William Rostov, State Bar No. 184528
Colin O'Brien, State Bar No. 309413
EARTHJUSTICE
50 California Street, Suite 500
San Francisco, CA 94111
wrostov@earthjustice.org
cobrien@earthjustice.org
Tel: (415) 217-2000
Fax: (415) 217-2040

Elizabeth Forsyth, State Bar No. 288311
EARTHJUSTICE
800 Wilshire Boulevard, Suite 1000
Los Angeles, CA 90017
eforsyth@earthjustice.org
Tel: (415) 217-2000
Fax: (415) 217-2040

Attorneys for Petitioners Natural Resources Defense Council and Sierra Club
(List of Counsel continued on next page)

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF KERN

VAQUERO ENERGY INC., a California corporation; and HUNTER EDISON OIL DEVELOPMENT LIMITED PARTNERSHIP, a California limited partnership, Petitioners / Plaintiffs, v. County of Kern, Kern County Board of Supervisors, and DOES 1-10, Respondents. CALIFORNIA INDEPENDENT PETROLEUM ASSOCIATION, a California non-profit mutual benefit corporation; INDEPENDENT OIL PRODUCERS' AGENCY, a California corporation; WESTERN STATES PETROLEUM ASSOCIATION, a California non-profit mutual benefit corporation; and DOES 11-20, Real Parties in Interest.	Case No. BCV-15-101645 EB consolidated with Case No. BCV-15-101666 EB, and Case No. BCV-15-101679 EB **ARVIN PETITIONERS' OPENING MERITS BRIEF** Date: June 13, 2016 Time: 8:30 am Dept: T-2 Judge: Eric J. Bradshaw Action filed: December 10, 2015

Margaret Hsieh, State Bar No. 287839
NATURAL RESOURCES DEFENSE COUNCIL
40 West 20th Street
New York, NY 10011
mhsieh@nrdc.org
Tel: (212) 727-2700
Fax: (415) 795-4799

Mary K. Umekubo, State Bar No. 268973
NATURAL RESOURCES DEFENSE COUNCIL
111 Sutter Street, 21st Floor
San Francisco, CA 94104
kumekubo@nrdc.org
Tel: (415) 875-6131
Fax: (415) 875-6161

Attorneys for Petitioner Natural Resources Defense Council

Elizabeth Benson, State Bar No. 268851
SIERRA CLUB
2101 Webster Street, Suite 1300
Oakland, CA 94612
elly.benson@sierraclub.org
Tel: (415) 977-5723
Fax: (510) 208-3140

Attorney for Petitioner Sierra Club

Sofia L. Parino, State Bar No. 221379
Madeline Stano, State Bar No. 289660
CENTER ON RACE, POVERTY & THE ENVIRONMENT
1999 Harrison Street, Suite 650
Oakland, CA 94612
sparino@crpe-ej.org
mstano@crpe-ej.org
Tel: (415) 346-4179
Fax: (415) 346-8723

Attorneys for Petitioners Committee for a Better Arvin, Committee for a Better Shafter, and Greenfield Walking Group

Hollin N. Kretzmann, State Bar No. 290054
Kevin P. Bundy, State Bar No. 231686
Clare Lakewood, State Bar No. 298479
CENTER FOR BIOLOGICAL DIVERSITY
1212 Broadway, Suite 800
Oakland, CA 94612
hkretzmann@biologicaldiversity.org
kbundy@biologicaldiversity.org
clakewood@biologicaldiversity.org
Tel: (510) 844-7133
Fax: (510) 844-7150

Attorneys for Petitioner Center for Biological Diversity

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INTRODUCTION

Kern County lies at the epicenter of California's water crisis, with the County's water resources in critical overdraft. It also sits in the heart of one the most polluted air basins in the country, with unhealthy levels of air pollution routinely sending County residents to the hospital with asthma and other respiratory ailments. Oil and gas activities contribute to these dire problems. Nonetheless, the County recently adopted an Ordinance that paves the way for a sweeping expansion of oil and gas development—more than 72,000 new wells and associated infrastructure for the next 25 years or more—in an area larger than the entire state of Delaware. In support of the Ordinance, the County did something unprecedented: it adopted a single environmental impact report (EIR) for the entirety of this development and decided to forgo detailed, site-specific review for discrete oil and gas projects. The County's actions violate the California Environmental Quality Act (CEQA) and mask the true impacts of the expansive growth the Ordinance facilitates.

CEQA makes environmental protection a mandatory part of government decisionmaking. It requires a detailed review of the environmental impacts of discretionary government decisions in a transparent, public process, and compels government entities to mitigate or avoid significant impacts when feasible. CEQA ensures that California governments at all levels carefully consider the environmental implications of their actions. It also provides community members with the opportunity to meaningfully participate in decisionmaking that affects the wellbeing of their communities. CEQA thus protects not only human health and the environment, but also informed self-government.

In approving the Ordinance, however, the County adopted a scheme to insulate extensive oil and gas development from the vigorous public oversight that CEQA requires. In a rushed public process that excluded the County's large population of Spanish-speaking residents, the County certified an EIR that fails to adequately assess and mitigate the full range of impacts. The County insists that its broad and vague EIR will be the one and only environmental assessment of nearly every new oil and gas project in the County for decades to come, even though the report omits the site-specific analysis of impacts and mitigation that CEQA requires for individual projects. The County attempts to evade this requirement by labeling the permitting for individual oil and gas projects as "ministerial" and therefore exempt from CEQA—a label usually reserved for rote approvals, like marriage and dog licenses. In reality, however,

the County retains ample permitting discretion under the Ordinance, and its discretionary permitting decisions must be subject to environmental review.

By the County's own assessment, expanded oil and gas development under the Ordinance will overtax critical sources of water and cause more than a billion pounds of air pollution. It will also threaten already-imperiled wildlife species and produce skyrocketing greenhouse gas emissions in defiance of the state's science-based climate goals. Given the County's unlawfully truncated environmental review, Kern residents have only been informed about, and allowed to comment on, future oil and gas development in high-level, abstract terms. Monolingual Spanish residents have been denied even that bare process. When actual oil and gas projects are proposed for local communities—promising real consequences for individuals and families—community members will have no say.

The residents of Kern County must be given the opportunity to participate in the future oil and gas permitting decisions that will continue to dramatically impact their communities. Until the County complies with CEQA, the EIR and Ordinance must be set aside.

LEGAL BACKGROUND

CEQA is a comprehensive statute designed to protect the environment and safeguard informed self-government. (*Laurel Heights Improvement Assn. v. Regents of U. of Cal.*(1988) 47 Cal.3d 376, 392 (*Laurel Heights*).) It accomplishes these objectives in two ways. First, CEQA requires agencies to inform decisionmakers and the public about a project's potential significant environmental effects. (Cal. Code Regs., tit. 14 (CEQA Guidelines), § 15002, subd. (a)(1).) Such disclosure ensures that "long-term protection of the environment . . . shall be the guiding criterion in public decisions." (Pub. Resources Code, § 21001, subd. (d).) The EIR is the "heart" of this requirement. (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 84.) "Because the EIR must be certified or rejected by public officials, it is a document of accountability." (*Laurel Heights*, at p. 392.)

Second, CEQA requires the adoption of alternatives or mitigation measures to avoid or reduce significant environmental damage whenever feasible. (See CEQA Guidelines, § 15002, subd. (a)(2), (3).) Mitigation measures for significant impacts must be "fully enforceable." (Pub. Resources Code, § 21081.6, subd. (b).) Where mitigation is known to be feasible but "practical considerations prohibit devising such measures early in the planning process," CEQA allows an agency to defer formulating

specific measures; however, the agency must "commit to" devising measures that will "satisfy specific performance criteria articulated at the time of project approval." (*Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 94 (*CBE*).) "[S]pecific and mandatory performance standards" are necessary to "ensure that the measures, as implemented, will be effective." (*Ibid*.) Further, "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." (*POET, LLC v. Cal. Air Resources Bd.* (2013) 218 Cal.App.4th 681, 738 (*POET*), citing CEQA Guidelines, § 21080.5, subd. (d)(3)(A).)

Under CEQA, there are several types of EIRs, including "program EIRs" and "project EIRs." Broad "program EIRs" are usually reserved for high-level policies, like the adoption of an ordinance, and frequently do not include site-specific assessment of impacts or mitigation, with the expectation that such finer-scale analyses will be undertaken in later "project EIRs" accompanying specific proposals. (CEQA Guidelines, § 15168, subd. (b).) In contrast, "project EIRs" are typically employed for localized activities, and must include site-specific evaluation because no further environmental review is expected. (*Id*., §§ 15161, 15146; see also *Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency* (2000) 82 Cal.App.4th 511, 533–534.) Whether environmental review consists of a "project EIR" alone or a "program EIR" followed by one or more "project EIRs," site-specific actions ultimately must be analyzed and mitigated at the local scale. (*Friends of Mammoth*, at p. 536.)

STATEMENT OF FACTS

I. The Environmental Setting

Kern County's residents live in some of the most heavily polluted communities in the state, including 55 census tracts that the California Environmental Protection Agency has identified as among the most vulnerable communities in California. (Administrative Record (AR) 010413.) These tracts are home to 330,000 people, 122,000 of whom already live within one mile of an oil or gas well. Of these 122,000 residents, 76 percent are people of color, and 64 percent are Latino. (AR037764–66.)

Kern County suffers from acute water scarcity. The County depends on water imports and groundwater pumping to serve its residents, farms, and other businesses, who collectively use more than three times as much water as local surface waters supply. (EIR at AR011986, AR011990, AR012005.)

Water levels in parts of the County "have dropped sharply since the start of the recent drought," resulting in a state of "critical overdraft." (*Id*. at AR012064.) If the County does not reduce groundwater use, it "will deplete critical reserves" and "pose significant threats to food production in the US and the state's economy." (*Id*. at AR012069.) The County's own analysis concludes that there is "no surplus water available in the Project Area to meet demand." (*Id*. at AR029230.) "Any new use of water is taking water away from some other user or results in groundwater overdraft." (*Id*. at AR011966.)

The San Joaquin Valley, which includes Kern County, suffers from some of the worst air quality in the United States—with residents breathing "an air that kills." (*Nat. Assn. of Home Builders v. San Joaquin Valley Unified Air Pollution Control Dist.* (9th Cir. 2010) 627 F.3d 730, 731.) The U.S. Environmental Protection Agency (EPA) and California Air Resources Board (CARB) each have established "health-based ambient air quality standards" the San Joaquin Valley does not meet. (EIR at AR000914–16.) Currently, the San Joaquin Valley violates standards for three pollutants: ozone, "respirable particulate matter" (PM_{10}), and "fine particulate matter" ($PM_{2.5}$). (*Id*. at AR000916.) These pollutants are "hazardous to human health" because they cause or aggravate respiratory ailments and cardiovascular disease, and may even cause premature death in people with heart or lung disease. (*Id*. at AR000920–24, AR000935–36.) Children, the elderly, and asthmatics are particularly susceptible to harm. (*Id*. at AR000914, AR000920, AR000936.) In recent years, pollution levels in Kern County have exceeded air quality standards by as much as a factor of four, with violations near the Van Horn Elementary School reported on 113 days in one year. (*Id*. at AR000914–915 [standards], AR000918–919 [monitor results].)

II. The Ordinance and the Significant Environmental Impacts It Authorizes

In 2013, oil and gas trade associations approached the County about revising Chapter 19.98 and related chapters of the Kern County Zoning Ordinance (Ordinance) to expedite permitting for oil and gas operations. (AR000048–49.) Their intent was for these revisions to provide for permitting by right, and thereby to avoid "time consuming" environmental review for each permit. (EIR at AR008588.) The oil industry funded the costs of developing the Ordinance. (AR152223.)

The Ordinance's defining feature is its adoption of a self-styled "ministerial" permitting process for new oil and gas projects. (EIR at AR008588.) Under the Ordinance, most oil and gas activity will be

permitted as of right following review processes that purportedly do not entail any exercise of discretion. (AR000037, AR000039, AR000041.) The County aims to green-light all manner of related oil and gas development activities using this approach, including the construction of well pads, roads, and pipelines; and the stimulation of wells using toxic chemicals. (AR000028–32.)

For purposes of its CEQA review, the County declined to develop a program EIR evaluating the Ordinance, with follow-up analysis to assess the local impacts of individual oil and gas projects. Instead, the County expansively defined the Ordinance and most future oil and gas permitting—including the first 3,647 new wells each year—to constitute a single "Project," analyzed in a single EIR. (AR008602.) The County designated 3,700 square miles (or more than 2.3 million acres) as the "Project Area," encompassing an area larger than the entire State of Delaware. (AR000714.) The purpose of defining nearly all oil and gas drilling in Kern County as a single "Project" and characterizing the prospective approvals as "ministerial" was to eliminate required future site-specific review for both Kern County and other government agencies issuing permits. (AR000710–13.)

Although CEQA normally requires project-level EIRs for construction projects to provide site-specific detail (CEQA Guidelines, § 15146), the County's Final EIR does not analyze the environmental impacts from any particular oil or gas well or field, or in any particular community in Kern County. (See AR008594, AR008597 [acknowledging "the impact analysis has been performed on a landscape or regional scale" and does not pinpoint "the precise location(s)" of future activities].) Though the EIR assesses impacts only on a coarse scale, it nevertheless concludes that the Project will have significant, unavoidable impacts, including water scarcity, air pollution, and climate change. (AR000593–97.)

The Project deepens the County's existing water crisis, particularly by intensifying demand for already-scarce municipal and industrial-quality (M&I) water. For at least the next 20 years, new oil and gas activity permitted under the Ordinance will compete directly with the County's farms, other businesses, and growing population for dwindling M&I supplies. (EIR at AR012056–58, AR029230; see also *id*. at AR012044 [projecting a 27 percent increase in urban water demand from 2015 to 2035].) Demand for M&I-quality groundwater in the Project Area, including for oil and gas use, has contributed to "a significant lowering of groundwater levels and reduced groundwater storage, particularly during the current drought." (*Id*. at AR008802.) The EIR contemplates reliance on "potentially unsustainable"

groundwater pumping for at least the next two decades (AR012060–62), and anticipates future decreases in the Project Area's three principal surface water sources (AR012005). In central Kern County, water supplies will be "insufficient to meet demand both currently (2015) and into the future (2035)," even under average conditions. (AR011966.) Shortages in dry years or multi-year droughts will be even worse. (*Ibid*.) Thus, the Project will further strain the overtaxed water reserves upon which the County's residents and existing industries depend.

With respect to air pollution, the EIR estimates that the Project, owing to its massive size and extended duration, will emit as much as 39,000 tons (78 million pounds) of air pollution per year and approximately 777,670 tons (1.56 billion pounds) in total through 2035. (AR001003–04, AR029116–17.) At such high levels, the Project will produce the lion's share of all air pollution emitted within Kern County by 2035, including 40 percent of all $PM_{2.5}$ emissions county-wide; 70 percent of all nitrogen oxide (NO_x) emissions; and 97 percent of all sulfur dioxide (SO_2) emissions. (AR001030.) The EIR concludes that the Project, even with mitigation, will cause a significant, cumulative increase in air pollution—including an increase in those air pollutants for which the County currently violates health standards. (AR001025–31, AR029059.)

With respect to climate change, in 2012 the oil and gas industry in the Project Area generated greenhouse gas emissions equivalent to 3.5 million passenger cars driving on California's roadways. (EIR at AR001476, AR010245.) The EIR anticipates the Project will nearly double direct annual emissions of greenhouse gases from the oil and gas industry from 2012 to 2035. (AR001476.) These rapidly rising emissions are set to occur at a time when the state's emissions must decrease by approximately five percent per year to meet emissions goals climate scientists agree are necessary to slow or arrest the expected negative consequences of climate change. (AR022879.)

Finally, the Project also poses a threat to wildlife. Roughly 166 sensitive species reside or potentially reside in the Project Area, including many that are endangered, threatened, or fully protected. (EIR at AR001069.) The EIR estimates that oil and gas activity will directly disturb roughly 4,856 acres of land every year; over 25 years, that amounts to over 120,000 acres. (AR001207.) Because the effects on wildlife are not limited to the physical footprint of new development, a much broader area of habitat may be destroyed or degraded. (AR010366–68.)

III. The County's Public Review Process for and Approval of the Ordinance

After working with the oil industry for two and a half years to develop the Ordinance and EIR, the County issued a Notice of Availability of the Draft EIR to the public on July 8, 2015. (AR000580.) In spite of requests for more time, the County gave the public only 65 days to review and comment on the Draft EIR's nearly 8,000 pages of text and technical appendices. (AR113221; AR000518–8481.) The County did not provide Spanish translations, even though 51 percent of Kern County's population is Latino or Hispanic and includes many monolingual Spanish speakers. (AR010414.)

Arvin Petitioners submitted five sets of comments on the Draft EIR, along with an expert report on air quality. They identified critical flaws in the Ordinance and the County's public review process, as well as in the Draft EIR's analyses and mitigation of the Project's impacts. (See generally AR010348–77, AR010410–23, AR010449–527, AR010544–637, AR010659–77.)

On November 2, 2015, the week before the Board of Supervisors was scheduled to vote on the Ordinance, the County released its Final EIR, including thousands of pages of new appendices. None of these documents were translated into Spanish. Arvin Petitioners submitted additional comments, along with a second expert report. (AR158951–160416.)

At a special meeting of the Board of Supervisors on November 9, 2015, a mere four months after providing the public with the Draft EIR, and just days after the County's final document dump, the Board of Supervisors voted to enact the Ordinance; certified the Final EIR; and adopted findings of fact, a statement of overriding considerations, and the mitigation measures prescribed in the Final EIR. The County did not translate any of these documents into Spanish.

STANDARD OF REVIEW

In determining whether an EIR complies with CEQA, a reviewing court must determine whether the lead agency committed "a prejudicial abuse of discretion." (Pub. Resources Code, § 21168.5.) "Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." (*Ibid*.) These two distinct grounds for error are reviewed under different standards. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435 (*Vineyard Area Citizens*).)

Challenges to an agency's failure to proceed in the manner required by CEQA raise issues of

law. (*Vineyard Area Citizens*, *supra*, 40 Cal.4th at p. 435.) Accordingly, a court must "determine de novo whether the agency has employed the correct procedures, 'scrupulously enforc[ing] all legislatively mandated CEQA requirements [citation].'" (*Ibid*.) "An EIR must include detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project." (*San Joaquin Raptor Rescue Center v. City of Merced* (2007) 149 Cal.App.4th 645, 653 (*San Joaquin Raptor*).) In short, the court must determine whether the EIR is sufficient as an informational document. (*Laurel Heights*, *supra*, 47 Cal.3d at p. 391.)

Factual questions are reviewed for substantial evidence. (*San Joaquin Raptor*, *supra*, 149 Cal.App.4th at p. 654.) While a reviewing court does not second guess the EIR's factual conclusions, it must determine whether they are supported by substantial evidence consisting of "facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts." (Pub. Resources Code, § 21082.2, subd. (c).) "Argument, speculation, [and] evidence which is clearly inaccurate or erroneous . . . is not substantial evidence." (*Ibid*.)

ARGUMENT

Kern County's attempt to dispense with environmental review for tens of thousands of individual projects in one fell swoop—offered as a CEQA shortcut for the oil and gas industry at the expense of informed, local decisionmaking and community involvement—violates CEQA in three significant ways discussed in this brief. First, the Ordinance characterizes most oil and gas permitting decisions as "ministerial" with the goal of sidestepping future CEQA review. But the Ordinance's and EIR's open-ended language allows the County to exercise substantial judgment in deciding whether and how to permit and mitigate oil and gas projects. The Ordinance cannot lawfully shield these permits from CEQA review. Second, CEQA requires EIRs to be written so that the affected public can understand and participate in decisionmaking. The County violated its fundamental responsibility to inform the community by disregarding requests to involve Spanish-speaking residents in the review process for an Ordinance that will undoubtedly impact them. Third, owing to the EIR's impossibly broad scope, the County only vaguely describes many of the Project's environmental impacts, and improperly defers crucial mitigation to a later date. Specifically, the EIR fails to sufficiently analyze or mitigate water-supply impacts, air pollution and greenhouse gas emissions, and impacts to sensitive species. The

County's strained attempt to avoid further environmental review of oil and gas development violates CEQA and must be rejected.[1]

I. The Ordinance Impermissibly Seeks to Foreclose CEQA Review of Future Permit Approvals by Falsely Declaring Those Approvals "Ministerial."

CEQA applies to "discretionary" as opposed to "ministerial" approvals. Through its revised Ordinance, the County seeks to circumvent CEQA by deeming most approvals of oil and gas activities "ministerial" and therefore exempt from the site-specific CEQA review necessary to fully inform decisionmakers and allow community members to learn about and comment on discrete projects in their local areas. But because the Ordinance provides the County with discretion in whether and how to permit future activities, the Ordinance does not, as a matter of law, create a ministerial approval process. Thus, the County's effort to bypass future CEQA review of individual permitting decisions fails.

The CEQA Guidelines define discretionary projects as government actions requiring "the exercise of judgment or deliberation." (CEQA Guidelines, § 15357.) In other words, "CEQA applies . . . where a governmental agency can use its judgment in deciding whether and how to carry out or approve a project." (*Id*., § 15002, subd. (i).) In a ministerial decision, by contrast, the agency must apply only "fixed standards" or "objective measurements" and "cannot use personal, subjective judgment in deciding whether or how the project should be carried out." (*Id*., § 15369.) "The term 'ministerial' is limited to those approvals which can be legally compelled without substantial modification or change." (*Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal.App.3d 259, 269 (*Friends of Westwood*).) "Common examples of ministerial permits include automobile registration, dog licenses, and marriage licenses." (CEQA Guidelines, § 15369.)

Whether an activity is ministerial is a question of law and subject to de novo review. (*Great Oaks Water Co. v. Santa Clara Valley Water Dist.* (2009) 170 Cal.App.4th 956, 967.) Any doubt about whether a project is ministerial or discretionary should be resolved in favor of the latter characterization. (*Friends of Westwood*, *supra*, 191 Cal.App.3d at p. 271; *Natural Resources Defense Council v. Arcata Nat. Corp.* (1976) 59 Cal.App.3d 959, 970 (*NRDC*).) "Where a project involves an approval that contains elements of both a ministerial action and a discretionary action, the project will be deemed to

[1] Arvin Petitioners also join in the arguments made by Petitioner King and Gardiner Farms.

be discretionary and will be subject to the requirements of CEQA." (CEQA Guidelines, § 15268, subd. (d).)

The Ordinance establishes "Oil and Gas Conformity Review" and "Minor Activity Review" procedures for County approval of permit approvals. (AR000028–42.) These procedures direct the County to approve most oil and gas activities ministerially and without further public notice or environmental review, so long as the Planning Director "determines that the proposed use meets the implementation standards and conditions specified in the applicable provisions of [the oil and gas zoning code]." (Ordinance, § 19.98.090(B) at AR000037; Ordinance, § 19.98.100(C)(5) at AR000039; Ordinance, § 19.98.120(B) at AR000041.) These "standards and conditions," in turn, require the County to determine whether the applicant has complied with "all applicable mitigation measures as listed in the [EIR's] Mitigation Monitoring and Reporting Program." (Ordinance, § 19.98.060(D) at AR000028; Ordinance, § 19.98.080(E)(11) at AR000033; Ordinance, § 19.98.085(F)(15) at AR000035; Ordinance, § 19.98.110(E) at AR000040.) In its Conformity Review, the County chooses which mitigation measures it believes are applicable to each new, unique project site, and includes them in the final permit approval letter. (Ordinance, § 19.98.090(H)(1) at AR000037; Ordinance, § 19.98.100(I)(1) at AR000039.)

Despite its description of individual permit approvals as "ministerial," the Ordinance establishes review procedures that are inherently discretionary and therefore should be subject to subsequent CEQA compliance. (CEQA Guidelines, § 15002, subd. (i).) The County must exercise judgment when it determines whether "the proposed use meets the implementation standards and conditions specified" in the zoning code, and in particular, whether individual oil and gas permits comply with the 88 mitigation measures outlined in the EIR. (Ordinance, § 19.98.090(B) at AR000037; Ordinance, § 19.98.100(C)(5) at AR000039; Ordinance, § 19.98.120(B) at AR000041.) Many of the 88 measures ask the County to make subjective, discretionary decisions, allowing it to decide whether mitigation is "adequate," "appropriate," "feasible" or "infeasible," sufficient to "minimize" impacts, "practical," or "proper."[2]

[2] "Adequate" (MM 4.1-5 at AR008539; MM 4.8-6 at AR008565-66; MM 4.8-20 at AR008570-71), "appropriate" (MM 4.3-6 at AR008545; MM 4.4-12 at AR008552; MM 4.5-1 at AR008557; MM 4.8-5 at AR008565; MM 4.8-8 at AR008567), "feasible" or "infeasible" (MM 4.2-2 at AR008541; MM 4.4-1

These decisions by their nature involve subjective determinations, and are therefore not ministerial. (See *Friends of Westwood*, *supra*, 191 Cal.App.3d at p. 273–274 [ability to determine what was "adequate" egress is discretionary]; *NRDC*, *supra*, 59 Cal.App.3d at p. 970-971 [ability to assess whether a logging plan had "adequate" drainage and utilized the contours of the land "to the full extent practicable" is discretionary].)

To illustrate, Mitigation Measure 4.8-6 requires an applicant to demonstrate to the County's satisfaction that it has implemented measures that the applicant deems "practical" to prevent the release of accidental spillage of oil and industrial waste into water bodies, including sizing reserve pits "properly" and maintaining "sufficient" supplies of barrier material to contain runoff "where appropriate." (AR008565–66.) If an applicant submits a pit design allowing for one foot of free space over the top of the liquids in the pit, and believes it needs 50 cubic feet of barrier material to contain runoff, is this "proper" and "sufficient"? Because there are no "fixed standards" or "objective measurements" to follow, the County necessarily must rely on its discretion and judgment to accept or reject the design. (CEQA Guidelines, § 15369.) Indeed, the selection of mitigation measures for a particular site gives the County wide berth to make discretionary determinations about almost all aspects of the individual project—including how oil and gas development is physically screened from public view, whether and how streets will be closed during construction, the extent to which dust is controlled, how air pollution impacts are mitigated, how the project protects water bodies and nearby schools, and the extent to which a project must reduce its use of water, to name a few. (MM 4.1-4 at AR008539; MM 4.16-2 at AR008583; MM 4.3-2 at AR008542-43; MM 4.3-8 at AR008545; MM 4.8-3 at 008563-64; MM 4.8-6 at AR008565-66; MM 4.8-15 at AR008569; MM 4.17-2 at AR008585; see also AR010455-56, 158955 [examples in Petitioners' comments].) These decisions are not ministerial.

The permit approvals likewise do not meet the definition of "ministerial" because a permit

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at AR008546-47; MM 4.4-3 at AR008547-48; MM 4.4-15 at AR008553-54; MM 4.6-3 at AR008560; MM 4.6-5 at AR008561; MM 4.17-2 at AR008585), sufficient to "minimize" impacts (MM 4.1-6 at AR008539; MM 4.2-1 at AR008540; MM 4.2-2 at AR008541; MM 4.3-2 at AR008542-43; MM 4.4-1 at AR008546; MM 4.4-15 at AR008553-54; MM 4.8-6 at AR008565-66; MM 4.9-2 at AR008572-75), "practical" (MM 4.8-3 at AR008563-64; MM 4.8-6 at AR008565-66), "proper" (MM 4.3-3 at AR008543; MM 4.3-4 at AR008543; MM 4.8-2 at AR008563; MM 4.8-6 at AR008565-66; MM 4.8-8 at AR008567; MM 4.9-2 at AR008572-75).

applicant cannot "*legally compel* approval without any changes in the design of its project," insofar as the County deems those changes necessary pursuant to its reasonable judgment. (*Friends of Westwood, supra*, 191 Cal.App.3d 259 at p. 267.) Notably, the Ordinance provides for several rounds of application review. At the first step, the County will review the permit application and reject it outright as "incomplete" if the County determines that its standards are not met. Upon resubmission, the County may reject it a second time. Upon the third inadequate submission (as adjudged by County officials), the County will meet with the applicant to suggest changes. (Ordinance, § 19.98.090(A)–(D) at AR000036–37; Ordinance, § 19.98.100(A)–(D) at AR000038–39; Ordinance, § 19.98.120(A)–(D) at AR000040–41.) Such iterative review and negotiation are hallmarks of discretionary decisionmaking. (*Friends of Westwood*, at p. 269.)

Because the Ordinance affords the County discretion to shape individual project designs and permit terms, and because permit applicants cannot compel approval of their applications without changes that the County reasonably requires, these approvals are not ministerial. The Court should therefore enter 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.

II. The County Unlawfully Denied Meaningful Participation to Spanish-Speaking Residents Who Are Directly Impacted by the Project.

The County made the EIR inaccessible to a large percentage of the public by failing to translate any notices or documents into Spanish, and by failing to provide Spanish interpretation at every public workshop. The County thereby made it impossible for the communities most affected by the Ordinance to make independent, reasoned judgments about the EIR, and as a result, deprived a substantial portion of the public of its statutory right under CEQA to comment meaningfully upon the EIR's conclusions. (See *Emmington v. Solano County Redevelopment Agency* (1987) 195 Cal.App.3d 491, 503.)

One of CEQA's fundamental precepts is the public should be able to participate meaningfully in government decisionmaking processes. (CEQA Guidelines, § 15201.) For this reason, 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." (*San Franciscans for Reasonable Growth v. City and County of San Francisco* (1987) 193 Cal.App.3d 1544, 1549 (*San*

Franciscans for Reasonable Growth).) "The 'privileged position' that members of the public hold in the CEQA process . . . is based on a belief that citizens can make important contributions to environmental protection and on notions of democratic decision-making." (*Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 936, citations omitted.) That is why the EIR is described as a "document of accountability" and a principal means by which the public can participate in "informed self-government." (*Laurel Heights, supra*, 47 Cal.3d at p. 392.)

Kern County is home to a large population of Spanish-speaking residents, disproportionately impacted by oil and gas development. (AR037764-66.) During the CEQA process for the Ordinance, the population in Kern County was 51 percent Latino or Hispanic, and 42 percent of the population spoke a language other than English at home. (Petitioners' comments at AR010414 [citing 2013 U.S. Census Data].) Many of Petitioners' members are monolingual Spanish speakers or have limited English proficiency. (*Ibid*.) Community members told the County they wanted to participate in the CEQA process but needed Spanish translation and interpretation to do so. (AR010414, AR155512, AR155514.) For example, at least 14 Spanish-speaking residents, some monolingual, attended the scoping workshop in Shafter and requested interpretation. (EIR at AR002627–30, AR002639.) The County staff rejected the residents' interpretation request in English and failed to provide Spanish interpretation. (AR002639.) As a result, those Spanish-speaking residents could not fully participate.

In addition, Petitioners also submitted written comments requesting translation of materials. (AR010414, AR155512, AR155514.) But none of the materials were translated; not the notices for the workshops or hearings (AR113059–494); not the Powerpoint presentations at the workshops (AR002493–512, AR002531–50, AR002569–88, AR002607–25); and not any of the CEQA documents, not even a summary. (AR000518–2393, AR008482–586.)

In a county like Kern, with a substantial Spanish-speaking population, meaningful engagement with the public can occur only when notices, presentations, and the EIR are translated into Spanish and interpretation services are available at hearings and workshops. Otherwise, if relevant materials are "incomprehensible to the very people they are meant to inform," the EIR fails at its core "function . . . to inform decisionmakers and the public (see Guideline 15140) about the impacts of a project." (*San Franciscans for Reasonable Growth*, *supra*, 193 Cal.App.3d at p. 1548 [explaining that a hypertechnical

EIR may be inaccessible to decisionmakers and the public].) Here, translation into Spanish of the EIR and notices, as well as interpretation at public presentations, was necessary for the content to be understandable to residents who are and will continue to be negatively impacted by the Project. The absence of Spanish translation and interpretation effectively precluded meaningful involvement by monolingual Spanish-speaking residents, in violation of CEQA.

III. The EIR Fails to Adequately Mitigate the Project's Water-Supply Impacts.

The Project exacerbates the County's severe water shortage at a time when the County's burgeoning population and existing businesses are already struggling to obtain enough water. The EIR finds that there are not "sufficient water supplies available . . . from existing entitlements and resources" to serve the oil and gas activities authorized under the Ordinance, and that these new activities may "substantially deplete groundwater supplies." (AR008576 [Impact 4.9-2], AR008585 [Impact 4.17-4]; accord AR000388–89, AR000416–17.) California's Division of Oil, Gas, and Geothermal Resources (DOGGR) and other commentators emphasized the gravity of the County's water-supply crisis and identified specific, feasible mitigation measures the County could have adopted without delay. (See, e.g., AR008892–94; AR010208–09, AR010218, AR010220–21.) Yet the County failed to formulate and implement adequate mitigation measures for the Project's significant water-supply impacts before adopting the Ordinance and allowing new oil and gas activity to proceed. This violates CEQA and compromises the water security of the County's residents, farms, and businesses.

A. The EIR Unlawfully Defers Formulation of Mitigation Measures.

Under CEQA, "[f]ormulation of mitigation measures should not be deferred until some future time." (CEQA Guidelines, § 15126.4, subd. (a)(1)(B).) An agency must meet stringent criteria to qualify for an exception to this rule. (See *CBE*, *supra,* 184 Cal.App.4th at p. 94.) Among other requirements, the agency must "commit itself to eventually devising measures that will satisfy specific performance criteria articulated at the time of project approval." (*Ibid.*, internal quotation marks omitted; *San Joaquin Raptor*, *supra*, 149 Cal.App.4th at p. 670.) Rather than finalize concrete mitigation measures to offset the Ordinance's significant water-supply impacts, however, the EIR unlawfully defers this task to future, generalized management plans devoid of specific performance criteria.

The EIR's three water-supply mitigation measures are all tethered to water-conservation plans

not due until 2020.[3] Mitigation Measure 4.17-2 requires the County and the oil industry's five largest M&I water users (to be identified later) to "work together to develop and implement a plan identifying new measures to reduce [M&I] water use by 2020." (AR008585.) Mitigation Measures 4.17-3 and 4.17-4, in turn, enlist permit applicants to help the County integrate "best practices" for water reuse into a "Groundwater Sustainability Plan," and to "work with the County on [that plan]" to increase applicants' use of reclaimed water and reduce their use of M&I-quality water. (*Ibid*.) State law does not require the County to develop the Sustainability Plan until 2020. (AR008798.) Without setting any timeframe whatsoever, Mitigation Measure 4.17-2 also calls on the oil industry's five largest M&I water users to "work with local agricultural producers and water districts to identify new opportunities to increase the use of produced water for agricultural irrigation and other activities, as appropriate." (AR008585.)

"An EIR is inadequate if '[t]he success or failure of mitigation efforts . . . may largely depend upon management plans that have not yet been formulated, and have not been subject to analysis and review within the EIR.'" (*CBE*, *supra*, 184 Cal.App.4th at p. 92, quoting *San Joaquin Raptor*, *supra*, 149 Cal.App.4th at p. 670.) That is precisely the situation here. The EIR unlawfully "puts off analysis" of how to curb the Project's serious and ongoing contributions to M&I water shortages and groundwater overdraft in Kern County by proposing that those questions be examined in plans that are not due until 2020 or beyond. (*Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 280–81 (*Santee*).)

In doing so, the EIR impermissibly fails to articulate "specific and mandatory performance standards to ensure that [future mitigation] measures, as implemented, will be effective." (*CBE*, *supra*, 184 Cal.App.4th at p. 94.) Mitigation Measure 4.17-2 states that "[a]ny produced water treated and used . . . shall be tested and monitored to assure compliance with applicable standards." (AR008585.) However, it fails to specify who will test and monitor the water, and what the "applicable standards" will be. (See AR008891.) The measure also vaguely calls on applicants to "reduce" M&I water use and to "increase" use of produced or reclaimed "to the extent feasible." (AR008585; cf. AR008893

[3] Although the EIR also cross-references mitigation measures for water pollution, none of those measures squarely addresses the groundwater overdraft and M&I shortages the County identifies as the most significant supply issues. (See EIR at AR008576 [Impact 4.9-2] [cross-referencing measures 4.9-1 to -6]; *id*. at AR008572–76 [text of measures 4.9-1 to -6, concerning "Water Quality Standards" and "Discharge Requirements"]; *id*. at AR008585 [Impact 4.17-4].)

[DOGGR suggestion that the County include "an enforceable CEQA performance measure" for Mitigation Measure 4.17-2].) Mitigation Measure 4.17-4 similarly enlists applicants to collaborate with the County on a plan to "reduce" M&I water use and "increase" re-use of reclaimed water—again without clearly quantifying how much reduction or increase will be required. (AR008585.) Such vague and open-ended criteria fail scrutiny. (See, e.g., *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 793–94 (*Endangered Habitats*) [merely requiring placement of supply stockpiles and vehicle staging areas "as far [away] as practicable" lacks specific performance criteria].)

In addition, courts have consistently rejected deferred mitigation measures that rest on the kind of high-level goal set forth in Mitigation Measure 4.17-3: reuse of 30,000 acre-feet of produced water per year, to be achieved through the future Groundwater Sustainability Plan. (AR008585.) For example, courts have found deficient measures with only the "generalized goal of no net increase in greenhouse gas emissions" (*CBE*, *supra*, 184 Cal.App.4th at p. 93); the broad objective to "ensure that there is no increase in NOx" (*POET*, *supra*, 218 Cal.App.4th at p. 739); the overarching intent to "maintain[] the integrity of vernal pool habitats" (*San Joaquin Raptor*, *supra*, 149 Cal.App.4th at pp. 670–71); and the ultimate purpose of "replac[ing] . . . water lost by neighboring landowners because of mine operations" (*Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1119 (*Gray*)). In failing to set forth specific performance criteria for its general mitigation plans, the EIR "place[s] the onus of mitigation to the future plan[s] and leav[es] the public 'in the dark about what . . . management steps will be taken.'" (*CBE*, at p. 93, citation omitted.)

Furthermore, the EIR fails to "demonstrat[e] how" the EIR's three mitigation measures will actually mitigate the Ordinance's water-supply impacts. (*Santee*, *supra*, 210 Cal.App.4th at p. 280–81.) At most, Mitigation Measure 4.17-2 "sets out a handful of cursorily described mitigation measures for future consideration" (*CBE*, *supra*, 184 Cal.App.4th at p. 93), such as "landscaping," "steam generation," and "dust control." (EIR at AR008585.) But it is far from clear how such activities would reduce water use, and "[n]o effort is made to calculate" how much water would be conserved by "each of these vaguely described future mitigation measures." (*CBE*, at p. 93; see also *Santee*, at pp. 272, 280–81 [mitigation improperly deferred where future management activities were "not guaranteed to occur at any particular time or in any particular manner"].) By and large, the mitigation measures simply require

the County and applicants to "identify[] new measures," "identify new opportunities," "integrate" best practices into a plan to "encourage" water-saving behaviors, and "work with" one another toward generalized water-conservation goals. (EIR at AR008585.) They do not commit the County or applicants to undertake "any actual mitigation" subject to the concrete benchmarks CEQA requires. (*Cal. Clean Energy Com. v. City of Woodland* (2014) 225 Cal.App.4th 173, 196 (*Cal. Clean Energy Com.*).) Accordingly, the EIR "offer[s] no assurance" that the water-supply mitigation measures will be "feasible and efficacious." (*CBE*, at p. 95.)

The cases the County cites in response to comments on the EIR only underscore the flaws in the County's deferred mitigation approach. (AR008658.) In those cases, the court expected projects to be subject to further environmental review, or found that the EIR at issue specified performance criteria for all the mitigation measures it upheld. (*See Rio Vista Farm Bureau v. County of Solano* (1997) 5 Cal.App.4th 351 at p. 364–65, 367 [analyzing program-level EIR that would be followed by site-specific CEQA review]; *Endangered Habitats*, *supra*, 131 Cal.App.4th at pp. 794 [future fuel modification plans to follow County Fire Authority's existing guidelines], 795–96 [future mitigation for runoff to incorporate best management practices the EIR enumerated]; *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428 at 1437, 1446, 1450 [County properly deferred detailed analysis of highway modification, where project would not proceed without further environmental review by two other agencies, informed by the detailed data not available at the time of the County's approval].[4])

Neither of those circumstances is present here. The Ordinance provides for thousands of permits a year to be issued through a purportedly ministerial process that does not mandate further CEQA review. In addition, the EIR fails to articulate specific performance criteria for the mitigation measures it has yet to formulate, depriving decisionmakers and the public of any assurance that those future measures will adequately abate the Project's serious water-supply impacts. As a result, the County's "[r]eliance on tentative plans for future mitigation after completion of the CEQA process significantly undermines CEQA's goals of full disclosure and informed decisionmaking" and is unlawful. (*CBE*,

[4] *Riverwatch* is inapposite, moreover, because the issue was whether a county unlawfully "defer[ed] full consideration of [highway widening] *impacts*," and not whether the county unlawfully deferred formulation of *mitigation*. (76 Cal.App.4th at pp. 1437–38, italics added; see also *id*. at p. 1447 ["the final EIR . . . requires mitigation which no one disputes will render the impact . . . insignificant"].)

supra, 184 Cal.App.4th 70 at p. 92.)

B. The County Failed to Implement Mitigation Measures Before Impacts Occur.

The County also violates CEQA's requirement that "mitigation itself cannot be deferred past the start of the project activity that causes the adverse environmental impact." (*POET*, *supra*, 217 Cal.App.4th at p. 740.) The EIR defers the formulation of specific mitigation measures to address the Ordinance's significant water-supply impacts to 2020 and beyond. (AR008585.) In the meantime, however, the County has approved the Ordinance, which authorizes the County to begin permitting water-depleting oil and gas activities immediately. And it has done so without implementing any concrete mitigation measures that actually curb the Project's significant, ongoing contributions to the County's water crisis. CEQA prohibits this approach. (*POET*, at p. 740.)

IV. The EIR Fails to Adequately Analyze or Mitigate The Project's Air Quality Impacts.

A. Overview of Air Quality Mitigation Measures.

Air quality is a key concern in the EIR because the San Joaquin Valley continues to violate health-based air quality standards and the Project is expected to emit more than a billion pounds of air pollution over the next 20 years. (AR001003–04, AR029116.) In an attempt to mitigate air pollution, the EIR relies heavily on the San Joaquin Valley Air Pollution Control District's (Air District) existing air quality rules and regulations, to be applied through the Air District's issuance of individual air permits. (MM 4.3-1 to 4.3-4 at AR029056–57; see also AR008676 [discussing "compliance with applicable air quality regulations" as mitigation].) But the Air District's existing rules do not limit air pollution from small equipment, well maintenance and treating operations, mobile sources, or construction activities. (EIR at AR000972, AR000992, AR001002.) Cumulatively, these "unpermitted" sources are expected to emit hundreds of millions of pounds of air pollution. (*Id*. at AR001005, AR0029116–17.)

To "fully offset" emissions from the Project's unpermitted sources, the EIR adopts Mitigation Measure 4.3-8. (AR008677, AR029059–60.) This measure aims to offset the Ordinance's pollution increases in two ways. First, under an "emission reduction agreement" the EIR assumes the County will negotiate and sign with the Air District, individual well operators may pay a fee to be used by the District to fund pollution-reducing activities anywhere within the San Joaquin Valley's eight-county area. Alternatively, an individual well operator may reduce air emissions at another site it controls,

subject to oversight by the Air District pursuant to the same emission reduction agreement. (EIR at AR001008–10, AR001030–31, AR029059–60, AR029120.) The EIR identifies a non-exclusive list of potential projects that may qualify to offset pollution under Mitigation Measure 4.3-8. (AR001010, AR001030–31, AR008705, AR029059–60, AR029123–24.) Under the measure, all decisions about pollution-reducing projects—including how to spend fee receipts and whether to accept a particular operator's proposal—will be made in the future, at the final discretion of the Air District. (AR008679, AR008864, AR029059–60.)

The EIR promises "full mitigation of air quality impacts," with emissions ultimately "mitigated to net zero" (AR008676), but does not analyze whether adequate pollution-reducing opportunities exist in the San Joaquin Valley to counteract the enormous volume of pollution the Project will generate. (AR008677–78.) Mitigation Measure 4.3-8 does not mandate any schedule for air pollution mitigation, and the EIR concedes there will be a "lag" between the onset of the Project's air-polluting activities and implementation of pollution-offsetting mitigation measures. (AR008681.)

B. Mitigation Measure 4.3-8 Unlawfully Defers Mitigation of Air Quality Impacts.

"Formulation of mitigation measures should not be deferred until some future time." (CEQA Guidelines, § 15126.4, subd. (a)(1)(B).) Here, despite the extraordinary scale of the Project and the tens of thousands of tons of air pollution it will generate, the EIR unlawfully assumes that it is feasible to offset such increases with future projects that may not exist. Further, the EIR unlawfully allows significant, harmful impacts to occur before air pollution mitigation measures are in place.

Under CEQA, a lead agency may defer formulation of specific mitigation measures *only* for "impacts for which mitigation is *known* to be feasible." (*CBE*, *supra*, 184 Cal.App.4th at p. 94, quoting *Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1101, 1028–29, italics added.) The EIR flunks this test. Here, in adopting Mitigation Measure 4.3-8, the County merely assumed that sufficient pollution-reducing projects exist within the San Joaquin Valley to fully offset the Project's emissions—without conducting any calculation or analysis to verify offsets are actually available and feasible. While the EIR notes the Air District has some experience with offset projects (AR001009, AR008679), it also concedes "the size and scope" of pollution reduction offsets required under Mitigation Measure 4.3-8 exceed the magnitude of anything that the Air District has managed before.

(AR001012.) The Air District likewise declined to address the availability of sufficient offset projects, noting merely that it will "continu[e] to work with Kern County to clearly identify emissions and emission sources . . . ." (Air District letter at AR008863.)

Air quality experts concluded that Mitigation Measure 4.3-8 likely is not feasible. For example, Dr. Ranajit Sahu criticized the EIR's failure to quantify potential pollution-reducing projects, noting the County "cannot 'mitigate' emissions if actual sources cannot be identified from which real reductions are to be obtained." (AR010489–90.) According to Dr. Sahu, "it is more likely than not that there are simply not enough sources in the Project Area from which any meaningful further reductions can be extracted." (AR010490.) Dr. Phyllis Fox reiterated: "[The] EIR has not demonstrated that there are sufficient opportunities to offset emissions . . . under the [emission reduction agreement] strategy." (AR155637–38.) Nonetheless, the EIR insists no feasibility analysis is necessary because it "commits to mitigating all Project emissions, no matter the amount." (AR008677.) But this is no answer to the experts' concern. No matter how sincere the County's intention to offset emissions, if opportunities to reduce emissions via the emission reduction agreement do not exist, the measure is not feasible. As the court explained in *CBE*, even with a "net zero standard," the EIR must still offer credible "assurance" that the standard is "feasible and efficacious"—something the EIR fails to do here. (184 Cal.App.4th at pp. 94–95; see also *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 728 (*Kings County*) ["failure to evaluate whether the agreement was feasible and to what extent water would be available for purchase was fatal to meaningful evaluation"].)

Mitigation Measure 4.3-8 also violates the CEQA requirement that project activity "may not be undertaken without mitigation measures being in place." (*POET*, *supra*, 218 Cal.App.4th at p. 738, citing CEQA Guidelines, § 21080.5, subd. (d)(3)(a).) Here, the EIR concedes the County will allow "commencement of emitting activities for well development in advance of the offsetting emission reductions." (AR008681.) Further, Mitigation Measure 4.3-8 lacks any mechanism to ensure that pollution-generating activities are not undertaken at a rate that outpaces actual mitigation. Any gap between Project activities and actual mitigation threatens to expose Kern County residents to significant spikes in unhealthy pollutants. Even as few as four individual wells—out of the thousands to be permitted annually—are enough to generate quantities of air pollution the EIR concedes will be

"significant." (See, e.g., EIR at AR000963, AR000971 [stating 10 tons per year of NO_x emissions, an ozone precursor, are significant]; AR029118 [showing an individual well may emit as much as 2.79 tons per year of NO_x]; see also *id*. at AR000914–15 [noting air quality standards are measured at intervals as short as one hour].) Allowing development to occur ahead of actual, real-world mitigation also presents a risk that mitigation will not occur at all, should the County ultimately find (as air quality experts predict) that there are too few pollution-reducing opportunities within the Air District to offset the huge influx of air pollution. Because "mitigation itself cannot be deferred past the start of the project activity that causes the adverse environmental impact," Mitigation Measure 4.3-8's contrary approach is unlawful. (*POET*, at p. 740.)

C. The EIR Fails to Adequately Mitigate a Significant Increase in $PM_{2.5}$ Pollution.

The EIR also fails to adopt adequate mitigation for $PM_{2.5}$, a distinct and distinctly dangerous form of particle pollution. CEQA requires adoption of feasible mitigation measures to reduce significant environmental impacts. (CEQA Guidelines, § 15002, subds. (a)(2) and (3).) It also specifies that measures must be "fully enforceable." (Pub. Resources Code, § 21081.6, subd. (b).) Here, the EIR is inadequate because Mitigation Measure 4.3-8 and the draft emission reduction agreement with the Air District fail to require the Project to offset significant increases in $PM_{2.5}$ emissions.

Mitigation Measure 4.3-8 purports to address the cumulatively considerable net increase of "any" air pollutant for which the Project fails to meet (i.e., is "not attaining") a health-based air quality standard. (EIR at AR001025–30, AR029059.) The EIR finds the Project's $PM_{2.5}$ emissions are "cumulatively considerable" (AR001030), and admits the Project Area is designated "nonattainment" for $PM_{2.5}$ (AR000916). Yet Mitigation Measure 4.3-8 does not mention $PM_{2.5}$. (AR029059–60.) Instead, the measure requires an emission reduction agreement with the Air District that addresses only *other* air pollutants. (*Ibid*. [specifying "oxides of nitrogen, reactive organic gases, and particulate matter of 10 microns or less in diameter [i.e., PM_{10}] . . ."].) The draft emission reduction agreement likewise omits any mention of $PM_{2.5}$ as one of the types of "Project emissions [that] shall be mitigated." (AR031177.)

Although the EIR fails to offer any reasons for the wholesale omission of $PM_{2.5}$ from Mitigation Measure 4.3-8 and the draft emission reduction agreement, the oversight may reflect an incorrect assumption that a requirement to offset PM_{10} will adequately address $PM_{2.5}$ emissions as well. (See

Board of Supervisors Meeting Transcript (Nov. 9, 2015) at AR112955–56, AR112958 [County counsel stating: "The EIR text . . . was wrong" and "misstate[d]" that MM 4.3-8 applies to $PM_{2.5}$ because "we include PM10 in the Emission Reduction Agreement, [meaning] we've also covered 2.5"].) But there is no substantial evidence to support a conclusion that offsetting PM_{10} emissions will fully offset $PM_{2.5}$ emissions. Although "PM_{10} refers to particles less than or equal to 10 micrometers in diameter," which technically includes $PM_{2.5}$ (EIR at AR000923), the two particle sizes constitute distinct types of air pollution generated by different sources. Coarser PM_{10} is typical of road dust, while $PM_{2.5}$ is commonly generated by combustion, including diesel engines. (Pless Expert Report at AR159186–89; EIR at AR000935–36; *Cal. Unions for Reliable Energy v. Mojave Desert Air Quality Management Dist.* (2009) 178 Cal.App.4th 1225, 1235 (*CURE*).) The two pollutants also have different physical properties and behave differently in the air. (Pless Expert Report at AR159187–91; *CURE*, at p. 1235.) Critically, they also have different health consequences. The fine particles in $PM_{2.5}$ are particularly dangerous because they can travel "deep into the lungs and bloodstream." (EIR at AR000924; see also Pless Expert Report at AR15192–95.) Such fine particles are most hazardous when generated by diesel engines, like those to be used in connection with the Project, because "particulate emissions from diesel-fueled engines have been identified as a carcinogen" and "carry many harmful organics and metals." (EIR at AR000935; see also Pless Expert Report at AR159195; *CURE*, at p. 1235.)

For all of these reasons, EPA and CARB instituted distinct air quality standards for PM_{10} and $PM_{2.5}$, and the San Joaquin Valley is subject to independent regulatory plans for each. (See EIR at AR000916, AR000923, AR000961–62; 52 Fed.Reg. 24634, 24639 (July 1, 1987); 62 Fed.Reg. 38652 (July 18, 1997).) For these same reasons, CARB opposes the use of PM_{10} emission reductions to offset $PM_{2.5}$ emissions (Pless Expert Report at AR159186–87), and one court held a CEQA analysis deficient because it ignored the harmful effects of using PM_{10} mitigation measures as a proxy for mitigating $PM_{2.5}$. (*CURE*, *supra*, 178 Cal.App.4th at p. 1245.) Indeed, not only are some measures to reduce PM_{10} ineffective at lowering $PM_{2.5}$ emissions, but certain measures that reduce PM_{10} may actually increase $PM_{2.5}$ pollution. (Pless Expert Report at AR159189–90; *CURE*, at p. 1245.)

The EIR separately quantifies the Project's expected PM_{10} and $PM_{2.5}$ emissions (see, e.g., AR029116–17), and acknowledges that each are significant (AR000593, AR001029), but mentions only

PM_{10} in Mitigation Measure 4.3-8. This failure to explicitly institute a parallel mitigation measure for $PM_{2.5}$, an entirely distinct "nonattainment" pollutant, violates CEQA's requirement that all feasible mitigation measures must be instituted to reduce significant environmental impacts. (CEQA Guidelines, § 15002, subds. (a)(2), (3).) Further, even if the County intends for both PM_{10} and $PM_{2.5}$ to be offset separately and fully, the EIR generally, Mitigation Measure 4.3-8 specifically, and the draft emissions agreement all fail to say so, rendering the requirement unenforceable and unlawful. (See *Federation of Hillside and Canyon Assns. v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1262 [requiring "a binding commitment to implement the mitigation measures" or comparable mechanism "that will ensure their implementation"].) Finally, in the absence of a mitigation measure that explicitly requires $PM_{2.5}$ reductions, the EIR's conclusion that the Project will "fully offset new emissions not already required to be offset under [Air District] rules" (AR008677) is not supported by substantial evidence. (Pub. Resources Code, § 21082.2 [substantial evidence requires "reasonable assumptions predicated upon facts"].)

D. The EIR Fails to Assess the Environmental Impacts of Road Paving as Mitigation.

An EIR must discuss not only the impacts of a project, but also "the impacts of mitigation measures" if such measures "would cause one or more significant effects in addition to those that would be caused by the project as proposed." (*Save Our Peninsula Com. v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 130 (*Save Our Peninsula*), citing CEQA Guidelines, § 15126, subd. (c) [now § 15126.4, subd. (a)(1)(D)].) Here, the EIR fails to assess the environmental impacts of road paving as a preferred mitigation measure to address air pollution.

As explained above, Mitigation Measure 4.3-8 intends for the Project's air pollution to be offset by reducing emissions from other sources in the San Joaquin Valley. (EIR at AR001008–10, AR001029–31, AR029116–17, AR029120.) The measure sets forth a non-exclusive list of potential pollution-reducing projects that might be funded or implemented, emphasizing opportunities to replace or retrofit high-polluting equipment and vehicles. (AR029059–60.) In response to industry comments, the final EIR endorsed "paving roads" as an additional way to "achieve direct PM reductions." (AR008705.) The EIR contemplates the Air District or private operators might "[p]ave 500 miles of

unpaved County-maintained roads in Kern County" to "achieve the required emissions reductions." (AR001012.)

However, the EIR completely fails to address the potentially significant and counter-productive impacts of road paving, which include significant air pollution emissions from road construction and increased traffic. (Pless Expert Report at AR159189–92, AR159198; *CURE*, *supra*, 178 Cal.App.4th at pp. 1235, 1245.) The EIR also neglects to evaluate road paving's potentially significant impacts to biological resources, including: mortality during road construction; increased frequency of road kill; spread of invasive plant species; air, water, soil, and noise pollution; soil disturbance and erosion; degradation and fragmentation of habitat; alteration of wildlife movement; and changes in wildlife populations. (Pless Expert Report at AR159196–97; *CURE*, p. 1236.)

County decisionmakers and residents should have been apprised of the distinct impacts of extensive road paving, and should not be forced to trade one impact for another—at least not without the benefit of full disclosure. Consequently, the EIR's failure to discuss these potentially significant effects is unlawful. (CEQA Guidelines, § 15126.4, subd. (a)(1)(D); see also *CURE, supra*, 178 Cal.App.4th at pp. 1230–31 [air district's failure to analyze negative effects of road paving as a measure to reduce air pollution was unlawful]; *Save Our Peninsula, supra*, 87 Cal.App.4th at pp. 130–32 [EIR unlawfully failed to analyze impacts of mitigation adopted "late in the environmental review process"]; *Stevens v. City of Glendale* (1981) 125 Cal.App.3d 986, 991 [EIR unlawful because mitigation "involve[d] . . . new environmental impacts not considered in the draft EIR"].)

V. The EIR Fails to Adequately Analyze or Mitigate the Project's Climate Impacts.

A. The EIR Fails to Provide Substantial Evidence of the Effectiveness of Greenhouse Gas Mitigation Through Offset Purchases.

Mitigation Measure 4.7-4 affords oil and gas project proponents two potential avenues for offsetting greenhouse gas ("GHG") emissions not covered by California's cap-and-trade program to "net zero": (1) purchase offset credits, either from a California Air Pollution Control Officers Association ("CAPCOA") registry or from unspecified "third party greenhouse gas reductions," or (2) enter into "Emission Reduction Agreement[s]." (AR029175.) Because there is no evidence either avenue will lead to effective mitigation, the EIR's reliance on the measure in finding the Project's GHG impacts less than

significant violates CEQA. (AR001480.)

First, the EIR's generic reference to "third party" GHG offset programs fails to establish that any such programs even exist. A mitigation measure requiring the purchase of offset credits operates as a kind of mitigation fee. But CEQA allows mitigation fees only where there is evidence of a functioning, enforceable, and effective implementation program. For example, courts have found mitigation fees inadequate where the amount to be paid for traffic mitigation was unspecified and not "part of a reasonable, enforceable program" (*Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1189 (*Anderson First*)); where a proposed urban decay mitigation fee contained no cost estimate and no description of how it would be implemented (*Cal. Clean Energy Com.*, *supra*, 225 Cal.App.4th at p. 198); and where there was no specific traffic mitigation plan in place that would be funded by mitigation fees (*Gray*, *supra*, 167 Cal.App.4th at p. 1122). Because the County has provided no evidence that specific, functioning "third party greenhouse gas reduction" programs exist, the EIR's reliance on this vague and speculative mitigation approach violates CEQA. (See, e.g., *ibid*.)

Second, as with air quality Mitigation Measure 4.3-8 discussed above, the EIR fails to provide evidence that enough GHG offset credits are available from existing, functioning programs to mitigate the Project's emissions. A substantial number of offset credits will be required to mitigate the Project's GHG emissions to "net zero." Between the years 2015 and 2020, GHG emissions not subject to cap-and-trade requirements under AB 32, California's premier climate legislation, will total 3,742,737 metric tons. (AR003364.) Annual emissions will then jump to 30,644,028 metric tons in 2021 alone—and rise to 43,678,629 metric tons by 2035—after the current cap-and-trade regulation expires. (*Ibid*.) Even County staff apparently expressed concern about the availability of sufficient emission reduction projects. (AR161355 [email exchange referencing County fears that it would not have sufficient emission reduction projects in Kern].) The sheer volume of uncovered emissions creates a serious doubt as to the availability of sufficient credits, and the lack of evidence that sufficient credits exist renders the mitigation measure invalid. (See *Kings County*, *supra*, 221 Cal.App.3d at p. 728.)

Third, the EIR fails to provide evidence that the contemplated offsets meet CEQA's requirement that only GHG reductions that are "not otherwise required" may be used to offset emissions. (CEQA Guidelines, § 15126.4, subd. (c)(3).) As the California Resources Agency's Final Statement of Reasons

for adopting this Guideline explains, the "not otherwise required" language was intended to make clear that only "additional" emission reductions—that is, reductions not otherwise required by law or likely to occur anyway—may be used to generate offsets for CEQA mitigation. (See AR035130, citing Health & Saf. Code, § 39607.5.) Nothing in the EIR demonstrates that offsets from either the CAPCOA registry or unspecified "third party" sources will be "additional." As a result, the EIR fails to ensure that these programs will generate offsets that comply with CEQA. The EIR's assertion that the County will consult with local Air District officials on methodology falls far short of demonstrating that sufficient performance standards are in place to ensure that offset credits actually represent additional emission reductions that would not otherwise be required. (AR029175.)

Finally, the EIR's reference to "Emission Reduction Agreements" as an alternative to offset programs cannot save the mitigation measure. (AR029175.) Air District officials admitted they do not yet have "an established incentive program" sufficient to support emission reduction agreements for greenhouse gases. (Air District comments at AR008866.) Again, without evidence that a sufficient, functioning mitigation program exists, this portion of Mitigation Measure 4.7-4 is also invalid. (See, e.g., *Gray*, *supra*, 167 Cal.App.4th at p. 1122; *Anderson First*, *supra*, 130 Cal.App.4th at p. 1189.)

B. The EIR Fails to Adequately Disclose and Analyze the Project's Long-Term Contribution to Potentially Severe Climate Impacts.

Although the EIR acknowledges that the Project's impact on cumulative greenhouse gas emissions will be significant and unavoidable (AR001486), it fails to provide meaningful analysis of the stark conflict between the Project's rising emissions over time and the long-term reductions climate scientists and California policymakers deem necessary to avoid the worst impacts of climate change. Indeed, the EIR fails even to disclose the Project's emissions after 2035, much less meaningfully evaluate their significance.

The County may not "travel the legally impermissible easy road to CEQA compliance" by simply declaring the Project's long-term cumulative climate impacts significant and unavoidable without adequate analysis. (*Berkeley Keep Jets Over the Bay Com. v. Bd. of Port Comrs.* (2001) 91 Cal.App.4th 1344, 1371; see also *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 831 [lead agency must inform public not just *whether* an impact is significant, but *how*

significant the impact will be].) Rather, the County "must use its best efforts to find out and disclose all it reasonably can." (CEQA Guidelines, § 15144.) An EIR's significance determinations also must be based on scientific and factual data to the extent possible. (*Id*., § 15064, subd. (b), § 15064.4.)

Current science establishes that substantial GHG emission reductions are necessary through at least 2050 to preserve any reasonable chance of avoiding the worst impacts of climate change. This science-based approach is reflected in California climate policy. Taking into consideration the persistent nature of GHGs and their lasting impacts on climate, Executive Orders S-3-05 and B-30-15 lay out a roadmap for steep reductions in statewide GHG emissions extending to mid-century: 40 percent below 1990 levels by 2030, and 80 percent below 1990 levels by 2050. (AR001459.) The EIR acknowledges that these orders' 2050 target is "in line with the scientifically established [emissions] levels needed in the United States" to avoid "major climate disruptions." (*Ibid*.; see also 2008 Climate Change Scoping Plan at AR022687 [explaining that Executive Order S-3-05 reflects scientists' view of reductions needed to stabilize atmospheric carbon dioxide and "prevent the most severe effects of climate change"].)

Nonetheless, the EIR failed to meaningfully address any inconsistency between the Project's rising GHG emissions—which would nearly double in the first two decades alone—and the long-term reductions necessary to stabilize the climate. The County refused to provide this analysis based on its view that executive orders do not bind local government agencies. (EIR at AR001484–85, AR008760–61.) The County's response misses the point. The executive orders' goals are based on climate scientists' understanding of the long-term impacts of rising GHG levels on the physical environment. These substantial physical impacts are CEQA's core concern, regardless of whether they are also incorporated into regulatory standards that specifically bind the County. (See, e.g., Pub. Resources Code, §§ 21060.5 [defining "environment" as "physical conditions"]; 21065, subd. (a) [defining "project" as an activity that may cause a "physical change in the environment"].) By the same token, the County's refusal to adopt a threshold of significance based on the state's long-term climate policy cannot excuse its failure to disclose and analyze the Project's lasting impacts. (See, e.g., *Rominger v. County. of Colusa* (2014) 229 Cal.App.4th 690, 717 [agency "cannot avoid finding a potentially significant effect . . . by rotely applying standards of significance that do not address that potential

effect"]; accord *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1109–11.)

CEQA's requirement that EIRs analyze both short- and long-term impacts underscores the County's obligation to disclose and analyze GHG impacts beyond 2035. (Pub. Resources Code, § 21083, subd. (b); CEQA Guidelines, § 15126.2, subd. (a); *Vineyard Area Citizens*, *supra*, 40 Cal.4th at p. 431.) Moreover, as the Supreme Court recently noted, "over time consistency with year 2020 [GHG emission reduction] goals will become a less definitive guide, especially for long-term projects that will not begin operations for several years." (*Center for Biological Diversity v. Dept. of Fish and Wildlife* (2015) 62 Cal.4th 204, 223, fn. 6.)[5] Thus, the County had a legal duty not only to disclose the Project's increasing emissions beyond 2035, but also to explain how those emissions may conflict with the steep emission reductions scientists agree are necessary to stabilize the climate over the same time period.

Although the County wrongly believes no such analysis was required, the EIR nonetheless purports to provide an "informational" analysis of the Project's consistency with the state's long-term goals. (AR001484–85.) This analysis, however, is based entirely on the unsupported assumption that the AB 32 cap-and-trade program will ensure the Project's consistency with California's climate goals *through 2050*. (AR001485 [citing AB 32 and First Updated Scoping Plan]; AR008762 [same].) Although AB 32's emission reductions are intended to continue after 2020 in some form (Health & Saf. Code, § 38551), its specific cap-and-trade authorization extends only through 2020. (*Id*., § 38562, subd.(c); see also AR001485 [EIR conceding cap-and-trade expires in 2020].) Indeed, the EIR's own technical GHG emission estimates assume *no* emissions will be covered by cap-and-trade after 2020. (AR003364.) Substantial evidence includes "reasonable assumptions predicated upon facts." (CEQA Guidelines, § 15384, subd. (b).) The EIR's "informational analysis" lacks factual support.

In sum, the EIR fails to analyze meaningfully whether and to what extent the Project's long-term increase in emissions conflicts with the mid-century reductions climate scientists and policymakers

[5] The California Supreme Court is currently considering whether an EIR for a long-term transportation plan must analyze consistency of GHG emissions with the state's long-term climate goals. (*Cleveland National Forest Foundation v. San Diego Assn. of Governments*, review granted Mar. 11, 2015, No. S223603.)

agree are necessary to stabilize the climate. The EIR's unsupported assumption that cap-and-trade will continue for 30 more years after 2020 cannot substitute for such an analysis.

VI. The EIR Fails to Adequately Analyze or Mitigate Harm to Biological Resources.

A core objective of CEQA is to "[p]revent the elimination of fish and wildlife species due to man's activities, insure that fish and wildlife populations do not drop below self-perpetuating levels, and preserve for future generations representations of all plant and animal communities." (Pub. Resources Code, § 21001, subd. (c).) Consequently, CEQA requires a lead agency to analyze and disclose a project's significant impacts on biological resources when the project has the potential to (1) substantially degrade the quality of the environment; (2) substantially reduce the habitat of a fish or wildlife species; (3) cause a fish or wildlife population to drop below self-sustaining levels; (4) threaten to eliminate a plant or animal community; or (5) substantially reduce the number or restrict the range of an endangered, rare or threatened species. (CEQA Guidelines, § 15065, subd. (a)(1); see also CEQA Guidelines appen. G., § IV(a).) Moreover, where the lead agency finds a "potential substantial impact on endangered, rare or threatened species," the impact is "*per se* significant." (*Vineyard Area Citizens*, *supra*, 40 Cal.4th 412 at p. 449.) CEQA's mandated disclosure of the above-described impacts applies not only to species already granted special protections, but also to those that "may become endangered if [their] environment worsens . . . ." (CEQA Guidelines, § 15380, subd. (b).) Here, the County unlawfully failed to provide necessary information to determine the extent of harm to these "sensitive species" and their habitats, and it failed to provide substantial evidence to support its conclusion that mitigation measures will decrease the impacts to these species to less than significant.

A. The EIR Fails to Adequately Analyze Impacts to Sensitive Species.

Ignoring the clearly enumerated elements of an assessment of biological resources impacts under CEQA Guidelines section 15065, the EIR: (1) fails to estimate the number of individuals within populations of sensitive species that will be "taken" (i.e., harmed or killed); (2) does not quantify the area of habitat that will be disturbed for certain of those sensitive species; and (3) altogether eschews a study of additional sensitive species that may occur in the area. Because complete disclosure of impacts is critical to both the public and decisionmakers, omitting this information from the EIR is "a prejudicial

abuse of discretion." (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1198 (*Bakersfield Citizens*).)

The County failed to meet its obligation to assess whether the Project will "substantially reduce the *number*" of endangered, rare, or threatened species, or cause a fish or wildlife population to "drop below self-sustaining levels," because it did not disclose or evaluate how many individuals of any particular species will be taken as a result of the Project. (CEQA Guidelines, § 15065, subd. (a)(1), emphasis added.) Without these data, the public is left to guess the extent to which sensitive species will be reduced, and whether they will become unable to self-sustain. As the California Department of Fish and Wildlife pointed out in its comments, the EIR "needs . . . specifics as to what extent the activities and related impacts would result in the taking of state-listed species." (AR008997.) Studies submitted to the County demonstrate that the Project will lead to the take of numerous species, including endangered species like the San Joaquin kit fox, burrowing owl, Le Conte's thrasher, and San Joaquin antelope squirrel. (See, e.g., Fiehler (2011) at AR017518–46.) In addition, the County itself admits that the Project "could result in a proximate cause of take" of certain species. (AR009019.) Yet the EIR does not attempt to quantify the decreases in species populations resulting from the Project, or assess whether any species will drop below self-sustaining levels. (AR001203–63.)

For a limited number of species, the County attempts a shortcut by assessing the proportion of habitat that will be disturbed. (See, e.g., EIR at AR001217 [33.9 percent for the Lost Hills crownscale], AR001234 [28.8 percent for Le Conte's thrasher], AR001229 [27.7 percent for the giant kangaroo rat].) Although it is a starting point, habitat disturbance alone is an insufficient proxy for the extent to which wildlife will be taken, because different species have varying ability to move to new, undisturbed habitat. Populations are also not uniformly distributed, so some habitat disturbances may impact disproportionately large numbers of individuals. Thus, CEQA's questions are left unanswered: what is the reduction that is expected to occur, and will species continue to be self-sustaining? (Cf., *Assn. of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383 [upholding EIR that disclosed the number of expected kit fox takes].)

For 50 other sensitive species, the County fails even to quantify the likely habitat loss, despite acknowledging that these species are "known or likely to occur in the Project Area." (AR001065.)

Instead of disclosing how many acres of habitat for so-called "non-modeled" species will be impacted, the EIR simply lists "NA." (AR001214–16, AR001227.) As a result, it is impossible to assess how many acres of habitat will be impacted, and thus impossible to determine whether the Project will "substantially reduce the habitat of [these] species." (CEQA Guidelines, § 15065, subd. (a)(1).) The County claims it used a variety of sources and "occurrence probability estimates" to determine whether sensitive species occur in the area or not. (AR001212, AR001222.) But whether or not a species is absent or present in the area alone does not reveal what the impact to those species will be. The EIR fails to serve its purpose as an informational document. (*Laurel Heights*, *supra*, 47 Cal.3d at p. 391; CEQA Guidelines, § 15151.)

Finally, the EIR skips even the most basic assessment for many other species. The EIR lists 77 "Category 3" species identified by experts or scientific literature as "potentially occurring in the vicinity of the Project Area . . . [and having] suitable habitat" or potentially being "present in the Project Area" (AR001065; see also AR001076–81 [listing Category 3 plant species], AR001112–16 [listing Category 3 wildlife species].) Despite evidence that they occur or potentially occur within the Project Area, the County declined to do anything other than simply list them. The EIR alternately justifies these omissions on the basis that these species do not have "official status as a State of California or federally threatened or endangered species," "do not occur in the region," or "are not considered to be a sensitive species within the Project Area." (Compare AR001065 and AR005582 with AR001069 and AR010392.) But the EIR does not clearly explain which rationale it relied upon to preclude study for any particular species, depriving its various (and conflicting) explanations of utility.

As stated above, CEQA requires an EIR to analyze impacts to not just those species currently listed as endangered or threatened, but also those who "may become endangered if [their] environment worsens," or are "likely to become endangered within the foreseeable future"—i.e., all sensitive species. (CEQA Guidelines, § 15380, subds. (a), (d); see also *id*. at appen. G [instructing a study of not just species with "official status," but "sensitive" species as well].) Thus, categorically excluding species that do not have official protected status improperly limits the scope of the County's assessment.

In addition, species that the EIR excludes as not being "sensitive species within the Project Area" includes those species that the EIR deems to be "migratory or transient, with little or no chance of

impact from Project Area activities." (AR010392.) Despite purporting to rely on "a review by qualified biologists," the EIR provides no actual data, and thus no substantial evidence, for its conclusory assertion that the Project would have "little or no chance of impacts" on these species. (Compare AR010392 [citing DEIR appen. N to justify excluding migratory or transitory species] with AR005602–11 [appen. N, which fails to explain which species have little or no chance of experiencing impacts in the Project Area due to their migratory or transitory nature, or why such species would be immune to Project impacts].) The EIR's categorical exclusion of migratory or transient species thus also unlawfully restricts the scope of the County's analysis.

The County's failure to disclose the true extent of potential harm to so many sensitive species makes "any meaningful assessment of the potentially significant environment impacts of [the Project] and the development of site-specific mitigation measures impossible. In these circumstances prejudice is presumed." (*Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1237.) The EIR thus fails as an informational document as a matter of law, and the County lacks substantial evidence to support its conclusion that impacts to these species will be less than significant after mitigation. (AR029060; CEQA Guidelines, § 15384, subd. (b), § 15151.)

B. The EIR's Analysis of Impacts to Habitat Adjacent to Worksites Is Inadequate.

CEQA requires the disclosure and analysis of both direct and reasonably foreseeable indirect significant effects of the Project. (CEQA Guidelines, § 15126.2, subd. (a), 15064, subd. (d).) To analyze a project's potential impact upon wildlife habitat, an EIR should include some "investigation into the exact location and extent of . . . habitats either adjacent to or within the site[s]" at issue. (*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 728.) The EIR fails to analyze habitat adjacent to new oil and gas infrastructure and operations ("worksites").

An analysis of potential impacts on habitat adjacent to worksites within the Project Area is necessary because light, noise, vibration, and air and water pollution extend well beyond the boundaries of discrete worksites. (Petitioners' comments at AR010367 [collecting studies].) One study in the record found that oil wells occupying 8.8 acres can adversely affect 30 acres of surrounding habitat. (*Id*. at AR010366, citing Johnson (2010), AR017883–928.) In Kern County, photo images show land disturbance far greater than what was disclosed in the EIR. (AR012256.) Such impacts that disturb or

destroy surrounding habitats are sometimes called "edge effects," and the EIR's failure to address these potentially substantial effects renders its impacts analysis incomplete and misleading.

The EIR acknowledges such edge effects, even claiming credit for mitigating them, but does not analyze them. According to the EIR, operations authorized under the Ordinance will disturb species that "occur within the facility perimeter [of worksites] *and in adjacent habitat*." (AR001203, italics added.) Yet the EIR does nothing to analyze the extent of the inevitable edge effects of continued oil and gas activity expansion. Instead, the EIR uses only the acreage within the boundaries of worksites—121,400 acres—to calculate the amount of habitat that will be disturbed. (AR001207, see also AR010394 [noting land disturbance disclosed in "Appendix F was not intended to be used as a tool to measure habitat fragmentation or edge effects"].) But the Project's oil and gas activity will affect a much broader area. Lacking any analysis of impacts to adjacent habitat, the EIR fails to disclose the true level of habitat disturbance in Kern County. It therefore fails as an informational document, and the County's conclusion that impact to habitats will be mitigated to less than significant is not supported by substantial evidence. (*Bakersfield Citizens*, *supra*, 124 Cal.App.4th at 1198.)

C. The EIR Unlawfully Defers Mitigation of Impacts to Species.

In an attempt to mitigate the Project's significant impacts on species (AR001214–16, AR001223–27, AR001237 [summarizing impacts on species]), the EIR requires permit applicants to complete a wildlife survey before construction and to comply with recommendations in the survey. (AR029060.) Because this measure lacks specific performance criteria, however, it constitutes unlawfully deferred mitigation and violates CEQA. As discussed, CEQA prohibits deferred mitigation measures that do not "specify performance standards." (CEQA Guidelines, § 15126.4, subd. (a)(1)(B).) Courts therefore routinely reject mitigation measures that "simply require[] a project applicant to obtain a biological report and then comply with any recommendations that may be made in the report." (*San Joaquin Raptor*, *supra*, 149 Cal.App.4th at p. 670; accord *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1396–1397 (*Gentry*) [reliance on a future biological survey is inadequate mitigation].).

Mitigation Measure 4.4-1 simply requires completion of wildlife surveys "prior to commencement of new ground-disturbance construction activities" to "confirm the presence or absence

of" threatened, endangered, or sensitive species, "and to identify and implement feasible avoidance and minimization measures for such species." (AR029060.) But what constitutes "feasible" avoidance or minimization remains completely undefined; without specific performance standards as to the extent to which impacts to species must be avoided or minimized, the EIR provides no assurance that mitigation will be adequate. (See *Endangered Habitats League*, *supra*, 131 Cal.App.4th at pp. 777, 793–94.) Because "this mitigation measure does no more than require a report be prepared and followed, or allow approval by [the] [C]ounty . . . without setting any standards," it constitutes improperly deferred mitigation, and should be rejected. (*Cal. Clean Energy Com.*, *supra*, 225 Cal.App.4th at p. 195; see also *Gentry*, *supra*, 36 Cal.App.4th at pp. 1396–97.)

D. The EIR Fails to Ensure Adequate Mitigation of Harm to Species' Habitats.

Mitigation Measure 4.4-16 attempts to mitigate disturbed habitats by requiring permittees to conserve 0.5 or 1.0 acres for every acre of land disturbed (depending on the land's existing disturbance level). But the measure fails to require that habitat be replaced with habitat of the equivalent type or value. The EIR's conclusion that habitat impacts can be reduced to less than significant therefore lacks substantial evidence.

CEQA Guidelines provide that mitigation may include "compensating for the impact by replacing or providing substitute resources or environments." (CEQA Guidelines, § 15370, subd. (e).) The EIR concedes that, to be effective, compensation must be "'roughly proportional' . . . both in *nature* and extent to the impact of the proposed [project]." (AR008741, italics added, citation omitted.) California courts have rejected habitat compensation schemes when the compensatory habitat is not of the same quality or nature as the habitat being destroyed. For example, in *Santee*, *supra*, 210 Cal.App.4th 260, the court found inadequate a mitigation measure to preserve compensatory habitat for the quino butterfly. The quino required "large, unfragmented areas of habitat generally consisting of open scrub vegetation with larval host plants . . . [and] nectar sites . . . in close proximity." (*Id*. at p. 272.) Creating and maintaining this particular kind of habitat would require active vegetation management. (*Id*. at pp. 272, 281.) Because the EIR failed to prescribe standards or guidelines for this type of vegetation management—which was necessary to maintain the distinct habitat features needed by the quino—the court concluded that the mitigation measure was inadequate. (*Id.* at p. 281.)

Here, Mitigation Measure 4.4-16 is similarly flawed. The measure does not require that disturbed habitat be replaced by habitat of the same quality or type. Rather, the County treats habitat *of any quality or type* as an adequate substitute for disturbed habitat. (See EIR at AR008555 [no criteria for replacement habitat].) But not all habitats are equal: different species require different and sometimes relatively unique habitat. (See *id*. at AR001072–81, AR001105–16 [summarizing the distinct habitat requirements of identified special status plant and wildlife species].) Mitigation Measure 4.4-16 allows one species' habitat to be destroyed and offset with land that is completely unsuitable for that species, and also allows high quality habitat to be replaced with low quality habitat. This leaves open the potential that a species will suffer loss of its habitat with no suitable replacement habitat created for that species. Such unequal swaps do not "compensat[e]" for habitat loss (CEQA Guidelines, § 15370, subd. (e)), and the EIR's conclusion to the contrary lacks substantial evidence. (*Santee*, *supra*, 210 Cal.App.4th at p. 281.) Thus, the County's erroneous reliance on Mitigation Measure 4.4-16 cannot constitute substantial evidence that the Project's impacts to species will be reduced to less than significant.

CONCLUSION

The Court should reject Kern County's unlawful approval of sweeping oil and gas development for decades to come, in an area exceeding two million acres, based on a flawed EIR completed through an exclusionary process. Until the County complies with CEQA, the Court should set aside the Ordinance and EIR.

Dated: November 14, 2016

Elizabeth Forsyth, State Bar No. 288311
EARTHJUSTICE
800 Wilshire Boulevard, Suite 1000
Los Angeles, CA 90017
eforsyth@earthjustice.org
Tel: (415) 217-2000
Fax: (415) 217-2040

William Rostov, State Bar No. 184528
Colin O'Brien, State Bar No. 309413
EARTHJUSTICE
50 California Street, Suite 500

San Francisco, CA 94111
wrostov@earthjustice.org
cobrien@earthjustice.org
Tel: (415) 217-2000
Fax: (415) 217-2040

Attorneys for Petitioners Natural Resources Defense Council and Sierra Club

Margaret Hsieh, State Bar No. 287839
NATURAL RESOURCES DEFENSE COUNCIL
40 West 20th Street
New York, NY 10011
mhsieh@nrdc.org
Tel: (212) 727-2700
Fax: (415) 795-4799

Mary K. Umekubo, State Bar No. 268973
NATURAL RESOURCES DEFENSE COUNCIL
111 Sutter Street, 21st Floor
San Francisco, CA 94104
kumekubo@nrdc.org
Tel: (415) 875-6131
Fax: (415) 875-6161

Attorneys for Petitioner Natural Resources Defense Council

Elizabeth Benson, State Bar No. 268851
SIERRA CLUB
2101 Webster Street, Suite 1300
Oakland, CA 94612
elly.benson@sierraclub.org
Tel: (415) 977-5723
Fax: (510) 208-3140

Attorney for Petitioner Sierra Club

Sofia L. Parino, State Bar No. 221379
Madeline Stano, State Bar No. 289660
CENTER ON RACE, POVERTY & THE ENVIRONMENT
1999 Harrison Street, Suite 650
Oakland, CA 94612
sparino@crpe-ej.org
mstano@crpe-ej.org
Tel: (415) 346-4179
Fax: (415) 346-8723

Attorneys for Petitioners Committee for a Better Arvin, Committee for a Better Shafter, and Greenfield Walking Group

Hollin N. Kretzmann, State Bar No. 290054
Kevin P. Bundy, State Bar No. 231686
Clare Lakewood, State Bar No. 298479
CENTER FOR BIOLOGICAL DIVERSITY
1212 Broadway, Suite 800
Oakland, CA 94612
hkretzmann@biologicaldiversity.org
kbundy@biologicaldiversity.org
clakewood@biologicaldiversity.org
Tel: (510) 844-7133
Fax: (510) 844-7150

Attorneys for Petitioner Center for Biological Diversity

PROOF OF SERVICE

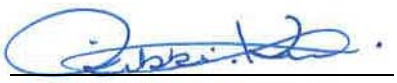
I am a citizen of the United States of America and a resident of the County of San Francisco; I am over the age of 18 years and not a party to the within entitled action; my business address is 50 California Street, Suite 500, San Francisco, California 94111.

I hereby certify that on November 14, 2016, I served by Electronic Mail (pursuant to stipulation) one true copy of the document herein on the parties listed below:

Jennifer L. Hernandez Charles L. Coleman Daniel R. Golub Holland & Knight LLP Counsel for Respondents, County of Kern, et al.	jennifer.hernandez@hklaw.com Charles.coleman@hklaw.com Daniel.golub@hklaw.com
Theresa A. Goldner, County Counsel Charles F. Collins, Chief Deputy Kern County Counsel Counsel for Respondents Kern County, et al.	tgoldner@co.kern.ca.us ccollins@co.kern.ca.us
Craig A. Moyer Keli N. Osaki Counsel for Real Party in Interest, California Independent Petroleum Association	cmoyer@manatt.com kosaki@manatt.com
Norman F. Carlin Blaine I. Green Pillsbury Winthrop Shaw Pittman LLP Counsel for Real Parties in Interest, Independent Oil Producers' Agency and Western States Petroleum Association	norman.carlin@pillsburylaw.com blaine.green@pillsburylaw.com
Rachel B. Hooper Heather Minner Peter J. Broderick Shute, Mihaly & Weinberger LLP Counsel for King and Gardiner Farms LLC	hooper@smwlaw.com minner@smwlaw.com Broderick@smwlaw.com
Daniel P. Selmi	dselmi@aol.com

Counsel for King and Gardiner Farms LLC	
William Rostov Elizabeth B. Forsyth Colin O'Brien Earthjustice Counsel for Petitioners NRDC and Sierra Club	wrostov@earthjustice.org eforsyth@earthjustice.org cobrien@earthjustice.org
Mary K. Umekubo Margaret T. Hsieh Natural Resources Defense Council Counsel for Petitioner NRDC	kumekubo@nrdc.org mhsieh@nrdc.org
Elizabeth Benson Sierra Club Counsel for Petitioner Sierra Club	elly.benson@sierraclub.org
Sofia L. Parino Center on Race, Poverty, and the Environment Counsel for Committee for a Better Arvin et al.	sparino@crpe-ej.org
Hollin N. Kretzmann Kevin P. Bundy Clare Lakewood Center for Biological Diversity Counsel for Petitioner Center for Biological Diversity	hkretzmann@biologicaldiversity.org kbundy@biologicaldiversity.org clakewood@biologicaldiversity.or
Edward S. Renwick Hanna and Morton LLP John B. Linford A Professional Corporation Counsel for Petitioners Vaquero Energy Inc. et al.	erenwick@hanmor.com john@linfordlaw.net

I certify under penalty of perjury that the foregoing is true and correct. Executed on November 14, 2016 in San Francisco, California.



Rikki Weber