Superior Court of California
County of Kern
1415 Truxtun Ave
Bakersfield, CA 93301

Date: **03/12/2018** **Time:** **8:00 AM - 5:00 PM**

BCV-15-101645

VAQUERO ENERGY VS COUNTY OF KERN

Courtroom Staff

Honorable: J. Eric Bradshaw **Clerk:** Y. Torres

Court reporter: N/A **Bailiff:** N/A
Interpreter: **Language of:**

PARTIES:

CALIFORNIA INDEPENDENT PETROLEUM ASSOCIATION, *Real Party Interest, not present*	KELI OSAKI, Attorney, not present
CALIFORNIA INDEPENDENT PETROLEUM ASSOCIATION, Real Party Interest, not present	KELI OSAKI, Attorney, not present
CALIFORNIA INDEPENDENT PETROLEUM ASSOCIATION, A CALIFORNIA NON-PROFIT MUTUAL BENEFIT CORPORATION, Real Party Interest, not present	CRAIG MOYER, Attorney, not present
CENTER FOR BIOLOGICAL DIVERSITY, Petitioner, not present	HOLLIN KRETZMANN, Attorney, not present
COMMITTEE FOR A BETTER ARVIN, Petitioner, not present	CAROLINE FARRELL, Attorney, not present
COMMITTEE FOR A BETTER SHAFTER, Petitioner, not present	CAROLINE FARRELL, Attorney, not present
COUNTY OF KERN, Respondent, not present	CHARLES COLLINS, Attorney, not present
COUNTY OF KERN, Respondent, not present	CHARLES COLLINS, Attorney, not present
GREENFIELD WALKING GROUP, Petitioner, not present	CAROLINE FARRELL, Attorney, not present
HUNTER EDISON OIL DEVELOPMENT LIMITED PARTNERSHIP, A CALIFORNIA LIMITED PARTNERSHIP, Petitioner, not present	EDWARD RENWICK, Attorney, not present
INDEPENDENT OIL PRODUCERS AGENCY, Real Party Interest, not present	BLAINE GREEN, Attorney, not present
INDEPENDENT OIL PRODUCERS AGENCY, Real Party Interest, not present	NORMAN CARLIN, Attorney, not present
INDEPENDENT OIL PRODUCERS' AGENCY, A CALIFORNIA CORPORATION, Real Party Interest, not present	NORMAN CARLIN, Attorney, not present
KERN COUNTY, Respondent, not present	*CHARLES COLLINS, Attorney, not present*
KERN COUNTY BOARD OF SUPERVISORS, Respondent, not present	CHARLES COLLINS, Attorney, not present

KERN COUNTY BOARD OF SUPERVISORS, Respondent, not present	CHARLES COLLINS, Attorney, not present
KERN COUNTY BOARD OF SUPERVISORS, Respondent, not present Kern County Counsel, Defendant, not present	CHARLES COLLINS, Attorney, not present
KERN COUNTY PLANNING AND COMMUNITY DEVELOPMENT DEPARTMENT, Respondent, not present	CHARLES COLLINS, Attorney, not present
KERN COUNTY PLANNING AND COMMUNITY DEVELOPMENT DEPARTMENT, Respondent, not present	CHARLES COLLINS, Attorney, not present
KERN COUNTY PLANNING COMMISSION, Respondent, not present	CHARLES COLLINS, Attorney, not present
KING AND GARDINER FARMS, LLC, Petitioner, not present	RACHEL HOOPER, Attorney, not present
NATURAL RESOURCES DEFENSE COUNCIL, Petitioner, not present	WILLIAM ROSTOV, Attorney, not present
Natural Resources Defense Council, Petitioner, not present	MARGARET HSIEH, Attorney, not present
SIERRA CLUB, Petitioner, not present	WILLIAM ROSTOV, Attorney, not present
VAQUERO ENERGY INC., A CALIFORNIA CORPORATION, Petitioner, not present	EDWARD RENWICK, Attorney, not present
WESTERN STATES PETROLEUM ASSOCIATION, Real Party Interest, not present	BLAINE GREEN, Attorney, not present
WESTERN STATES PETROLEUM ASSOCIATION, Real Party Interest, not present	NORMAN CARLIN, Attorney, not present
WESTERN STATES PETROLEUM ASSOCIATION, A CALIFORNIA NON-PROFIT MUTUAL BENEFIT CORPORATION, Real Party Interest, not present	NORMAN CARLIN, Attorney, not present

NATURE OF PROCEEDINGS: RULING ON CONSOLIDATED PETITIONS FOR WRITS OF MANDATE, AND COMPLAINTS FOR DECLARATORY AND INJUNCTIVE RELIEF (BCV-15-101645, BCV-15-101666, and BCV-15-101679) HERETOFORE SUBMITTED:

SEE ATTACHED RULING, INCORPORATED HEREIN.

MINUTE ORDER FINALIZED BY: YESENIA TORRES *ON:* MARCH 12, 2018

CONSOLIDATED PETITIONS FOR WRITS OF MANDATE, AND COMPLAINTS FOR DECLARATORY AND INJUNCTIVE RELIEF (BCV-15-101645, BCV-15-101666, and BCV-15-101679) HERETOFORE SUBMITTED:

* * * * *

DISPOSITION

BCV-15-101645 (Lead case)

The first amended petition/complaint of Vaquero Energy, Inc. ("Vaquero"), and Hunter Edison Oil Development Limited Partnership ("Hunter") (sometimes collectively "Vaquero petitioners"), for a writ of mandate, and for declaratory and injunctive relief, is DENIED. Judgment shall be entered in favor of respondents/defendants, against Vaquero petitioners, and Vaquero petitioners shall take nothing by way of their petition/complaint. Costs of suit and attorneys' fees may be claimed in accordance with applicable law and rules of court. Respondent/defendant County of Kern shall prepare a separate judgment for BCV-15-101645.

BCV-15-101666 & BCV-15-101679

The petition/complaint of King and Gardiner Farms, LLC ("KGF"), and the petition/complaint of Committee for a Better Arvin, Committee for a Better Shafter, Greenfield Walking Group, Natural Resources Defense Council, Sierra Club, and Center for Biological Diversity (collectively "Arvin Petitioners"), for a writs of mandate, and for declaratory, injunctive and other relief, are GRANTED IN PART, and DENIED IN PART, consistent with the issue-specific rulings herein. Judgment and other appropriate relief shall be entered consistent with the rulings herein. Arvin Petitioners' request for judicial notice of the unpublished superior court decision (Ex. 1) is DENIED. Costs of suit and attorneys' fees may be claimed in accordance with applicable law and rules of court.

A case management conference is hereby scheduled in these two consolidated cases (BCV-15-101666 and BCV-15-101679), in Dept. T-2 of the Kern County Superior Court, located at 3131 Arrow Street, Bakersfield, CA, on April 4, 2018 at 8:30 a.m., for the purpose of discussing remedy and relief. The parties are ordered to meet and confer in good faith prior to the case management conference to discuss the foregoing, and if possible, to submit to the court for review and signature an agreed form of judgment, writ or other orders/decrees as may be appropriate.

DISCUSSION

This discussion organizes rulings on issues according to the plaintiff/petitioner principally responsible for arguing the particular issue at trial.

Vaquero Petitioners' Issues

1. Contract Clause

Vaquero petitioners have failed to prove that Kern County Ordinance Code sections 19.98.100, 19.98.140, 19.98.085, 19.98.090, or 19.98.130, unconstitutionally impair a contract in violation of the Contract Clauses of the U. S. Constitution or California Constitution. It is undisputed that Vaquero is a lessee under oil and gas leases in "Tier 2" areas in Kern County where surface ownership has been severed from mineral ownership, and that Hunter operates those leases. The specific provisions of the leases and agreements under which Vaquero petitioners hold their interests and operate, however, have not been proven. Thus, no impairment of a particular contract or obligation, substantial or otherwise, has been proven.

Similarly, assuming *arguendo*, the Vaquero petitioners' "bargaining power" vis-à-vis surface owners is a "contract" or "obligation" that can be "impaired" within the meaning of the Contract Clause, the impairment is slight under the circumstances. The oil and gas industry is heavily regulated. The burden of successfully negotiating a surface owner's consent, or obtaining a ministerial permit by following the "second pathway," is justified by the County's interest in protecting agricultural land use, and minimizing land use conflicts. Regulations substantially more restrictive than the County's ordinance have been upheld against Contract Clause challenges. *See, e.g., Energy Reserves Group, Inc. v. Kansas Power and Light Co. (1983) 459 U.S. 400; Exxon Corp. v. Eagerton (1983) 462 U.S. 176; Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach (2001) 86 Cal.App.4th 534.*

2. Equal Protection

Vaquero petitioners have failed to prove that the ordinance denies them equal protection under the U.S. Constitution, or the California Constitution. The "two pathway" provisions of the ordinance do not involve a suspect class or a fundamental right. The differential regulatory treatment for split estate mineral owners, based on surface owner consent or refusal to consent, is rationally related to the County's legitimate interest in promoting cooperation, protecting agricultural land use, and minimizing land use conflicts.

3. Due Process

Vaquero petitioners have failed to prove that the ordinance denies them due process of the law under the U.S. Constitution, or the California Constitution, and no impermissible regulatory "taking" has been shown. The purposes of the County's ordinance, establishing

tiers and "two pathways" to a ministerial permit, include protecting agricultural land use, minimizing land use conflicts, promoting cooperation where mineral and surface ownership has been severed, and protecting health, safety and the environment. The subject ordinance contains reasonable provisions substantially aimed at achieving these legitimate purposes. *See, Murphy v. Amoco Production Co. (1984) 729 F.2d 552, 556.*

Vaquero petitioners' reliance on *Eubank v. City of Richmond (1912) 226 U.S. 137 ("Eubank")*, is misplaced. In *Eubank*, the Supreme Court invalidated a city ordinance that conferred the power to establish building setback lines upon the owners of two-thirds of the property abutting any street. In the present case, County's ordinance does not give surface owners the power to "veto" a mineral owner's activity, just the power to consent or withhold consent. When either the surface owner or the mineral owner is unwilling to agree, for whatever reason, the mineral owner has the "second pathway" option. *Eubank* precludes the unlawful *delegation* of legislative authority; it does not apply to circumstances where—as here—the law allows private parties to *waive* a requirement ("first pathway"), or obtain a permit by alternate means ("second pathway"). *See, Thomas Cusack Co. v. City of Chicago (1917) 242 U.S. 526 ("Cusack"); see also, Kentucky Div., Horsemen's Benev. & Protective Assn., Inc. v. Turfway Park Racing Assn., Inc. (1994) 20 F.3d 1406* [discussing *Eubank* and *Cusack*].

CEQA Standard of Review

Public Resources Code § 21168.5 applies in cases seeking traditional ("ordinary") mandamus and cases other than those to which Public Resources Code § 21168 applies, such as cases where an agency has made a "legislative," "nonjudicial" or "nonadjudicative" determination or decision. *Pub. Res. Code § 21168.5*; *Laurel Heights Improvement Assn. of San Francisco, Inc. v. Regents of Univ. of Calif. (1988) 47 Cal.3d 376, fn. 5; Vineyard Area Citizens for Responsible Growth, Inc., v. City of Rancho Cordova (2007) 40 Cal.4th 412, fn. 4; Center for Biological Diversity v. California Dept. of Fish & Wildlife ("Center") (2015) 62 Cal.4th 204, 214-215.* The court reviews an agency's determination or decision under Section 21168.5 to see if the agency committed a "prejudicial abuse of discretion." *Pub. Res. Code § 21168.5.* An "abuse of discretion" occurs under Section 21168.5 if: (1) "the agency has not proceeded in a manner required by law," or (2) "the [agency's] determination or decision is not supported by substantial evidence." *Pub. Res. Code § 21168.5*; *Vineyard, supra, at p. 435.* Judicial review of these two types of error differs significantly: the court determines *de novo* whether the agency has employed the correct procedures, "scrupulously enforc[ing] all legislatively mandated CEQA requirements," *Vineyard, supra, at p. 435 [quoting Citizens Goleta Valley v. Board of Supervisors (1990) 52 Cal.3d 553, 564]*; the court accords greater deference to the agency's substantive factual conclusions, and reviews them for substantial evidence. *Laurel Heights, supra, 47 Cal.3d at p. 393; Vineyard, supra, at p. 435.* Thus, in evaluating an EIR for CEQA compliance under Section 21168.5, the court must adjust its scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of improper

procedure or a dispute over the facts. *Vineyard, supra, at p. 435; Center, supra, 62 Cal.4th 204, 214-215.*

An EIR will be found legally inadequate—and subject to independent review for procedural error—where it omits information that is both required by CEQA and necessary to informed discussion." *California Native Plant Society v. City of Santa Cruz (2009) 177 Cal.App.4th 957, 986.* Omission of required information constitutes a failure to proceed in a manner required by law where it precludes informed decision-making by the agency or informed public participation by the public. *Id. at p. 987.*

The substantial evidence standard is applied to conclusions, findings, and determinations, to challenges regarding the scope of an EIR's analysis of a topic, the methodology used for studying an impact, and the reliability or accuracy of data upon which the EIR relied, because these types of challenges involve factual questions. *Ibid.; see also, Santa Monica Baykeeper v. City of Malibu (2011) 193 Cal.App.4th 1538, 1546.*

In applying the "substantial evidence" standard to an agency's factual determinations under both Section 21168 and Section 21168.5, the court must resolve reasonable doubts in favor of the administrative finding and decision. *Topanga Association for a Scenic Community v. County of Los Angeles (1974) 11 Cal.3d 506, 514; Laurel Heights, supra, 47 Cal.3d at p. 393.* A court may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable. *Greenbaum v. City of Los Angeles (1984) 153 Cal.App.3d 401-402; Laurel Heights, supra, 47 Cal.3d at p. 393.* The court does not pass upon the correctness of the EIR's environmental conclusions, but only upon its sufficiency as an informative document. *Laurel Heights, supra, 47 Cal.3d at p. 392.* The court must resolve reasonable doubts in favor of the administrative finding and decision. *Id. at p. 393.*

KGF Issues

1. CUP Alternative

Petitioner argues that no substantial evidence supports the County's determinations that: (1) the CUP alternative would impede a project objective; and (2) the CUP alternative is environmentally inferior to the project ordinance.

Would Not Achieve Basic Objective

County's findings regarding the CUP alternative state, in part: the "[CUP alternative] would not achieve the Project's basic objective[;]" it "would not streamline the County's current oil and gas permitting procedures because it would impose a lengthy and cumbersome discretionary permitting process on all new oil and gas development...[;]" "County currently contains approximately 75 active oil and gas fields, and over 2,500 wells are drilled in the County every year[;]" "it is not practical to subject every well permit to

an individual discretionary approval process, or for environmental reviews to be conducted on every single well or groups of wells[;]" "County lacks the resources to process thousands of oil and gas Negative Declarations and/or EIRs each year[;]" "the economic consequences for operators would be severe, delaying drilling for many months during the preparation of costly individualized CEQA documents[;]" "such individualized review would be highly repetitive, as the thousands of Negative Declarations and EIR's would re-analyze the same impacts and prescribe the same mitigation for each new well or group of wells throughout the County[;]" "the basic objective of the Project and this EIR is to eliminate time-consuming and costly discretionary reviews of individual well and field development activities by establishing a ministerial site plan review process which incorporates mitigation identified in this EIR." Substantial evidence supported County's findings.

Petitioner argues that County rejected the CUP alternative because it would not achieve "one of the 13 project objectives, the streamlining of oil and gas environmental review and permitting." Petitioner cites Guideline § 15126.6(b), and argues that County may not "reject an alternative because it has some adverse impact on a single project objective." Petitioner's interpretation of the findings is unreasonably narrow. Several project objectives obviously overlap and interrelate. It is reasonably apparent that County's findings discuss "streamlining" regulations and the consequences of doing so, from the standpoint of both County administration and industry compliance. The finding is sufficiently informative and cannot reasonably be understood as involving only "one of 13 project objectives." Moreover, Guideline § 15126.6(b) governs the assessment of "*potentially*" feasible alternatives in the EIR. County's ultimate decision to reject an infeasible alternative is governed by Guideline § 15091(a)(3). *California Native Plant Soc. v. City of Santa Cruz (2009) 177 Cal.App.4th 957, 998-999.*

Petitioner argues the CUP alternative "would not impede efficient and streamlined environmental review," and that "no actual evidence" supports County's determinations regarding the administrative burden imposed by the CUP alternative. Petitioner is incorrect. Petitioner's opinion the CUP alternative "would *enable*" streamlined review in some abstract sense does not address objectives and practical constraints with which County was obviously considered. County considered an actual workload, and was entitled to rely on oral and written presentations and analyses regarding the estimated number of permits to be issued, County's experience with oil and gas development, CUPs, EIRs, negative declarations, costs, the discretionary approval process, how long that process actually takes, County's own resources and the limitations, as well as the severe negative consequences of individualized discretionary review to an industry so economically significant to County.

Petitioner argues that County refused to consider a variation of the CUP alternative. This argument appears as part of petitioner's broader contention that County's findings are not supported by substantial evidence. To the extent the perceived error is a lack of substantial evidence to support a finding, infeasibility findings are only required for "alternatives *identified in the environmental impact report.*" *Pub. Res. Code § 21081(a)(3).*

County made findings regarding the CUP alternative, and was not required to make specific findings regarding a proposed variation or variations of the CUP alternative. Nevertheless, substantial evidence in the record shows the CUP variant was criticized as infeasible for the same reasons as the CUP alternative, although it would have involved fewer CUPs. To the extent the perceived error is a failure to proceed in a manner required by law for failing to discuss a variation of the CUP alternative in the EIR, County considered and discussed a range of reasonable alternatives, as required. County was not required to discuss each proposed variation of a project alternative in the EIR. *Mira Mar Mobile Community v. City of Oceanside (2004) 119 Cal.App.4th 477, 491.*

County's findings and decision to reject the CUP alternative, including the CUP alternative variation, are supported by substantial evidence. There was no failure to proceed in a manner required by law. There was no prejudicial abuse of discretion.

Environmentally Inferior

County determined the "[CUP alternative] is ultimately environmentally inferior to the proposed Project." County found the "mitigation program...established by the Project would provide mitigation at levels in excess of that which would occur if new wells were subject to discretionary approval following individual environmental review, and "[i]n this sense, the Project is environmentally superior to [the CUP alternative] and will better serve regional conservation priorities...."

Substantial evidence shows the project mitigation measures were developed using "worst-case scenarios" and conservative assumptions. The mitigation is applied, including site-specific mitigation, whether or not the new project activity, e.g., new well, actually causes an impact. Petitioner may be correct that case-by-case analysis of each new well under a discretionary approval process, if reasonably practicable, might result in more tailored mitigation for particular wells. Petitioner might be wrong. Substantial evidence supports the determination, however, that subjecting all new wells to the project's mitigation measures over many years will produce environmentally superior results. County's judgment regarding the relative environmental merit of the project compared to the CUP alternative was informed by substantial evidence. There was no failure to proceed in a manner required by law. There was no prejudicial abuse of discretion.

2. Agricultural Impacts

Farmland Conversion / "Footprint"

Petitioner argues the EIR underestimated farmland conversion by considering only the infrastructure "footprint." The EIR determined that the project's incremental contribution to the conversion of farmland to non-agricultural uses would be cumulatively considerable. The EIR's analysis of project-related farmland conversion was not limited to infrastructure "footprint." Substantial evidence supports the determination that, of the

total farmland acreage in the project area (828,973 acres), the project will impact ("disturb") 298 acres (.04%) per year, or a total of approximately 7,450 acres between 2015 and 2040, less than 1% of total farmland acreage. The EIR's "disturbance factors," the methodology used to achieve them, the scope of the analysis, and determinations regarding farmland conversion are supported by substantial evidence. There was no failure to proceed in a manner required by law. There was no prejudicial abuse of discretion.

Clustering

Petitioner argues that it and others proposed a mitigation requirement that oil and gas infrastructure be "clustered" on farmland to minimize ground disturbance, and that County "completely ignored the proposal." Commenters asserted that the DEIR "must identify mitigation measures requiring oil and gas facilities to be clustered together, instead of being spread out across contiguous parcels of land" or "a farm." Petitioner's attorneys commented that the mitigation measures in the DEIR "fail[ed] to adequately remedy land use conflicts between oil and gas and agricultural operations," and "there are no measures that require wells and facilities to be clustered to avoid unnecessary disruptions of agricultural activities." Petitioner asserts that general plan policies require industrial uses to be clustered.

An EIR must adequately respond to specific suggestions for mitigating a significant environmental impact unless the suggested mitigation is facially infeasible. *Guideline § 15088; Los Angeles Unified School Dist. v. City of Los Angeles (1997) 58 Cal.App.4th 1019, 1029.* Clustering oil and gas facilities would not appear to be facially infeasible. Also, some of County's responses to comments regarding clustering directed commenters to responses that did not exist. In other responses and analyses, however, County directly and indirectly responded to comments on clustering.

County considered a range of reasonable alternatives to the project, including Alternative 3, the reduced ground disturbance alternative, which would limit the disturbance footprint on existing agricultural lands by requiring clustering of new wells in locations immediately adjacent to existing oil and gas equipment. Alternative 3 was adequately analyzed, and rejected. In other responses to comments regarding clustering, County: noted that for more than a century, there has been co-location of oil and gas operations with agricultural operations, including on split estate lands, with "little evidence of problems and conflicts;" referred to Global Response 4, [discussing legal rights of surface and mineral owners on "split estates," the origin of those rights, e.g., laws, regulations, leases and other agreements between oil and gas operators and surface landowners that may affect surface use, and the legal dominance of the mineral estate over the surface estate vis-à-vis use of the surface to extract minerals]; discussed general plan policies that promote clustering industrial uses, and "numerous and more specific policies" regarding oil and gas activities that do not require clustering uses, noting that the project ordinance balances these competing interests; discussed ordinance provisions requiring

notice to surface owners regarding oil and gas site plans and the surface owner signoff process, creating incentive for cooperation between mineral owners and surface owners.

The information provided in direct response to the comments on clustering mitigation could have been better structured, but County was responding to a number of comments, and the information provided was reasonably adequate for informational and decision-making purposes. The responses were supported by substantial evidence. There was no failure to proceed in a manner required by law There was no prejudicial abuse of discretion.

Rangeland

Petitioner argues that the EIR fails to include a determination regarding the significance of project impacts on rangeland. The DEIR's description of the environmental setting shows that Kern County encompasses 8,202 square miles, which includes approximately 2,317 square miles of rangeland. The total project area consists of approximately 3,700 square miles in the western part of the county, which includes 982,166 acres (approximately 1,535 square miles) designated as rangeland. The EIR discloses that over the 25-year life of the project, 832 acres of "uncultivated" land (which includes dairy farms, grazing land, and other agricultural production not dependent on cultivated land) out of the total 982,166 acres of rangeland in the project area, could be converted due to the project. The EIR also discloses that the Kern County General Plan projects a net loss of 55,000 acres of grazing land based on land use conversions consistent with existing land use plans, which are unrelated to the project. Petitioner points out that this statistical information does not address the significance of the rangeland conversion due to the project. Petitioner is correct.

An EIR must include a statement of "[a]ll significant effects on the environment of the proposed project," *Pub. Res. Code § 21100(b)(1)*, or alternatively, a "statement briefly indicating the reasons for determining that various effects on the environment of a project are not significant and consequently have not been discussed in detail in the environmental impact report" *Pub. Res. Code § 21100(c); Guideline § 15128. See also, Protect the Historic Amador Waterways v. Amador Water Agency (2004) 116 Cal.App.4th 1099, 1110-1111.* There appears to be no such statement in the project EIR.

County properly utilized Appendix "G" to determine the significance of impacts on agricultural resources, and real party argues that "agricultural" land as defined in Appendix "G" does not include rangeland. That conclusion, however, does not relieve County of its obligation to analyze significant impacts. The use "NOTE" at the top of Appendix "G" states, "Substantial evidence of potential impacts that are not listed on this form must also be considered." It is thus necessary in appropriate circumstances to modify or augment the checklist to ensure that all potentially significant impacts are adequately addressed. *See, Protect the Historic Amador Waterways v. Amador Water Agency, supra, 116 Cal.App.4th 1099, 1110-1111; 1 Kostka & Zischke, "Practice Under the Calif. Environmental*

Quality Act" (2d ed.) § 13.15.

The EIR's omission of a discussion regarding the significance of the project's impact on rangeland, or a statement briefly indicating the reason for determining that the project's impact on rangeland is not significant and consequently has not been discussed, amounts to a failure to proceed in a manner required by law, and a prejudicial abuse of discretion.

Mitigation Measure 4.2-1: Non-existent Programs and 1:1 Ratio

Petitioner argues that the EIR's determination mitigation measure ("MM") 4.2-1 would reduce the impact of farmland conversion to a level of less than significant is not supported by substantial evidence. MM 4.2-1 sets forth a performance standard requiring agricultural land mitigation at a ratio of 1:1, using one or more of several specified measures. It does not contain "numerous loopholes," and it does not rely on "nonexistent" preservation programs for its effectiveness. The impact being mitigated is the temporary loss of agricultural production caused by project-related activities. The applicant must demonstrate compliance with the 1:1 mitigation requirement through one or more specified measures prior to ground disturbance. The fact that County has not yet adopted an agricultural farmland mitigation bank or equivalent agricultural preservation or mitigation program, does not change the 1:1 mitigation requirement or limit the effectiveness of the mitigation measure through other specified options.

County identified and evaluated the potentially significant impact, and identified measures to mitigate that impact. County was not required to commit to a particular measure in the EIR as long as it committed to effectively mitigating the impact. *Guideline § 15127.4; North Coast Rivers Alliance v. Marin Municipal Water Dist. Bd. of Dir. (2013) 216 Cal.App.4th 614, 629-630; San Joaquin Raptor Rescue Center v. City of Merced (2007) 149 Cal.App.4th 645, 671.* The mitigation is not limited to a maximum acreage based on estimated land conversion. Specific mitigation acreage for each project activity will be based on a 1:1 ratio and determined at the time the project-related activities occur. This is an appropriate level of mitigation. *Masonite Corp. v. City of Mendocino (2013) 218 Cal.App.4th 230, 236-238.* County committed itself to mitigation through specified alternative measures over the 25-year life of the project.

Substantial evidence supports County's determination that MM 4.2-1 will reduce the related project impact to a level of less than significant. There was no failure to proceed in a manner required by law, and there was no prejudicial abuse of discretion.

3. Water Supply

Localized Impacts

Petitioner argues the EIR's analysis of water supply obscured the project's local impacts and lacked sufficient detail. The EIR water supply assessment described current

and projected water demands, surface and ground water sources, and water usage by sector in wet, single-dry and multiple-dry years, separately analyzing the defined "subareas" within the project area and their distinct characteristics. The water supply assessments utilized public reports and management plans from water districts and agencies, including quantitative data from each subarea, describing specific groundwater aquifers in the project area and the hydrological properties of aquifers in each subarea. The final water supply assessment projected urban water demand by water district, supply and demand projections by subarea, and surpluses and deficits within subareas. Produced water re-use was projected for each subarea. The EIR disclosed that oil and gas production currently generates, and will continue to generate, sufficient quantities of "produced" water to satisfy more than 90% of project-related water demands over the project's life, which does not take away from, or compete with, water usage/demand by other sectors.

The EIR disclosed that project M&I quality water demand is currently 8,778 AF annually, and will increase to an estimated 11,760 AF in 2040. The project M&I demand is compared to annual agricultural demand of 2,630,029 AF, and average annual urban demand of 301,736 AF. The EIR did not merely compare project M&I use to the total project area M&I demand. In the final water supply assessment, project M&I use was compared to agricultural, urban, and recycled "produced" water use, separately, for each subarea, in normal, single-dry and multiple-dry years. The EIR determined that project M&I demand would contribute to overdraft conditions in an existing water shortage, disclosed the water supply impacts, and mitigation measures were adopted.

A more detailed analysis that included more specific water supply impacts in particular locations, or to individual farmers, was not required. The EIR represents a good faith effort at full disclosure, and was reasonably adequate to inform decision-makers and the public of the project's water supply impacts. Substantial evidence supports the EIR's methodology, scope of analysis, and determinations regarding water supply impacts. There was no failure to proceed in a manner required by law, and no prejudicial abuse of discretion.

Impacts on Other Water Users

Petitioner argues the EIR lacks sufficient information about the project's impacts on other water users. Petitioner argues the EIR does not evaluate whether lowered groundwater levels could affect water wells near oil and gas development, does not mention that water shortages can result in abandoned crops and idled agricultural lands, and does not disclose the extent of water rationing that water agencies would impose on users as a result of projected water shortages.

Substantial evidence shows that total oil industry M&I water use will be 0.4% of projected agricultural use from 2015-2035. It would be speculative to assume such a small percentage would cause water rationing for famers, particularly when agricultural

demand, and localized agricultural supply and demand, is influenced by so many factors. Based on existing water constraints in the project area, the EIR determined the project would continue to create existing, as well as projected future, increases in water demand, and there are no feasible mitigation measures available to reduce such impacts to a less than significant level. The EIR determined that implementation of MM 4.17-2, MM 4.17-3, and MM 4.17-4 could reduce water supply impacts, "but the allocation of water supplies and water demands, the complex laws affecting water rights, the many water districts that have legal jurisdiction over one or more sources of water in the Project Area, the varied technical feasibility of treating produced water, and the produced water reuse opportunities all present complex variables that fall outside the scope of the County's jurisdiction or control under CEQA." The EIR concluded the project's impacts to water supplies would be significant and unavoidable, and mitigation measures were adopted. Substantial evidence supports the EIR's methodology, scope of analysis, and determinations, and the EIR was adequate as an informational document. There was no failure to proceed in a manner required by law, and no prejudicial abuse of discretion.

Drought Conditions

Petitioner argues the EIR should have been updated to account for the "historic" drought. Drought conditions were adequately addressed in the water supply assessments and EIR, using best available historical data. In its findings regarding project impacts, County determined the project would not have a sufficient M&I water supplies to serve project demand from existing entitlements and resources, or new or expanded entitlements would be required. County explained:

> With respect to the Project's demand for M&I water, however, current drought conditions have severely restricted the availability of imported and local surface supplies throughout California, including the Project Area, and groundwater is being used more heavily to meet Project Area demand, including for oil and gas activities. Surplus M&I-quality water is not available in the Project Area. Any new use reduces the availability of M&I-quality water to another Project Area user, or increases the regional groundwater overdraft if supply shortfalls are addressed by increased groundwater extraction. Consequently, existing entitlements and resources are insufficient to meet current and projected future M&I water demand in the Project Area. Increasing water demand under overdraft conditions is considered to be a significant impact.

Updating the EIR to provide more recent drought information was not required. The EIR was sufficiently informative. Substantial evidence supports the EIR's methodology, scope of analysis, and determinations. There was no failure to proceed in a manner required by law, and no prejudicial abuse of discretion.

Consistency with General Plan Water Supply Policies

Petitioner argues the project is inconsistent with General Plan policy # 41, and Metro Bakersfield General Plan # 3, requiring an adequate water supply for "development proposals." County determined that the project was consistent with these policies, and made the necessary findings. The policies are not implementation measures, distinguishing them from the specific implementation measure involved in *Spring Valley Lake Assn. v. City of Victorville (2016) 248 Cal.App.4th 91. See generally, Friends of Lagoon Valley v. City of Vacaville (2007) 154 Cal.App.4th 807, 817* [distinguishing guiding policies from implementing policies.]

Also, in the context of County's general plan policies, County could properly view the project is an "energy project proposal," not a "development proposal" as that designation is used in General Plan policy # 41, and Metro Bakersfield General Plan # 3. The EIR considered and discussed the policies. County's energy policies encourage orderly energy development, and protect oil and gas resources, as well as water resources. County's determinations of consistency are entitled to deference, and were reasonable. Petitioner's interpretation of the policies is not reasonable, and would effectively impose a moratorium on all County land use permitting because any impact on water supply by any source would be significant. Substantial evidence supports County's determinations regarding consistency with the general plan policies. There was no failure to proceed in a manner required by law, and no prejudicial abuse of discretion.

4. Noise

Petitioner argues the EIR's noise analysis violates CEQA because: (1) the EIR fails to disclose the project's impacts on ambient noise levels, and (2) the EIR fails to mitigate those significant impacts.

Ambient Noise Impact

Petitioner argues the EIR fails to disclose significant noise impacts by concluding that all increases to ambient noise levels are insignificant if they occur under 65 dB. Petitioner argues, in essence, that the EIR misapplies the thresholds of significance stated in the EIR.

The EIR identified three significance thresholds to evaluate noise impacts from the project. The first threshold evaluated noise impacts based on standards in applicable general plans, which the EIR determined was 65 dB DNL (day/night average sound level). The second threshold evaluated whether the project would create a "substantial temporary or periodic increase" in ambient noise levels. The third threshold evaluated whether the project would create a "substantial permanent increase" in ambient noise levels.[1]

[1] **The parties' briefs and the AR are not entirely consistent regarding the order in which the significance thresholds for noise are listed. The DEIR (AR 2002) listed the threshold for**

County explained in response to comments:

> The second threshold applies to project construction, and addresses whether the proposed project would create a "substantial temporary or periodic increase in ambient noise levels in the project vicinity above levels existing without the project." The third threshold applies to project operation, and addresses whether the proposed project would create a "substantial permanent increase in ambient noise levels in the project vicinity above levels existing without the project." While these two thresholds *qualitatively* assess temporary or permanent increases over ambient noise without the project, the lead agency – Kern County – maintains discretion to determine the *quantitative* threshold applicable to each project. For this project, the *County applied a quantitative threshold of 65 dB DNL/CNEL*, which represents the exterior noise levels the County has deemed to be acceptable for noise sensitive areas. . . Where a project would exceed 65 dB DNL/CNEL, noise mitigation measures would be required. (Emphasis added.)

Petitioner argues that County's application of the significance thresholds ignores noise increases from existing levels that occur *under* 65 dB. Petitioner argues that County's approach "simply writes the third threshold out of existence." Petitioner cites no authority to suggest that if an EIR has two thresholds of significance, those thresholds may not overlap, or arrive at the same result, or use the same numerical metric, evaluating an impact.

County's "quantitative" measure (65 dB DNL/CNEL) to determine whether an increase in ambient noise was "substantial" is supported by substantial evidence. County's noise study included ambient noise measurements from multiple locations in each of the subareas, with the results expressed using several discreet metrics, including "DNL/CNEL." Substantial evidence explains how noise is measured, the existing noise environment in the project area, how the noise study was conducted in the subareas, the

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"substantial *permanent* increase" (associated with operations) before "substantial *temporary* or periodic increase" (associated with construction). The responses to comments refer to temporary increases as the "second" threshold and "permanent" increases as the "third" threshold, which appears to be consistent with the parties' briefs. This ruling will refer to permanent increases as the "third" threshold to remain consistent with the briefs. The text of the DEIR (AR 2002), however, stated that a "project would normally be considered to have a significant impact if it would result in:

- Exposure of persons to, or generate, noise levels in excess of standards established in the local general plan or noise ordinance or applicable standards of other agencies;

* * * * *

- A substantial permanent increase in ambient noise levels in the project vicinity above levels existing without the project;
- A substantial temporary or periodic increase in ambient noise levels in the project vicinity above levels existing without the project[.]" (Emphasis added.)

results of the study, and applicable regulations. Part of this discussion included: OSHA's noise exposure limit for workers (90 dBA over an 8-hour work shift); California State Dept. of Health "acceptable" noise level for land use compatibility (60 dBA DNL/CNEL); Kern County General Plan limit in noise sensitive areas (65 dBA DNL); Metro Bakersfield General Plan limit (65 dB CNEL). The EIR's noise study expert stated:

> The Noise Element of the Kern County General Plan establishes a land use compatibility criterion of 65 dB DNL for exterior noise levels in outdoor activity areas of residential uses. Additionally, *the 65 dB DNL exterior noise level criterion is commonly applied throughout incorporated areas of Kern County, and therefore should be used to determine project compliance in most instances.* (Emphasis added.)

The record provides substantial evidence to support County's use of "65 dB DNL/CNEL" as a quantitative measure for determining whether an increase in noise was "substantial." County acted within its discretion to make that determination, and was not compelled by CEQA, case law, or experts to do otherwise.

CEQA does not define what constitutes a "substantial" increase in noise. Petitioner cites *Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners ("Berkeley Keep Jets") (2001) 91 Cal.App.4th 1344*, a case that demonstrates the fact-dependent nature of the court's evaluation of an EIR's noise impact analysis. In *Berkeley Keep Jets*, the Port Commissioners evaluated an airport expansion, but failed to select an additional significance threshold, beyond the 24-hour weighted average ("CNEL"), to determine if 27,000 additional flights annually—approx. 73/day, mostly at night—would have a significant effect on sleep in neighborhoods. Applying a 65 CNEL average, the Port Commissioners essentially found there would be little or no significant noise impacts from the additional flights. Many people objected. The court in *Berkeley Keep Jets* held the EIR was deficient for failing to specifically evaluate the impact of the increased flights. *Id. at p. 1382.* The court's analysis emphasized the unique circumstance of "the effect on sleep patterns from a proposed increase in overnight flights over noise-sensitive residential areas." *Id. at p. 1379.*

The present case does not involve thousands of additional nighttime flights over noise-sensitive residential areas. Averages are capable of "watering down" or obscuring important facts. That obviously occurred in *Berkeley Keep Jets.* But it did not occur here. The EIR provided more than just the DNL/CNEL weighted average. County's determination to use the 65 dB DNL/CNEL value to assess what increases were "substantial" from a standpoint of land use compatibility was within County's discretion, informed by substantial evidence. County explained why it used its general plan standard to define "substantial." See, *National Parks & Conservation Assn. v. City of Riverside (1999) 71 Cal.App.4th 1341, 1353* [upholding use of 65 dB as noise threshold]; *Oakland Heritage Alliance v. City of Oakland (2011) 195 Cal.App.4th 884, 896* [agency discretion to rely on

adopted standards]. County was not required to accept petitioner's suggestion that *any* "5 dB increase" be deemed "substantial."

County's determination to use 65 dB DNL to define what was "substantial" within the meaning of its stated noise significance threshold is supported substantial evidence. County acted within its discretion to select a quantitative measure. There was no failure to proceed in a manner required by law, and no prejudicial abuse of discretion.

Noise Mitigation:

Petitioner argues the noise mitigation violated CEQA because "significant increases" in noise levels below 65 dB were not addressed in the EIR, and thus, not mitigated. The EIR determined that noise impacts would be significant, but would be reduced to a level of less than significant after mitigation. In light of this court's ruling above, and in light of the record, substantial evidence supports County's determination that noise impacts would be less than significant after mitigation. There was no failure to proceed in a manner required by law, and no prejudicial abuse of discretion.

5. Recirculation of EIR - Revised Health Risk Assessment

Petitioner argues the EIR should have been recirculated after it had been revised to include an analysis of cumulative health risks from multiple wells in the same area. The DEIR included a health risk assessment ("HRA"). In response to comments by SJVAPCD, the HRA was revised. In response to comments that the first 2 HRAs did not address the combined effects of multiple wells, County prepared a third HRA. KGF argues the third HRA should have been recirculated for comments.

Real parties' contention that the multiple-well HRA was not a "cumulative impact" analysis within the meaning of CEQA is incorrect. "Cumulative impacts" refers to two or more individual *effects* which, when considered together, are considerable or which compound or increase other environmental impacts. *Guideline § 15355.* The "individual effects may be *changes resulting from a single project* or a number of separate projects." (Emphasis added.) *Guideline § 15355(a).*

However, County determined based on substantial evidence that the cumulative HRA confirmed conclusions reached earlier. Those conclusions were presented for review and comment, and petitioner commented on the cumulative HRA. The cumulative HRA presented no significant new information; it amplified an earlier conclusion. The record does not show that the draft EIR was so "fundamentally and basically inadequate and conclusory in nature that public comment on the draft was in effect meaningless." *Center for Biological Diversity v. California Dept. of Forestry and Fire Protection (2014) 197 Cal.App.4th 931, 949.* The decision not to recirculate the EIR is supported by substantial evidence. There was no prejudicial abuse of discretion.

Arvin Petitioners' Issues

1. "Ministerial" v. "Discretionary" Permits

Arvin Petitioners assert a "facial challenge" to the project ordinance. They argue the permit approval process is "inherently discretionary" because "many of the 88 mitigation measures ask the County to make subjective, discretionary decisions...." Arvin Petitioners' complaint seeks a declaratory judgment determining that the project ordinance "[d]oes not, within the meaning of CEQA, establish a ministerial, non-discretionary permitting scheme...." In their opening brief, Arvin Petitioners ask for a declaratory judgment that the "Ordinance's permitting scheme is discretionary, not ministerial, and does not exempt approval of future oil and gas activities from CEQA review." There is no challenge to a particular permit decision or approval.

The project ordinance establishes "Conformity Review" and "Minor Activity Review" permits in designated tier areas. "Conformity Review" permits are generally applicable to major oil and gas development activities, and "Minor Activity Review" permits are applicable to less intensive activities such as replacing tanks and pipelines. County has determined that the permits are ministerial. Applicants for either permit must demonstrate compliance with specified mandatory mitigation measures.

County's determinations regarding the ministerial nature of the permits and the permit approval process are supported by substantial evidence. There was no failure to proceed in a manner required by law. There was no prejudicial abuse of discretion. Declaratory relief is not warranted or appropriate, for several reasons.

First, County's legislative decision to establish a ministerial permit process, and its characterization of the permits as "ministerial," are entitled to deference. CEQA exempts ministerial permits from CEQA review. *Pub. Res. Code § 21080(b)(1).* CEQA Guidelines state, "The determination of what is 'ministerial' can most appropriately be made by the particular public agency involved based upon its analysis of its own laws...." *Guidelines § 15268(a).* Public agencies are urged to make a determination, in advance, what projects, actions and permits are ministerial. *Guidelines §§ 15022(a)(1)(B), 15268(c); Sierra Club v. Napa County Bd. of Supervisors (2012) 205 Cal.App.4th 162, 178.*

Second, the declaratory judgment Arvin Petitioners seek would effectively rewrite the project ordinance and create a new discretionary permitting system that County does not intend. When an agency's determination, finding, or decision does not comply with CEQA, Pub. Res Code § 21168.9 *requires* the court (i.e., "shall") to enter an order that "*includes*" one or more specified "mandates" to the agency, but only those "necessary to achieve [CEQA]compliance." Thus, while the equitable remedy of declaratory relief is expressly *not* precluded by section 21168.9, see *Pub. Res Code § 21168.9(c)*, such relief would seem to have limited value in the present case given the mandates required by section 21168.9. If the court determined that a particular mitigation measure gave County discretion, the

mandate necessary to achieve CEQA compliance might not require re-characterizing all permits issued under the ordinance as discretionary. The court cannot ignore County's determination, based on substantial evidence, that discretionary review of 2,000 plus permits per year is infeasible, or County's legislative judgment that ministerial permits are the most appropriate way to transition from "by-right" oil and gas development, to permits.

Third, just as declaratory relief is not available to review CEQA decisions subject to Pub. Res. Code § 21168, declaratory relief does not appear to be available in this ordinary ("traditional") mandamus proceeding governed by Pub. Res. Code § 21168.5. Judicial review of CEQA decisions that are subject to Pub. Res. Code § 21168 ("adjudicative" decisions) must be brought as administrative mandamus proceedings under CCP § 1094.5, and "[a] party...may not challenge an agency action that is reviewable under section 1094.5 by seeking *declaratory* or injunctive relief, either instead of or in addition to relief by administrative mandamus." *2 Kostka and Zischke, Practice Under the California Environmental Quality Act (2nd ed. 2017), § 23.59.* (Emphasis added.) Adoption of an ordinance is a "legislative" act to which Pub. Res. Code § 21168.5 applies, and related CEQA determinations are reviewed by ordinary mandamus under Code Civ. Proc., § 1085. *Western States Petroleum Assn. v. Superior Court (1995) 9 Cal.4th 559, 566; Friends of Sierra Madre v. City of Sierra Madre (2001) 21 Cal.4th 165, 172 fn.2.*

> **An ordinary mandamus proceeding under CCP section 1085 is the method for reviewing a CEQA decision governed by Pub Res C section 21168.5. (Citation omitted). The same limitations on the scope of judicial review that apply in CEQA cases reviewed under CCP section 1094.5 apply in most CEQA cases reviewed under CCP section 1085....*The rule prohibiting other forms of review should apply in those cases as well.* (Emphasis added.) *2, Kostka and Zischke, Practice Under the California Environmental Quality Act (2nd ed. 2017), § 23.59.***

Fourth, the subject mitigation measures are not "inherently discretionary." They contain objective standards, or require compliance with existing regulations, or defer to discretionary decisions of other agencies, all of which confirm the essential "ministerial" nature of the implementation standards and conditions, including the mitigation measures. *See, Guidelines § 15126.4(a)(1)(B); Citizens for a Sustainable Treasure Island v. City and County of San Francisco (2014) 227 Cal.App.4th 1036, 1059; North Coast Rivers Alliance v. Marin Municipal Water Dist. Bd. of Dir. (2013) 216 Cal.App.4th 614, 629-631; Oakland Heritage Alliance v. City of Oakland (2011) 195 Cal.App.4th 884, 906-907; Health First v. March Joint Powers Authority (2009) 174 Cal.App.4th 1135, 1142-1145.* The permit process requires County to determine whether a proposed activity *conforms* to specified standards. County is not given discretion to "shape" the repairs to, or development of, oil or gas wells. Neither the substance of the mitigation measures nor the permit approval process is discretionary to any substantial degree, thus distinguishing the present case from the circumstances involved in *Friends of Westwood, Inc. v. City of Los Angeles ("Westwood")*

(1987) 191 Cal.App.3d 259, and *Natural Resource Defense Council, Inc. v. Arcata Nat. Corp. ("NRDC/Arcata") (1976) 59 Cal.App.3d 959.*

Fifth, Arvin Petitioners have not shown in their facial challenge that "no set of circumstances exists under which the [ordinance] would be valid." See, *Sierra Club v. Napa County Bd. of Supervisors (2012) 205 Cal.App.4th 162, 173.* Arvin Petitioners do not challenge a particular permit, such as the challenges involved in *Westwood, supra, 191 Cal.App.3d 259,* and *NRDC/Arcata, supra, 59 Cal.App.3d 959. Westwood* and *NRDC/Arcata* both emphasize the fact-specific nature of determining whether an act is ministerial or discretionary under CEQA, and *Westwood* carefully avoids finding that the entire regulatory process was discretionary, or that the exercise of *any* discretion renders a particular permit decision discretionary. *Id. at p. 280.* The breadth of possible activities subject to the permit requirement make it very difficult, if not impossible, to know, over time, and in every situation, which mitigation measures will actually apply to a given application, or *how* the measure will be applied. Some activities *may* involve all of the mitigation measures with predictability, while others may not. The parties' briefs pose and analyze hypothetical scenarios, and there are no doubt many scenarios that *could* be envisioned where there is less predictability about the mitigation measures. It is conceivable the mitigation measures with which Arvin Petitioners are concerned will not apply to a particular project activity.

2. Spanish Language Translation

Arvin Petitioners argue that County unlawfully denied Spanish-speaking residents meaningful participation in the CEQA process.

Neither CEQA nor the CEQA Guidelines require translation or interpretation in the manner suggested by Arvin Petitioners. No reported case has concluded that CEQA requires lead agencies to translate documents or provide interpreters. Public Res. Code § 8 requires CEQA notices, reports, statements and records to be made "in writing in the English language." Pub. Res. Code § 21083.1 precludes courts from interpreting CEQA or the Guidelines "in a manner which imposes procedural or substantive requirements beyond those explicitly stated in [CEQA] or in the [Guidelines]."

The issue in *San Franciscans for Reasonable Growth v. City and County of San Francisco (1987) 193 Cal.App.3d 1544* ("*San Franciscans*"), cited by Arvin Petitioners, was the *comprehensibility* of an EIR. An EIR "must be written and presented in such a way that its message can be understood by . . . members of the public who have reason to be concerned with the impacts which the document studies." *Id. at p. 1549.* CEQA Guidelines contain specific "plain language" requirements. Public Res. Code § 8 contains a specific English-language requirement. The plain meaning of Public Res. Code § 8 is not limited to publication of notices. The statutory language is not ambiguous: "[A]ny notice, report, statement or record [] required by [CEQA] . . . shall be made in writing in the English language." An EIR is a "report" within the meaning of section 8.

Arvin Petitioners argue that Public Res. Code § 8 "does not mean . . . documents governed by [the Public Resources Code] may be published only in English." The issue is whether translation was required, not whether it was *permitted.* Petitioners cite examples in the Public Resources Code where translation is specifically addressed, but these examples demonstrate how clear the Legislature can be when it imposes a translation requirement, e.g., *Pub. Res. Code § 3465* [oil sellers to post recycling signs in languages other than English under specified circumstances]; *Pub. Res. Code § 30315.5* [Coastal Commission "shall" make meeting notices available "in both English and Spanish"]; *Pub. Res. Code § 71113* [environmental working group to provide "guidance for determining when it is appropriate . . . to translate crucial public documents, notices, and hearings . . . for limited-English-speaking populations" by April 2002].

Imposing or implying a requirement to translate and interpret in the manner suggested by Arvin Petitioners would impermissibly add new procedural and substantive requirements that are not explicitly required by CEQA. There was no prejudicial abuse of discretion. Respondent County did not fail to proceed in a manner required by law. Arvin Petitioners have not shown by a preponderance of the evidence, or by the weight of the evidence, that "meaningful participation" was denied. No prejudicial abuse of discretion has been shown.

3. Water Supply Mitigation Measures

Arvin Petitioners argue that MM 4.17-2, MM 4.17-3 and MM 4.17-4 unlawfully defer formulation of mitigation. They argue the EIR defers mitigation to future groundwater plans that will not be completed until years after project approval, while failing to commit the County to measures that will satisfy specific performance criteria articulated at the time of project approval. They argue the Sustainable Groundwater Management Act ("SGMA"), and the 30,000 AF re-use goal for produced water are not sufficiently specific performance criteria under CEQA.

County did not unlawfully defer mitigation in violation of CEQA. County was not precluded from adopting measures that might not be effective in mitigating water supply impacts that County determined were "significant and unavoidable." County approved the project, adopting a statement of overriding economic and other considerations, and acknowledged uncertainty regarding the effectiveness of MM 4.17-2, MM 4.17-3 and MM 4.17-4. That was sufficient. See, *Gray v. County of Madera (2008) 167 Cal.App.4th 1099, 1119 [*"County could have approved the Project even if the Project would cause significant and unavoidable impacts on water despite proposed mitigation measures if the County had adopted a Statement of Overriding Considerations that made such findings," but failed to do so.*]; see also, Citizens for Open Government v. City of Lodi (2012) 205 Cal.App.4th 296, 232; 1 Kostka and Zischke, Practice Under the California Environmental Quality Act (2nd ed. 2017), § 14.9.*

Substantial evidence supports County's determination the water supply impacts were significant and unavoidable, the uncertainty regarding the effectiveness of the mitigation measures, and County's statement of overriding considerations approving the project. There was no failure to proceed in a manner required by law, and no prejudicial abuse of discretion.

4. Air Quality

Arvin Petitioners argue the EIR inadequately analyzed and inadequately mitigated the project's air quality impacts, in that: (1) MM 4.3-8 violates the CEQA requirement that a project activity not be undertaken without mitigation measures in place; (2) the EIR fails to adequately mitigate PM 2.5 emissions; and (3) the EIR fails to assess the environmental impacts of road paving as mitigation.

MM4.3-8 - Deferral

The EIR discloses the project will cause significant air quality impacts, and mitigation measures were adopted. Among those measures, MM 4.3-8 requires an emission reduction agreement ("ERA") between County and the SJVAPCD whereby County will collect mitigation fees that the SJVAPCD will use for emission reduction projects, or, alternatively, the applicant may conduct its own emission reduction projects approved by SJVAPCD.

The legal principles governing deferral of the formulation of mitigation are discussed in *POET, LLC v. California Air Resources Board ("POET") (2013) 218 Cal.App.4th 681, at p. 738*:

> **[W]e glean two principles that are important to this case. First, the deferral of the formulation of mitigation measures requires the agency to commit itself to *specific performance criteria* for evaluating the efficacy of the measures implemented. Second, the "activity" constituting the CEQA project may not be undertaken without mitigation measures being in place "to minimize any significant adverse effect on the environment of the activity." (Citation) In other words, the deferral relates only to the *formulation* of mitigation measures, not the mitigation itself. Once the project reaches the point where activity will have a significant adverse effect on the environment, the mitigation measures must be in place.**

A project's contribution to an impact 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. *Guidelines § 15130(a)(3).* CEQA allows a project to mitigate by paying a fee to fund its fair share of a measure designed to mitigate that project's cumulative impact, so long as the funding contributions are part of a reasonable plan of actual mitigation that the responsible agency commits itself to

implementing. See, *Gray v. County of Madera (2008) 167 Cal.App.4t 1099, 1121-1122; Anderson First Coalition v. City of Anderson (2005) 130 Cal.App.4th 1173, 1187; 1 Kostka and Zischke, Practice Under the California Environmental Quality Act (2nd ed. 2017), § 14.14.*

Substantial evidence shows that MM 4.3-8 is one of five measures adopted to reduce emissions to a performance standard of "no net increase." Substantial evidence shows there are a variety of available emission reduction programs that could be completed with fee proceeds which satisfy CEQA requirements for fee-based mitigation, notwithstanding opinions to the contrary. Substantial evidence shows there is a history of funding such emission reduction programs within Kern County and the SJVAPCD. It is presumed that County will comply with its own ordinance and will spend the fees it collects for the required air quality mitigation purposes. *Save Our Peninsula Comm. v. Monterey County Bd. of Sup. (2001) 87 Cal.App.4th 99, 140-141.* If a fee program is not available, MM 4.3-8 allows the project applicant to undertake its own emission reduction program, verified by SJVAPCD. Substantial evidence shows that if an applicant does not comply with MM 4.3-8, no permit will issue.

The formulation of mitigation under MM4.3-8 was not improperly deferred. Substantial evidence shows that MM 4.3-8 satisfies the requirements for fee-based mitigation, and supports County's determinations regarding MM 4.3-8. There was no failure to proceed in a manner required by law, and no prejudicial abuse of discretion.

PM 2.5 Emissions

Arvin Petitioners argue that only respirable particulate matter (PM 10) emissions are mentioned in MM 4.3-8,[2] and that the absence of specific mitigation for fine particulate matter (PM 2.5) in MM 4.3-8 means the EIR's determination the project will "fully offset" emissions is not supported by substantial evidence. The EIR determines the project will make a cumulatively significant contribution of criteria pollutant emissions (NOx, PM 10, PM 2.5, CO and SO2), for which the project region is in nonattainment under applicable federal and state air quality standards. The draft EIR discloses that PM 2.5 was treated as a subset of PM 10. Five measures (MMs 4.3-1 through 4.3-4, and 4.3-8) were implemented

[2] MM 4.3-8 states, in relevant part:

> For Project facilities or equipment that are not required to offset emissions under a District rule as described in MM 4.3-1, and for Project vehicle and other mobile source emissions, the County will enter into emission reduction agreement with the San Joaquin Valley Air Pollution Control District, pursuant to which the Applicant shall pay fees to fully offset Project emissions of oxides of nitrogen, reactive organic gases, and particulate matter of 10 microns or less in diameter (including as applicable mitigating for reactive organic gases by additive reductions of particulate matter of 10 microns or less in diameter) (collectively, "designated criteria emissions") to avoid any net increase in these pollutants.... (Emphasis added)

to mitigate the project's contribution to criteria emissions. The EIR determined that even with implementation of the mitigation measures, the impacts will remain significant and unavoidable.

Substantial shows the air quality mitigation measures are designed to work together to mitigate project emissions, each measure achieving a portion of the required emissions mitigation. MM 4.3-8 requires an emission reduction agreement "[f]or Project facilities or equipment that are not required to offset emissions under a District rule as described in MM 4.3-1, and for Project vehicle and other mobile source emissions." Substantial evidence shows the EIR's "no net increase" standard for NOx, ROG and PM 10 is based on SJVAPCD policy, which can result, and historically has resulted, in direct and indirect reductions of PM 2.5 when viewed as a subset or component of PM 10. PM 2.5 represents approximately 35% of the total estimated particulate matter emissions from the project (PM 2.5 and PM 2.5-10). Substantial evidence shows that NOx generates PM 2.5 through chemical reactions in the atmosphere, that MM 4.3-8 emission reduction agreement programs for diesel vehicles and equipment will reduce PM 2.5 more than PM 10 emissions, and that NOx emission reductions are part of the SJVAPCD's strategy for reducing PM 2.5. Substantial evidence supports the determination that all feasible and reasonable changes or alterations have been required in, or incorporated into, the project that substantially reduce the potentially significant effects of PM 2.5 identified in the EIR.

The EIR does not fail to adequately mitigate PM 2.5 emissions. There may have been some lack of clarity regarding PM 2.5 in the EIR, but absolute perfection is not required. The EIR is adequate as an informational document, and substantial evidence supports the EIR's determinations, as stated, regarding MM 4.3-8. There was no failure to proceed in a manner required by law, and no prejudicial abuse of discretion.

Road Paving:

Arvin Petitioners argue the EIR fails to assess the environmental impacts of road paving as mitigation. Arvin Petitioners are correct.

Impacts of mitigation measures must be discussed in the EIR if such measures "would cause one or more significant effects in addition to those that would be caused by the project as proposed." *Guidelines § 15126.4 (a)(1)(D)).* County argues that MM 4.3-8 requires payment of a per-well mitigation fee and that *potential* emission reduction projects, such as road paving, are examples and not commitments concerning mitigation.

As Arvin Petitioners correctly observe, "[I]t is far from speculative that road paving will be proposed and approved."

County adopted a resolution committing County to implementing measures aimed at reducing PM 10 emissions, including road paving. The project applicant requested recognition of paving as an emission reduction measure. The SJVAPCD repeatedly cites

road paving as a pollution reduction option. In the realm of what is merely possible, County's argument might have merit. In the realm of what reasonable decision-makers and informed citizens would have understood from reading the EIR, road paving was and is a reasonably likely air quality mitigation measure under MM 4.3-8. Road paving impacts should have been addressed in the EIR.

County failed to proceed in a manner required by law, and there was a prejudicial abuse of discretion.

5. Biological Resources

Arvin Petitioners argue that: (1) the EIR fails to adequately analyze impacts to special-status species;[3] (2) the EIR's analysis of impacts to habitat adjacent to worksites is inadequate; (3) the EIR unlawfully defers mitigation of impacts to species; and (4) the EIR fails to ensure adequate mitigation of harm to species' habitats.

Analysis of Impacts to Special-Status Species

CEQA guidelines do not compel use of a particular methodology for assessing impacts to special-status species. See, *Save Round Valley Alliance v. County of Inyo (2007) 157 Cal.App.4th 1437, 1468.* CEQA Guideline § 15065 describes the circumstances under which a lead agency "shall find that a project may have a significant effect on the environment *and thereby require an EIR...*" It is a preliminary step, not a mandatory methodology or significance threshold. CEQA Guideline § 15151 states:

> An EIR should be prepared with a sufficient degree of analysis to provide *decisionmakers with information which enables them to make a decision* which intelligently takes account of environmental consequences. An evaluation of the environmental effects of a proposed project need not be exhaustive, but the sufficiency of an EIR is to be reviewed in the light of what is reasonably feasible. Disagreement among experts does not make an EIR inadequate, but the EIR should summarize the main points of disagreement among the experts. The courts have looked not for perfection but for adequacy, completeness, and a good faith effort at full disclosure.

The EIR divided species into three 3 categories for analysis. Category 1 species included plants and animals known or likely to occur in the project area, and for which one of four types of habitat modeling data was available and used to quantify and analyze potential impacts by subarea and tier. Potential habitat, by tier and subarea, was modeled for nine Category 1 plant species and 28 animal species identified in the project area. Project impacts to high quality and low-to-moderate quality habitat for each Category 1

[3] Arvin Petitioners use the term "sensitive species." The EIR and County use the term "special-status species."

species were estimated. The EIR analysis of habitat impacts to Category 1 species allowed quantification of impacts without knowing the actual occurrence of a species at a particular place, focusing on the importance of habitat to a species rather than occupation levels "that tend to change over time."

Category 2 included species known or likely to occur in the project area but for which no modeling data was available. Impacts to Category 2 species were evaluated by identifying the subarea and tiers where those species could occur and by considering the level of potential new disturbance in each location. The EIR identified 31 Category 2 special-status plant species and 19 special-status animal species, summarized the likelihood of habitat occurrence by species, and analyzed the species on the basis of species-specific occurrence information. This analysis included an assessment of which species could occur in each subarea and tier, and identified key habitat requirements or constraints that could affect the spatial distribution of special-status species.

The EIR's impact analyses for Category 1 and Category 2 species were based on several assumptions: that all new wells will occur on undisturbed land, when that is likely not the case; "potential" land disturbance to poor quality habitat was deemed a potential impact for Category 1 species; the occurrence was considered possible for Category 2 species even if there were only limited historical observations or an extremely low likelihood of species activity in a tier or subarea. The EIR discussed the potential level of habitat modification for each Category 1 species, and assessed the likelihood of occurrence of habitat for every Category 2 species. Potential impacts to modeled special status species were characterized in terms of annual impacts to all identified habitat categories for each species analyzed within the project area, which included urbanized, agricultural, or high-density oil and gas production areas where predicted habitat values have been reduced or eliminated. Potential impacts to non-modeled special status species were analyzed, assuming that impacts would occur even in areas where there was an extremely low likelihood of species impact.

Category 3 included "potentially occurring" species. Category 3 species were identified through literature review, database searches, or by local experts as "potentially occurring" in the vicinity of the project area, and for which suitable habitat is present. Based on the evaluation by County's biologist, a total of 53 plants and 24 wildlife species were included in Category 3 and not further analyzed in the EIR, because they either did not occur in the project area, or had the potential to occur in the project area but lacked official status. The determination that species were Category 3 species if they were absent from the project area was based on a reasonable screening analysis, followed by a biologist's review to determine those warranting further study. Species were screened from further consideration when: no records for a species were found in the project area and suitable habitat was not present or not expected; species occurrence in the project area was migratory or transient, with little or no chance of impact from project activities; and occurrence data for species within project area was found to be erroneous. "Watch list" species were included in Category 3 unless review of their distribution and status indicated

that the portion of the species' distribution within the project area warranted further consideration of impacts. Appendix "N" of the EIR identified and discussed all Category 3 species excluded from further analysis based on County's biologist's review. No Category 3 species were excluded from Category 3 analysis. Category 3 species are part of the project-related preconstruction surveys. All applicable mitigation applies to Category 3 species.

Detailed findings were made regarding each Category 1 and Category 2 species. The EIR determined that without mitigation, the project had the potential to cause substantial adverse effects, either directly or through habitat modification, on identified special-status species. The methodology and scope of analyses for impacts to plant and wildlife special-status species were adequate, complete and a good faith effort at full disclosure. Site-specific or further analysis was not required. See, *Save Round Valley Alliance v. County of Inyo, supra, 157 Cal.App.4th 1437, 1468; Center for Biological Diversity v. Dept. of Fish & Wildlife (2015) 234 Cal.App.4th 214, 234.*

The EIR adequately analyzed impacts to special-status species and mitigated where required. The EIR's methodology, scope of analysis, and determinations regarding impacts to special-status species are supported by substantial evidence. There was no failure to proceed in a manner required by law, and no prejudicial abuse of discretion.

Habitat Adjacent to Worksites–Edge Effects

The EIR discusses affected species, their habitat needs and distribution across the entire project area, existing efforts to conserve species and protect habitat, and the harmful effects of habitat fragmentation. Potential impacts to plant and wildlife species outside the construction or operations "footprint" are described. Both quantitative and qualitative approaches were utilized. The EIR discussed research specific to the area to analyze impacts, including local studies, that showed wildlife's ability to move across an active oil field was less impeded than with agricultural and urban lands, even where the oil field was moderately developed.

Mitigation measures to avoid or minimize impacts to species both at, and outside of, the development site were discussed and incorporated, including preconstruction surveys that must extend a specified distance beyond the ground disturbance, distance requirements in species-specific survey protocols where adjacent landowner approval is obtained, species-specific setbacks from occupied nests, burrows and other sensitive locales, and setbacks of up to one-half mile from certain active nests. The EIR was not required to quantify the acreage for "edge effects," and represents an adequate, complete and good faith effort at full disclosure.

The EIR specifically and adequately analyzed impacts to habitat outside the "footprint" of project-related development, including in the impact analysis and the formulation of mitigation measures. The EIR's methodology and scope of analysis regarding habitat

adjacent to worksites is supported by substantial evidence. There was no failure to proceed in a manner required by law, and no prejudicial abuse of discretion.

MM 4.4-1 - Deferral of Mitigation

The EIR determined that impacts to special-status species were potentially significant, and mitigation measures were identified. MM 4.4-1[4] is part of a comprehensive mitigation plan expressed in fifteen separate measures to which County is committed, and which contain sufficiently specific performance criteria for valid mitigation under CEQA. County stated in response to comments, "When considered as a whole, the mitigation measures for biological resources comprise a comprehensive approach that emphasizes avoidance of impacts and mitigation of the remaining impacts through conservation of species and habitats in a manner that has the greatest likelihood of success."

MM 4.4-1 requires a biological reconnaissance survey to advise on potential project impacts, potential surveying needs, and the need for focused special status surveys. Focused/protocol surveys are conducted to "confirm the presence or absence" of sensitive species and to identify and implement "feasible avoidance and minimization measures for such species." In addition to MM 4.4-1, there are 14 other mandatory measures with which the applicant must comply, and which County considered in determining that impacts would be mitigated to less than significant. Pre-disturbance surveys are required by Mitigation Measures 4.4-1 (special status wildlife), 4.4-5 (bats), 4.4-8 (golden eagle nests), 4.4-10 (active birds' nests), 4.4-11 (blunt-nosed leopard lizard), 4.4-12 (protected and sensitive plant species), and 4.4-17 (sensitive natural communities, including waters and wetlands). The mitigation measures specify that surveys must be completed by qualified biologists in accordance with approved protocols. Surveys must be conducted at times that will provide relevant information regarding the presence of sensitive species at the site.

MM 4.4-1 is distinguishable from the mitigation measure expressing a "generalized goal" involved in *San Joaquin Raptor Rescue Center v. City of Merced (2007) 149 Cal.App.4th 645, 670.* The reconnaissance surveys required by MM 4.4-1 are part of a series of mandatory measures that work together to impose specific avoidance measures, prohibit the wrongful take of protected species, and require specific mitigation ratios where habitat disturbance is unavoidable. The decision in *Gentry v. City of Murrietta (1995) 36*

[4] MM 4.4-1 states in relevant part: "A qualified biologist shall conduct a biological reconnaissance survey in potential special-status species habitat to advise the project proponent of potential project impacts, potential surveying needs, and advise on the need for focused special status surveys...Based on the information gathered from the biological reconnaissance survey and any informal consultation with United States Fish and Wildlife Service and California Department of Fish and Wildlife, focused/protocol surveys shall be conducted by a qualified or permitted biologist (whichever is applicable) well in advance of ground disturbing activities to determine the presence/absence of sensitive species protected by state and federal Endangered Species Acts and potential project impacts to those species..."

Cal.App.4th 1359, is similarly distinguishable because *Gentry* held the city was required to further analyze mitigation measures to support a negative declaration, applying the "fair argument" standard. *Gentry* stated, however, that, "a condition could validly allow for deferred mitigation, provided other mitigation measures were clearly adequate..." *Gentry, supra, 36 Cal.App.4th at p. 1396.* The mitigation measures, of which MM 4.4-1 forms a part, contain adequate performance criteria.

MM 4.4-1 does not unlawfully defer mitigation of impacts. Substantial evidence supports County's determination that impacts to biological resources will be less than significant after mitigation. There was no failure to proceed in a manner required by law, and no prejudicial abuse of discretion.

MM 4.4-16 - Mitigation of Harm to Habitats

Arvin Petitioners argue that MM 4.4-16[5] fails because it does not require that habitat be replaced with habitat of the equivalent type or quality. Arvin Petitioners cite *Preserve Wild Santee v. City of Santee (2012) 210 Cal.App.4th 260.* In *Santee*, which involved the Quino butterfly, the court stated at page 281:

> The absence of standards or guidelines in the EIR for active management of the Quino within the preserve is problematic because the draft habitat plan indicates vegetation management is the key consideration for the Quino's conservation and the City will not be utilizing prescribed burns or grazing in the preserve, the only two methods of vegetation management the draft habitat plan identifies. In addition, the timing and specific details for implementing other Quino management activities discussed in the draft habitat plan are subject to the discretion of the preserve manager based on prevailing environmental conditions. *Consequently, these activities are not guaranteed to occur at any particular time or in any particular manner.* (Emphasis added.)

[5] *MM 4.4-16 states in relevant part: "Ground disturbance shall be mitigated at a 1.0 to 1.0* ratio (one-acre of new disturbance shall require one-acre of mitigation) except in Tier 1 areas that contain existing disturbance of 70% or greater which shall be mitigated at a 1.0 to 0.5 ratio (one-acre of new disturbance shall require one-half acre of mitigation), for the land included in the Site Plan...New disturbance mitigation may be satisfied by one or a combination of the following measures: a. The recordation of a conservation easement or similar permanent, long-term conservation management agreement...b. Acquisition of land preservation credits from a mitigation bank... c. Removal of legacy oil and gas equipment...complete a reseeding effort using native species...d. Enhancement or restoration of existing habitat on lands already subject to a conservation easement or similar agreement, or which become subject to a conservation easement or similar agreement subsequent to the certification of this Environmental Impact Report...e. Payment of a biological resources mitigation fee for the acquisition and management of mitigation lands, legacy equipment removal, and/or land enhancement..."

Santee does not hold that compensatory habitat must be of the same quality or nature as the habitat destroyed. *Santee* held that the mitigation was deficient because it lacked specific performance criteria regarding vegetation management.

The EIR's evaluation and determination of significance regarding biological resources was based on six separately-stated criteria. Habitat modification, alone, was not identified as a significant impact; replacement of habitat, alone, was not identified as adequate mitigation. County relied on multiple, complementary measures to mitigate impacts, and the entire "suite of measures" constitutes substantial evidence supporting the County's findings. Arvin Petitioners have not shown that the EIR's measures, acting together, will not mitigate the impacts to less than significant.

MM 4.4-16 is part of a comprehensive mitigation plan that adequately ensures mitigation of harm to species' habitats. The EIR's determinations are supported by substantial evidence. There was no failure to proceed in a manner required by law, and no prejudicial abuse of discretion.

6. GHG Emissions

Mitigation – MM 4.7-4

County determined that GHG emissions from the project would be potentially significant, and implemented four mitigation measures to reduce impacts to less than significant. The first three measures rely on regulations to mitigate impacts. For emissions not captured by the first three measures, MM 4.7-4[6] applies and requires each applicant to reduce emissions to "no net increase" in one of three ways: (1) applicant reduction of GHG emissions verified by County; (2) acquisition of offset credits; or (3) inclusion in an emission reduction agreement ("ERA"). County determined the project's GHG impacts after mitigation would be less than significant, and determined the project's cumulative GHG impacts would be significant and unavoidable.

Arvin Petitioners argue there is no substantial evidence of the effectiveness of GHG mitigation through offset purchases. Arvin Petitioners specifically argue there is no substantial evidence: (1) that GHG offset programs exist, or that credits are available from

[6] MM 4.7-4 states: "Each Applicant shall offset all greenhouse gas emissions not covered by the Cap-and-Trade program or other mandatory greenhouse gas emission reduction measures through Applicant reductions of greenhouse gas emissions as verified by Kern County, through acquisition of offset credits from the California Air Pollution Control Officers Association Exchange Register or other third party greenhouse gas reductions, with consultation as to the validity of methodology for calculating reductions verified by the San Joaquin Valley Air Pollution Control District and accepted by Kern County, or through inclusion in an Emission Reduction Agreement, to offset Project-related greenhouse gas emissions that are not included in the Cap and Trade program to assure that no net increase in greenhouse gas emissions from the Project." (Emphasis added.)

existing programs; or (2) that offsets will satisfy CEQA's requirement that only GHG reductions "not otherwise required" may be used to offset emissions, i.e., the requirement of "additionality." Regarding ERAs, Arvin Petitioners argue there is no established program to support ERAs for project GHG emissions.

Arvin Petitioners' did not object to the effectiveness of the option under MM 4.7-4 permitting an applicant to directly reduce GHG emissions. That failure renders Arvin Petitioners' substantial evidence challenge to the remaining options academic. There is no reason that direct GHG reductions, verified by County, will not meet the performance standard.

In *San Joaquin Raptor Rescue Center v. County of Merced (2007) 149 Cal.App.4th 645*, the court found a mitigation measure adequate where only one of the two mitigation options available under the measure would be effective. The mitigation measure required mitigation in the form of replacement by either creating wetlands on site, or by offsite purchases of wetland banking credits. There was no wetlands conservation bank in the County, but the court held the mitigation measure was adequate, stating:

> Finally, Petitioners note that in mitigation measure 3.6–2d, if the Project causes loss to functioning and value of vernal pool areas, there must be mitigation in the form of replacement by either creating vernal pools or swales within the conservation area on site, or by off-site purchase of wetland banking credits. Since there are no wetlands conservation banks present in the County of Merced, the latter alternative is unavailable. The FEIR acknowledges this fact, but emphasizes that the other option—i.e., creating new vernal pools in the conservation area onsite—remains a reasonable mitigation measure. And if mitigation credits become available within the watershed, the FEIR further explains, then 'such acquisition would become an additional available measure.' In light of this clarification in the FEIR, petitioners have failed to demonstrate this particular mitigation measure is inadequate or unsubstantiated." *Id. at pp. 671-672.*

Arvin Petitioners' substantial evidence challenge regarding MM 4.7-4 fails on other grounds.

County and real parties in interest argue that during the administrative process, petitioners did not question the availability of offsets or credits, or whether the offsets would satisfy the requirement of GHG reductions "not otherwise required" ("additionality"). Exhaustion of administrative remedies is a jurisdictional prerequisite to maintenance of a CEQA action. *Bakersfield Citizens for Local Control v. City of Bakersfield (2004) 124 Cal.App.4th 1184, 1199.* Arvin Petitioners must show that an objection was made during the administrative process that was sufficiently specific so that County had the opportunity to evaluate and respond. *Citizens for Responsible Equitable Environmental Dev. v. City of San Diego (2011) 196 Cal.App.4th 515, 527.* The petitioners' objections

during the administrative proceeding regarding MM 4.7-4 did not give County the opportunity to evaluate and respond to comments or arguments regarding the availability of offset programs or credits, or the requirement of "additionality." Petitioners failed to exhaust their administrative remedy on those issues.

Nevertheless, substantial evidence supports the EIR's determinations regarding MM 4.7-4. The EIR discloses that the GHG mitigation measures were not intended to individually provide full mitigation for project GHG emissions. The measures were designed as a package, such that mitigating project GHG emissions to a level of "net zero" is achieved by all four of the mitigation measures working in concert. The record shows that lower GHG emission levels through compliance with MM 4.7-1, 4.7-2, and 4.7-3 will require smaller quantities of offsetting emission reductions, but emissions remaining after application of MM 4.7-1, 4.7-2 and 4.7-3 must be offset in accordance with MM 4.7-4. The record shows that at the time of filing an application for conformity review, applicants must specify their expected GHG emissions and identify how those emissions will be mitigated. According to the EIR:

> Emission-reducing measures may include the measures listed by ARB at http://www.arb.ca.gov/cc/non-co2-clearinghouse/non-co2-clearinghouse.htm, but those measures are not required. All reductions will be verified by the County.

In addition to mitigation through direct applicant reductions under MM 4.7-4, the applicant may acquire offset credits through the CAPCOA Exchange or other third party offset programs. Substantial evidence shows that offset programs exist, including Climate Action Reserve, the SoCal Climate Solutions Exchange, CARB-approved Offset Project Registries, and programs outside California. CEQA's "additionality" requirement is adequately addressed in MM 4.7-4. For third party offsets, MM 4.7-4 requires the SJVAPCD to verify, and County to accept, the methodology used to calculate GHG reductions, thus providing the mechanism to ensure that offsets will be reductions "not otherwise required." The court will presume the SJVAPCD and County will properly undertake those responsibilities.

Arvin Petitioners complain that real parties cite "a few passing references to offset programs scattered across an almost random collection of documents." This statement serves to underscore the reason it is necessary to make a sufficiently specific objection during the administrative process. From this court's vantage point, *petitioners* should have brought to this court's attention *all* references to offset programs as part of their "no substantial evidence" argument in the opening brief.

Arvin Petitioners cite *Kings County Farm Bureau v. City of Hanford ("Kings County") (1990) 221 Cal.App.3d 692*, where the appellants challenged an EIR's water impacts analysis that found no significant impact. The project applicant agreed to contribute financially to a water recharge program, but the appellants referred to a memo from the

city public works director stating there was no water available to purchase for a water recharge program. The record did not disclose whether the city relied on the applicant's agreement to help fund the water recharge program in making its "no significant impact" determination. The court stated:

> To the extent the GWF-KCWD agreement was an independent basis for finding no significant impact, the failure to evaluate whether the agreement was feasible and to what extent water would be available for purchase was fatal to a meaningful evaluation by the city council and the public. *Id at p. 728.*

MM 4.7-4's mitigation through direct GHG reduction, verified by County, is not analogous to paying a mitigation fee for a water recharge program where there is no water to buy, or no evidence of it. Moreover, substantial evidence in the present case shows that offset programs exist and that MM 4.7-4 would be effective, unlike the absence of analysis or information in *Kings County*.

MM 4.7-4 specifically refers to the CAPCOA Exchange Register. The EIR refers to emission-reducing measures "listed by ARB at http://www.arb.ca.gov/cc/non-co2-clearinghouse/non-co2-clearinghouse.htm." The administrative record discussed Climate Action Reserve, the SoCal Climate Solutions Exchange, CARB-approved Offset Project Registries and programs outside California.

Substantial evidence supported the effectiveness of offset programs as a method of mitigating GHG impacts. In general, the *effectiveness* of "market-based" solutions such as offsets is embedded in the Global Warming Solutions Act of 2006 ("Act"), and the regulations adopted to achieve that Act's objectives. The legislature specifically authorized the Air Resources Board to adopt regulations which establish market-based compliance mechanisms "in furtherance of achieving the statewide [GHG] emissions limit." *Health & Safety Code §§ 38562(b), 38570(a)* [authorizing regulation for "use of market-based compliance mechanisms to comply with the regulations"]. The Act defines a market-based compliance mechanism, which includes GHG exchanges, banking, credits, and other transactions. *Health & Safety Code § 38505(k).*

More directly, MM 4.7-4 specifically requires the SJVAPCD to validate the methodology for calculating the GHG reductions, and the County to accept it. Decision-makers could reasonably infer from the EIR that MM 4.7-4 would be effective.

County's determinations were supported by substantial evidence. The EIR was adequate as an informational document. There was no failure to proceed in a manner required by law of prejudicial abuse of discretion.

Long-term Impacts

Arvin Petitioners also argue that the EIR failed to adequately disclose and analyze long-term impacts to climate, and specifically, GHG emissions from 2035 through 2050 by: (1) failing to provide "meaningful analysis" of the conflict between the project's "rising emissions over time and the long-term reductions climate scientists and California policymakers deem necessary," including failure to analyze consistency with the Governor's executive order target for 2050; and (2) wrongfully assuming Cap-and-Trade would extend past 2020.

In July 2017, essentially between the second and third days of trial in this case, the California Supreme Court decided *Cleveland National Forest Foundation v. San Diego Association of Governments ("SANGAG") (2017) 3 Cal.5th* 497. The Supreme Court held that the agency considering a regional transportation plan did not abuse its discretion in declining to explicitly analyze the consistency of projected GHG emissions with the statewide GHG goals expressed in executive order. *Id. at p. 517.* The *SANDAG* opinion acknowledged the challenges that agencies face in analyzing GHG emissions in a climate of evolving regulations and science. *Ibid.*

Also in July 2017, AB 398 was passed by the California legislature and signed into law, extending Cap-and-Trade through 2030.

The EIR adequately disclosed and analyzed GHG emissions and long term impacts. The EIR comprehensively analyzed all project-related activities, including all phases of construction and operations. The EIR discussed direct and indirect emissions from all sources. It conservatively assumed for purposes of analysis that more wells would be drilled each year than are authorized under the project ordinance, and provided technical estimates based on the assumption Cap-and-Trade would *end* in 2020. The EIR used mandatory reporting regulation ("MRR") emissions as baseline, even though for some companies MRR-reported emissions include all activities in the San Joaquin Valley, not just the local area. It included these baseline emissions in calculating project emissions. The EIR mitigated the projects GHG emissions to "net zero," which is below the applicable threshold of significance.

The existence and content of the long-term statewide goals expressed in executive order was plainly discussed in the EIR. Nothing was obscured. The EIR included discussion and analysis for informational purposes regarding the project's consistency with the executive orders. County discussed and acknowledged the uncertainty in trying to predict what the oil and gas industry would be required to do in order to achieve statewide 2030 and 2050 targets. The EIR also acknowledged the project's long-term increases in GHG emissions, and discussed project GHG emissions in relation to statewide reduction goals. The EIR estimated the project GHG emissions at full build out in 2035. County determined and disclosed the project's cumulative GHG impacts would be significant and unavoidable. The project was approved based on a statement of overriding considerations.

In addition, County's technical analysis assumed Cap-and Trade would end in 2020 (the law at the time), but at the same time, included mitigation in the EIR based on the continued existence of Cap-and-Trade, as well as measures not covered by Cap-and-Trade. County disclosed its reasons for the EIR's approach, and stated that it believed Cap-and-Trade would "almost certainly" extend beyond 2020. County was correct.

Substantial evidence supports the EIR's determinations regarding GHG thresholds of significance, and Arvin Petitioners clarified in their reply brief that they do *not* contend the EIR should have used different significance thresholds. Substantial evidence supports the EIR's methodology, scope of analysis, and determinations regarding GHG emissions, including County's determination that project-related GHG impacts would be less than significant after mitigation. The EIR was adequate as an informational document. There was no failure to proceed in a manner required by law, and no prejudicial abuse of discretion.

CERTIFICATE OF MAILING

The undersigned, of said Kern County, certify: That I am a Deputy Clerk of the Superior Court of the State of California, in and for the County of Kern, that I am a citizen of the United States, over 18 years of age, I reside in or am employed in the County of Kern, and not a party to the within action, that I served the ***Minute Order dated March 12, 2018*** attached hereto on all interested parties and any respective counsel of record in the within action by depositing true copies thereof, enclosed in a sealed envelope(s) with postage fully prepaid and placed for collection and mailing on this date, following standard Court practices, in the United States mail at Bakersfield California addressed as indicated on the attached mailing list.

Date of Mailing: March 12, 2018

Place of Mailing: Bakersfield, CA

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

Date: March 12, 2018

Terry McNally
CLERK OF THE SUPERIOR COURT

By: _____
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