the area designated for open space to more than 40%.

## I. CEQA Principles and the Standard of Review.

A comprehensive discussion of CEQA and the purposes and role of an EIR appears in *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 390-393 (*Laurel Heights*). The Legislature intended CEQA to be interpreted to afford the fullest possible protection to the environment within the reasonable scope of the statutory language. (*Id.* at p. 390.) CEQA describes the EIR as an informational document. Its purpose is to provide public agencies, and the public, with detailed information about the effect a proposed project is likely to have on the environment; to list ways in which the significant effects of a project might be minimized; and to indicate alternatives to a project. (§ 21061.) Before approving a project, the lead agency – here, the City – must find either that the project's significant environmental effects identified in the EIR have been avoided or mitigated, or that unmitigated effects are outweighed by the project's benefits. (*Laurel Heights, supra*, 47 Cal.3d at p. 391, citing §§ 21002, 21002.1 and 21081.) The EIR has been described as "the heart of CEQA," an "environmental alarm bell," and a "document of accountability." (*Laurel Heights, supra*, 47 Cal.3d at p. 392, internal quotations and citations omitted.) "If CEQA is scrupulously followed, the public will know the basis on which its responsible officials either approve or reject environmentally significant action, and the public, being duly informed, can respond accordingly to action with which it disagrees." (*Ibid.*)

In an action to set aside an agency's decision under CEQA, the trial court's inquiry extends only to whether a prejudicial abuse of discretion has occurred. Abuse of discretion occurs if the agency has not proceeded in a manner required by law, or if its decision is not supported by substantial evidence. The court passes only upon the EIR's sufficiency as an informative document, not upon the correctness of its environmental conclusions. (*Laurel Heights, supra,* 47 Cal.3d at p. 392.) CEQA Guidelines, which implement the provisions of CEQA, define "substantial evidence" as "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached."

(Cal. Code Regs., tit. 14, § 15384, subd. (a).) *Laurel Heights* cautions that an agency's approval of an EIR may not be set aside on the ground that an opposite conclusion would have been equally or more reasonable. (*Laurel Heights, supra*, 47 Cal.3d at p. 393.) CEQA's purpose is to compel government to make decisions with environmental consequences in mind, but CEQA "'does not, indeed cannot, guarantee that these decisions will always be those which favor environmental considerations.'" (*Ibid.*, quoting *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 283.)

This court's inquiry is the same as that of the trial court. The appellate court reviews the administrative record independently to determine whether the City complied with CEQA. (*Planning & Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 912 (*PCL*).)

## II. The Water Supply Issues.

We agree with SCOPE's contention that the EIR must be set aside because substantial evidence does not support the conclusion that sufficient water supplies exist for the project. SCOPE's challenge to the EIR, in which *amicus curiae* Planning and Conservation League joins, has two principal components: certain water entitlements relied upon by the City were "paper" water rather than actual deliverable water; and the EIR did not in any way attempt to quantify the impact of perchlorate contamination on the availability of groundwater from the Saugus Formation. Although we are not persuaded the EIR's treatment of perchlorate contamination was insufficient, the EIR did not adequately inform the public about other uncertainties in the water supply.

To understand the matters at issue, we must first describe the sources of water for the Santa Clarita Valley, as well as several appellate court decisions relevant to the water supply issues. We then turn to the contents of the EIR, the comments elicited by the draft EIR, the City's responses to those comments, and finally to SCOPE's specific contentions.

### A. Water sources and legal background.

The Santa Clarita Valley historically obtained its water supply from an underground water basin or aquifer that is divided into a shallow level (the Alluvial Aquifer) and a deeper layer of groundwater called the Saugus Formation. Since 1980, however, the water supply has been supplemented with imported water to meet community water requirements. (*Friends of the Santa Clara River v. Castaic Lake Water Agency* (2004) 123 Cal.App.4th 1, 5-6 (*Friends II*).) The Castaic Lake Water Agency (Castaic) is a public agency formed to provide the imported water to the water purveyors of the Santa Clarita Valley. Castaic contracts with California's Department of Water Resources for water from the State Water Project, treats the water, and delivers it to several water retailers in the Santa Clarita Valley. (*Id.* at p. 4.) One of these retailers is the Newhall County Water District (Newhall District), which serves the project site.

The State Water Project (the Project) was authorized in the 1950s. The Project was designed to become a complex system of reservoirs, dams, power plants and other facilities for the storage and delivery of 4.23 million acre-feet of water annually.[4] The Department of Water Resources (the Department) operates the facilities and manages the Project. When the Project began, the Department entered into individual long-term contracts with water suppliers throughout the state. These contractors, including Castaic, received entitlements to an annual amount of water, in return for which they repay a proportionate share of the financing and maintenance of the Project facilities. (*PCL, supra*, 83 Cal.App.4th at pp. 898-899.)

The entitlements Castaic and other contractors received under their contracts with the Department were predicated on the state's obligation to build out the Project so as to deliver 4.23 million acre-feet per year (AFY) to the contractors. However, the Project has never been completed, and the state cannot deliver 4.23 million AFY. The court in

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[4] "An acre-foot is 43,560 cubic feet. Colloquially, it is an irrigation-based measurement equaling the quantity of water required to cover an acre of land to a depth of one foot." (*Brydon v. East Bay Mun. Utility Dist.* (1994) 24 Cal.App.4th 178, 182, fn. 1.)

*PCL* observed that "[a]ctual, reliable water supply from the [Project] is more in the vicinity of 2 to 2.5 [million AF] of water annually." (*PCL, supra*, 83 Cal.App.4th at p. 908, fn. 5.) The record in this case shows that in 1999, the Project delivered 3.1 million acre-feet and the 2000 projection was for 3.3 million acre-feet. Castaic and other contractors' entitlements "represent nothing more than hopes, expectations, water futures or . . . 'paper water.'"[5] (*Ibid.*)

By the late 1980s and early 1990s, water supplies were severely diminished as a result of a seven-year drought and other limitations, generating disputes among agricultural and urban water contractors and the Department about the distribution of the limited amount of water. (*PCL, supra*, 83 Cal.App.4th at p. 900.) In 1995, the parties settled these disputes in a statement of principles known as the Monterey Agreement. The Monterey Agreement changed the allocations between agricultural and urban contractors of entitlements to Project water, and permitted the transfer of entitlements up to 130,000 AFY from agricultural contractors to urban contractors on a willing buyer-willing seller basis. (*Friends of the Santa Clara River v. Castaic Lake Water Agency* (2002) 95 Cal.App.4th 1373, 1375 (*Friends I*).)

Under the Monterey Agreement, Castaic purchased an entitlement to 41,000 AFY of Project water from the Kern County Water Agency and its member district (hereafter, "Castaic purchase" or "41,000 AFY entitlement"). However:

- Because implementation of the Monterey Agreement would have potential adverse environmental impacts, an EIR was required. In September 2000, the court in *PCL*, *supra,* 83 Cal.App.4th 892, 907 concluded the EIR for implementation of the Monterey Agreement was inadequate. The EIR failed to

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[5] "Paper water always was an illusion. 'Entitlements' is a misnomer, for contractors surely cannot be entitled to water nature refuses to provide or the body politic refuses to harvest, store, and deliver. Paper water represents the unfulfilled dreams of those who, steeped in the water culture of the 1960's, created the expectation that 4.23 [million acre-feet] of water could be delivered by a [State Water Project] built to capacity." (*PCL, supra*, 83 Cal.App.4th at p. 914, fn. 7.)

provide a thorough examination of the environmental consequences, including the impact on land use planning, of the "no project" alternative to the Monterey Agreement. (*Id.* at p. 915.) Under the "no project" alternative, in the event of a threatened permanent water shortage, entitlements under the existing long-term contracts between the Department and the contractors would be proportionately reduced to reflect actual water delivery patterns. (*Id.* at pp. 900, 908-920.)

- In January 2002, the EIR for Castaic's purchase of entitlement to 41,000 AFY of Project water under the Monterey Agreement was also decertified. The EIR was decertified because it was expressly "tiered" upon – that is, it incorporated and relied upon – the EIR for the Monterey Agreement, which had been decertified in the *PCL* case.[6] (*Friends I, supra*, 95 Cal.App.4th at pp. 1387-1388.) The court found no defects in the EIR for the Castaic purchase other than the *PCL*/tiering problem.[7] (*Id.* at p. 1387.)
- Although the EIR for the Castaic purchase was decertified, the court did not enjoin implementation of the agreement for Castaic's purchase of the 41,000 AFY entitlement. As a result, the 41,000 AFY entitlement is available to Castaic during the pendency of the litigation over the Castaic purchase EIR.

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[6] The court observed that Castaic "may be able to cure the *PCL* problem by awaiting action by the [Department] complying with the *PCL* decision, then issuing a subsequent EIR, supplement to EIR, or addendum … tiering upon a newly certified Monterey Agreement EIR." (*Friends I*, *supra*, 95 Cal.App.4th at pp. 1387-1388.)

[7] Gate King requested, and is granted, judicial notice of various documents showing that on December 22, 2004 – long after certification of the EIR in this case – Castaic certified a new final EIR for the purchase of the 41,000 AFY entitlement to State Water Project water from the Kern County agency. According to Castaic's resolution approving the project, the new EIR did not tier off the EIR for the Monterey Agreement and did not rely upon Castaic's 2000 Urban Water Management Plan, the validity of which was also in question. Planning and Conservation League and California Water Impact Network have challenged Castaic's decisions to certify the new EIR and approve the 41,000 AFY water transfer in lawsuits filed in Ventura County.

- In February 2003, several months before the City certified the EIR for this project, the County of Los Angeles was ordered to vacate its certification of a final EIR for a mixed residential and commercial development in the Santa Clarita Valley. The court agreed with contentions by SCOPE that the EIR's water analysis was inadequate. (*Santa Clarita Organization for Planning the Environment v. County of Los Angeles* (2003) 106 Cal.App.4th 715 (*SCOPE*).) The court observed the EIR failed to undertake an adequate analysis of the amount of water the State Water Project could actually deliver in wet, average and dry years. (*Id.* at p. 724.)

**B. The EIR information on water supplies.**

The draft EIR for the Gate-King project was circulated in January 2002 and included, as did the final EIR, the following observations about water supplies:

- Castaic's "current total water entitlement" from the State Water Project is 95,200 acre-feet of water per year. This 95,200 AFY entitlement includes the 41,000 AFY entitlement that Castaic purchased under the Monterey Agreement, as described above.
- Castaic's State Water Project entitlement "can fluctuate from year to year based on a number of factors, including hydrologic conditions, the status of State Water Project facilities, construction, environmental requirements, and evolving policies for the Bay-Delta."[8]
- The EIR relied upon Castaic's "Urban Water Management Plan 2000" (UWMP 2000). The UWMP 2000 is a long-range planning tool prepared for

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[8] According to the EIR, Castaic has developed a funded capital improvement program providing for the following activities to achieve water supply reliability: purchase of additional State Water Project supplies; implementation of recycled water programs; development of additional dry-year Saugus Formation supplies (new wells); enhancement of groundwater banking programs; and seawater desalination/water exchange.

the Castaic service area. Every urban water supplier is required by statute to prepare and adopt such a plan as a part of its responsibility for ensuring adequate water supplies. The UWMP's projected water usage for the Castaic service area accounted for build-out of the City of Santa Clarita, including development of the Gate-King project. According to the UWMP 2000, "water supplies are expected to be adequate throughout the 20-year Plan period under all conditions."[9] The draft EIR thus concluded that "no water supply shortages are expected within [Castaic's] service area throughout the 20-year UWMP period, if projected and local supplies are developed as indicated."

- The Castaic service area's total entitlement, including groundwater wells and imported water, is approximately 103,200 to 180,900 AFY during an average or normal rainfall year, and approximately 201,100 to 279,700 AFY during a dry year.[10]
- The UWMP "anticipates a projected normal/average year water usage of 75,100 acre-feet of water per year in the area. Therefore, the area would maintain a water supply surplus of 28,100 AFY. As demand for water increases in the future, additional water supplies are expected to be available from [Castaic]." The 28,100 AFY surplus is derived by subtracting projected

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[9] In September 2004, more than a year after final certification of the EIR in this case, the UWMP 2000's description of the reliability of groundwater supplies was found to be inadequate under the Water Code, because it failed to address timing issues related to perchlorate contamination discovered in Saugus Formation groundwater. (*Friends II, supra*, 123 Cal.App.4th at p. 14.) See discussion *post*, part II.G.3.

[10] The EIR notes that according to UWMP 2000, dry year supplies are greater than wet year supplies because the Newhall District (the project's water retailer) will tap reserves, including drilling new wells in the Saugus Formation and importing additional water.

usage of 75,100 AFY from the low-end figure for total entitlement (imported water and groundwater) of 103,200 in a normal rainfall year.[11]

- The Gate-King project would generate demand for an estimated 386 AFY, which represents 1.4% of the area's current excess supply of 28,100 AFY. The EIR states that according to the Newhall District, "adequate water supply is available to serve the water demand generated by the proposed project," and "impacts to water supplies are not considered significant."[12] While the EIR concludes that the impact of the project on water supply "would be less than significant without mitigation," it also states that "because of ongoing concerns about regional water supplies, impacts to water supply are considered Class II, significant but mitigable." The EIR recommended various water conservation features to minimize the project's impact on regional water supplies.[13]

### C. Comments on the draft EIR.

SCOPE's comments on the draft EIR asserted that the draft failed to adequately evaluate water supply. SCOPE asserted that:

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[11] The 103,200 AFY figure is the sum of 30,000 AFY of groundwater from the Alluvial Aquifer; 7,500 AFY of groundwater from the Saugus Formation; 1,700 AFY of recycled water; 56,800 AFY of State Water Project entitlements (59.7% of Castaic's total entitlement of 95,200, which includes the disputed 41,000 AFY); and 7,200 AFY from planned programs for future implementation (water transfers and desalination). The EIR also states that, while the Saugus Formation has been pumped to an average of slightly more than 7,000 AFY over the last 20 years, increases in pumpage from 15,000 (the maximum to which it has been pumped historically) to 25,000 to 40,000 AFY, "in a ramped manner, would be hydrologically feasible . . . ."

[12] If estimated demand for water generated by the project exceeded available existing or future supplies, the impact would be considered significant.

[13] These included interior water conservation measures, "as required by the State of California," such as low flow toilets and self-closing faucets, and exterior water conservation features such as low water-using plants.

- The City did not review or comply with the findings in *PCL, supra*, 83 Cal.App.4th 892 (decertifying the EIR for the Monterey Agreement) and *Friends I, supra*, 95 Cal.App.4th 1373 (decertifying the EIR for the Castaic purchase), which made it clear that the City should not rely on Castaic's full 95,200 AFY entitlement to State Water Project water.
- The Saugus Formation cannot be relied upon as a water supply resource until it is remediated. SCOPE attached copies of expert testimony from other cases and various reports relating to perchlorate contamination and concern over its spread. SCOPE also attached a Castaic memo on strategy to address the contamination. SCOPE observed that actual remediation would take "several additional years for facilities design and land acquisition before clean water is actually produced. The Santa Clarita water agencies are currently only pumping approximately 3000 AF per year from this source although the water agencies have reported that they can provide 40,000 AF in [their] Urban Water Management Plan. Again, it is an abuse of [discretion] to rely on information which the [Planning] Commission knows to be false."
- It was imperative for the City to "do its own analysis of the water supply for the Santa Clarita Valley to ensure that this project approval will stand," because the UWMP 2000 for the Santa Clarita Valley was then being litigated "due to its over-statement of water supply and understatement of demand." (See footnote 9, *ante*.) SCOPE asserted that reliance on the UWMP 2000 for sufficiency of water supply would result in the project approval being overturned if the UWMP litigation were successful.

**D. The City's response to SCOPE's comments.**

The City's response to SCOPE's comments in the final EIR was as follows:

- As required by statute, in January 2002 the City requested that the Newhall District provide a water supply assessment for the proposed project. On May 30, 2002, the Newhall District's Board approved its assessment of the water

supply, concluding that water demand for the proposed project was included in UWMP 2000. The water supply assessment also indicated no current overdraft of the groundwater supplies upon which the Newhall District relies.

- The Newhall District assessment "indicates that water supplies available to the District could potentially be limited by three ongoing legal challenges" described in the assessment. The assessment in turn stated that the Newhall District's sources of supply were "subject to possible limitation as a result of the following pending litigation . . . ." The assessment then stated that:
  - The District relies on imported water deliveries from Castaic, which has contract entitlements of State Water Project water totaling 95,200 AFY. Projections of water supply availability under those entitlements "are estimated to be the delivery of 50% of the entitlement 80% of the time."
  - A portion of Castaic's State Water Project entitlements are derived from contracts entered into under the authority of the Monterey Agreement, and:

    > "[The Monterey Agreement] has been challenged by the Planning and Conservation League and as a result of that litigation further environmental assessment is going to be undertaken by the Department of Water Resources. The Friends of the Santa Clara River, another environmental group, has further challenged the recent EIR of Castaic Lake Water Agency which was tiered upon the Monterey [Agreement] EIR. This challenge is now under appellate court review. Finally, the Friends of the Santa Clara River and the County of Ventura have filed challenges to the adequacy of the District's Urban Water Management Plan which challenges are currently before the trial court."

As for SCOPE's comments on perchlorate contamination, the City acknowledged that:

> "perchlorate has been a concern associated with groundwater quality since it was detected in four wells in the eastern part of the Saugus Formation in 1997. Operation of the four wells has been suspended and purveyors are continuing to test for perchlorate in all active Alluvial and Saugus wells. However . . . several treatment

technologies for the removal of perchlorate from water are currently available."[14]

**E. Appendix K.**

No changes were made in the draft EIR's analysis of water supplies, although SCOPE's comments and the City's responses are a part of the final EIR. The final EIR was circulated in October 2002, and was republished in June 2003, contemporaneously with the City's certification of the EIR. When it was republished, it included several additional appendices, including Appendix K, entitled "Additional Water Supply Information." Appendix K is a memorandum dated May 27, 2003, from the consultants who prepared the City's EIR, and was provided "to more directly address issues raised by the Court of Appeals" in *SCOPE, supra*, 106 Cal.App.4th 715. Appendix K includes the following information:

- Referring to Castaic's State Water Project entitlements, Appendix K states: "In addition, the availability of the 41,000 AFY obtained from the Kern County Water Agency . . . is not absolutely established because the EIR prepared for its transfer was recently invalidated and decertified" by *Friends I, supra*, 95 Cal.App.4th 1373.
- "In recognition of the fact that the entire 95,200 AFY entitlement may not be available in all years, the water supply projections contained in the 2000 UWMP . . . are based on a reduced delivery." The estimate assumes that 59.7% of the total entitlement (or 56,000 AFY) would be available in average-normal years, and 39.8% of the entitlement (or 37,900 AFY) would be available in dry years.

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[14] The response also reported that the local water purveyors had filed a lawsuit against the former and present owners of the contaminated property, seeking payment by defendants of all necessary costs of response, removal of perchlorate, and so on.

- "[P]erchlorate has been a concern with respect to groundwater quality since it was detected in four wells in the eastern part of the Saugus Formation . . . in 1997. Operation of the four wells has been suspended and purveyors are continuing to test for perchlorate in all active Alluvial and Saugus wells. To date, no other wells have shown detectable levels of perchlorate . . . ."
- "Several treatment technologies for the removal of perchlorate from water are currently available. The DHS has issued a domestic water supply permit to deliver treated drinking water from contaminated wells to customers in the San Gabriel Valley. The approved technology is also available for use in the Santa Clarita Valley."
- In 2001, total water demand in the Santa Clarita Valley was 76,769 AF, essentially unchanged from demand in 2000. The year 2001 demand was met by a combination of 41,413 AF of local groundwater and 35,356 AF of State Water Project water. The UMWP 2000 projects water demand in the average/normal year to increase to about 102,500 AF by 2020.
- The 386 AFY water demand associated with the Gate-King project represents about 0.5% of the total current demand in the Santa Clarita Valley.
- The primary uncertainty with respect to local water supply is the availability of Castaic's State Water Project entitlement. If the 41,000 AFY entitlement purchased from Kern County is available, water supplies "appear to be sufficient to meet projected growth in demand through 2020." If it is not, "water supplies may be insufficient to meet the projected increase in demand through 2020."
- "However, even without the additional 41,000 AFY, [Castaic] retains an entitlement of 54,200. Because this amount exceeds 2001 [Castaic] demand for [State Water Project] water by 18,844 AF [actual Project water delivered was 35,356 AF], the 386 AFY increase in water demand associated with the proposed project would be well within the current entitlement."

- "Finally, the UWMP identifies several additional sources of water (water recycling, purchase of additional [State Water Project] supplies, desalination) that are expected to meet water demand projections over time. Since the proposed industrial park project's water demand is within that projected in the 2000 UWMP, would not exceed the current [State Water Project] entitlement, and would not significantly affect groundwater resources, water supplies appear to be adequate to serve the proposed development."

**F. The trial court's analysis.**

The trial court rejected SCOPE's contention that the EIR improperly relied on Castaic's entitlement to the 41,000 AFY and failed to discuss the pending litigation. The court found the EIR's conclusion – that sufficient actual water supply was available to serve the project and therefore water supply impacts were not significant – was based on substantial evidence, namely:

- Newhall District's May 30, 2002 water supply assessment, which relied on the UWMP 2000. The UWMP's projections were based on reduced delivery by Castaic (59.7% in average-normal years and 39.8% in dry years), and the UWMP concluded that supplies would be adequate to serve demand to 2020. Newhall District's water supply assessment concluded that water delivery under the State Water Project would be 50% of the entitlement 80% of the time.
- Even without the 41,000 AFY that is subject to litigation, Castaic "retains reliable entitlement to 54,200 AFY, which exceeds [Castaic's] demand for [State Water Project] water by 18,844 AFY." [As noted above, the area's 2001 demand for water (76,769 AF) was met with local groundwater plus 35,356 of Project water (65% of its 54,200 entitlement, or 37% of its 95,200 entitlement).] Thus, the demand created by the project (386 AFY) "will be well within the current entitlement even without the 41,000 AFY."

- *PCL* and *Friends I* are "fully discussed in the EIR." Although the EIRs in those cases were invalidated, the underlying agreement to transfer the 41,000 AFY entitlement to Castaic was not enjoined, and the disputed water "is in fact currently available to" Castaic and is being used.

The trial court also observed that perchlorate contamination was "discussed extensively in the EIR" (citing the evidence submitted by SCOPE, plus the City's one-paragraph response), and that Newhall District's water supply assessment acknowledged the concern about perchlorate, but nonetheless did not conclude that supplies would be insufficient.

**G. Analysis and conclusion: The EIR did not adequately inform the public about uncertainties in the water supply.**

SCOPE asserts that the trial court's finding that the EIR's water supply analysis was adequate is based on several legal errors. We agree in part, and treat SCOPE's claims in turn.

**1. The EIR's treatment of Castaic's 41,000 AFY entitlement was inadequate.**

SCOPE's primary challenge to the adequacy of the EIR's analysis of the water supply is that the City, without analysis or discussion, relied on Castaic's 41,000 AFY entitlement to State Water Project water – 43% of its total Project entitlement – despite the fact that the EIR for Castaic's purchase of the entitlement was decertified in *Friends I, supra*, 95 Cal.App.4th 1373. Gate King, on the other hand, contends the EIR's discussion of water supply was legally adequate, including its discussion of the uncertainties related to the 41,000 AFY transfer. According to Gate King, the EIR "directly addresses" this issue, acknowledges the uncertainty, "but concludes that it is likely that the 41,000 AFY will continue to be available."

We are compelled to agree with SCOPE. Contrary to Gate King's assertion, the EIR does not "directly address" the issue, which arose when *Friends I* was decided in January 2002, contemporaneously with circulation of the draft EIR. The final EIR

contains an inadequate discussion – in fact, no discussion at all – of the uncertainty surrounding the transfer of the 41,000 AFY entitlement. The text of the EIR does not mention the decertification of the EIR for the Castaic purchase, and does not discuss the fact that entitlements are not really entitlements, but only "paper" water. (*PCL, supra*, 83 Cal.App.4th at p. 908, fn. 5 ["the state cannot deliver 4.23 [million acre-feet] of water annually"; entitlements "represent nothing more than hopes, expectations, water futures or . . . 'paper water'"]; *Friends I, supra*, 95 Cal.App.4th at p. 1376 ["[t]he reliability of delivery is approximately 50 percent of entitlements"].) The EIR merely states, in an analysis unchanged from the draft, that Castaic's entitlement "can fluctuate from year to year based on a number of factors . . . ." When SCOPE's comments pointed out that the City failed to review or comply with the findings in *PCL* and *Friends I*, and should not rely on full entitlements to State Water Project water, the City's response provided no analysis of the point, and no mention of the magnitude of the Castaic purchase. The City simply stated that the Newhall District's water supply assessment concluded that the Gate-King project's water demand was included in the UWMP 2000, and that water supplies "could potentially be limited by three ongoing legal challenges" described in the District's water supply assessment. As mentioned, the assessment merely stated that: (1) Castaic's entitlements totaled 95,200 AFY, the availability of which was estimated to be delivery of 50% of the entitlement 80% of the time; (2) "[a] portion" of the entitlements was derived from the Monterey Agreement; (3) the Monterey Agreement was subject to further environmental assessment by the Department of Water Resources; (4) the Castaic EIR, which was tiered on the Monterey Agreement, was under appellate court review; and (5) the adequacy of the UWMP 2000 was being challenged in the trial court.

We cannot agree that the City's response "directly addresses" the uncertainty created by the decertification of the EIR for the Castaic purchase. It also does not conclude, as Gate King contends, that "it is likely that the 41,000 AFY will continue to be available." The City's response to SCOPE's comments is completely devoid of any direct discussion of the 41,000 AFY, as is the Newhall District's water supply assessment

on which the City relies. The adequacy of supply absent the 41,000 AFY entitlement is not discussed, and the means of meeting the demand for water in the absence of the 41,000 AFY entitlement is not analyzed. We can only assume the City "conclude[d] that it is likely that the 41,000 AFY will continue to be available," because the point is not discussed. Such an assumption, however, is impermissible, as it is antithetical to the purpose of an EIR, which is to reveal to the public "the basis on which its responsible officials either approve or reject environmentally significant action," so that the public, "being duly informed, can respond accordingly to action with which it disagrees." (*Laurel Heights, supra*, 47 Cal.3d at p. 392.) As another court observed, "[t]o be adequate, the EIR must include sufficient detail to enable those who did not participate in its preparation to understand and 'meaningfully' consider the issues raised by the proposed project." (*SCOPE, supra*, 106 Cal.App.4th at p. 721; see also *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935 (*Concerned Citizens*) ["[t]o facilitate CEQA's informational role, the EIR must contain facts and analysis, not just the agency's bare conclusions or opinions"].) This standard is not met in the absence of a forthright discussion of a significant factor that could affect water supplies. The EIR is devoid of any such discussion.

Gate King points out that while the EIR for Castaic's purchase of the 41,000 AFY entitlement was invalidated, the *Friends I* court did not set aside the contract or otherwise affect Castaic's actual use of the disputed 41,000 AFY entitlement, pending preparation of a new EIR. The reality of the water supply situation in the Santa Clarita Valley, Gate King says, is that the 41,000 AFY has been transferred, is available for use, and is being used, despite the decertification of the EIR. Gate King is correct on the facts, but is mistaken as to their import. While the "reality" is that water under the entitlement is being used,[15] the question is whether the entitlement should be used for purposes of

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[15] On remand of *Friends I* to the trial court, Castaic submitted the declaration of Dan Masnada, its general manager, urging the court not to set aside the transfer of the 41,000 AFY entitlement. SCOPE included the Masnada declaration, dated September 12, 2002, with its comments in this case. Masnada stated that if the water purveyors in the Santa

planning future development, since its prospective availability is legally uncertain. Although this decision must be made by the City, the EIR is intended to serve as an informative document to make government action transparent. Transparency is impossible without a clear and complete explanation of the circumstances surrounding the reliability of the water supply.[16]

This case bears a number of similarities to *SCOPE, supra*, 106 Cal.App.4th 715, which found that the water services portion of the EIR was inadequate:

> "Here the draft EIR gives no hint that [State Water Project] entitlements cannot be taken at face value. It is only in response to comments and submissions by project opponents such as SCOPE that the EIR obliquely acknowledges that the entitlements may not be all they seem. Instead of undertaking a serious and detailed analysis of [State Water Project] supplies, the EIR does little more than dismiss project opponents' concerns about water supply. Water is too important to receive such cursory treatment." (*SCOPE, supra*, 106 Cal.App.4th at p. 723.)

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Clarita Valley had been unable to rely on the 41,000 AFY entitlement, the Valley would have experienced water shortages in 2001 and 2002; that the permanent loss of the 41,000 AFY entitlement would have "an immediate and devastating impact on [Castaic's] ability to deliver requested water supplies to the Retail Purveyors;" and that the 41,000 AFY entitlement "is needed to meet demand of current users," and "[a]pproved development merely exacerbates the water shortage."

[16] Gate King contends that there is "simply no reason to believe that the transfer will be reversed," and that "it must be presumed" that Castaic "will eventually be able to prepare an adequate EIR." According to Gate King, to argue that Castaic should not be allowed to rely on the 41,000 AFY for planning purposes gives greater weight to a theoretical possibility than to an environmental reality, "turning CEQA on its head." We are inclined to agree with SCOPE that it is Gate King which turns CEQA on its head with its argument, which suggests that the environmental review of the 41,000 AFY transfer is "an exercise in futility because the pre-ordained outcome of the process is continued use of the 41,000." We note the *Friends I* trial court, in refusing to enjoin Castaic's use of the 41,000 AFY, found petitioner's contention that the water would be used to approve new development was "speculative at this time," but stated that the petitioner could renew its application to prohibit Castaic from using the water for development "based upon evidence of the actual use of such additional water for purposes it considers improper."

The circumstances in this case are strikingly similar to those in *SCOPE*, so far as the 41,000 AFY entitlement is concerned. The draft EIR gave "no hint" that State Water Project entitlements cannot be taken at face value. When SCOPE pointed this out in its comments, the City did "little more than dismiss project opponents' concerns about water supply." (*Ibid.*) The City merely (1) referred to the Newhall District's water supply assessment, which said Castaic's entitlements totaled 95,200 AFY, with availability of water under the entitlements projected at 50% of the entitlement 80% of the time; and (2) stated that water supplies "could potentially be limited" by three ongoing legal challenges, which were mentioned but not discussed. Without a discussion of the nature of the limitations, in particular the 41,000 AFY, it is impossible to know the contours of the potential limitation on the water supplies.

We recognize that Appendix K to the final EIR acknowledges that "the availability of the 41,000 AFY . . . is not absolutely established" because the EIR prepared for its transfer was invalidated. Further, Appendix K states that the "primary uncertainty" with respect to the local water supply is the availability of the 41,000 AFY entitlement. Indeed, Appendix K states that if the 41,000 AFY is not available, "water supplies may be insufficient to meet the projected increase in demand through 2020." However, Appendix K is too little and too late, for multiple reasons.

As stated in *SCOPE,* information "scattered here and there in EIR appendices," or a report "buried in an appendix," is not a substitute for "a good faith reasoned analysis in response." (*SCOPE, supra*, 106 Cal.App.4th at pp. 722, 723.) We are troubled by the fact that the only discussion in the EIR of the uncertainty created by the decertification of the EIR for the Castaic purchase appears in an appendix added to the final EIR shortly before certification. The seriousness of water supply issues, as reflected in SCOPE's comments, merits discussion in the text of the EIR, where it is most readily accessible. At a minimum, the text of the EIR should refer to the appendices that contain the relevant discussion. Nonetheless, if Appendix K's discussion were adequate, we might overlook

the fact it is relegated to an appendix that is not mentioned in the text of the EIR. But the discussion is not adequate.

Appendix K does little more than acknowledge that, without the 41,000 AFY entitlement, water supplies may be insufficient. However, as stated in *SCOPE*, "[t]he final EIR's acknowledgement that there 'could be a deficit of supply' does not cure the defect"[17] (*SCOPE, supra*, 106 Cal.App.4th at p. 723), as no discussion exists from which to judge the likelihood of the deficit or alternate sources of supply to meet such a deficit. The EIR "must contain facts and analysis, not just the agency's bare conclusions or opinions." (*Concerned Citizens, supra*, 42 Cal.3d at p. 935.) Moreover, the very next sentence of Appendix K contains the misleading statement that, even without the 41,000 AFY, Castaic retains an entitlement (54,200) that exceeds Castaic's 2001 demand for State Project Water by 18,844 AF, so that the project's demand of 386 AFY "would be well within the current entitlement." Appendix K fails to add, however, that the actual availability of the entitlement is estimated at "50% of the entitlement 80% of the time," a condition that would have resulted in a deficit, not a surplus, of supply in 2001 in the absence of the 41,000 AFY entitlement. (See discussion in part II.G.2., *post*.)

In short, neither the text of the EIR nor its appendices contain a proper analysis of the impact of the availability *vel non* of the 41,000 AFY. As in *SCOPE*, "[w]ithout such information, the general public and its responsible officials cannot make an informed decision on whether to approve the project." (*SCOPE, supra*, 106 Cal.App.4th at p. 724.) Consequently, the final EIR fails in its function as an informational document on the water issues.

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[17] The court continued: "Without some reasonably accurate estimate of [State Water Project's] ability to deliver water, it is impossible to judge how likely or how deep the deficit might be." (*SCOPE, supra*, 106 Cal.App.4th at p. 723.)

Gate King insists there was substantial evidence of adequate water supplies, pointing to the Newhall District water supply assessment, and to the fact that the UWMP 2000 projections were based on reduced entitlements, namely 59.7% in average/normal years and 39.8% in dry years. This evidence, however, does not address the point in dispute – the use of the disputed 41,000 AFY as part of the base upon which to calculate reduced entitlements. Gate King also points to other documents in the administrative record: the UWMP 2000, the Newhall District's 2001 Masterplan, and the 2001 and 2002 Santa Clarita Valley Water Reports. Of these documents, only the last two documents report the *Friends I* decision invalidating the EIR for the 41,000 AFY entitlement. Moreover, while these documents are contained in the administrative record, they are not found in the EIR. (See *SCOPE, supra,* 106 Cal.App.4th at p. 723 ["[i]t is not enough for the EIR simply to contain information submitted by the public and experts. Problems raised by the public and responsible experts require a good faith reasoned analysis in response"; "[t]he requirement of a detailed analysis in response ensures that stubborn problems or serious criticism are not 'swept under the rug'"].)

Finally, at oral argument Gate King observed that, even if the 41,000 AFY entitlement were discontinued, contingency plans exist for alternative sources of water, such as short-term water exchanges, desalination, and additional groundwater pumping. The EIR, however, does not analyze or quantify these alternative sources in connection with the uncertainty of the 41,000 AFY entitlement. In the text of the EIR, these sources are mentioned, in a description of Castaic's capital improvement program, as funded activities "to achieve water supply reliability . . . ." (see footnote 8, *ante*). Similarly, Appendix K observes that, to the extent projected water supplies may be insufficient to meet demand, Castaic's long-term capital improvement program includes funding to provide for such activities over time. Appendix K's discussion of the adequacy of the water supply without the 41,000 AFY entitlement, however, merely observes that "the UWMP identifies several additional sources of water (water recycling, purchase of additional [State Water Project] supplies, desalination) that are expected to meet water demand projections over time." These generalities, without details or estimates

concerning the amount of water the programs might make available, are not a proper substitute for a discussion which allows "those who did not participate in [the EIR's] preparation to understand and 'meaningfully' consider" the issue at hand. (*SCOPE, supra*, 106 Cal.App.4th at p. 721.)

In sum, no analysis was provided of the adequacy of the water supply in light of the uncertainty flowing from the decertification of the EIR for the Castaic purchase. This absence of discussion and analysis undermines the informational function of the EIR for the Gate-King project and requires its decertification.

**2. The record does not otherwise demonstrate the adequacy of water supplies without the 41,000 AFY entitlement.**

In a related argument Gate King contends, and the trial court concluded, that even without the 41,000 AFY entitlement, the record showed sufficient water supplies. Gate King reasons that Castaic retains an entitlement to 54,200 AFY; Castaic used 35,356 acre-feet of State Water Project water in 2001 to meet the total water demand of 76,769 acre-feet; and Appendix K states that "[b]ecause this amount [54,200] exceeds 2001 [Castaic] demand for [State Water Project] water by 18,844 AF, the 386 AFY increase in water demand associated with the proposed project would be well within the current entitlement." This argument is flawed because it relies on paper water, and assumes that the entitlement to 54,200 AFY is identical to actual delivery of 54,200 AFY. The EIR – in the City's response to SCOPE's comments – states that water supply availability under Castaic's entitlements is estimated to be "delivery of 50% of the entitlement 80% of the time." Accordingly, Castaic cannot count on 54,200 AFY of State Project Water. Without its 41,000 AFY entitlement, Castaic can reliably count on only fifty percent of 54,200, or 27,100 AFY. Since 2001 demand for State Water Project water was 35,356, there is plainly no surplus upon which to rely, absent the 41,000 AFY transfer.

Gate King argues that SCOPE's "mind-numbing calculations" of paper water versus actual water ignore "the most reliable indicator" of the volume of water the State Water Project will deliver, namely, the amount delivered in the past. In 2002, this figure was 41,768 acre-feet, "not the theoretical 27,100 AF posited by" SCOPE.[18] This argument assumes the very point at issue, since Castaic's 2002 water delivery was based on the full 95,200 AFY entitlement, and it ignores the EIR's own statement that delivery of entitlements is estimated to be 50% of the entitlement 80% of the time.[19]

In sum, without the 41,000 AFY entitlement, substantial evidence of sufficient water supplies simply does not exist. Accordingly, the EIR's failure to present a "reasoned analysis in response" to SCOPE's comments – that is, an analysis of how demand for water would be met without the 41,000 AFY entitlement, or of why it is appropriate to rely on the 41,000 transfer in any event – renders the EIR defective as an informational document upon which the public and its officials can rely in making informed judgments. (*SCOPE, supra*, 106 Cal.App.4th at p. 723.)

**3. The EIR's treatment of the perchlorate contamination issue was adequate.**

SCOPE also contends the trial court erred when it upheld the final EIR's analysis of perchlorate contamination in the Saugus Formation. It claims the EIR is inadequate because it does not attempt to quantify the impact of the contamination on the availability of groundwater from the Saugus Formation, and does not analyze the extent of the contamination, the rate at which it is advancing, the status of potential remediation

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[18] The 41,768 acre-feet figure for 2002 appears in the 2002 Santa Clarita Valley Water Report, prepared in April 2003. The report also shows total water demand at 85,031 acre-feet in 2002.

[19] Castaic's receipt of 41,768 acre-feet was 44% of the full entitlement of 95,200. Had Castaic been unable to rely on the 41,000 AFY entitlement, and received 44% of its reliable entitlement of 54,200, it would have received only 23,848 acre-feet of State Water Project water.

measures, or the time line for their implementation. On this point, we disagree with SCOPE, although the point is effectively moot in light of our conclusion that the water supply analysis is otherwise defective.

The draft EIR did not mention perchlorate contamination. However, it relied upon UWMP 2000's projections of water supply and usage. UWMP 2000 identified the discovery of perchlorate in Southern California as a water quality problem that could affect groundwater supply availability, stated that perchlorate can be treated and removed from groundwater, and mentioned two possible treatment programs. UWMP 2000 concluded: "The few wells affected have been shut down, effective treatment technologies have been developed, and a plan is being worked out to remove the contamination from the groundwater." SCOPE's comments on the draft EIR asserted the Saugus Formation could not be relied on until it is remediated, and observed that the UWMP 2000 was in litigation "due to its over-statement of water supply and understatement of demand." SCOPE also submitted expert testimony, reports and memoranda which extensively discussed the contamination.

The City's response acknowledged that perchlorate has been a concern since its discovery in 1997, and stated that operation of the four contaminated wells was suspended, testing for perchlorate was continuing in all active wells, and treatment technologies were currently available. SCOPE asserts its evidence was ignored, but we are unable to make that assumption. The function of the EIR is to inform and, by virtue of SCOPE's evidence and the UWMP 2000, the City and the public were fully informed. While we may not agree with the City's decision to rely on the conclusions in the UWMP 2000 rather than the conclusions flowing from SCOPE's evidence, this court's inquiry extends only to the EIR's sufficiency as an informative document, not to the correctness of its environmental conclusions. (*Laurel Heights, supra,* 47 Cal.3d at p. 392.)

SCOPE points out that Castaic's UWMP 2000 was recently invalidated by the court of appeal in *Friends II, supra*, 123 Cal.App.4th at pp. 14-15, and suggests that we remand the case to the City for a re-evaluation of its analysis. SCOPE is mistaken. It is well-established that once a project is approved, new information does not require

reopening the approval. (*SCOPE, supra*, 106 Cal.App.4th at p. 723; Cal.Code Regs., tit. 14, § 15162, subd. (c).) Gate King is thus correct that it is "simply too late to raise this [the invalidation of the UWMP 2000] as an issue."

Gate King's victory on the issue of perchlorate contamination, however, is pyrrhic. Our decision to decertify the EIR, based on inadequate consideration of the water supply issues previously discussed, inevitably has the practical effect of requiring the City to come to grips with the perchlorate issue as well, because reliance on groundwater supplies will acquire additional significance if less imported water is available. And, while the City properly relied on UWMP 2000 conclusions on perchlorate contamination in its previous analysis, it will be unable to do so in any new analysis because of the invalidation of UWMP 2000 in *Friends II*. (*Friends II*, *supra*, 123 Cal.App.4th at pp. 14-15 [describing the UWMP 2000 as "fatally flawed" and concluding that its description of the reliability of the groundwater supplied from the Saugus Formation and Alluvial Aquifer was inadequate because of failure to address timing issues related to the perchlorate contamination].)[20]

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[20] In *Friends II, supra*, 123 Cal.App.4th 1, the court held that the UWMP 2000 failed to comply with statutory requirements for preparation of an urban water management plan. The court found the UWMP 2000's description of the reliability of the groundwater supplied from the Saugus Formation and Alluvial Aquifer was inadequate under Water Code section 10631, subdivision (c), because it failed to address timing issues related to the perchlorate contamination discovered in Saugus Formation groundwater. While the UWMP 2000 mentioned that a groundwater cleanup plan was being developed, it did not mention the stage of development that had been reached or the date when the plan could be completed and implemented. (*Friends II, supra*, 123 Cal.App.4th at p. 12.) Nor did the UWMP state how fast the perchlorate contamination was spreading, or how any uncertainty on timing issues affects the reliability of the supply of groundwater. (*Id.* at p. 13.) The court observed that "[t]he public and the various governmental entities that rely on the UWMP may be seriously misled by it and, if the wrong set of circumstances occur [e.g., prolonged drought, increased reliance on groundwater from the Saugus Formation, accelerated spread of the perchlorate contamination within the formation], the consequences to those who relied on the UWMP, as well as those who share a water supply with them, could be severe." (*Id.* at p. 15, fn. omitted.)

## III. The Ridgeline Preservation Ordinance

SCOPE contends the City's approval of the Gate-King project should be set aside because the City violated its own ridgeline preservation ordinance. Specifically, SCOPE asserts the project did not qualify as an "innovative design" under the ordinance, and the City was required, but failed, to make an explicit finding that the design for the project was unique. SCOPE is mistaken on both counts.[21]

The City of Santa Clarita's municipal code includes an ordinance governing ridgeline preservation and hillside development. (Santa Clarita Mun. Code, ch. 17.80.) Its purpose is to regulate the development and alteration of hillside areas and ridgelines.[22] The ordinance contains development standards for two categories of significant ridgelines, primary and secondary ridgelines. Significant ridgelines may not be altered by grading or improvements, except as approved through a hillside plan review permit.[23] (Mun. Code, § 17.80.045, subd. C., formerly § 17.80.040, subd. B.)

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[21] The EIR for the Gate-King development found that the project would alter scenic views from public viewing locations and alter city-designated primary and secondary ridgelines, an impact considered unavoidably significant. The EIR also concluded that, because project development would entail grading on primary and secondary ridgelines, a finding that the proposed grading plan is consistent with the ridgeline preservation ordinance would be required to approve the project. SCOPE does not challenge the EIR, but asserts a violation of the ordinance, compliance with which is necessary for project approval.

[22] The regulation of development and alteration of hillside areas and ridgelines is "to minimize the adverse effects of hillside development and to provide for the safety and welfare of the City of Santa Clarita while allowing for the reasonable development of hillside areas . . . ." (Mun. Code, § 17.80.010.)

[23] Significant ridgelines are those that "surround or visually dominate the valley landscape" under criteria described in the ordinance. (Mun. Code, § 17.80.045, subd. B., formerly §17.80.040, subd. A.)

The ordinance has a subdivision entitled "Innovative Applications for Significant Ridgelines." At the time of the City's action in this case, this subdivision provided that:

> "Certain uses may be permitted on significant ridgelines to promote the public health, safety and general welfare. Such uses or development may include but shall not be limited to the following: innovative development alternatives, apiaries, aviaries, historical landmarks, observatories, open space/conservation areas, parks and recreation areas, publicly and privately-operated transmission facilities, public street access (including utility extensions underneath the street), public buildings, recreational camps, riding academies or stables, trails and water tanks (screened)." (Former Mun. Code, § 17.80.040, subd. E.)

Subdivision E continued with a specification of "Criteria for innovative applications." (*Id.*, former § 17.80.040, subd. E.1.) It expressly allowed encroachment onto a significant ridgeline when the Planning Commission, after a public hearing, issued written findings based upon five specified criteria.[24]

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[24] Subdivision E.1. stated:

> "Encroachment onto a significant ridgeline shall be permitted when the Planning Commission, following a public hearing, issues written findings based upon the following evidence:
>
> a. The proposed use is proper in relation to adjacent uses, the development of the community and the various goals and policies of the General Plan.
> b. The use or development will not be materially detrimental to the visual character of the neighborhood or community, nor will it endanger the public health, safety or general welfare.
> c. The appearance of the use or development will not be different than the appearance of adjoining ridgeline areas so as to cause depreciation of the ridgeline appearance in the vicinity.
> d. The establishment of the proposed use or development will not impede the normal and orderly development and improvement of surrounding property, nor encourage inappropriate encroachments to the ridgeline area.

The City made each of the five written findings specified by the ridgeline preservation ordinance (see footnote 24, *ante*), and each finding included a delineation of the evidence and reasons supporting the finding. On appeal, SCOPE does not challenge these findings or their evidentiary support. Instead, SCOPE argues that a project "cannot be considered 'innovative' within the meaning of the Ordinance unless its design is 'unique' and 'differs from other projects around the City.'" SCOPE also contends the City was required to make a finding "as to whether the Project employs a unique design," and that the trial court erred when it held that no express findings other than those specified in the ordinance were required. We disagree.

First, the ordinance was clear on its face. It expressly stated that encroachment onto a significant ridgeline is permitted when the Planning Commission issues written findings based upon the five criteria specified in the ordinance. (Former Mun. Code, § 17.80.040, subd. E.1.) The City made those findings, which are uncontested on this appeal. Moreover, the ordinance's list of the "uses or development" permitted on significant ridgelines is not exhaustive. Those uses "may include but shall not be limited to" those specified, among which was "innovative development alternatives." The term "innovative development alternatives" was not defined in the ordinance.[25] However, even

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e. It has been demonstrated that the proposed use or development will not violate the visual integrity of the significant ridgeline area through precise illustration and depiction as required in [subdivision] D . . . ." (Former Mun. Code, § 17.80.040, subd. E.1.)

The same provisions now appear in Municipal Code section 17.80.040, subdivision C.1. a. through e., along with additional criteria. See footnote 25, *post*.

[25] The ridgeline ordinance was revised in January 2005 by Santa Clarita Ordinance No. 05-1, section 2. The subdivision on "Innovative Applications for Significant Ridgelines" now appears in section 17.80.045, subdivision A, and includes a definition of the term "innovative development" as follows:

> "[A]n 'innovative development' shall be defined as a proposed use or development that demonstrates creative and imaginative site design resulting in a project that will complement the community character and provide a direct benefit

if the Gate-King project were not an "innovative development alternative," the fact that the "uses or development" allowed are not limited to those listed strongly suggests that, as long as the City makes the findings expressly required by the ordinance, the project need not fall into any of the categories listed.[26]

Second, SCOPE's contention that a project cannot be considered "innovative" unless its design is "unique" and "differs from other projects in and around the City" is not based on the text of the ordinance, but on a May 7, 2002 memorandum from the staff of the Planning Commission. The staff stated the project was "subject to a two-step review process" under the ordinance. The first step was to determine whether the project was an innovative application. The second step was to determine whether it met the findings described in the ordinance. The staff reported that Gate King requested the

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> to current and future community residents of not only the proposed use or development, but the residents of the City of Santa Clarita as a whole utilizing unique grading techniques, imaginative project site design and spacing of development that significantly exceeds the minimum standards identified in the City of Santa Clarita Ridgeline Preservation and Hillside Development Guidelines." (Mun. Code, § 17.80.045, subd. A.)

In addition, under the amended ordinance the approving authority must issue written findings based upon six further criteria, as well as the five criteria quoted above and required at the time the City approved the Gate-King project. (Mun. Code, § 17.80.040, subd. C.1. f. through k.) Two of the additional criteria use the terms comprising the ordinance's new definition of "innovative development." (Mun. Code, § 17.80.040, subd. C.1.h. & j.)

[26] The City has not argued that the plain language of the ordinance – that uses "may include but shall not be limited to" those stated – on its face permitted the city to approve any project encroaching onto a ridgeline, whether innovative or not and whether listed or not, so long as the five specified findings were made and supported by the evidence. The parties proceeded on the basis that Gate King applied for project approval as an "innovative development alternative"; the City conceded a two-step process existed for such applications; and the City conceded it has interpreted the term "innovative development" to mean "projects . . . that are of public benefit, sensitive planning design, and unique to the proposed project area." This court is obliged to take the case as it finds it.

Planning Commission to determine that its application was an "innovative development alternative" based on the facts that it was "providing an internally connected trails and parks (open space) system, improving the historical Pioneer Oil Refinery site and, is utilizing contour grading." The staff stated:

> "However, staff believes that to be considered an innovative application a project should be defined as a project having a unique site design that differs from other projects in and around the City and utilizes a high quality of design. Those projects that would be designated as an innovative application are ones that are of public benefit, sensitive planning design, and unique to the proposed project area. These projects should also be designed with maximum sensitivity to the natural hillsides with minimal landform alteration."

The staff stated it did not consider the application, as then designed, to be innovative:

> "Although the Gate-King project incorporates contour grading, a trail system, 220 acres of open space, and minimal improvements to the historical Pioneer Oil Refinery site, staff does not consider the application, as currently designed, to be innovative. Staff believes the project as proposed does not provide a significant public benefit and is not designed to be sensitive to viewsheds, oak trees, and the wildlife corridor."

The staff then considered the five findings necessary for approval of an innovative application, and determined that none of them could be met by the project as then proposed. The staff discussed several alternatives that appeared in the draft EIR, and concluded some of them "could possibly" meet the definition and findings, including, with some modifications, "Alternative 5," also known as the "C" Street alternative.

SCOPE's reliance on the staff memorandum avails it nothing for several reasons. First, a staff opinion on whether a project should be considered "innovative" has no compelling legal significance, particularly in the face of the text of an ordinance. Second, even according full weight to the staff opinion, it does not suggest that the City is required to make an express finding that an application is innovative. Third, and most significantly, the staff's memorandum analyzed Gate King's initial proposal, not the

proposal that the Planning Commission ultimately recommended to the City. The staff's view that the initial proposal should not be considered an innovative application was expressly based on its belief that the project "as proposed does not provide a significant public benefit and is not designed to be sensitive to viewsheds, oak trees, and the wildlife corridor." However, the alternative project ultimately recommended by the Planning Commission after several further meetings was the "'C' Street Alternative #5 Project." The approved alternative was different from the initial proposal in numerous respects.[27] Moreover, the Planning Commission expressly found that the alternative project would mitigate impacts to wildlife corridors to a less than significant level; would allow the Commission to "make the findings [of innovation] as described in the entitlement resolution for hillside and oak trees"; and was "a significant community benefit . . . ." Accordingly, the bases underlying the staff view that the original application was not "innovative" were subsequently eliminated.

Finally, the City concedes it has interpreted the term "innovative development" to mean, as the staff stated, "projects . . . that are of public benefit, sensitive planning design, and unique to the proposed project area," and such projects "should also be designed with maximum sensitivity to the natural hillsides with minimal landform alteration." However, the ordinance plainly did not require the City to make an explicit finding to that effect or, as SCOPE contends, a finding that the project employed a "unique site design." Moreover, the City's conclusion that the Gate-King project, as finally modified, complied with the City's interpretation of "innovative development" is implicit throughout and is supported by substantial evidence in the record. For example:

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[27] The alternative was a derivative of "Alternative 5: Reconfigured 'C' Street," a project alternative reviewed in the draft EIR. In the final proposal, the overall buildout of the project was reduced by 5%; 75.8 acres were removed from the project site and donated to the City; grading was avoided on an approximately 1,700 foot section of the primary ridgeline; open space was increased; and overall impacts to biological resources were reduced, as there were fewer oak tree removals and a reduction in the impact to wildlife movement through the open space area.

- As to "public benefit," the City expressly listed numerous benefits in finding the project was a "significant community benefit."[28]
- As to "sensitive planning design," the City stated in its resolution, *inter alia*, that "[w]ith the elimination of 'C' Street and the dedication of permanent open space, the site's wildlife corridor is protected." Further, the City found that the changes made to the project, including the elimination of "C" Street and adjacent development lots, "retain[ed] more of the undisturbed portion of another primary ridgeline" and "minimize[d] disruption of view corridors and scenic vistas," and that the "revised project will not cause depreciation of the appearance of the primary ridgeline . . . ." These are implicit, if not explicit, findings consistent with "sensitive planning design" and "maximum sensitivity to the natural hillsides with minimal landform alteration."
- Finally, the project is clearly "unique to the proposed project area." It is a modern industrial/commercial development, estimated to provide employment for more than 6,000 people, where no other such project currently exists.

In sum, and as the trial court properly concluded, the ridgeline preservation ordinance did not require an express finding that the project was an innovative development alternative. Indeed, the ordinance on its face permitted encroachment on significant ridgelines when, as here, findings were made based upon the five criteria specified in the ordinance. In any event, the City's conclusion that the Gate-King project, as finally modified, was consonant with the City's interpretation of "innovative development" is implicit and supported by substantial evidence in the record. Accordingly, SCOPE's claim that the City violated the ordinance is without merit.

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[28] The Planning Commission found that the project was a significant community benefit as the applicant was providing the following benefits: "landscaped medians and full street improvement from Pine Street to Sierra Highway on San Fernando Road, a community entrance sign, Phase I, II, III environmental test for City land dedication, 237 acres of dedicate[d] open space, a 9 acre alternative school site, $1,923,500.00 cash contribution to the City, a 1.5 acre fire station site, a fire heli-pad site, two trail heads, and three miles of trails."

## IV. The EIR's Treatment of Special-Status Species

Special-status biological resources are resources, including vegetation, that are considered endangered, threatened, rare, or sensitive by federal, state, or local agencies. At issue in this case are three special-status plant species: the slender mariposa lily, the Plummer's mariposa lily, and the San Fernando Valley spineflower. We describe first the EIR findings and then address SCOPE's claims that the City did not require adequate surveys for these species prior to approving the EIR, and failed to require adequate mitigation measures to address the project's potential adverse impacts on these species. We reject both contentions.

### A. The EIR findings.

The methodology for assessing the environmental impacts of the Gate-King project on biological resources, including special-status biological resources, consisted of:

- A review of the literature applicable to the biological resources in the project area, including a 1999 study entitled "Biological Resources of Needham Ranch," conducted for Gate King by Independent Environmental Consultants (the IEC study). The IEC study included survey efforts for vegetation, wildlife, special-status species, and habitats of special concern over an eight-year period between 1991 and 1999, as well as site visits since that time, "with records maintained on the flora and fauna observed."
- A compilation of recorded occurrences of state and federally threatened and endangered plants and animals in the project vicinity from the California Department of Fish and Game Natural Diversity Data Base; and

- A survey of the project area, conducted by biologists for Rincon Consultants, the City's environmental advisors, to determine the adequacy of the conclusions of the biological studies prepared for the project site.[29]

Rincon's literature review, database search, and field surveys identified 13 special-status plant species as potentially occurring at the site. Among these were the slender mariposa lily, Plummer's mariposa lily, and the San Fernando Valley spineflower. Specifically, the EIR reports that:

- The slender mariposa lily and the Plummer's mariposa lily, which are on List 1B (rare, threatened or endangered in California and elsewhere), were identified by the IEC study "as potentially present onsite due to their historic distribution, documented occurrence in the region, and the appropriate habitats present onsite." However, neither species was observed in the field surveys. The development of the project would remove approximately 59% of the chaparral, scrub and annual grassland habitats where these two species are found. The EIR concluded that:
    - The proposed project "may cause the direct loss of special-status plants identified as List 1B . . . species . . . ." Since the California Department of Fish and Game considers the loss of any List 1B species as a potentially adverse impact under CEQA, "potential impacts to the slender and Plummer's mariposa lilies would be potentially significant, but mitigable."
    - Mitigation measures would reduce the potential impacts to a less than significant level. The mitigation measures require, prior to the grading of each development phase of the project, the conduct of focused surveys during the prior flowering season to determine the presence or

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[29] The EIR states: "Rincon Biologists surveyed the project area on February 7, April 10, and May 25, 2001 to determine the adequacy of the conclusions of the biological studies prepared for the project site. Habitat types identified in the [IEC study] were confirmed by Rincon and mapped via groundtruthing and aerial photographs. Vegetation and wildlife observed during the onsite surveys were documented."

absence of the two species. If no specimens are found within the development footprint or fire clearance zone, no additional mitigation is required. On the other hand, if either species is identified, Gate King must submit a special-status plant restoration plan for review and approval by a City of Santa Clarita Planning Department-approved biologist.[30]

- The San Fernando Valley spineflower was identified by Rincon biologists as potentially present in areas of low vegetative cover and shallow soils within the chaparral, scrub, annual grassland and disturbed areas onsite. This species was presumed extinct until it was rediscovered in 1999 at the Ahmanson Ranch and later in the Newhall area. The EIR reports that: "Due to its limited blooming period in April-June, and the expanse of areas onsite within the development footprint which might host appropriate habitat for the spineflower, onsite surveys to date have not been able to confirm the absence of this species within the project area." The EIR concluded that:
    - Development of the proposed project "could potentially affect the San Fernando Valley spineflower . . . , if present onsite," and "[p]otential

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[30] The required mitigation measures continue:
"Target sites for mitigation shall be sampled for soil type and habitat criteria sufficient for the establishment and growth of the affected special-status species. The plan shall additionally include, but not be limited to, the following components:
1) Performance criteria (i.e., what is an acceptable success level of revegetation to mitigate past impacts);
2) Monitoring effort (who is to check on the success of the revegetation plan, and how frequently);
3) Contingency planning (if the effort fails to reach the performance criteria, identify the remediation steps need to be taken); and
4) Irrigation method/schedule (how much water is needed, where, and for how long)."

impacts to this species would be considered Class II, significant but mitigable."

- Due to the extreme rarity of the spineflower and its known presence at only two locations, several mitigation measures were required, including a survey conducted by a qualified biologist in areas where ground disturbance is anticipated. If the spineflower is discovered, further mitigation measures are required, including the mapping of current and anticipated future distribution of the species by a qualified biologist, notification of and consultation with various agencies, and preparation of a preservation and management plan by a qualified biologist. The plan must include a number of stated requirements.[31] In addition, if it is determined that project development could potentially affect the spineflower, the Department of Fish and Game must be contacted to determine the need for a "take permit" under the California Endangered Species Act.[32] In that event, "[a]ppropriate

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[31] The preservation plan must include the following: "The project applicant will provide a buffer between development and any [spineflower] that may be found onsite as required by [California Department of Fish and Game]. This buffer zone shall be designated with appropriate fencing to exclude construction vehicles and public access, but not wildlife access; [¶] Stormwater runoff, irrigation runoff, and other drainage from developed areas shall not pass through areas populated by the [spineflower]; [¶] Spineflower areas shall not be artificially shaded by structures or landscaping within the adjacent development areas; [¶] Pesticide use shall not be permitted within [spineflower] areas; [¶] The agency responsible for monitoring the [spineflower] area during construction and after project completion shall be identified and the frequency and extent of monitoring shall be determined."

[32] The California Endangered Species Act prohibits the incidental taking of a listed species unless a permit is obtained. (Fish & G. Code, §§ 2080, 2081.) Among the conditions for issuance of a permit is the requirement that the impacts of the take be fully mitigated. (Fish & G. Code, § 2081, subd. (b)(2).) If the spineflower is listed under the federal Endangered Species Act (for which it was a candidate when the EIR was

mitigation required to minimize or mitigate impacts to the [spineflower] shall be implemented and may include . . . the creation of a spineflower preserve, establishment of vegetated buffers or other setbacks, drainage modification of the adjacent areas, [spineflower] revegetation, and monitoring to ensure the success of the mitigation."

- With mitigation as described, "[d]irect and indirect impacts to the San Fernando Valley spineflower would be less than significant . . . ."

**B. The City was not required to undertake focused surveys before certification of the EIR.**

SCOPE argues that once the City determined that special-status plants were potentially present on the site, it was required to undertake focused surveys that would enable it to either rule out or confirm the presence of each of the three special-status species on the site, before certification of the EIR.[33] Deferral of focused surveys until after project approval, SCOPE contends, runs counter to the CEQA policy of requiring environmental review at the earliest possible stage. Surveys before certification would enable the City to adequately evaluate the project's impact on the species and to better formulate mitigation measures. Without survey results, SCOPE maintains, the City could not adequately determine the project's impacts on the three species. We conclude there is no precedential or other support for SCOPE's contention that the failure to perform focused surveys prior to EIR certification violated CEQA.

SCOPE relies on *Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215 (*Sierra Club*) to support its claim that a focused survey must be conducted before EIR certification. *Sierra Club* does not require the result SCOPE seeks. In *Sierra Club*, the

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certified) before site grading, federal authorities must also be contacted to determine the need for a take permit under federal law.

[33] By "focused surveys" SCOPE apparently means "protocol level surveys," designed on a species-by-species basis to definitively rule out the presence of a species.

Board of Forestry approved a lumber company's timber harvesting plans, finding there would be no significant adverse effect on old-growth-dependent wildlife species or habitat from the harvesting under the plans. (*Id.* at p. 1219.) The Supreme Court held the board abused its discretion in approving the plans based on a record "which lacked information regarding the presence in the subject areas of some old-growth-dependent species, information which both the [Department of Forestry] and [the Department of] Fish and Game had determined was necessary." (*Id.* at p. 1220.) Although Fish and Game and the Department of Forestry had requested the lumber company to conduct new surveys of old-growth-dependent wildlife on its property, the company had refused. (*Id.* at pp. 1222-1223.) The Court found the board failed to proceed in the manner prescribed by CEQA (and by the Forest Practice Act) because it evaluated the plans without any site-specific data regarding the presence of four old-growth-dependent species, despite a determination by Fish and Game that the proposed timber harvest could have a significant adverse effect on the old-growth-dependent wildlife habitat. (*Id.* at p. 1236.) Because of Fish and Game's determination,

> "the board, through the department, had an obligation imposed by CEQA to collect information regarding the presence of old-growth-dependent species on the site of the proposed timber harvest. Without that information the board could not identify the environmental impacts of the project or carry out its obligation to protect wildlife as required by the Forest Practice Act …, and to prevent environmental damage by refusing to approve projects if feasible mitigation measures are available which will avoid or substantially lessen significant environmental effects as required by CEQA." (*Ibid.*)

SCOPE's reliance on *Sierra Club* is misplaced. This case is significantly different from *Sierra Club*. In *Sierra Club*, both the Department of Forestry and the Department of Fish and Game requested new surveys of old-growth-dependent wildlife, which the company refused to conduct. In this case, no such requests were made by any governmental agency. In *Sierra Club*, the board found, without any information, that the timber harvesting plan would have no significant adverse effect on old-growth-dependent

wildlife. In this case, the City found the opposite – that the project "may cause the direct loss of special-status plants" and "could potentially affect the San Fernando Valley spineflower" if these species were present. The City found these adverse effects were significant, but mitigable, requiring the performance of focused surveys during the flowering season and before grading in each development phase. In short, fundamental differences exist between *Sierra Club* and this case, rendering *Sierra Club* inapposite. In *Sierra Club*, the board's decision allowed the project to proceed without site-specific surveys for old-growth-dependent species, while in this case, focused surveys for special-status plants must occur, and mitigation measures are specified, before the project can go forward. *Sierra Club* simply does not address SCOPE's claim, otherwise unsupported, that CEQA requires the conduct of a focused survey before certification of an EIR.

Other case precedent supports the conclusion that the EIR was adequate in its treatment of special-status species. *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261 (*Defend the Bay*) is a case in point. In that case, Defend the Bay challenged the city's certification of an EIR that authorized a general plan amendment and zone change for development of a site near El Toro. The EIR concluded that, with proposed mitigation measures, the biological impacts of the project would be insignificant. Defend the Bay argued the EIR improperly deferred mitigation of significant impacts to three species (an endangered bird, the foothill mariposa lily, and the western spadefoot toad). (*Id.* at pp. 1273-1274.) Mitigation measures with respect to the endangered bird included conducting "surveys during the breeding season to determine if the birds are in fact present in the habitat area . . . ." (*Id.* at p. 1274.) Similarly, as to the western spadefoot toad:

> "The EIR reports the [toad] was not found in the project area, but there is suitable habitat that would support the creature, so surveys must be conducted in potential breeding pools prior to issuing grading permits. If the toad is found in the project area, a mitigation plan must be prepared in consultation with [the United States Fish and Wildlife Service] and [the California Department of Fish and Game]. It is to include the construction of breeding pools

> satisfactory to these agencies on nearby protected lands. Since there are existing populations of the toad within the regional conservation area . . . , the EIR concludes any impact on this animal would be less than significant."[34] (*Id.* at p. 1275, fn. omitted.)

The court rejected Defend the Bay's objections, which claimed improper deferral of mitigation of significant impacts as to the three species. As the court stated with respect to the toad: "[T]he City has committed to mitigation if the toad is found in the project area, and it has a plan – to build satisfactory breeding pools on nearby protected land. That is sufficient." (*Id.* at p. 1277.)

We discern no significant difference between this case and *Defend the Bay*, in which post-certification surveys, conducted during the breeding season for the species, were permitted. That is exactly what will occur in this case. SCOPE asserts that *Defend the Bay* is factually distinguishable because (a) the project was at an earlier stage (involving approval of a general plan amendment and zone change, rather than, as here, final approval of tentative tract maps), and (b) populations of the toad existed elsewhere in the regional conservation area, whereas in this case the species are "extremely rare." These distinctions do not support a different result. While the projects are at different stages, the surveys in this case are required to be undertaken, as in *Defend the Bay*, before grading. "Deferral of the specifics of mitigation is permissible where the local entity commits itself to mitigation and lists the alternatives to be considered, analyzed and possibly incorporated in the mitigation plan." (*Defend the Bay, supra*, 119 Cal.App.4th at p. 1275; see *Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1396 (*Irritated Residents*) ["[t]he County was not required to conduct

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[34] The project also affected two colonies (28 individual plants) of the foothill mariposa lily on the site. The city was required to comply with specified requirements of a regional conservation plan, but the actual mitigation plan was not set out in the EIR. (*Defend the Bay, supra*, 119 Cal.App.4th at p. 1275.)

a protocol level study merely because [appellant] requested it in its comment"].)[35]
In short, if adequate mitigation measures are provided in the event the species are found on site, the stage of the project and the degree of rarity of the species should not require a different result. We therefore conclude the City was not required to confirm or rule out the presence of the three special-status plants before certification of the EIR, and turn to SCOPE's challenge to the mitigation measures required by the EIR.

### C. The mitigation measures required by the EIR are adequate.

SCOPE argues the mitigation measures for the two mariposa lily species and for the spineflower are legally inadequate. The measures are "too vague and uncertain" to permit the EIR's conclusion that their implementation would reduce the impacts to the three special-status plants to less than significant, and the measures "improperly defer the formulation [of] mitigation measures without setting any performance criteria for the success of the future plan." We do not agree.

The formulation of specific mitigation measures may be deferred if it is impractical to formulate them at the time of project approval. "Deferral of the specifics of mitigation is permissible where the local entity commits itself to mitigation and lists the alternatives to be considered, analyzed and possibly incorporated in the mitigation plan." (*Defend the Bay, supra,* 119 Cal.App.4th at p. 1275.) In this case, the EIR provides that, if the slender or Plummer mariposa lilies are found in the required surveys, Gate King must submit a special-status plant restoration plan for review and approval by a City of Santa Clarita Planning Department-approved biologist. The plan must provide for sampling of target sites for soil type and habitat criteria sufficient for the establishment and growth of the affected special-status species, and must include four

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[35] "CEQA does not require a lead agency to conduct every recommended test and perform all recommended research to evaluate the impacts of a proposed project. The fact that additional studies might be helpful does not mean that they are required." (*Irritated Residents, supra,* 107 Cal.App.4th at p. 1396.)

other specified components (see footnote 30, *ante*), including performance criteria for an acceptable level of revegetation, monitoring the success of the revegetation plan, contingency planning for failed efforts, irrigation methods, and so on.

SCOPE argues that deferral of the formulation of the particulars of the specified components of the plan – the performance criteria for success of revegetation, deciding who will monitor the success of revegetation, the frequency of monitoring and the remediation steps to be used if an acceptable level of revegetation is not achieved – is improper. However, the authorities cited by SCOPE do not support SCOPE's conclusion. SCOPE relies on *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359 (*Gentry*). *Gentry* states it may be proper for an agency to "commit itself to eventually devising measures that will satisfy specific performance criteria articulated at the time of project approval." (*Id.* at p. 1394, internal citations and quotations omitted.) SCOPE's complaint is that "performance criteria" have not been articulated, but SCOPE stretches the point too far. The EIR requires a restoration plan if the plants are found on site, and it requires the plan to include four specified components. While the particulars of the four specified components are not specified, this does not indicate an absence of "performance criteria." The components of the plan are specified, and the plan must receive the approval of a City-approved biologist. These measures are not inadequate. As the court stated in *Defend the Bay, supra*, 119 Cal.App.4th at p. 1276: "while there is deferred mitigation, it is not improper. The City is required to mitigate impacts to the [foothill mariposa] lily . . . , the EIR commits the City to such mitigation, and it lists what will be required in the mitigation plan. That is enough." (See also *Gentry, supra,* 36 Cal.App.4th at p. 1396, citing and quoting with approval 1 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 1993) § 6.72, p. 318 (rev. 4/03) ["condition requiring applicant to avoid erosion and prevent siltation by developing

'erosion control plan subject to review and approval by City staff' avoids improperly deferred mitigation"].)[36]

The mitigation measures for the San Fernando Valley spineflower are likewise adequate, and even more specific than those required for the mariposa lilies. If the spineflower is discovered, a qualified biologist is required to map the current and anticipated future distribution of the species and to prepare a preservation and management plan. Additionally, various interested agencies must be notified. The plan must include a number of items, including a buffer zone between development and any spineflower that may be found; restrictions against stormwater runoff, irrigation runoff, and other drainage from developed areas passing through areas populated by the spineflower; prohibitions against artificial shading by structures or landscaping in adjacent development areas; prohibitions on pesticide use; and others (see footnote 31, *ante* and accompanying text).

We can discern no basis for SCOPE's assertions that performance criteria have not been articulated in these mitigation measures. SCOPE asserts the measures are "too vague and uncertain" because, for example, "it is unclear how wide a buffer would be required" and it is unclear "what procedure is to be followed if [the spineflower] is discovered within a construction pad, or in the middle of a road, where creating a buffer would be infeasible." The buffer, however, is to be "as required by [the Department of

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[36] SCOPE points to one mitigation condition in *Gentry* which the court found improperly deferred the formulation of specific mitigation measures. This mitigation condition allowed the city to request the applicant to obtain a biological report concerning the Stephens' kangaroo rat, and in that event the applicant had to comply with any recommendations in the report. This constituted improper deferral of the formulation of mitigation because it required compliance "with any recommendations of a report that had yet to be performed." (*Gentry, supra*, 36 Cal.App.4th at p. 1396.) This is not such a case. See *Defend the Bay, supra*, 119 Cal.App.4th at p. 1275 [contrasting permissible deferral of the specifics of mitigation (where the local entity commits itself to mitigation and lists the alternatives to be considered, analyzed and possibly incorporated into the mitigation plan) with impermissible deferral (when the agency merely requires a project applicant to obtain a biological report and comply with any recommendations that may be made)].

Fish and Game],” which administers the California Endangered Species Act. (See *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428, 1447 (*Riverwatch*) [while the extent of mitigation required would depend on the results of a study, “the fact the entire extent and precise detail of the mitigation that may be required is not known does not undermine the final EIR’s conclusion that the impact can in fact be successfully mitigated”].)

Finally, SCOPE objects to the mitigation measure (BIO-3(c)) that requires the Department of Fish and Game to be contacted, in the event it is determined that project development could potentially affect the spineflower, to determine the need for a “take permit” under the California Endangered Species Act (Act). The Act prohibits the incidental taking of a listed species unless a permit is obtained. (Fish & G. Code, §§ 2080, 2081.) A permit may be issued if, among other things, the impacts of the take are “minimized and fully mitigated,” and no permit may be issued if issuance would jeopardize the continued existence of a species. (Fish & G. Code, § 2081, subds. (b)(2) & (c).) Mitigation measure BIO-3(c) will not reduce the project’s impact to a less than significant level, according to SCOPE, because the Act does not prohibit “indirect harm” to a species as a result of adverse habitat modification, and therefore the Department of Fish and Game has no authority to require mitigation for indirect harm to the spineflower.[37] Whether SCOPE’s interpretation of the Act is correct is not a matter of concern, as no legal inadequacy in this mitigation measure is perceived. “[A] condition requiring compliance with environmental regulations is a common and reasonable mitigating measure.” (*Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296,

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[37] SCOPE cites an opinion of the Attorney General concluding that the California Endangered Species Act does not prohibit indirect harm to an endangered or threatened species by way of habitat modification. (78 Ops.Cal.Atty.Gen. 137 (1995).) The federal Endangered Species Act is broader, and includes harm to or harassment of a species. (16 U.S.C. § 1532(19).) As previously noted, the mitigation measures for the spineflower provide that if the spineflower is federally listed prior to site grading, the U.S. Fish and Wildlife Service must also be contacted to determine the need for a take permit under federal law.

308; see 1 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act, *supra*, § 14.8, p. 563 (rev. 10/04).) Moreover, BIO-3(c) is only one of several mitigation measures, and the City concluded the required measures would reduce both direct and indirect impacts to less than significant levels. While SCOPE may disagree, there is no basis in law for quarreling with the City's conclusion. (*Laurel Heights, supra*, 47 Cal.3d at p. 392 [court passes on EIR's sufficiency as an informative document, not upon the correctness of its environmental conclusions].)

In sum, SCOPE has failed to show any legal inadequacy in the mitigation measures required by the EIR for special-status plant species. Previous studies and the City's field surveys did not reveal the presence of these species on the project site, and further focused surveys during the blooming season are required before any grading may occur. No legal requirement exists mandating the performance of focused surveys before certification of an EIR, and mitigation measures are in place in the event any of the three species are found on site. No basis exists for concluding these measures are legally inadequate. (See *Riverwatch, supra,* 76 Cal.App.4th at p. 1447 [fact that precise details of required mitigation are not known does not undermine EIR's conclusions].)

## V. CONCLUSION

While no other defects in the EIR are found, the section discussing water supplies is inadequate. Specifically, the EIR failed to present a reasoned analysis in response to SCOPE's comments pointing out the uncertainty attending the City's reliance on Castaic's entitlement to 41,000 AFY of imported water purchased under the Monterey Agreement. Without the 41,000 AFY entitlement, substantial evidence of sufficient water supplies does not exist. Yet neither the text of the EIR nor its appendices present a reasoned analysis of the significance *vel non* of the decertification of the EIR for the Castaic purchase; how demand for water would be met without the 41,000 AFY entitlement; or why it is appropriate to rely on the 41,000 AFY transfer in any event. The absence of this analysis renders the EIR defective as an informational document upon which the public and its officials can rely in making informed judgments. An analysis of

these points should, in our view, appear in the text of the EIR. However, if the analysis is to appear in an appendix, the EIR text should contain a summary of the salient points of the appendix and a specific reference to it.

As for the issue of perchlorate contamination, the City and the public were fully informed by virtue of SCOPE's evidence and the UWMP 2000. However, our decision to decertify the EIR based on inadequate consideration of the imported water issues will necessarily require a renewed consideration of groundwater supplies, and the City will be unable to rely on UWMP 2000 conclusions on perchlorate contamination because of the invalidation of UWMP 2000 in *Friends II*, *supra*, 123 Cal.App.4th 1.

## DISPOSITION

Because the water supplies portion of the EIR is inadequate, the judgment is reversed. The trial court is directed to issue a writ of mandate vacating the certification of the EIR and to retain jurisdiction until the City certifies an EIR complying with CEQA consistent with the views expressed in this opinion. Costs on appeal are awarded to appellants.

**CERTIFIED FOR PARTIAL PUBLICATION**

BOLAND, J.

We concur:

COOPER, P. J.

RUBIN, J.