Filed 7/10/18 Sierra Club v. County of Kern CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

SIERRA CLUB,

Petitioner and Appellant,

v.

COUNTY OF KERN et al.,

Defendants and Respondents.

F071133

(Super. Ct. No. CV-274340)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Kenneth C. Twisselman II, Judge.

Law Office of Babak Naficy, Babak Naficy and Jamie Garretson for Plaintiff and Appellant.

Mark L. Nations, County Counsel, Andrew C. Thompson, Deputy County Counsel; Hogan Law and Michael M. Hogan for Defendants and Respondents.

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In July 2011, the County of Kern[1] approved the Kern River Valley Specific Plan (the Specific Plan) and certified a related program environmental impact report (EIR)

[1] We continue the practice of using the term "County" to refer to the governmental entity and "Kern County" to refer to the geographical area. (See *County of Kern v.*

prepared pursuant to the California Environmental Quality Act (CEQA; Pub. Resources Code, § 21000 et seq.).[2] The purpose of the Specific Plan was to guide future development of the Specific Plan area located in northeastern Kern County. Appellant Sierra Club contends the EIR violated CEQA by (1) inadequately analyzing the long-term significance of the project's greenhouse gas emissions, (2) inadequately mitigating the project's climate change impacts, (3) inadequately mitigating impacts to agricultural resources, and (4) deferring the formulation mitigation measures for air quality impacts.

We reach the following conclusions. First, the EIR's analysis of the long-term significance of the Specific Plan's greenhouse gas emissions was adequate at the time it was released in 2011. Second, the EIR's approach to mitigating the impacts of greenhouse gas emissions was not a prejudicial abuse of discretion. Third, in connection with the conversion of farmland to nonagricultural uses, CEQA does not require a greater amount of farmland be placed under an agricultural conservation easement or similar program than the amount of farmland converted to nonagricultural use. In other words, a greater than 1:1 mitigation ratio is not required by CEQA. Fourth, County violated CEQA by deferring the formulation of air quality mitigation measures without firmly committing to specific performance standards for the future mitigation measures.

We therefore reverse the judgment and remand for the issuance of a writ of mandate directing County to take action correcting the CEQA violation.

FACTS

CEQA requires public agencies assess the environmental impacts of projects requiring government approval. In this case, the project consists of the approval and implementation of the July 2011 Kern River Valley Specific Plan and related

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T.C.E.F., Inc. (2016) 246 Cal.App.4th 301, 306, fn. 1; *County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1557, fn. 1.)

[2] All unlabeled statutory references are to the Public Resources Code.

amendments to certain elements of the Kern County General Plan. The area covered by the Specific Plan contains approximately 110,510 acres (173 square miles) located in the northeastern portion of Kern County adjacent to Tulare County. The area includes the Isabella Reservoir,[3] the North and South Forks of the Kern River, and part of the Sierra Nevada Mountains. The unincorporated communities located within the Specific Plan area include Bodfish, Lake Isabella, Kernville and Onyx. The main roads are State Routes 155 and 178.

Approximately 45 percent of the land within the Specific Plan area is owned by the federal government. Of that federal land, the Bureau of Land Management administers roughly 75 percent and the Forest Service administers about 19 percent. In 2006, approximately 37,000 acres within the Specific Plan area were used for grazing, while 1,351 acres were planted to crops such as alfalfa (513 acres), oats (446 acres), and potatoes (162 acres). According to the California Department of Conservation's figures for 2006, the Specific Plan area contained 2,695 acres of prime farmland, 850 acres of unique farmland, and 31 acres of farmland of statewide importance.

Specific plans are used to systematically implement general plans in a particular geographic area. (Gov. Code, § 65450.) All development guidelines, zoning and future projects must be consistent with the specific plan. (Gov. Code, §§ 65455, 65867.5.) The Specific Plan integrated existing specific plans (i.e., the Kelso Valley Specific Plan and the South Lake Isabella Specific Plan) and the Kern County General Plan within a unified framework to guide future development in the Specific Plan area. The Specific Plan states its planning horizon is the year 2030. Notwithstanding that horizon, the Specific Plan also states it "generally addresses development in a post-2030 planning horizon" and

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[3] Since the completion of Isabella Reservoir in 1953, recreational use of the area has increased and now the Kern River Valley contains many hotels, lodges and recreational activity areas.

anticipates its provisions "will go through periodic comprehensive updates every 10 years to ensure that the planning program is reflective of community needs."

In 2004, County began conducting community workshops to obtain information from local residents relevant to identifying issues and establishing goals. In January 2006, County made a draft Specific Plan available for public review and issued a notice of preparation of an EIR. In January 2011, a draft EIR was made available for public review and a 45-day comment period was established.

In March 2011, Sierra Club provided County with a 50-page letter of comments on the draft EIR. The comments addressed the draft EIR's analysis of climate change, air quality, agricultural resources and raised issues related to mitigation measures and alternatives.

In April 2011, the final EIR was released. It included County's responses to the public comments. In June 2011, County's board of supervisors approved the Specific Plan and certified the final EIR. In July 2011, a notice of determination was posted.

PROCEEDINGS

In August 2011, Sierra Club filed a petition for peremptory writ of mandate and complaint for declaratory and injunctive relief. In March 2014, County certified the administrative record of proceedings and lodged it with the trial court. The administrative record of proceedings contained 10,403 pages and was organized into 39 volumes.

In May 2014, Sierra Club filed its opening brief in support of its petition for writ of mandate. Sierra Club claimed (1) the EIR used an inappropriate threshold for assessing the significance of impacts on climate change; (2) the climate change mitigation scheme violated CEQA; (3) the 1:1 mitigation for conversion of farmland was legally inadequate; (4) County failed to adequately respond to comments; and (5) the EIR failed to identify mitigation measures for impacts on air quality. Briefing was completed in July 2014.

On August 29, 2014, the trial court held a hearing on the petition. The court stated its tentative ruling from the bench, heard argument from counsel, and confirmed its tentative ruling to deny the petition for writ. The court directed the attorney representing County to prepare the judgment.

In November 2014, a notice of entry of order denying the petition for writ of mandate and the complaint was filed and served. In January 2015, Sierra Club filed a notice of appeal.

In May 2015, pursuant to a stipulation of the parties, this court stayed all proceedings pending a decision by the California Supreme Court in a CEQA case addressing the analysis of greenhouse gas emissions. In July 2017, that decision was filed. (*Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 3 Cal.5th 497 (*Cleveland Forest*).) In *Cleveland Forest*, the plaintiffs argued that the EIR for a regional development plan, intended to guide future transportation infrastructure, failed to adequately analyze the plan's impacts on greenhouse gas emissions and climate change. (*Id*. at p. 503.) They argued the EIR should have evaluated the plan's impacts against Executive Order No. S-3-05, signed by Governor Schwarzenegger in June 2005 (Executive Order). The Executive Order set goals for reducing greenhouse gas emissions for the years 2010, 2020 and 2050. (*Id*. at p. 504.) The Supreme Court concluded the lead agency "did not abuse its discretion by declining to explicitly engage in an analysis of the consistency of projected 2050 greenhouse gas emissions with the goals in the executive order." (*Ibid*.) The Supreme Court's analysis and conclusions are relevant to issues raised in this appeal about the Executive Order's emission reduction goals for the year 2050.

After *Cleveland Forest* became final, this court lifted the stay in this proceeding. In March 2018, the last appellate brief was filed and we received the administrative record of proceedings from the trial court.

DISCUSSION

I. CEQA PRINCIPLES

A. Standard of Review

Appellate review in a CEQA proceeding is governed by the abuse of discretion standard set forth in section 21168.5. Consequently, our "inquiry shall extend only to whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." (§ 21168.5.)

Under this abuse of discretion standard, we independently review claims that a public agency committed legal error (i.e., did not proceed in the manner required by law) in conducting the environmental review required by CEQA. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 426-427 (*Vineyard*).) As to claims an agency committed factual error, we apply the substantial evidence standard of review. (*Id*. at p. 426.)

B. Adequacy of an EIR's Discussion

Stated in general terms, assertions that an EIR's discussion of a particular topic was legally inadequate under CEQA fall into two categories: (1) failures to provide information specifically required by a statute, regulation or judicial decision; and (2) discussions that address a required topic and provide some information about that topic, but the party challenging the discussion claims the information provided is insufficient even though there is no violation of an explicit disclosure requirement.

1. Specific Disclosure Requirements

Claims of inadequacy that fall within the first category are relatively easy for the reviewing court to decide. The court (1) identifies the information required by the statute, regulation or judicial decision and (2) examines the EIR to determine if that information was included or omitted. (E.g., *Laurel Heights Improvement Assn. v.*

Regents of University of California (1988) 47 Cal.3d 376, 404 [EIR's discussion was insufficient because it contained no analysis of alternate locations for biomedical research facilities].) Courts must scrupulously enforce mandated disclosure requirements. (*Vineyard, supra,* 40 Cal.4th at p. 435.)

2. General Standard of Adequacy

Claims of inadequacy falling within the second category are more complex. Without a specific standard of disclosure to enforce, the court must rely on general principles in drawing a line that divides *sufficient* discussions from those that are *insufficient*. First, we conclude drawing this line and determining whether the EIR complies with CEQA's information disclosure requirements is properly characterized as a question of law subject to independent review by the courts. (*Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48, 102.)

Second, this court has identified some general principles to help define the line between sufficient and insufficient discussions in an EIR:

> "When assessing the legal sufficiency of an EIR, the reviewing court focuses on adequacy, completeness and a good faith effort at full disclosure. [Citation.] 'The EIR must contain facts and analysis, not just the bare conclusions of the agency.' [Citation.] 'An EIR must include detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.' [Citation.] Analysis of environmental effects need not be exhaustive, but will be judged in light of what was reasonably feasible." (*Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1390 (*Irritated Residents*); see Guidelines, §§ 15144 [best effort to find out and disclose all lead agency reasonably can], 15151 [standards of adequacy].)[4]

In addition, this court has recognized that a good faith effort at full disclosure does not mandate perfection and does not require an analysis to be exhaustive. (*San Joaquin*

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[4] "Guidelines" refers to the regulations that implement CEQA and are set forth in California Code of Regulations, title 14, section 15000 et seq.

Raptor Rescue Center v. County of Merced (2007) 149 Cal.App.4th 645, 653; Guidelines, § 15003, subd. (i).)

Third, to establish a *prejudicial* abuse of discretion as required by section 21168.5, plaintiffs claiming the information in an EIR was insufficient must demonstrate that the failure to include relevant information precluded informed decisionmaking by the lead agency or informed participation by the public. (*Madera Oversight Coalition, Inc. v. County of Madera*, *supra*, 199 Cal.App.4th at pp. 76-77; *Irritated Residents*, *supra*, 107 Cal.App.4th at p. 1391.) Plaintiffs need not show that the outcome of the administrative process would have been different if the lead agency had complied with CEQA's disclosure requirements. (*San Joaquin Raptor Rescue Center v. County of Merced*, *supra*, 149 Cal.App.4th at p. 653.)

3. Program EIR's, Tiering, and Specificity

In section 2.2, the EIR identified itself as a "program" EIR. Guidelines section 15168, subdivision (a)(3) states: "A program EIR is an EIR which may be prepared on a series of actions that can be characterized as one large project and are related … [i]n connection with the issuance of … plans." Although the Specific Plan area is part of the Kern County General Plan, the Specific Plan qualifies as a "plan" for purposes of this provision. (See *Concerned Dublin Citizens v. City of Dublin* (2013) 214 Cal.App.4th 1301, 1305 ["EIR for the specific plan was prepared as a program EIR"].)

Section 2.2 of the EIR also stated that, as a program EIR, it was part of a tiering process. Tiering is addressed in Guidelines sections 15152 and 15385. "'Tiering' refers to using the analysis of general matters contained in a broader EIR (such as one prepared for a general plan or policy statement) with later EIRs and negative declarations on narrower projects; incorporation by reference the general discussions from the broader EIR; and concentrating the later EIR or negative declaration solely on the issues specific to the later project." (Guidelines, § 15152, subd. (a); see Guidelines, § 15385.) Tiering is

appropriate when the sequence of EIR's is from a program EIR to (1) a program EIR of lesser scope or (2) a site-specific EIR. (Guidelines, § 15385, subd. (a).) Tiering is "a method by which the scope and intensity of an EIR can be adjusted, depending on the focus of the 'project.'" (*Koster v. County of San Joaquin* (1996) 47 Cal.App.4th 29, 36.)

"Where a lead agency is using the tiering process in connection with an EIR for a large-scale planning approval, such as a [specific] plan ..., the development of detailed, site-specific information may not be feasible but can be deferred, in many instances, until such time as the lead agency prepares a future environmental document in connection with a project of a more limited geographic scale, as long as deferral does not prevent adequate identification of significant effects of the planning approval at hand." (Guidelines, § 15152, subd. (c).) The California Supreme Court has explained that "[t]iering is properly used to defer analysis of environmental impacts and mitigation measures to later phases when the impacts or mitigation measures are not determined by the first-tier approval decision but are specific to the later phases." (*Vineyard*, *supra*, 40 Cal.4th at p. 431.)

CEQA and the Guidelines do not identify the level or detail of analysis required in a program EIR. (1 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2d ed. 2018) § 10.14, p. 10-20.) "All EIRs must cover the same elements, but the levels of specificity is determined by the nature of the project covered by the EIR." (*Ibid.*) Guidelines section 15146 addresses specificity by providing:

> "The degree of specificity required in an EIR will correspond to the degree of specificity involved in the underlying activity which is described in the EIR.
>
> "(a) An EIR on a construction project will necessarily be more detailed in the specific effects of the project than will be an EIR on the adoption of a local general plan or comprehensive zoning ordinance because the effects of the construction can be predicted with greater accuracy.

> "(b) An EIR on a project such as the adoption or amendment of a comprehensive zoning ordinance or a local general plan should focus on the secondary effects that can be expected to follow from the adoption, or amendment, but the EIR need not be as detailed as an EIR on the specific construction projects that might follow."

The foregoing principles related to tiering, program EIR's, and the level of specificity required in an EIR are relevant to Sierra Club's challenges to the adequacy of the analysis contained in the final EIR.

II. GREENHOUSE GAS EMISSIONS

A. General Information about Greenhouse Gases

Greenhouse gas emissions contribute to climate change. Greenhouse gases absorb infrared radiation and trap the heat in the Earth's atmosphere, rather than allowing the radiation to escape into space. Prominent greenhouse gases include water vapor, carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. The capacity of each gas to retain heat varies. (*Association of Irritated Residents v. Kern County Bd. of Supervisors* (2017) 17 Cal.App.5th 708, 731.) To ease the comparison of different mixes of gases, emissions are converted into a carbon dioxide equivalent (CO_2e),[5] which is the amount of carbon dioxide that would have the same global warming potential as the emissions of that particular greenhouse gas. (*Id*. at p. 732.) "In 2011, total greenhouse gas emissions in the United States were 6,702 million metric tons of CO_2e, which is down from the peak of 7,263 million metric tons in 2007." (*Ibid*.)

B. Regulatory Setting

Section 4.17.3 of the EIR devoted approximately 11 pages to describing the regulatory setting for greenhouse gas emissions at the international, federal, state,

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[5] "CO_2e" is defined by regulation to mean "the number of metric tons of [carbon dioxide] emissions with the same global warming potential as one metric ton of another greenhouse gas." (Cal. Code Regs., tit. 17, § 95802, subd. (a).)

regional and local level. Recent decisions of the California Supreme Court also provide overviews of California's regulatory scheme addressing greenhouse gas emissions for the purpose of slowing climate change. (*Cleveland Forest, supra*, 3 Cal.5th at pp. 504-507 [part I]; *Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal.4th 204, 215-217 [part II.A.1.] (*Center for Biological Diversity*).)

The EIR and Supreme Court decisions described the Executive Order signed by Governor Schwarzenegger in June 2005. The Executive Order established the goals of reducing greenhouse gas emissions to 2000 levels by 2010, reducing emission to 1990 levels by 2020, and reducing emissions to 80 percent below 1990 levels by 2050. (*Cleveland Forest, supra*, 3 Cal.5th at p. 504.)

After the Executive Order was issued, the Legislature enacted the California Global Warming Solutions Act of 2006 (Health & Saf. Code, § 38500 et seq.), which is "commonly known as Assembly Bill No. 32." (*Cleveland Forest, supra*, 3 Cal.5th at p. 505.) Assembly Bill No. 32 partially adopted the Executive Order's goals by directing the California Air Resources Board (CARB) to "determine what the statewide greenhouse gas emissions level was in 1990, and approve in a public hearing, a statewide greenhouse gas emissions limit that is equivalent to that level, to be achieved by 2020." (Health & Saf. Code, § 38550.) The Legislature also directed CARB to prepare a "scoping plan" to identify how to achieve the "maximum technologically feasible and cost-effective reductions in greenhouse gas emissions by ... 2020." (Health & Saf. Code, § 38561, subd. (a).)

CARB's 2008 scoping plan estimated statewide 1990 emissions at 427 million metric tons of CO_2e. (*Center for Biological Diversity*, *supra*, 62 Cal.4th at p. 216.) The scoping plan also estimated emissions for the period 2002 to 2004 were 469 million metric tons of CO_2e annually. (*Ibid*.) The scoping plan then applied a "business-as-usual

model"[6] to the estimated recent emissions and population and economic growth projections, generating a business as usual estimate of greenhouse gas emissions of 596 million metric tons of CO_2e for the year 2020. Comparing this figure to the estimate of 427 million metric tons of CO_2e emissions in 1990, the scoping plan concluded: "'[R]educing greenhouse gas emissions to 1990 levels means cutting approximately 30 percent from business-as-usual emission levels projected for 2020, or about 15 percent from today's levels.'" (*Ibid.*) "The Scoping Plan's 2020 forecast is referred to as a 'business-as-usual' projection." (*Ibid.*)

Assembly Bill No. 32 and CARB's scoping plan did not establish a method for CEQA analysis of greenhouse gas emissions from a proposed project. (*Center for Biological Diversity*, *supra*, 62 Cal.4th at pp. 216-217.) Also, they did not resolve a more specific question by establishing thresholds of significance for emissions of greenhouse gas. In 2007, the Legislature amended CEQA by adding a provision requiring the preparation, adoption and periodic update of guidelines for *mitigation* of greenhouse gas impacts.[7] (Stats. 2007, ch. 185, § 1, p. 2330, adding § 21083.05.) In response to this directive, Guidelines section 15126.4, subdivision (c) addressing mitigation of greenhouse gas emissions and Guidelines section 15064.4 addressing the description and analysis of greenhouse gas emissions were adopted and went into effect in March 2010. Thus, these Guideline provisions were in effect when the draft EIR was released in January 2011.

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6 A business-as-usual model assumes no conservation or regulatory efforts beyond what is in place when the forecast was made. It "'represent[s] the emissions that would be expected to occur in the absence of any GHG [greenhouse gas] reduction actions.'" (*Center for Biological Diversity*, *supra*, 62 Cal.4th at p. 216.)

7 Mitigation is a subject that is addressed towards the end of the CEQA analysis, after the impact is described, thresholds of significance are adopted, and a determination is made that the impact is significant. The 2007 legislation did not address issues that arise earlier in the CEQA analysis, such as how to describe and analyze greenhouse gas impacts or how to choose a threshold of significance.

III. SIGNIFICANCE OF IMPACT ON CLIMATE CHANGE

A. Claimed CEQA Violations

Sierra Club contends the EIR fails to comply with CEQA because it does not adequately analyze the significance of the Specific Plan's impact on climate change. In Sierra Club's view, this inadequacy exists "because the County never considered the significance of the Specific Plan's projected 2030 [greenhouse gas] emissions in light of the State's target of reducing overall [greenhouse gas] emissions to 80% of 1990 levels by 2050."

Sierra Club's arguments about *inadequate analysis* and *failures to consider* can be viewed as an indirect attack on the thresholds of significance adopted by County and a claim that County chose an inappropriate threshold of significance. Accordingly, we address the following two issues involving the significance of the project's greenhouse gas emissions. First, did County's choice of thresholds of significance for greenhouse gas emissions violate CEQA? Second, did County provide a legally *adequate analysis and discussion* of the significance of the Specific Plan's impact on climate change? As explained below, we conclude County did not abuse its discretion in either way.

B. Thresholds of Significance

A lead agency's determination of the significance of impacts from greenhouse gas emissions is subject to (1) the general rules governing the selection and use of thresholds of significance and (2) the provisions of Guidelines section 15064.4, which specifically address greenhouse gas emissions.

1. General Principles

Many of the general principles governing thresholds of significance are contained in Guidelines section 15064.7. The term "threshold of significance" is defined as "an identifiable quantitative, qualitative or performance level of a particular environmental

effect, non-compliance with which means the effect will normally be determined to be significant." (Guidelines, § 15064.7, subd. (a).)[8]

The evaluation of a threshold of significance for a particular project is subject to subdivision (c) of Guidelines section 15064.7, which states: "When adopting thresholds of significance, a lead agency may consider thresholds of significance previously adopted or recommended by other public agencies or recommended by experts, provided the decision of the lead agency to adopt such thresholds is supported by substantial evidence." Here, County followed this guidance by considering how CARB and regional air pollution control districts had approached the question of thresholds of significance for greenhouse gas emissions. We interpret the Guidelines' reference to "substantial evidence" to mean the agency's determination of a threshold of significance resolves either a question of fact or a mixed question of law and fact.

Furthermore, in resolving the question of an appropriate threshold (or thresholds) of significance for a particular impact, lead agencies are granted "substantial discretion."[9] (*Mission Bay Alliance v. Office of Community Investment & Infrastructure* (2016) 6 Cal.App.5th 160, 192.) A logical implication of committing the question of an appropriate threshold to the lead agency's discretion is that there is a "permissible range of options set by the legal criteria" and not only one correct threshold. (See *Department*

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8 The section also addresses the development, publication and adoption of thresholds of significance for general use. County did not adopt a threshold for general use and, thus, those provisions are not described here.

9 A rationale for granting lead agencies discretion in selecting a threshold of significance is that the adverse environmental consequences of an impact often depends on the nature of the area affected. (*North Coast Rivers Alliance v. Marin Municipal Water Dist. Bd. of Directors* (2013) 216 Cal.App.4th 614, 624-625.) This consideration of local conditions does not apply to climate change because the area affected is global. (See *Center for Biological Diversity, supra,* 62 Cal.4th at pp. 219-220 [greenhouse gases are not contained in local area of emission, which means the impacts are global rather than local].)

of Parks & Recreation v. State Personnel Bd. (1991) 233 Cal.App.3d 813, 831.) The idea that there is a range of permissible thresholds of significance has not been overridden by the adoption of international, federal or statewide thresholds of significance for greenhouse gas emissions. (See *Center for Biological Diversity*, *supra*, 62 Cal.4th at pp. 222-223 [agency's *discretionary* choice of Assembly Bill No. 32 consistency as a significance criterion did not violate Guidelines or CEQA].)

2. Estimating or Calculating Greenhous Gas Emissions

In 2010, the Natural Resources Agency adopted a new guideline addressing greenhouse gas emissions. (*Center for Biological Diversity*, *supra*, 62 Cal.4th at p. 217.) Guidelines section 15064.4, subdivision (a) states: "A lead agency should make a good-faith effort, based to the extent possible on scientific and factual data, to describe, calculate or estimate the amount of greenhouse gas emissions resulting from a project." (Guidelines, § 15064.4, subd. (a).) In determining how to describe, calculate or estimate the amount of greenhouse gas emissions, the lead agency has the discretion to use (1) a model or methodology to quantify the emissions, (2) a qualitative analysis or performance based standards, or (3) a combination of approaches. (Guidelines, § 15064.4, subd. (a)(1)-(2); *Center for Biological Diversity*, *supra*, at p. 217.) Here, Sierra Club does not contend County violated the Guidelines section 15064.4, subdivision (a) when it described and calculated the amount of greenhouse gas emissions that would result from the project. Instead, Sierra Club argues the EIR failed to comply with CEQA because it did not *adequately analyze* the significance of the Specific Plan's impact on climate change and *failed to consider* the significance of the project's emissions in light of the year 2050 target in the Executive Order. (See pt. III.A., *ante*, and pt. III.D., *post*.)

3. Significance of Greenhouse Gas Emissions

Subdivision (b) of Guidelines section 15064.4 does not identify the amount of greenhouse gas emissions that are deemed significant. Instead, it provides the following

nonexclusive list of factors the lead agency should[10] consider when assessing the significance of the environmental impacts from greenhouse gas emissions:

> "(1) The extent to which the project may increase or reduce greenhouse gas emissions as compared to the existing environmental setting;
>
> "(2) Whether the project emissions exceed a *threshold of significance* that the lead agency determines applies to the project.
>
> "(3) The extent to which the project complies with regulations or requirements adopted to implement a statewide, regional, or local plan for the reduction or mitigation of greenhouse gas emissions." (Guidelines, § 15064.4, subd. (b), italics added; see *Center for Biological Diversity*, *supra*, 62 Cal.4th at pp. 221-222.)

Subdivision (b)(2) of Guidelines section 15064.4 confirms the lead agency must determine which threshold or thresholds of significance apply to the project. We interpret Guidelines section 15064.4 and existing case law to mean lead agencies have discretion in selecting a threshold or thresholds of significance for evaluating the impacts of a project's greenhouse gas emissions.

C. Correct Thresholds of Significance

Section 4.17.4 of the EIR stated the potential impacts of greenhouse gas emissions "were evaluated on a quantitative and qualitative basis." Under the heading "Thresholds of Significance Impact Criteria" in the greenhouse gas emissions section, the EIR referred to County documents stating a proposed project could potentially have a significant impact if it would (1) generate greenhouse gas emissions, either directly or indirectly, that may have a significant impact on the environment or (2) conflict with any

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10 "'Should' identifies guidance provided by the Secretary of Resources based on policy considerations contained in CEQA, in the legislative history of the statute, or in federal court decisions which California courts can be expected to follow. Public agencies are advised to follow this guidance in the absence of compelling, countervailing considerations." (Guidelines, § 15005, subd. (b).) In contrast, the terms "must" and "shall" are used to identify mandatory elements that all public agencies are required to follow. (*Id.*, subd. (a).)

applicable plan, policy, or regulation adopted for the purpose of reducing the emissions of greenhouse gases. The first criteria is an indirect reference to a quantitative model threshold adopted later in the EIR. The second criteria is a qualitative threshold that follows the advice provided by Guidelines section 15064.4, subdivision (b)(3). Thus, in contrast to *Center for Biological Diversity*, this is not a case where "the agency cho[se] to rely completely on a single quantitative method to justify a no-significance finding." (*Center for Biological Diversity, supra*, 62 Cal.4th at p. 228.)

1. Qualitative Threshold

Sierra Club does not contend the qualitative threshold (i.e., conflict with plans, policies and regulations) adopted by County was an inappropriate or misleading threshold. We simply describe it here to provide context for our analysis of County's selection of a quantitative threshold.

First, the EIR analyzed the Specific Plan and concluded it was "consistent with the relevant goals and policies of the General Plan related to air quality and the effects of [greenhouse gas] emissions." The EIR used this consistency to support its statement that the Specific Plan's impacts "would be considered less than significant."[11]

Second, the EIR discussed emissions related to *construction* activities of future development allowed by the Specific Plan. As the construction activities would be required to comply with applicable federal and state law, local regulatory requirements (including County's general plan and the Specific Plan), the EIR concluded the impact from greenhouse gas emissions related to the construction activity "would be considered less than significant."

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11 Perhaps a more accurate way to state this conclusion is as follows: "There is no conflict between the specific plan and the general plan. Therefore, inconsistency does not provide a ground for finding the specific plan's impacts would be significant." Stated this way, the possibility that the specific plan's greenhouse gas emissions might be viewed as significant under another threshold is left open.

Third, the EIR discussed emissions related to the *operation* of future development and addressed "whether the proposed project would comply with the provisions of an adopted greenhouse [gas] reduction plan or strategy." The EIR described greenhouse gas emission reduction strategies implemented under Assembly Bill No. 32. These strategies were included in (1) the 2006 report of the Climate Action Team (CAT) established by Governor Schwarzenegger; (2) CARB's expanded list of early action measures; and (3) a list of "CEQA Mitigations for Global Warming Impacts" maintained by the California Attorney General's Office. The EIR determined the Specific Plan would comply with the strategies set forth in these sources and, as a result, operational "impacts are considered less than significant."

2. Quantitative Threshold

The EIR began its quantitative analysis of the project's greenhouse gas emissions by describing—as recommended in Guidelines section 15064.4, subdivision (a)—how it calculated or estimated the amount of the project's long-term emissions. The EIR adopted estimates of residential and job growth in the Specific Plan area by the year 2030. Next, it plugged those estimates into models using "business as usual" conditions. This approach generated an estimate of 35,546 metric tons per year of CO_2e for mobile source emissions and 5,801 metric tons per year of CO_2e, for area source emissions. As a result, the EIR stated "the implementation of the proposed project based on the 'business as usual conditions' would result in 41,347 metric tons per year of CO_2e" in the year 2030. The EIR next stated, "This represents 0.008 percent of the CO_2e of [greenhouse gas] emissions in the State of California (which is 551,958,893 CO_2e)."[12]

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12 Presumably, the figure of 551,958,893 refers to metric tons for a particular year. The statement is unclear as to whether the emissions are for a particular year and, if so, which year. It is unlikely the figure refers to emissions for the year preceding the release of the EIR, because another document prepared by County and presented to this court stated California produced 452 million metric tons of CO_2e in 2010. (*Association of Irritated Residents v. Kern County Bd. of Supervisors*, *supra*, 17 Cal.App.5th at p. 732.)

The draft EIR stated future development proposals subject to discretionary permits would have their long-term emissions impact addressed through mitigation measures. In particular, implementation measure 5.5.10 of the Specific Plan stated all new discretionary developments may be required to identify mitigation measures, either regulatory or applicant implemented, for the reduction by 29 percent of the project's "business as usual" operational CO_2e emissions. Based on the mitigation measures and compliance with applicable laws, regulations and planning documents, the draft EIR concluded "the potential long-term impacts to global climate change as a result of [greenhouse gas] emissions would be considered less than significant."[13] In effect, the draft EIR concluded the threshold of significance was a reduction of "business as usual" greenhouse gas emissions by 29 percent.

Sierra Club's comments to the draft EIR raised a number of points related to global warming and greenhouse gas emissions. One comment asserted the draft EIR failed to quantify and analyze the significance of the project's impacts on climate change. Another stated implementation measure 5.5.10's use of a "business as usual" condition was problematic because (1) the measure contained no specific performance standards for the reduction from business as usual, which made it impossible to understand the plan's impact on climate change; (2) determining significance based on a comparison to hypothetical business as usual conditions violated CEQA's requirement for a comparison to existing conditions; and (3) use of Assembly Bill No. 32's target for 2020 failed to

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Also, CARB's 2008 scoping plan estimated emissions for the year 2020 using a "business as usual" model at 596 million metric tons of CO_2e. (*Center for Biological Diversity, supra,* 62 Cal.4th at p. 216.) Despite these uncertainties, Sierra Club has not argued the sentence was misleading or inaccurate.

[13] As to cumulative impacts, the draft EIR stated "the effect of 41,347 metric tons of CO_2e per year could be considered cumulatively considerable" and, thus, "buildout of the proposed project by the year 2030 would contribute to cumulative [greenhouse gas] emissions in California and the related potential health effects."

take account of the Executive Order's goal for 2050—a goal that would require reductions greater than those meeting the 2020 target.

The final EIR included County's response to Sierra Club's comments on climate change.[14] Addressing the reliance on Assembly Bill No. 32, the final EIR stated Assembly Bill No. 32 required CARB to establish measures to roll back "business as usual" greenhouse gas emissions produced in 2020 to 1990 levels and cited Health and Safety Code section 38550.[15] The final EIR stated CARB prepared a scoping plan that determined reducing greenhouse gas emissions to 1990 levels meant cutting 28.356 percent from business-as-usual emission levels projected for 2020 and allocated 8 percent of the reduction to residential and commercial development. The final EIR stated, despite the 8 percent allocation, "Staff has determined in this case that the significance threshold for analyzing the project's impacts concerning greenhouse gas emissions is AB 32's overall greenhouse gas reduction goal of 29 percent below business as usual." The final EIR supported this choice of threshold of significance by noting (1) there was no statewide threshold of significance for greenhouse gas emissions, (2) the Eastern Kern Air Pollution Control District, which governed the area covered by the Specific Plan, had not adopted a threshold of significance for greenhouse gas emissions; and (3) the San Joaquin Valley Air Pollution Control District, which covered the remainder of Kern County, had adopted a 29 percent business as usual threshold of significance. County adopted this standard to promote consistency throughout Kern County and because it was consistent with Assembly Bill No. 32.

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14 The final EIR included a revised version of implementation measure 5.5.10, which is discussed in part IV.B., *post*.

15 Our Supreme Court described this aspect of Assembly Bill No. 32 as follows: "AB 32 partially adopted the Executive Order's goals by directing CARB to 'determine what the statewide greenhouse gas emissions level was in 1990, and approve in a public hearing, a statewide greenhouse gas emissions limit that is equivalent to that level, to be achieved by 2020.' (Health & Saf. Code, § 38550.)" (*Cleveland Forest, supra*, 3 Cal.5th at p. 505.)

The final EIR addressed the challenge to its choice of the threshold of significance by stating:

> "The commenter conten[d]s that the 29 percent business as usual is unreasonable because the Specific Plan's planning horizon extends to 2030, well beyond the 2020 target year and suggests that it would be more appropriate to consider AB 32's long-term goal of reducing California's overall greenhouse gas emissions by 80 percent of 1990 levels by 2050.
>
> "In response to this suggestion, the Lead Agency notes that in amending AB 32, the Legislature declined to adopt the longer-term emission reductions, and that AB 32's goals for 2020 are not only grounded in hard science but represent the only legally enforceable limit under California law."

As to adopting a more rigorous standard tied to the year 2050 target, the final EIR stated such a standard would be speculative for a program EIR prepared for the Specific Plan, implying it was unclear whether the Legislature would attempt to implement the Governor's goal. The final EIR also expressed the concern that new development could not be required to bear more than its fair share of the reductions of greenhouse gas emissions because of constitutional constraints relating to nexus and rough proportionality standards. (See Guidelines, § 15126.4, subd. (a)(4)(A)-(B) [mitigation measures must be consistent with constitutional requirements].)

We conclude County did not abuse its discretion in selecting the 29 percent reduction from business as usual as a threshold of significance. First, in accordance with subdivision (c) of Guidelines section 15064.7, County considered "thresholds of significance previously adopted or recommended by other public agencies." Specifically, County considered the absence of a threshold of significance at the state level and the fact the regional air pollution control district with jurisdiction over the Specific Plan area had not adopted a threshold. County then considered and adopted the threshold used by the neighboring air pollution control district, which had jurisdiction over the rest of Kern County. Therefore, County chose a standard that does not conflict with or contradict a

threshold adopted by other agencies with jurisdiction in or near the Specific Plan area. This is one factor that shows County exercised its discretion in a reasonable manner.

Second, County's choice of thresholds was reasonable in light of the information available at the time, which included the actions taken by the Legislature, CAT, CARB and the regional air pollution control districts. Five years after the preparation of the EIR, the Legislature added Health and Safety Code section 38566, which adopted a goal of reducing greenhouse gas emissions by 40 percent below 1990 levels by the year 2030. (*Cleveland Forest, supra,* 3 Cal.5th at pp. 518-519.) County, and lead agencies in general, are not responsible for predicting or forecasting the standards the Legislature will adopt in future. Instead, County acted reasonably in choosing a threshold that was compatible with the legislative standards actually in place when County certified the EIR in 2011. County's reference to legislative standards is another factor that shows County exercised its discretion in a reasonable manner.

Third, our conclusion that County did not abuse its discretion in selecting the threshold of significance does not conflict with the holding in *Cleveland Forest, supra,* 3 Cal.5th 497. In that case, the Supreme Court concluded the lead agency "did not abuse its discretion by declining to explicitly engage in an analysis of the consistency of the projected 2050 greenhouse gas emissions with the goals in the executive order." (*Id.* at p. 504.)

In sum, we conclude the actions of the Legislature and the relevant state and regional agencies constitute substantial evidence supporting County's choice of thresholds. Therefore, County's choice complies with the substantial evidence requirement contained in Guidelines section 15064.7, subdivision (c). Consequently, County did not abuse its discretion in 2011 when it selected the 29 percent reduction from business as usual as a threshold of significance.

D. The EIR's Analysis and Discussion Was Not Prejudicially Inadequate

1. The Purported Failure to Consider the 2050 Target

Sierra Club contends "County never considered the significance of the Specific Plan's projected 2030 [greenhouse gas] emissions in light of the State's target of reducing overall [greenhouse gas] emissions to 80% of 1990 levels by 2050."[16] The EIR did, in fact, explicitly discuss the 2050 target set forth the Executive Order and explain why the target was not used as a threshold of significance. Section 4.17.3 of the EIR devotes two thirds of a page to describing the Executive Order and that description includes the goals set for 2010, 2020 and 2050. Section 4.17.4 of the EIR describes various elements of the Specific Plan, including the sustainability element. The measure implementing state sustainability legislation provided in part: "AB 32 requires California to reduce its total greenhouse gas emissions to 1990 levels by 2020. AB 32 was preceded by Executive Order S-3-05 of 2005, which required an 80 percent reduction in greenhouse gas emissions from 1990 levels by 2050." Furthermore, as quoted in part III.C.2., *ante*, the final EIR addressed the comment that use of the 2050 target would be more appropriate.

Therefore, County considered the 2050 target and considered (but rejected) the possibility of using that target in evaluating the significance of the project's emissions. As a result, the EIR informed its readers of the possibility of using the 2050 target and explained why it was not used as a threshold of significance. Therefore, we conclude the EIR was adequate and reasonable in its *consideration* and *discussion* of the 2050 target set forth in the Executive Order.

2. Inadequate Analysis of Significance

Sierra Club's claim that the EIR did not adequately analyze the significance of the Specific Plan's long-term impacts on climate change is similar to the claim presented in

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16 "Consider" means to view attentively; to fix the mind on, with a view of careful examination; to think on with care; to ponder. (*Gonzales v. Interinsurance Exchange* (1978) 84 Cal.App.3d 58, 63.)

Cleveland Forest. In that case, our Supreme Court addressed a claim that an EIR for a regional development plan failed to adequately analyze the plan's impacts on greenhouse gas emissions and climate change—specifically, whether the EIR should have evaluated the plan's impact against the Executive Order's target of reducing emissions to 80 percent below 1990 levels by the year 2050. (*Cleveland Forest, supra*, 3 Cal.5th at p. 503.) The court summarized its holding as follows:

> "We conclude that [the lead agency] did not abuse its discretion by declining to explicitly engage in an analysis of the consistency of projected 2050 greenhouse gas emissions with the goals in the executive order. The EIR sufficiently informed the public, based on the information available at the time, about the regional plan's greenhouse gas impacts and its potential inconsistency with state climate change goals. Nevertheless, we do not hold that the analysis of greenhouse gas impacts employed by [the lead agency] in this case will necessarily be sufficient going forward. CEQA requires public agencies … to ensure that such analysis stay in step with evolving scientific knowledge and state regulatory schemes." (*Id*. at p. 504.)

The EIR challenged in *Cleveland Forest* was certified in 2011, just like the EIR for the Specific Plan. Consequently, the Supreme Court's conclusions are particularly relevant to our inquiry in this case.

We conclude the EIR's analysis using the year 2020 target was appropriate in light of *Cleveland Forest*. Furthermore, the EIR did not rely solely on the threshold of a 29 percent reduction from business as usual. The EIR also used a qualitative threshold (compliance with plans, policies and regulations) tailored to evolving scientific knowledge and regulatory scheme for greenhouse gas emissions. The Specific Plan requires County to implement AB 32 and other legislation addressing climate change. Reasonably interpreted, this requirement means County shall implement the version of that legislation in effect when County is evaluating future development. Thus, the Specific Plan takes into account that legislative standards may change and commits County to implement those changes. Accordingly, when the EIR's analysis of

significance is viewed in the context of the Specific Plan's flexibility, we conclude the analysis of the significance of the greenhouse gas emissions attributable to the Specific Plan was adequate for purposes of CEQA.

3. EIR's Statement About Scientific Grounding for Targets

Sierra Club argues the EIR "completely ignores the 2050 emission reductions targets, ostensibly based on the false notion that only AB 32's reduction targets are backed by hard science." For the reasons stated below, we reject this argument.

First, Sierra Club's use of the phrase "completely ignores" is inaccurate. The EIR discusses the 2050 target and Sierra Club's comment that the 2050 target was a more appropriate threshold of significance. Second, we disagree with the claim that there was a false notion underlying the EIR's analysis. The purported false notion is based on Sierra Club's interpretation of the statements in the final EIR "that in amending AB 32, the Legislature declined to adopt the longer-term emission reductions, and that AB 32's goals for 2020 are not only grounded in hard science but represent the only legally enforceable emission limit under California law." Sierra Club infers from the statement that the 2020 goals are grounded in hard science that the 2050 goals are not. We reject this inference because (1) the EIR's statement does not necessarily imply targets set further in the future have no scientific basis and (2) when the EIR's statement about Assembly Bill No. 32's goals for 2020 are considered in the context of the EIR as a whole, the statement is not misleading to the objectively reasonable person. Instead, the EIR informs the reader of the uncertainty about what standards the Legislature might enact in the future and explains why it has adopted a standard connected to the legislative target for 2020.[17] Consequently, we reject the argument that the EIR's discussion was

[17] We now know that in 2016 the Legislature adopted the goal of reducing greenhouse gas emissions by 40 percent below 1990 levels by the year 2030. (Health & Saf. Code, § 38566; see *Cleveland Forest*, *supra*, 3 Cal.5th at pp. 518-519.) An EIR adopted in 2011 is not required to anticipate and describe a legislative standard enacted five years later. (See Guidelines, § 15144 [forecasting].)

based on the false notion that the 2050 target had no scientific foundation. The EIR's references to hard science were not misleading and, therefore, do not provide a ground for concluding the EIR's analysis of the significance of greenhouse gas emissions was inadequate.

IV. MITIGATION MEASURES FOR GREENHOUSE GAS EMISSIONS

A. Overview of Sierra Club's Claimed CEQA Violations

Sierra Club contends the Specific Plan's climate change mitigation scheme violated CEQA. Sierra Club asserts the EIR was "legally inadequate in that the County's climate change mitigation measures do not go far enough to address the Project's [greenhouse gas] emissions." Sierra Club also contends "the County arbitrarily decided to exempt an unknown number of 'smaller' commercial, residential and industrial projects from implementing any climate change mitigation measures despite concluding that cumulatively, these projects would make a significant contribution to climate change."

The headings in Sierra Club's opening brief specifically contend (1) County's reliance on the 29 percent reduction of business as usual to formulate a mitigation plan violated CEQA and (2) County's refusal to consider potentially feasible transportation-related mitigation measures to reduce greenhouse gas emissions was an abuse of discretion. (See Cal. Rules of Court, rule 8.204(a)(1)(B) [briefs must state each point under a separate heading].)

B. Purported Exemption of Smaller Projects

Sierra Club interprets revised implementation measure 5.5.10 as exempting "all projects whose criteria emissions are expected to be below the threshold of significance

for criteria emissions (NOx, ROG, and PM) from mitigating climate change impacts."[18] As revised for the final EIR, Specific Plan implementation measure 5.5.10 provides:

> "All new discretionary development proposals which may emit air emissions that exceed the thresholds established by the Eastern Kern Air Pollution Control District may be required to submit an Air Quality Impact Analysis (AQIA), including greenhouse gas emission equivalents as a part of the discretionary application process. The Planning and Community Development Department shall determine the necessity of an AQIA during the preliminary review of each discretionary application. The AQIA shall include a focused Greenhouse Gas (GHG) report that identifies the mitigation measures (regulatory or applicant implemented) for the reduction by 29 percent of the project's 'business as usual' operational CO2 equivalent emissions, or a reduction to be determined by any future Greenhouse Gas/Climate Change Action Plan as prepared by the County, and as quantified by the AQAI. The GHG report shall be submitted to the Eastern Kern Air Pollution Control District along with the AQIA for review and comment regarding the methodology used to quantify the reductions."

County disagrees with Sierra Club's interpretation of this implementation measure as creating an exemption or otherwise limiting review of a proposed project's greenhouse gas emissions. County asserts the implementation measure (1) is only one of several implementation measures identified in the EIR that relates to greenhouse gas emissions associated with air quality and (2) is not worded as a limitation. In addition, County argues the final EIR refutes Sierra Club's interpretation by noting the EIR is a programmatic document and stating that "future discretionary actions will be subject to CEQA and reviewed on a case-by-case basis." This description is confirmed by the following statement in section 4.17.4 of the draft EIR: "The specific effects as a result of future development proposals would be determined on a case-by-case basis as the land

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[18] "Criteria pollutant" is defined by federal regulations as "a pollutant for which the Administrator [of the Environmental Protection Agency] has promulgated a national ambient air quality standard pursuant to 42 U.S.C. 7409 (i.e., ozone, lead, sulfur dioxide, particulate matter, carbon monoxide, nitrogen dioxide)." (40 C.F.R. § 52.31(b)(4).) "ROG" refers to reactive organic gases, "NOx" to nitrogen oxides, "PM" to particulate matter, and "PM10" to particulate matter 10 microns in diameter or smaller.

uses defined in the Specific Plan Land Use Plan are addressed during the planning and environmental process by the County prior to the approval of any discretionary permits. The identified impacts related to GHG emissions would be addressed through mitigation measures provided in the planning and environmental documentation for future development projects in the Specific Plan Area."

First, we agree with County's view that implementation measure 5.5.10 is just one of the implementation measures that relate to greenhouse gas emissions. For example, implementation measure 5.5.6 states: "Solar or low-emission water heaters shall be utilized in all residential and commercial projects to reduce emissions."

Second, based on the wording of implementation measure 5.5.10, we conclude it is not reasonable to interpret it as exempting proposed projects that fall below the thresholds of significance for criteria pollutants from review of the project's greenhouse gas emissions. The first sentence of the measure states proposals exceeding the thresholds "may be required to submit" an air quality impact analysis. The use of "may be required" demonstrates the advisory nature of the provision. Furthermore, the second sentence uses mandatory language in stating the planning and community development department "shall determine the necessity of an AQIA during the preliminary review of *each* discretionary application." (Italics added.) This mandatory language demonstrates the department must exercise its discretion in deciding whether to require an AQIA and the reference to "each" discretionary project demonstrates that every discretionary project must be considered. There are no exemptions or limitations in the sentence containing mandatory language.

Third, the EIR clearly states that proposed developments will be subject to case-by-case review and that review will include the consideration of greenhouse gas emissions and mitigation measures to address those emissions. Therefore, we reject Sierra Club's interpretation of implementation measure 5.5.10 as providing certain

projects with an exemption from any analysis of greenhouse gas emissions or from adopting mitigation measures tailored to the project.

C. Consistency with Assembly Bill No. 32's Goal

1. Contentions of the Parties

Sierra Club challenges County's reliance on the use of reduction of 29 percent from business as usual to formulate mitigation. Sierra Club contends:

> "Given the significance the County attached to AB32's emissions reduction targets, the County was logically required to analyze the Project's consistency with AB32 in relation to achieving AB32's goal of reducing 2020 emissions levels to 1990 levels through reducing overall emissions by 29% BAU. This is not, however, what the EIR attempted to do. The EIR did not specifically address whether the Project would impede attainment of AB 32's emission reduction goals."

County responds by contending this issue was not raised in the trial court and, therefore, should not be considered for the first time on appeal. (See *Citizen Opposing a Dangerous Environment v. County of Kern* (2014) 228 Cal.App.4th 360, 380, fn. 16.) County also contends Sierra Club's argument misinterprets the applicable threshold of significance.

2. Waiver

Sierra Club's reply brief did not directly address County's claim of waiver based on the failure to raise this issue in the trial court proceedings. Consequently, Sierra Club has not provided a citation to the page in its appellant's appendix where this argument about consistency with Assembly Bill No. 32's goal was presented to the trial court. It appears the reason Sierra Club did not provide such a citation to the record is that the argument was not raised below. We have reviewed the sections challenging County's climate change mitigation scheme in the opening and reply briefs filed by Sierra Club in the trial court. We have not located an argument that the Specific Plan is inconsistent with Assembly Bill No. 32's goals for emission reductions. Accordingly, we conclude the argument has been waived.

D. Consideration of Feasible Mitigation Measures Related to Transportation

1. Sierra Club's Contentions

Sierra Club contends "[t]he EIR's refusal to consider potentially feasible transportation-related mitigation measures to reduce [greenhouse gas] emissions was an abuse of discretion." (Boldface omitted.) Sierra Club's contention is based on two main points.

First, Sierra Club contends County determined that *specific plan level* mitigation measures for greenhouse gas emissions were unnecessary because (1) proposed development projects would be subject to site-specific mitigation measures identified during the case-by-case review at the project level and (2) "any further feasible mitigation would be accomplished through CARB regulations pursuant to AB 32." Sierra Club argues County's determination that specific plan level mitigation measures were not needed was wrong. Sierra Club asserts "County's contention that it was powerless to consider and implement any land use strategies to reduce [greenhouse gas] emissions is false."

Second, Sierra Club contends potentially feasible plan level mitigation measures existed and County's refusal to consider transportation-related mitigation measures, such as transit-oriented housing that would cluster relatively dense housing around major traffic corridors, constituted an abuse of discretion. Sierra Club also restates its "refusal to consider" contention as County having "largely ignored" its comments about transit-oriented housing.

2. County's Contentions

Responding to Sierra Club's first point, County argues it did not contend it was powerless to consider land use strategies to reduce greenhouse gas emissions. Instead, County asserts it did, in fact, include a number of land use goals, policies and implementation measures in the Specific Plan that address greenhouse gas emissions. Furthermore, County asserts the EIR identified two planning level documents under

preparation that would further reduce greenhouse gas emissions of future development—namely, (1) the County's own Climate Change Action Plan and (2) the Kern Council of Governments (KernCOG) regional transportation plan prepared pursuant to the Sustainable Communities and Climate Protection Act (Stats. 2008, ch. 728, § 1; Stats. 2009, ch. 354, § 5), commonly referred to as Senate Bill No. 375.

As to Sierra Club's second point, County contends it did not ignore, largely or otherwise, Sierra Club's comment about transit-oriented housing. Instead, County labeled Sierra Club's suggestion as "Comment 5-S" and responded to the comment in the final EIR by explaining that dense housing clustered around major transportation centers would be inconsistent with the rural nature of the Specific Plan area and that the transportation corridors actually existing in the area limit the type of transit-oriented development suggested by Sierra Club.

3. Sierra Club's Reply

Sierra Club argues County's response to the comment was not reasonable and in good faith. Sierra Club asserts the response only addressed "dense housing" and sidestepped the suggestion that County consider "relatively dense" development around the transportation corridor to encourage public transportation. In addition, Sierra Club argued the claim that dense housing was incompatible with the planning area cannot be reconciled with a number of County's land use policies for the area.

Sierra Club also asserts it specifically suggested the EIR should make an effort to determine the amount of transit-oriented housing that would make public transportation economically viable. Sierra Club claims the "EIR rejected [the] suggestion out of hand, did not acknowledge this request and made no effort to consider the issue." In making this argument, Sierra Club did not cite any statute, regulation or judicial decision and did not explain how County's reaction violated CEQA.

4. Power to Adopt Land Use Strategies

We reject Sierra Club's first argument that County took the position that it was powerless to consider and implement any land use strategies to reduce greenhouse gas emissions. As described in part IV.B., *ante*, the Specific Plan's implementation measures 5.5.6 and 5.5.10 relate to greenhouse gas emissions and, as discussed in the next section, County did consider the land use strategies that might reduce greenhouse gas emissions.

5. Refusal to Consider

The issue as framed by the heading in Sierra Club's opening brief is whether the EIR refused to consider potentially feasible transportation-related mitigation measures. (See Cal. Rules of Court, rule 8.204(a)(1)(B).) Sierra Club does not argue County committed factual error (i.e., made a finding not supported by substantial evidence) in determining the proposed mitigation measure was not feasible. (Guidelines, § 15364 [definition of feasible]; see *Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296, 323 (*Citizens-Lodi*) [finding that there was no feasible mitigation measures was supported by substantial evidence].)

Sierra Club's March 2011 comment letter stated County should address the issue of global warming with specific feasible mitigation measures and stated there were a number of potential feasible measures, including "[d]esign features for new development to reduce Vehicle Miles Traveled (VMT)." The comment asserted design features "might include relatively dense housing clustered around major traffic corridors with adjacent bus stops and/or other public transportation. Such housing could include affordable housing, condominiums, and apartments." The comment about design features ended with the following sentence: "Environmental documents should determine the amount of such transit-oriented housing that would make public transportation economically feasible, and it should determine [greenhouse gas] reductions associated with such transit-oriented development."

County's "Response 5-S," which is part of the final EIR, stated the "comment has been included in the record and will be provided to the decision-makers for their review and consideration." Next, the response stated:

> "Given the rural nature of the Specific Plan area, and the desire and goal to maintain the rural atmosphere as new development is proposed, dense housing clustered around major traffic corridors would not maintain the typical development pattern. The only major transportation corridor in the Kern River Valley is the one roadway that circumnavigates the lake area, along with the one primary roadway that traverses the Kern Valley that connects Bakersfield and Ridgecrest. This roadway network (which is not proposed to change) limits the types of transit-oriented development suggested by the commentor."

Based on this response in the final EIR, we conclude County did not refuse to consider the issue of transit-oriented development. Thus, Sierra Club's argument has not identified an abuse of discretion based on a failure to proceed in a manner required by CEQA, the Guidelines or other applicable law. (See § 21168.5.)

6. Failure to Make Requested Determination

Sierra Club suggested that County determine the amount of transit-oriented housing that would make public transportation economically viable. This suggestion is, in effect, a request for County to perform additional research or conduct a study on transit-oriented housing. Guidelines section 15204, subdivision (a) states in part: "CEQA does not require a lead agency to conduct every test or perform all research, study, and experimentation recommended or demanded by commentors." In *Irritated Residents, supra,* 107 Cal.App.4th 1383, this court stated: "The fact that additional studies might be helpful does not mean that they are required." (*Id.* at p. 1396.) Sierra Club has not addressed the Guidelines provision or our earlier decision. As a result, Sierra Club has not demonstrated County abused its discretion by failing to proceed "in a manner required by law" (§ 21168.5) when it went forward without conducting the study suggested by Sierra Club.

V. MITIGATION OF IMPACTS ON AGRICULTURAL RESOURCES

A. EIR's Discussion of Agricultural Resources

Section 4.2 of the EIR addressed agricultural resources. Table 4.2-2 stated that in the year 2006, the Specific Plan area contained 2,695 acres of Prime Farmland, 850 acres of Unique Farmland, and 31 acres of Farmland of Statewide Significance.[19] Under the Specific Plan, parcels of farmland with these classifications "would have a Land Use Map designation of Map Code 8.1 (Intensive Agriculture), 8.3 (Extensive Agriculture), or 8.5 (Resource Management)." These designations do not directly conflict with the existing zoning for agricultural use.

1. Impacts of the Specific Plan

The EIR noted that the Specific Plan, as a policy document, would not convert any agricultural land to a nonagricultural use. The finding supports the determination that the Specific Plan's direct impacts on agricultural resources would not be significant.

The EIR also addressed the indirect impacts of the Specific Plan on agricultural resources by stating:

> "However, the Specific Plan only serves as a guidance document and outside factors such as future growth needs, market demands in favor of or against agricultural uses, water availability and future resource management plans or desires may lead to the conversion of [agricultural] lands within the Specific Plan Area. To address this, Implementation Measure 5.2.4 in the Specific Plan Conservation Element specifically states that any conversion of prime agricultural farmland as defined by CEQA [§] 21060.1 to a non-agricultural designation shall require mitigation at a ratio of 1:1. As future project-level development applications are proposed, the analysis of the direct impacts to agricultural and forest lands would be required. With the implementation of the goals, policies, and implementation measures identified in the Kern County General Plan and the Specific Plan, impacts would be considered less than significant."

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19 CEQA defines "agricultural land" to mean "prime farmland, farmland of statewide importance, or unique farmland, as defined by the United States Department of Agriculture land inventory and monitoring criteria, as modified for California." (§ 21060.1, subd. (a).)

Implementation Measure 5.2.4 of the Specific Plan stated in part: "Mitigation for loss of agricultural land shall be at a ratio of 1:1 for net acreage before conversion." It also listed four ways to satisfy the requirement, including (1) funding and purchasing agricultural conservation easements,[20] which would be managed and maintained by an appropriate entity, (2) purchasing credits from an established agricultural farmland mitigation bank, and (3) contributing agricultural land or equivalent funding to an organization that provides for the preservation of farmland in California.

The subject of mitigation measures was addressed in section 4.2.5 of the EIR, which stated in full: "No mitigation measures are required beyond compliance with the goals, policies, and implementation measures identified in the Kern County General Plan and the Kern River Valley Specific Plan." Section 4.2.6 of the EIR addressed the level of significance after mitigation by stating the *project* impacts related to (1) "the conversion of Prime Farmland, Unique Farmland, or Farmland of Statewide Importance to a non-agricultural use would be considered less than significant" and (2) "the future conversion of farmland to non-agricultural use … would be considered less than significant."

2. Cumulative Impacts

The EIR addressed the cumulative impacts on agricultural resources by identifying three other projects that potentially could be aggregated with the Specific Plan and concluded that only an analysis of the cumulative effects of the Specific Plan in conjunction with the Rio Bravo Ranch was appropriate. The EIR stated:

> "The development of the Rio Bravo Ranch would result in significant impacts to agricultural resources as a result of the conversion of 674 acres of Prime Farmland to non-agricultural uses. This loss would be

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[20] "Agricultural conservation easement" is defined by section 10211 as "an interest in land, less than fee simple, which represents the right to prevent the development or improvement of the land, as specified in Section 815.1 of the Civil Code, for any purpose other than agricultural production." (See Civ. Code, §§ 815.1, 815.2 [describing agricultural and other conservation easements].)

> reduced to a less than significant level through participation in an agricultural land mitigation program. However, Kern County as a whole has experienced urbanization that has resulted and will continue to result in the loss of agricultural resources, including resource land used for grazing and prime and important farmland. This loss is considered a significant impact."

The EIR also stated "the less than significant impacts of the proposed project would incrementally contribute to a cumulative impact related to the loss of agricultural resources within the County. Therefore, the proposed project would contribute to significant and unavoidable cumulative impacts to agricultural resources." In accordance with this discussion, section 4.2.6 of the EIR concluded: "The cumulative impacts related to agricultural resources would be considered significant and unavoidable."

B. Claimed CEQA Violations

Sierra Club contends County's requirement for mitigation of impacts to agricultural resources at no greater than a 1:1 ratio violated CEQA. Sierra Club argues it is clear that a 1:1 mitigation ratio for conversion of farmland is not enough to address a significant indirect or growth inducing impact. In Sierra Club's view, when farmland is converted to nonagricultural uses, two bad things (i.e., adverse environmental impacts) happen. First, that farmland is lost to agricultural. Second, the change in use of that land will make it more difficult or costly to farm neighboring properties, which increases the probability the neighboring land will eventually be converted to urban uses. Sierra Club argues this indirect adverse impact on neighboring land is not addressed by a simple 1:1 mitigation ratio.

Sierra Club supports its contention by referring to the EIR's analysis of cumulative impacts. Sierra Club argues County's determination that the Specific Plan "would contribute to significant and unavoidable cumulative impacts to agricultural resources" and case law stating that agricultural conservation easements can be used to mitigate indirect impacts make "it clear that a 1:1 mitigatio ratio[] for loss of farmland is not enough to address a significant direct or growth inducing impact." Thus, Sierra Club

concludes "County must require additional mitigation to address th[ese] indirect/growth inducing impacts."

In response, County argues the claim that a greater ratio of mitigation was needed to address the indirect impacts of growth that make continued farming on adjacent lands difficult or impossible fails, because the mitigation for such indirect impacts provided in the EIR is supported by substantial evidence. In County's view, CEQA does not compel the adoption of a higher mitigation ratio.

C. Overview of Judicial Decisions Discussing Particular Ratios

Mitigating the conversion of farmland by obtaining an agricultural conservation easement on an equal amount of farmland—that is, using a 1:1 ratio—has been addressed in a handful of published decisions, most of which were decided *after* Sierra Club submitted its comments to the EIR and then filed this CEQA lawsuit in August 2011. Here, we summarize those decisions in chronological order.

In November 2010, this court issued a decision in a case where a developer's association raised constitutional and statutory challenges to the validity of a farmland mitigation program in an update of a county's general plan. (*Building Industry Assn. of Central California v. County of Stanislaus* (2010) 190 Cal.App.4th 582, 586.) The farmland mitigation program was designed to aid in mitigating the loss of farmland to residential development by allowing the conversion of farmland if an agricultural conservation easement granted in perpetuity was acquired over an equivalent area of farmland comparable to that being developed.[21] (*Ibid.*) Thus, the land being converted from agricultural to other uses corresponded in a 1:1 ratio to the land subject to restrictions under the agricultural conservation easement. "Although the developed farmland is not replaced, an equivalent area of comparable farmland is permanently

[21] For parcels less than 20 acres in size, the board of supervisors was granted the authority to allow the payment of an in-lieu mitigation fee. (*Building Industry Assn. of Central California v. County of Stanislaus*, *supra*, 190 Cal.App.4th at p. 588.)

protected from a similar fate." (*Id.* at p. 592.) We concluded the farmland mitigation program was a valid exercise of the county's police power because it bore a reasonable relationship to the burden caused by residential development and also was valid under Civil Code section 815.3, subdivision (b).

The next year, the Third District considered a CEQA challenge to a lead agency's use of a 1:1 mitigation ratio for farmland conversion. (*Citizens-Lodi, supra,* 205 Cal.App.4th 296.) In *Citizens-Lodi*, the plaintiffs argued the EIR prepared for a proposed shopping center project anchored by a Wal-Mart Supercenter violated CEQA. (*Id.* at p. 300.) The EIR (1) stated the project would convert approximately 40 acres of prime agricultural land to urban uses; (2) explained no mitigation would reduce this impact to a less than significant level use because, once land is converted, it is removed from the stock of agricultural land; and (3) adopted a statement of overriding considerations. (*Id.* at p. 322.) The EIR stated the acquisition of an off-site agricultural conservation easement would provide partial mitigation and required the project applicant to obtain such an easement over 40 acres of prime farmland. This requirement constituted a 1:1 mitigation ratio. In challenging the EIR, the plaintiffs argued for the adoption of a 2:1 ratio. (*Ibid.*) The Third District rejected this argument, concluding (1) the city was not required to accept the larger ratio proposed by the plaintiffs and (2) substantial evidence supported the city's finding that there were no feasible mitigation measures because it was not possible to recreate prime farmland on other lands. (*Id.* at pp. 323-324.) The EIR addendum prepared in March 2008 provided general historical information about mitigation ratios for converted farmland, stating:

> "'The standard for California is the 1 for 1 ratio and is appropriate in this case. In addition to the City of Lodi, the following agencies in the surrounding area apply the 1:1 mitigation ratio: cities of Stockton and Elk Grove, counties of San Joaquin and Stanislaus, Tri-Valley Conservancy (Livermore/Alameda County).'" (*Id.* at p. 322.)

To summarize, in *Citizens-Lodi*, the Third District held a 1:1 mitigation ratio for a specific construction project was appropriate. The court explicitly rejected the argument that CEQA required a higher mitigation ratio.

In *Masonite Corp. v. County of Mendocino* (2013) 218 Cal.App.4th 230 (*Masonite*), the plaintiff argued the lead agency violated CEQA when it determined agricultural conservation easements and in-lieu fees were not feasible ways to mitigate the loss of prime farmland caused by the project, a sand and gravel quarry. (*Masonite, supra,* at pp. 232-233.) The First District agreed, "conclud[ing] that [agricultural conservation easements] may appropriately mitigate the direct loss of farmland when a project converts agricultural land to a nonagricultural use, even though an [agricultural conservation easement] does not replace the onsite resources." (*Id*. at p. 238.)

Most recently, this court considered the validity of an EIR for a project that included a new surface mine for aggregate and related processing plants. (*Friends of the Kings River v. County of Fresno* (2014) 232 Cal.App.4th 105, 109 (*Friends of Kings River*).) The plaintiff argued the county violated CEQA by (1) failing to require mitigation for the conversion of farmland, (2) failing to evaluate feasible mitigation measures, and (3) not adopting the use of agricultural conservation easements as a mitigation measure. (*Id*. at pp. 123-124.) First, we concluded the EIR had required mitigation for the conversion of farmland, noting the EIR recommend three mitigation measures that the county subsequently approved. (*Id*. at p. 123.) Second, as to purported failure to evaluate feasible mitigation measures, we stated:

> "County considered [agricultural conservation easements] as a possible mitigation measure along with the three mitigation measures recommended in the DEIR. In Collective Response 6, the FEIR discusses [agricultural conservation easements], comparing them to the recommended mitigation measures of continuing agricultural production until each cell is ready to be mined, saving the topsoil and overburden to reclaim some of the mined land to farmland, and requiring a 600–acre agricultural zone within the Project site. The FEIR notes that mitigation measure AG–2 preserves

> farmland at a 1:1 ratio for the life of the Project, which is 100 years. Accordingly, we reject petitioner's contention that the EIR fails to evaluate feasible mitigation measures." (*Friends of Kings River, supra*, 232 Cal.App.4th p. 124.)

Third, we considered the plaintiff's argument that the failure to require compensatory mitigation violates the law, which we interpreted as an argument that the County was required to adopt the use of agricultural conservation easements as a mitigation measure as a matter of law. (*Friends of Kings River, supra,* 232 Cal.App.4th p. 124.) We concluded *Masonite* did not "stand for the proposition that CEQA *requires* the use of [agricultural conservation easements] as a mitigation measure in every case where [agricultural conservation easements] are economically feasible and the project causes the loss of farmland." (*Friends of Kings River, supra*, at p. 126.) We noted the county had considered the use of agricultural conservation easements along with other mitigation measures and selected the three measures recommended in the EIR. We explicitly rejected the argument "that County was required to adopt [agricultural conservation easements] as a mitigation measure instead of the mitigation measures it did adopt." (*Ibid*.)

D. The 1:1 Mitigation Ratio Did Not Violate CEQA

We reject Sierra Club's claim that requiring mitigation at no greater than a 1:1 ratio violated CEQA. First, having determined in *Friends of Kings River* that agricultural conservation easements are not a mitigation measure that is required *as a matter of law*, it logically follows that the use of agricultural conservation easements with a ratio greater than 1:1 are not required as a matter of law. Stated another way, if a ratio of 0:1 passes muster, then a ratio of 1:1 is not deficient *as a matter of law*.

Second, the EIR for the Specific Plan is a program EIR. As a program EIR for a planning document, the level of specificity required in the EIR's analysis and in the mitigation measures adopted is less than would be required for a specific construction project that, if approved, would result in the conversion of an identifiable parcel of

agricultural land. (See Guidelines, § 15146, subd. (b) [EIR for planning document "need not be as detailed as an EIR on the specific construction projects that might follow"].) Thus, Sierra Club's claim that the mitigation ratio of 1:1 is the "only concrete and mandatory mitigation measure imposed by the County to address potential future impacts associated with the conversion of farmlands" fails to identify a defect in (1) the ratio itself or (2) County's overall approach to mitigation at the program EIR level.

As to the overall approach, the EIR discussed project impacts (as opposed to cumulative impacts) and the pressures development put on agricultural land as follows:

> "[F]uture development would occur consistent the State law and local regulatory requirements including the Williamson Act, the Kern County Estray Ordinance, the Kern County General Plan, and the Kern County Zoning Ordinance. Upon compliance with these regulatory requirements and the Specific Plan implementation measures, which require an agricultural conversion study for future amendments to the Specific Plan, along with identified mitigation should prime farmland be converted, the potential impacts related to future conversion of farmland to non-agricultural use or forest land to non-forest land would be considered less than significant."

This discussion identified procedural steps that are "concrete" in the sense that they are requirements that would apply for future development projects that propose converting farmland. Specifically, the applicant must prepare an agricultural conversion study and also is required to identify mitigation, which necessarily will be adapted to the particular project site and the surrounding land uses. We conclude these requirements, which will involve the consideration of various policies[22] set forth in the Specific Plan,

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[22] County has listed Policy 2.1.2, Policy 5.2.2, Policy 5.2.7, Policy 5.2.8(a) and Implement Measure 2.1.14. Policy 2.1.2 states: "Development adjacent to existing agricultural uses shall minimize potential impacts which could be detrimental to the continuation of agricultural operations and activities." Policy 5.2.2 states: "Projects involving the conversion of agricultural designated land to residential, commercial, industrial or other non-agricultural use shall be reviewed for compatibility with surrounding land uses."

are adequate for a *program* EIR. Further specificity in the Specific Plan, the EIR, or the responses to comments about the 1:1 mitigation ratio are not required. (Guidelines, § 15146 [specificity].)

In summary, CEQA does not require County to adopt a greater than 1:1 mitigation ratio in connection with the use of agricultural conservation easements, credits from an established agricultural farmland mitigation bank, or the other two options identified in the Specific Plan's Implementation Measure 5.2.4.

VI. DEFERRED FORMULATION OF AIR QUALITY MITIGATION MEASURES

A. Contentions of the Parties

Sierra Club contends the EIR's air quality mitigation scheme was inadequate to address the Specific Plan's significant adverse air quality impact. Specifically, Sierra Club argues County impermissibly deferred the formulation of air quality mitigation measures without adopting appropriate performance standards.

County disagrees, contending it "complied with CEQA by committing itself to eventually devise measures that will satisfy specific performance criteria." County refers to implementation measures that require future development proposals to be evaluated on a case-by-case basis to comply with air quality standards, which County argues are the standards established by the East Kern Air Pollution Control District. County contends the district's standards "provide the performance criteria which mitigation measures for future development must meet to reduce impacts below significance."

Sierra Club responds by arguing County's position is not supported by substantial evidence. Sierra Club asserts the EIR does not clearly state that (1) County will use the East Kern Air Pollution Control District's thresholds of significance as performance standards or (2) County's case-by-case analysis of future project would ensure those project's air quality impacts would be reduced to less than significant levels. As to the latter point, the EIR and the board of supervisor's findings do not state the approval of

future development *is conditioned or contingent upon* the project's emissions of ROG, NOx and PM10 being under the East Kern Air Pollution Control District's thresholds of significance for those emissions.

B. Applicable Legal Principles

The parties agree on the proper legal standard when the formulation of mitigation measures is deferred. A dispute as to the proper phrasing of this legal standard was addressed by this court in *POET, LLC v. State Air Resources Board* (2013) 218 Cal.App.4th 681 (*POET I*), where we reviewed a number of decisions addressing deferred formulation of mitigation measures. (*Id*. at pp. 735-738.) We stated the principle "allowing the deferral of the formulation of mitigation measures has been expressed in a variety of ways." (*Id*. at pp. 737-738.) We noted this court "already ha[s] adopted the position 'that CEQA permits a lead agency to defer specifically detailing mitigation measures as long as the lead agency commits itself to mitigation and to *specific performance standards* ….' [Citations.]" (*Id*. at p. 738.) Ultimately in *POET I*, we confirmed this wording and required the "agency to commit to specific performance standards." (*Id*. at p. 739.) Thus, as relevant to this appeal, the deferral of the formulation of mitigation measures is permissible when two elements are satisfied—(1) an agency commitment to (2) specific performance standards that the future mitigation measures must meet. These elements are recognized in the briefing of both parties, which discuss the need for an agency commitment to specific performance standards (i.e., criteria). For example, the two elements appear in County's argument that Sierra Club's contention lacks merit because "County *committed* itself to adopting site-specific mitigation measures for future development project and identified the *performance standards* which apply to such measures." (Italics added.) Based on our prior published decisions and the arguments presented by the parties, we conclude the applicable legal

principle requires us to analyze (1) whether specific performance standards were adopted and (2) the nature of County's commitment to those performance standards.

C. EIR's Discussion and the County's Findings

Our analysis of County's commitment to specific performance standards begins with two fundamental documents generated by CEQA's environmental review process—the EIR and the findings adopted by the lead agency.

The EIR addressed the total operational emissions of ROG, NOx and PM10 in the year 2030 and determined "the proposed project would result in a significant impact to regional air quality." Next, the EIR stated:

> "[A]s required by County Policy, the Kern County General Plan, and the Specific Plan policies and implementation measures, future development proposals would be required to be analyzed consistent with CEQA and the requirements of the [East Kern Air Pollution Control District] including the applicable rules. In addition, the specific effects as a result of future development proposals would be determined on a case-by-case basis as the land uses defined in the Specific Plan Land Use Plan are addressed during the planning and environmental process by the County prior to the approval of any discretionary permits. The identified impacts would be addressed through *mitigation measures* provided in the planning and environmental documentation for future development projects in the Specific Plan Area. However, it is anticipated that due to the nonattainment status of the [Mojave District Air Basin] and the [East Kern Air Pollution Control District] for ozone precursors (ROG and NOx) and the [San Joaquin Valley Air Pollution Control District] for PM10, future development would have the potential to result in combined mobile source and area source air emissions that could not be reduced to a less than significant level. Therefore, in the Year 2030, the proposed project would result in significant impacts to regional air quality from the total emissions as a result of the ongoing operation of future development within the Specific Plan Area." (Italics added.)

The EIR did not recommend the adoption of any mitigation measures for operational emissions. The only reference to mitigation measures occurs in the statement that impacts from future development "would be addressed through mitigation measures provided in the planning and environmental documentation" for the development. There

was no direct reference to specific performance criteria for the mitigation measures that might be adopted for a future development project. Instead, the future development simply would be "required to be analyzed consistent with" CEQA and the rules and requirements of the East Kern Air Pollution Control District. The EIR did not take the additional step of stating approval of a future development proposal would be withheld if (1) the proposal did not satisfy the rules and requirements or (2) the projected emissions exceeded the East Kern Air Pollution Control District's thresholds of significance.

Sierra Club's March 2011 comments to the draft EIR's discussion of air quality stated the Specific Plan "contains no specific mitigation measures or performance standards to address significant operational emissions" affecting air quality. As an example of the importance of providing specific performance standards, Sierra Club noted the Tulare County Superior Court recently had set aside the City of Tulare's general plan update and related EIR because the City of Tulare's climate change policies failed to include specific performance criteria.

County's board of supervisors reviewed the EIR and explicitly found that "[i]mpacts to regional air quality from total emissions (combined mobile source and area source emissions) as a result of operation of future development are considered significant and unavoidable." As facts supporting this finding, the board supervisors stated:

> "CEQA requires that all feasible and reasonable mitigation be applied to the Specific Plan to reduce the impacts to regional air quality. Compliance with federal and State law and the goals, policies, and implementation measures of the Kern County General Plan, Kern River Valley Specific Plan, and local ordinances is required. No additional mitigation measures are proposed, and no other reasonable or feasible mitigation has been identified that would reduce impacts.
>
> "Despite the reduction in impacts to regional air quality achievable through implementation of the goals, policies, and implementation measures of applicable land use plans, the Specific Plan will nonetheless result in

significant and unavoidable impacts due to total emissions from operation of future development."

Similarly, the board of supervisors found cumulative impacts to air quality were significant and unavoidable and, except for compliance with existing plans and ordinances, no other reasonable or feasible mitigation measures had been identified.

D. County's Commitment to Standards

County argues the EIR clearly stated its commitment to devising mitigation measures for future development, a commitment further demonstrated by the Specific Plan's implementation measures 5.5.2 and 5.5.5, which state, respectively:

> "Require developers to mitigate to the extent feasible any air quality impacts resulting from new projects during both project construction and operation."
>
> "Evaluate proposals for discretionary projects to ensure that the project complies with air quality standards."

County asserts the air quality standards mentioned are established by the East Kern Air Pollution Control District for mobile emissions, area source emissions and total operations emissions and those standards "provide the performance criteria which mitigation measures for future development must meet to reduce impacts below significance."

We conclude implementation measure 5.5.2, which states County will require developers to mitigate any air quality impacts "to the extent feasible" is not a commitment to specific performance criteria. "'Feasible' means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors." (Guidelines, § 15364.) Therefore, we conclude "to the extent feasible" does not create an "objective criteria for measuring success." (See *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 95 (*Communities for a Better Environment*).)

In *Communities for a Better Environment*, the project was an upgrade of an oil refinery. (*Communities for a Better Environment, supra,* 184 Cal.App.4th at p. 75.) The EIR proposed the submission of a mitigation plan within a year of approval of the conditional use permit needed to begin construction. The EIR stated the mitigation measures in the plan would ensure the operation of the upgraded refinery "'shall result in no net increase in [greenhouse gas] emissions over the Proposed Project baseline.'" (*Id.* at p. 91.) The court rejected the mitigation plan because there was no assurance mitigation to a net-zero standard was both feasible and efficacious and, more importantly for purposes of this appeal, the net-zero standard provided no objective criteria for measuring success. (*Id*. at p. 95.)

Similarly, in *POET I, supra*, 218 Cal.App.4th 681, this court concluded CARB's statement that its future rulemaking would establish fuel specifications for biodiesel to ensure there was "'no increase in NOx'" was an impermissible deferral of the formulation of mitigation measures. (*Id*. at p. 740.) The no-increase commitment was defective because "it established no objective performance criteria for measuring whether the stated goal will be achieved" and, thus, did not inform the public how CARB would determine its fuel specification regulations ensured that use of biodiesel did not increase NOx emissions. (*Ibid*.) Based on the reasoning in *Communities for a Better Environment* and *POET I*, we conclude requiring the mitigation of air quality impacts "to the extent feasible" is not a commitment to a specific performance standard and, thus constitutes an improper deferral in the formulation of mitigation measures.

Furthermore, implementation measure 5.5.5 is not a firm commitment to the formulation of future mitigation measures that meet specific performance standards. First, it refers to *projects*, not to mitigation measures. Thus, implementation measure 5.5.5 might be viewed as setting a performance standard for a project, which might be regarded as an *indirect* performance standard for any mitigation measures adopted for a future development project. (Cf. *Communities for a Better Environment, supra,* 184

Cal.App.4th at p. 95.) Despite this possibility, however, the measure is not a specific performance standard for the future mitigation measure itself. Second, compliance with "air quality standards" is not a specific performance criteria. County asserts compliance with air quality standards means that future development *must* reduce impacts to air quality below significance. The interpretation that air quality standards *require* such a reduction is far from obvious and, thus, the vague implementation measure cannot be considered a firm commitment to disapprove projects with estimated emissions that exceed thresholds of significance contained air quality standards. For instance, the implementation measure easily could be interpreted to allow the approval of a future development project based on a statement of overriding considerations. (See Guidelines, § 15093 [statement of overriding considerations].) Neither the implementation measure nor the final EIR informs County that it must reject projects that are forecast to result in emissions that exceed a threshold of significance for air quality impacts. (See *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 794 ["If mitigation is feasible but impractical at the time of a general plan or zoning amendment, it is sufficient to articulate specific performance criteria and make further approvals contingent on finding a way to meet them."].) Here, implementation measure 5.5.5 does not make further approvals contingent on meeting the thresholds of significance.

The Fourth District, after the remand required by the Supreme Court's decision in *Cleveland Forest*, concluded the EIR violated CEQA because it improperly deferred mitigation of the transportation plan's significant air quality impacts. (*Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 17 Cal.App.5th 413, 442-443.) The court stated, with one exception, the EIR deferred the analysis of appropriate mitigation measures, failed to set performance standards, and failed to commit the lead agency to comply with performance standards. (*Id*. at p. 443.) The court also concluded the error in addressing air quality impacts was prejudicial because it

precluded informed decisionmaking and public participation. (*Ibid*.) Our conclusion that County improperly deferred the formulation of mitigation measures is compatible with the Fourth District's decision. Accordingly, a writ of mandate should have been issued requiring County to address this failure to comply with CEQA. (See *LandValue 77, LLC v. Bd. of Trustees of California State University* (2011) 193 Cal.App.4th 675, 680-681; § 21168.9, subd. (b).)

DISPOSITION

The judgment is reversed and the matter remanded for further proceedings. The superior court is directed (1) to vacate its order denying the petition for writ of mandate, (2) to enter a new order granting the petition for writ of mandate, which writ shall address the improper deferral of the formulation of mitigation measures for air quality impacts, and (3) issue a peremptory writ of mandate for corrective action that is consistent with this opinion and with section 21168.9. The superior court shall retain jurisdiction over the proceedings by way of a return to the writ.

Appellant shall recover 25 percent of its costs on appeal.

_____
FRANSON, Acting P.J.

WE CONCUR:

_____
PEÑA, J.

_____
SMITH, J.