SUPERIOR COURT OF CALIFORNIA

COUNTY OF MERCED

MERCED ALLIANCE FOR RESPONSIBLE GROWTH; TOM GRAVE; KYLE STOCKARD; JOEL KNOX; and DOES 1 through 10,

Petitioners and Plaintiffs,

vs.

CITY OF MERCED; MERCED CITY COUNCIL, and DOES 11 through 20,

Respondents and Defendants,

WAL-MART STORES EAST, L.P.; WAL-MART STORES EAST, INC.; WAL-MART STORES, INC.; and DOES 21 through 40,

Real Parties in Interest and Defendants.

Case No. CV000593

DECISION ON WRIT OF MANDATE AND COMPLAINT FOR INJUNCTIVE RELIEF

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners Merced Alliance for Responsible Growth, et al., challenge Respondents' (City of Merced et al.) approval of a Wal-Mart Regional Distribution Center (the "Project") because they contend the City failed to comply with California

Environmental Quality Act's ("CEQA") mandatory procedural and substantive requirements in approving the Project and certifying the related Environmental Impact Report ("EIR"). Petitioners challenge the City's violations of CEQA in failing to: (1) compare the Project to an existing baseline "no-project" alternative; (2) adequately disclose and analyze air quality, hydrology, traffic, and its related failure to provide reasoned responses to public comments on these inadequacies in its Final EIR ("FEIR"); and (3) adequately disclose in its Draft EIR ("DEIR") that the Project implements mandatory CEQA mitigation measures previously adopted by the City in annexing the Project site, or analyze the Project's consistency with such measures – instead, proposing at the last moment in its FEIR to delete certain unspecified measures "on a case by case basis" after Project approval. Petitioners seek a writ of mandate compelling the City to set aside its EIR and related Project approvals and enjoining the City of Real Parties from carrying out any physical activities in furtherance of the Project based on the City's unlawful approvals.

II. STATEMENT OF FACTS

A. PROJECT DESCRIPTION

The Project involves the construction and operation of a 1.1 million square foot Wal-Mart Regional Distribution Center on approximately 230 acres in the City of Merced at the northwest corner of Gerard Avenue and Tower Road. (AR 184, 1287) The Project would store and distribute non-grocery goods to regional Wal-Mart retails stores in the San Joaquin Valley (AR 256), operating 24 hours per day, and employing approximately

1,200 employees. (AR 184) The project "consist of a warehouse, distribution center, and support facilities," including "offices, a cafeteria, and acrosol storage (all located within the warehouse building), as well as a truck gate, a truck maintenance garage, a truck fueling station, a fire pump house, and parking lots." (AR 253) The site is zoned industrial, but has been used for agriculture. (AR 256, 258) The Project would accommodate up to 900 diesel-truck trips per day (AR 626) and is expected to generate 4,328 passenger car equivalent trips per day, seven days a week (AR 465-466).

The Project's main elements include: (1) a 1.1 million square-foot distribution warehouse, containing, *inter alia*, a 500-gallon diesel fuel tank; (2) a 17,000 square-foot truck maintenance building with two underground storage tanks (a 6,000 new oil storage tank and a 2,500 gallon waste oil storage tank); (3) a diesel fuel dispensing station with two 20,000-gallon underground storage tanks; (4) a 1,600 square-foot fire pump house, containing, *inter alia*, a diesel-powered standby pump and 500-gallon fuel tank; and (5) a 500 square-foot truck gate house. (AR 262) The Project site would include approximately 850 employee parking spaces, 1,600 tractor trailer parking spaces, and 300 tractor (without trailer) parking spaces on approximately 70 acres of paved surfaces (in addition to the area covered by buildings). (AR 263)

B. ADMINISTRATIVE PROCEEDINGS

Real Parties, Wal-Mart Stores East, L.P. et al., submitted their Project application on January 30, 2006. (AR 2758-3186) The City circulated its DEIR for public comment from February 25 though April 27, 2009. (AR 607, 5589) Petitioners submitted detailed

comments later, together with five accompanying letters from their experts, identifying procedural defects in the DEIR, including the lack of adequate " no-project alternative" and fundamental informational deficiencies regarding impacts on air quality, hydrology, traffic, urban decay, visual resources, and greenhouse gas emissions. (AR 1349-1430)

On July 30, 2009, the City notified interested parties of the availability of the FEIR. (AR 6237-6246) Petitioners submitted three detailed letters – again incorporating related expert letters – responding to the FEIR on September 18, 2009 (re air quality impacts; AR 7567-8347), September 21, 2009 (re hydrological, traffic, land use, and visual impacts; AR 8348-9785), and September 23, 2009 (re greenhouse gas impacts and new mitigation measures added to FEIR; (AR 11394-11568). These comment letters alleged multiple violations of CEQA's mandatory procedural and substantive requirements, including, *inter alia*: (1) the EIR's failure to adequately disclose, analyze, or mitigate the Project's potentially significant air quality, public health, traffic, land use, urban decay, hydrology, visual, and greenhouse gas impacts; (2) the City's failure to conduct environmental review that addressed the "whole" of the Project; (3) the City's failure to recirculate a DEIR in light of significant new information that had not been presented in the publicly circulated DEIR; and (4) the City's failure to adequately consider alternatives.

On August 19 and 24, 2009, the Planning Commission considered the EIR and the Project. (AR 6473-7031, 7033-7174) On August 24, the Planning Commission voted 7-0 to recommend that the City Council certify the EIR and approve the Project (AR 7175-

7179), with the exception of a 6-1 vote recommending approval of the Site Plan Review Application for the Project. (AR 7179) Petitioners timely appealed the Planning Commission's approvals to the City Council. (AR 7377-7380)

The City Council held public hearings on the EIR, the Project, and Petitioners' administrative appeal, on September 21, 23, 26, and 28, 2009. On September 27th and 28th, the City's staff and consultants inserted four letters and two memoranda with voluminous exhibits dismissing Petitioner's objections into the City's record, constituting more that 4,000 pages of new information that were never provided for public review or comment. (AR 12222-16826) On September 28th, the City approved the Project by adopting: (1) Resolution 2009-67, certifying the FEIR, making findings of fact, adopting a statement of overriding consideration, approving a mitigation monitoring plan, and directing staff to file a CEQA Notice of Determination ("NOD"); (2) Resolution 2009-69, amending the City of Merced General Plan circulation element, approving the Site Plan Review Application, and approving the developer agreement for the Project; and (3) Resolution 2009-70, ordering the vacation and abandonment of the right-of-way for Kibby Road. (AR 16932-16934) The City Council also denied Petitioners' administrative appeal. (AR 16933-16934) Petitioners timely commenced this action on October 28, 2009. (CEQA, § 21167)

III. ARGUMENT

A. STANDARD OF REVIEW

Courts review actions for non-compliance with CEQA under the "prejudicial abuse of discretion" standard. (Code Civ. Proc., § 1094.5, subd. (b); CEQA, §21168.) "Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (Code Civ. Proc., § 109.5, subd. (b).) In the CEQA context, "an agency may abuse its discretion...either by failing to proceed in the manner CEQA provides or by reaching factual conclusions unsupported by substantial evidence." (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal. 4th 412, 435 (*Vineyard*).)

In *Vineyard*, the Supreme Court noted that "[judicial] review of the administrative record for legal error and substantial evidence in CEQA case...is de novo. *Id.* at p. 427. Thus, the courts "resolve...substantive CEQA issues...by independently determining whether the administrative record demonstrates any legal error by the [agency] and whether it contains substantial evidence to support the [agency's] factual determinations." *Ibi.d* The Court in *Vineyard* also noted that the standard of review in CEQA cases is determined by the nature of the alleged violation, i.e., whether the violation is a procedural error or an unsupported factual determination.

I. INTRODUCTION

Petitioners ask this Court to overturn the City's approval of the Wal-Mart distribution center ("Project") based on alleged violations of CEQA. The Project EIR is the culmination of a three-year environmental review and public hearing process that exemplifies CEQA's policies of public participation and informed decision-making. The extensive administrative record reveals the City thoroughly analyzed the Project's potential environmental impacts. The process included meaningful consideration of thousands of pages of analysis in the EIR, as well as voluminous information and commentary from numerous public agencies and members of the public, including Petitioners. In disregard of the evidence in the administrative record, Petitioners contend the City certified an EIR riddled with dozens of prejudicial omissions, violations of mandatory procedures and unsubstantiated findings. The truth of the matter is just the opposite. The City proceeded in the manner required by law, and its determinations are supported by substantial evidence in the record. The Court should therefore deny the Petition.

II. RESPONDENT'S STATEMENT OF FACTS

A. The Approved Project

The Project is a 1.1 million sq. ft. distribution center that will provide 1,200 permanent jobs and 600 construction jobs. (AR 259, 6523) It is located in the East Merced Industrial Area, which has been slated for job-generating industrial uses for decades in the City's General Plan. For decades, the City's General Plan designated the

Project site and its surroundings as being appropriate for "heavy concentrations of commercial and industrial development." (AR 19779) Promoting these land uses is central to the economic development priorities the City established in its General Plan, namely: (1) increased year-round employment opportunities for Merced citizens; (2) a diverse economy; (3) preservation of the City's economic base; and (4) high quality industrial areas. (AR 83, 19781) The City's policies to implement these goals include the promotion of industrial development that offers full-time employment, and the directive that industrial uses should be located where it will have good access to transportation links. (AR 83, 6523, 19777-19783) The City Council determined the Project promotes all of these goals and policies; the Project will provide critically needed local jobs and is "strategically located in close proximity to Campus Parkway and Highway 99, thereby maximizing access to and use of major regional transportation infrastructure." (AR 83, 6523-6534)

As a result of the area's central location as well as the City's strategic land use planning, warehouse facilities have been common in the general vicinity of the Project. (AR 83, 256) For 13 years, Wal-Mart operated the McLane logistics facility located just north of the Project site. (AR 9871, 10517, 11364) From 1972 to 2006, Ragu Foods operated a major processing and distribution facility in the City generating some 1,200 truck trips per day. (AR 10936) Additionally, Save-Mart, Well Made and Central Valley Almond Growers also operate distribution centers in the City; the latter warehouse is located just north of the Project site. (AR 83, 398, 7172)

The Project's land uses are among the most benign of those permitted in "Industrial" areas. The General Plan reserves such areas for heavy manufacturing, food processing, lumber yards, fabrication, railroad yards, truck depots, as well as warehouse-distribution facilities. (AR 387, 6523) Similarly, the Zoning Code designates the "Heavy Industrial District" for uses such as steel foundries, slaughterhouses, meat packing, and wrecking operations. (AR 260, 6529)

The Project will bring extraordinary benefits to a region in desperate need of economic stimulus. In 2006, the Ragu Foods distribution center closed, eliminating hundreds of local jobs. (AR 10936) Shortly thereafter, the economic recession severely impacted the region, and as of 2009, unemployment in the City stood at a staggering 20%. (AR 84, 6833) During this time, the City suffered the closures of and/or layoffs from 11 major employers resulting in approximately 970 lost jobs – most of these in unskilled positions. (AR 84) Approximately 40% of the City's homeowners are in danger of imminent foreclosure of their homes. (AR 84, 6833)

The Record is replete with strong local support for the Project. Residents are anxiously awaiting the 600 construction and the 1,200 long-term jobs (AR 6516, 6786, 7000) Many of those who participated in the public review process also noted the Project would have a positive multiplier effect on the local economy. (AR 6800, 6945, 6819, 6948, 10663-10668) A Chamber of Commerce poll demonstrated that 81% of the voters within the City supported the Project. (AR 10760) Further, hundreds of individuals and

businesses voiced support for the Project. Indeed, minorities expressed particular support; a petition signed by over 233 Hmong residents stated:

> A [a] low-skilled workforce, the Southeast Asian community has been especially hard hit by the crisis. The distribution center will greatly benefit these community members by creating numerous attainable jobs. (AR 6819)

The Project will also provide critically needed tax and fee revenues, which will be used to support public safety and the provision of other public services. City staff estimated the Project would pay approximately $4.19 million in facilities and over $1.5 million in transportation impact fees. (AR 6528) The Project will also dramatically increase property tax revenue. The Project is located within the Gateways Redevelopment Project Area, and the large property tax increment generated by the Project will be used for neighborhood revitalization, affordable housing and other business development programs. (AR 84) The Record contains a plethora of evidence demonstrating the economic and job creation benefits of Wal-Mart distribution centers that have been located in other communities throughout the country. (AR 10523-10534)

The Project contains numerous features that minimize the Project's environmental impacts. Its strategic location provides an efficient point of distribution to Wal-Mart stores throughout the Central Valley. (AR 256) The close proximity to Campus Parkway and State Route (SR) 99 creates efficient access to existing regional roadways. (AR 256, 6524) The Project incorporates sustainability features such as increased truck fleet efficiency, daylight harvesting, solar power, hydrogen fuel cell forklifts, recycling programs, and "smart" on-site power systems that power down warehouse equipment

when not in use. (AR 203, 265, 10535-10537) Wal-Mart's fleets are so fuel efficient that the USEPA has certified Wal-Mart as a "superior environmental performer"-a federal government award reserved for the nation's least polluting fleets. (AR 266)

The Project also includes a state-of-the-art ERA to be entered into with the SJVAPCD to reduce ozone precursor and PM emissions to less-than-significant levels. (AR 201) The ERA is one of the most sophisticated design features/mitigation measures recommended by the SJVAPCD to mitigate the air quality impacts of a particular project. Indeed, the Fifth District Court of Appeal upheld the use of ERAs as a valuable air quality mitigation tool in a CEQA case involving the Tejon Ranch industrial complex in Kern County. (AR 13404, 26566)

B. The Environmental and Public Review Process

The three-year public process that preceded Project approval was exhaustive. The initial application submitted in 2006 contained detailed, preliminary studies pertaining to the Project's potential traffic, biological, cultural, geotechnical and haz/mat impacts. (AR 3419-3790) In May of 2006, the City hired EDAW to prepare the DEIR. (AR 3814-3915) The EDAW team of experts was exceptionally well qualified to complete the task. (AR 11159-11232) Subsequently, a NOP was circulated for public review and public scoping session was held, both of which resulted in significant public participation.

By the time the DEIR was released for public review in February 2009, it consisted of over 1,100 pages of detailed analysis of the Project's potential impacts, mitigation measures designed to reduce identified impacts, as well as analysis of other

topics required by CEQA. (AR 166-1282, 5564.) In addition, the DEIR was peer-reviewed by a second environmental consulting firm (RBF) and by one of the State's leading CEQA law firms (Remy, Thomas & Moose), the latter of which author a leading CEQA practice guide used by practitioners and courts throughout the State. (AR 5235, 9864, 11159-11288; *see* Guide to CEQA (Solano Press, 11th Ed. 2006).)

The DEIR was circulated for public review for 60 days instead of the required 45 days. (AR 9864.) Over 315 comment letters were received. (AR 11069.) The 2,591-page FEIR was released in July 2009, and consisted of exhaustive environmental analysis and responses to comments. (AR 166-2757.) The Project was deliberated and further scrutinized at two Planning Commission meetings and five City Council meetings, which included public testimony from hundreds of residents and businesses. (AR 6379, 6473, 7033, 9786, 11569, 12042, 16829.)

The California courts have repeatedly stated the public participation process required by CEQA "protects not only the environment but also informed self-government." (*Laurel Heights Improvement Assoc. v. Regents of California* (1988) 47 Cal. 3d 376, 392.) In this case, the City went far beyond what was required to ensure broad scale public participation and fully informed democratic decision making. The City designated a portion of its website to make the EIR and Project documents available to the public. (AR 5590, 9788.) It established a comment period a third longer than what was legally required and while the normal requirement is that public hearing notices be given to those within 300 ft. of the Project's boundaries, the City provided notice to those

residing with 2400 ft. of the Project's boundaries (over 400 property owners). (AR 11057.) It then conducted seven public hearings on the Project, five or more than the number required by law.

Despite having over seven months to comment on the EIR, Petitioners submitted nearly 1,000 pages of comments on the EIR just days prior to the first City Council meeting on the Project. (AR 7567-8347.) They then submitted two more letters consisting of another 1,600 pages on the dates of the first and second Council meetings held on the Project. (AR 8348-9785, 11394-11568.) Petitioners' 11th hour "document dump" was in direct contravention of California Supreme Court authority that disapproves of "last minute" objections:

> We cannot...overemphasize our disapproval of the tactic of withholding objections, which could have been raised earlier in the environmental review process, solely for the purpose of obstruction and delay. As one federal court has aptly stated: '[T]he NEPA requirement of studying alternatives may not be turned into a game to be played by persons who-for whatever reasons and with whatever depth of conviction-are chiefly interested in scuttling a particular project.'

(*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal. 3d 553, 568; *City of Poway v. City of San Diego* (1984) 155 Cal. App. 3d 1037, 1044; *City of Fremont v. SFBART* (1995) 34 Cal. App. 4th 1780, 1790 [objections "asserted at the last possible moment" raised "serious questions about [petitioner's] good faith."].)

While the City was under no obligation to respond to Petitioners' last minute document dump (Guideline 15088(a)), it nevertheless prepared comprehensive responses prior to City Council approval of the Project. (AR 12222-16826.) To the extent CEQA's

purpose is to "protect not only the environment but also informed self-government" (*Laurel Heights*, 47 Cal.3d at 392), the City not only scrupulously complied with this mandate, but in fact went well beyond what was required by law by responding to Petitioners' last minute document dump. The City Council thereafter certified the FEIR and approved the Project on September 28, 2009. (AR 1.)

C. No Project Alternative

CEQA requires the public agency to consider feasible alternatives to the project which would lessen any significant adverse environmental impact. One alternative is "no project". Guidelines, Section 15126(d)(2).

In *Planning* and *Conservation League et al., v. Department of Water Resources* (2000) 83 Cal. App. 4th 892, 911, the court states "CEQA requires that the no project alternative discussed in an EIR address "existing conditions" as well as "what would be reasonably expected to occur in the foreseeable future if the project were not approved based on current plans and consistent with available infrastructure and community services." (Guidelines, former Section 15126, subd. (d)(4), now 15126.6, subd. (e)(2).) **The existing conditions, supplemented by a reasonable forecast, are characterized as the no project alternative.** (emphasis added) The description must be straight forward and intelligible, assisting the decision maker and the public in ascertaining the environmental consequences of doing nothing; requiring the reader to painstakingly ferret out the information from the reports is not enough …"

The DEIR included a detailed description of the conditions existing at and surrounding the proposed site. (AR 253-255) The DEIR also includes many photographs, diagrams (including various colors), and maps of the proposed site setting forth in great detail the land uses surrounding the project site. (AR 259-260) The project site has been most recently used to grow almonds and alfalfa. (AR 269) The City's General Plan EIR concluded that to achieve the goals of maintaining a compact urban form, and other types of land-use compatibility issues, mitigation that would eliminate the loss of agricultural land to urban development is not possible. (AR 279)

The CEQA Findings of Fact and Statement of Overriding Considerations included the following:

> "The project would result in conversion of 228.68 acres of Prime Farmland and Unique Farmland to a nonagricultural use. Placing an industrial use adjacent to agricultural uses may also produce land use conflicts and may lead to increased conversion of agricultural land. Approximately 70% of the project site consists of Prime Farmland, the conversion of which would also be considered a substantial impact." AR19 The western portion of the project site...was designated as Industrial in the General Plan in 1080. The eastern portion of the project site was designated as Industrial in the General Plan adopted in 1997." AR20

"The EIR discussed the following alternatives in detail: ... No project"... (AR 74)

"ALTERNATIVES CONSIDERED

Alternative 1 – No Project

This alternative assumes the site would not be developed with the approved project. However, given the following facts, it is assumed that some type of industrial or warehouse development would occur at the project in the near term:

- The project site is within Merced's city limits;
- The project site is designated for industrial use in the City General Plan and zoning ordinance;
- The project site is sufficiently large to accommodate industrial or warehouse projects;
- The project site is relatively close, and has convenient access, to major arterial roadways and SR 99; and
- The project site is relatively close to, and could readily connect to, major public infrastructure, such as water, wastewater, and storm drainage systems.

In other words, if the Wal-Mart Distribution Center application were to be withdrawn or denied, it is unlikely that the project site would remain indefinitely vacant, given the factors listed above." (AR 76-77)

The DEIR discusses various animals and birds that might be present at the project site. Mountain plowers are unlikely to occur at the project site. The San Joaquin Kit Fox is unlikely to range on the site because of its poor habitat quality and lack of more suitable adjacent habitat. The Swainson's Hawk could use the project site for foraging during breeding season. The report concluded there are no vernal pools, grassland habitat, woodlands, marsh or swamp habitat, seasonal wetlands, or aquatic habitat present at the project site.

As set forth in *Planning* above, the existing conditions, supplemented by a reasonable forecast, are characterized as the no project alternative. In *Woodward Park Homeowners Assn. v. City of Fresno* (2007) 150 Cal. App.4th 683, 717 (*Woodland Park*) the court stated Guidelines on the no project alternative do require attention to existing conditions as well as to hypothetical future developments under existing plans. Section 15126.6(e)(2) of the Guidelines, provide, "The no project analysis shall discuss the

existing conditions at the time the notice of preparation is published...as well as what would be reasonably expected to occur in the foreseeable future if the project were not approved, based on current plans and consistent with available infrastructure and community services."

A review of the notice of preparation reveals a rather detailed description of the project location and a description of the site. It does not discuss what would be expected if the project were not approved. The DEIR did discuss the no project alternative. And as set forth below, Petitioners' attorneys discussed the no project alternative in their response to the DEIR.

In *Mira Mar Mobile Community et al. v. City of Oceanside* (2004) 119 Cal. App. 4th 477, 489, (*Mira Mar*) the court concluded, "The discussion of the no project alternative satisfied CEQA because it allowed decision makers to compare the environmental impacts of the project with the impacts of no project."

In *Mira Mar, supra*, at p. 312, the court stated that "Our role is to determine whether the challenged EIR is sufficient as an information document, not whether its ultimate conclusions are correct." (Citations omitted) We 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" (Citations omitted) "An EIR is presumed adequate (Section 21167.3 subd. (a)) and we review an agency's action under CEQA for a prejudicial abuse of discretion. (Section 21168.5) Abuse of discretion is established if the agency has not proceeded in a manner required by law or the determination or decision is not supported

by substantial evidence. (Section 21168.5) Under CEQA, substantial evidence is defined 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. Whether a fair argument can be made...is to be determined by examining the whole record before the lead agency."

Is there substantial information from which a fair argument can be made to support the City's assumption that a similar project would be proposed if the City denied the project? Did the EIR provide substantial information so that a fair argument could be made that allowed for the comparison of the environmental impacts of the project with the impacts of no project?

In addition to the factors specifically set forth in the discussion of the no project alternative, the record before the City revealed that warehouse facilities are already located and operating immediately north of the project site. (AR 398, 7172) The site is adjacent to Campus Parkway and SR 99. (AR 83) The City has aggressively promoted the location of the industrial and the surrounding area for industrial uses. (AR 83) The entire project site has only been available for industrial development since 1997. (AR 19-20) Although it is unclear when Wal-Mart began negotiating the purchase of the project site, the City issued the notice of preparation in July 2006, nine years after the entire project site became available for industrial development. (AR 609)

Petitioners, in their attorney's response to the DEIR dated April 27, 2009, stated "...it is not 'predictable' that anyone would propose or the City would approve a nearly

exact replica of Wal-Mart's proposal. Instead, this possibility is entirely speculative. Indeed, the opposite possibility is more predictable; i.e., that if the City does not want this Project, no prospective developer is likely to assume the City will approve the same project if submitted by a different applicant." (AR 1349)

Given all the factors set forth by the City and the information before the City, the existing conditions supplemented by a reasonable forecast (*Planning*) amounted to substantial information before the City that allowed for a fair argument that if the project was not approved some type of industrial or warehouse development would occur at the project in the near term (CEQA Findings of Fact and Statement of Overriding Considerations).

The record as a whole reveals that, unlike the situation in *Woodward*, *supra*, a detailed description of the project site, location, and existing conditions were made available to the City. Information about the presence of animals and birds and their habitat at the project site was available to the City. Failure to state, that their presence and their habitat would not change should the project be denied is merely a failure to discuss the obvious. See *Mira Mar*, *supra*, at p. 488. Another example of the obvious would be the information available to the City through the information about increased emissions of Carbon Dioxide during construction and operations. This discussion is clearly a comparison which would allow the City to know the emission levels should the project be denied. (AR 326-328) The existing traffic conditions were analyzed as well as 2030 No Project Conditions and 2030 Cumulative Project Conditions. (AR 446)

Petitioners, in their opening brief at page 9, argue that the EIR "Fails to discuss a true 'No Project Alternative'." They further argue at page 10, "By defining the no project alternative as a development of the site in the same manner as proposed, the DEIR avoids any comparison of the Project to the baseline condition of the site."

There was sufficient information available to the City from which a fair argument could be made that the information provided sufficient information from which to compare the environmental impacts of the project with the impacts of a no project.

2. The EIR Fails to Adequately Discuss and Analyze the Project's Impacts on Air Quality

Petitioners contend that the City violated CEQA standards in its discussion of the projects impacts on Ozone Precursor levels on diesel particulate matter (Diesel PM) because what the City did in its FEIR (final environmental impact report) was to adopt the San Joaquin Valley Air Basin (SJVAB) 10 TPY (Tone Per Year), which Petitioners claim violated CEQA. Petitioners contend The City should have done its own investigation and prepared its own findings. In other words do not rely on someone else to do your work.

Petitioners argue that the EIR's reliance on the Air District's 10-ton-per-year (TPY) threshold violates CEQA's procedures in several ways. First, the DEIR uses the Air District's Threshold of Significance ("TOS") uncritically, simply concluding that mitigation of project related emissions to a level below 10 tons per year necessarily results in impacts zero less than significant. The court in *Amador Waterways vs. Amador*

Water Agency (2004) 116 CA 4th1099 stated the fact that a particular environmental effect meets a particular threshold cannot be used as an automatic determinant that the effect is or is not significant. A TOS cannot be applied in a way that would foreclose the consideration of other evidence tending to show the environmental effect to which the threshold relates may be significant (See *Mejia v. City of Los Angeles* (2005)130 CA 4th 322, 327).

Petitioners contend simply relying on the Air District's 10 TPY TOS to declare that impacts are less than significant will not do. The bottom line here is that the City made no attempt to assess the significance of air quality impacts below 10 TPY. The Air District (SJVAB) considers 10 TPY to be the TOS for the purpose of meeting its obligations under Federal and State Clean Air Acts.

Petitioners argue that the City's DEIR failed to comply with CEQA's procedures because it contained no factual explanation as to why the Air District 10 TPY TOS. The DEIR simply cited the Air District's guide for Assessing and Mitigating Air Quality Impacts. This guide GAMAQI (Guide for Assessing and Mitigating Air Quality Impacts) was prepared by SJVAPCD, the latest revision occurring in 2002. The purpose of the Guide is to provide lead agencies, and the City, with uniform procedures for addressing air quality in environmental documents. To this end, the GAMAQI sets forth protocols local agencies are recommended to utilize to determine the scope of air quality analysis, the TOS to be used, the mitigation to employ, and the determination of significant

impacts. Section 4 of the GAMAQI set forth the recommended TOS to be used when determining whether projects have a significant air quality impact.

However, Petitioners point out that if one reads the Guide it is not clear why the 10 TOS was established. Here is what the Guide says: "The Guide says although it may be argued that any increase in pollutions in an area with severe (Merced is not extreme) pollution problem may be significant, which is the standard for CEQA, may there be significant impacts, a reasonable threshold is still needed to avoid unnecessarily burdening every project with a requirement to prepare an EIR, which is clearly not intended by CEQA, nor desired by the Air District."

Petitioners' assert that this statement is flawed. CEQA does not say to set a threshold so that some projects can escape the need to prepare an EIR. What CEQA says is one must prepare an EIR for any project where there is substantial evidence in the record indicating that the Project may have a significant effect on the environment. The 10 TOS established by the Air District in the first instance was established in contravention of CEQA's legal procedural requirements. As was mentioned earlier in this decision compliance with another agency's regulatory standards cannot be used under CEQA as a basis for presuming without substantive consideration that a project's effects either before or after mitigation are insignificant. (*Kings County Farm Bureau vs. City of Hanford* (1990) 221 Cal. App. 3d 692).

It is argued by Petitioners the City's DEIR uses the Air District's 10 TOS general threshold, but does not impose any mitigation measures requiring either the best available

control technology or offsets that the Air District standard requires. The City has allowed the Wal-Mart project to increase the amount of Ozone precursor emissions by up to 10 TOS per year with nothing to offset that increase in air quality emissions in this extreme non-attainment area.

Petitioners point out that CEQA Guidelines §15.065(a)(3) defines "cumulatively considerable" effects as the incremental effects of an individual project (here, the Wal-Mart Project)are significant when viewed in connection with the effects of other past, present, and future projects. Thus, the EIR must discuss the project's cumulative impacts when the project's incremental effects are cumulatively considerable.

The City's DEIR asserts that the Project's cumulative Ozone impacts will not be significant. The Wal-Mart Project's contribution, along with other past, present, and future project's, are not considerable, because level impacts have been reduced to the air districts or below the 10 TOS.

Another subject brought up by Petitioners is the particulate matter emissions of the project. The DEIR states that the baseline conditions that exist right now is that Diesel PM impacts is causing 390 excess cancer cases in the Merced Air basin. The EIR estimates the project will add Diesel PM health risks to the extent of 7.3 additional cancer cases per million in the basin, bringing the total to 397.3 excess cases of cancer per million in the basin.

The DEIR concluded that these Project level impacts, adding another 7.3 cases to the already 390, are less than significant because the impacts below the ten-additional-

cancer cases pre million standard. Petitioners contend that the Air District's ten-additional-cases-per million standard is only referenced in terms of soil remediation projects in its guide.

Petitioners also contend the DEIR's analysis and conclusions regarding Diesel PM is erroneous as a matter of law for the same reasons that were stated regarding the Ozone impacts, which are that the DEIR used the Air District's TOS for particulate matter uncritically and without any factual analysis of its own. Petitioners further contend the uncritical application of the Air District's TOS represents a failure to exercise the independent judgment of the CEQA land agency in violation of CEQA procedures. Additionally, according to petitioners, neither the cited Air District document nor the DEIR provided any factual explanation as to why allowing ten additional cases over the 390 that are already occurring represents an appropriate TOS for this project. Furthermore, petitioners contend compliance with other agencies' regulatory standards cannot substitute for a fact-based analysis of significant impacts as required by CEQA. Thus, the City's reliance on Appendix G on this basis is misplaced, because the guidelines themselves cannot authorize the violation of CEQA's statutory requirements.

The health risk in the Merced air basin is already beyond an acceptable threshold. In this case, the City is allowing another 7.3 people to get cancer out of a million per year.

Petitioners argument raises the issue of public disclosure before approving the project. They contend that the City put significant new information in the EIR that was

not made public and approved the Project. This issue will be addressed by the Court in a separate heading.

The City challenges the Petitioner's attack on the FEIR's air quality section by stating it was lawful for the City to rely on the SJVAPCD's GAMAQI. They cite *Kings County Farm Bureau vs. City of Hanford* (1990) 221 Cal. App. 3d 692. Prior to 1991, air quality within the central valley was regulated by eight separate county–based air pollution districts. In 1991, the legislature enacted SB 124, which had the purpose of unifying the SJVAB and creating the SJVAPCD to manage and regulate air quality throughout the entire SJVAB. In creating the SJAPCD, the Legislature determined that "there was a need for a basin wide approach to the air pollution problems of the San Joaquin Valley." The Legislature provided broad powers to the SJVAPCD to implement both State and Federal Clean Air Acts. Since its creation in 1992, the SJVAPCD has adopted over 500 air quality rules and amendments.

The record reflects that in the 18 years since the unification of the SJVAB and the creation of the SJAPCD, air quality within the SJVAB has dramatically improved. Between 1990 and 2005, decreases of Ozone precursors such as NOX and R9G within the air basin were 28% and 37%, respectively, even though the population of the San Joaquin Valley over the same period increased 37%. The dramatic improvement of air quality within the SJVAB has been the result of unification and the uniform implementation throughout the SJVAB of regulatory programs.

The SJVAPCD has prepared two comprehensive GAMAQIs with the latest revision occurring in 2002. The GAMAQIs purpose is to provide "lead agencies in Merced, consultants, and project applicants with uniform procedures for addressing air quality in environmental documents". GAMAQI §4 sets forth the recommended TOS to be used when determining whether projects have significant air quality impact. GAMAQI §4 further provides that the TOS established in the GAMAQI are based on scientific and factual data. SJVAPCD recommends that these thresholds be used by lead agencies in making a determination of significance.

The City complied with all recommendations in GAMAQI in the FEIR. Petitioners may not obtain invalidation of the air quality section simply because petitioners disagree with the conclusions set for in the FEIR. Petitioners request that the court second guess the SJVAPCD's expert opinion, as well as the expert opinion of the City's consultants, and invalidate the Air Quality section. This request is based entirely on its unsupported theory, that the City somehow did not provide enough explanation as to why it chose to utilize the 10 TOS required by the trustee agency charged by both CEQA and the State Legislature to oversee and regulate air quality in the San Joaquin Valley.

The City contends that "disagreement among experts" cannot be a basis for overturning the FEIR's air quality section as it relates to Ozone precursors. The City did exercise its "independent judgment" in utilizing the GAMAQI TOS. The city provided

repeated and exhaustive explanations reflecting the City's independent judgment to employ SJAPCD's TOS.

The City answers the Petitioners' argument that GAMAQI does not explain how the 10 TPY TOS was developed by citing two cases *Santiago County Water District v. County of Orange* (1981) 118 Cal. App. 3d 818 and *Environmental Defense Fund v. Coastside County Water District* (1972) 27 Cal. App. 3d 695. Neither case stands for the proposition that a lead agency cannot rely on a TOS developed by a trustee agency. The City did not apply a regulation that was inapplicable on its face to conclude that an impact was less than significant; rather, the City precisely followed the methodologies set forth in the GAMAQI which was created by SJVAPCD to be utilized when making direct and cumulative impact determinations under CEQA.

Petitioners claim that "it is inappropriate to base the City's significance determination, for purposes of CEQA on the Air District's TOS of 10 TPY, because the Air District's standard relates to an entirely different regulatory framework, the Clean Air Act" also fails. Again, this claim is nothing more than a "disagreement" with SJVAPCD's TOS and cannot be the basis for overturning the air quality section (see *Cadiz*, 83 Cal. App. 4th 97).

The main thrust of the City's argument in favor of the EIR is that Petitioners want to substitute the opinion of its experts in lieu of the City's. A conflict of an opinion with an expert is not sufficient to override the EIR. The air quality analysis has been challenged.

The EIR was reviewed during the context of a nine month review process, was reviewed by the Air District itself, which has no issue with the use of the Air District's TOS. The Courts have recognized that the Air District, as a creature of statute charged with, among other things, advising local agencies on how to conduct their CEQA analysis is an appropriate agency to rely on with respect to the TOS. SJVAB has been around since 1991 and has an excellent track record in cleaning up the air in the valley.

The court finds that the City complied with CEQA by adopting the requirements of SJVAB.

3. The EIR Fails to Adequately Discuss and Analyze the Project's Hydrological Impacts

There are four areas of concern regarding the Projects' Hydrological Impacts. The Court will address each one concerning Petitioners' contentions and responses by respondent, City.

A. Municipal Drinking Water Supply

Petitioners contend that the EIR's discussion and analysis of the risk of the Project contaminating the local municipal groundwater supply are legally inadequate. Petitioners point out that the City (Merced) operates a municipal drinking water well on the southern border of the project. The Project includes both underground and above ground storage tanks that will hold over 40,000 gallons of diesel fuel and over 6,000 gallons of motor oil. However, petitioners contend the DEIR neither assesses nor provides enough information to allow the public to assess the risk that the Project may

contaminate the City's drinking water supplies if the proposed fuel storage tanks fail. CEQA requires that the EIR adequately describe the environmental setting. *(San Joaquin Raptor v. County of Stanislaus* (1994) 27 Cal. App. 4th 713) (*San Joaquin Raptor*)

Petitioners' contend that the DEIR circulated for public review and comment was procedurally inadequate, because it failed to describe to the public the existence of the City's drinking water well or well's spatial relationships to the Project's proposed above- and below-ground diesel fuel and oil storage tanks or the characteristics of the land that might contribute to a risk of tank failure or well contamination (*San Joaquin Raptor, supra,* 27 Cal. App. 4th at 725).

Petitioners further contend the site's geologic and geomorphic characteristics include several risk factors that the DEIR does not include in its evaluation of potential impacts, including (1) two old stream channels that are now filled with soil that is less dense and more permeable to water then surrounding land; (2) the fact that the soil on the site has a high "shrink-swell potential," meaning that it expands and contracts when exposed to wet and dry conditions; and (3) corrosive soil conditions. Accordingly to petitioners, these characteristics of the site increase the risk of tank failure, but the DEIR does not publicly disclose or discuss them. Therefore, Petitioners contend, the City's decision to defer any disclosure or consideration of (1) what such impacts might be and (2) what mitigation measures are needed to address such impacts until after project approval constitutes a further procedural violation of CEQA.

The City counters these allegations by stating that the EIR adequately addressed the potential impacts on the City's water wells. In the first place, the storage tanks and dispensing facilities will be located 1200 feet from one of the 22 wells operated by the City. This is 12 times the 100 feet recommended by the U.S. EPA. Contrary to the Petitioners' allegations the City's DEIR (1) described the City's well and depicted its location; (2) described the nature of the proposed fuel facilities and depicted their location; (3) included a determination that fuel facilities and related structures would not pose a significant hazard to the public; and (4) provided a detailed explanation of why the risk of release or leakage from the fuel facilities was not significant.

The City addressed Petitioners' concern (Mr. Wagner's statement) and outlined why there was not a problem in that there would be no significant impact on the water well. The City engineer rendered an opinion (he is responsible for all public infrastructures) to the City Council that all the regulations that applied to the tanks were sufficient to protect the City's water system. That is exactly the type of substantial evidence the City is allowed to rely on.

All of the expert opinions were set forth in the DEIR that was circulated to the public. (*Leonoff v. Monterey County Board of Supervisors* (1990) 222 Cal. App. 3d 1337). There are numerous public agencies in California Department of Public Health that will "police" the fuel facilities to make sure there is not contamination, etc.

The court agrees with the city that the fuel tanks are not a significant risk to the City's water systems.

B. Surface Water Quality

The Petitioners contend that the EIR's discussion and analysis of the Project's impacts on downstream surface water quality are legally inadequate. Petitioners contend the EIR unlawfully defers the development of mitigation measures to address the Project's potential impacts on downstream water quality. CEQA mandates: "Formulation of mitigation measures should not be deferred until some future time." The general rule is that deferral of mitigation is not permitted unless: (1) mitigation is feasible, but impractical at the time of a general plan or zoning amendment; and (2) the agency articulates specific performance criteria and makes further approvals contingent on finding a way to meet them. (*Endangered Habitats League vs. County of Orange* (2005) 131 Cal. App. 4th 777, 793. (*Endangered Habitats)* Petitioners contend the EIR's mitigation deferral meets neither of these requirements because the City's mitigation measure 4.2-6 unlawfully defers mitigation since (1) there is no indication that finalizing the "design standards for water quality treatment is feasible but impractical at the time of a general plan or zoning amendment"; (2) the DEIR "articulates specific performance criteria", but then admits that the Project will not meet them; and (3) the DEIR does not explicitly "make further approvals contingent on finding a way to meet the design standards."

In opposition to Petitioners' argument the City cites *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428. The court in that case found "CEQA does not require project proponents to act imprudently or to bear unnecessary investigative and

assessment burdens"(*Ibid.,* at p. 1449). CEQA clearly does not require that all aspects of a project be designed and engineered to construction level detail before the project is approved.

The City cites *Endangered Habitats, supra*, 131 Cal. App. 4th at p. 796. The EIR requires the developer to prepare a project water quality plan to reduce discharge into storm water runoff. It must incorporate "best management practices", which are a series of four traps and filters to remove various pollutants ...The design features ...are adequate, since they require use of a clearly identified standards in the form of the "best management practices." Nor is deferring preparation of CC & R's[1] a problem where the content is laid out and concededly adequate. So while final mitigation measures have not been adopted in these cases, deferral is permissible because the EIR commits to it and lists standards to be incorporated in the mitigation plan".

Here, like the mitigation approved of in *Endangered Habitats*, the EIR requires the preparation of a water quality plan incorporating best management practices (BMPs). In this case, mitigation measure 4.6-2 requires that the applicant "develop and implement BMP and water quality maintenance and monitoring plan." That plan is required to spell out design standards for water quality treatment that "meet or exceed City of Merced Strom Drain Master Plan and Standard Design requirements." Therefore, the City's water quality mitigation measures are sufficient "since they commit to mitigation and set out standards for a plan to follow."

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[1] CC &R means covenants, conditions and restrictions.

Contrary to Petitioner's claim, the City was not required to provide "shovel-ready" specifications for such facilities during environmental review stage.

Petitioners take on the City's requirement that retention ponds be dry in 48 hours after a large storm. However, the City in the EIR states that ponds be dry within 48 hours, if the maximum discharge rate will allow it.

C. Project's Potential Flood And Drainage Impacts:

Petitioners contend that the City failed to adequately discuss or analyze the potentially significant, adverse impacts that the Project may have on flooding and drainage downstream from the project site.

Petitioners also contend the Project description regarding the risk of detention pond berm failure is uncertain and unstable, because (1) the capacity of the detention basins is stated in one section of the DEIR to be a 50 year, 24 hour storm event, and in another section to be a 100- year, 24-hour storm event; and (2) the text of the DEIR states there will be two detention ponds, while Exhibit 4.6-2 shows six detention ponds. Conditionally, Petitioners contend the DEIR neither assesses, nor provides sufficient information for the public to assess, the actual capacity of the detention ponds, because the DEIR does not provide the elevations of the storm water inlets to the detention basins in relation to the elevation of the bottom of the basins. Furthermore, petitioners contend the DEIR neither assesses, nor provides sufficient information for the public to assess, the risk that the berms surrounding the detention ponds may fail, releasing large volumes of water into the surrounding neighborhood.

Petitioners contend the DEIR's description of the environmental setting is incomplete because it omits information regarding the intensity of the design storms and the details of the run-off calculations, preventing a complete examination of these issues. The omissions are exacerbated by the fact that neither the presence of two filled-in stream channels, nor the existence of expansive soils in the project area, were considered in the design of the detention ponds.

Petitioners contend the DEIR notes that the Project's detention pond berms will effectively cause the Project site to become an island in times of surface water flooding. However, Petitioners stated the DEIR does not discuss the effect of creating a 110-acre island of berms on the future movement of 100-year flood water in the region. Moreover, petitioners contend the DEIR does not answer the critically important question of whether the presence of this new, 110-acre island will cause 100-year flood water to accelerate near the Project, possibly resulting in increased erosion of surrounding lands or roads. The DEIR states that the project will alter the natural drainage pattern on the site by collecting, concentrating, and discharging run-off into two possible outlets, Fairfield Canal to the Northeast or Fairfield Lateral to the Southwest. Petitioners contend this is not an accurate, stable and finite project description, because it is not clear which location will be used for drainage, nor what criteria will govern the decision. Nor does DEIR discuss where either outlet discharges and, therefore, whether there is any potential for off-site impacts associated with adding flood water to either of the MID (Merced Irrigation District) Canals. Since MID limits storm water discharges from the Project to

less than 25% of Pre-project 2-year discharge, it appears that there are off-site cumulative impacts from routing storm water into MID's Fairfield Canal that the EIR does not disclose. Finally, Petitioners claim that the FEIR fails to provide adequate responses to their comments on the DEIR's discussion and analysis of the Project's potential flood and drainage impacts.

Petitioners contend the FEIR fails to substantially respond to any of Petitioners' hydrological comments/concerns. Petitioners also contend the City abused it discretion because (1) the DEIR that was circulated for public review violated CEQA's procedures by failing to provide critical information regarding the Project's potential hydrological impacts; and (2) the FEIR's responses to Petitioners' comments violate CEQA's procedures by not substantively responding to Petitioners' comments, relying instead on conclusory and factually unsupported statements to deflect Petitioners' concerns about the DEIR's fundamental deficiencies.

The City in its rebuttal to these contentions claims that the EIR adequately addressed the Project's potential flooding and drainage impacts and Petitioners' comments regarding same. The City in its opposition brief at page 30 line 7-30 to page 31 lines 1-2 quote the City's responses to similar comments by Petitioners' prior to approval of the Project. These responses cover ponds and risks if the berms surrounding the detention ponds fail. The City also addressed Petitioners' comments regarding expansive soils and the 110-acre island of berms on the future movement of 100-year flood water in the region. (See brief Page 31, lines 13-24).

In response to Petitioners' comment that "it is not clear which of two possible canals will be used for drainage, nor what criteria will govern the decision" and that there could be "off-site cumulative impacts from routing storm water" into one of the canals, the City explained that "which of the two channels is actually used is ultimately a determination that MID will make and notes that the DEIR limits the maximum discharge from the site to either canal and describes the drainage facilities that would be necessary to drain each Canal, as well as the MID and City requirements and how drainage rates into the canals would be controlled to prevent downstream flooding".

The City finally concluded that for each concern the Petitioners raise there is a detailed explanation in the record. They make it clear in their responsive brief that there is no risk of berm failure. In conclusion, the City claims it responded to every hydrological concern raised by Petitioners.

This court is satisfied with the City's response to the hydrological issues and finds there has been no violation of CEQA.

4. The EIR Fail To Adequatetly Discuss And Anaylyze The Project's Traffic Impact

Petitioners argue that the EIR violated CEQA, because the City used a hypothetical future baseline rather than using the actual existing environment at the time of the notice of preparation before approving the Project.

The effect of this was for the City to essentially downgrade from the actual existing environment levels of service for a couple of different roadways. The City, then

concluded, where it would have had to conclude that traffic impacts on these roads were significant, that they were not significant because the roadways were already substantially impacted. By assuming a future condition that does not exist as the baseline, the City concluded that impacts would not be significant and, therefore, no mitigation was required. (*Woodward Park, supra)*

The hypothetical "future" baseline was 2010. The project application was January 30, 2006. The 2010 background condition assumes construction of 1,855 new housing units in the area, generating 18, 381 additional daily residential trips, and 12,000 retail use trips. The trouble with this analysis is that the distribution center will have nothing to do with residence, but rather truck traffic bringing and delivering goods from the center.

Petitioners contend the DEIR projects patterns for Project-generated local and regional truck traffic that have no basis in the sources of the goods coming to the center or the locations of the regional retail stores to which such goods will be shipped. Thus, it fails to disclose or assess the Project's actual potential impacts to local roadways and throughout the Project's distribution area.

Petitioner also contend the DEIR fails to provide an analysis of potential impacts that may result from trucks using neighboring residential streets for parking until the center's gates open. In conclusion, Petitioners contend that the DEIR's disclosure and analysis of the Project's traffic impacts was inaccurate and incomplete, in violation of CEQA mandatory procedures (*San Joaquin Raptor, Supra,* 27 Cal. App. 4th 713, *County of Inyo v. City of Los Angeles (1981)* 11 124 Cal. App. 3d 9). Petitioners also contend that

the FEIR fails to adequately respond to Petitioners' comment on the DEIR's discussion and analysis of the Project's traffic impacts.

Petitioners bring up another issue regarding mitigation. Measure 1.2 had a mandatory employee trip reduction program. The public was told about this in the DEIR pertaining to air quality impacts, which also applies to traffic as well. What the City said when circulating it's DEIR was that one of the ways we are going to reduce air quality impacts is to require a 25 percent trip reduction program for the employees to come to the center. In other words, the City is going to reduce employee vehicle trips by 25 percent.

The FEIR deleted this mitigation measure on the basis that it was infeasible, because it was legally not plausible. Petitioners take issue with the City regarding this interpretation of the applicable statute. (Health and Safety Code § 40717.9) Again, Petitioners argue that the public was not given an opportunity to respond to the removal of this mitigation measure from the FEIR. To counter the Petitioners' contentions heretofor discussed, the City takes the position that its analysis of traffic impacts comply with CEQA. The City points out that the Petitioners' arguments that (1) the EIR's traffic analysis used an improper baseline and flawed mythologies; (2) the FEIR's responses to the City's traffic comments are inadequate; and (3) the FEIR's modification of trip reduction mitigation measure invalidates the EIR.

The City takes issue with the Petitioners' contentions by claiming their arguments rely on misstatements of law, and ignore the substantial evidence in the record supporting the City's determinations. Petitioners forfeited all of these claims by failing to

set forth fully the evidence supporting the City's actions (*Tracy First v. City of Tracy* (2009) 177 Cal. App. 4th 912, 934). The City's traffic analysis is reflected in a 338–page report prepared by DKS, a professional traffic engineering firm (see appendix E to the DEIR). The EIR explains that the Project will generate approximately 2,400 new daily trips. DKS then measured the Projects new impacts against the environmental baseline of 2010. This also included the addition of new trips expected to be generated by 12 approved projects within the study area.

The traffic baseline issue is to try to get as accurate of an assessment as possible of what the difference will be between the conditions that exist at the time the project opens up without the Project versus with the Project. The Petitioners want the baseline to be 2007 (the start of the EIR development process) and not some speculative date, ie, 2010.

The City followed the rules laid out in the *Save Our Peninsula v. Monterey County* (2001) 87 Cal. App. 4th 99 and selected a baseline date closer to the date the Project was approved. This date of approval may be a more accurate representation of the existing baseline against which to measure the impact of the Project. CEQA authorizes the use of a future baseline providing the agency's assumptions regarding the future conditions are supported by substantial evidence. (*Fat v. County of Sacramento* (2002) 97 Cal. App. 4th 1270).

The EIR's 2010 baseline is not based on hypothetical conditions, but rather existing conditions plus the anticipated traffic from 12 approved Projects. (*Woodward Park, supra,* 150 Cal. App. 4th 683).

The EIR's methodologies and data are supported by substantial evidence. Petitioners assert the EIR's traffic analysis suffers from significant omissions and factual errors, which violate CEQA's mandatory procedures. (Guideline Sections 15125(a) and 15088.5(a)(4). Petitioners' argument amount to nothing more than criticisms of DKS's methodologies. These challenges involve factual questions. This court must reject Petitioners' various technical challenges. What this amounts to is a disagreement among experts on which methodology should be applied. (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2006) 145 Cal. App. 4th 1184). Petitioners are critical of DKS's methodologies of taking traffic counts during August rather than peak shopping months and assuming a vehicle occupancy rate 1.37 persons/vehicle, rather than 1.1 person/vehicle. DKS considered and rejected both criticisms. Again, DKS's methodologies are supported by substantial evidence and the Court must reject Petitioners' challenges (Id. at p.1198).

The City also attacks other issues it claims fall into the category of "disagreement among experts".

(1) Quality of Life Impacts.

Petitioners contend the EIR should have analyzed the Project's qualitative impacts on residential quality of life. The City argues that there is no requirement under CEQA for any such analysis (Public Res. Code §21083.1). The City points out that the EIR actually dispels this concern by revealing that 90% of truck traffic will not affect residential roads, and the remaining 10% will not cause significant traffic impacts.

(2) Truck Distribution Routes

Petitioners argue the EIR improperly assumes that truck routes to the Project will mirror local residents traffic patterns. This claim is refuted by the EIR. No other major highways aside from SRs 99 and 140 service the Project area. Routes to/from SR 99 and SR140 via Campus Parkway, Mission Ave West of Campus Parkway, Gerard Avenue East of Campus Parkway, and Tower Road were assumed in the traffic analysis, and are the logical truck routes choices. Thus, DKS's methodology is supported by substantial evidence.

(3) On Site Truck Parking

Petitioners claim the Project described in the DEIR does not include on-site parking for trucks. The DEIR fails to provide an analysis of potential impacts that may result from trucks using neighborhood residential areas for parking. The City counters this contention by quoting mitigation measure 4.11-2a, which requires that the Project include on-site parking for trucks.

The City contends that Petitioners have no standing in their claim that the FEIR failed to respond to their comments regarding DKS's methodology. The FEIR adequately responded to Petitioner's baseline arguments, vehicle occupancy rate, and truck distribution patterns.

The Petitioners are making a big point out of the FEIR modified mitigation measure 4.2-2b to eliminate employee vehicle trip reduction program requirement. The original DEIR spoke about a mitigation measure that included an employee vehicle trips

reduction program. However, that proposed mitigation measure is expressly prohibited by California Health & Safety Code § 40717.9, which states that no public agency shall impose such a employee vehicle trip reduction program as a mitigation measure unless authorized by Federal law. Based on this law it was appropriate and legally required for the City to modify this mitigation measure. This was all explained to the public as well in the FEIR.

Again, the City has convinced this Court, that it complied with CEQA's requirements on the issue of traffic impacts.

5. The Eir Fails To Adequately Discus And Analyze The Projects Land Use/Urban Decay Impacts

The DEIR summarizes the Project's broad purpose as the "storage and distribution of non-grocery goods to Wal-Mart retail stores located throughout the region." The growth-inducing impacts section of the DEIR, however, is evasive in responding to whether Wal-Mart's plan is to use its new Distribution Center as a springboard for new regional retail operations throughout the distribution area, stating "the proposed Project can be viewed as a means to simply improve the service to existing retail outlets. The Project's purpose is to deliver goods to regional retail stores throughout its distribution area. Wal-Mart has announced its intent that the Distribution Center is going to serve not just existing retail stores, but serve Wal-Mart's growth plans. Wal-Mart plans to build new or expanded retail stores in the cities of Tracy, Clovis, Sonora, Ceres, Livingston and Los Banos.

What the Petitioners are complaining about is that the City ignored these impacts in the EIR, which violated CEQA's procedures. (*Vineyard, supra,* 40 Cal 4th at p. 440). The *Vineyard* case basically said that where you do not have environmental review for a piece of a project that you are relying on either, you need to complete that other environmental review first and certify it, so that you have something you can rely on or you need to back up and complete the environmental review in terms of what are the impacts that this Project will have throughout the environment that it will effect. In this case, the impacts to the other cities and locations where Wal-Mart will expand.

CEQA Guidelines § 15144 states "an agency has to use the best efforts it can to find out and disclose all that it reasonably can. Merced did not do this. The City just went ahead and approved the Project saying that it did not know whether those Projects will be built. The City had no awareness of Wal-Mart's intent to use the Project as the basis for its growth plans, which is wrong because that's what Wal-Mart's representatives stated to the commission.

The City contends that it did comply with the CEQA on urban decay. What the Petitioners are saying is that the EIR should analyze the urban decay impacts of those future stores that will be built in unknown locations at unknown times. (See *Del Mar Terrace Conservancy v. City Council* (1992) 10 Cal App 4th 712).The Project will cause new Wal-Mart retail stores to be constructed, and that the City violated CEQA by failing to analyze the indirect urban decay impacts resulting from these hypothetical new stores.

The EIR concludes that such future Wal-Mart retail stores are too speculative for meaningful environmental analysis.

The EIR acknowledges "it is possible that the project could support the operation of new Wal-Mart stores". However, the EIR rightfully explains that "the factual situations for environmental analysis, such as if when and where new Wal-Stores would go in, and whether those facilities would possibly foster urban decay, are unknown and unknowable, and thus the potential impact is too speculative to analyze in this EIR". The City substantiated this conclusion in detailed responses in the FEIR (DK's supplemental report).

Thus, this court finds that the City complied with CEQA's requirements on the issue of urban decay.

6. The EIR Fails To Adequately Discuss And Analyze The Projects Impacts On Visual Resources

Petitioners complain, that the final FEIR did not address the Projects' lighting plan. The DEIR states that Wal-Mart did not provide the City a detailed plan that would show the locations and design of light fixtures. The EIR that was circulated for public review provided no information on a lighting plan.

The City simply said it will deal with this problem after Project approval to make sure that it mitigates everything as much as possible. Petitioners contend that there is no reason why the City would not require lighting information to be provided by Wal-Mart, before Project approval, so that the public could comment on it. CEQA's procedures

required the City, when it realized it did not have sufficient information to understand and describe how adverse the nighttime lighting impacts of the Project would be, to stop and request the information needed. (See *Santiago County Water District v. County of Orange* (1981) 118 Cal. App. 3d 818).

Petitioners contend that the EIR's discussion and analysis of, and statement of overriding considerations regarding, cumulative visual impacts are legally inadequate. Petitioners also contend that the City's treatment of cumulative impacts on visual resources is procedurally inadequate on three grounds:

(1) The EIR does not adequately assess or disclose the Project's direct, nighttime lighting and sky glow visual impacts. Accordingly, it is not possible for the EIR to meaningfully assess how such undisclosed and unanalyzed impacts may, or may not, contribute to cumulatively considerable sky glow impacts, when considered in conjunction with other past, present, and future projects.

(2) The DEIR while providing a list of other past, present, and future projects that may combine with the proposed Project to result in cumulatively considerable nighttime sky glow impacts, provides no information regarding the adverse aesthetic impacts of the listed Projects or reference to where such information is available.

(3) Given that the EIR omits the required description and analysis of cumulative nighttime lighting and sky glow impacts, the City's findings of significant and unavoidable cumulative visual impacts, and its related statement of overriding considerations are unsupported by any evidence in the record (CEQA §21081, (e)(2).

The City's response to Petitioner's lighting issues states "it is not time". The bulk of the concerns were all responded to in the final FEIR Page (AR 1424) of the record, all before the public hearings.

Regarding the mitigation about whether the City made sure the project would not have lighting escaping the property, the City did two things. First, the City required Wal-Mart to comply with the City's ordinance. Section 24.58.450 of the ordinance requires lighting to not escape the property. Comply with this ordinance and there will be compliance with the law. Second, the City ordered Wal-Mart to prepare a specific lighting plan to be approved by the City before the building permit may be issued to ensure compliance with the code. The DEIR concluded that with the implementation of mitigation measure 4.13-3 any potentially significant light and glare impacts would be less than significant.

In conclusion the Court finds that the City complied with CEQA's requirements.

7. The EIR Fails To Adequately Discuss And Analyze Greenhouse Gas/Climate Change Impacts:

Petitioners contend that the DEIR is deficient wherein it states that the cumulative climate change impacts of the Project are significant and is informationally deficient in its discussion and analysis of those impacts.

The DEIR included carbon emissions from vehicles used in the construction of the Project, architectural coatings, operations-level natural gas use, and operations–level vehicle use. However, as Petitioners and their consultants noted in their comments, the

analysis omits three important sources of greenhouse gases ("GHG") and they are: (1) the GHG embedded in the construction materials used to build the Project; (2) the GHG embedded in the goods being distributed through the center and sold by Wal-Mart stores; and (3) the new emissions of GHG's associated with the mitigation measures. The City has an obligation to use its best efforts to find out and disclose all it reasonably can regarding project impacts (*Vineyard, supra d* 40 Cal 4th at p. 428).

CEQA requires agencies (The City) to discuss the significant effects of proposed mitigation measures. Petitioners contends the EIR fails to do so. (see CEQA Guidelines § 15126.4 (a)(1)(d) and Guideline § 15144).

Furthermore, petitioners contend another problem is that the City, when attempting to address the question of GHG emissions, asserted that the size of associated GHG reductions could not be quantified at the time of writing the EIR. The City basically said there is no established methodology for verifying associated greenhouse gas reductions from emission reduction agreement. However, Petitioners' consultants did specify the methodology, which the City had regarding how you measure GHG reductions for mitigation measures before it approved the Project

The DEIR stated that the Project's cumulative impact on GHG levels will be mitigated in part through off-sets, but provided no standard for quantifying and validating that the off-sets will or can be obtained. CEQA requires that mitigation measures be "fully enforceable through permit conditions, agreements, or other legally–binding instruments (Guidelines § 15126.4(a)(2)). Petitioners' consultants in their comments on

the DEIR list several entities that provide accepted off-set standards. Yet, the FEIR responds that "GHG off-sets cannot be fully substantiated" until one set of standards is "fully established". Diversity of available standards is not an excuse for inaction. The City must choose one and ensure that it is fully enforced.

The City responds to Petitioners' argument by stating their claim has been expressly rejected under CEQA Guideline 15064.4(a). This guideline was amended from its original obligation to analyze greenhouse gases, "associated with the Project" to "resulting from the Project". This change expressly rejected what they call life cycle extent of greenhouse gas emissions that Petitioners are asking the court to impose on the City. Under that specific guideline, the City expressly complied with CEQA in its scope of greenhouse gas emissions analysis. The City took the conservative approach. Instead of saying the project is not going to have significant impacts and ending it there, the City took the conservative approach and said it looked at greenhouse gas emission in a cumulative context, meaning that this Project is one small cog in a very large world of emissions out there.

The approach adopted by the City was quite rational and conservative in looking at this project in conjunction with the rest of the world cumulatively, yes, significant impact, and, therefore, the City took the steps of adopting a statement of overriding considerations, which essentially moots Petitioners' criticisms of some mitigation measures. The City in effect states it cannot reduce the cumulative aspect of global greenhouse gas emissions to less than significant measures. The City fully broached and

applied the CEQA process on an issue like this appropriately. It fully complied with the mitigation measures that do apply to emissions by pointing to the obligations under the conditions of approval to comply with the requirements of SJVAPCD. All the law requires is that the mitigation measures are fully enforceable by permits, and that is exactly what these approvals do. They tie in with Wal-Mart's approvals compliance with the requirements of the Air District. CEQA Guidelines § 15126.4(a)(2). The City has not violated CEQA's requirements for the study of greenhouse gases and certainly no violation of mitigation requirements in the context of the finding that it is cumulatively significant in the adoption of the statement of overriding consideration.

This Court agrees with the City and finds there has been compliance with CEQA's Guidelines regarding greenhouse gases.

8. The EIR Fails to Adequately Discuss and Analyze Deleting Previously Adopted Mitigation Measures for the Lyon's Project

Petitioners contend that the City violated CEQA's procedures by preparing to delete unspecified, previously adopted mitigation measures for the Lyon's Annexation ("Lyon's Project") without presenting objective evidence of such measures infeasibility. The City's proposal constitutes a violation of the procedural requirements for deleting previously adopted CEQA mitigation measures set forth in *Napa Citizens for Honest Government v. Napa County Board of Supervisors* (2001) 91 Cal. App. 4th 342.

The City has not really specified or explained what mitigation measures with the Lyon's Annexation Project it intends to delete in the future, what standards would be

employed to do so, and what the implications are of deleting those mitigation measures or replacing them with other unspecified measures associated with the Project. The Court in the *Napa* case made it quite clear that agencies are not free once they have approved prior projects, to simply at will on an "ad hoc" basis go back and change or remove mitigation measures.

The City has not specified what mitigation measures will be changed going forward in the future, but has also not presented any and could not have presented any information regarding the feasibility of those mitigations or why they are deleting them, because it is unknown what they are. This violates CEQA procedures.

First, if the City wants to change mitigation measures from the Lyons Project, it needed to tell the public in the circulated DEIR. Secondly, expressly state what are those mitigation measures that they are going to change and what the City is going to replace them with, so that the public, as the Project was being approved could evaluate whether these mitigation measures truly are equivalent and will truly achieve the same or better environmental results. That did not happen here.

The City counters, that the information added to the FEIR clarifying the relationship between the 1998 Lyons Annexation and the Distribution Center did not trigger recirculation of the EIR or otherwise violate CEQA. Petitioners selectively quote from language that the City added to the FEIR to clarify the relationship between the initial study/Mitigated Negative Declaration ("MND") that was certified 12 years ago when a portion of the Project site was annexed to the City and the EIR for this Project.

Petitioners leave out critical portions of the clarifying language in order to advance their argument that the City was attempting to shirk its responsibility for imposing mitigation measures in 1998.

The clarifying language stated as follows:

"In addition, a portion of the Project site was included as part of the Lyon's Annexation to the City of Merced, which was approved by LAFCO on January 28, 1999. The MND prepared for annexation included several mitigation measures, which apply to any development approved within the annexation area. If approved, the proposed Project would be required to comply with these mitigation measures. It should be noted that, because many of the mitigation measures required in the Merced Wal-Mart Distribution Center are more current and more effective than the Lyon's Annexation Mitigation, the City may consider, on a case-by-case basis whether implementation of individual mitigation measures included in the Merced Wal-Mart Distribution Center EIR would meet the mitigation requirements for similar individual mitigation measures required under the Lyon's Annexation Project."

Petitioners waited until September 23, 2009 to submit a letter objecting to the clarification. Two days after Petitioners submitted their objections, the City staff issued a detailed memorandum that reiterated there was no intent to omit any mitigation measures from the Lyon's Annexation. The author of the clarifying language explained "It was not the intent of that language to suggest that any of the Lyon's Annexation mitigation measures would be eliminated unless they were subsumed by a new measure in the EIR".

From this, the Petitioners are asking this Court to conclude that the City plans to violate its 1998 obligations arising from the annexation of the portion of the Project site. The City has not disregarded the measure.

This Court agrees with the City there has not been a violation of CEQA's procedures.

9. City Violated CEQA by Failing to Recirculate the EIR

The Court put this issue last because of the controversy it has created between the City and Petitioners. Petitioners have alleged in their Petition for Writ of Mandate, par. 46 that the City violated CEQA's procedures in failing to recirculate a DEIR addressing significant new information before certifying its FEIR approving the Project.

Petitioners referred to the allegations in par. 46 in their opening trial brief, but do not mention the City "dumping of thousands of pages of documents" at the last minute not presented for public view. The Petitioners allege that these documents contained "substantial evidence". However, in their reply brief Petitioners alleged that the City in its opposition brief used these "thousands of pages of documents" in support of its position there was no violation of CEQA's guidelines.

It was not until final argument Petitioners brought up the "4,000 dumping of documents". After hearing arguments from both sides, this court ordered the parties to prepare supplemental briefs covering these "4,000 pages of documents" not shown to the public and in violation of CEQA.

Subsequent to the filing of these briefs Petitioners filed a motion to amend its Petition, at par. 46 to add 46(a): "the city violated CEQA's procedures in failing to recirculate a DEIR and approving the Project, including, but not limited to the City's addition of 4,000 plus pages of information and documents to the City's record of proccedings on the day it approved the Project, including the portions of said 4,000 plus pages that the City has now relied on in these proceedings to defend the informational adequacy of its publicly circulated EIR."

The City circulated the DEIR for the Project for public review and comment from February 25 through April 27, 2009. (AR 607, 5589) Petitioners submitted comments identifying procedural defects in the DEIR, including, *inter alia,* numerous fundamental informational gaps and deficiencies regarding the DEIR's inadequate disclosure and analysis of air quality, hydrology, traffic, urban decay, visual resources, and greenhouse gas emissions impacts. (AR 1349-1430) On July 30, 2009, the City published its notice of availability of the FEIR. (AR 6237-6246) Petitioners responded with three more comment letters, again raising the City's continued and ongoing violations of CEQA's procedures in failing to adequately disclose, analyze or mitigate a broad range of Project impacts. (AR 7567-8347; AR 8348-9785; AR 11394-11568)

On September 21, 2009 Petitioners' counsel, in presenting Petitioners' ongoing objections to the City Council, expressly objected to the City's failure to prepare and circulate an informationally adequate, revised DEIR as required by CEQA's mandatory informed decisionmaking and public participation procedures: "[T]he EIR that you are

presented with ... does not meet CEQA's requirements, and can't be certified by this agency. It needs to be revised and recirculated so that it has adequate information in it and addresses the [Project's] impacts, and also makes sure that they are fully mitigated. We have submitted multiple comment letters on the project to describe where the problems fall ... " (AR 11370-11371) "As a legal technician, what I can tell you ... is that right now you can't approve this project. And the reason you can't approve the project is because the EIR that has been prepared is inadequate to meet CEQA's requirements. And so at the very minimum, what this body should do is take a big step back from where you are at, take a look at our letters, take a look at the information we have. We request that...the City...rather than approve the project...prepare a revised EIR, recirculated for public review, so that the entire project and all of its impacts can be disclosed and we can have a real discussion about what the impacts of this project may be." (AR 11381 [emphasis added])

The City did not prepare or recirculate the requested, revised DEIR. Instead, the City's staff and its EIR consultant prepared 4,615 pages of new documents and information. Then, at the City Council's final September 28, 2009 hearing on the Project, the City added the new information into its records of proceedings with no opportunity for either the decisionmaking City Council members or the public to actually review or respond to the new information: "Since September 17th a voluminous amount of material has been submitted by the attorney for the organized opposition...And since that time, Staff, along with the consultants for the city, EDAW have been diligently going through

all of those documents ... Staff is providing written responses along with supporting documentation simply for purposes of clarification. You have been provided with copies of the memorandum which [was] prepared in response to the numerous comments that were received. We have not provided you actual, supporting attachments. They are huge pile sitting over with the city clerk there ... The pile is approximately 10 or 12 inches thick...[C]opies are available if any member of the public does wish to take a look and they will be available on the website tomorrow and available for the public to pick up." (AR 16853-16854 [emphasis added] [testimony of Chief Deputy City Attorney Jeanne Schecter, referring to the new documents and information presented at AR 12222-16826].) The Chief Deputy City Attorney and the City's Planner then provided oral reports, after which the City (1) closed its public hearing and then (2) approved the Project.

The Court granted the motion to amend, but ordered the "4,000 plus pages" to read 365 pages because Petitioners, in their supplemental briefs, admitted that they could only identify 365 pages that purportedly contain information that requires recirculation.

The Court will address the issues presented in the Petitioners Supplemental Briefing.

Petitioners Statement of Facts

The City circulated its DEIR for the Project for public review and comment from February 25 through April 27, 2009. (AR 607,5589) Petitioners submitted comments identifying procedural defects in the DEIR, including, *inter alia,* numerous fundamental

informational gaps and deficiencies regarding the DEIR's inadequate disclosure and analysis of air quality, hydrology, traffic, urban decay, visual resources, and greenhouse gas emissions impacts. (AR 1349-1430) On July 30, 2009, the City published its notice of availability of the FEIR. (AR 6237-6246) Petitioners responded with three more comment letters, again raising the City's continued and ongoing violations of CEQA's procedures in failing to adequately disclose, analyze or mitigate a broad range of Project impacts. (AR 7567-8347; AR 8348-9785; AR 11394-11568)

The Court is cognizant of the many cases mandating public participation in CEQA process. The public holds a privileged position in the CEQA process. (*Concerned Citizen of Costa Mesa v. 32nd District Agricultural Assn* (1986) 42 Cal. 3d 929).

Petitioners argue that the "thousands of documents" referred to in the EIR were not presented for public review or comment. (Note there were really only 365 pages)Petitioners contend that the City's post-hoc reliance on these 4,000 plus pages and/or 365 pages to argue that "substantial evidence" supports the City's approval of the Project violates CEQA's mandatory information disclosure and public participation because the City (1) circulated a DEIR for public review that was so fundamentally inadequate that a meaningful opportunity for public comment was precluded; (2) attempted to cure the EIR's informational inadequacies by inserting 4,615 pages (365) of new information that was not presented for public review into its record, and now, for use in the proceeding; and (3) has relied all but exclusively on these same, late-submitted documents, instead of the EIR and other documents that were provided for public

consumption to substantively defend its approval in Court. (CEQA § 21092.1 [recirculation required where "significant new information" added after DEIR circulated for public review.] (*Laurel Heights Improvement Assn v. Regents of the Univ of Cal* (1993) 6 Cal. 4th 1112 *Laurel Heights*)).

Petitioners point out in their brief how this "significant information: of some 4,000 + pages (365) affected air quality impacts, ground water impact, surface water impacts, traffic impacts, urban decay, visual impacts, GHG emission impacts, and last minute change to Project description.

Petitioners request that the court issue a writ of mandate compelling the City to set aside its FIR and Project approvals, and include a mandate prohibiting the city and real parties from carrying at any physical activities in furtherance of the Project based on invalid approvals.

The City's Statement of Facts

Contrary to the false picture Petitioners paint for this Court, the City fostered and enabled extensive public participation during the three-year public process that preceded the City's approval of the Project. Following the City's Notice of Publication ("NOP") of its intent to prepare an EIR, the public participated in scoping sessions where it provided comments on the scope of that analysis. (AR 3986-4004, 4020-4152, 4165-4217) The City circulated the DEIR for public review for 60 days, instead of the required 45 days. (AR 9864) The City then provided detailed responses in the FEIR to 315 comment letters submitted regarding the DEIR. (AR 166-2757) The City released the

FEIR 60 days prior to the certification of the EIR instead of the 10 days required by CEQA. (AR 2376) The City then addressed the Project during two duly noticed public hearings before the Planning Commission, and *five duly* noticed public hearings before the City Council. (AR 6379, 6473, 7033, 9786, 11569, 12042, 16829)

How then, on this record did the City violate CEQA's public participation requirements? According to Petitioners, by "preparing 4,615 pages of new documents and information" in response to Petitioners' mere request submitted on September 21, 2009 to prepare a revised EIR (PSB at p.5.) Petitioners' description of the relevant background facts is incomplete and misleading in, at least, the following material respects.

First, Petitioners' September 21st submittal did not merely reiterate their "ongoing objections" to the Project as Petitioners claim. (PSBat p. 5.) Rather, they submitted to the City Council ***three new comment letters along with thousand of pages of attachments.*** (AR 8348-9785, 11394-11568) Petitioners' documents arrived just days before the ***fifth*** scheduled City Council hearing on the Project, and more than ***seven months*** after the DEIR was circulated for public comments. The City had no legal obligation under CEQA to respond to Petitioners' proverbial, last-minute "document dump" (Guideline 15088(a).) However, the City was mindful of the court's warning in *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal. App. 4th 1184, 1201, if a city does not "consider" comments submitted just prior to or at the last public hearings held on the project, it "does so at its own risk" because "[i]f a CEQA action is subsequently

brought, the EIR may be found to be deficient on grounds that were raised at any point prior to the close of the hearing on project approval." The City's staff and consultants therefore prepared thorough responses to Petitioners' comments in time for the City Council's review prior to consideration of the Project. (AR 12222-16826) The City's staff and its consultants prepared the following memoranda responding to Petitioners' late comments:

- A 17-page "Master Response" from the EIR consultant, EDAW. (AR 12224-12241) ***EDAW's memo confirms the accuracy of the original EIR's analysis and findings.*** (AR 12224)["After reviewing all of the letters received after the Planning Commission meeting on August 24, 2009, including those from Lippe, as well as other comment letters received from the general public, no changes to the DEIR or FEIR are required."]);

- A 9-page response from the City's traffic consultants, DKS (AR 13011-13020.) ***DKS's memo confirms the accuracy of the EIR's original traffic analysis and findings.*** (AR 13012) ["As set forth in the EIR and in the previous response to the earlier comment provided by Mr. Smith, the traffic impact analysis prepared for the DC EIR complies with the City of Merced and County of Merced traffic impact guidelines, both of which require precisely the analysis that was conducted in connection with the TIA."]);

- A-13 page response from the City's air quality consultant, Austin Kerr, responding to comments submitted by Petitioners on September 18, 2009. (AR 13402-13414) ***Mr. Kerr's response confirms the accurancy of the EIR's original analysis and findings.*** (AR 13402) ["As set forth below, objections to the EIR stated by both Mr. Gilber and Mr. Lippe are without merit."]);

- A 4-page response from Austin Kerr to Petitioners' comments submitted on September 23, 2009. (AR 16565-68) ***Mr. Kerr confirms the accuracy of the EIR's original analysis and findings.*** (AR 16565) ["As set forth below, Mr. Lippe's objections to the EIR are without merit."]);

- A 4-page memorandum from the City's Development Manager, Frank Quintero, addressing comments regarding urban decay. (AR 16749-16752) ***Mr. Quintero's memo confirm the accuracy of the original EIR's analysis and findings.*** (AR 16750) ["[B]ased on the evidence attached to this staff memorandum and contained in the FEIR prepared for the proposed project, it is not foreseeable that urban decay will result from development of the Wal-Mart Distribution Center or future individual Supercenters."]); and finally

- A 7-page memorandum from the City's Chief Deputy Attorney, Jeanne Schechter, and Planning Manager, Kim Espinosa, addressing comments concerning the Lyons Annexation. (AR 16820-16826) ***This memo also confirms the accuracy of the original EIR's analysis and findings.*** (AR 16821 and 16825-16826 [stating that the memo only clarifies the EIR, and therefore "Recirculation is not required."])

As the Court will readily observe from its review of these documents, each memorandum merely clarifies and/or reaffirms the accuracy of the EIR's analysis and findings, and therefore, as explained below, do not either individually or collectively trigger CEQA's recirculation requirements. (CEQA § 15088.5(b); *Laurel Heights, supra,* 6 Cal. 4th at pp. 1124-1125.)

Second, contrary to Petitioners' claim, the City and its consultant did ***not*** "prepare 4,615 pages of new documents and information." (PSB at p.5.) Rather, as shown above, the City and its consultants prepared six brief memoranda responding to Petitioners' specific comments and reaffirming the accuracy of the EIR's analysis and findings. (See (AR 12223) [summary list])

Moreover, the City prepared the above-described memoranda, not to exclude the public from participating in the CEQA process, but rather to assess ***in good faith whether any of Petitioners' new comments and information substantiated their request for a***

revised and recirculated EIR. The City staff's September 29th Memorandum to the City Council explains:

> The attorney for the organized opposition, Thomas Lippe, has submitted a voluminous amount of information, roughly 1,500 pages, which includes comments and supporting documentation, since Friday, September 18, 2009. City staff and City's consultant, EDAQ have been diligently working since that time to review those comments and supporting documentation, along with other comments submitted by members of the general public at the public hearing before the City Council and via email, to ensure that all of the issues were addressed in the EIR and to respond as appropriate. (AR 12222) [emph. Added])

After reviewing and analyzing Petitioners' voluminous new comments and evidence, the City and its consultants concluded that Petitioners raised no new substantive information that would require a revised EIR or recirculation under CEQA's standards regarding recirculation. The City Staff's Memorandum to the City Council thus explained:

After reviewing all the comments, staff and EDAW have determined that no new substantive issues were raised by any of the comments, all of the issues raised have been previously and adequately addressed in the DEIR and FEIR and no changes to the DEIR and FEIR are required. Staff is providing these written responses, along with a number of supporting documents for the record, simply for purpose of clarification... Information contained in these response does not constitute substantial new information, as defined pursuant to CEQA Guidelines §15088.5 ... This information being added merely clarifies and amplifies or makes insignificant modifications to the adequately prepared EIR and recirculation is not required. (AR 12222-12223)

The City's responses and additional analysis prepared in response to Petitioners' last-minute dump comments include substantial evidence in support of the City's decision to not recirculate the EIR (AR 12222-12223, 12224-12241, 13011-13020, 13402-13414, 16565-16568, 16479-16752, 16820-16826)–which is precisely what CEQA requires of the City. (Guidelines § 15088.5(e).) The administrative record–when properly viewed in context - therefore demonstrates the City fully complied with CEQA's requirements.

Finally, after repeatedly playing the "more-than-4000-pages-of-new-information" card during the September 3rd hearing, Petitioners now only identify 365 pages that purportedly contain information that requires recirculation. (PSB at pp. 2-3.) As will be shown below, none of the identified information triggered recirculation of the EIR.

The first thing the City brings up is Petitioners' argument, that the City must set aside the Projects EIR because the City in its briefing cited to or relied on "documents contained in the 4,000 plus pages (365) new information." Petitioners contend that the Respondent's lawyers citation to the 4,000 plus pages in their trial briefs equate to a procedural violation under CEQA by arguing " the more fundamental procedural problems is that the City seeks to rely in its trial brief on new information from its consultants." This argument is the centerpiece of Petitioners legal challenge.

The City brings out the fact, that Petitioners cite no authority in support of their "novel theory" and there is none. No CEQA statute or guideline imposes legal requirements on what evidence from the administrative record lead agencies may cite in

their trial briefs during the course of CEQA litigation. The Court is required to uphold the City's decision if it is supported by substantial evidence in the record. The trial brief is not part of the Administrative Record. Courts are precluded from considering any evidence outside of the record in CEQA cases. (*Western States Petroleum Association v. Superior Court* (1995) 9 Cal. App. 4th, 559).

The single most important issue here boils down to whether or not the 4,000 pages (365) contain significant new information. If the answer is "yes" recirculation is required. The California Court of Appeal addressed this issue in the recent case *California Oak Foundation v. Regents of the University of California* (2010) 188 Cal. App. 4th 227 (introduction of new information and evidence to the AR following public review and comment did not trigger CEQA's recirculation requirements).

The City cites *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal. 3d 553, which held that lead agencies may add even voluminous new information to the record following the EIR comment period, and need not recirculate the EIR unless the new information is significant, as defined by CEQA Guideline § 15088.5(a). The City contends that the 365 pages [not the 4,000 plus], which Petitioners have recently identified does not contain significant new information. Respondents' citation to the 4,000 plus pages in their trial briefs is irrelevant to the issue of the City's compliance with CEQA in general or, more specifically, with CEQA's recirculation requirements.

The City brings up another issue namely, Petitioners are barred from asserting the "4,000 plus pages" because they did not raise it in their Petition or statement of issues.

Petitioners waived their recirculation argument, because the claim was not raised in the Petition. The Petition is absolutely void of any assertion that the City's responses to Petitioners last minute comments required re-circulation or was otherwise unlawful. This issue may be moot in light of the amendment in par. 46(a) of the petition.

The City refers to air quality, groundwater impacts, surface water impacts, traffic impacts, urban decay impacts, visual impacts, GHG emissions; Lyon's Annexation Mitigation and argues that there is no information contained in the 365 pages identified by Petitioners requiring recirculation of the EIR.

The Court agrees with the City that there was no violation of CEQA's legal requirements and it is not required to recirculate the EIR.

For all of the reasons set forth in this decision, the Petition is denied as well as the request for injunctive relief. Judgment for the City of Merced and Wal-Mart Stores, Real Parties in Interest and against Petitioners Merced Alliance for Responsible Growth, et al.

The City of Merced is ordered to prepare the Judgment.

DATED: 3/14/11

William Burby
WILLIAM BURBY
Judge of the Superior Court

PROOF OF SERVICE BY MAIL
(1013a, 2015.5 C.C.P)

STATE OF CALIFORNIA)
)
COUNTY OF MERCED) Case No. **CV000593**

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is Merced County Superior Court, 627 West 21st Street, Merced, California 95340.

On **March 14, 2011,** I served the within **DECISION ON WRIT OF MANDATE AND COMPLAINT FOR INJUCTIVE RELIEF,** on the person(s) named below and then placing a true copy thereof in an envelope and then placing in the Merced County Superior Court/Clerk's outgoing mail addressed as follows:

Keith G. Wagner, Esq.
LIPPE GAFFNEY WAGNER LLP
329 Bryant Street, Suite 3D
San Francisco, CA 94107

Gregory G. Diaz, Esq.
City Clerk's Office
City of Merced
678 West 18th Street
Merced, CA 95340

John Ramirez, Esq.
M. Katherine Jenson, Esq.
RUTAN & TUCKER, LLP
611 Anton Blvd., Fourteenth Floor
Costa Mesa, CA 92626-1931

Arthur Friedman, Esq.
Sheppard Mullin Richter & Hampton LLP
Four Embarcadero Center, 17 Floor
San Francisco, CA 94111

and then placing a true copy thereof in an envelope and then placing in the Merced County Superior Court/Clerk's office for the following department(s) or person(s):

N/a

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **March 14, 2011**, at Merced, California.

Melanie Myers, Declarant