SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

DATE: 06/27/2022 TIME: 08:00:00 AM DEPT: C-72

JUDICIAL OFFICER PRESIDING: Timothy Taylor
CLERK: Ryan A Willis
REPORTER/ERM: Not Reported
BAILIFF/COURT ATTENDANT:

CASE NO: **37-2021-00023385-CU-TT-CTL** CASE INIT.DATE: 09/16/2020
CASE TITLE: **Natural Resources Defense Council Inc vs City of Los Angeles [E-FILE]**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Toxic Tort/Environmental

APPEARANCES

The Court, having taken the above-entitled matter under submission on 06/24/2022 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

Ruling on Merits

Natural Resources Defense Council, Inc., et al. v. City of Los Angeles, et al.; SCAQMD v. City of Los Angeles, et al., Case No. 2021-23385

Argued: June 24, 2022, 1:30 p.m., Dept. 72

1. Overview and Procedural Posture.

These consolidated mandamus actions arise under CEQA, and concern the 142-acre China Shipping Container Terminal at the Port of Los Angeles.* The Port is the "busiest seaport in the Western Hemisphere. It is critical for U.S. trade with Asia, and there is a lot of trade with Asia." *SCAQMD v. City of Los Angeles* (2021) 71 Cal.App.5th 314, 316 ("*SCAQMD*").

In 2001, the Los Angeles Harbor Department ("LAHD") issued Permit No. 999 to China Shipping to construct, and thereafter lease and operate, the Terminal at Berths 97-109. Litigation quickly ensued. Environmental and community groups filed a lawsuit alleging various CEQA violations. After a stop at the Court of Appeal (*NRDC v. City of Los Angeles* (2002) 103 Cal.App.4th 268), the parties entered into a court-approved settlement in 2004 that required the Port to prepare a project-specific environmental impact report ("EIR") for the Terminal.

The EIR was completed in 2008. It too was the subject of a lawsuit. *See City of Riverside v. City of Los Angeles* (Aug. 11, 2011, G043651) 2011 WL 3527504 (nonpub. opn.). Among other things, the EIR found that the Terminal would have "[s]ignificant unavoidable aesthetic, air quality, and noise impacts," particularly on minority and low-income populations. AR 2477. To counteract these adverse effects, the EIR identified and adopted 52 mitigation measures. AR 7750. However, the implementation of many of

the mitigation measures was expressly contingent upon the measures being incorporated, via amendment, into LAHD's lease with China Shipping. *See* AR 6561-6571. This never occurred. AR 9680. China Shipping, which had "chose[n] not to participate" in either the lawsuit or the court-approved settlement, took the position that "it was not required to agree to an amended lease" because it was not a party to these proceedings. AR 7749-7750. It also claimed that certain mitigation measures were "operationally or economically infeasible." AR 7751. As a result, some mitigation measures were incompletely implemented or not implemented at all.

By May 2015, it was clear to LAHD that a supplemental EIR was needed. AR 51493-51495. LAHD informed China Shipping of this decision and requested "specific information" to support China's Shipping's non-compliance with certain mitigation measures. AR 51605-51613. However, it was not until September 18, 2015 – shortly after the Port received a California Public Records Act request regarding "reports on all mitigation obligations still to be accomplished by...China Shipping" – that LAHD issued a Notice of Preparation to inform the public that an SEIR would be prepared. AR 9680, 107548. During this process, China Shipping informed LAHD that it would "work cooperatively with the Port with regard to implementation of environmental measures in a manner that respects each party's contractual commitments," but made clear its view that the Port would be "responsible for any and all cost difference between the environmental compliance that is in place now, and the elevated standards found in the SEIR[.]" AR 56266, 92072.

The final SEIR was certified by the Board of Harbor Commissioners ("Board") in October 2019. AR 8-22. It eliminated several mitigation measures from the EIR and modified others. AR 10529. Critically, however, the modified mitigation measures were once again made contingent on their inclusion in a new lease amendment between LAHD and China Shipping. AR 10529-10535. On August 12, 2020, despite acknowledging that China Shipping had not "demonstrated a lot of flexibility in the past," the Los Angeles City Council adopted the recommendations of the Board. AR 23-24, 44065. Later that day, the Port emailed China Shipping regarding entering into an amended lease. AR 149193. The record contains neither a response to this email nor an amendment to the China Shipping lease incorporating the SEIR mitigation measures.

On September 16, 2020, two lawsuits were filed in Los Angeles Superior Court challenging the SEIR: (i) a petition for writ of mandate and complaint for declaratory and injunctive relief by petitioners San Pedro and Peninsula Homeowners Coalition, San Pedro Peninsula Homeowners United, East yard Communities for Environmental Justice, Coalition for Clean Air, and Natural Resources Defense Council (collectively, "NRDC"); and (ii) a petition for writ of mandate and complaint for declaratory and injunctive relief by petitioner South Coast Air Quality Management District ("SCAQMD"). Thereafter, the California Attorney General and the California Air Resources Board (collectively, "CARB") successfully moved to intervene in the SCAQMD action.**

After the cases were consolidated, respondents sought an order transferring the consolidated proceeding and petitions in intervention to the Superior Court of the County of Ventura. ROA 16. The LASC granted the motion, and ordered the parties to meet and confer regarding a transferee court. ROA 14. The parties agreed upon San Diego, which is how the case came to Dept. 72 in in late May, 2021. ROA 3, 8-9, 11, 13. The court immediately set a CMC. ROA 4. Respondents answered and the parties filed their Statements of Issues under Public Resources Code section 21167.8. ROA 48-53, 55-57.

On September 24, 2021, this court denied respondents' motion to dismiss, granted NRDC's motion for relief from a clerical error, overruled respondents' demurrer to the petition in intervention, and set a

merits hearing for June 24, 2022.*** ROA 98-99, 101, 106. The court later received, modified, and approved a stipulated briefing schedule.**** ROA 113. The Administrative Record ("AR") has been certified (ROA 46, 119), and excerpts have been lodged. ROA 138, 147. The merits briefs filed by the parties are extensive:

CARB Opening Brief and errata (ROA 120, 122, 126-127, 130-**131**) – 23 pages of text.
NRDC Opening Brief and errata (ROA 121, 128-**129**) – 35 pages of text.
SCAQMD Opening Brief and errata (ROA 123-**125**) – 29 pages of text.

The Port's Opposing Brief and errata (ROA **133**-135) – 89 pages of text.

CARB Reply Brief and errata (ROA 140, 144-**145**) – 16 pages of text.
NRDC Reply Brief (ROA 141) – 20 pages of text.
SCAQMD Reply Brief and errata (ROA **142**-143) – 20 pages of text.

The parties submitted hyperlinked versions of final versions of their briefs (identified in **bold** type immediately above), which was very helpful to the court. ROA 132, 136, 146. The court reviewed the briefing and the record, published a detailed tentative ruling (ROA 149), and heard thoughtful, well-prepared and extensive argument on June 24, 2022. The case was submitted for decision. This is the court's decision.

2. Applicable Standards.

A. The environmental document at issue in this case is the 2019 SEIR. An SEIR is required under section 21166 of the Public Resources Code "where it is necessary to explore the environmental impacts of a substantial change not considered in the original EIR. *Martis Camp Cmty. Ass'n v. Cnty. of Placer* (2020) 53 Cal.App.5th 569, 607. It is undisputed that in 2015, the Port conceded there had been substantial changes from the time of the 2008 EIR, requiring preparation of the SEIR.

B. The Fourth District Court of Appeal, Division One, considered a SEIR in *Golden Door Properties v. County of San Diego* (2020) 50 Cal.App.5th 467, 494. The following summary of the relevant standards in this section 2B borrows heavily from pp. 503-505 of Justice Irion's exhaustive opinion:

The foremost principle under CEQA is that the Legislature intended the act "to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.' " [Citations.] 'With narrow exceptions, CEQA requires an EIR whenever a public agency proposes to approve or to carry out a project that may have a significant effect on the environment. [Citations.]' The basic purpose of an EIR is to 'provide public agencies and the public in general with detailed information about the effect [that] a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project.' [Citations.] 'Because the EIR must be certified or rejected by public officials, it is a document of accountability. If CEQA is scrupulously followed, the public will know the basis on which its responsible officials either approve or reject environmentally significant action, and the public, being duly informed, can respond accordingly to action with which it disagrees.' [Citation.] The EIR "protects not only the environment but also informed self-government.' " (*Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 511-512 (*Sierra Club*).) " ' "The EIR is the heart of CEQA," and the integrity of the process is dependent on the adequacy of the EIR.' " (*Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 924).

CEQA is a comprehensive scheme designed to provide long-term protection to the environment. *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 112. Its purpose is to compel government to make decisions with environmental consequences in mind. *Golden Gate Land Holdings LLC v. East Bay Regional Park Dist.* (2013) 215 Cal.App.4th 353, 365. The applicable standard of review is quite nuanced. "[T]he appellate court reviews the agency's action, not the trial court's decision; in that sense appellate judicial review under CEQA is de novo." (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 427.)

The determinations of the lead agency are reviewed for abuse of discretion. (*Sierra Club, supra*, 6 Cal.5th at p. 512, 241 Cal.Rptr.3d 508, 431 P.3d 1151.) " '[A]n agency may abuse its discretion under CEQA either by failing to proceed in the manner CEQA provides or by reaching factual conclusions unsupported by substantial evidence.' " (*Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, 935 (*Banning Ranch*).) And within this abuse of discretion standard, review varies depending on the issue involved. " 'While we determine de novo whether the agency has employed the correct procedures, "scrupulously enforc[ing] all legislatively mandated CEQA requirements" [citation], we accord greater deference to the agency's substantive factual conclusions. In reviewing for substantial evidence, the reviewing court "may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable," for, on factual questions, our task "is not to weigh conflicting evidence and determine who has the better argument." ' " (*Sierra Club, supra*, 6 Cal.5th at p. 512.)

In *Sierra Club*, the California Supreme Court summarized these principles as follows: (1) An agency has considerable discretion in deciding the manner of discussing potentially significant effects in an EIR. (2) However, a reviewing court must determine whether that discussion comports with an EIR's intended function. (3) This review is not solely a matter of discerning whether there is substantial evidence to support the agency's factual conclusions. (*Sierra Club, supra*, 6 Cal.5th at pp. 515-516.) For example, there are " 'instances where the agency's discussion of significant project impacts may implicate a factual question that makes substantial evidence review appropriate,' such as an agency's decision to use a particular methodology. [Citation.] 'But whether a description of an environmental impact is insufficient because it lacks analysis or omits the magnitude of the impact is not a substantial evidence question.' [Citation.] Where the ultimate inquiry is whether an EIR omits material necessary to reasoned decisionmaking and informed public participation, the inquiry is predominantly legal and, '[a]s such, it is generally subject to independent review.' " (*Chico Advocates for a Responsible Economy v. City of Chico* (2019) 40 Cal.App.5th 839, 846-847.)

"The ultimate inquiry ... is whether the EIR includes enough detail 'to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.' " (*Sierra Club, supra*, 6 Cal.5th at p. 516.) "Generally, that inquiry is a mixed question of law and fact subject to de novo review, but to the extent factual questions ... predominate, a substantial evidence standard of review will apply." (*South of Market Community Action Network v. City and County of San Francisco* (2019) 33 Cal.App.5th 321, 330-331.) " 'A prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process.' " (*Id.* at p. 331.)

C. Courts review a lead agency's action under CEQA for a prejudicial abuse of discretion. Pub. Res. Code § 21168.5. An agency may abuse its discretion under CEQA either by failing to proceed in the manner CEQA provides or by reaching factual conclusions unsupported by substantial evidence. *Id.* However, judicial review of these two types of error differs significantly. While the court determines de novo whether the agency has employed the correct procedures, scrupulously enforcing all legislatively

mandated CEQA requirements, it accords greater deference to the agency's substantive factual conclusions. *Citizens for a Sustainable Treasure Island v. City and County of San Francisco* (2014) 227 Cal.App.4th 1036, 1045.

D. In applying the latter substantial evidence standard, courts resolve all reasonable doubts in favor of the administrative finding and decision. *Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4th 477, 486. Under CEQA, "substantial evidence" means "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. CEQA Guidelines, § 15384(a). It includes "facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts," but not speculation or unsubstantiated opinion. CEQA Guidelines, § 15384(a), (b).

E. A mitigation measure is a change that would reduce or minimize the project's significant adverse environmental impact. (*No Slo Transit, Inc. v. City of Long Beach* (1987) 197 Cal.App.3d 241, 256.) " 'Mitigating conditions are not mere expressions of hope.' " (*Sierra Club I, supra*, 231 Cal.App.4th at p. 1167.) They must be enforceable through permit conditions, agreements, or other legally-binding instruments. (Pub. Resources Code, § 21081.6, subd. (b); Guidelines, § 15126.4, subd. (a)(2). ... "Formulation of mitigation measures shall not be deferred until some future time." (Guidelines, § 15126.4, subd. (a)(1)(B).) However, the specific details of a mitigation measure ... may be developed after project approval when it is impractical or infeasible to include those details during the project's environmental review provided that the agency (1) commits itself to the mitigation, (2) adopts specific performance standards the mitigation will achieve, and (3) identifies the type(s) of potential action(s) that can feasibly achieve that performance standard and that will considered, analyzed, and potentially incorporated in the mitigation measure." (*Ibid.*; see also *Forest Foundation, supra*, 17 Cal.App.5th at pp. 442-443.) Where an EIR improperly defers mitigation, the approving agency abuses its discretion by failing to proceed as required by law. (*CBE, supra*, 184 Cal.App.4th at pp. 89-90.)... Deferred mitigation violates CEQA if it lacks performance standards to ensure the mitigation goal will be achieved."

Golden Door Properties, supra, 50 Cal. App. 5th at 506, 518-20(cleaned up) (striking down County's proposed GHG mitigation measures).

F. Once a mitigation measure is adopted, it is presumed valid and may not be eliminated or gutted without a showing of substantial evidence that it is infeasible. *Lincoln Place Tenants Ass'n. v. City of Los Angeles*, 130 Cal. App. 4th 1491, 1509 (2005); *Napa Citizens for Honest Government v. Napa County*, 91 Cal. App. 4th 342, 359 (2001). Bare conclusions are not enough, and will not satisfy the requirements for demonstrating infeasibility. *King & Gardiner Farms v. Kern County*, 45 Cal. App. 5th 814, 866 (2020); *Village Laguna v. Orange County*, 134 Cal. App. 3d 1022, 1032-35 (1982).

3. <u>Discussion and Rulings</u>.

The NRDC and CARB petitions are granted in part. The Port violated CEQA in several ways by certifying the SEIR in August of 2020. The SCAQMD petition is granted only insofar as SCAQMD adopted the positions of NRDC and CARB which the court finds well taken, and is otherwise denied. The court begins with the big picture and what it considers to be the central issue of the case. It then addresses each of the specific grounds raised by the petitioners.

The critical assumption underlying the SEIR's environmental analysis – *i.e.*, that China Shipping would agree to amend its lease in 2019 to require mitigation – is completely baseless. The Port's brief contends at 90:25-26 of its brief that this was a "reasonable assumption." But the only substantial

evidence in the record leads to the opposite conclusion. This failure, standing alone, is enough to require that the petitions be granted because it renders even the Port's watered-down mitigation measures unenforceable under the longstanding precedent summarized in section 2E above.

The Port contends at pages 97-100 of its brief that the mitigation measures it proposes will be a matter for negotiation with China Shipping. But China Shipping's track record – and the City's – overwhelmingly shows this assumption is and was unrealistic. The Port has countenanced years of China Shipping's breach of existing lease provisions and obdurate refusals to negotiate new permit conditions, all without taking any action against China Shipping in the form of contract remedies or termination. And the record is replete with examples supporting the conclusion that China Shipping has, time after time, stubbornly refused to agree to implement mitigation measures.

Given this history, the court readily concludes the mitigation measures are not legally enforceable, and thus do not pass muster under CEQA. The record establishes it is not feasible to achieve mitigation through negotiations with China Shipping, because the only substantial evidence before the court is that China Shipping is an unwilling participant in negotiations. Thus, the Port's position is exposed for what it is: a mere expression of hope, untethered to any realistic expectation that China Shipping will sublimate its desire for profitable port operations to the requirements of California law and the well-being of port workers and nearby residents.

The Port's statement at AR 92734, repeated at 98:4 of its merits brief, that "if there is ultimately no new lease, the revised project will not be implemented" is simply another way of saying this: "if there is no new lease, the Port will be at liberty to continue to turn a less than vigilant eye to China Shipping's refusal to take any steps to bring the port facility into compliance with California environmental law, to the detriment of port workers and people living and working in Wilmington, Harbor City and San Pedro."

The Port's final rejoinder is equally unpersuasive. It contends this case presents "unusual circumstances," blames NRDC for not suing China Shipping, and asserts "this history has complicated the Port's contract negotiations with China Shipping." (Oppo. at 100:5-14.) The record before this court establishes beyond any doubt that the only "unusual circumstances" present here are the Port's repeated failures over many years to adopt a negotiating position with China Shipping which places compliance with California environmental law and the health of harbor workers and residents ahead of (or at least on equal footing with) its desire to appease its largest tenant. Finally, it appears to the court that the Port's own executive director knew full well in 2020 that the SEIR was destined to be struck down by the courts, and welcomed this result because it would strengthen the Port's hand with China Shipping. AR 44064-44066.

A. Project Description.

SCAQMD's challenge to the adequacy of the project description is not well taken. "[A]n accurate, stable, and finite project description is the 'sine qua non' of an informative and legally sufficient EIR." *Southwest Regional Council of Carpenters v. City of Los Angeles* (2022) 76 Cal.App.5th 1154, 1179. The project description must include (a) the precise location and boundaries of the proposed project, (b) a statement of the objectives sought by the proposed project, (c) a general description of the project's technical, economic and environmental characteristics, and (d) a statement briefly describing the intended use of the EIR. CEQA Guidelines § 15124(a).

Here, the SEIR defines the Revised Project "the continued operation of the China Shipping (CS) Container Terminal, located in the Port of Los Angeles (Port), under new or revised mitigation

measures." AR 9674. SCAQMD contends that this description is deficient because it does not address increases in capacity at the Terminal, which is one of the Revised Project's objectives. This argument lacks merit. The SEIR expressly states that the impacts of the Revised Project are analyzed "under the assumption that throughput at the CS Container Terminal will be incrementally higher than was assumed in the 2008 EIS/EIR, consistent with LAHD's re-assessment of terminal capacity." AR 9684. SCAQMD cites no authority holding that more information is required in the project description. However, even if additional information in the project description was required, its omission was not prejudicial. "Noncompliance with CEQA's information disclosure requirements is not per se reversible; prejudice must be shown." *Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1391.

SCAQMD's reliance on *San Juaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645 is misplaced. That case involved an EIR in connection with the issuance of a conditional use permit for the proposed expansion of an aggregate mining operation. The EIR described the project as an expansion that included the mining of additional acreage that was "not proposed to substantially increase daily or annual production." *Id.* at 650. However, it turned out that the project actually included a substantial increase in mine production. The court found that by giving such conflicting signals to decisionmakers and the public about the nature and scope of the activity being proposed, the project description was "fundamentally inadequate and misleading." *Id.* at 655-56. In this case, by contrast, neither the project description nor any portion of the SEIR suggests that there will not be an increase in Terminal's capacity.

B. Emissions Impacts.

NRDC's challenge to the SEIR's emissions impact analysis is valid. The SEIR concedes that "[e]missions from operation of the Revised Project would affect air quality in the immediate area of the Revised Project and the surrounding region." AR 7824. In calculating the impact from these emissions, the SEIR compared two future conditions (2018 to 2045) scenarios to a baseline (2008) scenario. AR 10111. As relevant here, one of the future condition scenarios – the "Revised Project Scenario" – assumes "implementation of the modified mitigation measures under the Revised Project[.]" *Id.* The SEIR then concludes that "incremental peak daily emissions of the Revised Project relative to the 2008 Actual Baseline are below the SCAQMD significance thresholds for all air pollutants and averaging times in all analysis years except for VOC, CO and NOx." AR 7872; *see also* AR 10043-10045.

NRDC argues these calculations are incorrect and misleading because they are based on the flawed assumption that LAHD and China Shipping would incorporate the modified mitigation measures into a new lease amendment in 2019. AR 7824, 7865. The court agrees. "A public agency can make reasonable assumptions based on substantial evidence about future conditions without guaranteeing that those assumptions will remain true." *Environmental Council of Sacramento v. City of Sacramento* (2006) 142 Cal.App.4th 1018, 1036. Here, as detailed above, the assumption that the lease would be amended in 2019 was neither reasonable nor supported by substantial evidence. To the contrary, the administrative record is replete with examples showing that this assumption is completely unfounded. It is undisputed that, despite the Port's efforts, China Shipping refused to amend its lease to incorporate the legally-mandated mitigation measures from the 2008 EIR. *See, e.g.*, AR 7750-7751, 9680, 50634, 51158-51165-51171, 51179. China Shipping took the position that "it should only be required to comply with current regulatory requirements applicable to all shippers at the Port, with no project-specific mitigation measures being more stringent or restrictive than such standard regulatory requirements." AR 55190.

Again, there is no evidence that China Shipping materially changed its position with respect to the modified mitigation measures in the SEIR. *See* AR 56266-56268. Nor does the record show any kind of commitment on the part of China Shipping to amending its lease. At most, China Shipping offered to "make considerable efforts to satisfy the measures proposed in the SEIR[.]" AR 92072. But such words ring hollow in light of its track record. Indeed, on October 7, 2019 – just one day before the Board certified the SEIR – China Shipping expressed its "concern[]" that there remained "considerable" operational, commercial, and financial feasibility challenges in the SEIR. AR 92069, 92072. Thus, there is no factual basis for the SEIR to assume that China Shipping will amend its lease. Indeed, the reverse is true, and the court does not consider this to be a close call. Accordingly, the emissions impact calculations are not supported by substantial evidence.

C. Comment and Response.

Failure to Respond to Comment

SCAQMD contends that the Port improperly failed to respond to a mitigation fee program to "incentivize and accelerate" equipment turnover to zero emissions, which was proposed in a October 4, 2019 letter to the Board. AR 92044, 92046. This argument lacks merit. Public comments allow an agency "to identify, at the earliest possible time in the environmental review process, potential significant effects of a project, alternatives, and mitigation measures." Pub. Res. Code § 21003.1(a). While a lead agency must respond to comments received during the notice and comment period (CEQA Guidelines, § 15088(a)), there is no requirement that the agency respond to comments submitted after expiration of the comment period. *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 567. In this case, the comment period for the Recirculated Draft SEIR ran from September 28, 2018 through November 13, 2018. AR 7785-7786. SCAQMD's letter was 11 months late. Thus, the Port was not required to make a formal response. *See Residents Against Specific Plan 380 v. County of Riverside* (2017) 9 Cal.App.5th 941, 972 (holding that a lead agency did not abuse its discretion by failing to adopt a proposed mitigation measure submitted 14 months after the comment period had closed).

Inadequate Response to Comment

NRDC argues that the Port provided an inadequate response to its recommendation that the Port create "a permanent and independent oversight committee...to conduct audits of the implementation of all committed mitigation measures[.]" AR 88276. The court disagrees. When a comment raises a "significant environmental issue" or brings a "new issue to the table," there must be some genuine confrontation with the issue; it can't be swept under the rug[.]" *City of Irvine v. City of Orange* (2015) 238 Cal.App.4th 526, 553. By contrast, "comments that are only objections to the merits of the project itself may be addressed with cursory responses[.]" *Id.* Here, NRDC's comment did not raise a "significant environmental issue"; it merely suggested a type of monitoring program. In any event, the Port noted the comment, referenced other portions of the SEIR, and ultimately rejected the recommendation because "[t]here is no requirement under CEQA that LAHD must...form a committee to oversee Port-wide compliance." AR 9901-9902. This is all the CEQA requires. *See King & Gardiner*, *supra*, 45 Cal.App.5th at 880 ("[A]gencies 'generally have considerable leeway' regarding their response to a public comment.") (quoting *Environmental Protection Information Center v. California Dept. of Forestry & Fire Protection* (2008) 44 Cal.4th 459, 487 fn. 9).

D. Modification and Deletion of 2008 EIR Mitigation Measures.

As noted above, mitigation measures in an EIR may be modified or deleted if the responsible agency

provides a legitimate reason for making the change and substantial evidence supports the reason. *Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 359. The agency must review the continuing need for the previously-adopted mitigation measure and state the reasons for the change. *Katzeff v. Department of Forestry & Fir Protection* (2010) 181 Cal.App.4th 601, 614. Valid reasons include that the mitigation measure is "infeasible" or "ill-advised" (*id.*), or "impractical or unworkable" (*Lincoln Place Tenants Assn. v. City of Los Angeles* (2005) 130 Cal.App.4th 1491, 1508-09) ("*Lincoln Place I*").

Here, the SEIR modifies six mitigation measures (MM AQ-9, MM AQ-10, MM AQ-15, MM AQ-17, MM TRANS-2, and MM TRANS-3) and eliminates four mitigation measures and one lease measure (MM AQ-16, MM AQ-20, LM AQ-23, MM TRANS-4, and MM TRANS-6) from the EIR. AR 10529. SCAQMD challenges the Port's decision to modify MM AQ-10 and delete MM AQ-20 and LM AQ-23 (SCAQMD OB at 12:1-18:15, 22:25-30:22); NRDC challenges the Port's decision to modify MM AQ-17 (NRDC OB at 25:8-32:14); and CARB challenges the Port's decision to modify MM AQ-9, MM AQ-10, MM AQ-15, and MM AQ-17. (CARB OB at 15:4-19:14.)

In a footnote, the Port argues that "CARB's participation in these arguments is barred" because it was only granted leave to intervene with respect to the SEIR's mitigation measures which could impact implementation of the Community Emissions Reduction Plan ("CERP") for Wilmington, Carson, and West Long Beach community for Wilmington. (Oppo. at 25:3 fn. 4.) But that is exactly what CARB is doing. (CARB OB at 9:4 fn. 10.) Nothing in the court's intervention order requires CARB to show how the mitigation measures impact CERP.

Deletion of Drayage Trucks (MM AQ-20)

SCAQMD's challenge to the deletion of the drayage trucks mitigation measure is denied. The 2008 EIR required that heavy duty trucks entering the Terminal transition to liquified natural gas ("LNG") over a period of 10 years. Specifically, 50% of trucks were to be LNG-fueled in 2012 and 2013, 70% in 2014 through 2017, and 100% in 2018 and thereafter. AR 5840. In April 2017, Ramboll Environ prepared an "Assessment of the Feasibility of Requiring Alternative-Technology Drayage Trucks at Individual Container Terminals" for LAHD. AR 40249-40283. The Assessment concluded that the mitigation measure was infeasible because it was "incompatible with the structure of the drayage industry," subject to previously unforeseen technological limitations, and commercially disadvantageous to the Terminal. AR 40254-40255. The SEIR relies on the Assessment's conclusions in finding that it is infeasible to include MM AQ-20 as a mitigation measure for the Revised Project. AR 226, 7808-7810.

SCAQMD argues there is no substantial evidence supporting the SEIR's determination of infeasibility. However, the Assessment ***is*** substantial evidence. *See* Pub. Res. Code § 21082.2(c) (substantial evidence includes "expert opinion supported by facts"). To the extent SCAQMD is challenging the Assessment itself, it must show that the Assessment is clearly inadequate or unsupported. *City of Maywood v. Los Angeles Unified School Dist.* (2012) 208 Cal.App.4th 362, 462. It has not done so. The Assessment was prepared by expert Ramboll Environ with the help of Dr. John Husing, an economist specializing in the economy of Southern California. AR 40253. It spans 23 pages and cites 16 sources as references. AR 40282-40283. Although the Assessment was prepared on the heels of China Shipping's assertions of infeasibility, there is nothing in the record showing that China Shipping's concerns influenced the Assessment's analysis or conclusions. In sum, the court finds that the Assessment is sufficiently credible to support the SEIR's finding that MM AQ-20 is infeasible for the Revised Project. *See Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 419.

Deletion of Throughput Tracking (LM AQ-23)

SCAQMD's challenge to the deletion of the throughput tracking from the Revised Project is denied. The 2008 EIR included MM AQ-23 to track throughput, *i.e.*, capacity, at the Terminal to determine whether it exceeded assumptions. If that occurred, the Port would be required to evaluate actual air emissions for comparison with the EIR. The SEIR eliminates this measure, which it has re-designated as LM AQ-23, because periodic throughput tracking reviews are "unnecessary." AR 227, 9897, 10032. SCAQMD contends that this deletion was improper. The court disagrees. Regardless of how MM AQ-23 may have been labeled in the 2008 EIR, it was not a "mitigation measure." "A 'mitigation measure' is a suggestion or change that would reduce or minimize significant adverse impacts on the environment caused by the project as proposed." *Lincoln Place Tenants Assn. v. City of Los Angeles* (2007) 155 Cal.App.4th 425, 445 ("*Lincoln Place II*"). In this case, MM AQ-23 was "not included" in the EIR's mitigated emissions calculations because the measure's "effectiveness ha[d] not been established." AR 729, 737. Thus, MM AQ-23 did not qualify as a "mitigation measure" triggering the requirements set forth in *Napa Citizens* and *Lincoln Place I*.

Modification of Alternative Marine Power Mitigation Measure (MM AQ-9)

CARB's challenge to the modification of the Alternative Marine Power ("AMP") mitigation measure is well taken. The 2008 EIR required all ships retrofitted for AMP to use AMP while at the Port beginning in 2010. It further required China Shipping vessels to use AMP while at the Terminal pursuant to a phase-in schedule. AR 6561. Critically, however, while China Shipping's full compliance was expected by 2011, the EIR explicitly recognized that "certain events such as equipment failure may mean less than 100% of ships would comply with this measure in certain years (the Port expects compliance to be 97 to 98 percent in such cases)." AR 5834. In other words, "[a] compliance change of 2 to 3 percent would not affect significance findings[.]" *Id.*

The SEIR modifies MM AQ-9 by reducing the compliance rate to 95% for all ships calling at the Terminal. AR 9685-9686. In doing so, it concludes that the goal of 100% compliance for China Shipping vessels is infeasible because some third-party vessels may not be equipped to use AMP, certain "situations" may prevent an AMP-capable vessel from utilizing AMP, and 100% compliance has never occurred. AR 9685. These findings are not supported by substantial evidence. First, MM AQ-9 only applies to third party vessels retrofitted for AMP. Thus, a third-party vessel not equipped to use shore power is not subject to MM AQ-9. Second, MM AQ-9 already expressly accounts for the emergency "situations" highlighted in the SEIR. Third, and most importantly, the record shows that as of February 2, 2017 – just four months before the draft SEIR was issued – the Port had reason to believe that China Shipping vessels were complying with the requirements of MM AQ-9. AR 55567. Indeed, in 2016, 99% of China Shipping vessels used AMP – a percentage well within the range of compliance contemplated by the EIR. AR 9681, 55492, 55567. Similarly, there was 98% compliance in both 2014 and 2017.***** AR 51858, 55567, 87875, SSAR 152801, 152832. In sum, although 100% AMP compliance was never technically achieved, the Port's claims of infeasibility with respect to MM AQ-9 lack merit. The measure was unlawfully modified in violation of CEQA.

Modification of Vessel Speed Reduction Program (MM AQ-10)

SCAQMD's challenge to the modification of the Vessel Speed Reduction Program ("VSRP") mitigation measure is denied. The 2008 EIR required China Shipping to increase its participation in a voluntary vessel speed reduction program. AR 738. Specifically, by 2009, all ships (100%) entering and leaving

the Terminal would need to reduce their speed to 12 knots within a 40 nautical mile radius of Port Fermin. AR 6561. The SEIR reduces this level of compliance to 95% because "while 100% compliance may be achieved in any given year, that rate cannot be sustained over a period of years." AR 7803. This is a legitimate reason for the modification, and it is supported by substantial evidence. *See Lincoln Place I*, 130 Cal.App.4th at 1508-09 The administrative record shows that the Port failed to obtain 100% compliance at the Terminal in the years following the certification of the EIR. AR 9681. While the lack of compliance could have been due to China Shipping's refusal to incorporate the VSRP requirement into its lease, the administrative record also shows that Port-wide, just 80% of ships in 2015 slowed to 12 knots within 20 to 40 miles. AR 56258. This figure only slightly increased to 85% for 2017 and 2018. AR 9754. Moreover, according to the 2017 Clean Air Action Plan ("CAAP"), a 12-knot vessel speed may not be the optimal speed from an emissions perspective for certain vessels that are equipped with an emissions reduction technology that requires higher speeds for optimum performance. AR 41306.

SCAQMD argues that the 2017 CAAP does not constitute substantial evidence because it is a "high-level guidance document" for the Ports of Long Beach and Los Angeles. However, no authority has been cited in support this position. In fact, in its comment letters regarding the Draft SEIR and the Recirculated Draft SEIR, SCAQMD repeatedly encouraged the Port to implement and comply with the 2017 CAAP. *See* AR 56326, 56341-56342, 88546, 88552.

Modification of Yard Equipment at Berth 97-106 Terminal (MM AQ-17)

NRDC's challenge to the modification of MM AQ-17 is granted in part and denied in part. The 2008 EIR adopted a mitigation measure to regulate yard equipment at the Terminal. Among other things, it required (1) all rubber-tired gantry ("RTG") cranes at the terminal to be electric by 2009 and (1) China Shipping's participation in a 1-year electric yard tractor pilot project. AR 6565. The SEIR deletes both requirements. AR 225-226. NRDC contends these changes are unlawful and unsupported by substantial evidence.

The court disagrees with respect to the RTG requirement. The SEIR concludes that all-electric RTGs are "more expensive to purchase" and their installation would require "substantial and costly modifications" at the Terminal. AR 6709-6710. These infeasibility findings are supported by substantial evidence. Ron Widdows, the Chairman of the World Shipping Council with over 45 years in the shipping industry, opines that the RTG requirement is "extraordinarily costly" and that it could prompt Cosco to "relocate activities currently conducted at the China Shipping Container Terminal to one or more other terminals at the Port of Los Angeles, the Port of Long Beach or another port." AR 92556, 92559. In reaching this conclusion, Widdows reviewed AR 92547-92549, a three-page document analyzing "Cost Scenarios for Expenditures on Mitigation Requiring Infrastructure for Electrified Equipment," which shows that it would cost $33 million to make the necessary electrification modifications at the Terminal. AR 92556-92557.

NRDC dismisses this amount as insufficient to establish economic infeasibility under *Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App.4th 587 because neither the Port nor Widdows concluded that an expenditure of $33 million would prevent the Terminal from being economically successful. But *Uphold Our Heritage* concerned the feasibility of project alternatives, not mitigation measures. The relevant inquiry regarding the economic feasibility of mitigation measures focuses on whether the measures are themselves feasible. *See Cherry Valley Pass Acres & Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316, 352. As discussed above, there is substantial evidence in the record showing that the RTG requirement is not. Thus, it was not unlawful for the Port to delete this

requirement from MM AQ-17.

As for the electric yard tractor project, the Port claims that it had no means of implementing the project absent an amendment to the China Shipping lease. NRDC argues that this is not a legitimate reason for deleting it from MM AQ-17. The court agrees. "While the passage of time may have eliminated the need for the mitigation, it does not on its own render the mitigation inoperative[.]" *Katzeff*, 181 Cal.App.4th at 614. Here, unlike with the RTG requirement, there is no evidence in the record suggesting that Port ever analyzed the continuing need for the pilot project. The fact that the Port may have decided to adopt a "more comprehensive requirement" as a lease measure for the Revised Project does not show that the electric yard tractor pilot project was infeasible, ill-advised, impracticable, or unworkable. *See* AR 10037; *see also Citizens for Honest Government*, 91 Cal.App.4th at 359; *Lincoln Place I*, 130 Cal.App.4th at 1508-09. Accordingly, the deletion of the pilot project from MM AQ-17 is not supported by substantial evidence.

E. Feasibility and Enforceability of 2019 SEIR Mitigation Measures.

Even though the Port's decision to modify certain mitigation measures may have been proper, those modified measures must still comply with CEQA. That is, they must be feasible and enforceable. *Napa Citizens*, 91 Cal.App.4th at 360. A mitigation measure is feasible if it is "capable of being accomplished in a successful manner within a reasonable period of time[.]" Pub. Res. Code § 21061.1. A mitigation measure is enforceable if it is "required or incorporated into the project[.]" Pub. Res. Code § 21081.6(a)(1).

In this case, the SEIR provides that MM AQ-9, MMAQ-10, MM AQ-15, MM AQ-17, and MM GHG-1 will come into effect only upon the execution of a lease amendment with China Shipping. AR 10529-10533, 10535. But this has not yet occurred and, as discussed above, there is no substantial evidence suggesting that it ever will. *See, e.g.*, AR 7750-7751, 9680, 44065, 50634, 51158-51165-51171, 51179. The Port did not require that the lease be amended as a condition of the Revised Project, and made no provision to ensure that the mitigation measures will actually be implemented. Thus, MM AQ-9, MM AQ-10, MM AQ-15, MM AQ-17, and MM GHG-1 are neither feasible nor enforceable.

The Port concedes as much, but contends it was justified in taking such an approach in order to strengthen its bargaining position with China Shipping. *See* AR 44064, 44066-44067. No authority, however, is cited in support of this novel position. To the contrary, the law is clear that mitigation "cannot be deferred past the start of the project activity that causes the adverse environmental impact." *POET, LLC v. State Air Resources Bd.* (2013) 218 Cal.App.4th 681, 740. Here, the Port has gone forward with the Revised Project – *i.e.*, the continued operation of the Terminal – without implementing the mitigation measures to combat emissions. The absence of such mitigation measures for project activity constitutes a profound violation of CEQA.

In sum, CARB's challenge to the enforceability of the mitigation measures and NRDC's challenge to the SEIR's replacement schedules (set forth in MM AQ-15 and MM AQ-17) are granted.

G. Consideration and Feasibility of Additional Mitigation Measures.

Petitioners contend that the Port failed to adopt all feasible mitigation measures to address air quality and greenhouse gas emissions. (NRDC OB at 32:15-35:4, 39:1-40:19; SCAQMD OB at 18:16-22:24; CARB OB at 19:15-23:20.)

Greenhouse Gases

To reduce greenhouse gas emissions from the Revised Project, the Port adopted a mitigation measure (MM GHG-1) and a lease measure (LM GHG-1). AR 10535. NRDC argues that the lease measure, which establishes a carbon offset fund, should have been included as a mitigation measure. The court disagrees. The SEIR makes clear that "the effectiveness of LM GHG-1 cannot be quantified." AR 7902. As such, the measure was not included in the SEIR's mitigated GHG emissions calculations. *See* AR 7928. NRDC cites no evidence from the record suggesting that LM GHG-1 will "reduce or minimize significant adverse impacts on the environment" caused by the Revised Project such that it should have been adopted as a mitigation measure. *See Lincoln Place II*, 155 Cal.App.4th at 445. As such, its challenge on this ground is denied.

Top Handlers and Forklifts

NRDC also contends that the Port failed to provide "good faith, reasoned analysis" for not adopting a mitigation measure requiring zero-emission top handlers and large-capacity forklifts. The court disagrees. "Nothing in the CEQA requires an EIR to explain why certain mitigation measures are infeasible." *Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, 245. In any event, the SEIR thoroughly addresses zero-emissions technologies in Master Responses 2 and concludes that such technologies are infeasible for top handlers and forklifts. AR 9703, 9713-9715. Substantial evidence supports this finding. *See* AR 424406-424516. NRDC's disagreement with this analysis is insufficient to establish a violation of CEQA. *See North Coast Rivers Alliance v. Marin Municipal Water Dist. Bd. of Directors* (2013) 216 Cal.App.4th 614, 653; *Save Panoche Valley v. San Benito County* (2013) 217 Cal.App.4th 503, 527. NRDC's challenge regarding feasible mitigation for top handlers and forklifts is therefore denied.

Drayage Trucks

SCAQMD challenges the Port's rejection of zero-emission or near-zero emission technology mitigation measures as infeasible for drayage trucks. However, for the reasons discussed above with respect to top handlers and forklifts, the Port's infeasibly finding is sufficiently explained and supported by substantial evidence. *See* AR 7810, 9703, 9705-9708, 9894, SAR152274-1522530. SCAQMD argues that the Port used an unlawfully narrow feasibility definition in reaching this conclusion by refusing to consider any technology that is not already in widespread commercial deployment. According to SCAQMD, feasible mitigation includes "that which can be successfully accomplished not only today, but also years in the future." (SCAQMD OB at 19:9-10.) Putting aside that SCAQMD cites no authority in support of its position, such a rule would directly conflict with the requirement that mitigation "cannot be deferred past the start of the project activity that causes the adverse environmental impact." *POET*, 218 Cal.App.4th at 740. Thus, SCAQMD has not established that the Port violated CEQA in declining to adopt a replacement mitigation measure for drayage trucks and its challenge on this ground is denied.

At-Berth Emissions

CARB appears to take issue with the Port's rejection of additional feasible measures "aimed at mitigating the significant air quality and climate impacts from at-berth auxiliary engine emissions at the Terminal." (CARB OB at 19:20-22.) However, its argument is essentially a rehash of its challenge to the modification of MM AQ-9, which the court has found to be unlawful. Accordingly, CARB's petition challenging the Port's failure to adopt all feasible measures to mitigate the Revised Project's at-berth emissions is granted to the extent it is not mooted by any of the foregoing.

H. Miscellaneous.

CARB's petition challenging the Port's failure to enforce 6 of the 52 mitigation measures in the 2008 EIR is denied. Although the SCAQMD petition (ROA 24) raised the Port's failure to comply with the 2008 EIR in paragraphs 74-77, the relief requested was to have the Port "set aside Permit No. 999 pending compliance with CEQA." This permit was issued more than a decade ago under an environmental document that was reviewed by another trial court and a Court of Appeal. The relief sought does not appear appropriate to this court, and the remedy does not appear cognizable in this court. The main thrust of this case is the SEIR, not the original EIR.

I. Conclusion.

In light of the foregoing, the petitions are granted in part and denied in part as follows:

NRDC's petition is granted as to (1) the SEIR's emissions impact analysis, (2) the deletion of the electric yard tractor pilot project from MM AQ-17, and (3) the SEIR's replacement schedules for MM AQ-15 and MM AQ-17.

SCAQMD's petition is granted insofar as it adopted the positions of NRDC and CARB with which the court agrees, and is otherwise denied.

CARB's petition is granted as to (1) the modification of MM AQ-9, (2) the deletion of the electric yard tractor pilot project from MM AQ-17, and (3) the enforceability of the SEIR's mitigation measures. In addition, CARB's petition challenging the Port's failure to adopt all feasible measures to mitigate the Revised Project's at-berth emissions is granted to the extent it is not mooted by any other aspects of the court's ruling.

The court believes it has addressed each of the central grounds raised by petitioners. Pub. Res. Code § 21005(c). In the event the parties think otherwise, the court concludes that, in light of its conclusion that the City violated CEQA and that the 2020 project approvals must be set aside, further discussion of subsidiary theories is not necessary. *See PDK Labs. Inc. v. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment) (noting "the cardinal principle of judicial restraint" that "if it is not necessary to decide more, it is necessary not to decide more"); *Compare Natter v. Palm Desert Rent Review Comm'n.,* 190 Cal. App. 3d 994, 1001 (1987)(reversal on stated grounds made it unnecessary to resolve other contentions challenging constitutionality); *Young v. Three for One Oil Royalties*, 1 Cal. 2d 639, 647-648 (1934)(court declined to rule on matters unnecessary to resolving the case before the court, as to do so would be to provide "dictum pure and simple").

The City of Los Angeles, its City Council and the Board are ordered forthwith to set aside the August 2020 certification of the SEIR (and the other related project approvals, AR 8-25). Counsel for NRDC, SCAQMD and CARB are ordered forthwith to present a form of writ of mandate and judgment consistent with the foregoing. The writ is to be made returnable in 60 days. The court retains jurisdiction under Pub. Res. Code section 21168.9(b).

CARB's and NRDC's requests for further briefing on remedy are denied. The court may not direct the Port to carry out its obligations under CEQA in any particular way. Pub. Res. Code § 21168.9(c). Absent a consent decree, the court may only declare an earlier CEQA document invalid and order it set aside. The court has done so here. Moreover, the case has already been extensively briefed, and this

court is only a temporary first port of call on the voyage to appellate review. Because the trial courts are not final, it is important that they be prompt. See Pub. Res. Code sections 21167.1 and 21167.4(c). Further briefing in this court will simply delay review by the Court of Appeal. It will be the third reported appellate proceeding involving the same basic dispute, following *NRDC*, *supra*, and *SCAQMD*, *supra*.

IT IS SO ORDERED.

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*Historically a tidal mudflat, the Port of Los Angeles now occupies some 7500 acres of land and water. G. Knatz, *Port of Los Angeles: Conflict, Commerce and the Fight for Control* (Angel City Press 2019). The terminal facilities in question in this case handled "17% of the Port's cargo in 2019." *SCAQMD*, 71 Cal.App.5th at 316.

**Intervention was denied as to International Longshore and Warehouse Union, Locals 13, 63, and 94. *See SCAQMD,* 71 Cal.App.5th at 316.

***Respondents later answered the petition in intervention. ROA 112.

****The stipulated order allowed the parties to exceed the page limits imposed by the Rules of Court.

*****The SEIR states that compliance in 2014 and 2017 was 93% and 96%, respectively. AR9681. The court, however, has been unable verify either number in the administrative record. Instead, the referenced materials – including the draft EIR – show a compliance rate of 98%. *See* AR 6696, 51858, 55567, 87875, SSAR 152801, 152832.

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Judge Timothy Taylor