

Hearing Date: 03/11/2021

Department: 82

Puvunga Wetlands Protectors, et al.,

Judge Mary Strobel

Hearing: March 11, 2021

v.

California Coastal Commission, Respondent

Beach Oil Minerals, LLC, et al., Real Parties in Interest

19STCP00435

Tentative Decision on Petition for Writ of Mandate

Petitioners Puvunga Wetlands Protectors and Anna Christensen (“Petitioners”) petition for a writ of administrative mandate directing California Coastal Commission (“Commission”) to set aside its approval of a Coastal Development Permit (“CDP”) for consolidation of an oil and gas development and wetlands restoration project (“Project”) on four sites in the City of Long Beach (“City”). Commission and Real Parties in Interest Beach Oil Minerals, LLC, Lyon Housing (Pumpkin Patch) XLV, LLC, and Los Cerritos Wetlands, LLC (“Real Parties”) separately oppose the petition, and Real Party in Interest Los Cerritos Wetlands Authority (“LCWA”) joins the opposition.

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Background

Project Site

The Project spans four distinct sites in the Los Cerritos Wetlands Complex and within the Coastal Zone. (AR 49-50, 151.) These are known as the “Synergy,” “City,” “Pumpkin Patch,” and “LCWA” sites. (AR 150 [site map].) Since the mid-1920s, the two largest sites (i.e., the Synergy and City sites) have been used for oil and gas production. (AR 49-50.) Current operations on the Synergy and City sites include a total of 106 acres of aging oil and gas facilities (like wells, above-ground pipelines, tanks, transformers, and other production equipment). (AR 49-50, 84; see, e.g., AR 5054-5059, 5062, 19518-19522 [photographs]; AR 153, 155 [aerials].) Most of the equipment is old and outdated, which contributes to the relatively low annual production from the field in recent history. (AR 49-50.)

The Pumpkin Patch Site is an approximately 7-acre disturbed site that is currently used seasonally for the sale of pumpkins and Christmas trees. (AR 50.) The LCWA site is an approximately 5-acre disturbed industrial site that is generally used as a temporary storage and staging area. In 2007, Real Party LCWA accepted an offer of dedication for this site. Other than some non-native trees on the perimeter, the LCWA site is generally devoid of vegetation. (Ibid.)

The wetlands in this area have been severely degraded by urban developments, including oil production. (AR 49, 151, 609.) Only a few remnant wetlands remain. (AR 49.) One such wetland, the relatively pristine 30-acre Steamshovel Slough, lies within the northern part of the Synergy oil field property. (Ibid.) The 150-acre Synergy site is divided into a 76.5-acre northern section and 73.1-acre southern section. (AR 49, AR 153 [Figure of northern and southern sites]). All existing oil production facilities are located on the southern site, interspersed among wetlands and wildlife. (AR 49.)

Project Description

The Project consists of five main components:

- (1) Construction and operation of two new oil production facilities on the Pumpkin Patch and LCWA sites, including drilling up to 120 new wells with a maximum production capacity of 24,000 barrels per day.
- (2) Construction and operation of a 2,200 foot above-ground pipeline on the City site that connects the Pumpkin Patch and LCWA sites.
- (3) Decommissioning of existing oil productions at the Synergy, Pumpkin Patch, and City sites over a 20-year period.
- (4) Conversion of an existing building into a Visitor's Center for the Los Cerritos Wetlands on the southern portion of the Synergy site.
- (5) Implementation of a wetlands restoration project and mitigation bank on the northern portion of the Synergy site. (AR 50-51; see also 51-59 [detailed description of Project components].)

CEQA Review

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Between April 2016 and January 2018, the Project underwent environmental review under CEQA. City certified an EIR and adopted corresponding CEQA findings, a statement of overriding considerations ("SOC"), and a mitigation monitoring and reporting program ("MMRP") in January 2018. (See e.g. AR 15235-26 [City Council resolution], 12369-14690 [FEIR].) In this writ action, Petitioners have not challenged the City's approval of the Project under CEQA, or any other land use entitlements granted by the City.

Commission Approves Coastal Development Permit

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On December 13, 2018, in a lengthy public hearing, Commission considered an application of Real Parties Beach Oil Minerals (“BOM”) and LCWA for a Coastal Development Permit (“CDP”) for the Project. (AR 19855.) The Commission’s initial staff report, which was published prior to the hearing, recommended 25 special conditions to mitigate the environmental impacts of the project. (AR 2568-2607.) The Commission received 70-80 comments, approximately one-half supporting the project, and one-half objecting. (AR 19855.) An addendum added a twenty-sixth special condition (AR 2715), and responded to comments about the project. (AR 2701-2716.) Commission staff presented its recommendations orally during the hearing and described the main benefits to the public: the restoration of a small area of wetlands and the ability to restore a much larger area in the future, and the certainty of a timeline for removal of the existing aging and outdated oil infrastructure. (AR 19873.)

After hearing from the applicant, tribal leaders, conservation groups, and members of the public, the Commission voted 6-3 to approve the project’s coastal development permit. (AR 1- 146 [final adopted findings]; AR 19854-20103 [hearing transcript].) The Commission imposed 26 special conditions on the Project. (AR 20175-20217.)

The Commission assessed the Project’s consistency with each of the policies in Chapter 3 of the Coastal Act — i.e., wetland resources (§ 30233), environmentally sensitive biological resources (§ 30240), water quality (§§ 30230-30231), oil and gas development (§ 30262), oil spills (§ 30232), visual resources (§ 30251), geological hazards (§ 30253(a)-(b)), greenhouse gas emissions (§ 30253(c)), cultural and tribal resources (§ 30244), public access and recreation (§§ 30210 & 30214), and environmental justice (§ 30604(h)). (AR 60-138.) For all but two of those policies (i.e., visual resources [§ 30251] and oil spills [§ 30232]), the Commission found the Project is consistent with Chapter 3’s policies. (See AR 72, 83, 85-86, 117, 123-124, 132, 134, & 137-138.)

The Commission approved the project despite its inconsistency with the Oil Spill and Visual Resources policies of the Coastal Act, finding that the project met the three-part test of the override provision in section 30260, as further discussed below. (Pub. Res. Code § 30260; see AR 86-97, 138-145.)

Procedural History

On February 11, 2019, Petitioner Puvunga filed a verified petition for writ of mandate pursuant to CCP section 1094.5. On August 2, 2019, Petitioners Puvunga and Christensen filed a first amended petition (“FAP”) for writ of mandate.

On October 27, 2020, after a hearing and briefing, the court denied the motion of Real Parties for an order tolling term of the Coastal Development Permit.

On December 7, 2020, Petitioners filed their opening brief (“OB”) in support of the writ petition. The court has received hyperlinked opposition briefs from Real Parties and Commission, the joinder of Real Party in Interest Los Cerritos Wetlands Authority, Petitioners’ reply, the administrative record, and the joint appendix.

Standard of Review

Under CCP section 1094.5(b), the pertinent issues are whether the respondent has proceeded without jurisdiction, whether there was a fair trial, and whether there was a prejudicial abuse of discretion. An abuse of discretion is established if the agency has not proceeded in the manner required by law, the decision is not supported by the findings, or the findings are not supported by the evidence. (CCP § 1094.5(b).)

The trial court reviews Commission's decision and findings under the substantial evidence test. "The trial court presumes that the agency's decision is supported by substantial evidence, and the party challenging that decision bears the burden of demonstrating the contrary. [Citation] In reviewing the agency's decision, the court examines the whole record and considers all relevant evidence, including that evidence which detracts from its decision. [Citation.] Although this task involves some weighing to fairly estimate the worth of the evidence, that limited weighing does not constitute independent review where the court substitutes its own findings and inferences for that of the Commission. Rather, it is for the Commission to weigh the preponderance of conflicting evidence, as [the court] may reverse its decision only if, based on the evidence before it, a reasonable person could not have reached the conclusion reached by it." (*Lindstrom v. Cal. Coastal Com.* (2019) 40 Cal.App.5th 73, 93.)

Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion (*California Youth Authority v. State Personnel Board* (2002) 104 Cal. App. 4th 575, 584-85), or evidence of ponderable legal significance which is reasonable in nature, credible and of solid value. (*Mohilef v. Janovici* (1996) 51 Cal. App. 4th 267, 305 n. 28.)

"On questions of law arising in mandate proceedings, [the court] exercise[s] independent judgment." (*Christensen v. Lightbourne* (2017) 15 Cal.App.5th 1239, 1251.) To the extent "purely legal issues involve the interpretation of a statute [or regulation] an administrative agency is responsible for enforcing, [the court] exercise[s] [its] independent judgment, 'taking into account and respecting the agency's interpretation of its meaning.'" (*Housing Partners I, Inc. v. Duncan* (2012) 206 Cal.App.4th 1335, 1343; see also *Yamaha Corp. of America v. State Bd. Of Equalization* (1998) 19 Cal.4th 1, 11.)

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Analysis

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Exhaustion of Administrative Remedies

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Real Parties and Commission contend that Petitioners failed to exhaust their administrative remedies for all (Real Parties) or most (Commission) of the arguments made in Petitioners' writ briefs.

“Where an administrative remedy is provided by statute, this remedy must be exhausted before the courts will act. This is not a matter of judicial discretion, but is a fundamental rule of procedure laid down by courts of last resort, followed under the doctrine of stare decisis, and binding upon all courts. The rationale for the rule is that an agency is entitled to learn the contentions of interested parties before litigation arises, so it will have an opportunity to address the contentions and perhaps render litigation unnecessary. To advance this purpose an interested party must present the exact issue to the administrative agency that is later asserted during litigation or on appeal. General objections, generalized references or unelaborated comments will not suffice. [T]he objections must be sufficiently specific so that the agency has the opportunity to evaluate and respond to them. The petitioner bears the burden of demonstrating that the issues raised in the judicial proceeding were first raised at the administrative level.” (*Greene v. California Coastal Com.* (2019) 40 Cal.App.5th 1227, 1237 [Property owners' general arguments before Coastal Commission did not put Commission on notice of takings issue, and thus, owners did not exhaust their administrative remedies on this issue].)

“To satisfy the exhaustion requirement, [Petitioners] were required to present the ‘exact issue’ to the administrative agency.” (*Green, supra*, at 1238.) “Less specificity is required to preserve an issue for appeal in an administrative proceeding than in a judicial proceeding.” (*East Peninsula Ed. Council, Inc. v. Palos Verdes Peninsula Unified School Dist.* (1989) 210 Cal.App.3d 155, 176-177.) Nonetheless, to prove that they exhausted their administrative remedies, Petitioners must show that they fairly alerted the Commission to the issues raised in their writ briefs. (*Ibid.*)

Public Resources Code section 30801 sets forth a specific exhaustion requirement for proceedings before the Commission, and provides in relevant part:

Any aggrieved person shall have a right to judicial review of any decision or action of the commission by filing a petition for a writ of mandate in accordance with Section 1094.5 of the Code of Civil Procedure

For purposes of this section ..., an “aggrieved person” means any person who, in person or through a representative, appeared at a public hearing of the commission, local government, or port governing body in connection with the decision or action appealed, or who, by other appropriate means prior to a hearing, informed the commission, local government, or port governing body of the nature of his concerns or who for good cause was unable to do either. (§ 30801.)

Petitioners concede that Petitioner Puvunga Wetlands Protectors “did not exist until after the Commission rendered its decision” and therefore did not participate in the administrative proceedings. (Reply 5, fn. 2.) Petitioners contend that “[b]ecause it was impossible for Petitioner Puvunga to appear before the Commission good cause exists for its failure to do so.” (*Ibid.*) The court is not persuaded by this interpretation of the “good cause” exception in section 30801, which would substantially weaken the exhaustion requirement for entities created after the Commission proceedings.

However, Petitioner Christensen appeared in the administrative proceedings and informed the Commission of her concerns about approval of the CDP. (See e.g. 2760, 2775-2789, 19930-57.) Accordingly, she exhausted administrative remedies for issues she raised to Commission

below. For the specific arguments raised in Petitioners' writ briefs, the court analyzes below whether Petitioner Christensen exhausted administrative remedies based on written and oral statements she or other persons presented to the Commission.

In the reply brief, Petitioners suggest that they could exhaust administrative remedies if the issue was raised by other participants in the Commission proceedings, even though such persons or entities are not parties to this writ petition. (See e.g. Reply 12:21-24 ["Petitioners *and others* commented that the plans required via Special Conditions should have been submitted to the Commission prior to project approval"]; Reply 16:7-8 [same].) Because this argument was raised in reply, Real Parties and Commission have not had the opportunity to respond. They should do so at the hearing. Subject to argument at the hearing, the court is inclined to interpret section 30801 similarly to the exhaustion requirement that applies in CEQA cases. (See Pub. Res. Code § 21177(a).) Under CEQA, the exhaustion requirement is satisfied if the issue was "presented to the public agency orally or in writing by any person..." (Pub. Res. Code § 21177(a).) Although section 30801 is not identical, it does not state that the "aggrieved person" is prohibited from raising arguments on writ review that were presented to the Commission by other persons. A stricter interpretation of section 30801 would seem inconsistent with section 30009, which requires the Coastal Act to be "liberally construed to accomplish its purposes and objectives." The court would reach the same result on this writ petition even if the exhaustion requirement were strictly construed to require the "aggrieved person" to have exhausted the specific argument at issue.

Commission's Public Welfare Findings Under Section 30260

The Commission approved the project despite its inconsistency with the Oil Spill and Visual Resources policies of the Coastal Act, finding that the project was subject to the override provision in section 30260 and that it met its three-part test. (Pub. Res. Code § 30260; see AR 86-97, 138-145.) Section 30260 provides in full:

Coastal-dependent industrial facilities shall be encouraged to locate or expand within existing sites and shall be permitted reasonable long-term growth where consistent with this division. However, where new or expanded coastal-dependent industrial facilities cannot feasibly be accommodated consistent with other policies of this division, they may nonetheless be permitted in accordance with this section and [Sections 30261](#) and [30262](#) if (1) alternative locations are infeasible or more environmentally damaging; (2) to do otherwise would adversely affect the public welfare; and (3) adverse environmental effects are mitigated to the maximum extent feasible. (§ 30260.)

Petitioners' Writ Contentions; and Exhaustion of Administrative Remedies

Petitioners contend that Commission's finding that denying the project would be against the public interest was improperly based on the benefits of the land swap and the wetlands restoration rather than the expanded oil and gas development alone. (OB 10.) Petitioners contend that the Commission should have denied the oil and gas project because (1) there is little need for oil and gas infrastructure due to the decrease in use of fossil fuels, and (2) the benefit of decommissioning older infrastructure is outweighed by the "increased potential spill risk." (OB 9.)

Real Parties contend that Petitioners failed to exhaust administrative remedies for these arguments. (RP Oppo. 16.) In reply, Petitioners contend that “Petitioner and numerous others took issue with the Commission’s override consistency determination, including the project description. (AR19964[Marcia Hanscom, Ballona Institute and Wetlands Defense, CDP hearing, first and second prong of override provision not met]; AR19973 [Steve Brothers, CDP hearing, second prong not met]; AR14837 [“Again, I understand that the promise of Wetlands restoration is driving today’s hearing and the pressure to approve the modified LCP document before you.”]; AR4618-4619; AR15044; AR15192).” (Reply 7.) Petitioners also cite comments from Commission staff, Commissioners, and others that the “impetus” behind the Project is the expansion and relocation of Real Parties’ existing oil operations. (Reply 8.)

Petitioners do not cite any evidence that they, or any other commenters, raised their contention that Commission could not base its public welfare finding, in part, on the benefits of the land swap and the wetlands restoration. However, Commission itself analyzed and considered that legal issue, and members of the public raised concerns about Commission’s analysis of the second prong of section 30260. In that circumstance, and where Petitioner Christensen participated in the administrative proceedings, the court considers the issue preserved for writ review. (AR 141-143.)

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Commission Correctly Interpreted the Override Provision in Section 30260

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As noted, Petitioners contend that the Commission’s finding that denying the project would be against the public interest was improperly based on the benefits of the land swap and the wetlands restoration rather than the expanded oil and gas development alone. (OB 10.) In effect, Petitioners contend that Commission applied the wrong legal standard with respect to the public welfare prong of section 30260.

Petitioners raise a question of statutory construction. “To determine legislative intent, we turn first to the words of the statute, giving them their usual and ordinary meaning. [Citations.] When the language of a statute is clear, we need go no further. However, when the language is susceptible of more than one reasonable interpretation, we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.” (*Nolan v. City of Anaheim* (2004) 33 Cal.4th 335, 340.)

Real Parties contend that the plain language of section 30260 does not support Petitioners’ narrow interpretation. (RP Oppo. 19-20.) The court agrees. Section 30260 does not expressly limit or constrain Commission’s discretion to consider non-industrial benefits or detriments to the public welfare of the proposed project.

Petitioners rely on *Gherini v. California Coastal Co.* (1998) 204 Cal.App.3d 699. In *Gherini*, the Commission rejected a proposal that would allow new hydrocarbon development on Santa Cruz Island in an area that was designated as a National Park and an Area of Special Biological Significance, and surrounded by a marine sanctuary. (*Id.*, at 706-707.) Evaluating whether an “override” was appropriate, the Commission “determined that energy development on the island would be inconsistent with the resource protection policies of the Act” and that the public welfare would not be adversely affected by prohibition of energy development on the island. (*Id.* at 707-

708.) Similarly to Petitioners, the *Gherini* applicant argued it was improper for the Commission to consider “environmental effects of development” in its public welfare analysis and that the Commission must focus “solely” on whether there would be an “adverse impact on the public welfare of prohibiting energy development.” (Id. at 707.) The Court of Appeal disagreed, stating “We do not read the section so narrowly.” The Court held that “a determination of what will adversely affect the public welfare requires consideration of the preservation and protection of the state’s natural resources and the ecological balance of the coastal zone as well as the need for a particular type of coastal-dependent development.” (Id. at 707-708.) The Court held that the Commission “properly balanced the risk of harm to the highly sensitive and unique natural resources in and around Santa Cruz Island against the public’s need to permit oil and gas development in ascertaining whether refusal to permit such hydrocarbon development would adversely affect the public welfare.” (Ibid.)

Petitioners contend that *Gherini* “confirms the Commission should consider the positive and negative direct impacts of the oil and gas development, not non-industrial incentives as the Commission did here.” (Reply 10.) The court is not persuaded by this narrow reading of *Gherini*, especially where non-industrial aspects of the Project are designed to promote protection of natural resources in the Coastal Zone. Although the *Gherini* Court upheld a Commission determination that the public welfare requirement was not satisfied, *Gherini* strongly supports Commission’s decision in this case to consider both the preservation and protection of the state’s natural resources—the wetlands—and the need for the oil and gas infrastructure. As stated in *Gherini*, legislative findings for the Coastal Act recognize that “the public welfare involves both protection and preservation of natural coastal resources and the need for some coastal development.” (*Gherini, supra* at 708; see Pub. Res. Code § 30001, § 30001.2

Further, Real Parties argue Petitioners’ interpretation of the public welfare prong is problematic because it would require Commission to evaluate a hypothetical version of the Project that the applicant has not proposed — a project that only includes oil and gas development and does not include any wetland restoration, nor provision of public access and public ownership of the wetlands. Petitioners’ interpretation would require the Commission to “piecemeal” or “split” the Project in a manner that is not required in the statute. (See RP Oppo. 20-21.)

In reply, Petitioners contend that, under Real Parties’ and Commission’s interpretation, “applicants could simply add infinite project features until the scales tipped in their favor. For example, an oil and gas drilling project could be coupled with a cash donation to a local agency or foundation for a land purchase. Petitioners argue that interpretation would stretch the statute beyond its literal and logical confines.” (Reply 10-11.) Unlike these hypotheticals, the Commission’s public welfare finding was based directly on Project benefits to natural resources – wetlands – that fall squarely within the scope of the Coastal Act. (See Pub. Res. Code § 30001.) The court need not and does not decide whether Commission’s discretion under section 30260 extends to Petitioner’s hypothetical scenarios.

Based on the foregoing, Petitioners do not show that Commission prejudicially abused its discretion or failed to proceed as required by law in the manner it interpreted the public welfare requirement of section 30260.

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Substantial Evidence Supports Commission’s Public Welfare Findings

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Petitioners contend that the Commission's public welfare findings are not supported by substantial evidence because (1) there is little need for oil and gas infrastructure due to the decrease in use of fossil fuels, and (2) the benefit of decommissioning older infrastructure is outweighed by the "increased potential spill risk." (OB 9-10, citing AR 2, 12, 84, 87, 120.) Petitioners contend that the Commission's denial of a 1998 application for a different oil and gas development on one of the Project sites (the "Samedan project") undermines the Commission's finding that denying this Project would adversely affect the public welfare. (OB 9-10, citing AR 608.)

The court's role is to consider whether the Commission's decision regarding the public welfare is supported by substantial evidence, not whether there is support for a different decision. There was substantial evidence before the Commission to support its decision that denying the permit would be against the public welfare. Commission found that the principal public benefits from the Project would be: (1) "immediate restoration of 29.66 acres of salt marsh and mudflat habitat and about 6 acres of wetlands buffer areas"; (2) "preservation of 32 acres of relatively

pristine salt marsh, mudflat and subtidal habitat in Steamshovel Slough"; (3) "the construction of a Visitor's Center and a trail on the adjacent upland which would allow the public to access a valuable biological resource that has been locked away on private land for almost 100 years"; (4) the opportunity for tribal communities "to educate the public on their culture and connection to the wetlands and to experience a small part of their cultural landscape returned to a natural state"; (5) "the possibility of restoring up to 106 additional acres after the 20 year decommissioning period is completed"; and (6) "the decommissioning of existing aging oil infrastructure which would eliminate a potential oil spill risk and a visual blight from the Los Cerritos Wetlands area. (AR 141-143.)

In their writ briefs, Petitioners do not dispute that substantial evidence supports Commission's findings that the Project would have these public benefits. Based on the court's independent review, the court finds substantial evidence supporting these findings. (See e.g. AR 49-50; 5054-61, 19518-522 [photographs]; 153-168 [aerials]; 1455-56 [chart comparing existing and proposed conditions]; 19524-566 [PowerPoint slides]; 4989, 5023 [draft EIR].)

Commission also acknowledged "BOM's proposed project also imposes potential risks to the public," including "a significant visual impact from the drill rig for a twelve year period" and oil spill risks. (AR 141-143.) Commission also considered the uncertainty with respect to wetlands preservation and restoration that would be caused by denial of the Project: "If the proposed project does not move forward, it is uncertain what would happen with the four project sites. Synergy Oil, the current operator of the Synergy and City sites, could continue to operate the oil fields indefinitely.... At this time, the only way to ensure restoration of these wetlands on an established timeline would be to approve the proposed project." (AR 141-143.) Petitioners do not dispute these findings. Substantial evidence supports that the public benefits set forth above could be lost, reduced, or delayed if Commission denied the permit.

Commission's denial of the 1998 application for a different oil and gas development does not mean Commission had to reach the same decision here. (See OB 9, citing AR 608.) Unlike this Project, the Samedan project did not include a wetlands restoration component. (AR 621-614.) It would have expanded oil and gas development (i.e., added 12 new wells) on a site planned for wetlands restoration (i.e., the Synergy site) and was not consolidated to the "maximum extent feasible" (as required by Section 30262(b)). (AR 608-609.) It would have created an "industrial 'island' that would

divide the restorable area” on the Synergy site. (AR 612.) Rejecting the Samedan project, the Commission staff encouraged that applicant to “evaluate whether the drill site could be relocated either completely outside of, or to a more appropriate alternative site within, the wetland restoration area to optimize restoration opportunities” (AR 624.) Substantial evidence supports that the current Project addresses at least some of the Commission’s concerns from the Samedan project. In any event, Commission’s prior findings are not binding on its current determination under section 30260.

Commission considered potential adverse impacts of the Project and also that it was unlikely that the public would be harmed by loss of additional oil and gas development. Weighing these factors, the Commission concluded that denial of the Project would adversely affect the public welfare. The court cannot re-weigh the evidence to determine if it would reach a different conclusion than the Commission. (See *San Diego Navy Broadway Complex Coalition v. California Coastal Com.* (2019) 40 Cal.App.5th 563, 600 [court “will not reweigh the evidence” in writ petition challenging Commission’s evidentiary findings under the Coastal Act].) The court determines that substantial evidence supports the Commission’s decision the Project would promote important policies of the Coastal Act, including wetlands preservation and restoration, and that Commission’s weighing of the public benefits and risks for the second prong of section 30620 was not unreasonable, arbitrary or capricious.

Based on the foregoing, Commission’s public welfare findings under section 30260 are supported by substantial evidence. Commission applied the correct legal standard in making these findings. Other than the specific arguments analyzed below related to mitigation, Petitioners otherwise do not challenge Commission’s override findings under section 30260. (See OB 8-15; see also Reply 16, fn. 7.)

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Commission’s Findings and Mitigation for Cultural and Tribal Resources

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The third requirement of the override statute, section 30260, is that “adverse environmental effects are mitigated to the maximum extent feasible.” Commission interpreted this requirement to apply only to “impacts in the areas of policy inconsistency identified” in its decision, specifically visual resources and oil spill. (AR 143-145.) With imposition of various mitigation measures and special conditions, Commission found that “adverse visual impacts from the proposed project would be mitigated to the maximum extent feasible” and “the proposed project would have mitigated potential oil spill impacts to the maximum extent feasible.” (AR 144-145.) Other than the improper delegation and deferred mitigation arguments discussed below, Petitioners do not challenge these specific findings under section 30260 in their writ briefs. (*Nelson v. Avondale HOA* (2009) 172 Cal.App.4th 857, 862-863 [argument waived if not raised].)

Rather, Petitioners challenge Commission’s mitigation findings related to impacts on cultural resources. Commission analyzed mitigation for impacts to cultural resources under section 30244. (AR 132.) Section 30244 provides that “[w]here development would adversely impact archaeological or paleontological resources as identified by the State Historic Preservation Officer, reasonable mitigation measures shall be required.”

Petitioners contend that “[b]ecause the Commission applied a less stringent standard to the Project’s adverse cultural resources impacts [from section 30244], it failed to proceed in the manner required by law and the Project did not meet this additional aspect of the Section 30260 override provision.” (OB 12.) Petitioners contend that “Commission only imposed ‘reasonable mitigation measures’ pursuant to Coastal Act Section 30244” and “[c]ultural resource impacts were therefore not eliminated (AR132) and additional feasible mitigation measures were in fact available.” (OB 12.) Petitioners make this same argument in reply. (Reply 18:4-6.)

Exhaustion of Administrative Remedies

Real Parties and Commission contend that Petitioners failed to exhaust administrative remedies as to these mitigation arguments related to cultural resources impacts. (RP Oppo. 23; Comm. Oppo. 10:9-15.) The court agrees.

Petitioners have the burden to prove exhaustion of administrative remedies. The Commission’s staff report applied the section 30260 mitigation standard only to impacts related to visual resources and oil spills. (AR 2698-2700.) The staff report analyzed mitigation for cultural resources impacts under section 30244. (AR 2682-91.) The staff report was circulated prior to the Commission hearing. (See AR 2560, 2760, 4521-23.) Despite this analysis in the staff report, Petitioners’ record citations do not show that any person made an argument that Commission should apply the section 30260 standard to impacts on cultural resources or to any other Coastal Act policies for which Commission made findings of consistency (i.e., any policies other than visual resources and oil spills). (See Reply 16-17, citing AR 19939, 3546, 2784, 20209-210, 20213, 3493.)

In their writ briefs, Petitioners do *not* contend or develop an argument that Commission abused its discretion in finding that the mitigation measures for cultural resources impacts satisfied the reasonableness standard of section 30244. All of Petitioners’ arguments depend on the theory that Commission was required to apply the more “stringent” standard from section 30260. (See OB 10-12; Reply 16-18.) Because Petitioners did not exhaust administrative remedies on that issue, Petitioners’ arguments about the sufficiency of mitigation for cultural resources impacts are waived.

No Prejudicial Abuse of Discretion

Even if Petitioners exhausted administrative remedies, Petitioners do not show a prejudicial abuse of discretion in the Commission’s decision related to cultural resources impacts.

Petitioners contend that “[b]ecause the Commission applied a less stringent standard [of section 30244] to the Project’s adverse cultural resources impacts, it failed to proceed in the manner required by law and the Project did not meet [the third requirement] of the Section 30260 override provision.” (OB 12.) Petitioners raise a question of statutory interpretation. Petitioners contends that section 30260 governs even if the agency finds that the project is consistent with the Coastal Act because impacts were found for cultural resources. In contrast, Commission interpreted section

30260 to apply only to “impacts in the areas of policy inconsistency identified” in its decision, specifically visual resources and oil spill. (AR 143-145.)

“A statute must be construed “in the context of the entire statutory system of which it is a part, in order to achieve harmony among the parts.” (*People v. Hall* (1991) 1 Cal. 4th 266, 272.) “When the legislature has carefully employed a term in one place and has excluded it in another, it should not be implied where excluded.” (*Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1118.) The court “may neither insert language which has been omitted nor ignore language which has been inserted.” (See *People v. National Auto. and Cas. Ins. Co.* (2002) 98 Cal.App.4th 277, 282.)

The override provisions of section 30260 only apply “where new or expanded coastal-dependent industrial facilities cannot feasibly be accommodated **consistent with other policies of this division.**” (emphasis added.) Section 30244 provides that “[w]here development would adversely impact archaeological or paleontological resources as identified by the State Historic Preservation Officer, reasonable mitigation measures shall be required.” Petitioners do not argue or show that any other statute in the Coastal Act specifically governs impacts on cultural resources. Harmonizing sections 30260 and 30244, these provisions are reasonably interpreted such that a project that complies with the “reasonable mitigation” standard of section 30244 is consistent with the Coastal Act. Thus, where a project complies with section 30244, the override provisions of section 30260 do not apply. Commission’s interpretation of the statute is reasonable, harmonizes sections 30244 and 30260, and is entitled to deference. (*Reddell v. California Coastal Com.* (2009) 180 Cal.App.4th 956, 965.) Petitioners’ interpretation creates a conflict between sections 30244 and 30260 and fails to harmonize the statutory scheme. The court finds Commission’s interpretation of the statutes to be more reasonable.

Here, Commission found that the Project, as conditioned and mitigated, would be consistent with section 30244 and Coastal Act policies related to cultural resources. (AR 124-132.) Specifically, Commission found that the Project complies with section 30244 because “as conditioned, the proposed project includes reasonable mitigation measures that would partially address but do not eliminate this impact, and there are no additional reasonable mitigation measures available that could fully eliminate this impact.” (AR 132.) The court reviews this finding for substantial evidence. “Where the alleged defect predominantly relates to a factual dispute, such as ‘whether adverse effects have been mitigated or could be better mitigated’ [citation], the courts ‘accord greater deference to the agency’s substantive factual conclusions.’” (*Citizens Opposing a Dangerous Environment v. County of Kern* (2014) 228 Cal.App.4th 360, 382.)

Substantial evidence supports Commission’s finding that the Project complies with section 30244 because reasonable mitigation measures were included for any adverse impacts on cultural resources. Although no known cultural resources were discovered on any of the project sites, because it was nevertheless possible that cultural resources were present, a mitigation measure for Protection of Cultural Resources, consisting of six pages of mitigation, was imposed. (AR 129-131, 20207-20213 [special condition 23].) Special condition 23 requires an Archeological Research Plan and Archeological Monitoring and Mitigation Plan, which expands and increases the records search radius from within 0.5 miles to within 1.5 miles of the project sites, and includes additional soil core sampling. (AR 20207.) If any cultural deposits are discovered, all work is halted until the discovery can be evaluated by a qualified archaeologist, with consultation with Native American

representatives for possible treatment or preservation. (AR 20207-08 [special condition]; 2049, 4942-43, 8601-03 [same mitigation standard under CEQA].)

The Commission also evaluated any potential impacts to the Tribal Cultural Landscape as described by members of the Gabrieleno – Tongva tribe and the Gabrieleno – Kizh Nation, and imposed five special conditions to mitigate any potential impacts: 10, 11, 14, 19 and 24. (AR 130- 132.) This mitigation included: a Revised Nuisance Minimization Plan to meet identified lighting, noise, and vibration restrictions (AR 131, 20196-97 [special condition 14]), a Pollution Prevention Plan and Cultural Responsibilities Plan to verify that erosion control measures are in place and are mitigated during construction (AR 132, 20189-94 [special conditions 10 & 11]), an Oil Spill Prevention and Response Plan to reduce the chance of a spill and respond adequately in the event it occurs (AR 131-32, 20204-05 [special condition 19]), and a Tribal Cultural Education Plan with direct involvement from tribal members on educational materials for the Visitor's Center (AR 132, 20213-14 [special condition 24]).

To address these potential impacts on cultural resources, the Commission also sought input from several tribal representatives. (AR 126, 19870-72.) Of the representatives who spoke at the Commission hearing, the Tribal Chair of the Gabrieleno Band of Mission Indians – Kizh Nation, appearing on behalf of 550 members, supported the project as conditioned. (AR 19902-03; see also 19906-07, 19912-13.) A tribal biologist also spoke in support of the project's benefits to plants and animals, including endangered species, in the wetlands. (AR 19903-05.) An archeologist testified favorably that the cultural resources conditions were "comprehensive and well suited to mitigate impacts to archeological deposits that might be found during the project," and that the Tribal Education Plan would "emphasiz[e] the past and present Native American contributions to the local area." (AR 19928-29.) This testimony is substantial evidence supporting Commission's determination that the cultural resources impacts are reasonably mitigated, as required by section 30244. (AR 132.)

Petitioners have not challenged Commission's finding that the Project is consistent with section 30244 and Coastal Act policies related to cultural resources. Because Commission's finding of consistency with the Coastal Act is supported by substantial evidence, the override provisions of section 30260 were not triggered as to impacts on cultural resources. Accordingly, Petitioners do not show a prejudicial abuse of discretion. (CCP § 1094.5(b).)

Finally, even assuming *arguendo* that section 30260 did apply to cultural resources impacts, Petitioners do not show a prejudicial abuse of discretion. Petitioners contend that Commission's findings violate section 30260 because "Cultural resource impacts were ... not eliminated (AR132)." (OB 12.) Section 30260 does not require adverse impacts to be eliminated, but rather to be "mitigated to the maximum extent feasible."

Petitioners do not cite evidence establishing that any feasible mitigation measures exist that would be more protective of and further reduce the impacts on cultural resources. Petitioners contend that "additional feasible mitigation measures were in fact available," specifically a "LCWA Cultural Resources Plan suggesting incorporation of Tongva advisors in restoration planning and potential salt panne landscape as unique habitat for cultural and educational activity." (OB 12, citing AR 3493-96; see also Reply 16-17.) In response, Commission contends that "similar measures are already imposed, and Puvunga does not explain how its proposals provide any more

protection.” (Comm. Oppo. 17, citing 20180, 20213-14; see also RP Oppo. 29.) Commission’s argument is persuasive.

Special Condition 4, the Wetland Restoration and Mitigation Plan, requires a restoration plan developed in consultation with Native American groups “with documented ancestral ties to the area,” and therefore allows Tongva advisors to be involved in restoration planning or wetlands design. (AR 20180 [condition 4(g)]; see also AR 3494 [“the entire LCW Complex is a cultural site and is of great significance within the larger homeland of the Tongva”].) Relatedly, Special Condition 24, the Tribal Cultural Education Plan, requires consultation with tribal representatives to develop an education plan, and provides notice and an opportunity for tribal representatives to comment on the draft plans, which will be re-evaluated every five years. (AR 20213-20214.) While Petitioners contend that these special conditions only apply to Native American Heritage Commission (“NAHC”) groups, and do not include public comment, Petitioners have not shown it suggested public comment or that such a provision would improve the level of mitigation. In light of Special Conditions 4 and 24, Petitioners cited evidence does not show that impacts on cultural resources were not “mitigated to the maximum extent feasible.” Thus, even if section 30260 applied Petitioners do not show a prejudicial abuse of discretion in Commission’s decision with respect to cultural resources.[1]

Based on the foregoing, Petitioners did not exhaust administrative remedies with respect to their arguments about mitigation of cultural resources impacts. Moreover, Petitioners do not show a prejudicial abuse of discretion in the Commission’s decision for the reasons discussed above. Based on these conclusions, the court need not reach Real Parties’ arguments that the State Historic Preservation Officer has not identified any archeological resources on the sites and section 32044 does not require *any* mitigation. (RP Oppo. 25-28.)

Delegation of Duties to the Executive Director; and Deferred Mitigation

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Petitioners contend that “the Commission delegated its quasi-judicial function and deferred analysis of numerous Project mitigation measures.” (OB 13-14.) Specifically, “the Commission imposed 26 Special Conditions, most of which require preparation of a plan or study and mitigation measures based thereon, subject to Executive Director review and approval.” (OB 12.)

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Exhaustion of Administrative Remedies; and Failure to Plead Claim

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Real Parties and Commission contend that Petitioners failed to exhaust administrative remedies for, or plead in the petition their arguments about improper delegation of duties to the executive director, and impermissible deferred mitigation. (RP Oppo. 29-30; Comm. Oppo. 17-18.) The court agrees.

In written correspondence relevant to the improper delegation issue, Petitioner Christensen and others objected that plans for the 25 special conditions should be submitted to the Commission before approving the project. (AR 2777-79, 2749, 4544.) This objection was part of a request to postpone the hearing, stating that the “plans should be submitted and agreed to by both parties before this project is approved.” (AR 2775, 2777-78.)

In arguing that they exhausted their administrative remedies, Petitioners contend that “Petitioners and others commented that the plans required via Special Conditions should have been submitted to the Commission prior to project approval.” (Reply 12-13, citing AR 2863, 2789, 2778, 4528, 3542, 3584.) In a letter dated December 3, 2018, Center for Biological Diversity requested a postponement of the Commission hearing “to provide stakeholders ... additional time to review, comment, and consult with the Commission” (AR 2862-64.) Among other reasons for a postponement, Center for Biological Diversity wrote that “much of the mitigation relied on by the Staff Report to reduce these impacts and risks is included in 25 Special Conditions and remains to be fully developed and evaluated.” (AR 2863.)

To satisfy the exhaustion doctrine, “the objections must be sufficiently specific so that the agency has the opportunity to evaluate and respond to them.” (*Greene v. California Coastal Com.* (2019) 40 Cal.App.5th 1227, 1237.) Petitioners’ record citations do not satisfy that standard with respect to their arguments about improper delegation of duties and deferred mitigation. Christensen and other commentators (including Center for Biological Diversity) did not argue that the special conditions were inadequate because they lacked specific criteria or because they delegated duties to the executive director. Nor do these record citations show any legal arguments applying concepts of improper delegation or deferred mitigation to specific components of the Special Conditions, which are extremely detailed and span some 40 pages. (See AR 1-48.)

Real Parties and Commission also contend that Petitioners failed to plead in their writ petition a claim that Commission improperly delegated duties to the executive director or deferred mitigation. (RP Oppo. 29-30; Comm. Oppo. 17-18.) The court agrees. Contrary to Petitioners’ assertion in reply, Petitioners’ general allegations about “conflicts with Chapter 3 of the California Coastal Act” did not place in issue a claim that Commission improperly delegated duties or deferred mitigation. (See Reply 13, citing FAP ¶¶ 56, 59-64, 67.) Nor did Petitioners’ allegation that “Commission abused its discretion in determining the Project met all three tests of Section 30260.” (FAP ¶ 59.) An issue not raised in the petition for writ of mandate should not be considered by the trial court. (*Borror v. Department of Investment* (1971) 15 Cal.App.3d 531, 547; see also *Duchrow v. Forrest* (2013) 215 Cal.App.4th 1359, 1380 [denying leave to amend pleadings mid-trial to add a new and substantially different theory of liability])

In their Reply, Petitioners request leave to amend their petition to conform to proof. (Reply 13-14.) “A trial court has broad discretion to allow the filing of amendments to pleadings to conform to proof after a trial has been concluded. Granting leave to file such an amendment is not an abuse of discretion unless the amendment brings new and substantially different issues into the case.” (*Nelson v. Gaunt* (1981) 125 Cal.App.3d 623, 636.) However, leave to amend is not automatically granted. “[E]ven if a good amendment is proposed in proper form, unwarranted delay in presenting it may—of itself—be a valid reason for denial.” (*Duchrow, supra*, 215 Cal.App.4th at 1380.) In assessing a request for amendment at trial, the court may consider the diligence of the party making the request. (*Ibid.*)

Here, in requesting leave to amend, Petitioners provide no explanation for the delay in seeking to add a new legal theory to the petition. The writ petition was filed in February 2019, more than two years ago. Petitioners filed an amended petition in August 2019. On October 27, 2020, after a hearing and briefing, the court denied the motion of Real Parties for an order tolling the term of the Coastal Development Permit. This motion highlighted that the passage of time was significant

to Real Parties, given that the project approval contained a deadline for commencement of development. Substantial new legal theories that delay resolution of this writ action could prejudice Real Parties as a practical matter. Nonetheless, Petitioners did not seek at that time to amend their petition or at any time prior to filing their reply brief. This unexplained delay and lack of diligence weigh heavily against granting an amendment at trial, especially where Petitioners did not show that they exhausted administrative remedies with respect to the proposed amended claim.

Petitioners suggest that leave to amend must be granted because their new legal claim is based on an administrative record and not new evidence. (Reply 13-14, citing *Rainer v. Buena Community Memorial Hosp.* (1971) 18 Cal.App.3d 240, 254.) The court is not persuaded. In a writ action based on an administrative record, which in this case spans more than 20,000 pages, an entirely new legal theory necessarily “brings new and substantially different issues into the case.” (*Nelson v. Gaunt* (1981) 125 Cal.App.3d 623, 636.) The mere fact that a writ petition is based on an administrative record does not justify amendment of the petition at trial.

Based on the foregoing, Petitioners failed to exhaust administrative remedies with respect to their contentions that Commission improperly delegated duties to its executive director and deferred analysis of numerous Project conditions. Petitioners also failed to plead this claim in the writ petition. Petitioners’ request to amend the writ petition is DENIED. (See Reply 13-14.)

No Prejudicial Abuse of Discretion

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Because Petitioners did not exhaust administrative remedies and also failed to plead the claim, Petitioners’ arguments that Commission improperly delegated duties to its executive director and deferred analysis of numerous Project mitigation measures were waived. These procedural defects are a sufficient basis for the court to deny the claim and have been specifically relied upon by the court in its decision. However, even if Petitioners overcame these procedural defects, Petitioners do not show a prejudicial abuse of discretion.

The Commission imposed 40 pages of special conditions on the Project. (AR 1-48; AR 20175-20217.) The majority of the plans imposed therein require “review and written approval” by the Executive Director. These plans concern numerous different aspects of the Project, including: the development’s seismic safety (AR 20178, 20206-20207); wetland restoration and mitigation (AR 20179-82); the protection of wetlands, sensitive habitat areas, and special-status species (AR 20184-20188); construction pollution prevention (AR 20190-20194); special-status plant restoration and mitigation (AR 20195-20196); nuisance minimization (AR 2196-20197); public access protection (AR 20197-20199); water quality protection (AR 20199-20202); contaminated soil investigation and removal (AR 20202-20203); land surface elevation and seismic activity monitoring and mitigation (AR 20203-20204); oil spill prevention and response (AR 20204-20205); seismic analysis and safety (AR 20206-20207); archeological research and protection of cultural resources and a monitoring and mitigation plan (AR 20207-20213); tribal culture education (AR 20213-20214); and visual compensation (AR 20214-20215).

Petitioners contend that these conditions “are not mere formalities” and that important decision-making functions are delegated to the executive director or deferred. (OB 14.) As an example, Petitioners refer to Special Condition 21, which requires BOM to submit a Seismic and

Geotechnical Analysis and Hazard Mitigation Plan that requires detailed design plans, site-specific geotechnical analysis for each site evaluating fault rupture hazards, and engineering analysis and specific design recommendation and mitigation measures the address the aforementioned hazards. (AR 39-40.) Prior to issuance of the CDP, BOM must submit these plan documents to the executive director for “review and written approval.” The condition states that “[t]he Permittee shall undertake development in conformance with the approved plans unless the Commission amends this permit or the Executive Director provides a written

determination that no amendment is legally required.” (Ibid.)

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Citing CEQA cases, Petitioners contend that “such deferral of formulation of mitigation measures is forbidden unless the agency commits itself to specific criteria for evaluating the efficacy of the measures implemented.” (OB 14.) Under guidelines that apply specifically to CEQA, “[f]ormulation of mitigation measures should not be deferred until some future time.” (*King & Gardiner Farms, LLC v. County of Kern* (2020) 45 Cal.App.5th 814, 856, citing CEQA Guidelines § 15126.4.) “Thus, as a general rule, ‘it is inappropriate [under CEQA] to postpone the formulation of mitigation measures.’ However, the general rule is not absolute and ‘there are circumstances in which some aspects of mitigation may appropriately be deferred.’ For instance, ‘measures may specify performance standards which would mitigate the significant effect of the project and which may be accomplished in more than one specified way.’” (*King & Gardiner, supra* at 856.) “Deferral of the specifics of mitigation is permissible where the local entity commits itself to mitigation and lists the alternatives to be considered, analyzed and possibly incorporated in the mitigation plan.... If mitigation is feasible but impractical at the time of a general plan or zoning amendment, it is sufficient to articulate specific performance criteria and make further approvals contingent on finding a way to meet them.” (Ibid.)

Petitioners cite no authority that CEQA concepts of deferred mitigation have been applied to conditions imposed by the Commission under the Coastal Act. *Bolsa Chica Land Trust v. Superior Court* (1999) 71 Cal. App. 4th 493, cited by Petitioners, did not decide that question. (OB 14.) “It is axiomatic that language in a judicial opinion is to be understood in accordance with the facts and issues before the court. An opinion is not authority for propositions not considered.” (*People v. Knoller* (2007) 41 Cal.4th 139, 154-55.)

Even if the CEQA standard provides guidance here, Petitioners have not provided sufficient discussion of the Special Conditions to establish that Commission improperly deferred mitigation. In the opening brief, Petitioners only discuss Special Condition 21 and Petitioners’ legal analysis is conclusory. (OB 14.) As noted by Real Parties, Special Condition 21 provides technical and specific standards for BOM’s preparation of a Seismic Analysis Safety Plan. For instance, the plan must include a geotechnical analysis for each site evaluating “[f]ault rupture hazards, at a minimum evaluating the maximum horizontal and vertical fault displacement that could occur during an earthquake event on the Newport-Inglewood fault with a 1% in 50 year chance of occurrence (1/4,975 annual probability), as determined based on a review of the most current available science.” (AR 39.) The geotechnical plan must also evaluate “[g]round shaking, liquefaction and seismic settlement hazards based on current building codes (e.g., CBC 2016) and ASCE guidelines (e.g., ASCE 7-16) and the most current, best available science.” (Ibid.)

In addition to the detailed requirements regarding the contents of the Plan, the Special Condition also provides performance standards the Plan is to meet. For example, the Plan requires an engineering analysis demonstrating that “flood control barriers have been designed to withstand the

maximum horizontal and vertical fault displacements identified in the geotechnical analysis,” and that project structures are “designed and constructed to withstand expected level of ground shaking, liquefaction and ground settlement as determined in the geotechnical analysis.” (Ibid.)

Given the highly technical nature of the required Plan, it seems reasonable for Commission to articulate specific performance criteria and require Real Parties to submit the plans to the executive director for review and approval. As long as the Special Condition contains criteria by which the Plan is to be evaluated, such condition does not constitute improper deferred mitigation, assuming the CEQA analysis of this issue is analogous.

In reply, Petitioners contend that “Special Condition 19, which is intended to address oil spills, includes similar language [as Condition 21], requiring a risk assessment and thereafter a demonstration that the prevention and response measures address the deferred assessment.” (Reply 15, citing AR 37.) “The salutary rule is that points raised in a reply brief for the first time will not be considered unless good cause is shown for the failure to present them before.” (*Balboa Ins. Co. v. Aguirre* (1983) 149 Cal.App.3d 1002, 1010.) Petitioners do not show good cause to raise a new argument in reply regarding a condition that was not discussed in the opening brief. In any event, like Condition 21, Special Condition 19 specifies the information that must be included in the Oil Spill Prevention and Response Plan and contain at least some standards by which the Plan is to be evaluated [e.g. “oil spill prevention and safety measures for all project components, ... and procedures for testing, maintaining, and inspecting pipelines shall comply with California Office of Spill Prevention and Response regulations.”] (AR 37-38.)

Other than Special Conditions 19 and 21, Petitioners provide no meaningful discussion in their writ briefs concerning the specific components of the conditions and why Petitioners believe Commission improperly deferred mitigation. It is not the court’s function to develop such arguments in the first instance. (*Nelson v. Avondale HOA* (2009) 172 Cal.App.4th 857, 862-863 [argument waived if not raised]; *Pfeifer v. Countrywide Home Loans, Inc.* (2012) 211 Cal.App.4th 1250, 1282 [same]; *Inyo Citizens for Better Planning v. Inyo County Board of Supervisors* (2009) 180 Cal.App.4th 1, 14 [court does not serve as “backup” counsel]; *Quantum Cooking Concepts, Inc. v. LV Associates, Inc.* (2011) 197 Cal.App.4th 927, 934 [Cal. Rules of Court, Rule 3.1113 “rests on a policy-based allocation of resources, preventing the trial court from being cast as a tacit advocate for the moving party’s theories”].)

Petitioners also make a broader argument that “neither the Coastal Act nor the Commission’s regulations authorize delegation of the Commission’s primary quasi-judicial role to review development permits for Coastal Act consistency.” (OB 13-15.) Petitioners contend that “[t]hough the Coastal Act envisions some level of delegation to the Executive Director, such instances must be specifically enumerated.” (Ibid.)

In response, Real Parties and Commission contend that the Coastal Act and its implementing regulations authorize Commission to delegate certain duties to the executive director, including with respect to execution of special conditions and determination of compliance with permit conditions. (See e.g. Comm. Opp. 18-19.) The Coastal Act empowers the Commission to promulgate regulations and hire an executive director and staff counsel to administer those regulations. (§§ 30333, 30335.) The executive director is authorized to issue coastal permits in certain cases (§ 30624) and grant permit extensions (14 CCR § 13169(a) & (b)). Most important

here, the executive director is authorized to “administer the affairs of the commission.” (14 CCR § 13032.)

Real Parties and Commission contend that “[i]t would be entirely impractical for the Commission, a 12-member body responsible for statewide Coastal Act compliance, to monitor compliance with each of its individual decisions.” (Comm. Oppo. 18.) They also point out that some of the special conditions specify that Commission approval is required, either for mitigation that changes Project plans in a manner that is more than “de minimis,” or to resolve disputes between interested parties. (RP Oppo. 32-33, citing AR 20210-12.)

The court is not persuaded that practical considerations alone, unconnected to any statute or regulatory framework, allow Commission to delegate duties to the executive director or staff. It is also noteworthy that, other than for certain emergency and nonemergency permits not at issue here (see § 30624), Commission has not identified any regulation that specifically describes the circumstances in which Commission may delegate duties to the executive director related to review, approval, and execution of project conditions. On the other hand, by regulation promulgated pursuant to the Coastal Act, the executive director has broad authority to “administer the affairs of the commission.” (14 CCR § 13032.) Petitioners have not disputed that such authority extends to routine and ministerial duties related to the permit conditions, such as receipt from the permittee of all local, state, and federal permits required to perform the project-related work. (See AR 9; Special Condition 1.) There is at least a colorable argument that such authority also extends to review and approval of design or mitigation plans, where the conditions include detailed performance standards and instructions approved by the Commission.

None of the parties have provided the court with any case law authority bearing on the scope of proper delegation to the Executive Director under the Coastal Act. Under the circumstances of this case, the court need not further opine on this issue. Petitioners have not exhausted administrative remedies on this argument, depriving Commission of an opportunity to respond to Petitioners’ concerns in the administrative proceedings or modify the project conditions. Nor did Petitioners sufficiently plead the claims.

As an unpled claim, and one for which Petitioners did not exhaust administrative remedies, and for the further reasons discussed above, the court does not find the Commission’s delegation of authority to the Executive Director with respect to some of the Special Conditions is a basis to overturn the Commission’s decision.

Conclusion

The writ petition is DENIED.

[1] In Reply, Petitioners argue that they suggested a mitigation measure turning over the entire design of the Archaeological Research Plan to NAHC. Petitioners have not shown it would be consistent with the Coastal Act to delegate design of a mitigation measure to a party not under the control of the Commission, or that it would result in greater mitigation of any impact than the Commission's condition.