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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

FRIENDS OF THE KANGAROO RAT,

Plaintiff and Appellant,

v.

THE CALIFORNIA DEPARTMENT OF CORRECTIONS,

Defendant and Respondent.

F040956

(Super. Ct. No. 241965-RDR)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Roger D. Randall, Judge.

Erica Etelson, Ellen Berry, Tom Brush and Babak Naficy, attorneys for Plaintiff and Appellant.

Bill Lockyer, Attorney General, Louis R. Mauro, Senior Assistant Attorney General, Catherine M. Van Aken, Meg Halloran and Evelyn M. Matteucci, Deputy Attorneys General, for Defendant and Respondent.

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Appellant Friends of the Kangaroo Rat (hereinafter "Friends" or "appellant") challenges the legal sufficiency of a subsequent environmental impact report (SEIR) prepared and certified by the California Department of Corrections (CDC) for a prison construction project (the "Delano II" prison) in Kern County. Appellant's first court challenge to the SEIR was successful. The court found the cumulative impacts analysis of the SEIR to be deficient, and issued a writ of mandate ordering CDC to prepare and

circulate a so-called "revised cumulative impacts analysis" (RCIA). This RCIA then became part of the SEIR. Appellant again challenged the SEIR. Appellant contended that SEIR's cumulative impacts analysis (i.e., the RCIA) was still deficient, and that some new information contained in the RCIA required preparation of yet another SEIR. The court rejected appellant's second challenge and ruled in favor of CDC and of the adequacy of RCIA and the SEIR. On this appeal Friends contends that the final subsequent environmental impact report ("SEIR") was deficient for three reasons: (1) for procedural reasons which we shall explain later on in detail, CDC should have prepared yet another subsequent EIR further addressing the impacts of supplying water to the project; (2) the analysis of the proposed project's cumulative impacts on traffic was inadequate; and (3) the SEIR failed to adequately consider feasible mitigation measures that would reduce a significant cumulative impact caused by the conversion of important farmland to nonagricultural use. Friends refers to these three contentions, in shorthand fashion, as its "water issue," its "traffic issue," and its "farmland issue." CDC responds by contending that Friends' water issue has been waived by the failure of Friends (and of any commenter) to raise it administratively, and that appellant's traffic issue and farmland issue are without merit.

In this opinion, we will begin with a somewhat general and abbreviated statement of pertinent facts and procedural history of this case. We will then set forth our standard of review of the superior court's decision. Finally, we will address the "water issue" (in part "I" below), the "traffic issue" (part "II"), and the "farmland issue" (part "III"). We will set forth additional facts pertinent to each of these three issues in our discussions of each such issue. As we shall explain, we agree with CDC (and with the trial court) that appellant's "water issue" has been waived by a failure to exhaust administrative remedies, and that appellant's other two issues are without merit. We will affirm the judgment.

FACTS AND PROCEDURAL HISTORY

In 1995, CDC certified an environmental impact report (EIR), required under the California Environmental Quality Act (CEQA), (Pub. Resources Code, § 21000, et seq.)[1] prior to construction of the prison in Kern County. The EIR evaluated a facility to accommodate up to 4,180 inmates on a 400-acre site. The EIR was certified, but the project was not funded.

In 1999, the Governor signed urgency legislation authorizing construction of Delano II. (Stats. 1999, ch. 54, § 1.) Upon receiving this authorization, CDC, in accordance with CEQA Guidelines section 15162, began the exhaustive process of preparing a Subsequent EIR (SEIR) to address the potential environmental impacts of the proposed prison, which would accommodate 5,160 inmates on a 480-acre site adjacent to the western corporate limits of the City of Delano, and 0.5 miles from North Kern State Prison (NKSP).

On February 11, 2000, CDC distributed to public agencies and the general public a draft SEIR (DSEIR) for Delano II. A 45-day public review period was provided for the DSEIR in accordance with Guidelines section 15105. In addition, a public hearing was held during which oral comments on the DSEIR were received from five commenters.

On May 22, 2000, CDC published all written and oral comments on the DSEIR, and CDC's responses to them. The Responses to Comments, along with the DSEIR and Technical Appendices, Findings of Fact, Statement of Overriding Considerations, and Mitigation Monitoring Program, constituted the Final SEIR. The SEIR was certified and a Notice of Determination (NOD) was signed by the Director of CDC on June 7, 2000,

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[1] All further section references will be to the Public Resources Code unless otherwise indicated.

and filed with the State Clearinghouse on June 9, 2000. All of these steps were in meticulous compliance with CEQA's procedural requirements.

On July 10, 2000, three groups sued, challenging the approval and certification of the SEIR for Delano II. On October 23, 2000, CDC filed a motion to strike, asserting that petitioners Critical Resistance and the National Lawyers Guild Prison Law Project lacked standing to bring the CEQA action because their interest in the project had nothing to do with the environment. Rather, as the groups themselves stated, their true objective was to stop all prison construction on political grounds. The third petitioner was a group calling itself Friends of the Kangaroo Rat.

On November 15, 2000, the trial judge granted CDC's Motion to Strike, with leave to amend. On November 30, 2000, petitioners filed a First Amended Petition for Writ of Mandate, attempting to establish standing and again challenging CDC's certification of the SEIR.

On June 7, 2001, the trial court ruled that Critical Resistance and the Prison Law Project lacked standing to pursue the CEQA action. Neither organization appealed that determination. Moreover, the court upheld CDC's SEIR on all but one of the challenges raised in the amended petition. The court found that one portion of the SEIR, the cumulative impact analysis, was deficient because it did not adequately address the effect of past projects and existing projects, and because it failed to provide a summary of the expected environmental effects of the pending and proposed projects listed in the SEIR. The court ordered CDC to prepare a revised cumulative impacts analysis (RCIA). The court ruled that "[a]lthough the analysis need not be detailed, it must be accomplished in at least a cursory fashion."

CDC promptly complied. On August 15, 2001, in compliance with Guidelines section 15202(a), respondent sent out its RCIA for public review. The comprehensive 39-page RCIA, supported by a technical appendix, addressed in detail the expected environmental effects of past, present and proposed projects in the vicinity of Delano II.

The document includes an historical section back to 1850, and a detailed consideration of projects developed in the past 15 years.

Upon completion of the 45-day public comment process, CDC prepared a Response to Comments. On December 5, 2001, the Director of CDC, after reviewing and considering the RCIA, certified the Final SEIR. On December 13, 2001, the Director adopted Findings of Fact, a Statement of Overriding Considerations, a Mitigation Monitoring Program for the project, and approved construction of the prison conditioned upon numerous mitigation measures. The NOD was filed on December 13, 2001.

On December 21, 2001, respondent filed its Return to the Writ and a Motion for Discharge of the Writ. Friends opposed the discharge, and a hearing was held on January 28, 2002. On April 4, 2002, the trial court issued its ruling granting respondent's motion to discharge the peremptory writ. The court found that CDC had fully complied with the writ and all CEQA requirements. Friends now appeals from the court's April 2002 order discharging the writ.[2]

STANDARD OF REVIEW

We recently explained our standard of review of a superior court's judgment in a CEQA action in *Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1390-1391:

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[2] The court issued a judgment in June 2001 when it ordered the preparation of the revised cumulative impacts analysis. Although appellant's brief states that appellant is appealing from the judgment, the notice of appeal states that appellant is appealing from the April 2002 order discharging the writ, and appellant's arguments attack the April 2002 order discharging the writ. The appeal from the April 2002 order is thus authorized by Code of Civil Procedure section 904.1, subdivision (a)(2) as an appeal from a post-judgment order. "An appeal … may be taken …: (1) From a judgment … (2) From an order made after a judgment made appealable by paragraph (1)." (Code Civ. Proc., § 904.1, subd. (a).)

"In reviewing challenges to the certification of an EIR or approval of a CUP, the court must determine whether the lead agency abused its discretion by failing to proceed in a manner required by law or by making a determination or decision that is not supported by substantial evidence. (§ 21168.5; *Fairview Neighbors v. County of Ventura* (1999) 70 Cal.App.4th 238, 241-242 (*Fairview*).) 'Provided the EIR complies with CEQA, the [b]oard may approve the project even if it would create significant and unmitigable impacts on the environment.' (70 Cal.App.4th at p. 242.) 'The appellate court reviews the administrative record independently; the trial court's conclusions are not binding on it.' (*Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1375-1376.)

"When assessing the legal sufficiency of an EIR, the reviewing court focuses on adequacy, completeness and a good faith effort at full disclosure. (*County of Amador v. El Dorado County Water Agency* (1990) 76 Cal.App.4th 931, 954 (*Amador*).) 'The EIR must contain facts and analysis, not just the bare conclusions of the agency.' (*Santiago Water Dist. V. County of Orange* (1981) 118 Cal.App.3d 818, 831.) 'An EIR must include detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.' (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 405 (*Laurel Heights*).) Analysis of environmental effects need not be exhaustive, but will be judged in light of what was reasonably feasible. When experts in a subject area dispute the conclusions reached by other experts whose studies were used in drafting the EIR, the EIR need only summarize the main points of disagreement and explain the agency's reasons for accepting one set of judgments instead of another. (CEQA Guidelines, § 15151; Remy et al., Guide to the Cal. Environmental Quality Act (10th ed. 1999) p. 353 (Guide to CEQA).)

"A court's proper role in reviewing a challenged EIR is not to determine whether the EIR's ultimate conclusions are correct but only whether they are supported by substantial evidence in the record and whether the EIR is sufficient as an information document. (*Laurel Heights*, *supra*, 47 Cal.3d at p. 407.) 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.' (CEQA Guidelines, § 15384, subd. (a); *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 722 (*Raptor*).)

" … Noncompliance with CEQA's information disclosure requirements is not per se reversible; prejudice must be shown. (§ 21005, subd. (b).) This court has previously explained, '[a] prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process.' (*Kings County Farm Bureau v. City of Hanford* (1999) 221 Cal.App.3d 692, 712 (*Farm Bureau*); see also *Raptor*, *supra*, 27 Cal.App.4th at p. 722.) Numerous authorities have followed and applied this prejudice standard. (See, e.g., *Cadiz* [*Land Co. v. Rail Cycle* (2000) 83 Cal.App.4th 75], 95; *Fall River Wild Trout Foundation v. County of Shasta* (1999) 70 Cal.App.4th 482, 492; *Amador*, *supra*, 76 Cal.App.4th at p. 946; *Del Mar Terrace Conservancy, Inc. v. City Council* (1992) 10 Cal.App.4th 712, 730.)"

I.

THE "WATER ISSUE"

Appellant's superior court water issue was appellant's contention that yet another subsequent EIR was required because the RCIA contained new information about the project's water supply. Appellant also argued that the RCIA's conclusion that the proposed project "will be cumulatively beneficial to groundwater supply" was unsound and was not supported by substantial evidence. The superior court did not address these two arguments on their merits The court instead concluded that appellant could not raise these arguments in court because no one had raised them at the administrative level. The court ruled: "Under the circumstances the Court finds that [Friends] failed to exhaust its administrative remedies with regard to the issue it now seeks to raise concerning the use of water at the site." On this appeal, Friends has attempted to chop its water issue up into seven sub-arguments. In essence these seven sub-arguments appear to be a combination of (1) the same arguments made in the superior court, plus (2) arguments as to why appellant contends the exhaustion of administrative remedies doctrine should not apply to appellant. We will first set forth some facts pertinent to appellant's water issue. We will then explain why the superior court's ruling was correct. Finally, we will address each of appellant's seven separate contentions of error.

A. Facts

Appellant's water issue involves the following pertinent procedural facts. Appellant's superior court action challenging the certification of the CDC's original subsequent EIR made five contentions of error. These were that the subsequent EIR was legally inadequate because it: (1) failed to adequately describe the project; (2) failed to consider a reasonable range of feasible alternatives to the project; (3) contained an inadequate analysis of the cumulative impacts of the project; (4) failed to propose adequate measures to mitigate the significant impacts of the project on wastewater treatment, farmland, the San Joaquin Kit Fox and the Tipton Kangaroo Rat; and (5) failed to propose adequate measures to mitigate the significant impact of the project on local schools. The superior court rejected all of appellant's arguments except appellant's contention that the subsequent EIR's cumulative impacts analysis was inadequate. The court issued a peremptory writ of mandate ordering CDC to "prepare an adequate cumulative impact analysis which shall address not only proposed projects in the vicinity of the Delano II facility, but also past projects and current existing projects which may affect the significance of the impacts of Delano II on the environment, in compliance with CEQA guidelines §15130." The court further ordered that "[s]aid cumulative impact analysis shall be submitted for review and comment by the public and public agencies, recirculated and certified in accordance with the California Environmental Quality Act ('CEQA') …."

CDC then prepared it's revised cumulative impacts analysis (RCIA). CDC circulated this 47-page document for a public comment process, responded to the comments made, and then certified the SEIR, with the RCIA, in accordance with the court's order. CDC then moved to discharge the writ. Appellant's unsuccessful opposition to the motion raised three of the arguments appellant now makes on this appeal, plus a fourth argument not pursued by appellant on this appeal (i.e., that the revised cumulative impacts analysis did not adequately address the cumulative impacts

on sensitive species). The superior court granted CDC's motion and discharged the writ. The court found that the water issue could not be raised for the first time by appellant in appellant's opposition to CDC's motion to discharge. This was because the water issue had not been raised at all at the administrative level. The court rejected appellant's other arguments on their merits.

Appellant's water issue focuses on two pages of the 47-page revised cumulative impacts analysis. There, the RCIA makes what is in essence a correction of some information contained in the original subsequent EIR. The RCIA points out that although the earlier subsequent EIR asserted that the agriculture on the project site used groundwater as its water supply, the agricultural water supply was in fact surface water delivered by the Southern San Joaquin Municipal Utility District (SSJMUD). The pertinent six paragraphs of the RCIA read as follows:

> "This discussion of cumulative effects of the proposed project on groundwater is based on new information obtained since the May 2000 certification of the SEIR on the proposed project. It presents corrections to the assumptions used previously in the SEIR analysis, and provides updated estimates of changes in groundwater use that would occur under project implementation. Although this information differs from that presented in SEIR Volume I, it shows a benefit to groundwater levels, the same conclusion as in the SEIR Volume I, and therefore does not alter the conclusion that the project would have no significant adverse impact on groundwater supply.
>
> "In April 2001, following the May 2000 certification of the SEIR on the proposed project, Southern San Joaquin Municipal Utility District (SSJMUD) contacted CDC regarding their concerns about water supply for the project site. Based on information provided by SSJMUD, CDC has determined that the assumptions used in the water supply analysis in Section 4.7 of SEIR Volume I were incorrect. Specifically, Volume I of the SEIR indicated that the source of all water for the recent agricultural uses on the project site was groundwater developed on site from existing wells. However, the information provided by SSJMUD indicates that the agricultural water supply has consisted primarily of surface water delivered by SSJMUD, with a smaller amount of groundwater used to supplement the surface water deliveries when needed. An updated analysis of potential

project effects on groundwater use has been performed for CDC by Boyle Engineering based on the updated information from SSJMUD, previous landowners or water users, and previous studies. The following information is summarized from that analysis, which is included as SEIR Appendix I and is attached hereto.

"As shown in Appendix I, groundwater pumping to supply the water needs of the proposed project would be greater than under current agricultural use of the site. Based on 5 years of data and estimates using cropping patterns and other records, it is calculated that the average annual water supply used on the project site under the recent agricultural uses consists of 1,808 acre-feet of surface water and approximately 380 acre-feet of groundwater, for a total water use of 2,188 acre-feet per year (AFY). It is estimated that the annual water use of the prison would be 1,011 acre-feet, which would be supplied completely from groundwater. Thus, the project would pump 631 AFY more than current onsite agricultural uses (1,011-380 AFY).

"However, there are other considerations, and they are significant and beneficial to groundwater. The new change in groundwater under proposed project operations will be positive. This is because the average of 1,808 AFY of surface water used on the site under agricultural operations (and forgone under proposed project operations) would be allocated to other lands serviced by the SSJMUD, reducing their reliance on groundwater by 1,808 AFY. Therefore, the net change in regional groundwater use with proposed project operations is estimated to be the difference between –631 AFY and +1,808 AFY, or approximately +1,177 AFY. As shown in Table 2 of Appendix I, percolation under both agricultural and proposed project operations would also add water back into the groundwater table. Under agricultural land uses, the percolation amount is estimated to be 503 AFY, and under proposed project operations, it is projected to be a total of 254 AFY, or 249 AFY less. The estimated net change in groundwater levels attributable to the proposed project is therefore 928 AFY less. The estimated net change in groundwater levels attributable to the proposed project is therefore 928 AFY (1,177-249). This is a beneficial effect. This total does not include the approximately 600 acre-feet of treated wastewater that will be delivered for irrigation use to agricultural lands adjacent to the proposed project site, which can also be expected to eliminate an equivalent amount of groundwater pumping on the sites that receive the treated wastewater.

"In addition, groundwater pumping under the proposed project is expected to have a negligible effect on groundwater levels in the nearest

wells (approximately a 1-foot variation in groundwater level), which are 3,500-4,000 feet from the project site (Swanson pers. Comm., 2001).

"*The proposed project will be cumulatively beneficial to groundwater supply*."

Appellant argued to the superior court that this "new information" required preparation of a new supplemental EIR. It is not clear what information a new supplemental EIR would contain, other than what is already in the RCIA that has been circulated and certified. Appellant also argued that the RCIA's conclusion ("[t]he proposed project will be cumulatively beneficial to groundwater supply") was not supported by substantial evidence. The superior court ruled that appellant could not raise these arguments because they were never raised by anyone at the administrative level.

B. <u>The Superior Court's Ruling Was Correct</u>

The trial court was correct. Section 21177, subdivision (a) states: "No action or proceeding may be brought pursuant to Section 21167 unless the alleged grounds for noncompliance with this division were presented to the public agency orally or in writing by any person during the public comment period provided by this division or prior to the close of the public hearing on the project before the issuance of the notice of determination." See also Guidelines, section 15230 ("Litigation under CEQA must be handled under the time limits and criteria described in Sections 21167 et seq. of the Public Resources Code …"). "It is axiomatic that judicial review is precluded unless the issue was first presented at the administrative level. [Citations.] Although it is true the plaintiff need not have *personally* raised the issue [citation], the exact issue raised in the lawsuit must have been presented to the administrative agency so that it will have had an opportunity to act and render the litigation unnecessary. [Citation.]" (*Resource Defense Fund v. Local Agency Formation Com*. (1987) 191 Cal.App.3d 886, 894.) "The purpose of the rule of exhaustion of administrative remedies is to provide an administrative agency with the opportunity to decide matters in its area of expertise prior to judicial review. [Citation.] The decisionmaking body '"is entitled to learn the contentions of

interested parties before litigation is instituted. If [plaintiffs] have previously sought administrative relief … the Board will have had its opportunity to act and to render litigation unnecessary, if it had chosen to do so." [Citation.]'" (*Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 384.)

During the public comment period for the revised cumulative impacts analysis, CDC received an 11-page letter signed by a Kevin Bundy "[o]n behalf of, and with authorization from: Friends of the Kangaroo Rat." CDC also received a three-page letter from FKR's counsel, Babak Naficy. These letters contained several criticisms of the RCIA, but neither of the letters mentioned any water issue at all.

The Bundy letter argued that the Delano II prison project was simply "unnecessary" because state prison capacity already exceeded inmate population by 5,381, the prison population "will shrink in the coming years," and "creating additional capacity in an already gargantuan penal system would be beyond superfluous." The Bundy letter also argued that "[t]here are no social, economic, or other considerations that justify moving ahead with a project that will increase development, exacerbate air pollution, destroy endangered species habitat, and convert additional agricultural land to more intensive uses." It also made other arguments, including an argument that the supplemental EIR (and presumably the RCIA also) should be "translated into Spanish and … an additional public comment period thereafter be provided," and an argument that the RCIA was inadequate because it "fails to consider any in detail projects that are greater than 15 years old."

The Naficy letter argued that the CDC failed to "analyze potential alternatives that might reduce or eliminate" loss of farmland, impacts on air quality and traffic noise, and overcrowding of local schools. The Naficy letter also argued that the RCIA failed to adequately address potential measures to mitigate the effect of loss of agricultural land, failed to adequately address the cumulative impacts on the San Joaquin kit fox and the Tipton kangaroo rat, and failed to consider the cumulative impacts from odor. The sound

of the silence of these letters on any issue of water supply is, in the context of this appeal, so loud as to be deafening.

Appellant is correct that so long as anyone raises a particular issue at the administrative level, any party who objects to an EIR at the administrative level and who later challenges the EIR in court may raise that issue in the court action. In simpler terms, appellant was entitled to raise the water issue in the superior court so long as someone (not necessarily appellant) raised it at the administrative level. (§ 21177.) "[A] party can litigate issues that were timely raised by others, but only if that party objected to the project approval on any ground during the public comment period or prior to the close of the public hearing on the project." (*Federation of Hillside & Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1263; in accord, see also *Galante Vineyards v. Monterey Peninsula Water Management Dist*. (1997) 60 Cal.App.4th 1109, 1119; *Resource Defense Fund v. Local Agency Formation Com*., *supra*, 191 Cal.App.3d at p. 894; 2 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2003) § 23.95, p. 1014.) Appellant relies on two documents which appellant says have preserved its water issue. One is an April 10, 2001 letter from William Carlisle, the General Manager of the SSJMUD. The other is a September 28, 2001 letter to the CDC from a Mr. Craig Gilmore of Oakland. As we shall explain, neither of these two letters suffices to preserve appellant's current contention that yet another subsequent EIR addressing water supply issues was required.

The Carlisle letter stated in pertinent part as follows:

> "Your project causes us great concern that has yet to be addressed. First, we are always concerned when productive farmland is taken out of production. Farming is the base industry and largest employer for the communities we serve. We view another prison, the fourth in the area, as a loss of jobs for the average citizen in Delano and McFarland and a loss of way of life for many people.
>
> "Second, the District's operations are totally funded by the collection of a standby charge assessed to each acre within the District.

> The loss of 640 acres for a prison site reduces the District's fixed income by $27,942.40 annually. That same amount would normally be spread over the remaining acreage, however, Proposition 218 prevents us from increasing the standby charge without an election.
>
> "Third, we are concerned about loss of water revenue and increase demand on groundwater. The District will cease delivery to the 640-acre prison site. On a normal year, nearly 1,920-acre feet of surface water will not be delivered. Instead, 100% groundwater will be pumped for a 5,000 inmate facility. This in itself impacts the District, however, I understand you also plan to provide the prison's treated water to farmers who own land adjacent to the proposed prison site. The negative 'sphere of influence' of the prison site goes beyond the 640 acres and endangers both farming in the area of the prison as well as the District's ability to retain its current water allocation and financial stability.
>
> "In our opinion, the State of California must mitigate these impacts on the District and its landowners. However, the District was not included in whatever process the State conducted on the site and was not given a chance to bring these issues forward.
>
> "We request the State address the losses the District will suffer when the land goes out of production and how we are to compete when the State gives water away free to surrounding farms."

This letter fails to preserve appellant's water issue for several reasons. First, it is not part of the administrative record. "'The appellate court reviews the administrative record independently ….'" (*Association of Irritated Residents v. County of Madera*, *supra*, 107 Cal.App.4th at p. 1390; *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1375-1376.) Appellant has included the letter as part of appellant's Appendix on appeal, but it is not part of the actual administrative record, which was submitted to us by respondent. Second, there is no indication that the letter was ever sent to CDC at any time. It is addressed to a Mr. Geoff Marmas at a Sacramento address that differs from the addresses used in comment letters to the CDC. Third, it is simply not a comment on the revised cumulative impacts analysis. The RCIA was not circulated for public review until August 25, 2001. The Carlisle letter is dated April 10, 2001. Fourth, the letter does not appear to have anything to do with any environmental impact report. It does not

mention any EIR, any subsequent EIR, any RCIA, or any other environmental document. It simply points out that when the prison is built and uses groundwater instead of the 1,920 acre-feet per year of SSJMUD water, this "impacts the District" because the District "will cease delivery to the 640-acre prison site" and thus the District will suffer a "loss of water revenue." Fifth, even if this Carlisle letter were part of the administrative record, the "impact" the District wanted "addressed" was apparently its own loss of revenue, not any effect on the environment. An EIR is required to address "significant effects on the environment." (§ 21100, subd. (b)(1).) "Economic or social effects of a project shall not be treated as significant effects on the environment." (Guidelines, § 15131(a).) This is because an effect on the environment is an effect on a physical condition. "'Environment'" means the physical conditions which exist within the area which will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance." (§ 21060.5.)

The September 28, 2001 Craig Gilmore letter to the CDC is a comment on the RCIA, but that letter again asks the CDC to analyze the "fiscal impacts of their water plans." The Gilmore letter addressed several topics, but the portion on which appellant relies states:

> "WATER RESOURCES
>
> > "The RCIA's conclusion that the project will be cumulatively beneficial to local groundwater supply is based on 'new information' (5-33) obtained after the preparation of the SEIR. That information, as summarized the Water Resources Analysis Technical Memorandum, is inadequate. The RCIA and DEIS state that the proposed prison will supply all water needs from new pumps on site, substantially increasing the amount of groundwater extraction from current levels. The agriculturalists currently using the site have been recharging the groundwater with supplies purchased from South San Joaquin Municipal Utilities District. The prison will use no SSJMUD water, so the REIS claims that the water supplied to the agriculturalists who have been using the site by the can be 'reallocated' to other lands. That 'reallocation' would, the RCIA claims, recharge local

groundwater, more than making up for the additional groundwater to be pumped by the proposed prison.

"But when the Technical Memorandum states that 'the potential fiscal impact to SSJMUD and its landowners is not part of this analysis' (no page number in REIS), it avoids a crucial part of the analysis. The allocation of water by SSJMUD is limited by that agenc[y's] funds and the funds available to the participating water users. By not buying water from SSJMUD, Delano II would reduce that agency's income. In order to 'reallocate' water currently being used on site to other 'eligible lands' someone will have to pay for the water. By ignoring the fiscal impacts of their water plans on SSJMUD and its landowners, the CDC has in fact not provided convincing evidence that the project would have beneficial cumulative impacts. Conversation with SSJMUD suggest that the CDC's plan could result in higher water costs for other SSJMUD water users. If higher water costs might be anticipated, the RCIA must determine whether higher water costs might cause more agricultural losses, bankruptcies, further consolidation of small farms into larger operations, whether the lack of affordable water might keep other developments from locating in Delano.

"By ignoring the fiscal impacts of their water plans, the RCIA cannot provide an adequate cumulative impact analysis."

The CDC responded to the Gilmore letter by correctly pointing out that economic or social effects of a project shall not be treated as significant effects on the environment. (Guidelines, § 15131(a).) The CDC's response also pointed out that even though an EIR need not address economic or social effects of a project, the CDC also disagreed with Gilmore's fiscal impacts analysis. The CDC's response stated in pertinent part:

"The commenter contends that the information provided on water supply in the RCIA is inadequate, and objects to the assumption that Southern San Joaquin Municipal Utility District (SSJMUD) water would be reallocated to other lands because such reallocation would require purchase of the water by other water users. The commenter contends that higher costs for SSJMUD water may result and that the RCIA must analyze the fiscal impacts of higher water costs for users, such as agricultural losses, bankruptcies, and consolidation of small farms into larger operations.

"The State CEQA Guidelines § 15131(a) and § 15382 direct that social and economic changes are not to be treated as significant effects on the environment. Although social and economic changes may be discussed

in relation to physical changes, '[t]he focus of the analysis shall be on the physical changes' (§ 15131[a]). For this reason and also because evaluation of the type of effects listed by the commenter would require a high degree of speculation about chains of cause and effect, such an evaluation is not required and has not been performed.

"Further, the argument lacks merit. During the same period that SSJMUD delivered an estimated 1,800 acre-feet per year (AFY) to the site, it delivered a total 122,000 AFY to farmers throughout the district. Reallocation of (or even loss of revenues from) 1,800 AFY – less than 2% of the total – cannot be argued to have the claimed drastic economic impacts. This is especially true when considering that surface water from SSJMUD is generally cheaper and higher quality than local groundwater, and is therefore more desirable to use than groundwater. In other words, the only reasonable conclusion is that this small amount of water will be consumed in this water-short region.

"Please note that the preparer of the Water Supply Analysis Technical Memorandum that is the basis of the RCIA discussion of cumulative impacts on water supply (presented as SEIR Appendix I in the RCIA) is an engineer with extensive experience in agricultural water issues, such as irrigation water supply and management, groundwater management, and other water resource issues pertaining to the San Joaquin Valley. The assumptions made in the technical memorandum about the likelihood of reallocation of available surface water supply are based on the various sources of information summarized in the introduction to the technical memorandum and on 20 years of professional experience in San Joaquin Valley water resource issues, and therefore represent reasonable assumptions on which to base conclusions."

With this backdrop, we turn to what appellant now describes as its water issue. In fact, appellant's water issue is a series of seven contentions which are all related in some way to CDC's correction, in the RCIA, of some incorrect information contained in the original subsequent EIR.

C. <u>Appellant's Seven "Water Issue" Arguments</u>

(1) First, appellant argues that "appellant was not legally required to exhaust its administrative remedies with respect to the water supply issue because CDC failed to provide adequate notice." This argument appears to assume that appellant raised some "notice" issue in the superior court, and that the court failed or refused to reach the notice

issue because appellant failed to raise it administratively. We do not so read the record. When CDC moved to discharge the writ, appellant opposed the motion by arguing that the CDC was required to prepare yet a second subsequent EIR. There was not one word of argument in appellant's 19-page written opposition contending that there was any flaw in the CDC's notice of anything. At the January 28, 2002, hearing on CDC's motion to discharge the writ, appellant's counsel requested leave to file supplemental briefing. The court denied this request. Appellant's counsel then did make a vague, conclusory verbal argument that "there was no adequate notice" (of what, we are not sure), but this verbal argument contained no explanation whatsoever of what CEQA statute may have been violated or how such a statute may have been violated. Appellant did point out that the exhaustion of administrative remedies doctrine does not apply "if the public agency failed to give the notice required by law." (§ 21177, subd. (e).) Appellant is correct about this. But what was missing from appellant's argument was any explanation of what "notice required by law" appellant "failed to give." Appellant pointed out no statute or Guideline that was violated. Now, on appeal, appellant argues that "[a]lthough the notice issue was raised by Appellant at the hearing on the Motion for Discharge of Writ …, the court below ignored this issue altogether." It is true that the superior court's written ruling did not expressly or explicitly address any "notice issue." But given that appellant did not make any contention as to what statute or Guideline CDC may have violated regarding notice, there is nothing the superior court could have said other than that appellant did not even attempt to demonstrate any violation of any statute or Guideline pertaining to notice. Under this state of affairs, we cannot conclude that the superior court erred.

(2) Second, appellant argues that "[t]he RCIA failed as a CEQA document because it failed to include correspondence from the Southern San Joaquin Municipal Utility District on the water issue." The "correspondence" appellant refers to is an April 10, 2001, letter from the SSJMUD to someone named Mr. Geoff Marmas at an address in Sacramento. Appellant's argument fails for several reasons. First, it was never raised in

the administrative review process by anyone. Therefore it cannot be raised in court. (§ 21177; *Resource Defense Fund v. Local Agency Formation Com*., *supra*, 191 Cal.App.3d at p. 894; *Napa Citizens for Honest Government v. Napa County Bd. of Supervisors, supra*, 91 Cal.App.4th at p. 384.) Second, even if the argument could have been raised in the superior court, it was not. The superior court did not err in not considering an argument that was never presented to it. (*Doers v. Golden Gate Bridge etc. Dist*. (1979) 23 Cal.3d 180, 184-185, fn. 1.) For these reasons alone, appellant's argument fails. Furthermore, appellant itself had every opportunity to make the letter a part of the administrative record by submitting a copy of it to the CDC during the 45-day public comment period for the RCIA. Appellant apparently chose not to do so, even though the RCIA itself expressly states at page "5-33" that the SSJMUD provided corrected information to CDC in April of 2001, and explains the correction. And appellant provides no authority for its argument that CDC was required to include the SSJMUD April 10, 2001 letter in the RCIA even though that letter was never submitted to the CDC during the public comment period for the RCIA. (See Guidelines, §15132: "The final EIR shall consist of: [¶] (a) the Draft EIR or a revision of the draft. [¶] (b) Comments and recommendations received on the Draft EIR either verbatim or in summary….")

(3) Third, appellant argues that "[t]he comments on the RCIA submitted by Craig Gilmore exhausted Appellant's administrative remedies on the water issue." We have previously quoted the substantive portion of the September 28, 2001 Craig Gilmore letter commenting on the RCIA. The Gilmore letter made no contention that there was any notice problem with the RCIA. Nor did it make any contention that CEQA required the preparation of a second subsequent EIR addressing water issues. Rather, it argued that the RCIA was deficient because it did not address "'fiscal impacts … on SSJMUD and its landowners.'" This is the issue which the Gilmore letter raised administratively and thus preserved for court review. It was not raised in court, either in the trial court or on this

appeal. This is apparently because appellant realizes that an EIR is required to address a project's "significant effects on the environment" (§ 21100, subd. (b)(1)), but not "fiscal effects" of a project. "Economic or social effects of a project shall not be treated as significant effects on the environment." (Guidelines, §15131(a).) An effect on the environment is an effect on a physical condition. "'Environment' means the physical conditions which exist within the area which will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance." (§ 21060.5.)

(4) Fourth, appellant argues that "CDC was required to prepare a [second] subsequent EIR despite the fact that the 'new' information could have been known before the certification of the SEIR because that document is fundamentally deceptive and misleading." This is the argument appellant raised in the superior court, and is the argument the superior court ruled was waived because it had not been raised administratively. The trial court was correct. (§ 21177, subd. (a); *Resource Defense Fund v. Local Agency Formation Com*., *supra*, 191 Cal.App.3d at p. 894; *Napa Citizens for Honest Government v. Napa County Bd. of Supervisors*, *supra*, 91 Cal.App.4th at p. 384.)

(5) Fifth, appellant contends that "CDC expert's opinion does not constitute substantial evidence in support of CDC's conclusion that the impact on water resources is not more severe than predicted by the subsequent EIR." This again is the same argument the trial court correctly ruled was waived because it had not been raised administratively. (§ 21177, subd. (a); *Resource Defense Fund v. Local Agency Formation Com*., *supra*, 191 Cal.App.3d 886; *Napa Citizens for Honest Government v. Napa County Bd. of Supervisors*, *supra*, 91 Cal.App.4th 342.) Appellant argued to the superior court that a second subsequent EIR had to be prepared because various assumptions relied on by the CDC expert were not supported by substantial evidence in the record. Neither appellant nor anyone else had raised this issue before the RCIA was certified.

(6) Appellant's sixth argument is yet another attempt to rephrase its fourth and fifth arguments. Appellant contends that "[b]ecause the SEIR relied on false and misleading information regarding water, the document is inadequate as a matter of law, requiring CDC to prepare a new SEIR using the correct information." Again, the failure of anyone to contend administratively that a second subsequent EIR was required constituted a failure to exhaust administrative remedies and a waiver of the issue never presented to the administrative body. (§ 21177, subd. (a); Resource *Defense Fund v. Local Agency Formation Com*., *supra*, 191 Cal.App.3d 886; *Napa Citizens for Honest Government v. Napa County Bd. of Supervisors*, *supra*, 91 Cal.App.4th 342.)

(7) Seventh, appellant argues that "the Court erred when it refused to consider a letter from the Southern San Joaquin Municipal Utility District submitted to the court prior to the hearing on CDC's Motion to Discharge the Writ." The Southern San Joaquin Municipal Utility District sent a letter dated January 21, 2002, directly to the superior court judge (the Honorable Roger D. Randall) who was to conduct the January 28, 2002, hearing on CDC's motion to discharge the writ. The letter was signed by SSJMUD's general manager, William Carlisle. At the outset of the January 28, 2002 hearing, Judge Randall announced that he had "received an ex parte communication from the director of SSJMUD, which I sent out to you folks but I have not read." Appellant now argues that "it would have been appropriate for the trial court to review" the SSJMUD letter. Appellant's argument fails for several reasons. First, appellant cites no authority for the proposition that the superior court was required to consider a document that was not part of the administrative record and not before the administrative body. The superior court's task was to review the CDC's administrative action. The superior court was not required to admit extra-record evidence where, as here, the agency was required by law to accept evidence from interested parties before making its decision. (*Friends of Old Trees v. Department of Forestry & Fire Protection* (1997) 52 Cal.App.4th 1383, 1391.) This is so even if the agency permits only "purely documentary" proceedings, as opposed to a

hearing with oral testimony, before the agency makes its decision. (*Id*. at p. 1391.) Second, even though appellant now argues on appeal that the superior court should have taken judicial notice of the document, appellant never asked the superior court to take judicial notice of it. The court could thus not have erred in not doing so. (*Doers v. Golden Gate Bridge Etc. Dist*., *supra*, 23 Cal.3d at pp. 184-185, fn. 1.) Third, even if the superior court had somehow erred in refusing to consider the January 28, 2002 document, appellant fails to explain how any such error could have been prejudicial to appellant. The document was offered in support of appellant's argument that a second subsequent EIR was required because the conclusion in the RCIA that the proposed project would be cumulatively beneficial to groundwater supply was not supported by substantial evidence. As we have already discussed, the superior court's ruling that this issue was waived because it had not been raised administratively was correct. Extra-record evidence or information in support of an issue that had been waived could not have been helpful to appellant. (Evid. Code, § 354.) In sum, all seven of appellant's "water issue" arguments fail to demonstrate the existence of any reversible error.

II.

THE "TRAFFIC ISSUE"

A. Facts

Appellant's court challenge to the SEIR made the argument that the cumulative impacts analysis in the SEIR did not comply with section 15130, subdivision (b)(1)(A) of the CEQA Guidelines because the SEIR did not include a "list of past, present, and probable future projects producing related or cumulative impacts, including, if necessary, those projects outside the control of the agency." (*Ibid*.) Notably, appellant's challenge to the cumulative impacts analysis in the SEIR did not focus on traffic. It simply argued that CDC had not complied with section 15130, subdivision (b)(1)(A) of the Guidelines. The superior court agreed. It ruled that "with regard to the pending and proposed projects

listed in the SEIR, there was a failure to provide a summary of the expected environmental effects to be produced by those projects." It also ruled that "neither the EIR, as incorporated in the SEIR, nor the SEIR itself complies with the mandate that the analysis include the effect of past projects and other current projects." The court directed the CDC to: "prepare an adequate cumulative impacts analysis which shall address not only proposed projects in the vicinity of the Delano II facility, but also past projects and currently existing projects which may affect the significance of the impact of Delano II on the environment, in compliance with CEQA guidelines § 15130. Said cumulative impact analysis shall be submitted for review and comment by the public and public agencies, recirculated and certified in accordance with the California Environmental Quality Act ('CEQA') …."

CDC then did prepare and circulate its revised cumulative impacts analysis (RCIA). We note that the cumulative impacts analysis of the original SEIR was nine pages long, exclusive of attachments and responses to comments. The revised cumulative impacts analysis, prepared to comply with the court's above-quoted order, was 47 pages long, exclusive of attachments and responses to comments. We also note that appellant's two comment letters (dated October 1, 2001, and September 28, 2001, respectively) on the RCIA mentioned various topics but contained no mention whatsoever of traffic. One letter argued in part that the RCIA was deficient in its treatment of cumulative impacts from "odor." The other argued in part that the RCIA was deficient because it "fails to consider in any detail projects that are greater than 15 years old."

When CDC moved to discharge the superior court's writ and argued that CDC had complied with the superior court's order directing CDC to prepare a revised cumulative impacts analysis which complied with section 15130 of the Guidelines, appellant opposed the CDC motion by arguing, in part, that the RCIA failed to adequately analyze the project's cumulative impacts on traffic. Although the RCIA contained an analysis of the

cumulative impacts of 17 past, present and future projects in the area of this prison project, appellant argued that "a 20-year traffic study is needed for this project." The superior court rejected the CDC's argument that appellant had waived this issue by not raising it administratively. The court correctly observed that the Department of Transportation had submitted a comment letter urging the preparation of a 20-year traffic study, and that this was sufficient to preserve this issue for a court challenge by appellant. The court rejected appellant's argument on its merits, however. Its ruling stated in part: "After review of the traffic analysis in the RCIA, as well as re-review of the analysis contained in the SEIR, the Court finds there was ample consideration given to the cumulative impacts of traffic …."

B. The RCIA and SEIR Adequately Addressed Cumulative Traffic Impacts

We agree with the trial court that the cumulative impacts analysis was adequate. Section 21083 authorizes the Office of Planning and Research to prepare and develop proposed guidelines for the implementation of CEQA by public agencies. The proposed guidelines are then certified and adopted by the Secretary of the Resources Agency. (§ 21083, subd. (e).) Subdivision (b) of section 21083 states in pertinent part:

> "(b) The guidelines shall specifically include criteria for public agencies to follow in determining whether or not a proposed project may have a 'significant effect on the environment.' The criteria shall require a finding that a project may have a 'significant effect on the environment' if any of the following conditions exist: [¶] … [¶]
>
> "(2) The possible effects of a project are individually limited but cumulatively considerable. As used in this paragraph, 'cumulatively considerable' means that the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects."

Section 15130 of the Guidelines was adopted by the Secretary of the Resources Agency pursuant to the section 21083 procedure.[3] Section 15130 of the Guidelines

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[3] Guidelines section 15130 pertains to an EIR's cumulative impacts analysis and states in its entirety: "**Discussion of Cumulative Impacts**. [¶] (a) An EIR shall discuss cumulative impacts of a project when the project's incremental effect is cumulatively considerable, as defined in section 15065(c). Where a lead agency is examining a project with an incremental effect that is not 'cumulatively considerable', a lead agency need not consider that effect significant, but shall briefly describe its basis for concluding that the incremental effect is not cumulatively considerable.

"(1) As defined in Section 15355, a cumulative impact consists of an impact which is created as a result of the combination of the project evaluated in the EIR together with other projects causing related impacts. An EIR should not discuss impacts which do not result in part from the project evaluated in the EIR.

"(2) When the combined cumulative impact associated with the project's incremental effect and the effects of other projects is not significant, the EIR shall briefly indicate why the cumulative impact is not significant and is not discussed in further detail in the EIR. A lead agency shall identify facts and analysis supporting the lead agency's conclusion that the cumulative impact is less than significant.

"(3) An EIR may determine that a project's contribution to a significant cumulative impact will be rendered less than cumulatively considerable and thus is not significant. A project's contribution is less than cumulatively considerable if the project is required to implement or fund its fair share of a mitigation measure or measures designed to alleviate the cumulative impact. The lead agency shall identify facts and analysis supporting its conclusion that the contribution will be rendered less than cumulatively considerable.

"(4) An EIR may determine that a project's contribution to a significant cumulative impact is de minimus and thus is not significant. A de minimus contribution means that the environmental conditions would essentially be the same whether or not the proposed project is implemented.

"(b) The discussion of cumulative impacts shall reflect the severity of the impacts and their likelihood of occurrence, but the discussion need not provide as great detail as is provided for the effects attributable to the project alone. The discussion should be guided by the standards of practicality and reasonableness, and should focus on the cumulative impact to which the identified other projects contribute rather than the attributes of other projects which do not contribute to the cumulative impact. The following elements are necessary to an adequate discussion of significant cumulative impacts: [fn. contd.]

"(1) Either:

"(A) A list of past, present, and probable future projects producing related or cumulative impacts, including, if necessary, those projects outside the control of the agency, or

"(B) A summary of projections contained in an adopted general plan or related planning document, or in a prior environmental document which has been adopted or certified, which described or evaluated regional or area wide conditions contributing to the cumulative impact. Any such planning document shall be referenced and made available to the public at a location specified by the lead agency;

"1. When utilizing a list, as suggested in paragraph (1) of subdivision (b), factors to consider when determining whether to include a related project should include the nature of each environmental resource being examined, the location of the project and its type. Location may be important, for example, when water quality impacts are at issue since projects outside the watershed would probably not contribute to a cumulative effect. Project type may be important, for example, when the impact is specialized, such as a particular air pollutant or mode of traffic.

"2. 'Probable future projects' may be limited to those projects requiring an agency approval for an application which has been received at the time the notice of preparation is released, unless abandoned by the applicant; projects included in an adopted capital improvements program, general plan, regional transportation plan, or other similar plan; projects included in a summary of projections of projects (or development areas designated) in a general plan or a similar plan; projects anticipated as later phase of a previously approved project (e.g. a subdivision); or those public agency projects for which money has been budgeted.

"3. Lead agencies should define the geographic scope of the area affected by the cumulative effect and provide a reasonable explanation for the geographic limitation used.

"(2) A summary of the expected environmental effects to be produced by those projects with specific reference to additional information stating where that information is available, and

"(3) A reasonable analysis of the cumulative impacts of the relevant projects. An EIR shall examine reasonable, feasible options for mitigating or avoiding the project's contribution to any significant cumulative effects.

"(c) With some projects, the only feasible mitigation for cumulative impacts may involve the adoption of ordinances or regulations rather than the imposition of conditions on a project-by-project basis. [Fn. contd.]

provides that a discussion of cumulative impacts may take a "list of … projects" approach (Guidelines § 15130, subd. (b)(1)(A)) or a "summary of projections" approach (Guidelines § 15130, subd. (b)(1)(B)). Either way, the discussion of cumulative impacts "need not provide as great detail as is provided for the effects attributable to the project alone" and "should be guided by the standards of practicality and reasonableness, and should focus on the cumulative impact to which the identified other projects contribute rather than the attributes of other projects which do not contribute to the cumulative impact." (Guidelines, § 15130, subd. (b).) The CDC's revised cumulative impacts analysis took the list approach. It listed 17 past, present and probable future projects (thus remedying the defect first complained about by appellant and which resulted in the court's order requiring the revised cumulative impacts analysis).

The RCIA concluded that there would be adverse impacts to three intersections in the area of the Delano II prison. The measure of effectiveness of a road or intersection is described by a "level of service" (or "LOS") rating. We need not here present the numerical definitions of the various LOS ratings. It will suffice to say that for streets, intersections and freeways, an LOS rating of "A" means that traffic is flowing very

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"(d) Previously approved land use documents such as general plans[,] specific plans, and local coastal plans may be used in cumulative impact analysis. A pertinent discussion of cumulative impacts contained in one or more previously certified EIRs may be incorporated by reference pursuant to the provisions for tiering and program EIRs. No further cumulative impacts analysis is required when a project is consistent with a general, specific, master or comparable programmatic plan where the lead agency determines that the regional or areawide cumulative impacts of the proposed project have already been adequately addressed, as defined in section 15152(f), in a certified EIR for that plan.

"(e) If a cumulative impact was adequately addressed in a prior EIR for a community plan, zoning action, or general plan, and the project is consistent with that plan or action, then an EIR for such a project should not further analyze that cumulative impact, as provided in Section 15183(j)."

freely, an LOS rating of "F" means that there is traffic congestion, and the ratings from "B" to "E" inclusive represent a gradual increase in the level of traffic congestion. A Caltrans "Guide for the Preparation of Traffic Impact Studies" contained in the administrative record that "Caltrans endeavors to maintain a target LOS at the transition between LOS 'C' and LOS 'D' … on State highway facilities …." The Delano II prison project is bordered on the north by Cecil Avenue, on the east by Benner Avenue, on the south by Garces Highway (route 155), and on the west by Roscoe Pond Road. Access to the project site would be from Cecil Avenue. The RCIA concluded that all roadways and intersections would operate at LOS "C" or better with three exceptions. (1) The intersection of Ellington Street and Garces Highway would operate at LOS "F" (congested conditions) in the peak afternoon hour. (2) The intersection of Fremont Street and Garces Highway would also operate at LOS "F" during the peak afternoon hour. (3) The intersection of Albany Street and Cecil Avenue would operate at LOS "F" in the peak afternoon hour during project construction and at LOS "E" during the peak afternoon hour during project operations. The RCIA also recommended mitigation measures for these impacts. The mitigation measures are not pertinent to this appeal.

Appellant argues that compliance with CEQA requires a 20-year traffic impact analysis. Appellant relies on a comment letter submitted by Caltrans which argued that a "20-year analysis … is necessary to anticipate future improvements." A 20-year traffic study might be deemed necessary by Caltrans to "anticipate future improvements," but it does not appear to be required by CEQA. Nor did the Caltrans comment letter expressly make such an assertion. It stated that "[f]urther investigation is recommended to determine the mitigation within a 20-year horizon." Appellant further relies on a comment letter from the City of Delano which stated in part that "[t]he General Plan identifies Cecil Avenue as an East-West arterial to be designated for a 20-year capacity for Level of Service (LOS) "C" or better." Nothing in these comment letters identifies any "probable future projects" (§15130, subd. (b)(1)(A)) that may have been omitted

from the CDC's cumulative impacts analysis. The RCIA identifies eight probable future projects (along with nine past and present projects). Appellant points to none that have been omitted from CDC's list of probable future projects.

Appellant argues that CDC improperly used "the year 2002 as the end point for its analysis of traffic impacts." This argument appears to us to be somewhat misleading, or at least an incomplete factual representation. The traffic analysis in the original SEIR did analyze what the traffic conditions were expected to be at the anticipated year 2002 completion and "full occupancy" of the prison. But the RCIA analyzed the cumulative effects of past, present and probable future projects, with some of the probable future projects not expected to be completed until as late as 2004. For example, one of the future projects was Residential Tentative Tract No. 5897. This tract was located about two miles east of the prison and was anticipated to be completed sometime in 2003. Construction of it had not yet started when the RCIA circulated in August of 2001. Another project was an expansion of Sears Logistic Services, to be located about five miles southeast of the prison. This project was anticipated to be completed in 2004.

Finally, appellant argues that the RCIA is inadequate because the RCIA did not "consider, at a minimum, Delano's General Plan and the Kern County Council of Governments (KCOG) regional transportation model." According to appellant, this violates the court's holding in *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98 (*Communities*). In *Communities*, the court held: "The categories of probable future projects set forth in Guidelines section 15130(b)(1)(B)2 are drawn from controlling CEQA law. However, as the trial court found, to the extent this section lists these categories *disjunctively* and a lead agency may refer to only one of the categories in analyzing cumulative impacts, the section is inconsistent with CEQA law and is invalid." (*Communities*, *supra*, 103 Cal.App.3d at p. 122.) We reject appellant's argument for several reasons. First, appellant does not explain how a failure to "consider … Delano's General Plan and the … [KCOG] regional

transportation model" is in any way inconsistent with the above-quoted holding of *Communities*. Although the *Communities* case does not explain why subdivision (b)(1)(B)2 of Guidelines section 15130 is inconsistent with CEQA law, we believe that the rationale of the case, were it to be expressly stated, would be along the lines of the following. Section 21083 requires the Office of Planning and Research to prepare and develop proposed guidelines which include criteria for public agencies to follow in determining whether a project's effects are cumulatively considerable. "Cumulatively considerable" means that the incremental effects of a project are considerable when "viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects." (§ 21083, subd. (b)(2).) Thus the statute requires any guideline attempting to define or to give guidance to the meaning of "probable future projects" to include all known "probable future projects" of any significance, at least to the extent that those probable future projects can be identified with specificity and that their coming to fruition is indeed "probable." Thus a guideline that would permit a lead agency to prepare a cumulative impacts analysis that took into account only *some* known "probable future projects" (§ 21083, subd. (b)(2)) such as, for example, "those public agency projects for which money has been budgeted" (Guidelines § 15130, subd. (b)(1)(B)(2)), but did not take into account other probable future projects (such as, for example, privately funded probable future projects), would not appear to comply with the section 21083, subdivision (b)(2) mandate that the cumulative impacts analysis address the cumulatively considerable environmental impacts of "probable future projects." (*Ibid.*) We frankly doubt that the drafters of Guidelines section 15130 intended the subdivision (b)(1)(B)2 words "or those public agency projects for which money has been budgeted" to mean that a cumulative impacts analysis can properly limit its analysis of the cumulative impacts of past, present, and probable future projects so as to include only those "probable future projects" which are "public agency projects" which have been budgeted. It seems much more likely that the last clause of subdivision

(b)(1)(B)2 was intended to convey the idea that in making the determination of what possible future public agency projects may be deemed "probable future projects," a lead agency may deem a possible future public agency project to not be a "probable" future project until money has been budgeted for it. In any event, appellant fails to point out any "probable future project" which the RCIA has failed to consider.

We reject appellant's argument that the *Communities* case requires us to conclude that the traffic analysis in the RCIA violates CEQA. As we understand it, appellant's argument goes like this. First, under Guidelines section 15130, subdivision (b)(1)(B)2, "probable future projects" should include "projects included in an adopted … general plan, regional transportation plan, or other similar plan." (*Ibid*.) Second, the RCIA did not "consider … Delano's General Plan and the Kern County Council of Governments (KGOG [*sic*] regional transportation model." The RCIA did not consider any probable future projects included in the Delano General Plan or in the KCOG's regional transportation model. The RCIA therefore violated Guidelines section 15130 and violated CEQA. We reject this argument for two reasons.

First, it was not raised administratively, by anyone, and thus has been waived. (*Resource Defense Fund v. Local Agency Formation Com*., *supra*, 191 Cal.App.3d at p. 894.) The City of Delano commented on the RCIA by stating in part that "[n]o consideration for the 20-year planning capacity has been indicated as required by the City's General Plan." We are not sure what this means, but it is not an assertion that the list of probable future projects in the RCIA failed to include some particular probable future project mentioned in the Delano General Plan. Similarly, no one appears to have asserted administratively that there were probable future projects in the Kern County Council of Governments regional transportation model that were not considered in the RCIA. The traffic study appearing in Appendix "C" to the SEIR states in part: "It is recognized that the Kern County Council of Governments (KCOG) operates and maintains a regional transportation model. However, the data available from the model is

based on long-range projections for the year 2020." This appears to imply that there may not be any projects listed in the regional transportation model (as opposed to "projections contained in" the model – see Guidelines § 15130, subd. (b)(1)(B)). And because this issue was not raised administratively, the Delano General Plan and the KCOG regional transportation model do not appear to be part of the administrative record in this case.

Second, the argument fails on its merits because appellant has failed to show that the CDC's list of probable future projects did not include "projects included in an adopted … general plan, regional transportation plan, or other similar plan." (Guidelines § 15130, subd. (b)(1)(B)2.) We do not know whether there are any probable future projects mentioned in the Delano General Plan or the regional transportation model. Appellant does not point out any, and apparently cannot because (as we have already stated) no one did so administratively and thus the administrative record does not even include these documents.

Appellant accurately points out that the superior court's ruling states that the clauses of Guidelines section 15130, subdivision (b)(1)(B)2 may be read disjunctively, and that this portion of the superior court's ruling therefore conflicts with the *Communities* case. This does not help appellant, however, because appellant's burden on appeal is to show that the superior court erred in finding the RCIA to be adequate, not merely to show that the court may have used incorrect reasoning to reach its ultimate conclusion. "'No rule of decision is better or more firmly established by authority, nor one resting on a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of law applicable to the case, it must be sustained regardless of the considerations which may have moved the court to its conclusion.'" (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19; *Davey v. Southern Pacific Co*. (1897) 116 Cal. 325, 329.)

III.

THE "FARMLAND ISSUE"

A. Facts

The RCIA pointed out that the Delano II prison project would convert 480 acres of farmland to an institutional use. It further pointed out that the past, present and probable future projects described in the RCIA would convert an additional 1,820 acres of farmland to non-agricultural use. It concluded that although this total of 2,300 acres of agricultural land to be converted to non-agricultural use "is a small portion of the 700,000 acres of Important Farmland in Kern County," this cumulative impact is considered significant. The RCIA also concluded that this impact could not be mitigated. "*The proposed project's incremental contribution to the cumulative conversion of Important Farmland to non-agricultural uses is considered a significant impact. No mitigation is available to reduce this impact to a less-than-significant level; it is therefore significant and unavoidable*."

Appellant's October 1, 2001 comment letter responded to the above-quoted portion of the RCIA as follows: "This conclusion is not supported by any evidence in the record. Nor is it based on any analysis or discussion. The RCIA fails to consider, for example, the possibility that the impact of this conversion could be reduced by creating agricultural easements over Important Farmlands in the vicinity of the project site." CDC responded to appellant's comment letter as follows:

> The commenter contends that there is not substantial evidence to support the RCIA conclusion that no mitigation is available to reduce the loss of Important Farmland to a less-than-significant level, suggests that this impact could be reduced by the creation of agricultural easements over Important Farmlands in the vicinity of the project site, and asserts that CDC should analyze alternative project locations to avoid conversion of Important Farmlands.
>
> "The RCIA conclusion about the lack of mitigation for Important Farmland conversion is appropriate. CDC does not need to perform

additional analysis of alternative project locations and has met the requirements of CEQA. The RCIA does not discuss mitigation for the conversion of Important Farmland to non-agricultural uses because there is no known mitigation for this impact. The State CEQA Guidelines require that an EIR discuss feasible measures that would avoid or substantially reduce a project's significant environmental effects. They also require that if mitigation exists that is considered infeasible, the infeasibility be discussed. The State CEQA Guidelines, however, do not require that a lead agency present evidence of the non-existence of mitigation.

"The suggestion that CDC purchase an easement over existing farmland is novel. This land use impact was identified in SEIR Volumes I through III, and the expanded cumulative analysis did not identify either a new or more severe cumulative impact on farmland. The same commenter proffered previously, both in comments on SEIR Volume I and in litigation on the SEIR, that this impact was not mitigated, but provided no suggested mitigation. CDC concludes the same here. No details are provided on how an easement would mitigate loss of farmland, how such an easement would be implemented, etc. As we can only infer the suggestion here, CDC would pay the owner of existing agricultural land to continue to farm the land. This would not mitigate the loss of farmland; it would not create new farmland or compensate for the loss of farmland that has already occurred. The only other options would be to acquire for conversion to agricultural use (1) land that is presently undeveloped and not in agricultural use but that could be suitable for cultivation as Important Farmland (i.e., fallow land) or (2) land that is already developed. Based on field visits and a review of the draft Valley Floor Habitat Conservation Plan (VFHCP), it can be concluded that fallow agricultural land or natural open space land is likely to contain natural habitat that may potentially be used by special-status wildlife species, such as Tipton kangaroo rats; converting such land to agricultural use to mitigate a land use impact could therefore entail introducing disturbance (agricultural operations) into potential habitat, which would result in impacts on these species. This is not environmentally beneficial. Converting land developed with residential, commercial, or industrial uses to Important Farmland is infeasible for obvious reasons.

"As noted above, mitigation as defined in CEQA is an action that would avoid or substantially reduce the effect of a project, and the commenter's suggested mitigation would not do so."

Appellant then contended in the superior court that CDC failed to consider reasonable mitigation measures that could reduce or eliminate the significant cumulative

impact caused by the conversion of important farmland to nonagricultural use. Appellant also argued that CDC's conclusions that there was no mitigation available, or that if an agricultural easement were considered mitigation it would not be feasible, are not supported by substantial evidence. The superior court rejected this argument. The court's ruling stated:

> "As the response found at AR 3512 demonstrates, the Respondent did address the feasibility of an agricultural easement. It simply concluded that such an easement would not be feasible.
>
> "The analysis contained in the response to Petitioner's suggestion that a 480 acre easement in farmland be utilized to offset the loss of 480 acres to the construction project contemplated herein adequately discusses the reasons why such an easement would not constitute a potentially feasible mitigation measure that could potentially reduce or eliminate the impact of the conversion of land here contemplated. Consequently, CDC's failure to give further consideration to that option does not render the RCIA analysis inadequate."

B. The Superior Court Correctly Ruled That The Cumulative Impacts Analysis of Loss of Farmland Was Adequate

Appellant again argues to this court that CDC failed to consider a feasible mitigation measure that would reduce significant cumulative impact caused by the conversion of important farmland to nonagricultural use. We agree with the superior court that appellant's contention is without merit. Guidelines section 15130, subdivision (a) provides that an EIR "shall discuss cumulative impacts of a project when the project's incremental effect is cumulatively considerable …." Guidelines section 15065, subdivision (c) states in pertinent part: "'Cumulatively considerable' means that the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects as defined in Section 15130." Subdivision (b) of Guidelines section 15130 states in pertinent part: "The following elements are necessary to an adequate discussion of significant cumulative impacts: … [¶] … [¶] (3) A reasonable

analysis of the cumulative impacts of the relevant projects. An EIR shall examine reasonable, feasible options for mitigating or avoiding the project's contribution to any significant cumulative effects." When the list-of-projects approach to cumulative impacts analysis is used, the "relevant projects" referred to in subdivision (b)(3) of Guidelines section 15130 are the projects in the "list of past, present, and probable future projects producing related or cumulative impacts …." (Guidelines, § 15130, subd. (b)(1)(A).) The CDC correctly observed that once the prison is built and the 480 acres of farmland at that site have been converted to what the RCIA calls "an institutional use" (i.e., a prison), the 480 acres of farmland will be gone. Similarly, when the 2,300 acres of past, present and probable future projects are completed, 2,300 acres of farmland will be gone. The only option for "mitigating or avoiding the project's contribution to" loss of farmland would be to not build the prison. (Guidelines, § 15130, subd. (b)(3).) This is in essence the "'No project' alternative" which was required to be discussed in the SEIR (see Guidelines, § 15126.6, subd. (e)) and which was in fact discussed at section 7.4 of the SEIR.

Appellant's suggestion that an agricultural easement be created assumes, incorrectly in our view, that the creation of an agricultural easement would constitute "mitigation." We disagree. Guidelines section 15370 states:

> "'Mitigation' includes:
>
> "(a) Avoiding the impact altogether by not taking a certain action or parts of an action.
>
> "(b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
>
> "(c) Rectifying the impact by repairing, rehabilitating, or restoring the impacted environment.
>
> "(d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

"(e) Compensating for the impact by replacing or providing substitute resources or environments."

Appellant's suggestion, the creation of an agricultural easement, does not appear to fall into any of these five categories. The easement would presumably not be on the site of one of the "probable future projects" identified in the RCIA. (Guidelines § 15130, subd. (b)(1)(A).) It would thus not reduce or mitigate the loss of farmland caused by this project or by the "probable future projects" (Guidelines, § 15130, subd. (b)(1)(A), § 15065, subd. (c).) The suggested agricultural easement would presumably not create any new farmland where no farmland presently exists (at least appellant does not so claim). Thus an agricultural easement would not compensate for a loss of farmland "by replacing or providing substitute resources or environments" (Guidelines § 15370, subd. (e)), and would not fall within subdivision (e) of Guidelines § 15370. At best, such an easement might prevent the future conversion of some as yet unidentified parcel of farmland to a nonagricultural use. Although appellant might deem this to be a desirable result, appellant's desire for such a result does turn appellant's proposed action into mitigation of the cumulative impact (on farmland) of this project and of the past, present, and probable future projects properly considered in the RCIA.

Furthermore, even if appellant's suggested agricultural easement is deemed to be a "mitigation" measure (see Guidelines, § 15126.4, subd. (a) and § 15370), the superior court was still correct in concluding that the RCIA was adequate. CDC did consider appellant's suggestion, and explained why appellant's suggestion was not deemed feasible. (See Guidelines, § 15126.4 and § 15364; and Pub. Res. Code, § 21061.1.) The CDC was not required to pay someone to continue farming land that was already being farmed, and which was not the site of any probable future project. A public agency "'need not, under CEQA, adopt every nickel and dime mitigation scheme brought to its attention or proposed in the project EIR.'" (*A Local & Regional Monitor v. City of Los*

Angeles (1993) 12 Cal.App.4th 1773, 1809; *San Franciscans for Reasonable Growth v. City and County of San Francisco* (1989) 209 Cal.App.3d 1502, 1519.)

DISPOSITION

The April 2002 "order discharging peremptory writ of mandate" is affirmed. Costs to respondent.

_____
Ardaiz, P.J.

WE CONCUR:

_____
Dibiaso, J.

_____
Levy, J.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

FRIENDS OF THE KANGAROO RAT, Plaintiff and Appellant, v. THE CALIFORNIA DEPARTMENT OF CORRECTIONS, Defendant and Respondent.	F040956 (Super. Ct. No. 241965-RDR) ORDER GRANTING REQUEST FOR PUBLICATION

THE COURT

It appearing that the nonpublished opinion filed in the above-entitled matter on the 18th day of August, 2003, meets the standards for publication specified in California Rules of Court, rule 976(b)(3), it is ordered that the opinion be certified for partial publication in the Official Reports with the exception of parts I and II.

_____

Ardaiz, P. J.

WE CONCUR:

_____

Dibiaso, J.

_____

Levy, J.