SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF VENTURA

CALIFORNIA CONSTRUCTION AND INDUSTRIAL MATERIALS ASSOCIATION, Petitioner, vs. COUNTY OF VENTURA, Respondent.	Case No.: 56-2019-00527805-CU-WM-VTA TENTATIVE DECISION

California Construction and Industrial Materials Association ("Petitioner") petitions for a writ of mandate. Petitioner contends that respondent, County of Ventura ("County"), ran afoul of the Surface Mining Reclamation Act ("SMARA"), the California Environmental Quality Act ("CEQA"), and other laws in adopting a land use ordinance intended to preserve wildlife corridors in less-developed areas of the county. Specifically, Petitioner has stated causes of action for a writ of mandate and declaratory relief based on: (1) alleged violations of SMARA, and, in particular, the public disclosure provisions of Public Resource sections 2762 and 2763; (2) alleged violations of subdivision (a) of Government Code § 65860, which concerns consistency between ordinances and general plans; and (3) alleged violations of CEQA centering on the County's finding that the project was exempt from environmental review.

The County disputes the key allegations of the petition, and it urges the court to deny the petition.

Los Padres ForestWatch, Defenders of Wildlife, Center for Biological Diversity, and National Parks Conservation Association (collectively, "Intervenors") have intervened in the action. These intervenors side with the County on the CEQA issues.

This case and another[1] have been consolidated for the purposes of the certification of the administrative record ("AR") and for oral argument but for no other purpose. The court will issue separate judgments in each case.

The court now renders its tentative decision, which shall also serve as the proposed statement of decision.

SUMMARY

On March 12, 2019, by a vote of 3-2, the County Board of Supervisors ("Board") approved the Habitat Connectivity and Wildlife Corridor Project ("the Project"). Generally, the purpose of the Project was to "discourage" development within an approximately 163,000 acre overlay zone to permit mountain lions and other wildlife to move more freely throughout the less developed areas of the county. The Project was implemented through the adoption of an ordinance entitled, "County-Initiated Proposal to Amend the General Plan and Articles 2, 3, 4, 5, 9, and 18 of the Non-Coastal Zoning Ordinance (PL16-0127) to Establish a Habitat Connectivity and Wildlife Corridors Overlay Zone and a Critical Wildlife Passage Areas Overlay Zone, and to Adopt Regulations for These Areas; Find that the Proposed Amendments are Exempt from Environmental Review Under the California Environmental Quality Act" ("the Ordinance").[2]

Petitioner challenges the Ordinance on several grounds. First, Petitioner contends that the County violated SMARA by failing to prepare a "statement of the reasons" prior to adopting the Ordinance. Petitioner argues that the Project fell within those provisions of SMARA that require public disclosure of a statement of reasons before permitting a land use that threatens the

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[1] VC Coalition of Labor Agriculture and Business vs. County of Ventura, Case No. 56-2019-00527815-CU-WM-VTA.

[2] What is referred to as "the Ordinance" is actually two separate ordinances passed on March 12, 2019 and March 19, 2019. The parties interchangeably refer to "the Ordinance" and "the Ordinances." The court here uses the singular form to refer to both.

potential extraction of mineral resources, which Petitioner asserts the Project does.

Second, Petitioner contends that the County has violated CEQA in that:

- The County improperly split the Project from the General Plan Update and thereby engaged in illegal "piecemealing."
- The Project is not exempt from CEQA review under the Class 7 and Class 8 exemptions because those exemptions do not apply by their own terms, but even if they do, an exception to the exemptions applies because there is a reasonable possibility of adverse impacts due to unusual circumstances.
- The County improperly relied on the "common sense" exemption because it is not certain the Project has no possibility of having a significant effect on the environment.

The County denies any impropriety occurred in adopting the Ordinance and urges the court to deny the petition. It argues that it was not required to prepare a statement of reasons under SMARA because substantial evidence supports the County's determination that the Project is not a use that would threaten the potential to extract minerals. Alternatively, the County says that Petitioner is not entitled to a writ of mandate on the SMARA claim because Petitioner has failed to establish prejudice. The County also argues that Petitioner's asserted CEQA violations lack merit because:

- There is no "piecemealing" violation because Project and the General Plan Update are separate projects under CEQA.
- The Project is exempt from CEQA review under the Class 7, Class 8, and common sense exemptions, and that substantial evidence supports the County's findings as to each exemption.
- The unusual circumstances exception to the categorial exemptions does not apply.

Finally, the County asserts that Petitioner has forfeited the second cause of action (for an alleged violation of Government Code section 65860) because Petitioner did not address this claim in its opening brief.

REQUEST FOR JUDICIAL NOTICE

1. Petitioner's Request for Judicial Notice in Support of the Opening Brief

Petitioner requests judicial notice of the petition for writ of mandate and complaint filed

by intervenor Center for Biological Diversity in *Center for Biological Diversity, et al. v. County of Los Angeles, et al.*, Los Angeles Superior Court Case No. 19STCP01610 in 2019. The County objects on several grounds, including that the pleadings in that other case are not relevant.

It is fundamental that a court only considers relevant evidence. (See Evid. Code, § 350.) Therefore, a court may decline to take judicial notice of matters that are not relevant. (*Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 Cal.App.4th 471, 482.) Petitioner has not demonstrated any relevance to this action of the pleadings in an unrelated case concerning a different development project in a different county. The only connection between the two cases is that an intervenor here, the Center for Biological Diversity, is the plaintiff there. Petitioner hopes to show that the Center for Biological Diversity will, at some later time, pressure the County to increase scrutiny of permit applications for surface mining operations because it has previously challenged the Los Angeles County development project based on allegations of habitat conservation. But whether a given person or entity advocates for or against a governmental action is not probative of any issue now before the court. It may be assumed that intervenors and Petitioner will continue to advocate on behalf of their respective interests. The existence of that advocacy does not have a tendency in reason to show how the County may act in the future. Therefore, this request for judicial notice is denied.

2. The County's Request for Judicial Notice

The County requests judicial notice of Assembly Bill No. 3551 (Chapter 1097, of Statutes of 1990) and records from the legislative history of that bill.

Judicial notice may be taken because, first, this case raises the application of certain CEQA exemptions and, second, the petition raises non-CEQA claims.

The County correctly asserts that its Exhibit A is subject to judicial notice as a record of an official act. (See Evid. Code, § 452, subd. (c).) It also persuasively argues that its Exhibits B-E are subject to judicial notice because they are legislative committee reports and analyses. (See *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 39.) Each of the items is relevant to Petitioner's SMARA claim because each concerns the code section Petitioner accuses the County of violating.

Accordingly, the County's request for judicial notice is granted.

3. Petitioner's Request for Judicial Notice in Support of the Reply Brief

Petitioner requests judicial notice of California Department of Fish and Wildlife's January 22, 2021 letter to Ventura County Planning Division regarding "Pacific Rock Quarry Expansion Project, Draft Environmental Impact Report, SCH #2017081052, Ventura County."

To the extent Petitioner seeks judicial notice of this item in connection with its CEQA claim, this item cannot be considered because it post-dates the County's approval of the Project, and, thus, was unavailable when the County made its CEQA determinations. "Extra-record evidence is admissible under this exception only in those rare instances in which (1) the evidence in question existed *before* the agency made its decision, and (2) it was not possible in the exercise of reasonable diligence to present this evidence to the agency *before* the decision was made so that it could be considered and included in the administrative record." (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 578, italics in original.) Here, the County adopted the Ordinance, and thereby approved the Project, in March 2019. (See, e.g., AR 00010.) The letter in question is dated January 2021. Therefore, to the extent Petitioner requests judicial notice of this letter in connection with the CEQA claim, the request for judicial notice is denied.

To the extent Petitioner seeks judicial notice of this item in connection with its SMARA claim, it has not explained its failure to request judicial notice when it submitted its opening brief. Generally, evidence raised for the first time in a reply brief will not be considered, unless an excuse or reason is proffered for failing to submit them sooner, since considering such evidence would deprive the other party of the opportunity to respond. (See *Lady v. Palen* (1936) 12 Cal.App.2d 3, 5; see also *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764.) Therefore, the court exercises its discretion to decline judicial notice on the SMARA claim.

Accordingly, Petitioner's rebuttal request for judicial notice is denied.

FORFEITURE OF THE SECOND CAUSE OF ACTION

The County contends that Petitioner has forfeited its second cause of action – which asserts an improper conflict between the Ordinance and the County's General Plan --by failing to

substantively address this claim in its opening brief, citing *Holden v. City of San Diego* (2019) 43 Cal.App.5th 404, 418 ("*Holden*"). Petitioner disagrees. In its reply brief, Petitioner argues that there has been no forfeiture and mentions, for the first time, Government Code section 65680.

Holden provides useful guidance in assessing these arguments. The Court of Appeal there analyzed the forfeiture issue this way:

> Finally, although Holden's opening brief alludes to his claim in the trial court that City did not comply with Government Code section 65863 in approving the Project, we conclude that Holden waived or forfeited that argument both in the trial court and on appeal. "When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived." [Citation.] Alternatively stated, "[w]here a point is merely asserted by [appellant] without any [substantive] argument of or authority for its proposition, it is deemed to be without foundation and requires no discussion." [Citation.] "Issues do not have a life of their own: if they are not raised or supported by [substantive] argument or citation to authority, we consider the issues waived." [Citations.] The record shows that Holden raised Government Code section 65863 in the trial court only in a footnote in his opening brief and without any substantive legal analysis. . . . Holden neither quoted the relevant language of that statute nor provided any substantive legal analysis showing that City was required to comply with that statutory provision and failed to do so. Because Holden did not adequately raise and discuss the Government Code section 65863 issue in the trial court, he is precluded from raising that issue on appeal. [Citation.]
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> (43 Cal.App.5th pp. 418–419.)

Petitioner's second cause of action is based on an alleged violation of Government Code section 65680. That section is not mentioned or discussed in Petitioner's opening brief. This fact is confirmed by the absence to any reference to Government Code section 65680 in Petitioner's table of authorities in its opening brief. Although Petitioner's opening brief discusses the requirement that certain *permits* must be consistent with the General Plan, it does not discuss any obligation that the *Ordinance* be consistent with the General Plan. Applying the principles discussed in *Holden* here, it is clear that the second cause of action has been forfeited.

Therefore, the second cause of action of the petition is ordered dismissed.

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BACKGROUND

(a) Permitting Requirements Before the Ordinance

Before the adoption of the Ordinance, the General Plan required, and still requires, the following with respect to surface mining and related conditional use permits ("CUPs"):

- The Non-Coastal Zoning Ordinance ("NCZO") requires CUPs for all mineral resource development. (AR 13598; 13608-09.)

- The General Plan requires CUPs meet General Permit Approval Standards. The permits shall be granted if all billed fees and charges for processing the application request have been paid, and all of the specified standards are met, subject to some discretionary exemptions. Under those standards, the applicant must demonstrate that:

    - The proposed development is consistent with the intent and provisions of the County's General Plan and of Division 8, Chapters and 2, of the Ventura County Ordinance Code;
    - The proposed development is compatible with the character of surrounding, legally established development;
    - The proposed development would not be obnoxious or harmful, or impair the utility of neighboring property or uses;
    - The proposed development would not be detrimental to the public interest, health, safety, convenience, or welfare;
    - The proposed development is compatible with existing and potential land uses in the general area where the development is to be located (CUPs only);
    - The proposed development will occur on a legal lot; and
    - The proposed development is approved in accordance with CEQA and all other applicable laws.

    (AR 13836.)

- The General Plan Goals, Policies, and Programs require the following:

    - Applications for *mineral resource development* shall be reviewed to assure minimal disturbance to the environment and to assure that lands are reclaimed for appropriate uses which provide for and protect the public health, safety and welfare.
    - *Mining operations* shall comply with the requirements of the County Zoning Ordinance and standard conditions, and state laws and guidelines relating to mining and reclamation.
    - All *discretionary permits* for in-river *mining* shall be conditioned to incorporate all feasible measures to mitigate flooding and erosion impacts as well as impacts to water resources, biological resources, and beach sediment transport.

- Petroleum exploration and production shall comply with the requirements of the County Zoning Ordinance and standard conditions, and state laws and guidelines relating to oil and gas exploration and production.
- As existing petroleum permits are modified, they shall be conditioned so that production will be subject to appropriate environmental and jurisdictional review.
- All General Plan amendments, zone changes, and discretionary developments shall be evaluated for their individual and cumulative impacts on access to and extraction of recognized mineral resources, in compliance with the California Environmental Quality Act.
- Mineral Resource Areas may be established, in whole or part, in accordance with the following criteria:
  - Any area designated by the State Board of Mines and Geology as an area of statewide or regional significance pursuant to the provisions of the Surface Mining and Reclamation Act of 1975.
  - Any area covered by a *discretionary permit* (e.g., a CUP) for mining of aggregate minerals determined to be of Statewide or regional significance.
- *Discretionary development* within a Mineral Resource Area shall be subject to the provisions of the Mineral Resource Protection (MRP) Overlay Zone, and is prohibited if the use will significantly hamper or preclude access to or the extraction of mineral resources.

(AR 13938.)

(b) The Ordinance

Among other things, the Ordinance describes two overlay zones, which are defined in separate sections of the Ordinance. The first of those sections defines the Habitat Connectivity and Wildlife Corridors Overlay Zone ("HCWC zone") as follows:

> Section 8104-7.7 – Habitat Connectivity and Wildlife Corridors Overlay Zone
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> The general purposes of the Habitat Connectivity and Wildlife Corridors overlay zone are to preserve *functional connectivity* for wildlife and *vegetation* throughout the overlay zone by minimizing direct and indirect barriers, minimizing loss of *vegetation* and habitat fragmentation and minimizing impacts to those areas that are narrow, impacted or otherwise tenuous with respect to wildlife movement. More specifically, the purposes of the Habitat Connectivity and Wildlife Corridors overlay zone include the following:
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> a. Minimize the indirect impacts to wildlife created by *outdoor lighting*, such as disorientation of nocturnal species and the disruption of mating, feeding, migrating, and the predator-prey balance.
> b. Preserve the *functional connectivity* and habitat quality of *surface water features*, due to the vital role they play in providing refuge and resources for wildlife.

c. Protect and enhance *wildlife crossing structures* to help facilitate safe wildlife passage.
d. Minimize the introduction of *invasive plants*, which can increase fire risk, reduce water availability, accelerate erosion and flooding, and diminish biodiversity within an ecosystem.
e. Minimize *wildlife impermeable fencing*, which can create barriers to food and water, shelter, and breeding access to unrelated members of the same species needed to maintain genetic diversity.

The second section defines a "Critical Wildlife Passage Areas Overlay Zone" ("CWPA zone"). That section reads:

> Section 8104-7.8 – Critical Wildlife Passage Areas Overlay Zone
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> There are three critical wildlife passage areas that are located entirely within the boundaries of the larger Habitat Connectivity and Wildlife Corridors overlay zone. These areas are particularly critical for facilitating wildlife movement due to any of the following: (1) the existence of intact native habitat or other habitat with important beneficial values for wildlife; (2) proximity to water bodies or ridgelines; (3) proximity to critical roadway crossings; (4) likelihood of encroachment by future development which could easily disturb wildlife movement and plant dispersal; or (5) presence of non-urbanized or undeveloped lands within a geographic location that connects core habitats at the regional scale.
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> (AR 00211-12.)

(The HCWC and CWPA zones are at times referred to herein collectively as the "overlay zones.")

The Ordinance also amends Article 9, Section 8109-4 of the NCZO by adding new Section 8109-4.8, captioned "Habitat Connectivity and Wildlife Corridors Overlay Zone," and Section 8109-4.9, captioned "Critical Wildlife Passage Areas Overlay Zone." (AR 00214-30.) Section 8109.4.8.1, regarding the HCWC zone, governs applicability. (AR 00214-15.) That section states in relevant part:

> d. If a proposed land use or *structure* requires a discretionary permit or modification thereto under a section of this Chapter other than Sec. 8109-4.8, no additional discretionary permit or Zoning Clearance shall be required for the proposed land use or *structure* pursuant to this Sec. 8109-4.8. Instead, applicable standards, requirements and procedures of this Sec. 8109-4.8 shall be incorporated into the processing of the application for, and the substantive terms and conditions

of, the discretionary permit or modification that is otherwise required by this Chapter.

(AR 00215.)

Section 8109.4.8.2, concerning the HCWC zone, governs outdoor lighting, and generally imposes limitations on certain type of lighting, and the brightness and colors of lighting permitted. (AR 00215-21.) Exempt from these standards are temporary or intermittent outdoor night lighting necessary to conduct surface mining operations or oil and gas exploration and production, regardless of the location or number of lights used intermittently (with intermittent defined as 31-90 calendar days within any 12-month period). (AR 00216.) Lighting for oil and gas operations and surface mining operations "may deviate from the above-stated standard and requirements" if "a lighting plan [is] approved by the County during the discretionary permitting process for the subject facility or operation" and is "designed and operated to minimize impacts on wildlife passage to the extent feasible." (AR 00220-21.)

Section 8109.4.8.3, applying to the HCWC zone, governs wildlife crossing structures, surface water features, vegetation modification, wildlife impermeable fencing, and permitting. (AR 00221-30.) There are no specific requirements or exemptions applicable only to surface mining or oil and gas exploration within this section.

Section 8109.4.9 pertains only to the CWPA zone. It imposes more restrictive requirements. (AR 00230-37.) Section 8109.4.1 governs applicability, and it contains the same discretionary permit/modification language applicable more broadly to the HCWC zone, as set forth above in Section 8104.8.1(d). (AR 00231-32.) Section 8109.4.2 sets forth exemptions, although none specifically applies to surface mining or oil and gas exploration. (AR 00232-34.) Section 8109.4.9.3 sets forth permitting requirements for development. (AR 00234-36.) Likewise, Section 8109-4.9.4 sets forth the discretionary permit application and approval standards applicable whenever a discretionary permit or modification thereto is required to authorize development pursuant to this Section 8109-4.9. (AR 00236-37.)

SMARA

Petitioner contends that the County violated SMARA by failing to prepare a "statement

of reasons," even after the County was requested to do so by the State Geologist. Petitioner further contends that the court's review of the alleged SMARA violation is de novo because the County's "failure to comply with mandatory procedural requirements under SMARA amounts to a failure to proceed in the manner required by law [and] presents a pure issue of law." (Pet. Open. Brief, p. 12.)

The County denies there is a SMARA violation. It argues that SMARA does not apply because the applicable statutes only require a statement of reasons in conjunction with a land use decision "permitting a use that would threaten the potential to extract minerals in that area." The County contends that its adoption of the Ordinance was not "permitting a use" and that, even if it was, that use does not "threaten the potential to extract minerals." Further, it asserts that Petitioner has not established that it has been prejudiced by the alleged SMARA violation and that a showing of prejudice is necessary before a traditional writ of mandate may issue. Finally, the County contends that review of the SMARA claim is the deferential standard under Code of Civil Procedure section 1085.

For the reasons stated below, the court finds that review of the County's interpretation of the applicable statutory language is de novo, that the adoption of the Ordinance was "permitting a use" as that phrase is used in those statutes, that this court's review of the factual question of whether that use threatened potential extraction of minerals is deferential, that the County's determination that the provisions of the Ordinance do not threaten potential extraction of minerals is supported by substantial evidence, and that even if there was a SMARA violation, Petitioner has not demonstrated prejudice from that violation.

1. Standard of Review

The parties disagree on the standard applicable to this court's review of the alleged SMARA violation. The parties agree that, procedurally, Petitioner's SMARA claim is made under Code of Civil Procedure section 1085, seeking a traditional writ of mandate.

Petitioner cites *Cleveland National Forest Foundation v. County of San Diego* (2019) 37 Cal.App.5th 1021 for the proposition that this court's review of the SMARA claim is de novo.

The issue in that case "turn[ed] on the interpretation of [a section] of the Map Act: what the Legislature meant by" certain language used in the statute. (*Cleveland National Forest Foundation v. County of San Diego, supra,* 37 Cal.App.5th 1021, 1040–1041.) The Court of Appeal there stated the standard applicable to the review of that issue: "A reviewing court exercises independent judgment on pure questions of law, including the interpretation of statutes and judicial precedent." (*Ibid.*) Otherwise, "writ review requires substantial deference to the agency's findings." (*Id.*, 37 Cal.App.5th at p. 1040.)

Here, Petitioner is correct in asserting that the court's interpretation of the applicable statutory language – i.e., what the Legislature meant by "permitting a use" – is a pure question of law, which the court determines through the exercise of its independent judgment. That is, no deference is paid to the County's interpretation of the statutory language. But the County is correct that the factual question – whether that use threatens the potential extraction of minerals – is governed by the deferential standard. That standard has been stated this way:

> "The standard of review for traditional mandamus (Code Civ. Proc. § 1085), calls for the trial court to determine whether ' "the agency's decision was arbitrary, capricious or entirely lacking in evidentiary support, contrary to established public policy, unlawful, or procedurally unfair." ' [Citation.] Under this deferential standard of review, the court's role is to 'ensure that the administrative agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choices made, and the purposes of the enabling statute.' [Citations.]" [Citation.] " ' "Although mandate will not lie to control a public agency's discretion, that is to say, force the exercise of discretion in a particular manner, it will lie to correct abuses of discretion. [Citation.] In determining whether an agency has abused its discretion, the court may not substitute its judgment for that of the agency, and if reasonable minds may disagree as to the wisdom of the agency's action, its determination must be upheld. [Citation.]" [Citation.]' " [Citation.]
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> (*Nowicki v. Contra Costa County Employees' Retirement Association* (2021) 67 Cal.App.5th 736, 746.)

What can be gleaned from this precedent is that (1) review of the County's interpretation of what the statutory language "permitting a use" means by is de novo (i.e., the court exercises its independent judgment); and (2) the factual dispute over whether the adoption of the Ordinance will threaten the potential extraction of minerals is deferential and determined under

the substantial evidence standard.

Having determined the appropriate standards of review, the court will now address the parties' substantive contentions.

2. Meaning of "Permitting a Use"

Petitioner asserts that the County's adoption of the Ordinance violated the provisions of SMARA that require an agency produce a "statement of reasons" under certain circumstances. Specifically, those provisions are found in Public Resources Code, section 2762, subdivision (d) and section 2763, subdivision (a). The former applies to areas that the State Geologist has determined contain mineral deposits that are of regional or statewide significance and the lead agency has designated that area in its general plan as having important minerals to be protected. The latter concerns areas that have been designated by the State Mining and Geology Board ("SMGB") as an area of regional significance, and the lead agency has designated that area in its general plan as having important minerals to be protected. The County does not dispute that the overlay zones span an area meeting both descriptions.

For an area falling into either or both of these descriptions, SMARA requires that "prior to permitting a use" that would "threaten the potential to extract minerals in that area" the lead agency (here, the County) must prepare a statement specifying its reasons for permitting the proposed use. (Pub. Res. Code, § § 2762, subd. (d), and 2763, subd. (a).) Such a statement is sometimes referred to as a "statement of reasons." It is disputed whether the County's adoption of the Ordinance was "permitting a use" and, if it was, whether that use threatens the potential to extract minerals in the overlay zones.

Both sides agree that there is no published authority clarifying the meaning of the phrase "permitting a use" as used in these statutes.[3] The County contends that its adoption of the Ordinance did not amount to "permitting a use" because the type of "use" contemplated by the

[3] SMARA does define the noun "permit." As used in the act, "permit" means "any authorization from, or approval by, a lead agency, the absence of which would preclude surface mining operations." (Pub. Resources Code, § 2732.5.) This definition is not helpful here; neither side argues that the phrase "permitting a use" is limited to authorizations or approvals allowing surface mining operations.

Legislature in enacting SMARA was limited to permitting a "specific development – such as residential subdivisions or commercial uses" (Opp., p. 9) and not the "adoption of general land use legislation" (*id.*, p. 10). Petitioner, conversely, argues that "the Ordinance permits a 'use' because it changes the regulations governing the use of land throughout" the overlay zones. (Reply, p. 7.)

The County's attempt to restrict these provisions of SMARA to decisions permitting specific developments is unpersuasive. This argument reads too much into the statutes. The few passages from the legislative history cited by the County are not compelling.

The court concludes the statutory language is best understood this way: SMARA requires a statement of reasons in the context of land use permitting decisions and, as the County acknowledges, the principal function of the Ordinance is to modify the requirements for permits necessary for uses in and around the overlay zones. Changes in these permitting requirements could theoretically impact the extraction of mineral resources by affecting whether, for example, permits necessary to conduct those activities are granted. That is, changing the rules under which permits are issued can ultimately determine which uses *are* permitted. If, under the new permitting procedures, permits needed to conduct surface mining operations were denied on a widespread basis or issued under terms impractical to meet, then it could be said that the new procedures "threaten" the potential extraction of minerals. [4]

Finding that the adoption of the Ordinance constituted "permitting a use" within the meaning of SMARA is consistent with the State Geologist's recommendation that the County prepare a statement of reasons. Although not binding on the court, an administrative agency's interpretation of statutory language that it is charged with enforcing is entitled to consideration. (*Dunn v. County of Santa Barbara (2006)* 135 Cal.App.4th 1281, 1289.) While the basis for the agency's conclusion is not explained in the record and that omission undermines the weight of the opinion, the State Geologist's opinion is nevertheless entitled to some credit, and it plainly implies a broader meaning of the "permitting a use" phrase than that urged by the County.

[4] Whether the Ordinance *would* have that effect is addressed in the next section.

For these reasons, the court finds that the adoption of the Ordinance constituted "permitting a use" within the meaning of SMARA.

3. Threaten the Potential Extraction of Minerals

The County determined that the adoption of the Ordinance did not threaten the potential extraction of minerals and, therefore, no statement of reasons was required. Under the applicable standard of review, this factual determination is entitled to deference and must be upheld if it is supported by substantial evidence in the administrative record.

As discussed above, an agency's obligation to prepare a statement of reasons is only triggered under SMARA if the use permitted "*would* threaten the potential to extract minerals." (Emphasis added.) Petitioner argues that the restrictions imposed by the Ordinance do threaten the potential extraction of minerals by creating regulatory obstacles that would make it more difficult or impossible to obtain CUPs necessary for mineral resource extraction projects. It also contends that provisions of the Ordinance concerning fencing, vegetation and lighting will similarly threaten mining operations. The County disputes these contentions. It asserts that substantial record evidence supports its finding that the Ordinance does not threaten the potential extraction of minerals.

A. Impact of Ordinance on the Issuance of CUPs

Petitioner's argument goes this way: The County requires a CUP for surface mining, and CUPs may be denied in the County's discretion based on a number of grounds, including that the operation is not consistent with the intent and provisions of the General Plan. (Citing AR 13598-99, 13834-35, 13835-36, § § 8111-1.2.1(a)-(e).) The County amended the General Plan to include new maps delineating, for the first time, the overlay zones, as well as Project-related nomenclature and definitions. (Citing AR 00003(1); 00005-08; 01172-75.) These amendments significantly change the standards for CUP surface mining applications, which must show the proposed activities are "compatible" with and not "harmful" or "detrimental" to the use of the Project area as a habitat for wildlife. (Citing AR 13836, § 8111-1.2.1a(a)-(e).) According to Petitioner, this makes it more likely that CUP applications for mineral extraction projects will be

denied, which in turn "threatens" the potential extraction of mineral resources. The focus of the Project is to discourage development and increase the burden of permitting new development. (Citing AR 00004.) This is exacerbated by new conservation-focused, Project-related provisions added to the County's Biological Resource Goals, Policies, and Programs, including new findings providing that habitat loss/fragmentation are leading threats to biodiversity. (Citing AR 00003, 01171.) The County added a new policy that requires decision makers evaluating a discretionary CUP to weigh the "project-specific and cumulative impacts on the movement of wildlife at a range of spatial scales including local scales (e.g., hundreds of feet) and regional scales (e.g., tens of miles)." (Citing AR 01173.) Thus, because mineral extraction projects require roads, cause noise (including noise from blasting activities), and often require nighttime lighting, Petitioner argues that it is reasonably likely to be more difficult for such projects to be deemed "consistent" with these new Biological Resource Goals, Policies, and Programs. (Citing AR 13836, § 8111-1.2.1.1a.) This process is further complicated by the need for decision makers to now consider the cumulative and "regional" impacts that a single mine will have on the new HCWC and the wildlife that use the Project area as habitat, says Petitioner.

The County disputes these contentions. Specifically, the County asserts that the Ordinance will not substantively change the existing discretionary CUP permitting standards. The County contends that even before the Ordinance was adopted, the County retained the discretion to deny a CUP that threatened biological resources.

Petitioner is correct that the Ordinance will impact the CUP permitting requirements for mining operations. Although existing permitting standards will continue to apply to mining CUP applications after implementation of the Ordinance (see AR 13598, 13608-09, 13836, 13938 [existing permitting requirements and standards]; AR 00215, 00236-37 [will use existing permitting standards in general]), the new purposes set forth in the Ordinance will be incorporated into the review of CUP applications. (See AR 00215 ["applicable standards, requirements and procedures of this Sec. 8109-4.8 shall be incorporated into the processing of the application for, and the substantive terms and conditions of, the discretionary permit or modification that is otherwise required by this Chapter"], AR 00236-37.) The Ordinance states a

new purpose will be added to the HCWC overlay zone: "to preserve *functional connectivity* for wildlife and *vegetation* throughout the overlay zone by minimizing direct and indirect barriers, minimizing loss of *vegetation* and habitat fragmentation." (AR 00211.) Specifically, the Ordinance will add the following purposes to the HCWC overlay zone: minimize indirect impacts to wildlife created through outdoor lighting, preserve functional connectivity and habitat quality of surface water, protect and enhance wildlife crossing structures, minimize the introduction of invasive plants, and minimize wildlife impermeable fencing. (AR 00211-12.) Under the Ordinance, when evaluating CUP applications, the decisionmaker must consider "the development's potential project-specific and cumulative impacts on the movement of wildlife at a range of spatial scales including local scales (e.g., hundreds of feet) and regional scales (e.g., tens of miles)." (AR 01173.)

Petitioner argues that CUPs for mining activities will be scrutinized more harshly due to the new wildlife-preserving purposes, causing future applications to be denied or throttled with impractical restrictions. But Petitioner has not demonstrated with record evidence that county officials will exercise the discretion vested in them arbitrarily or prohibitively. It does not follow that simply because an applicant for a mining-related CUP may have to satisfy new or additional requirements that the viability of the mining operations has been threatened. That is, the assumed fact that getting a CUP may be more difficult does not necessarily mean that a CUP will not be issued or that it would only be issued on terms which would be prohibitively restrictive.

Petitioner insists that surface mining and mineral extraction is inherently incompatible with a wildlife corridor and, consequently, that it is foreseeable that mining-related CUPs will not be issued. Implicit in this argument is the assumption that denial of CUP applications for mineral extraction operations in the overlay zones is a foregone conclusion under the Ordinance. This assertion is supported only by speculation. Even before the adoption of the Ordinance, review of CUP mining applications required measures to protect biological resources.[5] For

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[5] The existing permitting standards require the applicant to demonstrate: that the proposed development is consistent with the intent and provisions of the General Plan and Division 8, Chapters 1 and 2 of the Ventura County Ordinance Code; that proposed development is compatible with the surrounding, legally established development; that the proposed development would not be obnoxious or harmful, or impair the utility of neighboring properties or uses; that the proposed development would not be detrimental to the public interest, health, safety, convenience, or

example, the existing standards already require CUP mining applications "assure minimal disturbance of the environment" and incorporate "all feasible measures" to mitigate impacts to biological resources. (AR 13938.) These requirements could have been used in the same prohibitive way that Petitioner fears the new requirements will be used, but it is evident from the existence of current mining operations that the County has not exercised its discretion under existing law in a manner that prohibits those operations. Moreover, contrary to Petitioner's assertion, the Designation of Regionally Significant Construction Aggregate Resource Areas in the Western Ventura County and Simi Production-Consumption Regions ("Designation") defines "incompatible" as "[l]and uses inherently incompatible with mining and/or which require a high public or private investment in structures, land improvements, and landscaping, and which would prevent mining because of the higher economic value of the land and its improvements." (AR 02089.) Listed examples include high density residential, low density residential with high unit value, public facilities, intensive industrial, and commercial. (AR 02089.) The Ordinance does not create or authorize a land use falling into any of these categories. The Designation defines "compatible" as "[l]and uses inherently compatible with mining and/or which require a low public or private investment in structures, land improvements, and landscaping, and which would allow mining because of the low economic value of the land and its improvements." (AR 02089.) Listed examples of land uses that are compatible with mining include very low-density residential, extensive industrial, recreation, agricultural, silvicultural, grazing, and open space. (AR 02090.) These land uses are more akin to a wildlife corridor than those defined as "incompatible."

Petitioner also argues that mining requires (1) vehicle traffic that produces noise, and (2) can require lighting during hours of darkness. These impacts will, according to Petitioner, necessarily run afoul of the Ordinance's purposes. However, again, Petitioner cites nothing in the record to show, and Petitioner fails to otherwise explain how, these considerations will necessarily mean that mining operations will not be permitted. The provisions of the Ordinance

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welfare; that the proposed development is compatible with the existing and potential land uses in the general area where the development is to be located; that the proposed development will occur on a legal lot; and that the proposed development is approved in accordance with CEQA and all other applicable laws. (AR 13836.)

do not categorically prohibit traffic, noise, or lighting in the overlay zones.

Petitioner argues that the Ordinance will make mining more costly, which in turn will make it less profitable, and that the profitability of potential mineral extraction is considered in SMARA land use designations. (AR 02032-34.) Petitioner contends that "designation status is not always permanent" and that the SMGB may terminate a designation status when said status "is no longer necessary or appropriate." (AR 02039.) But there is nothing in the record that supports an inference that a termination decision is to any degree likely. The fact that a change in designation status is possible does not established that it *would* occur and that it *would* threaten mining operations.[6]

For these reasons, Petitioner has not established that the Ordinance will impact the issuance of mining-related CUP applications to an extent that it would threaten the potential extraction of minerals.

B. Fencing

Petitioner argues that one of the two critical linkages, the Santa Monica – Sierra Madre connection, overlies the Santa Clara River, which is the location of most of the County's sand and gravel extraction sites. This area has been identified as being of "special importance" for wildlife passage. Petitioner contends that sand and gravel mining in this area will necessarily require the installation of fencing and that the fencing provisions of the Ordinance will threaten sand and gravel extraction in that area. This argument lacks merit. The Ordinance does not completely prohibit fencing; rather, the Ordinance requires most fencing to be wildlife permeable, and it limits the use of impermeable fencing to 10% of the gross lot size. (AR 00221-29.) Petitioner proffers no argument or evidence to show that a requirement of 90% wildlife permeable fencing will greatly interfere with sand and gravel mining along the Santa Clara

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[6] In its reply papers, Petitioner argues that a mining expansion project in another county, which is undergoing environmental review, got back comments earlier this year from California Department of Fish and Wildlife stating that the parcels occur within the wildlife corridor overlay zone, and as a result, the project could be seen to have specific impacts on the mountain lion population due to "increasing human presence, traffic, noise, air pollutants and dust, artificial lighting, and will significant and permanently reduce the width of the existing wildlife corridor." This argument is based solely on Petitioner's request for judicial notice submitted with the reply, which the court has denied. Therefore, the facts supporting this contention have not been established, and the contention is, therefore, not addressed by the court.

River. Thus, the County did not abuse its discretion in finding the fencing regulations do not threaten the potential extraction of minerals.

C. Vegetation

Petitioner argues that developing a quarry necessarily involves the removal of vegetation, which will prevent wildlife from traversing through the "excavated and fenced-off area" for the duration of the mining, which can be as long as 100 years. (Pet. Open. Brief, p. 20:21-26.) But Petitioner fails to demonstrate that the Ordinance would categorically prohibit the removal of vegetation for this purpose. As discussed below, the Ordinance places limitations on vegetation modification and prohibits the intentional planting of invasive plants. (AR 00221-25.) Petitioner does not demonstrate how these limitations would threaten the potential to extract minerals.

D. Lighting

Petitioner objects to the Ordinance's lighting standards and nighttime lighting requirements. However, Petitioner cites no evidence in the record as to how much lighting is required for mining. That is, Petitioner has not shown that the lighting provisions of the Ordinance will substantially interfere with mining operations. The lighting regulations exempt mining's temporary nighttime lights, and only impose brightness limitations on permanent lighting. (AR 00215-21.) Moreover, applicants may request deviations from the lighting standards as part of their application for a CUP. (AR 00221.) The County did not abuse its discretion in determining these restrictions would not threaten the potential to extract minerals.

E. *State Geologist's Recommendation*

In determining whether the County was required to prepare a statement of reasons, the court has considered the recommendation of State Geologist to the effect that the County should prepare a statement of reasons. That recommendation, and the implied finding that the County's actions would threaten the potential extraction of minerals, is not binding on the court, however. Like Petitioner, the State Geologist failed to identify a compelling reason to conclude that the County was required to prepare a statement of reasons. It is not enough for Petitioner to show that the Geologist disagreed with the County. On the factual question of whether the Ordinance would threaten the potential extraction of minerals, the County's determination is entitled to

deference and will not be reversed if that conclusion is rationally reached based on substantial evidence. Here, it was.

For these reasons, the court concludes that no violation of SMARA has been proved.

4. Prejudice

As an additional reason to deny Petitioner's SMARA claim, the County contends that Petitioner must show prejudice in order to obtain a writ of mandate. The County is correct. Before a writ of traditional mandamus will issue against a public agency under Code of Civil Procedure section 1085, the petitioner must show prejudice resulted from the public agency's action. (*California Public Records Research, Inc. v. County of Stanislaus* (2016) 246 Cal.App.4th 1432, 1449.)

The County asserts that there has been no prejudice because SMARA merely provides the SGMB an opportunity to comment on a statement of reasons prepared by a lead agency, but neither Public Resources Code section 2762 nor section 2763 (nor any other provision in SMARA) authorizes the state to overrule or condition a lead agency's land use decision on that basis. The County states that it explained its position to the State Geologist, and there would be nothing gained by reiterating those points in a statement of reasons. The County also asserts that there was a two-year legislative review process that provided Petitioner and the public with an opportunity to comment.

Petitioner contends that it has been prejudiced because the County has not publicly declared its statement of reasons and discussed each of the adverse impacts to mineral resources required by Public Resources Code, section 2763, subdivision (a). It cites *Neighbors for Smart Rail v. Expo Metro Line Const. Authority* (2013) 57 Cal.4th 439, 463, *Sierra Club v. State Board of Forestry* (1994) 7 Cal.4th 1215, 1236-37, and *Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383 for the proposition that depriving the public and decision-makers of relevant information about a project's likely adverse impacts constitutes a prejudicial abuse of discretion.

The cases relied upon by Petitioner apply CEQA, not SMARA. *Neighbors for Smart Rail* recognizes the general rule that in a CEQA action, "[a]n omission in an EIR's significant impacts

analysis is deemed prejudicial if it deprived the public and decision makers of substantial relevant information about the project's likely adverse impacts." (*Neighbors for Smart Rail, supra,* 57 Cal.4th at p. 463.) Likewise, *Sierra Club* and *Association of Irritated Residents* are CEQA cases applying the rule that an omission in an EIR is prejudicial under CEQA. (*Sierra Club, supra,* 7 Cal.4th at pp. 1236-37; *Association of Irritated Residents, supra,* 107 Cal.App.4th at p. 1391.)

Petitioner's comparison of a statement of reasons under SMARA and an EIR under CEQA is not persuasive. Under CEQA, the failure to disclose such information in the EIR is expressly declared a prejudicial abuse of discretion by statute. (See Pub. Res. Code, § 21005, subd. (a) ["The Legislature finds and declares that it is the policy of the state that noncompliance with the information disclosure provisions of this division which precludes relevant information from being presented to the public agency . . . may constitute a prejudicial abuse of discretion within the meaning of Sections 21168 and 21168.5, regardless of whether a different outcome would have resulted if the public agency had complied with those provisions"].) However, there is no similar statutory provision in SMARA. Moreover, a SMARA statement of reasons requires much less information than a CEQA EIR. (Compare Pub. Res. Code, § § 21061, 21100, 21100.1 [required contents of CEQA EIR] with Pub. Res. Code, § 2762, subd. (d) [required contents of SMARA Statement of Reasons].) Therefore, the authorities cited by Petitioner are distinguishable.

Petitioner's argument regarding the absence of a public process lacks merit. As the County correctly notes, there has been no prejudice because SMARA merely provides the SGMB an opportunity to comment on a statement of reasons prepared by a lead agency, but neither Public Resources Code section 2762 nor section 2763 (nor any other provision in SMARA) authorizes the state to overrule or condition a lead agency's land use decision on that basis. In other words, there is no basis to conclude that had the County issued a statement of reasons and engaged in the public process under SMARA, the outcome would be any different. True, there might have been a public vetting of the County's statement of reasons, but the administrative record shows that there *was* a public process and the State Geologist *did* weigh in.

(See, e.g., AR 00579-08146 [documents, transcripts, etc. re: public hearing on 3/12/19] & 04500-01 [letter from the State Geologist].) None of this altered the County's resolve to adopt the Ordinance, and it is unlikely that the preparation of a statement of reasons would have had that effect.

In light of the foregoing, Petitioner has failed to demonstrate prejudice. For this and the other reasons stated above, Petitioner's SMARA claim is without merit and the petition for a writ of mandate on that claim is denied.

CEQA

Petitioner asserts the County's adoption of the Ordinance violated CEQA in several respects. Petitioner argues that the County improperly split the Ordinance from the General Plan, and, in doing so, it contends that the County violated the prohibition on "piecemealing" CEQA projects. Petitioner also argues that the County erroneously found the Project was exempt from CEQA. The County disputes these contentions.

1. CEQA Overview

The California Supreme Court has summarized the provisions of CEQA this way:

> CEQA was enacted to advance four related purposes: to (1) inform the government and public about a proposed activity's potential environmental impacts; (2) identify ways to reduce, or avoid, environmental damage; (3) prevent environmental damage by requiring project changes via alternatives or mitigation measures when feasible; and (4) disclose to the public the rationale for governmental approval of a project that may significantly impact the environment. [Citation.]
>
> To further these goals, CEQA requires that agencies follow a three-step process when planning an activity that could fall within its scope. [Citations.] First, the public agency must determine whether a proposed activity is a "project," i.e., an activity that is undertaken, supported, or approved by a public agency and that "may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." [Citation.] Second, if the proposed activity is a project, the agency must next decide whether the project is exempt from the CEQA review process under either a statutory exemption [citation] or a categorical exemption set forth in the CEQA Guidelines [citation]. If the agency determines the project is not exempt, it must then decide whether the project may have a significant environmental effect. And where the project will not have such an effect, the agency "must 'adopt a negative declaration to that effect.' " [Citation.]

> Third, if the agency finds the project "may have a significant effect on the environment," it must prepare an EIR before approving the project. [Citation.] Given the statute's text, and its purpose of informing the public about potential environmental consequences, it is quite clear that an EIR is required even if the project's ultimate effect on the environment is far from certain. [Citation.] Determining environmental significance "calls for careful judgment on the part of the public agency involved, based to the extent possible on scientific and factual data." [Citation.] The Guidelines encourage public agencies to develop and publish "thresholds of significance" [citation], which generally promote predictability and efficiency when the agencies determine whether to prepare an EIR. [Citation.]
>
> (*California Building Industry Assn. v. Bay Area Air Quality Management Dist.* (2015) 62 Cal.4th 369, 382–383.)

2. Piecemealing

Petitioner contends that the County has violated the prohibition against "piecemealing" CEQA projects. "The foremost principle under CEQA is that the Legislature intended the act 'to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.' " (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 390, 253 (*Laurel Heights*).) "With narrow exceptions, CEQA requires an EIR whenever a public agency proposes to approve or to carry out a project that may have a significant effect on the environment." (*Laurel Heights, supra,* 47 Cal.3d at p. 390.)

" 'There is no dispute that CEQA forbids "piecemeal" review of the significant environmental impacts of a project.' [Citation.]" (*Aptos Council v. County of Santa Cruz* (2017) 10 Cal.App.5th 266, 277–278 (*Aptos Council*), quoting *Berkeley Keep Jets Over the Bay Com. v. Board of Port Comrs.* (2001) 91 Cal.App.4th 1344, 1358.)

" 'Project' is a term of art." (*Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209, 1220 (*Banning Ranch*). "CEQA 'projects' include activities undertaken by public agencies that cause direct physical changes to the environment. (§ 21065.) What constitutes a project is given a broad interpretation. [Citation.] A project refers to 'the whole of an action' (Cal. Code Regs., tit. 14, § 15378, subd. (a)), not each individual component [citation]." (*County of Ventura v. City of Moorpark* (2018) 24 Cal.App.5th 377, 385.)

The framework of analysis, crafted in *Laurel Heights* and *Banning Ranch* among other

cases, was summarized in *Aptos Council* this way:

> Courts have found that agencies improperly piecemealed environmental review of projects in various situations. "First, there may be improper piecemealing when the purpose of the reviewed project is to be the first step toward future development." (*Banning Ranch, supra,* 211 Cal.App.4th at p. 1223.) For example, in *Laurel Heights*, the Supreme Court determined the University of California, San Francisco improperly piecemealed environmental review of the relocation of its pharmacy school to a building in the Laurel Heights neighborhood of San Francisco. The EIR acknowledged the university would occupy the entire Laurel Heights building when the remainder of the space became available. (*Laurel Heights, supra*, 47 Cal.3d at p. 396.) It also estimated how many faculty, staff, and students would populate the entire building at full occupancy. The EIR, however, failed to discuss additional environmental effects that would result from the university's use of the remaining building space. (*Id.* at p. 393.) The Supreme Court found the university improperly piecemealed environmental review, because it was "indisputable that the future expansion and general type of future use [was] reasonably foreseeable." (*Id.* at p. 396.)
>
> Additionally, "there may be improper piecemealing when the reviewed project legally compels or practically presumes completion of another action." (*Banning Ranch, supra*, 211 Cal.App.4th at p. 1223.) For example, in [*Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214, 1226], the appellate court determined the City of Sonora improperly piecemealed review of the building of a shopping center and the widening of a street, because the widening of the street was a condition precedent to the development. [Citation.]
>
> There is no piecemealing, however, when "projects have different proponents, serve different purposes, or can be implemented independently." (*Banning Ranch, supra*, 211 Cal.App.4th at p. 1223.)
>
> (*Aptos Council, supra*, 10 Cal.App.5th at pp. 279-280, footnotes omitted.)

Petitioner argues that the County violated CEQA by improperly splitting the Project between coastal and noncoastal areas. Specifically, Petitioner argues:

> The Project maps show two corridors that extend from inland areas of the County to the coast. AR 5; 1142; 1149-50. The Planning Department Staff Report stated that the coastal portions of the corridors were a part of the Project. AR 1101-02. Yet the Project amended only the NCZO [Noncoastal Zone Ordinance], as discussed above, but not the Coastal Zoning Ordinance ("CZO").
>
> (Pet. Open. Brief, p. 24.)

The County denies that there is a piecemealing violation. It contends that it was required to separately analyze the coastal zone ordinance ("CZO") amendments from the Project because a specific CEQA exemption applies only to the CZO amendments, and not to those portions of the Project falling outside the coastal zone.

The County is correct. Generally, the Coastal Act charges the Coastal Commission with responsibility for overseeing development with the coastal zone. The Coastal Act requires each local government to prepare a local coastal plan ("LCP") governing land use for the portion of the coastal zone within its jurisdiction. (Pub. Resources Code, § 30500, subd. (a).) An LCP consists of land use plans, zoning ordinances, and zoning district maps, among other things. (Pub. Resources Code, § 30108.6.) The Commission must certify that a proposed LCP conforms with the Coastal Act before the local government can adopt it. (Pub. Resources Code, §§ 30512, 30513.)

CEQA does not apply to activities and approvals of a local government, such as the County, where those activities and approvals are necessary for the preparation of adoption of an LCP. (Pub. Resources Code, § 21080.9.) Because that review process is the functional equivalent of CEQA review (see *Strother v. California Coastal Com.* (2009) 173 Cal.App.4th 873, 877), CEQA exempts such activities and approvals from the CEQA environmental review process. (Pub. Resource Code, § 21080.5.) It is the Coastal Commission—not the County—that must comply with CEQA under Public Resources Code section 21080.9. (CEQA Guidelines, § 15265, subd. (c).)

Because the County's amendment of the CZO was exempted from the CEQA review process, it follows that the policy behind the prohibition on piecemealing does not come into play here. That is, the County did not take a single project *otherwise subject to CEQA review as a whole* and attempt to mitigate its impact and avoid that review by dividing into small parts. The process for environmental review was fundamentally different as between the NCZO and the CZO, and the County's handling them separately was both appropriate and necessary.

For these reasons, there is no improper piecemealing of the Project. The court next addresses Petitioner's contention that the County erred in finding the Project exempt from the

environmental review provisions of CEQA.

3. Categorical Exemptions (Class 7 & Class 8)

The County found that CEQA review was not required because the Project fell into the Class 7 and Class 8 exemptions. These are "categorical exemptions" established in CEQA Guidelines sections 15307 and 15308. "When a project comes within a categorical exemption, no environmental review is required unless the project falls within an exception to the categorical exemption." (*Aptos Residents Assn. v. County of Santa Cruz* (2018) 20 Cal.App.5th 1039, 1046.) "Although categorical exemptions are construed narrowly, [a court's] review of an agency's decision that a project falls within a categorical exemption is deferential," and a court determines "only whether that decision is supported by substantial evidence." (*Ibid.*) "Under CEQA, 'substantial evidence includes fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact' and 'is not argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly inaccurate or erroneous, or evidence of social or economic impacts that do not contribute to, or are not caused by, physical impacts on the environment.' [Citation.]" (*Id.*, pp. 1046–1047, quoting from Pub. Resources Code, § 21080, subd. (e).) Substantial evidence is "evidence of ponderable legal significance that is reasonable in nature, credible, and of solid value, to support the agency's decision." (*Protect Tustin Ranch v. City of Tustin* (2021) 70 Cal.App.5th 951, 960.) "If an agency has established that a project comes within a categorical exemption, the burden shifts to the party challenging the exemption to show that it falls into one of the exceptions. [Citation]." (*North Coast Rivers Alliance v. Westlands Water Dist.* (2014) 227 Cal.App.4th 832, 851–852.)

The Class 7 exemption states:

> Class 7 consists of actions taken by regulatory agencies as authorized by state law or local ordinance to assure the maintenance, restoration, or enhancement of a *natural resource* where the regulatory process involves procedures for protection of the environment. Examples include but are not limited to wildlife preservation activities of the State Department of Fish and Game. Construction activities are not included in this exemption.

(CEQA Guidelines, § 15307, emphasis added.)

The Class 8 exemption states:

> Class 8 consists of actions taken by regulatory agencies, as authorized by state or local ordinance, to assure the maintenance, restoration, enhancement, or protection of the *environment* where the regulatory process involves procedures for protection of the environment. Construction activities and relaxation of standards allowing environmental degradation are not included in this exemption.
>
> (CEQA Guidelines, § 15308, emphasis added.)

Interpreting the meaning of the phrase "actions ... to assure the maintenance, restoration, or enhancement" as it is used in the Class 7 and Class 8 exemptions, the Court of Appeal in *Save Our Big Trees v. City of Santa Cruz* (2015) 241 Cal.App.4th 694, 707 observed:

> Case law is instructive as to which actions fall within these exemptions, and which do not. The prohibition of an activity that evidence shows is associated with "environmental problems, [such as] the contamination of farmland," constitutes an action to assure "protection of the environment." (*Magan v. County of Kings* (2002) 105 Cal.App.4th 468, 476, [ordinance phasing out "the land application of sewage sludge" fell within class 8 exemption].) By contrast, actions that remove existing wildlife protections, authorize and regulate hunting, or relax existing environmental safeguards do not assure the maintenance, restoration, or enhancement of the environment. (See *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 125 (*Mountain Lion*) [action that "removes rather than secures ... protections [of animal species]" does not fall within class 7 or class 8 exemption]; *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 205 (*Chickering*) [setting of hunting seasons does not fall within class 7 [fn.] exemption because such an action "cannot fairly or readily be characterized as a preservation activity in a strict sense"]; *International Longshoremen's & Warehousemen's Union v. Board of Supervisors* (1981) 116 Cal.App.3d 265, 276 (*International Longshoremen's*) [amendment doubling the allowable emissions of gases the Legislature has determined are dangerous substances did not fall within class 7 or class 8 exemption[fn.]].)

The appellate court in *Save Our Big Trees* concluded:

> These legal guideposts indicate that, consistent with its plain language, the phrase "actions ... to assure the maintenance, restoration, or enhancement" embraces projects that combat environmental harm, but not those that diminish existing environmental protections.
>
> (*Save Our Big Trees v. City of Santa Cruz, supra,* 241 Cal.App.4th 694, 707.)

As will be explained below, applying these principles here, the court finds that the County has met its burden to show that the Class 7 and Class 8 exemptions apply and that Petitioner has not met its burden to establish an exception to those exemptions.

(a) County's Burden to Show Exemption Applies

The County argues that substantial evidence supports its determination that the Project fell within both the Class 7 and Class 8 exemptions. It correctly notes that CEQA and the County's Assessment Guidelines identify impacts on wildlife movement and wildlife corridors as environmental impacts. Appendix G to the CEQA Guidelines recognizes impacts on wildlife movement and wildlife corridors as environmental impacts.[7] (See CEQA Guidelines, appen. G, § IV, subd. (d), p. 360 ["Would the project: [] Interfere substantially with the movement of any native resident or migratory fish or wildlife species or with established native resident or migratory wildlife corridors, or impede the use of native wildlife nursery sites?"].) Similarly, the County's Assessment Guidelines discuss habitat connectivity as an environmental impact. (See, e.g., AR 14239 ["A project would impact habitat connectivity if it would: (a) remove habitat within a wildlife movement corridor; (b) isolate habitat; (c) construct or create barriers that impede fish and/or wildlife movement, migration or long term connectivity; or (d) intimidate fish or wildlife via the introduction of noise, light, development or increased human presence"].)

The County's determination that the Project would benefit the environment is based on substantial evidence in the record showing: preserving geographic connections among protected areas enables wildlife and plant populations to access necessary resources; these connections are a crucial component of protecting the County's biological diversity; movement through habitats is often essential for wildlife survival; isolated wildlife populations may survive for a limited time, but will be vulnerable to die off due to diseases, periodic loss of food resources, and inbreeding; and preservation of biological resources requires that plant and animal species be able to successfully move through the areas of the County that contain the habitats they depend on. (AR 01111-30 [Planning Commission Staff Report dated 1/31/19]; AR 01628 [slideshow]; AR 02203-41 [Dr. Seth Riley's slideshow presentation to the Board of Supervisors; [Dr. Mark Ogonowski's slideshow presentation to the Board of Supervisors]; AR 03808 [letter from The Nature Conservancy to the Board of Supervisors]; AR 04515 [letter from National Wildlife

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[7] "Appendix G of the CEQA Guidelines is an 'Environmental Checklist Form' that may be used in determining whether a project could have a significant effect on the environment and whether it is necessary to prepare a negative declaration or an EIR." (*Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884, 896.)

Federation to the Planning Commission; AR 04519-20 [letter from Conejo Open Space Conservation Agency to the Board of Supervisors]; AR 04529 [letter from Friends of the Santa Clara River to the Board of Supervisors]; AR 04548-51 [letter from U.S. Fish & Wildlife Service to the Board of Supervisors]; AR 04734 [letter from National Wildlife Federation to the Board of Supervisors]; AR 00616-17 [testimony]; 00921-23 [testimony]; AR 08160-61 [testimony]; AR 009100-03 [testimony]; AR 1111-30 [Planning Commission Staff Report 1/31/19]; AR 01642-88 [slideshow for 1/31/19 meeting]; AR 02731-44 [slideshow for 3/12/19 meeting].) Record evidence includes studies and other documents citing the need to preserve wildlife corridors and provide support for the establishment of developmental standards that are compatible with wildlife movement. (AR 01510-13 [bibliography]; AR 09850-13521, 04551-04669, 10074-89, 10584-91, 10567-76, 09580-97, 10385-10413, 01492-01509, 10292-10372, 10711-61, 10525-33, 10090-10105, 09988-99, 10131-43 [multiple studies, reports, etc.].)

The record also contains extensive testimony and comments from wildlife biologists, researchers, conservation groups and others describing the environmental issues and how the Project would protect wildlife corridors and benefit the broader environment. (AR 00659:22-00675:9, 00679:23-00689:14, 00690:5- 00697:25, 00847:3-00848:9, 00887:1-00888:9, 00921:23-00923:3, 00923:17-00924:20, 08172:17-08191:16, 01463-68 [testimony]; AR 02203-41, 02758-02806 [slideshows]; AR 02823-33, 3804-06, 3808, 03810-04476, 03810-04476, 04506-09, 04529, 04546, 04547-04669, 04671, 04729-34, 04737-49, 04798-06415 [comments, reports, etc.]; 09423-48 [slideshow].) Intervenors, likewise, are correct that the record is replete with evidence supporting the County's reliance on the categorial exemptions. (E.g., AR 10644-10710 ["*Missing Linkages*" report].)

This is substantial evidence supporting the County's determination that the Class 7 exemption applies because it rationally leads to a conclusion that the Project will assure the maintenance, restoration, or enhancement of a natural resource where the regulatory process involves procedures for protection of the environment. This is also substantial evidence supporting the County's finding that the Class 8 exemption applies because it rationally leads to a conclusion that the Project is an action authorized by county ordinance to assure the

maintenance, restoration, enhancement, or protection of the environment where the regulatory process involves procedures for protection of the environment. (Compare *Magan v. County of Kings* (2002) 105 Cal.App.4th 468, 475–476.)

Nevertheless, Petitioner contends "the County failed to consider the Project's impacts upon the availability of mineral resources and the potential indirect effects of the unavailability if local resources" and "[i]nstead, the County speculated that the Project's impacts are 'expected to be beneficial.' AR 4." (Pet. Open. Brief, p. 30) Petitioner states that the County "cannot skip CEQA altogether and use its lack of CEQA analysis as a basis to dismiss concerns regarding potential impacts." (*Id.*, p. 31.)

However, this argument fails to persuade in the context of analyzing the County's initial burden to show that the Class 7 and Class 8 exemptions apply. That is because the County's initial burden is merely to show that substantial evidence supports its finding that the exemptions apply. Whether a project may potentially have an adverse effect on the environment is not at issue when deciding whether substantial evidence supports the use of a categorial exemption in the first instance, since projects can still be subject to a categorial exemption "notwithstanding their *potential* effect on the environment." (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1102 (*Berkeley Hillside*), emphasis in original.) Rather, the question of whether the Project will cause a significant environmental impact is an issue to be addressed in determining whether an exception to the exemption applied for unusual circumstances exception.[8]

Therefore, the County has met its burden to show, through substantial evidence, that the Project falls within the Class 7 and Class 8 categorical exemptions.[9] This shifts the burden to Petitioner to show an exception to these exemptions apply.

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[8] The applicability of the unusual circumstances exception is discussed in the next section.

[9] In a footnote to its opening brief, at p. 30, Petitioner purports to "incorporate[] CoLAB's arguments regarding the use of the class 7 and 8 exemptions." CoLAB discussed those exemptions at pages 21-30 of its opening brief. The court set pagination limits for Petitioner's opening briefs of 30 pages. (See Minute Order, 4/8/21.) Petitioner's opening brief is 35 pages. Including the materials Petitioner would incorporate by reference, Petitioner's opening brief would exceed the pagination limit ordered by the court. It did not obtain leave to file a brief in excess of the ordered pagination limit. Therefore, the court declines Petitioner's request to incorporate arguments made outside of the four-corners of its briefs. (See *York v. City of Los Angeles* (2019) 33 Cal.App.5th 1178, 1188.)

(b) Petitioner's Burden to Show an Exception Applies

"A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." (Cal. Code Regs., tit. 14, § 15300.2.) Petitioners have the burden of producing evidence supporting this exception. (*Berkeley Hillside,* 60 Cal.4th at p. 1105.)

> [T]o establish the unusual circumstances exception, it is not enough for a challenger merely to provide substantial evidence that the project *may* have a significant effect on the environment, because that is the inquiry CEQA requires absent an exemption. (§ 21151.) Such a showing is inadequate to overcome the Secretary's determination that the typical effects of a project within an exempt class are not significant for CEQA purposes. On the other hand, evidence that the project *will* have a significant effect *does* tend to prove that some circumstance of the project is unusual. An agency presented with such evidence must determine, based on the entire record before it—including contrary evidence regarding significant environmental effects—whether there is an unusual circumstance that justifies removing the project from the exempt class.

(*Berkeley Hillside* at p. 1105, emphasis in original.)

A party opposing the application of a categorical exemption may establish an unusual circumstance without evidence of an environmental effect, by showing two things: (1) "that the project has some feature that distinguishes it from others in the exempt class, such as its size or location"; and (2) there is "a reasonable possibility of a significant effect due to that unusual circumstance." (*Berkeley Hillside* at p. 1105.) Alternatively, the party opposing the exemption may carry its burden "with evidence that the project will have a significant environmental effect." (*Ibid.*)

The two-element test stated in *Berkeley Hillside* was recently summarized in *Protect Tustin Ranch v. City of Tustin* (2021) 70 Cal.App.5th 951, 961–962:

> "Whether a particular project presents circumstances that are unusual for projects in an exempt class is an essentially factual inquiry, ' "founded 'on the application of the fact-finding tribunal's experience with the mainsprings of human conduct.' " ' [Citation.] Accordingly, as to this question, the agency serves as 'the finder of fact' [citation], and a reviewing court should apply the traditional substantial evidence standard .... [A]fter resolving all evidentiary conflicts in the agency's favor and indulging in all legitimate and reasonable inferences to uphold the agency's finding, [the court] must affirm [the agency's] finding if there is any substantial evidence, contradicted or uncontradicted, to support it." [Citation.]

> "As to whether there is 'a reasonable possibility' that an unusual circumstance will produce 'a significant effect on the environment' [citation], a different approach is appropriate, both by the agency making the determination and by reviewing courts." [Citation.] The agency applies a fair argument standard, meaning it reviews the evidence to see if there is a fair argument of a reasonable possibility the project will have a significant effect on the environment. [Citation.] If there is substantial evidence of a reasonable possibility the project will have such an effect, the agency may not rely on the exemption even if there is evidence to the contrary. [Citation.]
>
> A reviewing court " 'determine[s] whether substantial evidence support[s] the agency's conclusion as to whether the prescribed "fair argument" could be made.' " [Citation.] If it " ' "perceives substantial evidence" ' " that there is a reasonable possibility the project will have a significant environmental impact, but the agency relied on the exemption, " ' "the agency's action is to be set aside because the agency abused its discretion by failing to proceeding "in a manner required by law." ' " [Citation.]

The other way of establishing unusual circumstances stated in *Berkeley Hillside* was summarized in *World Business Academy v. California State Lands Commission* (2018) 24 Cal.App.5th 476, 499:

> Alternatively, the party advocating for application of the unusual circumstances exception may make a heightened, one-element showing: that the project will have a significant environmental effect. [Citation.] If a project will have a significant environmental effect, that project necessarily presents unusual circumstances and the party does not need to separately establish that some feature of the project distinguishes it from others in the exempt class. [Citation.] [A court applies] the deferential substantial evidence review when reviewing this one-step alternative for proving the exception. [Citation.]

First, Petitioner contends that they have satisfied the single-element test. Petitioner states, "the Project is presumed under the County's IS Guidelines to have a 'significant adverse impact on the environment' because it is (i) 'located on … land zoned Mineral Resource Protection (MRP) overlay zone [and] adjacent to a principal access road to an existing aggregate Conditional Use Permit (CUP)'; and (ii) 'has the potential to hamper or preclude extraction of or access to the aggregate resources' . . .." (Pet. Open. Brief, p. 32.)

This argument lacks merit. The mere fact that the Project area is located in part in the Mineral Resource Protection ("MRP") overlay zone and adjacent to access roads to an existing

CUP does not, without more, suggest that the Project will have a significant effect on the environment. Nor has Petitioner shown that there is no substantial evidence to support the County's determination that the Project does not have the potential to hamper or preclude access to the mineral resources. (See discussion *supra* regarding the SMARA claim.)

Next, Petitioner asserts that it has met the two-element test. It asserts that "the size and location of the Project constitute an unusual circumstance because the Project far exceeds the size of projects in its exemption class, none of which have the potential to overlie nearly as many acres of mineral resources." (Pet. Open. Brief, p. 34.) Specifically, Petitioner states:

> The overall size of the Project is massive (over 163,000 acres), and the location includes and overlies over 10,000 acres of mineral resources that were previously classified and designated by the State of California. AR 5; 2135 (figure depicting HCWC overlaid upon Mineral Resources Zones, as discussed on AR 2127). Each of these issues independently qualifies as an unusual circumstance.
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> (Pet. Reply Brief, p. 25.)

Petitioner does not persuasively explain why the size of the Project distinguishes it from other projects that would qualify for the Class 7 or Class 8 exemptions and, further, to cite to evidence in the record demonstrating that distinction. (See *Protect Tustin Ranch v. City of Tustin* (2021) 70 Cal.App.5th 951, 962; *World Business Academy v. California State Lands Commission, supra*, 24 Cal.App.5th at pp. 503–504.) Petitioner does not advance a persuasive comparison to the five-acre limit of the Class 33 exemption: Petitioner compares "apples to oranges." The Class 33 exemption concerns small habitat restoration projects. (Cal. Code Regs., tit. 14, § 15333.) The examples provided in the CEQA Guidelines, although not exhaustive, clearly show that the Class 33 exemption is limited to small projects involving actions affirmatively undertaken to restore the environment. The focus of that exemption is not at play here.

Petitioner cites four cases it contends support its contention that both the size and location of the Project are "unusual circumstances." Those cases, however, do little to advance Petitioner's cause. In the first case, *Save the Plastic Bag Coalition v. County of Marin* (2013) 218 Cal.App.4th 209, there was no discussion of the unusual circumstances exemption, and the

Court of Appeal held that the Class 7 and Class 8 exemptions were properly found to apply. In the second case, *Save the Plastic Bag Coalition v. City and County of San Francisco* (2013) 222 Cal.App.4th 863, the Court of Appeal found that the exemption was properly applied and that the petitioner had failed to carry its burden with respect to the unusual circumstances exception. In the third case, *Main San Gabriel Basin Watermaster v. State Water Resources Control Bd.* (1993) 12 Cal.App.4th 1371, 1384, the Court of Appeal expressly stated that it was not considering the Class 7 and Class 8 exemptions because its decision rested on another issue. In the fourth case, *Magan v. County of Kings* (2002) 105 Cal.App.4th 468, the Court of Appeal found that the county met its burden to show the Class 8 exemption applied and that appellant failed to meet his burden to establish an exception.[10]

In addition, Petitioner refers to the conservation projects in other jurisdictions—SEA in Los Angeles County, RTP/SCS in Southern California, National Forest Resource Management Plans, the MSHCP in Riverside, the San Diego Multiple Species Conservation Plan, and the Orange County Central and Coastal Subregional National Community Conservation Plan—and asserts that the existence of these other projects highlights "why the Project and the County's approval process was unusual," since those other projects underwent environmental review.

The reference to these other projects fails to make Petitioner's point. First, Petitioner incorrectly suggests that SEA underwent environmental review; it did not. (See AR 02172-73.[11]) As for the other projects, the cited portions of the record either do not explain the scope of those other projects or do not disclose that the projects are far greater in scope. (AR 01891, 02172-73

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[10] If anything, *Magan* mitigates against Petitioner's position. There, the disputed ordinance phased out and ultimately prohibited the application of sewage sludge on land anywhere in the unincorporated area of Kings County. (*Magan v. County of Kings, supra,* 105 Cal.App.4th at p. 471.) It is a fair inference that the unincorporated area of the whole of Kings County is greater than 163,000 acres and includes more than 10,000 acres of mineral resources.

[11] The addendum and website referenced by Petitioner's counsel sets forth an addendum, stating that there was no environmental review or EIR for that project because none of the conditions in CEQA Guidelines, section 15162 are present. The cited addendum states in relevant part: "No major revisions of the Certified EIR are required as no new significant environmental effects have been identified, nor has a substantial increase in the severity of previously identified significant effects been identified, nor have any substantial changes occurred with respect to the circumstances under which the project was undertaken. [¶] The project does not propose to change the impacts previously analyzed within the Certified EIR. The proposed amendments to the General Plan are consistent with the Certified EIR analyses. . . ." (AR 02172-73; also available at https://planning.lacounty.gov/site/sea/wp-content/uploads/2018/09/H-ADDENDUM.pdf [addendum for SEA]; see also Exhibit 10 of Petitioners' counsel's letter.)

[stating that the SEA does not change the General Plan's prior EIR, without explaining the scope of SEA], AR 02175 [stating that the RTP/SCS is a regional transportation plan], AR 02146 [no explanation of the scope of the MSHCP], AR 02164-68 [list of hyperlinks from a website with no substantive information], AR 02169-71 [Orange County's project involves permanently protected open space].) Therefore, Petitioner has not shown that these other projects are analogous to the Project in this case.[12]

As for the fact that the acreage in the Project includes areas already classified as an MRP overlay zone, the court should consider, and has considered, whether the project is consistent with the surrounding zoning and land uses. (See *Citizens for Environmental Responsibility v. State ex rel. 14th Dist. Ag. Assn.* (2015) 242 Cal.App.4th 555, 586.) However, as discussed in connection with the SMARA claim, Petitioner has not demonstrated that the Project is incompatible with mining. As discussed above, under the definitions stated in the Designation, the Project is "consistent" with the surrounding land uses. Petitioner fails to cite any authority or offer a reasoned explanation supporting its assertion that the fact that the Project encompasses areas rich in mineral resources constitutes an unusual circumstance.

Therefore, Petitioner has not shown that the Project presents an unusual circumstance that distinguish it from other projects falling within the Class 7 and Class 8 exemptions. However, even if the court were to find that the size and location of the Project were collectively an unusual circumstance, it would not disturb the County's finding that there is no "fair argument" that those conditions give rise to a reasonable possibility of a significant effect on the environment due to unusual circumstances because, for reasons stated above in connection with the SMARA claim and below in connection with the common sense exemption, that finding is supported by substantial evidence.

Therefore, Petitioner has not met its burden to establish an exception to the Class 7 and

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[12] Petitioners' counsel argued, in a letter to the County, that Riverside County determined that its Multiple Species Habitat Conservation Plan ("MSHCP") surpassed its threshold of significance for impact to mining operations, and therefore that county issued an EIR. (AR 04697, 04706-08.) The facts cited by counsel in the letter are outside the record. In any event, the Riverside MSHCP is easily distinguished from the Project here because the Riverside MSHCP completely sets aside some land previously zoned for mineral resource mining to instead be used solely for conservation.

Class 8 categorical exemptions. It follows that the Project is not subject to environmental review under CEQA. This conclusion is sufficient to deny the petition.

4. Common Sense Exemption

In addition to finding that the Project was subject to the Class 7 and Class 8 exemptions, the County found the "common sense" exemption applied. Petitioner disagrees.

"A project that qualifies for neither a statutory nor a categorical exemption may nonetheless be found exempt under what is sometimes called the 'common sense' exemption." (*Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4th 372, 380 ("*Muzzy Ranch*").) A project is subject to this exemption "[w]here it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment." (*Ibid*; CEQA Guidelines, § 15061, subd. (b)(3).) "Determining whether a project qualifies for the common sense exemption need not necessarily be preceded by detailed or extensive factfinding. Evidence appropriate to the CEQA stage in issue is all that is required." (*Muzzy Ranch,* 41 Cal.4th at p. 388.)

Where the agency relies on the common sense exemption, it must provide the support for its decision before the burden shifts to the challenger. (*Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 116 ("*Davidon*").) The agency bears the burden to produce "substantial evidence supporting its exemption decision." (*Id.*, at p. 119.) "An agency's duty to provide such factual support 'is all the more important where the record shows, as it does here, that opponents of the project have raised arguments regarding possible significant environmental impacts.' " (*Muzzy Ranch,* 41 Cal.4th at p. 386, quoting *Davidon.*) "[T]he showing required of a party challenging an exemption under Guidelines section 15061, subdivision (b)(3) is slight, since that exemption requires the agency to be *certain* that there is *no possibility* the project may cause significant environmental impacts." (*Davidon*, 54 Cal.App.4th at p. 116.) "If legitimate questions can be raised about whether the project might have a significant impact and there is any dispute about the possibility of such an impact, the agency cannot find with certainty that a project is exempt." (*Ibid.*, italics in original.)

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In finding that the Project was subject to the common sense exemption, the County found:

> [T]o the extent the project affects the environment, the effect is expected to be beneficial since the proposed project is intended to protect biological resources, by including limits on vegetation removal, buffers created for surface water features and wildlife crossing structures, limits on the intentional planting of invasive plants, and the requirement for compact development in critical areas within the habitat linkages. In addition, staff has determined that the project does not result in the direct or indirect loss of agricultural soils or create any land use incompatibility issues with agricultural operations, as this project does not include any structures or uses, and agricultural operations are generally excluded from the proposed regulations.
>
> (AR 1131-32]

Petitioner argues that "the County's conclusion that there is 'no possibility' the Project will have a significant effect on the environment cannot be sustained because it is based solely upon the County's views as to the 'expected' environmental benefits of the Project without also considering its potential downsides." (Pet. Open. Brief, p. 26.) That is, Petitioner contends that the County only focused on the positive environment impacts and never seriously considered the adverse environmental affects the Project might have from its effect on mining operations.

In support of this argument, Petitioner cites *Davidon,* with the explanation that the County committed "the same error" that the lead agency made there. That error was described by the Court of Appeal this way:

> In this case the City's action was supported only by a conclusory recital in the preamble of the Ordinance that the project was exempt under [the common sense exemption]. *There is no indication that any preliminary environmental review was conducted before the exemption decision was made.* The agency produced no evidence to support its decision and we find no mention of CEQA in the various staff reports. A determination which has the effect of dispensing with further environmental review at the earliest possible stage requires something more. We conclude the agency's exemption determination must be supported by evidence in the record demonstrating that the agency considered possible environmental impacts in reaching its decision.
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> (*Davidon,* 54 Cal. App. 4th at pp. 116-117, emphasis added.)

Here, unlike *Davidon*, the County conducted an extensive preliminary environmental review before the exemption decision was made. In fact, County Planning Division Staff

considered and responded to Petitioner's specific concerns in a six-page memorandum. (AR 2820-25.) Among other things, staff concluded: that the Ordinance would not prohibit removal of native vegetation for surface mining operations, that the County already considered potential environmental impacts on wildlife and wildlife movement in issuing discretionary permits affecting surface mining operations, and that the Ordinance's regulation of lighting in connection with mining operations were consistent with existing Planning Department practices. (*Ibid.*)

Next, Petitioner contends that the Project *would have* an adverse environmental impact on mineral resources. It observes that Appendix "G" to the CEQA Guidelines identifies two mineral resource-related thresholds of significance that a lead agency must consider. The first is: "Would the project result in the loss of availability of a known mineral resource that would be of value to the region and the residents of the state?" (Guidelines, Appx. G, XII(a)-(b). The second is: "Would the project result in the loss of availability of a locally-important mineral resource recovery site delineated on a local general plan, specific plan or other land use plan?" (*Ibid.*) Petitioner also notes that the County's Assessment Guidelines include two thresholds of significance that relate to mining activities. (See AR 14226.) Under the Assessment Guidelines, any project in the MRP overlay zone "which has the potential to hamper or preclude extraction of or access to the aggregate resources, shall be considered to have a significant adverse impact on the environment." (*Ibid.*)

The Appendix "G" inquiries and the County's thresholds of significance require the "loss of availability" of a mineral resource or an impediment to the extraction of minerals. The County found that the Project had no adverse impact on mining operations and, thus, there is no possibility that the Project could have a significant effect on the environment. Petitioner fails to establish that the County's conclusion is without substantial evidence.

Petitioner argues, "For the same reasons why the Project will threaten the extraction of mineral resources in the context of SMARA, . . . the Project will also result in at least one significant environmental impact." (Pet. Open. Brief, p. 28.) But, as noted above, Petitioner failed to demonstrate in connection with the SMARA claim that the Ordinance would adversely impact mining operations.

The County, on the other hand, asserts that the record evidence supports its determination that the Project was covered by the common sense exemption. The evidence cited by the County shows:

- The Project does not authorize any new land use or development activities that were not previously allowed. (AR 00009-00249.)
- The Project regulates development in a manner that is compatible with, and minimizes impacts to, wildlife movement and wildlife corridors which mining projects were already required to do consistent with CEQA, the County's General Plan, and the County's Assessment Guidelines. (AR 00009-00249; 01110-31.)
- The Project addresses a regulatory gap in County land use policy for protection of biological resources by requiring a discretionary permit for certain land use development activities previously exempt or allowed with a ministerial permit without consideration for their impacts on wildlife movement and wildlife corridors. (AR 01131, 09216-17, 09406.)
- The Project's development standards were based on extensive research, scientific studies, and other evidence demonstrating both the need to protect wildlife corridors and the types of development that are more likely than others to imperil wildlife populations and plant species. (AR 01110-31, 01492-1509, 01510-13.)
- Mining projects were already conditioned to mitigate such impacts. (AR 01742, 02820-27, 14517-30, 14650-62, 14696-751, 14773, 14779-790, 14888-95.)

This is substantial evidence supporting the County's finding of the common sense exemption. Therefore, the Project was exempt from CEQA review by operation of the common sense exemption.

CONCLUSION

For these reasons, the petition is denied, and the claims stated therein are ordered dismissed.

This tentative decision is the court's proposed statement of decision and shall become the court's final statement of decision unless, within 10 days after announcement or service of the tentative decision (plus five days for service by mail), a party specifies those principal controverted issues as to which the party is requesting a statement of decision or makes proposals not included in the tentative decision. (See Code Civ. Proc. § 632; Cal. Rules of

Court, Rule 3.1590, subd. (c).) If no such request/proposal is made within the specified time (see Cal. Rules of Court, Rule 3.1590, subd. (d)), counsel for petitioners is to prepare, serve and submit a proposed judgment within 20 days of the service of this tentative decision.

The clerk is directed to serve this tentative decision upon the parties.

Dated: February 4, 2022

MARK S. BORRELL
Judge of the Superior Court

PROOF OF SERVICE
CCP § 1012, 1013a (1), (3) & (4)

STATE OF CALIFORNIA)
) ss.
COUNTY OF VENTURA)

Case Number: 56-2019-00527805-CU-WM-VTA
Case Title: California Construction and Industrial Materials Association v. County of Ventura

I am employed in the County of Ventura, State of California. I am over the age of 18 years and not a party to the above-entitled action. My business address is 800 S. Victoria Avenue, Ventura, CA 93009. On the date set forth below, I served the within:

TENTATIVE RULING

On the following named party(ies)

SEE SERVICE LIST

_____ **BY PERSONAL SERVICE**: I caused a copy of said document(s) to be hand delivered to the interested party at the address set forth above on _____at _____ a.m./p.m.

___X__ **BY MAIL**: I caused such envelope to be deposited in the mail at Ventura, California. I am readily familiar with the court's practice for collection and processing of mail. It is deposited with the U.S. Postal Service on the dated listed below.

__**BY FACSIMILE**: I caused a courtesy copy of said documents to be sent via facsimile to the interested party at the facsimile number set forth above at __. from telephone number **805.477.5894.**

___ **BY ELECTRONIC SERVICE** (to individual person): By electronically transmitting a copy/courtesy copy of the document(s) listed above to the email address(es) of the person(s) set forth above/ on the attached service list. The transmission was reported as complete and without error.

I declare under penalty of perjury that the foregoing is true and correct and that this document is executed on **February 4, 2022**, at Ventura, California.

By: _____
H. McIntyre, Judicial Secretary

SERVICE LIST

56-2019-00527805-CU-WM-VTA
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