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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

16 CENTER FOR BIOLOGICAL DIVERSITY;
17 NATURAL RESOURCES DEFENSE
COUNCIL, INC.; and PLANNING AND
18 CONSERVATION LEAGUE, non-profit
corporations,

Petitioners/Plaintiffs,

v.

21 CALIFORNIA DEPARTMENT OF
TRANSPORTATION, a public entity; and
22 DOES 1 through 20, inclusive,

Respondents/Defendants.

Case No.: 24CV077619

PETITIONERS' REPLY MEMORANDUM
OF POINTS AND AUTHORITIES

Assigned for all Purposes to:
Honorable Michael Markman, Dept. 23

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1 **INTRODUCTION**

2 Caltrans truncated its CEQA analysis for the Project in a rush to secure funding
3 (Opposition Brief at p. 16; hereafter “Opp. Br.”) and yet attempts to rehabilitate its resulting
4 errors with post hoc rationalizations, mischaracterizations of the record, and irrelevant cases. The
5 EIR cannot survive on such a foundation.

6 For example, Caltrans now claims—for the first time, through litigation counsel—that the
7 Project was “consistently described” “throughout” the regional transportation plan as having “a
8 single tolling lane in each direction.” (Opp. Br. at pp. 18–19, cleaned up.) One can search the
9 regional transportation plan in vain for even a single such description; Caltrans’ citations to the
10 regional transportation plan contain none. Instead, the regional transportation plan described the
11 Project as having “[m]anaged [l]anes” (plural) “in both directions” (also plural). (AR031763.)
12 And Caltrans admits that its own staff “relied” on an understanding that the Project would have
13 “[d]ual” express lanes in “each direction.” (Opp. Br. at p. 7.) The Project deviated from the
14 regional transportation plan, and Caltrans has not explained or justified that deviation.

15 Caltrans compounds its error by now asserting that it was not required to consider an
16 approach with more than one toll lane in each direction, even as an alternative, claiming that
17 such an alternative would have been infeasible. But Caltrans’ infeasibility argument boils down
18 to little more than its desire to move quickly to secure funding (Opp. Br. at p. 21), which is not a
19 recognized basis for violating the law. The record shows that an alternative with multiple toll
20 lanes in each direction was feasible, would meet Project objectives, and would mitigate
21 environmental impacts. (See Opening Brief at pp. 21–25; hereafter “Opening Br.”) Caltrans fails
22 to grapple with this evidence, responding only with conclusory statements. (Opp. Br. at p. 20.)

23 Caltrans likewise clings to its unreliable assessment of the environmental baseline—

1 Caltrans' blanket assertion of consistency with the regional transportation plan is belied
2 by the record. Caltrans' opposition brief makes an argument not found anywhere in the record:
3 that the regional transportation plan described the Project as "a single tolling lane in each
4 direction." (Opp. Br. at p. 18.) The regional transportation plan says nothing about "a single
5 tolling lane." Instead, it describes the Project as "[m]anaged [l]anes in both directions."
6 (AR031763.) Both "lanes" and "directions" are plural.

7 Instead of conceding this, Caltrans now describes the regional transportation plan as
8 "purposefully vague" (Opp. Br. at p. 6) while simultaneously asserting that the regional
9 transportation plan "consistently" described the project as having a "single tolling lane in each
10 direction" (Opp. Br. at pp. 18–19). The only pages Caltrans cites in the regional transportation
11 plan do not say that. Elsewhere, for other projects, the regional transportation plan specified
12 "[n]ew managed lane facility – one each direction" (AR031697) but it did not use this language
13 for this Project. And Caltrans' own staff understood "2+2"—that is, two toll lanes in each
14 direction—as the "SCS-specified project."¹ (AR047306; see also Opp. Br. at p. 7.)

15 The Air Board also consistently stated that the regional transportation plan requires
16 multiple toll lanes in each direction. In 2020, after reviewing a "complete submittal of the
17 [regional transportation plan] and all necessary supporting information" (AR013430), the Air
18 Board described the Project area with the term "Multilane Express Lane" (AR013455). The Air
19 Board later commented that the regional transportation plan specifies "two express lanes for the
20 corridor, one added and the other converted from an existing lane," and quoted the regional
21 transportation plan's travel demand model as specifying "[d]ual express lane each direction."
22

23 ¹ As Caltrans explains, the sustainable communities strategy, or "SCS," and the regional transportation plan are "one large document." (Opp. Br. at p. 6.)

1 (AR012752–53 [EIR at 4-47 to 48(Air Board Comment)]).² The Air Board’s understanding is
2 consistent with the plain meaning of the double plural in the regional transportation plan:
3 “managed lanes in both directions.” Caltrans’ decision-making cannot be affirmed based on the
4 contrary, revisionist argument of counsel. (*Ruegg & Ellsworth v. City of Berkeley* (2021) 63
5 Cal.App.5th 277, 317 [“An agency’s order must be upheld, if at all, on the same basis articulated
6 in the order by the agency itself.” (cleaned up)].)

7 Caltrans’ lone citation supporting its claim that the Project was described as a single toll
8 lane “[t]hroughout” the regional transportation plan is, perplexingly, not even to the regional
9 transportation plan. Instead, Caltrans cites a last-minute amendment to the transportation
10 improvement program. (Opp. Br. at pp. 18–19, citing AR038037–44.) The transportation
11 improvement program does not modify the regional transportation plan. It is a separate document
12 that is supposed to “contain[] projects consistent with the current [regional] transportation plan.”
13 (23 U.S.C. § 134(j)(1)(A)(i).) When the draft EIR was circulated, the transportation
14 improvement plan described the Project, like the regional transportation plan, as having
15 “managed lanes in each direction.” (AR018532–33.) However, after commenters on the draft
16 EIR pointed out that the regional transportation plan called for multiple toll lanes in each
17 direction (e.g., AR012752 [EIR at 4-47 (Air Board Comment)]), and less than one month before
18 Caltrans finalized the EIR, the transportation improvement program was amended to describe the
19 Project, for the first time, as “a High Occupancy Toll (HOT) 3+ lane in each direction.”
20 (AR038040.) This hasty revision of the transportation improvement program did not and could
21 not change the regional transportation plan. And it is the regional transportation plan that
22

23 ² It is entirely unclear what Caltrans means when it alleges that the Air Board confused the twenty-year plan with the four-year plan. (Opp. Br. at p. 7.)

1 Caltrans claims the Project was “consistent with” (e.g., AR012662 [EIR at 3-27]) and that the
2 agency was required to address in the EIR (Guidelines, § 15125, subd. (d)).

3 Regional transportation plans are meant to achieve state climate goals. (See Sustainable
4 Communities and Climate Protection Act, Gov. Code, § 65080.) The Air Board is tasked with
5 reviewing regional transportation plans for this purpose. (Gov. Code, § 65080, subd. (b)(2)(J).)
6 As Caltrans notes, the Air Board ultimately concluded that the regional transportation plan could
7 meet climate goals. (Opp. Br. at p. 8.) But in its review, the Air Board understood the Project as
8 including “multilane express lanes,” and warned that if the transportation plan was not fully
9 implemented, then the region may not “achieve its estimated GHG reduction benefits.”
10 (AR013460.) Caltrans now claims that the Project will not conflict with greenhouse gas emission
11 reduction plans because it is consistent with the regional transportation plan. (AR012662 [EIR at
12 3-27].) This claim not only contravenes the language of the regional transportation plan, it also
13 contravenes the Air Board’s understanding of the regional transportation plan when it made its
14 assessment. As a result, Caltrans’ post hoc revisionism puts state climate goals at risk.

15 CEQA requires Caltrans to address the Project’s inconsistency with the regional
16 transportation plan and to support its determinations with substantial evidence in the
17 administrative record. Caltrans did not.

18 **II. Caltrans violated CEQA by neglecting alternatives that would feasibly obtain**
19 **the Project’s objectives with fewer environmental impacts.**

20 As Caltrans admits (Opp Br. at p. 19), a project cannot be approved if there are “feasible
21 alternatives . . . available which would substantially lessen [its] significant environmental
22 effects.” (Pub. Resources Code, § 21002.) The record shows that tolling multiple lanes in each
23 direction, for example by converting an existing lane to a toll lane and adding another, would

1 reduce the Project’s significant environmental impacts, would meet Project objectives, and was
2 feasible. (Opening Br. at pp. 21–25.) Caltrans was therefore required to consider that alternative.

3 Another toll lane would increase revenue to mitigate the Project’s significant
4 environmental impacts. (AR009176–77 [Caltrans memo concluding that a “dual express lane . . .
5 has a higher ROI [return on investment].”]; AR012753 [EIR at 4-48 (Air Board comment)]; see
6 also AR014072 [EIR at 4-1367] (“Future potential toll revenue . . . would continue to provide
7 ongoing mitigation.”).) Caltrans does not refute this. Caltrans’ opposition brief instead argues
8 that a single toll lane would take until 2029 to become profitable (Opp. Br. at p. 21, citing
9 AR046180), but this has no bearing on the additional revenue from two toll lanes rather than one.

10 The record also shows that generally, managed lanes, including toll lanes, will ease
11 congestion and improve modality and travel time reliability, meeting project objectives. (See,
12 e.g., AR012657 [EIR at 3-22] [“The project would implement managed lanes to manage traffic
13 congestion, accommodate travel demands, and improve modality and travel time reliability.”].)
14 Caltrans uses these statements to support its preferred alternative, but fails to engage with how
15 they support an alternative with multiple toll lanes. (Compare AR012657 [EIR at 2-33] with
16 AR012764–65 [4-59 to 60] [ignoring the Air Board’s comment that multiple toll lanes would
17 better meet the Project’s purpose].) Caltrans also fails to grapple with clear record evidence that
18 multiple toll lanes are more effective at meeting the Project’s purpose than one toll lane,
19 including a Caltrans internal memo stating that “[a] dual express lane system is more
20 operationally robust.” (AR009176–77.) The Sacramento Metropolitan Air Quality Management
21 District likewise stated that multiple toll lanes, operating in tandem, can ease congestion better
22 than just one toll lane. (See AR003593.) Caltrans has no response.

23 Finally, an alternative with multiple toll lanes in each direction was feasible. Claiming

1 otherwise, Caltrans repeats its assertion that state and federal statutes prohibit converting a
2 general-purpose lane to a toll lane. Caltrans does not address evidence from the opening brief
3 that conversion *is* legally feasible. That evidence includes Caltrans’ commitment to consider
4 conversion in the future—a commitment that Caltrans repeats in its brief (Opp. Br. at p. 21)—
5 and the Federal Highway Administration’s presentation to Caltrans describing how to lawfully
6 execute such a conversion. (Opening Br. at pp. 22–23.) “An EIR that incorrectly disclaims the
7 power and duty to mitigate identified environmental effects based on erroneous legal
8 assumptions is not sufficient as an informative document and an agency’s use of an erroneous
9 legal standard constitutes a failure to proceed in a manner required by law.” (*City of San Diego v.*
10 *Bd. of Trustees of Cal. State Univ.* (2015) 61 Cal.4th 945, 956, cleaned up.)

11 Caltrans’ second argument for infeasibility boils down to its self-inflicted time crunch.
12 Caltrans claims that the time required to study and implement an alternative with multiple toll
13 lanes would have run past the deadline for the Project’s federal funding. (Opp. Br. at p. 21.) But
14 the Sacramento Metropolitan Air Quality Management District first requested an alternative
15 “that incorporates two HOT lanes in each direction, including one that uses an existing lane” in
16 July 2021. (AR003593.) And a Caltrans headquarters report lamented that Caltrans “has said that
17 the additional analysis [for a multiple toll lanes option] would take too much time, but that
18 assertion was made many months ago, leaving time for such work.” (AR009177.) In essence,
19 Caltrans put off considering a multiple toll lane alternative until the timeline became difficult to
20 meet, and now tries to justify the omission with this self-created delay. Caltrans cites no
21 authorities for its proposition that the CEQA process may be curtailed or feasible alternatives
22 ignored simply because of a desire to obtain funding from an external agency. Caltrans’ claim
23 also strains credulity because it had time to analyze 13 other alternatives.

1 Because it was feasible, would meet most Project objectives, and would raise revenue to
2 lessen the Project’s impacts, Caltrans was required to consider an alternative with more than one
3 toll lane in each direction.

4 **III. Caltrans’ faulty baseline is not supported by substantial evidence, violating**
5 **CEQA.**

6 To project future conditions for the environmental baseline, agencies must use reliable
7 projections supported by substantial evidence. (Guidelines, § 15125, subds. (a)(1), (2).) Caltrans
8 quotes selectively from *Center for Biological Diversity v. Department of Fish & Wildlife* (2015)
9 62 Cal.4th 204, 228, to argue that an agency enjoys “substantial discretion in its choice of
10 methodology.” This language did not change the applicable standard; the case reaffirmed the
11 requirement that an agency “support its chosen quantitative method . . . with evidence and
12 reasoned argument.” (*Ibid.*) The future conditions projected by SACSIM19, Caltrans’ travel
13 demand model, are neither reliable nor supported by substantial evidence. As a result, the model
14 underestimated Project impacts by overestimating baseline vehicle miles traveled.

15 SACSIM19’s traffic projections are unreliable due to two main shortcomings. First,
16 SACSIM19 does not factor in land use changes, even though Caltrans’ traffic modelling
17 consultant concluded that land-use changes impact modeling more than any other variable.
18 (AR033520.) Caltrans attempts to respond to this with the misleading observation that the model
19 was *calibrated* to “factor[] in the network and land changes” (Opp. Br. at p. 22.) What Caltrans’
20 lone citation for this proposition actually says is that “[t]he SACSIM19 model was also tested for
21 sensitivity to land use variables.” (AR012726 [EIR at 4-21].) Sensitivity to land uses does not
22 mean that land uses were modeled. The record shows that Caltrans did not model them.
23 (Opening Br. at pp. 18–20, 26.)

1 Second, Caltrans’ modeling unrealistically assumed that drivers would not change their
2 departure times to avoid congestion. Caltrans’ modeling instead assumed that drivers would
3 robotically pile onto the already congested highway until traffic got so bad that drivers choose a
4 20-mile detour to save time. This assumption was key to Caltrans’s conclusion that the Project
5 would lower vehicle miles traveled (and greenhouse gas emissions, air pollution, and energy use)
6 relative to the baseline. (Opening Br. at pp. 16–17, 26.) Had Caltrans recognized that some
7 drivers would instead leave a little earlier or later to avoid a 20-mile detour, then the agency
8 would have projected lower baseline vehicle miles traveled and lower resulting pollution—and
9 greater Project impacts relative to that baseline. (Contra Opp. Br. at p. 22.)

10 Caltrans attempts to support its assumption of robotic driver behavior with an assertion
11 that “many trips cannot shift the time of travel.” (AR012726.) Caltrans cites no evidence to
12 support this, however. (See Pub. Resources Code, § 21082.2, subd. (c) [“[U]nsubstantiated
13 opinion . . . is not substantial evidence.”].) In any event, even if some or “many” drivers might
14 not be able to shift travel times, that would not negate that (perhaps many) other drivers could.
15 Indeed, such shifts are part of our everyday experience: The school bell may ring at a fixed time,
16 but some parents choose early drop-off. Workers may be required to work eight-hour days, but
17 some choose to start their days at 8:30 a.m. instead of 9:00 a.m. And to avoid paying drivers for
18 sitting in traffic, some businesses choose to schedule deliveries outside of rush hour. These shifts
19 have real impacts on the road: As Caltrans’ own traffic modelling consultant explained, “VMT
20 could be lower if trips are shifted in time to more direct routes.” (AR041546.)

21 Caltrans never addressed the proportion of drivers that could change their departure
22 times. Instead, by not modeling for changes in driver behavior, Caltrans’ modeling in effect
23 assumed that *no* drivers could or would leave earlier or later to avoid the worst congestion. No

1 record evidence supports that assumption, and modeling based on it is unreliable.

2 Caltrans also attempted to defend its modeling as “consistent with current modeling
3 standards, guidelines, and practices.” (AR012722 [EIR at 4-17].) The record shows otherwise.
4 (Opening Br. at pp. 27–28.) Caltrans has now shifted its position, admitting in litigation that
5 SACSIM19 failed one of three tests in the *California Regional Transportation Plan Guidelines*.
6 (Opp. Br. at p. 24.)³ The record does not explain why this failure should be excused. Caltrans
7 asserts, without citing the record, that “after the validation testing, the model behaved
8 adequately, and no anomalies were noted” (*ibid.*), but this assertion does not change that the
9 model failed testing in the first place. Caltrans does not even acknowledge this failure.

10 “[E]vidence which is clearly inaccurate or erroneous . . . is not substantial evidence.”
11 (Pub. Resources Code, § 21082.2, subd. (c).) Caltrans’ model failed to account for land use
12 changes, rested on an unrealistic assumption about driver behavior, and did not meet Caltrans’
13 own modeling standards. The agency has therefore failed to support its baseline projection of
14 future traffic conditions with substantial evidence, violating CEQA.

15 **IV. Caltrans has not shown that further mitigation would be infeasible.**

16 Caltrans’ claim that further mitigation was infeasible is based on little more than its own
17 say-so, and is unsupported by substantial evidence. (Opening Br. at pp. 20–21, 28–29.)

18 Caltrans argues that the Project’s paltry mitigation budget was not limited by Caltrans,
19 but by the grant funding available for the Project. (Opp. Br. at pp. 25–26.) Although Caltrans
20 insinuates that it did not receive all the funding it asked for, it does not argue that it even *asked*

21
22 ³ Caltrans now claims, without citing the record or authorities, that the guidelines are “permissive or
23 optional.” (Opp. Br. at p. 24, fn. 27.) This misses the point. In the EIR, Caltrans concluded that
SACSIM19 was appropriate *because* it complied with relevant guidelines. (AR012722 [EIR at 4-17].) As
Caltrans now admits, this premise was false.

1 for enough funding to mitigate the Project’s transportation impact to a level of insignificance.
2 Instead, it seems Caltrans always planned to set aside an arbitrary portion, 15%, of the Project’s
3 total funding towards mitigation. Therefore, the fact remains that Caltrans itself rendered further
4 mitigation infeasible by asking for only enough money to build the Project, but not to mitigate
5 the Project’s impacts.

6 Caltrans gives a few unconvincing reasons why it did not apply for enough funding to
7 adequately mitigate the Project’s impacts. It claims that “[u]sing its expertise,” it “calculated” the
8 mitigation budget in its funding applications based on what was obtainable from grants. (Opp.
9 Br. at p. 25.) Caltrans cites nothing in the record (because nothing exists) to show that Caltrans
10 calculated its mitigation budget based on any methodology other than guesswork. And the record
11 shows that Caltrans planned from early on to abandon mitigation to the extent funding fell short.
12 (AR038166 [“In the unlikely event that SACOG is unable to fund the uncommitted \$10 million,
13 the District will phase some of the VMT mitigation infrastructure . . .”]; cf. also AR009177 [risk
14 assessment noting that Caltrans prematurely asked for a Statement of Overriding Considerations
15 instead of considering more mitigation measures or looking for more funding].)

16 Caltrans also argues that if it had asked for enough money to mitigate the Project’s
17 impacts, the Project would not be eligible for funding because it would fail a cost-benefit
18 analysis. (Opp. Br. at pp. 25–26.) This argument was not presented anywhere in the record. (See
19 *Ruegg & Ellsworth, supra*, 63 Cal.App.5th at p. 317 [agency decision-making cannot be upheld
20 on post-hoc rationalizations].) This speculative cost-benefit argument assumes that grantor
21 agencies see environmental mitigation as a pure cost without any benefit. This assumption is
22 false. The grant applications show that emissions increases caused by additional vehicle miles
23 traveled are listed as a cost. (AR038158–59; AR040312.) Therefore, by lowering vehicle miles

1 traveled, mitigation could be cost-effective.

2 To support its claim, Caltrans argues that mitigating 64% of the Project’s significant
3 environmental impacts would have cost \$1.688 billion. (Opp. Br. at p. 26.) This mischaracterizes
4 the record. The portion of the document Caltrans cites is a draft list of mitigation measures.
5 (AR009174–75.)⁴ It shows that although the total cost to construct or implement the measures
6 listed would be \$1.688 billion, Caltrans planned to contribute only a portion of this money. In
7 other words, the document shows that Caltrans always planned the Project’s mitigation budget to
8 be only “15% of the total [Project] cost,” so \$50 million, not \$1.688 billion. (*Ibid.*) The
9 document underscores that Caltrans never asked for or sought more funding for mitigation.

10 In essence, Caltrans continues to argue that CEQA allows agencies to deprioritize
11 mitigation in their funding, then plead infeasibility due to lack of funding. This would turn
12 CEQA’s mitigation requirement from a legal restriction on agency action to something akin to an
13 unenforceable *noblesse oblige*. Carried to its logical conclusion, Caltrans’ argument would allow
14 it (or any other agency) to budget nothing for mitigation and then claim that mitigation was
15 infeasible due to lack of budget. CEQA does not allow agencies to render options infeasible via
16 their own actions, then claim infeasibility. (Cf. *Kings County Farm Bureau v. City of Hanford*
17 (1990) 221 Cal.App.3d 692, 737 [“[The] choice to proceed in the face of pending review . . .
18 cannot render an alternative infeasible.”].)

19 **V. The EIR contains no analysis of the Project’s lighting impacts on wildlife.**

20 The EIR does not disclose the lighting impacts of the Project on wildlife. (See Opening
21

22 ⁴ Because the draft includes some mitigation measures that were dropped and does not include others that
23 were later added, it estimates that 67% of the increase in vehicle miles traveled would be mitigated, even
though the final number was 50%. (Compare AR009174–75 with AR012367–68 [EIR at 2-125 to 126]
[final mitigation measures].)

1 Br. at pp. 29–31.) Because the EIR contains *no* analysis of the Project’s lighting impacts on
2 wildlife, Caltrans is incorrect that the substantial evidence standard applies. (See AR012646–54
3 [EIR at 3-11 to 19].) This case is more akin to *Sierra Club v. County of Fresno* (2018) 6 Cal.5th
4 502, where the Court held that a description of an environmental impact which lacked analysis or
5 omitted the magnitude of the impact is “not a substantial evidence question.” (*Id.* at p. 514.)

6 Caltrans quibbles that Petitioners did not identify which specific species of wildlife will
7 be harmed, at which locations, and whether impacts would come from construction or operation.
8 (Opp. Br. at p. 27.) Yet, this proves Petitioners’ point—this is the type of information that
9 *Caltrans* should have disclosed and analyzed in the EIR, especially when presented with
10 evidence that activities like the Project *do* likely cause significant lighting impacts on wildlife.

11 The record is replete with such evidence. Fish and Wildlife cited nine scientific studies
12 that document the impacts of artificial night lighting on fish and wildlife species. (AR012784–85
13 [EIR at 4-79 to 80].) Petitioner Center for Biological Diversity cited studies on the same topic.
14 (See, e.g., AR012905 [EIR at 4-200], citing AR011056.) Caltrans should have used “its best
15 efforts to find out and disclose all that it reasonably can” about the lighting impacts of the Project
16 on species. (See Guidelines, § 15144.) It did not.

17 Caltrans clings to a single sentence in the EIR that mentions “lights during night work” as
18 a temporary construction impact on bats. (See Opp. Br. at p. 27, citing AR012574.) This passing
19 reference to construction impacts on bats is no substitute for analysis of the Project’s
20 construction *and* operational impacts on *all* affected wildlife, including birds. Caltrans also fails
21 to distinguish the three cases cited by Petitioners which found CEQA violations for understating
22 or downplaying the impacts of projects. (See Opening Br. at p. 31.) Such is the case here.

23 Caltrans unsuccessfully attempts to show compliance with CEQA by citing to one section

1 of Appendix G of the Guidelines that requires analysis of impacts to special status species. (See
2 Opp. Br. at p. 27.) This is just one of seven different biological resources issue areas in the
3 Guidelines, and Petitioners did not challenge compliance with this Guideline. It is also irrelevant
4 whether “lighting” impacts are specifically named in Appendix G; the third sentence of
5 Appendix G confirms that “[s]ubstantial evidence of potential impacts that are not listed on this
6 form must also be considered.” (Guidelines, appen. G.)

7 Even if the Guidelines were an exhaustive list of all biological resources topics that must
8 be considered, Caltrans failed to comply with them, as the Guidelines require analysis of how a
9 project “[i]nterfere[s] substantially with the movement of any native resident or migratory fish or
10 wildlife species” (Guidelines, appen. G, § IV, subd. (d); see also AR012651 [EIR at 3-16].)

11 The analysis and studies presented by Fish and Wildlife and Petitioner Center for Biological
12 Diversity demonstrate that artificial night lighting such as that associated with the Project may
13 interfere with movement and behavioral patterns. (See Opening Br. at p. 30.) Nonetheless, the
14 EIR does not attempt to address this issue and concluded in five sentences, without analysis, that
15 the Project would not interfere with the wildlife movement. (AR012651 [EIR at 3-16].)

16 Contrary to the Opposition Brief’s insinuation, Petitioners do not challenge whether the
17 EIR discusses impacts to “wildlife in general.” (See Opp. Br. at p. 28.) While the EIR may
18 correctly note that 46 bird species were observed in the Project area (see Opp. Br. at p. 28), that
19 underscores the need to analyze how the Project’s lighting will impact these species.

20 **VI. The EIR does not include all feasible mitigation measures to reduce the Project’s**
21 **lighting impacts on wildlife.**

22 Caltrans does not directly dispute that the EIR fails to include mitigation measures
23 designed to reduce lighting impacts on wildlife. (See Opening Br. at pp. 31–32.) Instead,

1 Caltrans asserts that no express CEQA requirement exists for lighting mitigation. (Opp. Br. at p.
2 29.) However, CEQA broadly requires the lead agency to adopt feasible mitigation measures to
3 reduce *all* potentially significant impacts. (See Pub. Resources Code, § 21002.) CEQA must be
4 interpreted to afford the fullest possible protection of the environment within scope of the
5 statute’s language. (*Laurel Heights Improvement Assn. v. Regents of U. of Cal.* (1988) 47 Cal.3d
6 376, 390.) Interpreting CEQA to *exclude* mitigation requirements for certain issue areas because
7 they are not expressly mentioned in the statute would be contrary to that purpose.

8 Indeed, the cases cited by Petitioners found that a lead agency failed to adopt feasible
9 mitigation measures without relying on an express statutory requirement that any certain topic
10 area requires mitigation. (See *Communities for a Better Environment v. City of Richmond* (2010)
11 184 Cal.App.4th 70, 92–93; *Cal. Clean Energy Committee v. City of Woodland* (2014) 225
12 Cal.App.4th 173, 180 & 188–200; *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16
13 Cal.4th 105, 134–35.) Caltrans does not even attempt to distinguish these cases.

14 Caltrans fails to provide any response to Petitioners’ argument that the “Avoidance,
15 Minimization, and/or Mitigation Measures,” or “AMMs,” on lighting impacts were vague and
16 lacked language ensuring actual implementation. (See Opening Br. at pp. 31–32.) By adding the
17 qualifier “if practicable” to AMMs, the EIR postponed making determinations on feasibility and
18 failed to actually commit to these measures. (See *Cal. Clean Energy Committee, supra*, 225
19 Cal.App.4th at pp. 195–200.) Caltrans falls back on the assertion that “most, if not all” of Fish
20 and Wildlife’s proposed lighting mitigation measures *will* be incorporated into the Project. (See
21 Opp. Br. at p. 29.) This assertion lacks any citation to the EIR or the record, so neither the public
22 nor the Court can verify its accuracy. Even if Caltrans had later decided to implement Fish and
23

1 Wildlife’s mitigation measures, CEQA requires their inclusion in the EIR. (See *Communities for*
2 *a Better Environment, supra*, 184 Cal.App.4th at pp. 92–93.)

3 **VII. Caltrans did not comply with CEQA’s requirements in rejecting Fish and**
4 **Wildlife’s mitigation measures.**

5 Caltrans failed to comply with guidelines set forth by the Supreme Court in *Banning*
6 *Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, when it rejected Fish and
7 Wildlife’s proposed mitigation measures. (See Opening Br. at pp. 32–34.) Caltrans dismisses
8 *Banning Ranch Conservancy* as simply addressing “violations involving property near the
9 coast.” (Opp. Br. at p. 30.) That was indeed the factual issue at hand, but the case lays out a legal
10 standard that applies to *any lead agency* receiving input from an expert agency. (*Banning Ranch*
11 *Conservancy, supra*, 2 Cal.5th at p. 940.) Notably, the Supreme Court did not propose new or
12 additional standards above or beyond CEQA’s statutory mandates, but instead based its holding
13 upon existing CEQA statutes, guidelines, and case law. (*Ibid.*)

14 Caltrans fails to demonstrate it even came close to complying with these standards.
15 Instead, Caltrans asserts that it “did not disagree per se with the recommendations that lighting
16 could affect wildlife.” (Opp. Br. at p. 30.) Yet, Caltrans did *not* adopt Fish and Wildlife’s
17 recommended mitigation; AMM BIO-13, AMM BIO-14, and AMM BIO-15 in the EIR do not
18 contain Fish and Wildlife’s recommendations. (Compare AR012782–83 [Fish and Wildlife’s
19 recommendations on these AMMs] with AR000772–73 [these AMMs in the Draft EIR] and
20 AR012796–97 [EIR at 4-91 to 92] [Caltrans concluding that no changes to the Draft EIR are
21 necessary].) Caltrans brushed over its disagreement with and clear rejection of Fish and
22 Wildlife’s recommendations, without summarizing the main points of disagreement and
23 addressing them, as required by *Banning Ranch Conservancy*. (See 2 Cal.5th at p. 940.) This

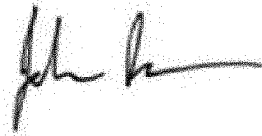
1 omission undermined CEQA’s purpose of “providing other agencies and the public with an
2 informed discussion of impacts, mitigation measures, and alternatives” (*Ibid.*)

3 **CONCLUSION**

4 Caltrans violated CEQA by approving the Project and certifying the EIR. Petitioners
5 request this Court to issue a writ of mandate compelling Caltrans to set aside and vacate its
6 certification of the EIR and approval of the Project, and to refrain from all Project activity that
7 could result in any change or alteration to the physical environment until it complies with
8 CEQA.

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Respectfully submitted,

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