Superior Court of California
County of Kern
Bakersfield Department 8

Date: 06/07/2022 **Time: 8:00 AM - 5:00 PM**

BCV-15-101645

Vaquero Energy, et. al., (Petitioners) v. County of Kern, et al., (Respondents), California Independent Petroleum Association, et al., Real Parties in Interest ("RPI")

Courtroom Staff

Honorable: Gregory Pulskamp **Clerk:** Stephanie Lockhart

NATURE OF PROCEEDINGS: RULING

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Ruling on Petitions for (Third) Writ of Mandate; heretofore submitted on May 26, 2022.

RULING:

The Court grants in part, and denies in part, the Petitions for Writ of Mandate.

DISCUSSION:

Petitioners in this case successfully challenged the enactment of the County of Kern's 2015 Ordinance (the "2015 Ordinance") that established ministerial procedures for permitting oil and gas activities. The County subsequently adopted a modified 2021 Ordinance. Petitioners now challenge the 2021 Ordinance. Petitioner King and Gardiner Farms[1] is referred to herein as "KGF" while the Arvin Petitioners are referred to as "Arvin."

I. Ruling on Request for Judicial Notice ("RJN"):

Each RJN filed in this case is granted. The Court finds the documents relevant for the reasons stated in each RJN.

II. Review of Applicable Law:

The parties have raised a number of issues regarding the applicable law, which the Court will address as follows:

[1] Subsequent to the briefing in this matter, KGF filed an application to change its name to V Lions Farming, LLC.

A. Sufficiency of EIR:

"'The question whether an EIR is sufficient as an informative document depends on the lead agency's…compliance with CEQA's requirements for the contents of an EIR: whether the EIR reflects a reasonable, good faith effort to disclose and evaluate environmental impacts and to identify and describe mitigation measures and alternatives; and whether the final EIR includes reasonable responses to comments on the draft EIR raising significant environmental issues. (Citations omitted).' 'Analysis of environmental effects ... will be judged in light of what was reasonably feasible. (Citations omitted).'
. . .
'Noncompliance with CEQA's information disclosure requirements is not per se reversible; prejudice must be shown (Citations omitted).' 'Failure to comply with the information disclosure requirements constitutes a prejudicial abuse of discretion when the omission of relevant information has precluded informed decision-making and informed public participation, regardless whether a different outcome would have resulted if the public agency had complied with the disclosure requirements. (Citations omitted).'" (*City of Maywood v. Los Angeles Unified School Dist.* (2012) 208 CA4th 362, 386).

"An EIR should be prepared with a sufficient degree of analysis to provide decision-makers with information which enables them to make a decision which intelligently takes account of environmental consequences. An evaluation of the environmental effects of a proposed project need not be exhaustive, but the sufficiency of an EIR is to be reviewed in the light of what is reasonably feasible. *Disagreement among experts does not make an EIR inadequate*, but the EIR should summarize the main points of disagreement among the experts. The courts have looked not for perfection but for adequacy, completeness, and a good faith effort at full disclosure." (14 CCR 15151; emphasis added).

B. Presumption of Correctness of an EIR:

The "decision to certify an EIR is presumed correct, and the challenger has the burden of proving the EIR is legally inadequate." (*California Clean Energy Committee v. City of Woodland* (2014) 225 CA4th 173, 187). "[T]he courts have looked not for an exhaustive analysis but for adequacy, completeness, and a good-faith effort at full disclosure." *(Sierra Club v. County of Fresno* ("Friant Ranch") (2018) 6 C. 5th 502, 515). "An evaluation of the environmental effects of a proposed project need not be exhaustive, but the sufficiency of an EIR is to be reviewed in the light of what is reasonably feasible." (14 CCR 15151).

C. Abuse of Discretion:

"In any action or proceeding, other than an action or proceeding under Section 21168, to attack, review, set aside, void or annul a determination, finding, or decision of a public agency on the grounds of noncompliance with this division, the inquiry shall extend only to whether

there was a prejudicial abuse of discretion. 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." (Public Resources Code section 21168.5).

D. Necessary findings where an environmental impact report identifies effects:

"Pursuant to the policy stated in Sections 21002 and 21002.1, no public agency shall approve or carry out a project for which an environmental impact report has been certified which identifies one or more significant effects on the environment that would occur if the project is approved or carried out unless both of the following occur:
(a) The public agency makes one or more of the following findings with respect to each significant effect:
(1) Changes or alterations have been required in, or incorporated into, the project which mitigate or avoid the significant effects on the environment.
(2) Those changes or alterations are within the responsibility and jurisdiction of another public agency and have been, or can and should be, adopted by that other agency.
(3) Specific economic, legal, social, technological, or other considerations, including considerations for the provision of employment opportunities for highly trained workers, make infeasible the mitigation measures or alternatives identified in the environmental impact report.
(b) With respect to significant effects which were subject to a finding under paragraph (3) of subdivision (a), the public agency finds that specific overriding economic, legal, social, technological, or other benefits of the project outweigh the significant effects on the environment." (Public Resources Code section 21081).

E. Standard of Review: Substantial Evidence or De Novo:

"(a) 'Substantial evidence' as used in these guidelines means enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached. Whether a fair argument can be made that the project may have a significant effect on the environment is to be determined by examining the whole record before the lead agency. Argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment does not constitute substantial evidence.

(b) Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts." (14 CCR 15384).

King and Gardiner Farms, LLC v. County of Kern (2020) 45 CA5th 814, 837-838 sets forth the standard of review for CEQA matters:

"Judicial review of a public agency's compliance with CEQA is governed by the abuse of discretion standard set forth in section 21168.5 and referred to in the policy declaration of section 21005, subdivision (a). (Footnote omitted). (*Sierra Club v. County of Fresno, supra*, 6 Cal.5th at p. 512, 241 Cal.Rptr.3d 508, 431 P.3d 1151.) Section 21168.5 provides that our 'inquiry shall extend only to whether there was a prejudicial abuse of discretion. 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.' (§ 21168.5.) Generally, an abuse of discretion may occur in two ways. The public agency could fail to proceed in the manner required by CEQA, thereby committing procedural (i.e., legal) error. Also, the public agency could err by making findings of fact unsupported by substantial evidence. Whether the public agency has employed the correct procedures—that is, followed applicable law—is subject to independent judicial review. (*Sierra Club v. County of Fresno, supra*, at p. 512, 241 Cal.Rptr.3d 508, 431 P.3d 1151.) In contrast, when the agency acts in its role as the finder of facts, its findings are subject to deferential review under the substantial evidence standard. (*Ibid.*)

…

In this case, some of the claims raised by plaintiffs assert the discussion contained in the EIR is inadequate, which undermines the EIR's effectiveness as an informational document. Sometimes, claims of an inadequate discussion cannot be neatly categorized as either factual or procedural error. (*Sierra Club v. County of Fresno, supra*, 6 Cal.5th at p. 513, 241 Cal.Rptr.3d 508, 431 P.3d 1151.) Our choice of the applicable standard of review for a particular claim of inadequacy is set forth in the part of this opinion discussing that claim."

F. Prejudicial Error:

There is no presumption that error is prejudicial. (Public Resources Code section 21005(b)). "Noncompliance with CEQA's information disclosure requirements is not per se reversible; prejudice must be shown. (Citation omitted). Failure to comply with the information disclosure requirements constitutes a prejudicial abuse of discretion when the omission of relevant information has precluded informed decision making and informed public participation, regardless whether a different outcome would have resulted if the public agency had complied with the disclosure requirements." (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 CA4th 1184, 1197-98).

In deciding whether a failure to comply with CEQA is prejudicial error, courts do not determine whether the agency's decision would have been different but on whether the CEQA violation prevented informed decision-making or public participation. "Insubstantial or merely technical omissions are not grounds for relief." (*Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 C. 4th 439, 463).

G. Supplemental EIRs and Res Judicata:

When a court issues a writ of mandate directing that an EIR be supplemented or corrected, this "does not mean that the Agency is required to start the EIR process anew. Rather, the Agency need only correct the deficiency in the EIR…before considering re-certification of the EIR." (*Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 CA4th 1099, 1112). CEQA is designed to avoid "endless rounds of revision and re-circulation of EIR[s]." (*Silverado Modjeska Recreation and Park Dist. v. County of Orange* (2011) 197 CA4th 282, 303). "[T]he trial court's retained jurisdiction under Public Resources Code section 21168.9, subdivision (b) is limited to ensuring compliance with the peremptory writ of mandate." (*Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 CA4th 455, 480).

"Res judicata bars all of LAWDA's objections to the partially re-circulated EIR certification and project approval, except for those issues arising from the partially re-circulated EIR concerning traffic impacts, because the remaining issues were litigated and resolved, or could have been litigated and resolved, in connection with the first petition, and the writ of mandate did not require the County to revisit issues other than traffic impacts." (Ione Valley Land, Air, & Water Defense Alliance, LLC v. County of Amador 33 Cal.App.5th 165, 170).

"Res judicata or claim preclusion precludes the re-litigation of a cause of action that previously was adjudicated in another proceeding between the same parties or parties in privity with them.(Citation omitted). Res judicata applies if (1) the decision in the prior proceeding is final and on the merits; (2) the present proceeding is on the same cause of action as the prior proceeding; and (3) the parties in the present proceeding or parties in privity with them were parties to the prior proceeding. (Citation omitted). Res judicata bars the litigation not only of issues that were actually litigated but also issues that could have been litigated. (Citation omitted). *(Federation of Hillside and Canyon Associates v. City of Los Angeles* (2004) 126 CA4th 1180, 1208).

H. Mitigation Measures:

An EIR must describe feasible measures that could minimize the project's significant adverse impacts. (14 CCR 15126.4(a)(1)). "[T]he lead agency must adopt feasible mitigation measures or project alternatives to reduce the effect to insignificance; to the extent significant impacts remain after mitigation, the agency may still approve the project with a statement of overriding considerations. (Citation omitted). The inclusion of a mitigation measure that reduces an environmental impact is permitted even if the measure will not reduce the impact to a level

below the threshold of significance." (*Sierra Club v. County of Fresno* (2018) (Friant Ranch) 6 C.5th 502, 525).

An EIR is not required to propose a mitigation measure that would not effectively address a significant impact or would be infeasible. (*Napa Citizens for Honest Government v. Napa County Board of Supervisors* (2001) 91 CA4th 342, 365). "Nothing in CEQA requires an EIR to explain why certain mitigation measures are infeasible." (*Clover Valley Found. V. City of Rocklin* (2011) 197 CA4th 200, 245). In addition, an EIR is not required to contain a detailed analysis of mitigation measures deemed infeasible. (*Cherry Valley Pass Acres and Neighbors v. City of Beaumont* (2010) 190 CA4th 316, 351).

I. CEQA does not require a lead agency to perform all research or study suggested by commentors:

"…CEQA does not require a lead agency to conduct every test or perform all research, study, and experimentation recommended or demanded by commentors. When responding to comments, lead agencies need only respond to significant environmental issues and do not need to provide all information requested by reviewers, as long as a good faith effort at full disclosure is made in the EIR." (14 CCR 15204(a)).

III. Rulings on the Merits:

A. Whether the SREIR Provides Legally Adequate Mitigation for Impacts on Agricultural Land Conversions:

KGF states that the 2021 Ordinance will have significant, unavoidable impacts on agricultural land conversion, yet the only MM the County proposed, MM 4.2-1 (requiring removal of legacy oil and gas equipment on certain lands) is inadequate because it lacks meaningful performance standards. KGF argues that the County ignored the Appellate Court in this matter, when the Court approved legacy equipment removal at a 1:1 ratio as mitigation that would fully compensate for the loss of agricultural land, but instead eliminated this requirement under new MM 4.2-1. Further, KGF points out that the County rejected mitigation proposed by KGF and the Department of Conservation (DOC). Finally, according to KGF, the County inaccurately reads the Court of Appeal opinion in this case as precluding the use of agricultural easements as mitigation. The County and RPIs take issue with each of these claims.

The Court will first address whether the Court of Appeal precluded the use of agricultural conservation easements as mitigation.

1. **Whether the Court of Appeal in this Case Found that Agricultural Conservation Easements Are Legally Infeasible CEQA Mitigation:**

Although the County considered such easements in the 2015 EIR, RPIs argue that the Appellate Court barred their use as CEQA mitigation. KGF asserts that the Court did not prohibit their use but found they were insufficient to reduce agricultural impacts to a less-than-significant level. KGF notes that conservation easements are set forth in the CEQA Guidelines as effective mitigation (14 CCR 15370(e)) and are widely used by farmers and land trusts.

RPIs argue that the Appellate Court found that agricultural mitigation easements are ineffective as mitigation because they do not actually offset conversion of agricultural land "in whole or in part." As such, the Court's decision is binding under res judicata.

The Appellate Court addressed conversion of agricultural land that would occur as a result of former MM 4.2-1. It noted that the "significant impact on agricultural land was addressed in MM 4.2-1, which requires mitigation at a ratio of 1:1 for oil and gas exploration and extraction activities on agricultural land that have been actively farmed five or more of the last 10 years…Prior to undertaking ground disturbing activities, an applicant must present the County with 'written evidence of completion of *one or more* of the following measures to achieve this 1:1 mitigation ratio:'

'a. Funding and/or purchasing agricultural conservation easements or similar instrument acceptable to the County (to be managed and maintained by an appropriate entity).
'b. Purchasing of credits for conservation of agricultural lands from an established agricultural farmland mitigation bank or an equivalent agricultural farmland preservation program managed by the County.
'c. Restoring agricultural lands to productive use through the removal of legacy oil and gas production equipment, including well abandonment and removal of surface equipment.
d. Participating in any agricultural land mitigation program adopted by Kern County that provides equal or more effective mitigation than the measures listed above.'" (*King and Gardiner Farms*, at p. 871).[2] (Emphasis added).

The Court then analyzed several cases dealing with agricultural conservation easements (option (a) in former MM 4.2-1) and concluded as follows:

"Based on the foregoing cases and the statutes addressing agricultural conservation easements, we reach the following conclusions. Entering into a binding agricultural conservation easement does not create new agricultural land to replace the agricultural land being converted to other uses. Instead, an agricultural conservation easement merely prevents the future conversion of

[2] In weighing each of these options, the Court used the substantial evidence standard.

the agricultural land subject to the easement. Because the easement does not offset the loss of agricultural land (in whole or in part), the easement does not reduce a project's impact on agricultural land. The absence of any offset means a project's significant impact on agricultural land would remain significant after the implementation of the agricultural conservation easement. Restating this conclusion using the data from this case, the implementation of agricultural conservation easements for the 289 acres of agricultural land estimated to be converted each year would not change the net effect of the annual conversions. At the end of each year, there would be 289 fewer acres of agricultural land in Kern County. Accordingly, under the thresholds of significance listed in the EIR, this yearly impact would qualify as a significant environmental effect. *Therefore, we agree with KG Farms' contention that MM 4.2-1.a does not provide effective mitigation for the conversion of agricultural land*." (*King and Gardiner Farms*, at pp. 875-876; emphasis added).

The Court then addressed option (c) (restoring agricultural land through removal of legacy equipment) and concluded that "the restoration of agricultural land to productive use would offset the loss of agricultural land caused by the County's approval of a permit for oil and gas activity. Furthermore, the use of the 1:1 ratio would result in full compensation for the loss of agricultural land. As a result, the net change in the amount of agricultural land would be zero—that is, the impact would be fully mitigated. Therefore, we conclude MM 4.2-1.c provides effective mitigation for the conversion of agricultural land." (Id., at p. 876).[3]

The Court concluded that "the finding the impact would be mitigated to a less than significant level must be based on the options that were available to permit applicants when the EIR was certified—namely, the agricultural conservation easements of MM 4.2-1.a and the agricultural land restoration described in MM 4.2-1.c. Because permit applicants *could* rely on an agricultural conservation easement under MM 4.2-1.a and because such easements do not actually offset the conversion of farmland, the Board erred when it found the impact to agricultural land would be less than significant with mitigation. Therefore, we conclude the EIR and the Board's finding as to the mitigation of a significant impact on agricultural land do not comply with CEQA." (Id., at pp. 878-879; emphasis added).

In *Masonite Corp. v. County of Mendocino* (2013) 218 CA4th 230, 238, the court rejected an agency's determination that conservation easements over off-site agricultural land cannot provide mitigation for conversion of agricultural land to another use. As a result of the

[3] The Court ruled that as to option (b) (purchase of credits), "the record does not contain substantial evidence showing the mitigation banks or preservation programs referred to in MM 4.2-1.b were available." As to option (d) (other measures), the Court found "because the record does not identify any program that qualifies as an 'agricultural land mitigation program adopted by Kern County' for purposes of MM 4.2-1.d, we conclude that option does not provide available, effective mitigation for the project's conversion of agricultural land." (Id., at p. 878).

Masonite case, the Guidelines (section 15370(e) were amended to incorporate Masonite's ruling that "off-site agricultural conservation easements constitute a potential means to mitigate for direct, in addition to cumulative and indirect, impacts to farmland." (*Practice Under the California Environmental Quality Act*, Second Edition, by Kostka and Zischke ("K and Z"), section 13.72).

However, in *King and Gardiner Farms* at p. 873 the Court found that an "*agency finding that conservation easements over off-site agricultural land was erroneous as a matter of law because impacts would not be reduced or offset*." (K and Z, section 14.9; emphasis added). *"[T]he court's holding that off-site conservation easements are not effective mitigation for the direct impact to farmland when it is converted to another use calls into question the holding in Masonite, as well as the effect of the Guideline amendment."* (K and Z, section 13.72; emphasis added).

Ruling on Whether the Court of Appeal in this Case Found that Agricultural Conservation Easements Are Legally Infeasible CEQA Mitigation:

This Court believes that the Court of Appeal in this case ruled that agricultural conservation easements (former MM 4.2-1a) do not provide effective mitigation because such easements do not offset, in whole or in part, the loss of 298 acres (annually) of agricultural land. The Appellate Court did not prohibit the use of agricultural easements but did find them to be ineffective mitigation.

The Court found that under MM 4.2-1c "the use of the 1:1 ratio would result in full compensation for the loss of agricultural land. As a result, the net change in the amount of agricultural land would be zero—that is, the impact would be fully mitigated. Therefore, we conclude MM 4.2-1.c provides effective mitigation for the conversion of agricultural land." (*King and Gardiner Farms*, at p. 876). The Court found no substantial evidence to support MM 4.2-1 b or d.

Because an applicant had the option of complying with MM 4.2-1a or c, "we conclude the EIR and the Board's finding as to the mitigation of a significant impact on agricultural land do not comply with CEQA." (*King and Gardiner Farms*, at p. 879).

Therefore, this Court finds that the Appellate Court has ruled that agricultural conservation easements do not provide effective mitigation for the conversion of agricultural land.

2. **Whether MM 4.2-1 Contains Performance Standards and the Omission of the 1:1 Ratio:**

Current MM 4.2-1 (found at AR: 171132) provides as follows:

"For Oil and Gas Conformity Reviews that are 1) on land designated Prime Farmland of Statewide Importance or Unique Farmland; and 2) that have been actively farmed five years or more out of the last 10 years; and 3) have a water allocation sufficient for farming from any source shall have the following siting requirements:

A. All Oil and Gas Conformity Reviews permitted after 2021 shall have a site plan that contains no more than the following area limitations per well. All storage parking and oil activities shall be conducted only on the approved site plan acreage… (Chart omitted).

B. No permit for a new well shall be issued if the applicant has legacy unused oil and gas equipment on the same legal parcel. The legacy oil and gas equipment shall be removed inclusive of compliance with applicable legal requirements (e.g. well plugging and abandonment requirements under state or federal regulations), and restoration of the surface grade consistent with surrounding lands on the parcel completed before any new well activity can commence. A full plan and details of actions needed to remove the legacy equipment shall be submitted with the site plan be shown on a detail of the site plan and be a condition of the approved permit. For farmland parcels in Tier 1, when both the surface and minerals are owned by the applicant, this measure does not apply.

C. Siting and construction of new disposal ponds are prohibited."

KGF argues the MM lacks performance standards and that the County eliminated the 1:1 ratio in spite of the fact that the Appellate Court recognized its effectiveness. By removing the 1:1 ratio, MM 4.2-1 now has no performance standard[4], making it invalid as a mitigation measure. (*Preserve Wild Santee v. City of Santee* (2012) 210 CA4th 260, 281: Finding that the EIR in question did not "specify performance standards or provide other guidelines for the active management requirement").

KGF asserts that legacy equipment removal is only required if the applicant has such equipment on the same parcel where the new drilling will occur. Applicants who do not own legacy equipment or who do not conduct new drilling on the same parcel as their old equipment do not have to mitigate. KGF asserts that many operators could access the same pool of oil by moving drilling to a nearby parcel that has no legacy equipment.

[4] A public agency "must quantitatively or qualitatively ascertain or estimate the effect" of mitigation measures. (*Friends of Oroville v. City of Oroville* (2013) 219 CA4th 832, 842).

KGF argues that the County never determined how much legacy equipment is located on farmland in the project area (even though it could have) and the number of acres that would likely be restored through its removal under MM 4.2-1, even though that information is available according to KGF's petroleum expert, Mr. Hughes.

RPIs argue that the wording of MM 4.2-1 establishes a narrative performance standard and that the MM need only be partially effective as mitigation. Mitigation measures "must be at least partially effective, even if they cannot mitigate significant impacts to less than significant levels." (*King and Gardiner Farms*, at p. 865).

RPIs assert that while the 1:1 ratio for legacy equipment removal is not required, nevertheless, mitigation at greater than 1:1 is required wherever feasible because if equipment "is present on a parcel, the applicant must remove all of it, regardless of the amount of agricultural land conversion…" (AR: 267484). In some instances, the 1:1 ratio will not be met because the equipment will not be present or the applicant may not own or control the equipment.
RPIs state that KGF takes issue only with part (B) of MM 4.2-1, while ignoring the fact that MM 4.2-1(A) and (C) also contribute to mitigation. (AR: 171132).

Concerning the claim that mitigation could be avoided by moving equipment to a nearby parcel that has no legacy equipment, RPIs claim that such assertion ignores the legal, physical, and technological constraints on the feasibility of moving such equipment.

RPIs contend that the analysis proposed by Mr. Hughes is not feasible or required. Calculating the number of idle wells with legacy equipment is not helpful because there is no way to determine which of these wells will be permanently plugged and which may later become active. Further, a mapping analysis would require knowing where legacy equipment is on the 298 acres of farmland that will be converted annually, not where it occurs throughout the County.

In its reply brief, KGF asserts that while RPIs argue that the 1:1 ratio is not feasible because not all farmland where drilling will occur has legacy equipment, this is exactly why a ratio is critical. CEQA requires that mitigation be "roughly proportional" to impacts. (14 CCR 15126.4(a)(4)(A), (B)). Even if all legacy equipment is removed on some parcels, the SREIR provides no criteria for ensuring that total mitigation correlates to the amount of farmland lost.

In its reply brief, KGF states that MM 4.2-1(A) limits the size of drilling sites to between 1.2 and 3 acres. These limits reflect estimates of the acreage that oil operations will actually disturb, not real regulatory constraints. The SREIR never indicates how much this measure will reduce farmland impacts. As to MM 4.2-1(C), there is no indication of how many acres of farmland the measure would protect, and therefore it does not constitute adequate mitigation under CEQA.

Ruling on Whether MM 4.2-1 Contains Performance Standards and the Omission of the 1:1 Ratio:

A public agency "must quantitatively or qualitatively ascertain or estimate the effect" of mitigation measures. (*Friends of Oroville v. City of Oroville* (2013) 219 CA4th 832, 842).

While MM 4.2-1 contains a quantitative performance standard, the County has not justified the elimination of the 1:1 ratio that was included in former MM 4.2-1. The Appellate Court in this matter found that under former MM 4.2-1 "the use of the 1:1 ratio would result in full compensation for the loss of agricultural land."

"The lead agency must find (1) the measures are at least partially effective, (2) all feasible mitigation measures have been adopted, and (3) the environmental impacts will not be mitigated to less than significant levels. The findings must be supported by substantial evidence." ([Pub. Res. Code] § 21168.5.)

While the Court finds that while MM 4.2-1 is partially effective as a mitigation measure (because it requires the removal of all legacy equipment that is on the same legal parcel before a permit is issued under the Ordinance), there is no substantial evidence in the SREIR to support elimination of the 1:1 ratio. This is especially noteworthy in light of the Court of Appeal's decision in this case finding "the use of the 1:1 ratio would result in full compensation for the loss of agricultural land. As a result, the net change in the amount of agricultural land would be zero—that is, the impact would be fully mitigated. Therefore, we conclude MM 4.2-1.c provides effective mitigation for the conversion of agricultural land."

The Court finds that substantial evidence supports the County's decision to not use the methodology suggested by Mr. Hughes. Calculating the number of idle wells with legacy equipment is not helpful because there is no way to determine which of these wells will be permanently plugged and which may later become active. Further, a mapping analysis would require knowing where legacy equipment is on the 298 acres of farmland that will be converted annually, not where it occurs throughout the County.

While a lead agency is required to respond to proposed facially feasible measures, it is not required to accept the suggested mitigation measures. (*A Local and Regional Monitor v. City of Los Angeles* (1993) 12 CA4th 1773, 1809).

3. **Whether the County Was Required to Justify Its Rejection of Mitigation Measures Proposed by KGF and DOC Requiring (1) Offsite Legacy Equipment Removal, (2) Creation of a Mitigation Fee Bank, and (3) Creation of a Soil Restoration Measure:**

KGF argues that because public agencies must adopt all feasible mitigation measures that would substantially lessen a project's significant environmental effects (*Sierra Club v. County of Fresno* (2018) 6 C. 5th 502, 524-525), the County wrongfully refused to adopt the above feasible mitigation measures proposed by KGF and DOC.

First, KGF proposed that if an applicant does not own legacy equipment on the same parcel but does on other farmland in the project area, it must remove the equipment on a 1:1 ratio. Second, if an applicant does not own legacy equipment in the project area, the County should create a mitigation fee bank that would fund removal of equipment on a 1:1 basis. Third, DOC proposed that MM 4.2-1 require removal of soil compaction and contaminants followed by restoration of soil fertility through planting cover crops.

As to the first proposal offered by KGF, RPIs claim that applicants may not be able to obtain permission from landowners to enter the property and remove equipment. Imposing a requirement to remove legacy equipment from unrelated property that lacks a nexus to the proposed oil and gas activities risks exposing the County to takings claims if owners of mineral interests underlying agricultural lands are unable to feasibly exercise their mineral rights.

As to the second proposal, the creation of a mitigation fee bank was determined by the County to be a major undertaking and that it was not feasible or reasonable to invest the time and resources to mitigate the impact of the anticipated conversion of agricultural land (up to 298 acres per year).

Concerning the third proposal, since equipment removal may occur on only a portion of a parcel, soil remediation may not be practical or effective, and the applicant who controls the legacy equipment may not be responsible for soil contamination.

In its reply brief, KGF claims there is no substantial evidence to support the County's rejection of the proposed mitigation measures.

Ruling:

The Court finds that the County's rejection of requiring an applicant to remove legacy equipment on property at a location other than where the permit is requested is not supported by substantial evidence. However, the County's rejection of the creation of a mitigation fee bank and the rejection of removal of soil contaminants (followed by soil restoration) are supported by substantial evidence.

“Reviewing courts will ordinarily defer to an agency’s determination that a proposed measure will not provide effective mitigation for an impact if the determination is supported by substantial evidence. *(City of Irvine v. County of Orange* (2015) 238 CA4th 526).” (K and Z, section 14.9). (See also, *Mount Shasta Bioregional Ecology Center v. County of Siskiyou* (2012) 210 CA4th 184, 208).

Generally, courts defer to agency determinations of mitigation measure effectiveness. (See, e.g., *Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 CA4th 1209, 1233 (courts do not weigh expert evidence on effectiveness of mitigation measures; city was not required to acquiesce to mitigation measures for habitat impacts proposed by regulatory agency). (K and Z, section 14.9).

Though an EIR must describe feasible mitigation measures that could minimize the project’s significant adverse impacts (14 CCR 15126.4(a)(1)), an EIR may decline to propose a mitigation measure that would not effectively address a significant impact. (*Napa Citizens for Honest Government v. Napa Board of Supervisors* (2001) 91 CA4th 342, 365). (K and Z, section 14.10).

While a lead agency is required to respond to proposed facially feasible measures, it is not required to accept the suggested mitigation measures. (*A Local and Regional Monitor v. City of Los Angeles* (1993) 12 CA4th 1773, 1809). (K and Z, section 14.10).

“This court's task is not to weigh conflicting evidence and determine who has the better argument when the dispute is whether adverse effects have been mitigated or could be better mitigated. [Courts] have neither the resources nor scientific expertise to engage in such analysis, even if the statutorily prescribed standard of review permitted us to do so. Our standard of review is the deferential substantial evidence test. In the present matter, plaintiffs have not shown substantial evidence is lacking for the designated mitigation measure. (Citations omitted).” (*Mount Shasta Bioregional Ecology Center v. County of Siskiyou* (2012) 210 CA4th 184, 208).

The County’s rejection of the creation of a mitigation fee bank is supported by substantial evidence. The County provided a lengthy explanation for its decision not to create a mitigation fee bank. (AR: 209258). In summary, it would require a major undertaking that would not be feasible or reasonable to mitigate the impact of up to 298 acres of farmland per year. (AR: 171128). Further, based on what occurred when the prior Ordinance was in effect, the project impacted only 12 acres of farmland per year (AR: 265688) which makes the creation of a mitigation fee bank even more unreasonable.

Also, the County’s rejection of the creation of a soil restoration measure is supported by substantial evidence. The County found that soil fertility improvements and crop planting on

farmland are best managed by farmers. (AR: 208337). Soil cleanup is determined by applicable regulatory requirements and site-specific conditions. The record contains extensive discussion of these requirements. (AR: 1518-1553).

As to the County's rejection of requiring an applicant to remove legacy equipment on property at a location other than where the permit is requested, the Court finds that this decision is not supported by substantial evidence.

Former MM 4.2-1 required agricultural land mitigation at a 1:1 ratio. (AR: 900). The Appellate Court found that the 1:1 ratio provided "full compensation for the loss of agricultural land." The SREIR does not explain why this mitigation was eliminated and therefore does not contain substantial evidence to support that decision.

B. Whether the Multi-Well Health Risk Assessment (HRA) Is Legally Adequate:

The Court of Appeal made the following findings with regard to the HRA:

"We conclude the 'draft EIR was [] fundamentally and basically inadequate ... in nature' in addressing the question of the health risks posed to sensitive receptors located near multiple wells. (Guidelines, § 15088.5, subd. (a)(4).) No analysis of this question was included in the draft EIR and, therefore, the question of inadequacy can be determined as a matter of law. (See *Sierra Club v. County of Fresno*, supra, 6 Cal.5th at p. 516.) Furthermore, under the peculiar facts of this case, this omission of information was exacerbated by the misstatements of fact included in the County's responses to comments received from other agencies and the public. These misstatements create the appearance that the County had decided the results of the Multi-Well Health Risk Assessment before it existed, which suggests the document was little more than a post hoc justification…

[W]e conclude the Multi-Well Health Risk Assessment must be included in any revised EIR recirculated for public comment before that revised EIR is presented to the Board for certification." (Slip Op. at pp. 131-132).

In response to the Court of Appeal's opinion, the County re-circulated the Multi-Well HRA as part of the process for the SREIR.

Arvin claims the HRA violates CEQA. The Ordinance allows drilling 210 feet from homes and 300 feet from schools. (AR: 168410). Deep wells (10,000 feet or more) must be 296 feet from sensitive receptors. (AR: 171333). By contrast, the HRA evaluated risks at a distance of approximately 1,000 feet (AR; 208643-45), which effectively underestimates the impacts of well drilling.

Further, the SREIR and HRA state that the County modeled air pollution emissions from twelve wells at one-eighth of a mile or 660 feet away from the sensitive receptor, but in fact the closest wells were modeled at 950 to 1,160 feet from the receptor. (AR: 208643-45; 268833-34). The County states that the differences are "slight" and would not be expected to alter the results in the HRA. (AR: 208710). Arvin contends that this contradicts the County's assertion that diesel pollution decreases significantly within 300 to 500 feet of the source. (AR: 8728). The County's actions thus prevented the public from understanding important environmental consequences of the Ordinance.

RPIs assert that CEQA does not require the SREIR to analyze wells at the closest distances allowed by the Ordinance (worst-case scenario) but only requires analysis of reasonably foreseeable impacts. The Multi-Well HRA addressed the unlikely prospect that forty-eight 13,000-foot wells would be drilled simultaneously in close proximity to a receptor, despite the fact that only 3 percent of the wells drilled in Kern County are at depths of 10,000 feet or greater. (AR: 171320, 171327). Again, the HRA conservatively assumed that all seven phases of drilling occur simultaneously and that all emissions are DPM. Even with these assumptions, the risk was 9.3 in one million, far below the 20 in one million threshold. (AR: 171329).

RPIs note that a supplemental HRA was prepared by the County's expert. It summarized all modeling changes and updates to the HRA guidelines and requirements since 2015. It concludes that "if the previously completed very conservative theoretical example in the multi-well HRA were to be remodeled today, resulting risk would be approximately 4.84 in one million. This is significantly below the SJVAPCD (Air District) health risk threshold of 20 in one million." (AR: 172417).

RPIs assert that the closest wells were modeled at 950 feet away rather than 660 feet, and the next closest were modeled at approximately 1,640 feet away rather than 1,320 feet. The County acknowledged these discrepancies and concluded that given the conservative assumptions in the HRA and the significant margin away from the risk threshold, these discrepancies would not alter the finding that the health risk would be below the 20 in one million threshold. (AR: 172413). As noted earlier, the maximum distance at which the revised HRA found a significant health impact was 182 feet from the sensitive receptor, and DPM dispersion models show that concentrations and risk drop most significantly in the first 200 feet and level off after 300 feet. Therefore, whether the closest model distance was 660 or 950 feet from the sensitive receptor would not make a difference. For a prejudicial abuse of discretion to be shown, an EIR must fail to include relevant information that precludes informed decision-making and public participation. (*Mount Shasta Bioregional Ecology Center v. County of Siskiyou* (2012) 210 CA4th 184, 210). That did not occur here.

In its reply, Arvin claims that this is not simply a disagreement over methodology (reviewed under substantial evidence) but that the SREIR's failure to analyze wells at a closer distance fails

as a matter of law. "[W]hether a description of an environmental impact is insufficient because it lacks analysis or omits the magnitude of the impact is not a substantial evidence question." (*Sierra Club v. County of Fresno* (2018) 6 C. 5th 502, 514).

Arvin argues that Respondents incorrectly assert that analysis of wells closer than 1,000 feet would not alter the results. Though one study found that the steepest drop-off occurs within 300 feet, pollution levels still decline from 300 to 1,000 feet. (AR: 8711). A second study found concentrations decline primarily in the first 500 feet. (AR: 33993). Respondents cannot claim there is no meaningful difference in the risk at 210 feet (allowed by the Ordinance) to 1,000 feet, where the Multi-Well analysis begins. Because drilling under the Ordinance can occur as close as 210 feet, the HRA has ignored the nearest and most dangerous wells.

Ruling:

The Court finds the Multi-Well HRA to be legally adequate. Arvin contends that the Multi-Well HRA had to analyze a worst-case scenario, regardless of whether that scenario is reasonably foreseeable or likely. CEQA does not require this. "CEQA does not require an agency to assume an unlikely worst-case scenario in its environmental analysis." (*High Sierra Rural Alliance v. County of Plumas* (2018) 29 CA5th 102, 126). Arvin cites no law to support its position that the Multi-Well HRA had to assume a worst-case scenario.

Challenges to the choice of methodology for assessing impacts are reviewed under the substantial evidence standard. (*Sierra Club v. County of Fresno* ("Friant Ranch") (2018) 6 C. 5th 502, 514). Also, not every error or misstatement in an EIR is prejudicial. "…The courts have looked not for perfection but for adequacy, completeness, and a good faith effort at full disclosure." (14 CCR 15151). For prejudicial abuse of discretion to be shown, the EIR must fail to include relevant information that precludes informed decision-making and public participation. (*Mount Shasta Bioregional Ecology Center v. County of Siskiyou* (2012) 210 CA4th 184, 203).

The following information in the record constitutes substantial evidence in support of the SREIR's findings on the Multi-Well HRA:

"The multi-well HRA assumed 48 wells would be drilled in concentric circles around a sensitive receptor. Although 48 wells cannot be drilled and completed simultaneously, that scenario was assumed for illustrative purposes. The results of the multi-well HRA demonstrated that even if it was possible to drill 48 wells in concentric circles in distances of up to a mile around a sensitive receptor, the resulting risk calculated would be 9.3 in one million significantly below the threshold of 20 in one million established by the San Joaquin Valley Air Pollution Control District SJVAPCD for use in permitting and CEQA documents. All modeling input assumptions documentation and modeling files were submitted to and reviewed by SJVAPCD." (AR: 172411).

“The California Air Resources Board (CARB) publishes a model (OFFROAD) which summarizes criteria pollutant emission rates (including PM10) from all off-road engines in the state. This program was used to calculate diesel emission estimates used to prepare the 2015 HRAs.

Since 2015 CARB has revised their OFFROAD model. The current version of the program shows a reduction in diesel exhaust from off-road engines of approximately 48% in California since 2015. Therefore ,if the HRAs were re run in 2020, the previously calculated risk results from 2015 would be expected to reduce by almost half.

Thus merely based on the change in assumptions regarding diesel exhaust if the multi-well HRA were to be remodeled today, resulting risk would be approximately 4.84 in one million This is significantly below the SJVAPCD health risk threshold of 20 in one million.” (AR: 172412).

C. Whether the SREIR Failed to Adequately Mitigate Noise Impacts:

The Appellate Court in this case addressed the issue of thresholds of significance for measuring noise levels:

“Based on the principles adopted in *Berkeley Jets* and *Keep Our Mountains Quiet*, we conclude the question presented in this appeal is whether the County violated CEQA by using a single standard relating to the absolute noise level as a threshold of significance for evaluating all ambient noise impacts. In *Berkeley Jets*, the lead agency adopted a single, fixed threshold of 65 dB CNEL for determining whether the project's noise impacts would be significant. (*Berkeley Jets, supra*, 91 Cal.App.4th at p. 1373, 111 Cal.Rptr.2d 598.) Similarly, in *Keep Our Mountains Quiet*, the lead agency deemed any *increase* in noise to be insignificant so long as the *absolute* noise level did not exceed the standards set forth in the County's general plan and noise ordinance. (*Keep Our Mountains Quiet, supra*, 236 Cal.App.4th at p. 732, 187 Cal.Rptr.3d 96.) In each case, the use of an absolute noise level as the threshold of significance was determined to violate CEQA. We reach the same conclusion here. The EIR's exclusive reliance on the cumulative DNL metric does not provide a complete picture of the noise impacts that may result from the project.

. . .

The cumulative noise level of 65 dBA DNL does not provide a complete and reasonable method of evaluating the significance of noise impacts because an increase in ambient noise of 20 dBA at monitoring site number 12, which was recorded as being 44.8 dBA, would not be a significant, adverse change in the noise environment. In contrast, a 2 dBA increase at monitoring site number 2, which was recorded as being 63.9 dBA, would be considered a significant adverse change in the noise environment. The EIR does not provide a rational explanation for this approach to environmental *change.* Simply saying the cumulative noise level would not be exceeded at site number 12 and would be exceeded at site number 2 does

not provide a rational explanation for why a 20-dBA increase is an insignificant increase at site 12." (*King and Gardiner Farms* at pp. 892-893).

"In summary, we conclude the County's exclusive reliance on a single cumulative DNL metric for determining the significance of the project's noise impacts and the absence of an analysis, supported by substantial evidence[5], for concluding the magnitude of the increase in ambient noise is irrelevant to the significance of the noise impact, does not comply with CEQA." (Id., at p. 894).

Arvin notes that in light of the Appellate Court's ruling, the SREIR revamped its noise analysis by providing that project-related noise should not increase ambient noise levels by more than 5 dB when the existing noise level is below 65 dB. It used a noise metric known as Day-Night Level (DNL) for its analysis, including the 5 dB incremental limit. It applies a 10 dB "penalty" to nighttime noise to account for increased sensitivity to noise during the night. DNL differs from another noise metric known as "equivalent sound pressure level" (Leq) that does not include the 10 dB penalty for nighttime noise.

Arvin's expert claims that the SREIR mixes both metrics with the result that the two MMs addressing noise (MM 4.12-1 and 4.12-2) are inadequate to prevent violations of the 5 dB standard. The County used the DNL metric to measure noise levels. With the aim of preventing a 5 dB increase above the existing level, the County calculated distances using the Leq metric instead of the DNL metric. Because Leq does not include the nighttime penalty, the mitigation trigger distances will allow an increase of over 10 dB in certain quiet locations, which exceed the SREIR's 5 dB. (AR: 209169-72).

The County asserts that in addition to the 65 dB maximum, the SREIR provides that where ambient noise is less than 65 dB, project activities may increase ambient noise by no more than 5 dB, and where ambient noise is at or below 65 dB, the increase can be no more than 1 dB.

The County contends that it followed the Court of Appeal's directive. In addition to the 65 dB maximum, the SREIR uses a two-pronged incremental standard: where the ambient noise is less than 65 dB, project activities may increase the ambient noise by no more than 5 dB, and where the level is at or above 65 dB, the increase can be no more than 1 dB. .[6] While noise levels in the project area varied from 44.8 dB to 67.8 dB, the County assumed for purposes of assessing significance that all sites would have the lowest level measured. If project activities would result in more than a 5 dB increase over 44.8 dB, then the impacts would be potentially significant and require mitigation. (AR: 171633; 208477-80).

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[5] The substantial evidence standard applies to this issue.

[6] "[T]he noise effects of the Project will be subject to both an absolute limit of 65 dB and an incremental increase standard of 5 dB." (AR: 171633).

The County assumed maximum noise levels would be produced continuously over a 24-hour period and conservatively determined the distances for each activity at which no sensitive receptor would experience more than 49 dB of project noise. Those distances were incorporated into MMs 4.12-1and 4.12-2. An applicant must prepare an Acoustic Noise Reduction Study if a sensitive receptor is located within the 49 dB triggering distance, even if existing ambient conditions (without any contribution from project activities) far exceed the 44.9 dB ambient noise assumption. (AR: 171634-51). Under the MMs, applicants may only proceed through the permitting process if they are able to ensure that their activities will exceed neither the County's maximum of 65 dB nor the incremental noise standard.

Ruling:

Though Arvin objects to the use of both metrics, the County's use of both DNL and Leq was rational and supported by substantial evidence. As part of the SREIR, the County responded directly to this issue raised by Arvin:

"Applying the allowable 5 dB increase resulted in a conservative incremental noise limit of 49 dB, the SREIR (October 2020) calculated the construction and operation noise contours for this 49 dB limit for various activities. These contours were based on noise measurements taken during the 2015 Environmental Noise Assessment. The SREIR (October 2020) explains that, for each activity, noise level measurements were taken in a minimum of four different directions from the activity to document the loudest direction of noise. For purposes of modeling, only noise from the loudest direction was used. The models assumed that the activity occurred at maximum volume for 24 hours a day and included no shielding as a result of buildings or other structures that may be in the sound propagation path. The contouring model also assumed atmospheric and topographic conditions conducive to the greatest sound propagation which led to an over-prediction of noise levels by up to 6 dB.

. . .

In light of these highly conservative assumptions, the comments statement that the mitigation screening distances can allow up to a 10 dB increase over DNL and fail to account for nighttime noise impacts is inaccurate. The County's consultant concluded that:

. . .

The Leq metric is appropriate for the screening distances in light of the very conservative measurement and modeling methodologies used by the consultants in the 2015 FEIR. The Leq is the equivalent sound pressure level and is commonly used to measure steady-state sound or noise and as such represents the sound as actually experienced by the sensitive receptor SREIR (October 2020), Vol. 2, Appendix E, at 6.

. . .

…In light of the conservative assumptions used in modeling the propagation of Project-related noise and the use of the lowest measured ambient, the use of the Leq metric will not lead to the 10 dB exceedance predicted by this comment. If a sensitive receptor is located within the

mitigation triggering distance, the applicant is then required to reduce the activity noise to achieve the applicable DNL standard. Regardless, the SREIR (August 2020) determined that noise impacts were significant and unavoidable because, while setbacks and mitigation trigger distances and noise attenuation strategies can reduce the effect of Project construction and operation activities, noise sensitivities vary based on individual tolerances and, depending on individual sensitivity, any incremental increase of that ambient noise level could be considered intrusive by the homeowner, church member, or other user of the sensitive receptor." (AR: 209269).

Based on the above, this is a disagreement between experts over methodology. The law is clear that such disagreement is not the basis for overturning the findings of the SREIR on this issue.

"As explained above, challenges to the scope of an EIR's analysis, the methodology used, or the reliability or accuracy of the data underlying an analysis, must be rejected unless the agency's reasons for proceeding as it did are clearly inadequate or unsupported. (Citation omitted).The issue for us is 'not whether the studies are irrefutable or whether they could have been better. The relevant issue is only whether the studies are sufficiently credible to be considered *as part of* the total evidence that supports the [agency's] finding[s] ....' (Citation omitted).
. . .
When an agency is faced with conflicting evidence on an issue, it is permitted to give more weight to some of the evidence and to favor the opinions of some experts over others. (Citations omitted.) Mere '[d]isagreement among experts does not make an EIR inadequate.' (Citation omitted)." (*Chico Advocates for a Responsible Economy v. City of Chico* (2019) 40 CA5th 839, 851).

Challenges to the choice of methodology for assessing impacts are reviewed under the substantial evidence standard. (*Sierra Club v. County of Fresno* ("Friant Ranch") (2018) 6 C. 5th 502, 514).

D. Whether the SREIR Contains Enforceable Mitigation for PM2.5 Emissions:

The Appellate Court found that mitigation for PM10 emissions cannot count as mitigation for PM2.5 emissions. The Court made the following ruling regarding the 2015 EIR and OG-ERA concerning PM2.5 emissions:

"It is not possible to interpret the oil and gas emission reduction agreement as providing a 'fully enforceable' mitigation measure for PM2.5 because that agreement treats PM2.5 as a subset of PM10 and, as a result, PM2.5 is not subject to any particular requirement. Therefore, we conclude MM 4.3-8 and the related oil and gas emission reduction agreement between the County and Air District does not provide enforceable mitigation of the project's PM2.5 emissions. Because the emissions of PM2.5 exceed the threshold of significance, the mitigation

measures must address this air quality impact. Because MM 4.3-8 does not address PM2.5 separately and the EIR does not provide an explanation for why it is infeasible for that measure to address PM2.5, MM 4.3-8 does not comply with the CEQA requirement for fully enforceable mitigation measures where feasible. (See § 21081.6, subd. (b); Guidelines, § 15126.4, subd. (a)(2).)

. . .

In summary, the County violated CEQA in two ways related to MM 4.3-8. First, the EIR did not discuss the impact of the measure on PM2.5 emissions or, alternatively, provide a rational explanation for why there is no separate discussion of the measure's impact on PM2.5 emissions. Second, MM 4.3-8 does not provide for enforceable mitigation ofPM2.5 emissions, and there is no finding that mitigation of this specific pollutant was not feasible. These deficiencies must be remedied on remand." (Slip Op. p. 73).

Arvin claims that the County did not address the deficiencies in the PM2.5 analysis identified above, but made a "meaningless" wording change by simply referencing PM2.5 in MM 4.3-8. This MM now lists PM2.5 as one of several pollutants for which applicants must pay fees to fully offset their effect. (AR: 171317). However, as before, the mitigation is to be achieved via an agreement with the Air District. That agreement (OG-ERA) still treats PM2.5 as a subset of PM10. The agreement remains the same and has not been updated or changed in any way. Hence, there is no enforcement mechanism to implement mitigation of PM2.5 emissions. The County must enter into an agreement with the Air District to establish a program for spending the fees to accomplish the offsets of PM2.5.

RPIs claim that neither this Court nor the Appellate Court required the County to amend the OG-ERA. It is the MM, not the OG-ERA, that must provide an enforceable requirement to mitigate PM2.5 emissions. RPIs argue that even if the OG-ERA should have been amended, such failure is not prejudicial. "In order to be prejudicial, an error or omission in the EIR must be such as would have precluded informed decision-making and informed public participation. (Citation omitted)." (*Mount Shasta Bioregional Ecology Center v. County of Siskiyou* (2012) 210 CA4th 184, 203).

Ruling:

The Court finds that the County's failure to amend the OG-ERA is prejudicial error. The OG-ERA has not been amended to differentiate PM2.5 and PM10. (AR: 172424-49). The heart of the problem—conflation of PM2.5 and PM10 in the OG-ERA—remains unchanged. As the Appellate Court stated:

"It is not possible to interpret *the oil and gas emission reduction agreement* as providing a 'fully enforceable' mitigation measure for PM2.5 because that agreement treats PM2.5 as a subset of PM10 and, as a result, PM2.5 is not subject to any particular requirement. Therefore, we

conclude MM 4.3-8 *and the related oil and gas emission reduction agreement* between the County and Air District does not provide enforceable mitigation of the project's PM2.5 emissions." (Emphasis added). (Slip Op. p. 73).

While the Court of Appeal did not specify the precise means of addressing the deficiencies in former MM 4.3-8 and the OG-ERA, it would be ineffective and arbitrary for the County to amend the MM to include PM2.5 while not including PM2.5 in the agreement that governs the measure's implementation. "A public agency shall provide that measures to mitigate or avoid significant effects on the environment are fully enforceable through permit conditions, *agreements*, or other measures." (Pub. Res. Code 21081.6(b); emphasis added).

E. Whether the Analysis and Mitigation of Water Supply Impacts is Adequate under CEQA:

The Court of Appeal in this case found that the EIR improperly deferred formulation of mitigation measures for water supply impacts and improperly delayed implementation of mitigation measures for water supply impacts. The Court also ruled that insufficient evidence supported County's implied finding that all feasible measures to mitigate water supply impacts had been adopted and that the County's failure to disclose specific information about mitigation measures and the extent of water supply impacts violated CEQA.

In the Second Peremptory Writ of Mandate, this Court directed that:

"The revised EIR also must update the original EIR's analysis of water supply impacts to address significant new baseline information relating to groundwater sustainability agencies and groundwater sustainability plans, and new legislation from 2017 requiring applicants for new water wells to provide more information and greater transparency about the wells' water use. The County also must consider whether the updated information warrants an analysis of impacts to water supplies at a level other than the three subareas used in the original EIR."

Arvin notes that a lead agency must adopt all feasible mitigation to avoid or reduce significant impacts and that if it rejects measures as infeasible, the rejection must be supported by substantial evidence. Here, the SREIR violates CEQA because its reasons for rejecting two mitigation measures proposed by Arvin are not supported by substantial evidence.

First, Arvin argues that the SREIR should have banned use of domestic quality water for steam generation associated with enhanced oil recovery operations and instead required the use of treated oilfield water. The SREIR concluded that transporting this water was infeasible but this is speculation. Second, the County failed to justify rejecting Arvin's proposal that the County set up a fee program for operators to pay a fair share of mitigation costs to Groundwater

Sustainability Agencies (GSAs). The California Supreme Court found a very similar program feasible in the case of *City of Marina v. Board of Trustees of Cal. State Univ.* (2006) 39 C.4th 341.

Arvin also claims that the SREIR violates CEQA because it did not adequately mitigate water impacts to disadvantaged communities. While the SREIR purports to mitigate impacts through a grant program, the analysis is insufficient because the SREIR does not describe baseline conditions in disadvantaged communities, does not adequately describe cumulative impacts to those communities (and did not define "disadvantaged communities"), and the proposed mitigation (MM 4.17-5) is insufficiently tied to the impacts.

The County asserts that Arvin has not disputed that the County has complied with the Second Writ. Instead, Arvin faults the SREIR for determining that M and I water use in steam enhanced oil recovery (EOR) could not be completely replaced by produced water.

The County argues that Arvin's claim is untimely because the feasibility of using additional treated produced water for steam EOR was discussed in the 2015 EIR (AR: 1740-42, 10218-21, 10316-17). Arvin declined to address this issue in the 2015 litigation and is barred from doing so now.

Further, the County contends that Arvin's claim is incorrect because existing infrastructure is not adequate to supplant M and I water with produced water. The County lacks produced water facilities with sufficient capacity to replace M and I water. Many operators lack the technological expertise and economic capacity to use treated water to offset M and I water. (AR: 171553-55).

As to Arvin's proposed fee program, the County argues that neither CEQA nor the Marina case require a lead agency to pay for actions within the exclusive authority of another agency. While the SREIR provides substantial evidence that GSP's effectiveness is highly uncertain, project applicants have an independent duty to comply with any mandates from the relevant GSA. Here, the GSAs have exclusive authority to implement SGMA, and State law has provided GSAs independent authority to impose fees necessary to implement the GSAs. (Water Code sec. 107302, et seq.). Here, unlike in *Marina,* there is substantial evidence in the SREIR that the effectiveness, feasibility, and cost of implementing project area GSPs is uncertain.

Concerning impacts to disadvantaged communities, the County argues that CEQA does not require consideration of DACs or other social effects. (14 CCR 15064(e), 15131(b), 15382). Nevertheless, the SREIR found that GSPs may not adequately consider the drinking water concerns of DACs, and it therefore provided funding for drinking water well and system improvements that benefit these communities. The SREIR sets forth MM 4.17-15 which requires applicants pay a per-well mitigation fee. Money collected from the fees will be administered by the Kern County Health Services Department. MM 4.17-5 requires that money

be disbursed in the form of grants for design and construction of improvements to drinking water wells or systems that serve DAC. (AR: 171563).

In its reply, Arvin argues that the standard of review for the County's failure to set up a fee program is de novo, not substantial evidence as claimed by the County. "At issue, rather, are the Trustees' findings that mitigation is infeasible and that mitigation is not their responsibility. These findings depend on a disputed question of law—a type of question we review de novo." (*Marina*, at p. 366).

Arvin asserts that Respondents incorrectly argue that the County need not contribute financially to GSA's mitigation efforts, claiming that GSAs have exclusive jurisdiction for groundwater impacts. Here, there is concurrent jurisdiction. So long as a lead agency may pay some of the costs of planned mitigation measures that qualifies as concurrent jurisdiction. (*Marina*, at p. 366).

While Respondents argue that the County need not contribute to GSAs because operators could be assessed fees directly by the GSAs in the future, Arvin claims that this is speculative and does not discharge the County's CEQA obligation to mitigate the Ordinance's significant impacts to the water supply. Respondents argue that the County cannot rely on GSAs to satisfy the County's duty to mitigate because it is uncertain whether mitigation will occur. However, GSAs are tasked with eliminating chronic lowering of groundwater levels, and it is presumed that GSAs will follow the law and therefore mitigation can be expected to occur. Respondents' argue that it is speculative to calculate a fair-share fee. The information that the County has is more than enough to develop an estimated fee. An estimate is all that is required.

The SREIR concludes that it is not feasible to ban the use of M and I water for steam generation. Arvin argues that this conclusion is not supported by substantial evidence. Respondents claim that there is inadequate infrastructure to transport treated produced water to certain oilfields, but the SREIR fails to establish how this lack of infrastructure makes it easier to transport M and I water than oilfield-produced water. The SREIR concludes that truck trips would be required to deliver produced water (AR: 171743), but it also notes that operators receive M and I water from truck-mounted tanks, among other sources. (AR: 171685).

Concerning disadvantaged communities, Arvin argues that a decline in water levels is a physical impact to the environment, regardless if it impacts disadvantaged communities. "'Environment' means the physical conditions which exist within the area which will be affected by a proposed project, including…water…" (Public Resources Code section 21060.5). In addition, the SREIR concludes that the impacts of declines in water supply are cumulatively significant to disadvantaged communities. (AR: 171563). Further, the SREIR fails to adequately describe baseline conditions in disadvantaged communities, other than to note that these communities are considered beneficial users of groundwater under SGMA. (AR: 171354).

The parties disagree whether *City of Marina v. Board of Trustees of Cal. State Univ.* (2006) 39 C.4th 341 controls in this matter. The following is a summary of that case.

The Fort Ord Reuse Authority (FORA) challenged an EIR prepared by the Board of Trustees. The EIR concerned the Trustees' plan to expand a small campus into a large campus. The Trustees refused to share the cost of certain infrastructure improvements proposed by FORA. FORA challenged the Trustees' decision to certify the EIR despite the remaining, unmitigated effects as an abuse of discretion under CEQA. The Supreme Court ruled that the Trustees abused their discretion.

To provide a government for the former base and to manage its transition to civilian use, the Legislature enacted the Fort Ord Reuse Authority Act. The charter for Fort Ord's future use and development is the statutorily mandated Base Reuse Plan, which FORA adopted. Pursuant to the plan, FORA would make land available over time for a wide range of civilian uses, including residential housing, business, light industry, research and development, visitor services, recreation and education. As the Legislature directed, FORA prepared a capital improvement plan identifying public facilities that need construction or improvement.

Together with the Master Plan for CSU Monterey Bay, the Trustees prepared and certified an EIR. As part of its long-term planning process, FORA adopted the assumption that that CSUMB would pay, as its share of the cost, infrastructure improvements. The Trustees were willing to contribute for improvements in water supply, drainage and wastewater management but found that the mitigation of CSUMB's effects on drainage, water supply, and wastewater management were FORA's responsibility. The Trustees concluded that the Legislature in effect authorized FORA to impose fees on CSUMB for the purposes mentioned in chapter 13.7 of the Government Code (e.g., water, drainage and sewage; see *id.,* § 54999.1, subd.(d)) but not for any other purposes not mentioned (e.g., roads and fire protection). Any payment to FORA for a purpose not mentioned in the section, the Trustees concluded, even a voluntary payment made in order to mitigate CSUMB's environmental effects, would amount to an assessment prohibited by the state Constitution.

The Trustees argued that the state Constitution prohibited them from voluntarily contributing funds to FORA as a form of mitigation. The Court found that "[t]he plain language of the California Constitution does not support the Trustees' position that voluntary mitigation payments are impermissible." (Id., at p. 701).

The Court found that one of the issues was the Trustees' findings that mitigation was infeasible and that mitigation was not their responsibility. "These findings depend on a disputed question of law—a type of question we review de novo." (Id., at p. 701).

Later in the opinion, the Court posed the question whether mitigation was exclusively the responsibility of FORA:

"Certainly FORA has responsibility for implementing the infrastructure improvements it has proposed. (Citation omitted). Just as certainly, however, the FORA Act contemplates that the costs of those improvements will be borne by those who benefit from them. (See *ibid.*) A finding by a lead agency under Public Resources Code section 21081, subdivision (a)(2), disclaiming the responsibility to mitigate environmental effects is permissible only when the other agency said to have responsibility has *exclusive* responsibility." (Id., at p. 708).

"The Trustees' [] argument—that they lack the power to construct infrastructure improvements away from campus on land they do not own and control—is beside the point. Certainly the Trustees may not enter the land of others to widen roads and lay sewer pipe; CEQA gives the Trustees no such power. (See Pub. Resources Code, § 21004['[i]n mitigating or avoiding a significant effect of a project on the environment, a public agency may exercise only those express or implied powers provided by law other than this division.']).) CEQA does not, however, as we have explained, limit a public agency's obligation to mitigate or avoid significant environmental effects to effects occurring on the agency's own property. (See Pub. Resources Code, §§ 21002.1, subd. (b), 21060.5.) CEQA also provides that '[a]ll state agencies ... shall request in their budgets the funds necessary to protect the environment in relation to problems caused by their activities.' (*Id.,* § 21106.) Thus, as we have also explained, if the Trustees cannot adequately mitigate or avoid CSUMB's off-campus environmental effects by performing acts on the campus, then to pay a third party such as FORA to perform the necessary acts off campus may well represent a feasible alternative." (Id., at p. 709).

This Court finds that Marina is factually and legally distinguishable from the case at bar, as it involves circumstances and statutes that are significantly different than those at issue here.

Ruling:

Arvin's first argument (that the SREIR should have banned use of domestic quality water for steam generation associated with enhanced oil recovery operations and instead required the use of treated oilfield water) is barred by res judicata. The feasibility of using additional treated produced water for steam EOR was discussed in the 2015 EIR (AR: 1740-42, 10218-21, 10316-17). Arvin declined to address this issue in the 2015 litigation and is barred from doing so now.

"Res judicata or claim preclusion precludes the re-litigation of a cause of action that previously was adjudicated in another proceeding between the same parties or parties in privity with them.(Citation omitted). Res judicata applies if (1) the decision in the prior proceeding is final and on the merits; (2) the present proceeding is on the same cause of action as the prior proceeding; and (3) the parties in the present proceeding or parties in privity with them were

parties to the prior proceeding. (Citation omitted). Res judicata bars the litigation not only of issues that were actually litigated but also issues that could have been litigated. (Citation omitted)." (*Federation of Hillside and Canyon Associates v. City of Los Angeles* (2004) 126 CA4th 1180, 1208).

Arvin's second argument (that the County failed to justify rejecting Arvin's proposal that the County set up a fee program for operators to pay a fair share of mitigation costs to GSAs) also fails. Neither CEQA nor the *Marina* case require a lead agency to pay for actions within the exclusive authority of another agency. While the SREIR provides substantial evidence that GSP's effectiveness is highly uncertain, project applicants have an independent duty to comply with any mandates from the relevant GSA. Here, the GSAs have exclusive authority to implement SGMA, and State law has provided GSAs independent authority to impose fees necessary to implement the GSAs. (Water Code sec. 107302, et seq.).

Each GSA is "presumed to be the exclusive groundwater sustainability agency" for the area within its jurisdiction. (AR: 171353-57), a principle stated in each GSP in the project area. (AR: 171355). Oil and gas operators within a GSP are subject to SGMA fees determined by GSAs using the GSAs' independent SGMA funding authority. (AR: 209552-54). Unlike the infrastructure projects in *Marina*, there is no question that the GSAs have independent authority to pursue a fair-share fee if one is deemed necessary to implement SGMA. Here, unlike in Marina, there is substantial evidence in the SREIR that the effectiveness, feasibility, and cost of implementing project area GSPs is uncertain.

Concerning impacts to disadvantaged communities, the Court finds that the analysis in the SREIR *fails* to comply with CEQA. While the County is correct that there is no requirement in CEQA to perform an analysis on impacts to low-income or disadvantaged communities, once the County committed to the analysis and imposed a mitigation fee to fund improvements to drinking water wells or systems that serve DACs, it had an obligation to make sure its analysis and findings complied with the requirements of CEQA.

An EIR "must delineate environmental conditions prevailing absent the project, defining a 'baseline' against which predicted effects can be described and quantified." (*Neighbors for Smart Rail v. Exposition Metro Line Authority* (2013) 57 C. 4th 439, 447). Here, the SREIR discloses nothing about baseline water supply conditions in disadvantaged communities. Failure to describe the environmental setting violates CEQA as a matter of law. (*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 CA4th 713, 729).

Further, the SREIR fails to disclose anything about the nature or magnitude of impacts to disadvantaged communities. While it does assert that the impacts are cumulatively significant, a finding of significance "does not excuse the EIR's failure to reasonably describe the nature

and magnitude of the adverse effect." (*Sierra Club*, at p. 514). It is unclear what types of impacts the County is identifying.

F. Whether the SREIR Failed to Analyze Significant New Information about the Lizard:[7]

Arvin asserts that the 2015 EIR did not and could not analyze specific impacts to the lizard because of a lack of information. Modeling information for this species was not available, and the EIR therefore lumped it with other lizard species. In 2019, a study commissioned by the California Department of Fish and Wildlife found that this type of lizard inhabited only four sites in California, two of which are within the boundaries of active Kern County oil fields. (AR: 203314, 275889-90). As of 2020, the species was proposed for formal endangered species status by the authors of the study. (AR: 203325).

Information that was not available in 2015 shows significant and more severe impacts to the lizard. The range of the lizard is very limited and 98% of its habitat is open to oil and gas operations. (AR: 275898). The EIR indicated that the silvery legless lizard, a different and more widespread species, will lose 15% of its habitat because of the Ordinance. (AR: 1231). Unlike this species, the lizard is threatened by localized extinction due to oil and gas activities developed under the Ordinance. (AR: 275912-13).

According to Arvin, the above constitutes "new information" that was not available in 2015 and triggers the need for further environmental review. (14 CCR 15162).[8]

The County argues that the only new information or changed circumstances Arvin identified is information on the lizards range. The range has expanded. (AR: 203311). The maps of the previous study and the 2019 study show the increase in range. (AR: 203307, 203312).

The County notes that the 2015 EIR prescribed a minimum buffer zone for all legless lizards (including the lizard in question, the Temblor Legless Lizard). (AR: 208694-95). With mitigation, impacts were found to be less than significant. None of the findings of the 2019 study constitutes new information or changed circumstances.

Ruling:

The Court finds no CEQA violation in the SREIR's analysis of impacts to the lizard. This is so because the Court believes the information in the 2019 study does not meet the definition of either "new information" or "changed circumstances" set forth in 14 CCR 15162. That section provides, in pertinent part, as follows:

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[7] Unless otherwise noted, references to the "lizard" are synonymous with the Temblor Legless Lizard.

[8] Arvin argues that the need for further environmental review is also triggered under the "substantial changes" portion of section 15162.

"(a) When an EIR has been certified or a negative declaration adopted for a project, no subsequent EIR shall be prepared for that project unless the lead agency determines, on the basis of substantial evidence in the light of the whole record, one or more of the following:
…
(2) Substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions of the previous EIR or negative declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects; or
(3) New information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified as complete or the negative declaration was adopted, shows any of the following:
(A) The project will have one or more significant effects not discussed in the previous EIR or negative declaration;
(B) Significant effects previously examined will be substantially more severe than shown in the previous EIR;
(C) Mitigation measures or alternatives previously found not to be feasible would in fact be feasible and would substantially reduce one or more significant effects of the project, but the project proponents decline to adopt the mitigation measure or alternative; or
(D) Mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative."

The Court finds that none of the conditions of section 15162 has been met.

The "new information" criteria that are relevant here are subsections (3)(A) and (B). In order to trigger the need for supplemental environmental review, the new information must be of "substantial importance" and show any of the following: "significant effects" not discussed in the previous EIR or "significant effects" previously examined that will be substantially more severe than in the earlier EIR.

The Court finds that the "new information" here is the finding of the 2019 study that expands the range of the lizard. The 2015 EIR identified the lizard as a species that would be impacted by the project and prescribed a minimum distance buffer zone for the lizard and other sensitive reptile species. To clarify that the lizard was included in MM 4.4-3 (minimum distance buffer zone), the SREIR revised the MM to apply to "all legless lizards." (AR: 87, 208694-95). The expanded range of the lizard is not "new information of substantial importance," especially in light of the fact the range of the lizard was already assumed to be in the area of the project. Nor does the 2019 study constitute "substantial changes [] with respect to the circumstances under which the project is undertaken which will require major revisions of the previous EIR." No

circumstances have changed other than the range of the lizard. The conclusions of this Court are made clear in the following excerpt from the record:

"The 2015 FEIR found that the silvery legless lizard (Anniela pulchra), Bakersfield legless lizard (A grinnelli), and Temblor legless lizard (A alexanderae) all had the potential to occur within the Project Area. See SREIR October 2020 Vol 3 at 4.4-89. Although little was known about the Temblor and Bakersfield legless lizards at the time the 2015 FEIR was published, the 2015 FEIR conservatively considered those species as special status due to the status of the silvery legless lizard as a California Species of Special Concern. See SREIR October 2020 Vol 3 at 4.4-89. As described under Impact 441 of the 2015 FEIR, potential impacts to the three species of legless lizard were evaluated based on their potential occurrence in each Project Area tier and Subarea. *Specifically, the 2015 FEIR found that the silvery legless lizard had the potential to occur within Tiers 2 and 3 of all Subareas and the Bakersfield legless lizard and Temblor legless lizard had the potential to occur within Tiers 1-4 of all Subareas*. See SREIR (2020) vol. 3, at 4.4-73, 78.

"The 2015 FEIR modeled silvery legless lizard habitat by tier and Subarea and provided summaries of potential impacts to silvery legless lizard habitat by Project Subarea and tier. See SREIR October 2020 Vol. 3 at 4.4-90, Figure 4.42-8; see also SREIR (October 2020) Vol 3 at 4.4-190-192. The 2015 FEIR also analyzed the amount of total modeled silvery legless lizard habitat that could be impacted by the projected annual level of disturbance from the Project over 25 years. See SREIR October 2020 Vol 3 at 4.4-198. The 2015 FEIR assumed that based on Papenfuss and Parham 2013 all legless lizards expected to occur within the Project Area would be Anniela pulchra, A grinnelli, or A alexanderae. Given the extremely limited distribution information available for A grinnelli and A alexanderae, all three species were discussed together. In particular URS statistical based model data for A pulchra had good predictive power and included all three species of legless lizard. See SREIR (October 2020) Vol.3 at 4.4-89, 90. *While Parham et al (2019) expanded the ranges of A alexanderae, A campi, and A stebbinsi, the study does not indicate that habitat for A campi and A stebbinsi is primarily within Kern County or that habitat for any of the five Anniela species within Kern County is outside of the Subareas or tiers identified and studied in the 2015 FEIR.* Nor does the report indicate as the comment suggests that some Anniela species may be disproportionately harmed due to their habitats proximity to projected oil and gas activity. For A campi Parham et al 2019 reported that modeling was problematic due to the small number of collected samples. For A stebbinsi the study's primary result was expanding the species range in Ventura and Santa Barbara Counties. Given the limited information and need for further study identified in Parham et al 2019, it remains appropriate to treat the legless lizard species together.

…In response to the comment, MM 443 has been clarified to state that the buffer zone is for all legless lizards." (AR: 208694; emphasis added).

"Once a project has been subject to environmental review and received approval, section 21166 and CEQA Guidelines section 15162 limit the circumstances under which a subsequent or supplemental EIR must be prepared. These limitations are designed to balance CEQA's central purpose of promoting consideration of the environmental consequences of public decisions with interests in finality and efficiency." (*Friends of College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 C. 5th 937, 949).

G. Whether the Refusal to Translate Notices or Portions of the SREIR into Spanish Was Improper:

Arvin argues that in spite of the County's large Spanish speaking population, the County refused to translate any CEQA notices or documents, noting that CEQA and its Guidelines do not require translation. Though the County provided close captioning and two-way interpretation in Spanish, the failure to provide notices in Spanish impeded residents from learning about these options. Further, attendees at workshops were directed to read the SREIR (in English) for substantive information.

The County notes that the Appellate Court ruled there is no legal requirement for interpreters or to translate documents. Though not required to do so, the County provided interpretation and translation services at workshops and at the Planning Commission and Board of Supervisors hearings on the SREIR.

Ruling:

This issue has already been decided by the Court of Appeal and is now barred by res judicata. The Court found as follows:

"We agree with the trial court's determinations. Although translations would be commendable, applicable law contains no express requirements for interpreters or translation of documents. Second, such a mandatory requirement cannot be implied. (§ 21083.1.) Consequently, the trial court correctly decided CEQA, the Guidelines, and other applicable laws did not require the County to provide interpreters or translations of documents." (Slip Op. p. 125).

H. Whether the Statement of Overriding Considerations (SOC) Is Invalid:

Both KGF and Arvin discuss the SOC in their opening briefs. The County responds to their arguments in its opposition to KGF. (In its opposition to Arvin, the County incorporates by reference its response to KGF). KGF included a discussion of the SOC in its reply brief.

KGF argues that the SOC is invalid because the County rejected several feasible mitigation measures that were available to reduce the impacts of farmland conversions.

First, the vagueness of the legacy equipment removal measure, and the County's failure to gather relevant data about its efficacy, produced an informational deficiency that "undermines the foundation upon which the statement of overriding considerations rests," thereby requiring the Override Statement to be set aside as a matter of law. (*King and Gardiner Farms* at p. 870).

Second, the SOC touts the benefits of oil drilling without a calculation of the project's costs. KGF argues that the Override Statement ignores the economic consequences of destroying thousands of acres of farmland, negative economic consequences of drilling on surrounding property values, and the economic costs of air pollution on health care, worker productivity and lower agricultural yields. While the SOC focuses on the gross domestic product ("GDP") that measures the value of oil and gas extracted in Kern County, "most of this value flows to outside investors in large multinational corporations." The County's claim that expanded oil production will provide energy independence ignores the fact that California policy is focused on reducing petroleum demand to avoid impacts from climate change and end the issuance of new hydraulic fracturing permits.

Lastly, KGF argues that the Court of Appeal addressed the 2015 Ordinance's primary purpose. "The Ordinance's primary purpose is the acceleration of oil and gas development and the economic benefits that might be achieved by that development. We identify this as the primary purpose because alternatives that served this purpose less effectively were rejected as infeasible." (*King and Gardiner Farms* at p. 898). The 2021 Ordinance has the same purpose. (AR: 171031). The Ordinance was created to make oil and gas drilling easier, not to protect the environment.

Arvin argues that the SOC is devoid of information that explains how the Ordinance itself will affect the industry's economic viability. It makes no effort to identify the benefits of the Ordinance. Second, the SOC fails to identify information about the Ordinance's economic costs. Third, the SOC fails to adequately describe the Ordinance's purported economic benefits. Two expert reports explain these deficiencies. (AR: 268848-60; 268509-20). The SOC ignores the fact that the oil industry's GDP and income to Kern County residents from that industry do not correlate. This is due to the fact that most of the value created by extracted oil and gas goes to investors outside the County. (AR: 268512-13).

The County asserts that the challenges to the SOC are barred by res judicata since they could have been raised, but were not, in the 2015 litigation. The County claims the only differences between the prior SOC and the current one is that the latter updates data.

The County points out that the 2021 SOC describes 21 significant environmental impacts of the project that cannot be feasibly reduced or avoided to a less than significant level and 6 project

benefits each of which, in the Board's judgment, constitutes a separate basis for approval that outweighs all the significant effects. (AR: 267289-95).

Given the expert evidence of the industry-wide economic, tax, and employment benefits conferred on Kern County, the increase and acceleration of oil and gas production will result in a commensurate increase and acceleration of the economic, tax, and employment benefits described in the 2021 SOC. Therefore, there is substantial evidence to support the SOC's findings that the project will increase output, generate money in the community, secure a tax base, and provide high-paying jobs. (AR: 267293-94).

When the 2015 Ordinance was in effect from December 2015 to March 2020, fee programs to fund air pollution reduction, biological resource mitigation, education programs, rural crime prevention, and roadway maintenance generated about $135 million to the County and Air District. Therefore, the Board was well within its discretion when it made the policy determination that these benefits, which would resume upon adoption of the 2021 Ordinance, outweighed the project's environmental impacts. (AR: 265637-38; 175103, 175112, 175176, 175184).

The County argues that Petitioners are incorrect that the SOC fails because it does not include an accounting of the economic consequences of agricultural land conversion, air pollution, depressed property values and taxes. The County is not legally required to do so. Public Resources Code section 21081(b) provides that an SOC need only include a finding "that specific overriding economic, legal, social, technological, or other benefits of the project outweigh the significant effects on the environment" without regard to the economic cost of such effects. An SOC is "not required to contain a quantitative fiscal analysis of the economic costs and benefits of the project." (*Woodward Park Homeowners Assn., Inc. v. City of Fresno* (2007) 150 CA4th 683, 720).

The 2021 SOC explains, based on substantial evidence, that the 2021 Ordinance will reduce California's dependency on foreign oil by facilitating oil production in a manner that is lower in cost and has fewer environmental effects when compared to imported oil. (AR: 267294, 267303). "It is not [a] court's place to second-guess [a] discretionary policy determination, but to uphold it if substantial evidence supports its underlying findings." (*Cherry Valley Pass Acres and Neighbors v. City of Beaumont* (2010) 190 CA4th 316, 359). While it is true that the State is transitioning from fossil fuels (Executive Order N-79-20), the Executive Order notes that "demand for oil has not [] declined" since 1985 and recognizes that there will be a period of "transition away from fossil fuels." Thus, there is no evidence to support the claim that the project "directly conflicts" with the Executive Order.

The Board found the project would "further the Goals and Objectives of the General Plan by enhancing the economic stability of the oil and gas industry in the County while ensuring the

environmental protection of Kern communities through local permitting." (AR: 267295). General Plan policy is to "[e]ncourage safe and orderly energy development within the County" (AR; 267294), and the Board found that adopting the 2021 Ordinance would further that goal. A project's promotion of local goals and policies is a legitimate SOC benefit that must be upheld when supported by substantial evidence. In *Cherry Valley*, the Court upheld an SOC finding that the project would promote the general plan policy of developing new housing. (*Cherry Valley* at p. 358).

In its reply, KGF claims that res judicata and collateral estoppel do not bar its claim on the insufficiency of the Override Statement. The 2021 Statement is a new balancing of benefits and harms where the County for the first time identified new impacts to agriculture, noise, and public health as significant and unavoidable.

The Appellate Court ordered the County to set aside certification of the EIR, and set aside the Ordinance and the Override Statement. (*King and Gardiner Farms*, at p. 901). As a result, the 2021 Override Statement is based on the 2021 SREIR which identified new significant and unavoidable impacts. (Compare AR: 168497, 168506, and 168000 to AR: 62, 71, 161).

KGF asserts that where an agency has erroneously failed to analyze or mitigate a significant impact, it follows that the Override Statement is invalid. (*City of Marina v. board of Trustee of California State University* (2006) 39 C4th 341, 368-369). Here, the SREIR's conclusion that there is no further feasible mitigation for impacts on agriculture, air pollution, water supply, and noise is unfounded. Because these errors violate CEQA, the SOC is invalid as a matter of law.

KGF claims that the Override Statement is also invalid because it conflates the project's purported benefits with those of the entire oil and gas industry and fails to articulate any basis for concluding that the project will confer particular benefits. The County approved a project aimed at streamlining permitting without specifying what specific benefits would occur as a result of the Ordinance.

The Override Statement is legally invalid because it never identifies the specific benefits of the Ordinance. It merely addresses general economic benefits for the entire industry.

Respondents' claim that the Ordinance will enhance environmental protections is also unfounded. The ministerial permits issued under the Ordinance are intended to bypass regulatory processes and invoke a presumption of CEQA compliance. (AR: 8587-88). The project's mitigation in the form of fees is not a benefit, as claimed by Respondents, but simply a way to reduce project harms.

Ruling:

The Court will first discuss the applicable law and then address the arguments on the merits.

"When the lead agency approves a project which will result in the occurrence of significant effects which are identified in the final EIR but are not avoided or substantially lessened, the agency shall state in writing the specific reasons to support its action based on the final EIR and/or other information in the record. The statement of overriding considerations shall be supported by substantial evidence in the record." (14 CCR 15093(b)).

"[A]dopting a statement of overriding considerations does not negate the statutory obligation to implement feasible mitigation measures" since "[e]ven when a project's benefits outweigh its unmitigated effects, agencies are still required to implement all mitigation measures unless those measures are truly infeasible." (*King and Gardiner Farms*, at p. 852). Consequently, courts will invalidate any SOC purporting to override impacts that could have been feasibly mitigated. (*City of Marina v. Board of Trustees of Cal. State Univ.* (2006) 39 C.4th 341, 368-369).

"A statement of overriding considerations may be set aside if the agency has failed to consider feasible mitigation or improperly determined mitigation to be infeasible. (*City of San Diego v. Board of Trustees of Cal State Univ.* (2015) 61 C. 4th 945, 955)… [Such statement] cannot cure fundamental defects in an EIR's discussion of mitigation. (*King and Gardiner Farms* at p. 866)." (K and Z, section 17.33).

Reviewing courts defer to the policy judgments in an SOC, "recognizing that determining a project's benefits and the weight to be given them, when balanced against the project's environmental impacts, is highly discretionary. CEQA and CEQA Guidelines reflect this by referring broadly to 'economic, legal, social, technological or other' project benefits as possible bases for a statement of overriding considerations. (Public Resources Code sec. 21081(b), 14 CCR 15093(a)." (K and Z, section 17.34).

However, an SOC "is legally inadequate if it does not accurately reflect the significant impacts disclosed by the EIR and mischaracterizes the relative benefits of the project. (*Woodward Park Homeowners Assn. v. City of Fresno* (2012) 150 CA4th 683, 717)." (Id).

In this case, the Court of Appeal has found that the 2015 EIR's "disclosures about the mitigation measures were inadequate and, as a result, the adoption of a statement of overriding considerations did not render harmless these failures to comply with CEQA." (*King and Gardiner Farms*, at p. 829).

"The Board's adoption of the statement of overriding considerations was based on the EIR, which omitted information necessary to understanding both the mitigation measures and the water supply impacts being overridden. This deficiency in the information provided prevents the adoption of the statement from curing the defects in the mitigation measures or rendering

them nonprejudicial. Instead, the informational deficiency undermines the foundation upon which the statement of overriding considerations rests. Consequently, the defects in the EIR's discussion of mitigation measures must be remedied and a revised EIR considered by the Board before it adopts any statement of overriding consideration." (Id. at p. 870).

This Court finds that res judicata does not apply. The SREIR did not simply update the 2015 EIR. It attempted to address the insufficiencies in the EIR identified by this Court and the Appellate Court. Only after discussing these issues did the SREIR produce an SOC. The new SOC must be analyzed separate and apart from the earlier SOC.

The Court recognizes that to the extent this Court finds all feasible mitigation measures have not been not been implemented, the SOC must be invalidated. (*King and Gardiner Farms* at p. 852, 866; *Marina* at pp. 368-369). However, if all feasible mitigation measures have been implemented, the Court will defer to the policy judgments of the County reflected in the SOC, unless the SOC does not accurately reflect the significant impacts disclosed by the EIR and mischaracterizes the relative benefits of the project. (*Woodward Park Homeowners Assn. v. City of Fresno* (2012) 150 CA4th 683, 717). (K and Z, section 17.34).

"A statement of overriding considerations is similar to findings in an EIR in that it needs to be supported by substantial evidence in the record….[T]he statement's status as a policy judgment does not insulate it from CEQA's central demand that environmental decisions be made after the public and decision makers have been informed of their consequences and the reasons for and against them. The statement's purposes are undermined if its conclusions are based on misrepresentations of the contents of the EIR or it misleads the reader about the relative magnitude of the impacts and benefits the agency has considered." (*Woodward Park*, at pp. 717-718).

Here, the Court has found that not all feasible mitigation measures have been implemented. (See above rulings on legacy equipment removal at a 1:1 ratio, the SREIR's failure to consider Arvin's proposed off-site legacy equipment removal, and the failure to adequately analyze water supply impacts to disadvantaged communities). Therefore, the failure to properly address these mitigation measures renders the SOC inadequate.

DISPOSITION:

Judgment and other appropriate relief shall be entered consistent with the rulings herein. Costs of suit and attorneys' fees may be claimed in accordance with applicable law and rules of court.

A Case Management Conference is hereby scheduled at 8:30 a.m. on July 14, 2022, in Department 8 of the Kern County Superior Court for purposes of discussing remedies and relief.

The parties are ordered to meet and confer in good faith prior to the Case Management Conference to try to derive mutually agreeable language for the judgment, the (third) writ, and any other appropriate order. If the parties are able to come to an agreement and submit to the Court an acceptable proposed judgment and writ, then the Court will be inclined to vacate the Case Management Conference.

FUTURE HEARINGS:

Case Management Conference: July 14, 2022 at 8:30 AM in Department 8

CERTIFICATE OF MAILING

The undersigned, of said Kern County, certify: That I am a Deputy Clerk of the Superior Court of the State of California, in and for the County of Kern, that I am a citizen of the United States, over 18 years of age, I reside in or am employed in the County of Kern, and not a party to the within action, that I served the ***Minutes dated June 07, 2022*** attached hereto on all interested parties and any respective counsel of record in the within action by depositing true copies thereof, enclosed in a sealed envelope(s) with postage fully prepaid and placed for collection and mailing on this date, following standard Court practices, in the United States mail at Bakersfield California addressed as indicated on the attached mailing list.

Date of Mailing: June 07, 2022

Place of Mailing: Bakersfield, CA

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

Tamarah Harber-Pickens
CLERK OF THE SUPERIOR COURT

Date: June 07, 2022

By: *Stephanie Lockhart*
Stephanie Lockhart, Deputy Clerk

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