

MITCHELL M. TSAI (Cal. Bar No. 277156)  
MITCHELL M. TSAI, ATTORNEY AT LAW  
155 South El Molino Avenue, Suite 104  
Pasadena, California 91101  
Telephone: (626) 381 - 9248  
Fax No.: (626) 389 - 5414  
Email: info@mitchtsailaw.com

TANYA A. GULESSERIAN (CBN 198640)  
CHRISTINA M. CARO (CBN 250797)  
ADAMS BROADWELL JOSEPH & CARDOZO  
601 Gateway Blvd., Suite 1000  
South San Francisco, CA 94080-7037  
Telephone: (650) 589-1660  
Fax No.: (650) 589-5062  
Email: tgulesserian@adamsbroadwell.com  
ccaro@adamsbroadwell.com

Attorneys for Petitioners and Plaintiffs

ARROYO SECO FOUNDATION and PASADENA AUDUBON SOCIETY

**SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES**

ARROYO SECO FOUNDATION, a California  
Non-Profit Corporation; PASADENA  
AUDUBON SOCIETY, a California Non-Profit  
Corporation;

Petitioners and Plaintiffs.

v.

COUNTY OF LOS ANGELES, a political  
subdivision of the State of California and Charter  
County; COUNTY OF LOS ANGELES BOARD  
OF SUPERVISORS, governing body of the  
County of Los Angeles; COUNTY OF LOS  
ANGELES DEPARTMENT OF PUBLIC  
WORKS, a public entity; LOS ANGELES  
COUNTY FLOOD CONTROL DISTRICT, a  
public entity; and DOES 1–10, inclusive.

Respondents, and Defendants.

LOS ANGELES COUNTY FLOOD CONTROL  
DISTRICT, a public entity; and ROES 1–10,  
inclusive.

Real Parties in Interest and Defendants.

CASE NO.: BS152771

**PETITIONERS' MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
OPPOSITION TO MOTION TO  
DISCHARGE WRIT**

Assigned for All Purposes to Honorable James C.  
Chalfant, Dept: 85

Date: December 5, 2017

Time: 1:30 p.m.

Dept.: 85

Trial Date: February 14, 2017

Continued Trial Date: March 23, 2017

TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	STATEMENT OF FACTS .....	2
III.	LEGAL STANDARD.....	5
IV.	ARGUMENT .....	5
A.	The District Misstates the Scope of Review of the Writ, Which Requires the District to “Comply with CEQA in All Respects.” .....	5
B.	The District Cannot Demonstrate Compliance With CEQA Because the RFEIR Fails to Support the District’s Reliance on a 1:1 Biological Mitigation Ratio With Substantial Evidence.....	6
1.	<u>The RFEIR Fails to Include a Site-Specific Analysis of the Project’s Proposed         Habitat Mitigation.</u> .....	7
2.	<u>Ambrose Study.</u> .....	7
3.	<u>Quail Run Apartments.</u> .....	8
4.	<u>Rambla Pacifico Project.</u> .....	9
5.	<u>Cajon Creek Project.</u> .....	9
C.	The District Cannot Demonstrate Compliance With CEQA Because the RFEIR Fails to Adequately Respond to Comments.....	10
D.	The Board’s Revisions to the Project at the November 7, 2017 Hearing Require Additional Recirculation. ....	11
E.	The District Cannot Demonstrate Compliance With CEQA Because MM AQ-1 Still Fails to Reduce Significant Air Quality Emissions to Less Than Significant Levels. ....	11
V.	CONCLUSION.....	12

**TABLE OF AUTHORITIES**

**Cases**

City of Carmel-By-The-Sea v. Bd. of Supervisors (1982) 137 Cal.App.3d 964.....	5
Clark v City of Hermosa Beach (1996) 48 Cal. App. 4th 1152.....	6
Laurel Heights Improvement Assn. v. Regents of University of California (1993) 6 Cal.4th 1112 .....	10
ns under the writ. CCP s 1097; .....	5
Ross v. McDougal (1939) 31 Cal. App. 2d 114.....	5
Topanga Association for a Scenic Community v. County of Los Angeles (1974) 11 Cal.3d 506 .....	10
Toyota of Visalia v. New Motor Vehicle Bd. (1987) 188 Cal. App. 3d 872, 885.....	6

**Statutes**

Cal. Code of Civil Procedure § 1094.5 .....	6
Cal. Code of Civil Procedure § 464 .....	5
Cal. Pub. Res. Code, § 21091 .....	10
Cal. Public Resources Code section 21168.9.....	5

**Regulations**

14 Cal Code of Regulations § 15384 .....	7
14 Cal. Code of Regulations § 15090 .....	6
14 Cal. Code Regs. § 15088.....	10

1 **I. INTRODUCTION**

2 Moving parties Los Angeles County Flood Control District et al. (collectively "District")  
3 erroneously claim that the Court's Writ of Mandate ("Writ") should be discharged. On April 19, 2017,  
4 this Court issued its Judgment, and on May 17, 2017 its Writ, commanding the District to set aside its  
5 certification of the portions of the Project's Environmental Impact Report ("EIR") which failed to  
6 adequately ensure that the Project's impacts to sensitive biological resources and air quality would be  
7 less than significant. The Writ also commanded the District to revise and recirculate all necessary  
8 portions of the EIR for public comment and public hearing, and to suspend all Project activities until  
9 the District takes all necessary corrective actions to comply with CEQA. See Writ, pp. 2-3. Finally, the  
10 Writ commanded the District to "ensure that the entire EIR has been completed in compliance with  
11 CEQA and the CEQA Guidelines prior to its recertification." Writ, p. 2. While the District set aside  
12 certification of limited portions of the FEIR, and recirculated those sections, the District failed to  
13 address numerous omissions in the FEIR's original biological and air quality analysis which rendered  
14 the revisions inadequate. As a result, the District failed to ensure that the entire FEIR complies with  
15 CEQA, as required by the Writ. In particular, the District failed to support its reliance on the FEIR's  
16 1:1 mitigation ratios with substantial evidence.

17 In particular, the Judgment found that the District must "include sufficient information to  
18 support its claim that a 1:1 mitigation ratio is appropriate as opposed to a higher mitigation ratio."  
19 3/23/17 Decision, p. 7. Rather than conduct a site-specific analysis, as required by CEQA, or adopt a  
20 higher mitigation ratio, as numerous commenters recommended, the Revised FEIR ("RFEIR") relied  
21 on CEQA documents prepared for 4 other projects with varied success rates to conclude that a 1:1  
22 mitigation ratio will be unequivocally adequate in this case to reduce the Project's significant impacts  
23 on rare riparian habitat and sensitive species to less than significant levels. The studies do not provide  
24 the site-specific information necessary to evaluate the efficacy of a 1:1 mitigation ratio at the Project  
25 site. The RFEIR also failed to meaningfully respond to comments from expert biologists which  
26 explained that 3:1, 4:1, and even 5:1 mitigation ratios are necessary to ensure the successful  
27 replacement of the rare riparian habitat that is specific to this Project site.

28 The District also chose to ignore substantial evidence submitted by Petitioners which  
demonstrates that the MM AQ-1's reliance (as revised) on the use of "Model Year 2010" haul trucks is  
insufficient to reduce the Project's air quality emissions to less than significant because recent studies  
demonstrate that operational emissions from Model Year 2010 trucks are 5 to 18 times greater than the  
original EPA estimates that the District relied on when it certified the original FEIR in 2014. In

1 ignoring this evidence, the District relied on the narrow clerical revision which the Court ordered the  
2 District to make in response to the Writ, instructing the District to cross out “2007” and write in  
3 “2010” in MM AQ-1 (“~~2007~~ 2010”). The RFEIR simply followed the Court’s instruction, and failed  
4 to address whether the revised MM AQ-1 would effectively reduce NOx emissions to less than  
5 significant levels.

6 Finally, the Motion fails to inform the Court that, at the November 7, 2017 Board of Supervisors  
7 hearing on the RFEIR, the Board voted to significantly downsize the Project from removing 2.4 million  
8 cubic yards (“mcy”) of sediment over a 5-year period, to removing just 1.7 mcy of sediment over a 4-  
9 year period. See Declaration of Mitchell M. Tsai in Support of Petitioners’ Memorandum of Points and  
10 Authorities in Opposition to Respondents’ Motion to Discharge Peremptory Writ of Mandate (“Tsai  
11 Decl”), Exhibit 5 at p. ASFAUD 27156 – 59. The Board’s reasoning for the 30% reduction in Project  
12 size was that the original scope of the Project was overly inflated compared to the actual flood  
13 protection needs of the District, and that the Board was concerned about the Project’s significant  
14 environmental impacts. *Id.* at Exh. 4 ASFAUD 27058 (Supervisor Kathryn Barger stating that “After  
15 numerous meetings with staff and opponents of the Project, I recognized that the recommendation  
16 originally proposed by Public Works may seem a bit ambitious and may be unnecessary.”). This  
17 significant reduction in Project size should have also allowed the District to consider a smaller footprint  
18 that would impact less acres of sensitive riparian habitat. However, the District failed to take this  
19 potential mitigation into account before re-certifying the RFEIR.

20 Petitioners and other members of the public are contemplating a new petition to challenge the  
21 District’s November 7, 2017 re-certification of the RFEIR. The statutory period to file a new petition  
22 does not end until December 6, 2017, a day after the currently scheduled hearing date for the Motion.

23 As discussed herein, the Motion to Discharge Writ of Mandate should be denied, and the  
24 District should be ordered to further revise and recirculate the RFEIR to effectively mitigate the  
25 Project’s remaining significant biological and air quality impacts. Alternatively, the hearing on the  
26 Motion should be continued until after the statute of limitations for filing a new CEQA action in  
27 response to the RFEIR, in order to determine whether the hearing on the Motion should be consolidated  
28 with the hearing on any new petitions for writ of mandate filed within that period.

## 26 **II. STATEMENT OF FACTS**

27 On April 19, 2017, the Court issued its Judgment holding that the District failed to comply with  
28 CEQA by (1) failing to support its conclusion that the Projects’ significant biological resource impacts  
will be reduced to less than significant levels with substantial evidence due to the FEIR’s failure to

1 support the 1:1 mitigation ratios included in Mitigation Measures BIO-6, -7, and -8 with substantial  
2 evidence; (2) failing to adequately discuss the Project's cumulative impacts to biological resources  
3 because the FEIR failed to state how the possible cumulative impacts to special status species, riparian  
4 habitat, and other sensitive natural communities would be mitigated; and (3) failing to include  
5 enforceable terms in Mitigation Measure AQ-1 to ensure that significant NOx emissions will be  
6 reduced to less than significant levels because MM AQ-1 failed to require that contractor dump trucks  
7 comply with EPA 2007 standards. Judgment, pp. 1-2.

8 On May 19, 2017, the Court issued the Writ, which commanded the District to correct these  
9 errors, and to "ensure that the entire EIR has been completed in compliance with CEQA and the CEQA  
10 Guidelines prior to its recertification." Writ, p. 2. Over Petitioners' objections, the Court included a  
11 detailed mandate in the Judgment and Writ which ordered the District to make specific text revisions to  
12 specific pages of the FEIR:

- 13 i. Respondents shall recirculate, for a 45-day public comment period, pages 83-  
14 85, 130-134, 690-694, and 707 of the Final EIR (Administrative Record pages  
15 AR6718-6720, AR6765- 6769, and AR 7315-7319, AR7332, respectively)  
16 revised to:
  - 17 1. Provide substantial evidence to support the 1:1 mitigation ratios in MM  
18 BOI-6, -7, and -8, and therefore the Final EIR's conclusion that the  
19 biological resource impacts will be reduced to less than significant levels;  
20 and
  - 21 2. Confirm that Mitigation Measures BIO-1 through BIO-8 will be applied  
22 as mitigation to the Water Conservation Project should such a project go  
23 forward.
  - 24 3. Modify MM AQ-1 to read as follows: "LACFCD shall require all  
25 construction contractors during the sediment removal phase of the  
26 Proposed Project to use only sediment removal dump trucks that meet  
27 EPA's emission standards for Model Year 2010. ~~Model Year 2007 or~~  
28 ~~later.~~"
  1. Amend the Mitigation Monitoring and Reporting Program ("MMRP") to  
update MM AQ-1 as specified above. See Judgment, p. 3; Writ, p. 2.

23 On July 24, 2017, the District issued the RFEIR for a 45-day public comment period to end on  
24 September 7, 2017. Although the Writ had stated that the District "elected" to take the specific actions  
25 listed above, the RFEIR interpreted these instructions as the *only* mandate with which the District was  
26 required to comply. See RFEIR, pp. ii-iii.

27 On July 26, 2017, Petitioners submitted a Public Records Act ("PRA") request seeking all  
28 documents related to the Project from March 23, 2017 to the present. On August 15, 2017, Petitioners  
submitted a letter to the District requesting "immediate access to any and all documents referenced or  
relied upon" in the RFEIR pursuant to Public Res. Code section 21092, and requested an extension in

1 the public comment period on the RFEIR due to the need to review these reference documents.

2 On August 23, 2017, almost a month later, the District provided a partial set of documents  
3 responsive to these requests. The District's response omitted a number of critical documents, including  
4 documents cited in the RFEIR in support of the District's proposed 1:1 mitigation ratio. See Suppl. Tsai  
5 Decl., Exh. 7. On August 24, 2017, the District denied Petitioners' request for an extension of the  
6 public comment period on the RFEIR. *Id.* at Exh. 8.

7 On August 31, 2017, Petitioners advised the District that Petitioners still had not received access  
8 to all documents cited in the RFEIR, and again requested an extension in the public comment period.  
9 On September 5, 2017, two days before the close of the comment period, the District's counsel  
10 provided weblinks to the outstanding RFEIR reference documents, but did not respond to Petitioners'  
11 request for an extension in the public comment period. On September 7, Petitioners submitted  
12 comments to the District on the RFEIR. At approximately close of business on September 7, 2017, the  
13 deadline for public comments, the District posted a notice on its website that it was extending the  
14 comment period by an additional 10 days. Suppl. Tsai Decl. Exh. 9.

15 On October 27, 2017, the District released responses to comments on the RFEIR. As the  
16 District explains in its moving papers, the District received comments from over 100 members of the  
17 public. In addition to Petitioners and other environmental organizations, commenters included local  
18 governments such as the City of Pasadena, which provided detailed comments supporting the selection  
19 of a reduced size alternative, and documenting the City's ongoing concerns regarding the Project's  
20 excess NOx emissions and significant impacts on wildlife corridors and sensitive vegetation from the  
21 Project's massive sediment removal plan. See Respondent's Notice of Lodging, Vol. I, Ex. A,  
22 Revcirculated Portions of Final EIR Devil's Gate Reservoir Sediment Removal and Management  
23 Project ("RFEIR") pp. 3-30 to 3-36.

24 On November 7, 2017, the Board of Supervisors conducted a hearing on the RFEIR. Petitioners  
25 and others submitted comments prior to the hearing documenting the District's failure to adequately  
26 respond to comments on the RFEIR. At the hearing, the Board discussed the viability of a reduced-size  
27 alternative that would remove 1.7 mcy of sediment from behind Devil's Gate Dam, rather than the 2.4  
28 mcy that was analyzed in the RFEIR. The Board voted to adopt the reduced size Project alternative, and  
re-certified the RFEIR.

The next day, on November 8, 2017, the District filed and served the instant Motion with a  
hearing date of December 5, 2017.

The limitations period to file a CEQA petition to the District's re-certification of the RFEIR

1 does not expire until December 6, 2017, the day after the currently scheduled hearing date on the  
2 Motion.

### 3 **III. LEGAL STANDARD**

4 A court issuing a peremptory writ of mandate retains jurisdiction to determine the adequacy of  
5 the return and ensure full compliance with the writ. As the District concedes in its Motion, the Court  
6 retains jurisdiction "pursuant to Cal. Public Resources Code section 21168.9(b)..... until the court  
7 determines that the agency has complied with CEQA." Motion, p. 8, ll.23-24. The Court's continuing  
8 jurisdiction gives the Court broad authority to ensure that the agency prepares a legally adequate  
9 revised CEQA document and otherwise complies with all obligations under the writ. CCP s 1097;  
10 *County of Inyo v. County of Los Angeles* (1977) 71 Cal. App. 3d 185, 205. "It is well settled that the  
11 court which issues a writ of mandate retains continuing jurisdiction to make any order necessary to its  
12 enforcement." *City of Carmel-By-The-Sea v. Bd. of Supervisors* (1982) 137 Cal.App.3d 964, 971.

13 The Court in *City of Carmel-By-The-Sea* further explains that there are many ways in which a  
14 petitioner may challenge the validity of an agency's claim that it has complied with a court's writ of  
15 mandate:

16 Where, as here, the writ remands the matter to the administrative body with directions to  
17 proceed in a certain manner, and the return states that the court's mandate has been carried out,  
18 the petitioner may challenge the validity of that claim in one of several ways. Petitioner may  
19 proceed by a new petition under Code of Civil Procedure section 1094.5, or by supplemental  
20 petition (using the original action number). [Citations.] But the petitioner is not required to  
21 proceed by writ; if it or the court is not satisfied with the return, the court may, on its own  
22 motion or on that of the petitioner, either oral or written, order the respondent to reconsider  
23 further. *City of Carmel-By-The-Sea*, 137 Cal.App.3d at 971.

24 Where a new petition is filed challenging a CEQA document prepared in response to a writ, the  
25 new petition may be consolidated with ongoing proceedings in the original case. *Id.* The petition may  
26 also place newly developing issues before the court. Cal. Code of Civil Procedure § 464; *Ross v.*  
27 *McDougal* (1939) 31 Cal. App. 2d 114, 121.

### 28 **IV. ARGUMENT**

#### 29 **A. The District Misstates the Scope of Review of the Writ, Which Requires the District 30 to "Comply with CEQA in All Respects."**

31 In its Motion, as in the RFEIR, the District fails to acknowledge that the Writ required the  
32 District to "[e]nsure that the entire EIR has been completed in compliance with CEQA and the CEQA  
33 Guidelines prior to its recertification." Writ, p. 2. Instead, the District erroneously concludes that the  
34 only changes the District was required to make to the original FEIR in order to comply with CEQA  
35 were to edit the 12 pages of the FEIR that were identified in the Writ. See Motion, p. 9-10 ("The Writ



1 ordered the County to recirculate, for a 45-day public comment period, three very narrow portions of  
2 the Final EIR – specifically, ‘pages 83-85, 130-134, 690-694, and 707’... Beyond these minor edits,  
3 the Court found that the remainder of the original FEIR complied with CEQA and did not need to be  
4 recirculated.”).<sup>1</sup>

5 As Petitioners strenuously argued during the Court’s pre-judgment OSC hearings, the language  
6 in the Writ which directed the District to correct specific pages of the FEIR improperly supplanted the  
7 District’s decision-making power, and violated the statutory mandate that a court remanding a project  
8 to an agency cannot compel the manner in which the agency exercises its discretion. See Cal. Code of  
9 Civil Procedure § 1094.5(f) (“the *judgment shall not limit or control in any way* the discretion legally  
10 vested in the respondent”) (emphasis added); see *Clark v City of Hermosa Beach* (1996) 48 Cal. App.  
11 4th 1152, 1174; *Toyota of Visalia v. New Motor Vehicle Bd.* (1987) 188 Cal. App. 3d 872, 885; 14 Cal.  
12 Code of Regulations § 15090(a)(3) (EIR must reflect agency’s independent judgment and analysis). It  
13 is clear from the District’s limited response to the Writ that this is precisely what happened, and that the  
14 District believes that all it was required to do to comply with the Writ was to revise these pages of the  
15 FEIR. Although the RFEIR ultimately included edits on 55 pages, the scope of the revisions was  
16 restricted to the limited content identified in Items 1-4 of the Writ. The District’s approach failed to  
17 comply with CEQA.

18 As a result of the District’s limited interpretation of the Writ, the District failed to support its  
19 1:1 biological mitigation ratio with substantial evidence, failed to adequately respond to comments on  
20 the RFEIR, and ignored substantial evidence demonstrating that MM AQ-1, as revised, may not  
21 effectively mitigate the Project’s NOx emissions.

22 **B. The District Cannot Demonstrate Compliance With CEQA Because the RFEIR**  
23 **Fails to Support the District’s Reliance on a 1:1 Biological Mitigation Ratio With**  
24 **Substantial Evidence.**

25 The RFEIR fails to provide substantial evidence supporting its conclusion that a 1:1 mitigation  
26 ratio is adequate to reduce significant impacts from the Project’s removal of 62.5 acres of riparian  
27 habitat to less than significant levels. The CEQA Guidelines define substantial evidence as “enough  
28 relevant information and reasonable inferences from this information that a fair argument can be made

---

<sup>1</sup> In further support of its slim EIR revisions, the District cites to the Court’s 9/26/17 tentative ruling to argue that “the Court stated that to meet the directives of the Judgment and Writ, no new analysis would be necessary.” Motion, p. 10. However, the District fails to cite the Court’s retraction of that statement, which acknowledged that additional analysis may be required to support the EIR’s biological mitigation ratios. See 9/26/17 Transcript, p. 20:24 to 21:21 (“THE COURT: Okay. my tentative says they didn't have to do any analysis and the argument is unless there was substantial evidence in the previous EIR, then you do have to do analysis, and that's right....I think what they [Petitioners] are trying to say is that it's not as simple as changing a number and you had to present more evidence and do more analysis and that that has a value.”).

1 to support a conclusion, even though other conclusions might also be reached.” 14 Cal Code of  
2 Regulations § 15384(a). Substantial evidence may include “facts, reasonable assumptions predicated  
3 upon facts, and expert opinion supported by facts.” *Id.* The Guidelines clarify that “argument,  
4 speculation, unsubstantiated opinion or narrative, [and] evidence which is clearly erroneous or  
5 inaccurate...does not constitute substantial evidence.” *Id.*

6 The Project will destroy 62.5 acres of riparian habitat to create a permanent maintenance area  
7 flood control activities, including 1.1 acres of Riversidean Alluvial Fan Sage Scrub, 51.4 acres of  
8 riparian woodland, and 1.1 acres of Mule Fat Thickets. RFEIR at 130. The FEIR concluded that the  
9 Project would have significant impacts on biological resources, including sensitive plant and wildlife  
10 species and jurisdictional waters, and relied on mitigation measures MM BIO 6, 7, and 8, which  
11 required 1:1 mitigation, to reduce those impacts to less than significant levels. *Id.*; see Feb. 14, 2017  
12 Decision, p. 25. The Judgment found that the original FEIR lacked substantial evidence to support the  
13 FEIR’s conclusions that the measures would reduce impacts to less than significant levels. Judgment,  
14 p. 1.

15 The RFEIR continues to rely on the same conclusion and the same 1:1 mitigation ratio, and fails  
16 to couple the mitigation ratio with any other measures to compensate for lost habitat. See RFEIR at  
17 134. This approach is insufficient to constitute substantial evidence. *Panoche*, 217 Cal.App.4th at 528;  
18 see 2/14/17 Decision, p. 27.

19 **1. The RFEIR Fails to Include a Site-Specific Analysis of the Project’s**  
20 **Proposed Habitat Mitigation.**

21 The RFEIR explains that “[d]etermining the appropriate mitigation ratio for impacts to  
22 biological resources is based on numerous site-specific and project-specific factors.” See Respondent’s  
23 Notice of Lodging, Vol. II, Response to Comments (“RTC”), p. 3-4 – 3-13. However, the RFEIR fails  
24 to include a site-specific analysis of its proposed 1:1 mitigation ratio. Instead, the RFEIR cites to  
25 studies from 4 other projects that adopted 1:1 habitat mitigation ratios in different parts of California.  
26 The RFEIR claims that these projects establish “precedent” for the District’s reliance on 1:1 mitigation  
27 for the localized riparian habitats in this case. As Petitioners commented extensively, the RFEIR’s  
28 conclusion is unsupported by its own statements, and by the facts of the cited studies themselves.

**2. Ambrose Study**

The RFEIR first relies on a 2007 report drafted by Richard F. Ambrose, a Professor at the  
University of California, Los Angeles (“Ambrose Study”) to assert that Ambrose documented “the  
success of projects that were required to create, restore and/or enhance federally protected wetlands at a  
1:1 mitigation ratio.” RFEIR at 132C. However, the Ambrose Report concluded exactly the opposite,

1 explaining that:

- 2 • “Most often, the amount of mitigation required is not a simple one-acre mitigated for one-
- 3 acre lost ratio [citation omitted]. The additional acreage is intended to account for temporal
- 4 losses and incomplete replacement of function. Therefore, mitigation ratios of 2:1, 3:1, or
- 5 greater are sometimes required. Tsai Decl., Exh. 1 at ASFAUD 24616, 24649.
- 6 • “In most years, more acres were required for mitigation than were allowed to be impacted.”
- 7 *Id. at* ASFAUD 24675;
- 8 • “The large mitigation ratios required by the regulatory agencies have been successful in
- 9 achieving overall net gains in wetland acreage within California.” *Id. at* ASFAUD 24695 –
- 10 96; and
- 11 • Noting that agencies generally require mitigation ratios greater than 1:1 throughout
- 12 California for all types of Projects. *Id. at* ASFAUD 24704, 24752, 24765.

13 As expert biologist Scott Cashen explained in his comments on the RFEIR, “[c]ontrary to the

14 conclusions in the RFEIR, not only did the Ambrose study demonstrate that most projects were

15 required to provide a mitigation ratio greater than 1:1, but it also demonstrated that many projects were

16 required to provide a ratio substantially greater than 1:1.” Tsai Decl., Exh. 1 at ASFAUD 2283 – 2286,

17 24824 – 24828; 24927 – 24930.

18 The RFEIR itself also acknowledges that a mere 16% of projects studied in the Ambrose Study

19 imposed mitigation ratios of equal to or less than 1:1 and that barely more than half of those projects,

20 67%, successfully achieved their promised mitigation ratios. RFEIR at p. 130K. Thus, by the RFEIR’s

21 own admission, the Ambrose Study fails to support its conclusion that 1:1 mitigation is adequate in this

22 case.

### 23 **3. Quail Run Apartments.**

24 The RFEIR next relies on a mitigated negative declaration prepared for the Quail Run

25 Apartment Project in Riverside, California (over 57 miles away from the Project site) as an example of

26 a project requiring a 1:1 mitigation ratio for impacts to Riversidean Alluvial Fan Sage Scrub and

27 riparian habitats. RFEIR, p. 130C. In addition to being too far from the Project site to constitute a site-

28 specific analysis, the Quail Run Project mitigation ratio is not comparable to the Project because the

Quail Run Project was part of a greater habitat conservation plan, the Western Riverside County

Multiple Species Habitat Conservation Plan, which allowed 1:1 mitigation only in specified locations

within the overall conservation area upon a “demonstrat[ion] that the functions and values of the

replacement habitat would be ‘Biologically Equivalent or Superior’” to the lost habitat. See Tsai

Decl., Exh. 1, ASFAUD 2288 – 89. The RFEIR has made no such demonstration for its proposed 1:1

mitigation.

Moreover, as biologist Mr. Cashen explained, unlike the Project's proposed 1:1 mitigation ratio, the Western Riverside Conservation Plan that the Quail Run MND was incorporated into had undergone extensive regulatory scrutiny by USFWS and CDFW prior to its adoption. Tsai Decl., Exh. 1, ASFAUD 26782 ("habitat conservation plans are specific landscape level habitat conservation plans that have already been thoroughly vetted and approved by federal and state wildlife agencies, are subject to strict oversight and numerous binding conditions."). Unlike the Quail Run Project, the RFEIR's proposed 1:1 mitigation has not been approved by any wildlife agency. Indeed, CDFW required a higher mitigation ratio in its Streambed Alteration Agreement for the Project. Tsai Decl., Exh. 1, ASFAUD 26369, 26399. Thus, the fact that a Mitigated Negative Declaration for another project adopted a 1:1 mitigation ratio "does not make it precedent for a much larger sediment removal project in Los Angeles County, which is not covered by a [Habitat Conservation Plan]." See Tsai Decl., Cashen at p. 8.

#### **4. Rambla Pacifico Project.**

The RFEIR similarly relies on an EIR prepared for the Rambla Pacifico Project in Malibu (48 miles from the Project site) to support its 1:1 mitigation ratio for Coastal Sage Scrub. RFEIR, p. 130G. However, the RFEIR only provided evidence demonstrating that the Rambla Project's 1:1 mitigation was successful for 1 out of the Project's 5 years. See RFEIR Responses to Comments; Tsai Decl., Exh. 2, ASFAUD 26782. Moreover, the Rambla Pacifico Project required that habitat restoration occur prior to or concurrently with construction activities, in order to ensure that there would be no temporary loss of Scrub habitat, which could cause significant temporary biological impacts. The RFEIR contains no such requirement, thus further demonstrating the lack of substantial evidence to support the presumed efficacy of MM BIO 6-8.

#### **5. Cajon Creek Project.**

Finally, the RFEIR relies on the Vulcan Materials – Cajon Creek Project / Tonner Hills Planned Community Project (39 miles from the Project site) as an example of a successful restoration project for both Coastal Sage Scrub and Riverside Alluvial Fan Sage Scrub. Although it appears this project was successful in replanting these species at a 1:1 ratio, the RFEIR fails to support its reliance on the Cajon Creek Project with substantial evidence because RFEIR fails to include any evidence or discussion demonstrating that the that Arroyo Seco habitat at the Project site exhibits similar alluvial processes and substrates to those at Cajon, nor that those alluvial processes and substrates would persist after implementation of the Project – a necessary factor for the success of 1:1 mitigation. See Tsai Decl., Exh. 1, ASFAUD 2283 – 84. The RFEIR thus fails to provide an analytic route between the Cajon

1 Creek study and the RFEIR's conclusion that the Project would have the same success rate as Cajon  
2 Creek, in violation of *Topanga Ass'n for a Scenic Comty. v. County of Los Angeles* (1974) 11 Cal. 3d  
3 506, 51.

4 **C. The District Cannot Demonstrate Compliance With CEQA Because the RFEIR  
5 Fails to Adequately Respond to Comments.**

6 The District's responses to comments on the RFEIR failed to comply with CEQA. The CEQA  
7 Guidelines provide that an agency must evaluate and respond to timely comments on the draft EIR that  
8 raise significant environmental issues. Cal. Pub. Res. Code, § 21091(d); 14 Cal. Code Regs. § 15088.  
9 Responses must describe the disposition of the issues raised in the comments. *Id.* at subs. (d)(2)(B). If  
10 the agency rejects a recommendation or objection concerning a significant environmental issue, the  
11 response must explain the reasons why. 14 Cal. Code Regs. § 15088(c). "There must be good faith,  
12 reasoned analysis in response [to the comments received]. Conclusory statements unsupported by  
13 factual information will not suffice." *Laurel Heights Improvement Assn. v. Regents of University of  
14 California* (1993) 6 Cal.4th 1112, 1124 citing 14 Cal. Code Regs § 15088(b).

15 Petitioners filed extensive comments on the RFEIR, supported by the substantial evidence from  
16 biological expert Scott Cashen, demonstrating that the Project's proposed 1:1 mitigation ratio for  
17 biological impacts was inadequate and unsupported, and that a mitigation ration of 3:1 or 4:1 was  
18 required to guarantee the efficacy of MM BIO 6, 7, and 8. Tsai Decl., Cashen, pp. 3-15. The District's  
19 responses to these comments failed to provide a meaningful qualitative or quantitative response, merely  
20 mischaracterizing Mr. Cashen's comments as a "disagreement among experts." See Motion, p. 12.  
21 The responses failed to acknowledge or rectify the severe inadequacies in the RFEIR's own habitat  
22 mitigation analysis. This fails to comply with the District's obligations under CEQA section 21091(d)  
23 and Guidelines section 15088.

24 The District also failed to meaningfully respond to the City of Pasadena's comments, which  
25 restated the issues raised in the City's 2014 Devil's Gate Dam Sediment Working Group report. The  
26 report identified numerous significant Project impacts which the City continued to conclude would not  
27 be effectively mitigated by the RFEIR. See RFEIR, pp. 3-30 to 3-36. In particular, the City's  
28 Working Group had concluded that the Project's habitat removal would result in ongoing significant  
impacts to riparian habitat and wildlife corridors that would not be effectively mitigated by the  
District's proposed 1:1 mitigation ratio. The City of Pasadena recommended a 5:1 replacement ratio.  
RFEIR, p. 3-36. The City also recommended that the District reduce the quantity of sediment removal,  
as well as reduce the Project's footprint to prohibit excavation or riparian habitat in the Westside stream

channel on the Project site. RFEIR, p. 3-34. The RFEIR rejected the City's analysis as another disagreement among experts.

**D. The Board's Revisions to the Project at the November 7, 2017 Hearing Require Additional Recirculation.**

Recirculation is required when significant new information is added to the EIR after public notice is given of the availability of the draft EIR for public review but before certification. Pub. Res. Code § 21092.1; 14 Cal. Code Regs. § 15088.5 (a); *Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4<sup>th</sup> 1112, 1126.

At the November 7, 2017 Project hearing, the District's Board voted to reduce the Project's sediment removal from 2.4 mcy to 1.7 mcy. The Board relied on a new study prepared by the District's consultants that had not been included in either the RFEIR or the Board staff report. See Tsai Decl., Exh. \_\_. The study concluded that the removal of 1.7 mcy of sediment from behind the Dam would be adequate for flood protection. *Id.* However, the study did not address whether the Project's footprint could be modified to accommodate a lower rate of habitat removal.

The Board's actions significantly altered the Project description. It is possible that the reduced sediment removal may facilitate a reduction in Project footprint that could more effectively reduce the Project's significant biological resources impacts than the mitigation proposed in the RFEIR. Further revision and recirculation of the RFEIR is therefore necessary to analyze these and other potential mitigation measures that may further reduce the Project's significant impacts to less than significant levels. Pub. Res. Code §§ 21002.1(a), 21100(b)(3).

**E. The District Cannot Demonstrate Compliance With CEQA Because MM AQ-1 Still Fails to Reduce Significant Air Quality Emissions to Less Than Significant Levels.**

The FEIR concluded that the Project's 425 haul trucks per day would generate significant NOx emissions of 328 lbs/day, which vastly exceeds the SCAQMD's significance threshold of 100 lbs/day. The FEIR relied on the use of EPA 2007-compliant trucks to reduce NOx emissions to less than significant levels. The RFEIR revised MM AQ-1 to require the use of "Model Year 2010" trucks to ensure that all trucks meet EPA 2007 standards. However, the RFEIR failed to consider emissions studies which demonstrate that the use of Model Year 2010 trucks will result in lower NOx reductions – and consequently higher NOx emissions – than previously assumed by the original FEIR.

Petitioners' comments on the RFEIR attached a series of studies prepared for the South Coast Air Quality Management District ("SCAQMD"), the air district with jurisdiction over the Project, which analyzed real-time in-use data of NOx emissions from Model Year 2010 (and later) trucks. The

1 SCAQMD studies concluded that Model Year 2010 and later trucks emit NOx at levels that are 5 to 18  
2 times higher than the levels assumed in the original 2007 EPA certification standard. See Tsai Decl.,  
3 Exh. 1, ASFAUD 19. Petitioners also submitted comments from air quality experts at SWAPE which  
4 quantified the Project's NOx emissions from Model Year 2010 trucks using the emissions assumptions  
5 from the SCAQMD studies. SWAPE concluded that the Project would continue to have significant  
6 NOx emissions, even with the revisions to MM AQ-1. The District failed to address this evidence in its  
7 responses to comments.

8 An EIR must contain mitigation measures sufficient to minimize the significant adverse  
9 environmental impacts identified in the document. PRC §§ 21002.1(a), 21100(b)(3); *Kings County*  
10 *Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727 (public agency may not rely on  
11 mitigation measures of uncertain efficacy or feasibility). The District recertified the RFEIR despite  
12 being presented with substantial evidence that MM AQ-1 will not reduce NOx emissions to less than  
13 significant levels. This fails to comply with the Writ's mandate that the RFEIR "comply with CEQA in  
14 all respects" prior to recertification.

## 15 **V. CONCLUSION**

16 For the reasons stated herein, the Motion to Discharge Writ of Mandate should be denied.  
17 Alternatively, the hearing on the Motion should be continued until after the statute of limitations for  
18 filing a new CEQA action in response to the RFEIR has passed, in order to determine whether the  
19 hearing on the Motion should be consolidated with the hearing on any new petitions for writ of mandate  
20 filed within that period to challenge the ongoing inadequacies in EIR for the Project.

21 Dated: November 20, 2017

MITCHELL M. TSAI, ATTORNEY AT LAW

22 By:   
23 MITCHELL M. TSAI  
24  
25  
26  
27  
28

**PROOF OF SERVICE**

I, Mitchell M. Tsai., being duly sworn, deposes and says:

I am a citizen of the United States and work in Los Angeles County, California. I am over the age of eighteen years and am not a party to the within entitled action. My business address is: 155 South El Molino Avenue, Ste. 104, Pasadena, California 91101. I served this list of persons with the following document(s) on **November 20, 2017**:

**PETITIONERS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO DISCHARGE WRIT**

The document(s) was served on:

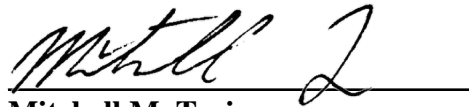
Michael S. Simon, Deputy County Counsel  
Lauren E. Dods, Senior Deputy County Counsel  
648 Kenneth Hahn Hall of Administration  
500 West Temple Street  
Los Angeles, California 90012-2713  
Email: msimon@counsel.lacounty.gov  
Email: ldods@counsel.lacounty.gov

Michelle Ouellette  
Best Best & Krieger  
3390 University Avenue, 5th Floor  
Riverside, California 92501  
Em: Michelle.Ouellette@bbklaw.com

✓ by electronic service, via either electronic transmission or notification consistent with California Code of Civil Procedure 1010.6.

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

Executed this **November 20, 2017** at Pasadena, California.

  
\_\_\_\_\_  
Mitchell M. Tsai