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RUSSIAN RIVERKEEPER AND CALIFORNIA COASTKEEEPER

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

RUSSIAN RIVERKEEPER, a California nonprofit corporation, and CALIFORNIA COASTKEEPER, a California non-profit corporation,

Petitioner,

v.

COUNTY OF SONOMA, a legal subdivision of the state of California, DOES 1-10,

Respondents.

Case No. SCV-273415
Judge: Bradford DeMeo

~~(PROPOSED)~~ **WRIT**

Dep't: 17
Action Filed: May 24, 2023
Trial Date: August 16, 2024

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(proposed) WRIT

WHEREAS, Judgment having been entered in this proceeding in favor of Petitioners RUSSIAN RIVERKEEPER and CALIFORNIA COASTKEEPER ALLIANCE, ordering that a Peremptory Writ of Mandate be issued from this Court;

NOW THEREFORE IT IS HEREBY ORDERED that Respondent SONOMA COUNTY ("County") shall do the following:

1. Set aside and void the Amendments to Chapter 25B Water Well Construction Standards adopted April 18, 2023 (Sonoma County Ordinance No. 6422) ("the Amendment"), because the Amendment depends on a legally inadequate consideration of impacts to public trust resources, as well as mitigation measures adopted without facts, evidence or analysis, and because the County exempted the Amendment from review under the California Environmental Quality Act ("CEQA"), in violation of law;
2. Rescind the categorical exemption approved in connection with the adoption of the Amendment;
3. Suspend non-emergency water well permit issuance within Sonoma County, or in the alternative extend the Moratorium on New Well Construction (Sonoma County Ordinance No. 6415; AR 14-16), unless and until the County has complied with the requirements of the Public Trust Doctrine, as set forth in the Court's Order After Hearing, attached as Exhibit A ("Order").

Within 90 days of the issuance of this peremptory writ of mandate, the County shall file a preliminary return on this writ of mandate explaining how it intends to comply with the Court's Order, which shall explain how it intends to comply with the Court's Order and its duties under the Public Trust Doctrine when issuing groundwater well permits..

Within 240 days of the issuance of this peremptory writ of mandate, the County shall file a final return on the writ of mandate.

In accordance with Public Resources Code section 21168.9(b) and (c), this Court shall retain jurisdiction over this action until the Court has determined that the County has complied with the provisions of CEQA, but does not direct the County to exercise its discretion in any particular way.

This Court also retains jurisdiction over the County's return to the writ and any subsequent return proceedings, as well as Petitioners' motion to recover fees and costs incurred in this action.

LET THE WRIT OF MANDATE ISSUE.

Robert Oliver

Griselda Zavala

Dated: 11/15/2024, 2024

By: _____

Clerk

Superior Court for the County of Sonoma

Exhibit A

THE HONORABLE BRADFORD DEMEO
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SONOMA
3035 Cleveland Avenue
Santa Rosa, CA 95403
Telephone: (707) 521-6725

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SONOMA

RUSSIAN RIVERKEEPER, a California Non-Profit Corporation; and CALIFORNIA COASTKEEPER, a California Non-Profit Corporation,

Petitioners,

vs.

COUNTY OF SONOMA, a legal subdivision of the state of California, DOES 1-10,

Respondents.

Case No. SCV-273415

ORDER AFTER HEARING

The above matter came on calendar for hearing on August 16, 2024, in Department 17 of the above-captioned court, the Honorable Bradford DeMeo, presiding. Counsels Drevet Hunt, Jaime Neary, Amy Minteer, and Daniel Cooper appeared on behalf of Petitioners Russian Riverkeeper and California Coastkeeper. Counsels Patricia Ursea and Amy Hoyt appeared on behalf of Respondent County of Sonoma.

The Court, having reviewed all filed pleadings and having heard and considered the argument of counsel, hereby rules as follows:

Petition GRANTED in full as to both the claims that Respondent failed to meet its obligations under the Public Trust Doctrine and violated the California Environmental Quality Act by finding the project to be exempt from that act.

Facts

Petitioners seek a writ of mandate, with related declaratory and injunctive relief, setting

aside Respondent County of Sonoma's adoption of amendments to its Chapter 25B Water Well Construction Standards (the "Amendment" or the "Project") and requiring Respondent to take the following actions: conduct review of the Project in compliance with the California Environmental Quality Act ("CEQA"); comply with nondiscretionary duties when issuing water well permits for groundwater extraction; and adopt and implement policies and procedures to ensure consideration of the impacts of water well permits on public trust resources and uses and also to prevent harm from the impacts of such permits.

Petitioners set forth two identified causes of action, both seeking a writ of mandate: 1) Violation of CEQA, and 2) Failure to Comply With Mandatory Duties Under the Public Trust Doctrine. In the second cause of action, Petitioners allege that Respondent failed to comply a "mandatory duties" under the Public Trust Doctrine (the "Doctrine") by failing to consider the effect authorizing groundwater extraction upon public trust resources (collectively, the "PTR") and mitigate harm to those uses and resources to the extent feasible. Petition, 44:11-17. They also contend that the decision was arbitrary and capricious, contrary to law, and without evidentiary support. Petitioners claim that the reliance on CEQA exemptions, as set forth in Respondent's Notice of Exemption ("NOE"), violates CEQA.

The Parties

Petitioners Russian Riverkeeper and California Coastkeeper are both non-profit public benefit corporations. Petition ¶¶21-38. The former was organized under California law in 1993, its main office is located in Healdsburg, CA, and its mission is to protect the Russian River and its tributaries to keep their waters drinkable, usable, and equitably shared. Ibid. The latter was established in 1999, with its office in Sacramento, CA, and with a mission of uniting "Waterkeeper" programs throughout California to protect the State's waters and ensure that they remain drinkable, usable, and equitably shared.

Respondent is the County of Sonoma, the Project applicant as well as lead agency. Petition, ¶¶39-43. Respondent and its departments control land-use planning, permitting, and development within its boundaries outside the jurisdiction of the incorporated cities within it. This includes such regulation activities related to water wells for groundwater extraction.

Context: Water and Wells in Sonoma County

Sonoma County contains several hundred miles of rivers and streams supporting fisheries, aquatic habitat, navigation, recreation, scientific study, and aesthetic enjoyment. See, e.g., Administrative Record ("AR"): 989, 2536-2540, 6935-6952, 7496-7574. Much of the water supply obtained in Sonoma County is from underground sources via approximately 45,000 wells, ***the most per capita of any county in California***. AR 20, 1936, 3458. Respondent issues several hundred groundwater well permits each year and has averaged 320 such permits annually from 2017 through 2022. AR 4095.

The Ordinance Amendments

The Project, or Amendment, at issue, modifies Respondent's Well Ordinance (the "Ordinance"), which sets forth the construction and permitting requirements for water wells. See, generally, Sonoma County Code ("SCC") Chapter 25B; AR 17-47; see, also, the Petition. Prior to adopting the Amendment, however, Respondent had adopted an ordinance imposing a moratorium on all new well construction except for emergency wells, based on claims that the pre-existing provisions were legally deficient. AR 6-8, 1006-1010, 1387. The Amendment states that the purpose is to "address [Respondent's] public trust obligation and to document [its] exercise of discretion regarding how it will evaluate the public trust when considering [such] permits... that may adversely affect public trust resources in interconnected navigable waters." SCC section 25B-2(b). It imposes certain requirements on all such permit applications. It imposes additional requirements depending on whether the well is in the Public Trust Review Area (the "PTRA") as delineated in the Amendment, as well as on other factors.

Depending on which factors apply, a permit may be evaluated under a defined Discretionary Review Process ("Discretionary Process") or a defined Ministerial Review Process ("Ministerial Process"). The Discretionary Process involves Respondent evaluating impacts and measures on a case-by-case basis. SCC section 25B-4(d)(3)-(4), 25B-5(c), 25B-5(e)(2); AR 25, 27-29. The Ministerial Process exempts certain applications from discretionary review where they meet the established criteria. SCC section 25B-4(e), 25B-5(c), (e); AR 26-29. The Ministerial Process applies to eight different categories, some of which require the applicant to

implement certain water conservation and monitoring requirements (the "Requirements"). SCC section 25B-4(e), 25B-5(c), (e); AR 26-29. The Requirements consist of Level 1 Requirements and Level 2 Requirements. Some applications need comply with only some requirements, and others need to comply with all Requirements. Some categories of wells qualifying for the Ministerial Process need not comply with the Requirements. SCC section 25B-4(e), 25B-5(c), (e) at AR 26-29 (setting forth the wells qualifying for the Ministerial Process); SCC section 25B-13 at 44-46 (setting forth the Requirements).

Level 1 Requirements consist of 1) the applicant must complete a leak and water conservation audit of water systems; 2) showerheads in existing habitable spaces on the project parcel must meet defined water-efficiency standards or be retrofitted with aerators or other flow regulators with flow rates of up to 1.8 gallons per minute ("gpm"); 3) faucets in existing habitable spaces on the project parcel must meet defined water-efficiency standards or be retrofitted with aerators or other flow regulators with flow rates of up to 1.8 gpm for kitchen faucets and 1.2 gpm for lavatory faucets; 4) new landscapes shall comply with specified regulations for water-efficient landscapes; 5) development after October 4, 2022 may not have irrigated grass lawns unless complying with the stated SCC landscape provision; 6) development existing prior to October 4, 2022 may have irrigated grass lawns no greater than 2500 square feet unless complying with the stated SCC landscape provision; 7) downspouts shall be disconnected and roof rainwater routed to disposal locations maximizing infiltration and minimizing erosion unless determined to pose a risk to structures or geologic hazards, or to be infeasible; and 8) compliance with applicable water conservation requirements adopted by a Groundwater Sustainability Agency as applicable which are consistent with, or more protective than, this Chapter of the SCC.

Level 2 Requirements include 1) water closets, i.e. toilets, in existing habitable spaces on the project parcel must meet defined water-efficiency standards or have an efficiency of up to 1.6 gallons per flush; 2) all urinals shall meet such requirements or have an efficiency of up to 0.125 gallons per flush; 3) all commercial, industrial, and institutional sites shall submit and implement a water conservation plan detailing best management practices employed to reduce groundwater

use to the extent feasible; 4) all agricultural sites using more than 2.0 acre-feet per year shall i) submit and implement agricultural water conservation practices plan that includes irrigation design, scheduling, and maintenance, soil moisture monitoring or plant stress monitoring, and other agricultural water conservation best management practices. Enrollment in an agricultural practices monitoring and certification program, approved by the Director, shall fulfill this requirement; ii) Submit and implement a frost protection plan. Enrollment in a frost water demand management program, approved by the State Water Resources Control Board, Director, or Sonoma County Agricultural Commissioner shall fulfill this requirement. Sites that do not use water for frost protection are exempt from this requirement; and iii) Vineyards and orchards shall limit growing season groundwater use to the existing use prior to, October 4, 2022, supported by metered data or a site-specific irrigation demand analysis; if no data or analysis is provided then a limit of 0.6 acre-feet per acre per year or less shall apply. When calculating the amount of existing growing season groundwater use, an average over the three-to-five-year period immediately prior shall be used.

At issue in this litigation, the portion of the Amendment which Petitioners challenge, are four of the categories of wells qualifying for the Ministerial Process. As numbered in the Ordinance, these are: (2) wells outside the PTRA, (6) "Low Water Use" wells where the cumulative groundwater use from all wells on the parcel is limited to two acre feet or less per year and the owner complies with Level 1 Requirements; (7) "existing use" wells where the cumulative groundwater use from all wells on the parcel is limited to the amount for legally established land uses existing as of October 4, 2022 and the owner complies with Level 1 and Level 2 Requirements; and (8) "Net Zero Groundwater Increase" wells where the water usage will not result in a net increase of the groundwater use when considering a number of factors such as conservation measures, and the owner submits a groundwater recharge plan and report documenting enhanced recharge equal to the net increase in proposed groundwater extraction and also complies with all Level 1 and Level 2 Requirements. SCC section 25B-4(e) at AR 26. It is not clear if the wells outside the PTRA will be required to comply with Level 1 Requirements or not, the Ordinance at SCC section 25B-4(e) giving no indication that they are,

in contrast to other categories within the Ministerial Process, but some portions of the record, such as a report by Respondent's staff at AR 823, indicate that wells outside the PTRA do need to implement Level 1 Requirements. Respondent also expressly argues that this is the case. Opposition 25:3-13. In this regard we find this part of the ordinance to be ambiguous.

Litigation History: Respondent's Demurrer

Respondent demurred to the second cause of action, Failure to Comply With Mandatory Duties Under the Public Trust Doctrine. Respondent demurred on the ground that it fails to state facts sufficient to constitute a cause of action because Petitioners have failed to identify a mandatory ministerial duty which Respondent has failed to discharge, a writ of mandate cannot bind an agency's discretion, and Petitioners do not allege facts showing that Respondent's actions enacting the Ordinance Amendments is so unreasonable and arbitrary that it is an abuse of discretion as a matter of law. Petitioners countered that their claim is not based on an assertion that Respondent must exercise its discretion in a particular way, but rather that it acted arbitrarily or capriciously or without evidentiary support, and thus abused its discretion.

The court heard the demurrer on January 24, 2024, and issued its order overruling the demurrer on February 20, 2024. It concluded that the allegations in the petition ultimately set forth a valid second cause of action, explaining that, despite reference to a "mandatory duty" to comply with the Doctrine, Petitioners allege that in enacting the Ordinance, Respondent's decision lacked evidentiary support, one of the bases for obtaining a writ of mandate pursuant to CCP section 1085. Similarly, despite reference to specific examples of evidence which Respondent allegedly failed to consider, Petitioners do not allege that Respondent must have relied on specific evidence but are merely giving examples of the types of evidence which Respondent should have ascertained and considered. The court also found that Petitioners do not claim that Respondent must have exercised its discretion in any particular way.

Arguments

In their Opening Brief ("Opening Brief"), Petitioners first contend that the adoption of the Ordinance violates the Doctrine because Respondent adopted the Requirements without evidentiary support or analysis demonstrating that they would mitigate impacts to the extent

feasible; Respondent failed to consider all relevant factors, particularly cumulative impacts, when establishing the PTRA; and Respondent abused its discretion in establishing categories of wells within the PTRA eligible for ministerial permitting and exempt from PT Review. Petitioners also argue that the adoption of the Ordinance and NOE violated CEQA because the Project does not fall within the scope of either Class 7 or Class 8 categorical exemptions or with the "common sense" exemption. They contend that the court reviews the scope of exemption classes de novo, the Project falls within an exception to exemptions based on cumulative impacts, and the Requirements are mitigation measures, while CEQA prohibits reliance on categorical exemptions for projects which require mitigation measures to mitigate potential impacts.

In its opposition, Respondent challenges Petitioner's arguments regarding both the Doctrine and CEQA. It argues that the Ordinance is presumptively valid under the Doctrine; the Doctrine is discretionary; Respondent has no duty under the Doctrine to provide evidence that it mitigated harm to resources or quantify cumulative impacts; and Petitioner fails to demonstrate that Respondent abused its discretion under the Doctrine. Regarding CEQA, it contends that the substantial evidence standard applies, and substantial evidence supports the exemptions; the Requirements are not mitigation measures; and Petitioners failed to show that the exception for cumulative impacts applies.

Petitioners have filed a reply, reiterating their position and providing rebuttals to Respondent's arguments.

Request for Judicial Notice

In its Request for Judicial Notice ("RJN"), Respondent requests judicial notice of Ordinance No. 6121 (2015) from its Sonoma County Code. This document, as an official legislative enactment of a government entity, is judicially noticeable. The court grants the request.

Claim Based on the Public Trust Doctrine

A party may seek a writ compelling an agency to exercise its discretion, or may claim that an agency abused its discretion, but may not seek a writ to compel an agency to exercise its

discretion in any particular manner or to achieve a particular result.

As before on the demurrer, the parties basically agree that Code of Civil Procedure ("CCP") section 1085 governs the claim for violation of the Doctrine. See Petitioners' Opening Brief 9:22-24; Respondent's Opposition Brief 8:19-21; see also, Respondent's Memorandum of Points and Authorities in Support of Demurrer 8:27-11:16; Opposition to Demurrer 5:7-21. Petitioners also expressly bring this claim under CCP section 1085. See Petition, e.g., ¶17.

CCP section 1085 governs "traditional" mandamus. It provides that a writ of mandate may issue to "compel the performance of an act which the law specifically enjoins, as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled and from which he is unlawfully precluded by such... person." However, in addition to ministerial actions without discretion, CCP section 1085 also governs judicial review of discretionary legislative and quasi-legislative acts. *CV Amalgamated LLC v. City of Chula Vista* (2022) 82 CA5th 265, 279-280; see also *Stauffer Chemical Co. v. Air Resources Board* (1982) 128 Cal.App.3d 789, 794 (stating, "judicial review of a *quasi-legislative* action is limited to ordinary mandamus... rather than administrative mandamus....") Traditional mandamus thus applies to, among others, claims that an agency has abused its discretion when the claim does not fall under CCP section 1094.5. *Saleeby v. State Bar of Calif.* (1985) 39 C3d 547, 562-563 (CCP section 1085 applied to State Bar's exercise of discretion in refusing to make payments from Client Security Fund); *Friends of the Old Trees v. Department of Forestry & Fire Protection* (1997) 52 Cal.App.4th 1383; 1389 (CCP section 1085 applies to claims that discretionary actions violated CEQA under Public Resources Code section 21168.5).

As the court explained in *CV Amalgamated LLC v. City of Chula Vista* (2022) 82 CA5th 265, at 279, 'a court may issue a writ when a public agency has abused its discretion in carrying out a discretionary function. "Although traditional mandamus will not lie to compel the exercise of discretion in a particular manner, it is a proper remedy to challenge agency discretionary action as an abuse of discretion." [Citation.]'

"Mandamus may ... issue to correct the exercise of discretionary legislative power, but

only where the action amounts to an abuse of discretion as a matter of law because it is so palpably unreasonable and arbitrary." *Ellena v. Dept. of Ins.* (2014) 230 Cal.App.4th 198, 206.

At the same time, the requirement that a court may overturn a discretionary act only upon a showing of a "clear" or "palpably unreasonable" abuse of discretion is simply another way of stating that, in determining whether an action was an abuse of discretion, courts should not substitute their judgment for that of the agency, and if reasonable minds could disagree about the agency's action, the agency's discretionary action must be upheld. See, e.g., *County of Del Norte v. City of Crescent City* (1999) 71 Cal.App.4th 965, 972-73 (stating that a court may correct legislative action only if "fraudulent or so palpably unreasonable and arbitrary as to reveal an abuse of discretion as a matter of law," and then explaining that this means simply that "the petitioner must bring forth evidence compelling the conclusion that the ordinance is unreasonable and invalid."); *CV Amalgamated LLC v. City of Chula Vista* (2022) 82 CA5th 265, 279-280; *Better Alternatives for Neighborhoods v. Heyman* (1989) 212 Cal.App. 3d 663, 671-672 The court in *CV Amalgamated* noted that a writ may issue to correct the exercise of discretionary legislative power only where the action is palpably unreasonable and arbitrary, but explained that this simply means the court may not substitute its judgment for that of the public entity, and must not issue a writ if reasonable minds may disagree as to the wisdom of the public entity's discretionary determination. Quoting *California Public Records Research, Inc. v. County of Stanislaus* (2016) 246 Cal.App.4th 1432, at 1443, it further explained that in making this determination, ' "When a court reviews a public entit[y's] decision for an abuse of discretion, the court may not substitute its judgment for that of the public entity, and if reasonable minds may disagree as to the wisdom of the public entity's discretionary determination, that decision must be upheld. [Citation.] Thus, "the judicial inquiry ... addresses whether the public entity's action was arbitrary, capricious or entirely without evidentiary support, and whether it failed to conform to procedures required by law." [Citation.]' Similarly, the court in *Better Alternatives* stated, "In determining whether an abuse of discretion has occurred, a court may not substitute its judgment for that of the administrative board [citation], and if reasonable minds may disagree as to the wisdom of the board's action, its determination

must be upheld [citation].".

As explained in *Taylor Bus Service v. San Diego Bd. Of Ed.* (1987) 195 Cal.App.3d 1331, at 1340,

> In a mandamus action arising under Code of Civil Procedure section 1085, judicial review is limited to an examination of the proceedings before the agency to determine whether its actions have been arbitrary or capricious, entirely lacking in evidentiary support, or whether it failed to follow proper procedures or failed to give notice as required by law. [Citations.]
>
> In determining whether evidentiary support is present in a traditional mandamus action, the applicable standard of review is the substantial evidence test.

Accordingly, when reviewing a decision under section 1085, "the scope of review is limited, out of deference to the agency's authority and presumed expertise." *Stone v. Regents of Univ. of California* (1999) 77 Cal.App.4th 736, 745.

The court may not reweigh the evidence and it must view the evidence in the light most favorable to the agency's actions, including drawing all reasonable inferences favoring those actions. *Taylor Bus Service, supra,* 195 Cal.App.3d, 1340. In order words, "[i]t is presumed that an administrative agency regularly performed its duty, and the burden is on the party challenging the agency's actions to prove an abuse of discretion." *Save Laurel Way v. City of Redwood City* (2017) 14 Cal.App.5th 1005, 1011.

Whether in the context of an administrative or legislative decision, addressing whether an agency abused its discretion may require a determination as to whether the agency considered required factors in making its decision. See, e.g., *Association of Irritated Residents v. San Joaquin Valley Unified Air Pollution Control Dist.* (2008) 168 CA4th 535, 542-549 ("*AIR*"). The court in *AIR* found an agency's decision to enact a rule to be an abuse of discretion because the agency had failed to consider a health factor which it was required to consider in making the rule. The Supreme Court in *American Coatings Assn. v. S. Coast Air Quality Mgmt. Dist.* (2012) 54 Cal.4th 446, at 460–61, explained that in challenging legislative or quasi-legislative acts,

> ...it is petitioner's burden to establish that [the agency's] decision was arbitrary, capricious, entirely lacking in evidentiary support, unlawful, or procedurally unfair." [Citation.] When inquiring into whether a regulation is arbitrary, capricious, or lacking in

> evidentiary support, the " ' " ' "court must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute." [Citation.]' " '

As briefly mentioned above, it is well established that "ordinarily, mandamus may not be available to compel the exercise by a court or officer of the discretion possessed by them in a particular manner, or to reach a particular result, it does lie to command the exercise of discretion to compel some action upon the subject involved." *Hollman v. Warren* (1948) 32 Cal.2d 351, 355. In *Schellinger Bros. v. City of Sebastopol* (App. 1 Dist. 2009) 179 Cal.App.4th 1245, the court, at 1266, addressed this issue in the context of a petition for writ of mandate pursuant to CEQA, stating, "a court will not order...discretion to be exercised in a particular fashion, or to produce a particular result." As the court in *Riggs v. City of Oxnard* (1984) 154 Cal.App.3d 526, at 530, explained,

> A writ of mandate will not issue to compel that discretion be exercised in a particular way. [Citations.] Further, it is not the function of the court to challenge the municipality's policy and wisdom. 'The function of the courts is to determine whether or not the municipal bodies acted within the limits of their power and discretion.' [Citation.]

The Public Trust Doctrine

The Public Trust Doctrine reflects a policy to protect public waterways and the land underlying them. *San Francisco Baykeeper, Inc. v. State Lands Com.* (2015) 242 Cal.App.4th 202, 232-234; *Environmental Law Foundation v. State Water Resources Control Bd.* (2018) 26 Cal.App.5th 844, 856-857 ("*ELF*"). In *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, at 434, the Supreme Court explained that the Doctrine was originally intended to protect navigation, commerce, and fisheries, including the right to fish, hunt, bathe, swim, and use the water for other recreational purposes, as well as using the bottom for anchoring, standing, and the like. Over time, the court added, the Doctrine was seen as not limiting the public interest and therefore encompassed changing public needs, including ecological purposes, scientific study, open space, and habitat for wildlife. The Doctrine also encompasses groundwater. *ELF, supra*. The state has an affirmative duty to take the public trust into account when making decisions affecting the waters. *National Audubon, supra*, 446.

'The state has the " 'duty ... to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.' " *Monterey Coastkeeper v. California Regional Water Quality Control Bd., et al.* (2022) 76 Cal.App.5th 1, at 21 (quoting *San Francisco Baykeeper, supra*, at 234, itself quoting *National Audubon, supra*, at 441). As a result, "[t]he state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible." *National Audubon, supra*, 446, fn. omitted; see also *Monterey Coastkeeper, supra* (quoting *National Audubon*).

The court in *Monterey Coastkeeper* explained, at 21, that 'public trust uses are to be protected wherever feasible. The public trust resources therefore need not be protected under every conceivable circumstance, but only in those where protection or harm minimization is feasible. "As a matter of practical necessity, the state may have to approve appropriations despite foreseeable harm to public trust uses." [Citation.] The public trust doctrine necessarily involves the exercise of discretion by state agencies. "[T]he state is free to choose between public trust uses and that selecting one trust use 'in preference to ... [an]other cannot reasonably be said to be an abuse of ... discretion.' [Citation.]" [Citation.] Accordingly, the relevant governing case law does not "impress into the public trust doctrine any kind of procedural matrix." [Citation.]' It is "inherently discretionary" and allows for "court intervention" only through "judicial review of administrative decisions." *Monterey Coastkeeper*, 21-22.

Public agencies must therefore consider the impacts on the various public trust interests and make feasible attempts to avoid or mitigate recognized harm to those interests. *National Audubon*, 426; *Monterey Coastkeeper, supra*, 21. As the Supreme Court stated in *National Audubon*, at 426, "before state courts and agencies approve water diversions they should consider the effect of such diversions upon interests protected by the public trust, and attempt, so far as feasible, to avoid or minimize any harm to those interests." The court in National Audubon added, at 446-447, "the state must bear in mind its duty as trustee to consider the effect of the taking on the public trust [Citation], and to preserve, so far as consistent with the public

interest, the uses protected by the trust."

Quoting *Citizens for East Shore Parks v. State Lands Com.* (2011) 202 Cal.App.4th 549, at 577-578, the court in *Monterey Coastkeeper*, at 21-22, reiterated that judicial oversight must be "by exercising oversight over the administrative process and ensuring that proper standards are applied...."

The court in *San Francisco Baykeeper, supra,* addressed compliance with the Doctrine in the context of CEQA. It described the Doctrine in detail at 232-234, stating,

> "The public trust doctrine, which is traceable to Roman law, rests on several related concepts. First, that the public rights of commerce, navigation, fishery, and recreation are so intrinsically important and vital to free citizens that their unfettered availability to all is essential in a democratic society. [Citation.] 'An allied principle holds that certain interests are so particularly the gifts of nature's bounty that they ought to be reserved for the whole of the populace.... [¶] Finally, there is often a recognition, albeit one that has been irregularly perceived in legal doctrine, that certain uses have a peculiarly public nature that makes their adaptation to private use inappropriate.'... [Citation.]" [Citation.]

It further noted that the doctrine applies to land under navigable waters, which is "held in trust for the people of the State," and it covers a "broad" range of uses, "encompassing not just navigation, commerce, and fishing, but also the public right to hunt, bathe or swim," as well as "the preservation of trust lands ' "in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area." [Citation.]' [Citation.]" It also noted that the public trust is also " 'more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands, and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.' [Citation.]" Similarly, the court in *ELF, supra,* at 857, quoting and relying on *San Francisco Baykeeper*, described the Doctrine as "expansive." With this view, it held that the Doctrine applies to the extraction of groundwater to the extent that the extraction adversely impacts a river.

Regarding compliance with the Doctrine, the court in *San Francisco Baykeeper*

explained, at 234, '[t]here is no set "procedural matrix" for determining state compliance with the public trust doctrine. [Citation.] However, "[a]ny action which will adversely affect traditional public rights in trust lands is a matter of general public interest and should therefore be made only if there has been full consideration of the state's public interest in the matter; such actions should not be taken in some fragmentary and publicly invisible way. Only with such a safeguard can there b[e] any assurance that the public interest will get adequate public attention.' [Citation.]" [Citation.]'

Respondent argues that the above authority means that it need not rely on evidence to support findings that the Project does not harm the public resources at issue in contravention of the Doctrine. They cite to *Monterey Coastkeeper* for the proposition that it need only "take the public trust into account" and protect the trust "whenever feasible," a determination entirely within its direction. This means, it reasons, that it need not present evidence supporting its decisions.

Respondent's argument is unpersuasive. It is correct that, as discussed above, it need only take the trust into account; it need only protect the trust when feasible; the decision is "inherently discretionary"; there is no "procedural matrix"; and there are no other specific legal standards. However, as Petitioners argue, and as the court in *Monterey Coastkeeper* itself expressly states, judicial oversight of government compliance with the Doctrine necessarily involves "oversight over the administrative process and ensuring that proper standards are applied," in the context of mandamus review. As discussed above, such review must not involve the court interposing its own judgment. However, it does require a determination that the agency did not abuse its discretion by determining whether or not substantial evidence supports the agency's decisions.

Respondent's interpretation of the freedom accorded agencies also directly conflicts with the discussed authority because it would ultimately mean that no judicial review is even possible. The authority discussed above, and which the parties themselves discuss, clearly states that courts have the authority to exercise judicial review over agency actions and decisions with respect to compliance with the Doctrine. Again, the decision on which Respondent relies,

Monterey Coastkeeper, makes that expressly clear as noted above. Respondent's characterization of this judicial review, as described at its Opposition at 11:15-14:28, would effectively mean that there is no judicial oversight at all. Respondent may be correct to the limited extent that the burden in this litigation initially lies on Petitioners to demonstrate that Respondent made its decisions without relying on substantial evidence and in a manner which was arbitrary and capricious. That does not mean, however, that Respondent is free to make such decisions without relying on substantial evidence, a contention which Respondent expressly makes. Respondent states that it "Has no Duty to Provide Evidence" supporting its decisions. Opposition 13:13-14. This is the heart of its contention that Petitioners are incorrect in arguing that the County abused its discretion because it "provided no evidence of analysis" which it counters by arguing that it had no duty to provide or rely on such evidence. Opposition 13-16.

Respondent relies on *Walgreen Co. v. City and County of San Francisco* (2010) 185 Cal.App.4th 424, at 435, for the proposition that ' "legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data. [Citations.]" [Citation.]' However, this statement and its application were in the context of the application of rational basis review for considering issues of equal protection under constitutional law. This is a standard which, as the *Walgreen* court explained, is used 'for reviewing economic and social welfare legislation in which there is a "discrimination" or differentiation of treatment between classes or individuals. It manifests restraint by the judiciary in relation to the discretionary act of a co-equal branch of government; in so doing it invests legislation involving such differentiated treatment with a presumption of constitutionality and "requir[es] merely that distinctions drawn by a challenged statute bear some rational relationship to a conceivable legitimate state purpose." [Citation.]' " [Citation.]' The Walgreen court was addressing a constitutional challenge based on principles of equal protection. The analysis and standards discussed are in that specific context and have little to no application here.

Respondent also argues that the abuse-of-discretion standard of review does not even apply to it. It acknowledges that under the abuse-of-discretion standard, a public entity must consider "all relevant factors" before it. It relies on *Poverty Resistance Center v. Hart* (1989)

213 Cal.App.3d 295, at 302, where the court explained that the "relevant factors" which an agency must consider are "derived from the statutes which govern the agency action." It contends that only applies where there is a governing statute or delegated statutory authority, not where an agency is acting based on its police powers. This argument lacks legal authority. Respondent's papers lack of citation to any authority supporting its contention that the abuse-of-discretion standard does not apply to counties exercising their police powers.

The determination of what "relevant factors" apply to an agency decision is distinct from the question of whether that decision is subject to judicial review for abuse of discretion. The court is aware of no authority which indicates that a county's actions in this regard are not subject to review for abuse of discretion, as via an action for writ of mandate. Moreover, Respondent itself contradicts its own argument when it starts the discussion by expressly stating, with citations to authority, that "Petitioner's Public Trust claim is governed by Section 1085, which allows mandamus relief... to correct a public entity's abuse of discretion." Opposition 8:19-21. The court accepts that statement, not the contrary.

The court finds that in the context of the Doctrine, there are no specific, mandated, "relevant factors" for an agency to consider, but that in each instance, there will be "relevant factors" which fluctuate on a case-by-case basis, and these are simply found in the nature of the Doctrine's underlying policies, and the facts of any given agency decision.

Finally, the parties address the applicability of authority regarding similar variations of the Doctrine in other "Western States." Petitioners argue that such authority is relevant and persuasive. Respondent counters that the court must disregard it as outside the ambit of California law. Respondent is correct that such authority is not binding and that the court should not rely on it in conflict with clear California authority.

The court finds that it is able to reach the conclusions which it draws herein without resorting to the authority from other states and by relying solely on California authority. Were the court to rely on the outside authority, this would simply provide further support for the court's determinations in this matter for the reasons stated in Petitioners' briefs.

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Discussion: Sufficiency of the Consideration of the PTRA and the Requirements

Petitioners assert that Respondent relied on no evidence to support its determination that the Requirements would mitigate the impacts of groundwater extraction. Opening Brief 10:13. They contend that Respondent merely stated that it "anticipates" and "expects" the Requirements to mitigate the impacts without any evidentiary or analytical support. They assert that the record contains no evidence to support any conclusion that the Requirements will in fact mitigate groundwater usage as envisioned, citing to AR 824-825, 827, 832, 1015-1017, 1614-1615, 1618, 2936, 3443, 3453. They also note that the California Department of Fish and Wildlife ("CDFW") pointed out at the final adoption hearing that the conservation measures and zero net increases were not quantified, and that the Amendment is based on unsupported assumptions. AR 1614-1615.

AR 824-832 is part of a March 13, 2023, Outcomes and Recommendations Report from Respondent's staff. It describes concerns and arguments by working groups regarding the Amendment, and particularly the application and efficacy of the Requirements regarding the wells qualifying for the Ministerial Process, but it contains no evidence or analysis supporting the efficacy of the Requirements. It also notes, at AR 824,

> At least one working group member is concerned that ministerial classification fails to account for impacts from new and replacement wells being added to existing impacts, which are causing overdraft or unsustainable groundwater use, without sufficient evidentiary support that the conservation requirements will result in reducing the adverse impact. Allowing for additional impacts that aren't "adequately considered" or "feasibility mitigated" may not satisfy the task at hand as described by the ELF case. The working groups have answered the "how question" how the county must consider and mitigate impacts to public trust resources when permitting groundwater wells in two ways, by defining a public trust review area and by limiting the water use of new wells in that area through conservation. The working groups did not have time to comprehensively consider and weigh different mitigation measures for their feasibility. Is simply reducing the extent or size of an individual impact a feasible mitigation for potentially perpetual accumulating impacts to public trust resources?

A chart at AR 827 describes the Requirements with no evidence or analysis. Discussion at AR 832 notes that the technical working group noted possible practical issues with the monitoring and data management measures and need to develop a plan.

AR 1015-1017 is part of a Summary Report from Respondent's staff, dated April 18, 2023. It describes proposed Ministerial Process classes and Requirements. It states that the Requirements were the result of "consensus" between staff, "water efficiency experts," and "working group members"; states that the Requirements "are generally consistent with current building code, drought regulations, and conservation programs for residents served by public water systems, and states what they "are expected" to cost. It contains no other evidence, analysis, or information supporting the efficacy of the Requirements or the delineation of the PTRA.

AR 1614-1615 is part of the transcript of a reading of the Amendment at the second adoption hearing. In this, a representative from the CDFW pointed out at that final adoption hearing that "the conservation measures and zero net increases were not quantified, and so it is impossible to assess their ability to avoid or mitigate potential impacts," adding that "[c]onservation measures and [net zero] increase were not studied or evaluated. There's no requirement to reduce overall use. The ordinance is based on assumptions that conservation measures will result in less use, but it doesn't require it and it doesn't measure it." AR 1614-1615. This representative from the CDFW added that "there is no technical or scientific basis for the decision to recommend two acre feet"; Respondent, the comment notes, based its determinations instead on "an administrative decision for setting fees and other requirements" with "no evaluation as to whether or not that amount of water has an impact on public trust resources"; the acre-feet-per-year standard chosen is "not consistent with what a small residence be [sic] using annually" and is "more than five times what an average household should be using"; the technical working group never agreed upon stream buffers which are "not clearly presented" in the Amendment while "the way in which they would be applied is only vaguely described in the supporting documentation, and it is unclear exactly how or where these buffer distances will be applied and how they were determined to be protective."

AR 3440-3445 is an e-mail from the CDFW which reiterates that the Requirements and "Net Zero Increase" approach "have not been evaluated or quantified" and stating that

Respondent counters at Opposition 16-20. It first reiterates its position that Petitioners are simply unable to meet their burden of showing that it abused its discretion because it "enjoy[s] the presumption that the Ordnance is valid and that the County fulfilled its legal obligations." In this argument Respondent appears to be asserting essentially that its decisions cannot be challenged or shown to be an abuse of discretion because it has full discretion, and its decisions are presumed to be correct and in accord with the law. This court has already explained above why this argument is incorrect but, in brief, although Respondent does have discretion as to Doctrine obligations, a party may seek a writ on the basis that the discretion was abused, and the presumption of correctness is not absolute; it may be overcome by a showing that the agency violated its obligations and abused its discretion.

Respondent also contends that, nonetheless, the record shows that it "engaged in an extensive and thoughtful public process to ensure that it gave due consideration to its public trust resources and adopted feasible measures to protect such resources." It cites actions taken to engage a consultant, create working groups including outside people and entities to provide input on the Amendments, solicit public comments; and approve a "multi-tiered Ordinance." Opposition 16-17. It cites to AR 390 as showing that it based the Amendment on the "best available information"; AR 388 as showing the watershed categories which Respondent used; AR 870 as showing that the PTRA delineation "is based on sound methodology"; AR 698-699 and 4637 as showing how Respondent determined habitat value and sensitivity as well as streamflow disruption; AR 390-391 as support for the 2-acre-feet standard; AR 393-394 and 506 to show that it balanced competing interests to support allowing ministerial approval "due to overriding public interest." These arguments are unpersuasive.

AR 390 is part of a county Summary Report of April 4, 2023. It lists some of the ministerial classes. It states that the staff reached the definition for the PTRA "because best available information was used to identify areas where groundwater extraction has moderate or high potential of impacting sensitive natural resources." It provides no explanation of these terms, does not state what the "best available information" is or cite to any evidence or

methodology may have been if employed.

AR 390-391, regarding the 2-acre-feet-per-year standard, shows that some working group members, echoing the CDFW criticisms above, argued that the Level 1 requirements should be imposed on use under 0.5 acre feet per year, instead of 2, and there should be greater restrictions on usage between 0.5 and 2 acre feet a year because rural single-family residences normally use less than 0.5 acre feet a year. At AR 390-391, it explains that other working group member felt this would be too restrictive because some rural residences use more water, so staff rejected the 0.5 threshold as too restrictive and applied the 2-acre-feet-per-year threshold. It cited as support Water Code section 10721 and an executive order which apply a 2-acre-feet-per-year threshold for their analyses and asserted that staff felt the stricter standard would have "undue economic impact." It cites no evidence or analysis for that conclusion.

AR 388-389 set forth the watershed categories which Respondent adopted. AR 698-699 is a repetition of this document at a different place in the record. It states that evaluation determined sensitivity of PTR solely by reference to whether any area is an aquatic habitat for protected salmonids "as an indicator... to represent public trust resource value and sensitivity. It generally describes streamflow depletion, the periods when streams are most sensitive, and reliance on the Richter 2012 documents for assumptions about levels of ecological protection. It provides no other evidence or analysis and provides nothing to explain why the only "indicator" for sensitivity of groundwater public trust resources is whether an area provides salmonid habitat. On the face of the matters, this leaves a gap in the consideration of the PTR, given the nature of water usage at issue, and the different types of elements falling within the PTR. Put simply, habitat for these fish species is only one aspect of the many public trust water resources at issue here.

As noted above, the Supreme Court stated in National Audubon, supra, at 446-447, "the state must bear in mind its duty as trustee to consider the effect of the taking on the public trust [Citation], and to preserve, so far as consistent with the public interest, the *uses* protected by the trust." Emphasis added. Accordingly, the Doctrine is concerned with the various uses or aspects of the PRT, not just one. There is no explanation why all others have been disregarded. In light

of this, the record does not show any basis or substantial evidence for determining the areas sensitive to pumping, and thus fails to include such evidence or analysis supporting the delineation of the PTRA. Moreover, this discussion is limited to the methodology for determining the PTRA, not the sufficiency of the Requirements or consideration of cumulative impacts.

AR 870 is part of the document delineating the PTRA. It states that the intent of the PTRA is to identify the areas of the county "where PTR may be sensitive to groundwater pumping." It generally states, the "PTRA has been identified based on analyses and interpretations of aquatic habitat value, hydrogeologic conditions, processes that generate streamflow, and groundwater use that could cause streamflow depletion in the County. This document summarizes these analyses and the geographic areas they delineate." This page itself adds nothing more than mere overview but the remainder of the document does describe the methodology used with an interplay of two factors: resource sensitivity to pumping, and streamflow depletion. It provides much detail and explanation, with references to sources and data regarding these two factors, including habitats of protected fish species to determine their sensitivity, and much discussion and detail on water usage, water recharge, pumping, change in storage, and the like. The evidence and analysis of water usage, storage, and streamflow depletion appears on its face detailed and thorough. However, regarding resource sensitivity, it used only the habitats for the fish as a consideration and it stated that areas not considered as priority habitat for either species was coded as "Low" sensitivity. It offers no explanation for this approach or limiting the identification of sensitive resources to those areas which provide such fish habitat. As with AR 388-389 above, this fails to explain or support the decision to consider only salmonid habitat for determining resources sensitivity, on the face of the record leaving a gap in the resources at issue.

AR 4637 is apparently the Richter document referenced in the citations above at AR 388-389. Respondent claims that this shows how Respondent determined habitat value and sensitivity as well as streamflow disruption. It presents "A Presumptive Standard for Environmental Flow Protection." The document is ten pages long with studies of various

examples around the world, with scientific discussion regarding protection of streamflow and appears to present facially valid scientific analysis. However, the discussion does not include California and although this may not be problematic, nothing which the court has seen in this document or elsewhere in the record explains its application here. That aside, and assuming that the document is reasonably applicable in this California context, it is not sufficient to demonstrate that Respondent relied on substantial evidence or any analysis. Respondent cites to nothing in the record showing that the analysis was even used, how it was used, how it supports the determinations for the Amendments, or the like. The record at AR 388-389 merely references the document; there is no indication that its analysis or methodology was actually applied, or why or how it is applicable, or that it supports Respondent's conclusions and decisions. Moreover, even if it were sufficient, it goes only to the methodology for determining the PTRA, not the sufficiency of the Requirements or consideration of cumulative impacts.

Finally, Respondent relies on AR 393-394 and 506 to show that it balanced competing interests to support allowing ministerial approval "due to overriding public interest." These show that Respondent noted that there are competing interests but otherwise do not show any balancing based on evidence or analysis. The section at AR 393-394 briefly discusses the decision not to impose a metering program for wells, explaining that this was largely because it would require time and resources, and they expect the data to be of "lower quality." This discussion is without evidence or analysis and is conclusory. Otherwise, the section largely just discusses generally how ministerial projects do not involve discretion and are streamlined and presents proposals for ministerial permits, again without presenting evidence or analysis to support the proposals. There is a brief reference to being "generally consistent with state definitions," but otherwise it notes that the Requirements proposed "are considered effective" or "considered appropriate mitigating requirements" without evidence or explanation, and states that certain results are "expected" or the like, again without any evidence or explanation. The page at AR 506 is the start of a section on the ministerial and discretionary well classifications. The whole section does include some discussion of different interests but is essentially just a presentation of different thoughts, ideas, and concerns. It appears to be devoid of actual

evidence, studies, or analysis.

Respondent dismisses Petitioner's arguments and citations to the record as nothing more than a reflection of their "disagreement" with Respondent's approach and as devoid of evidence showing Respondent's methodology to be "patently unreasonable and arbitrary." However, Petitioners' discussion based on the record does exactly what Respondent claims it does not. Petitioner's discussion consists of numerous citations to the record showing that Respondents' documents simply set forth the Amendment and the categories for Ministerial Process and the Requirements, with no evidence or analysis to support these. Moreover, Petitioners cite to specific and express evidence from the State of California's CDFW clearly explaining that Respondent's decisions and approach are devoid of analysis or evidence but based on mere assumptions which have never been explored. This is not merely "disagreeing" with "methodology"; Petitioners cite to portions of the record demonstrating that Respondent employed no apparent methodology and made decisions despite fully knowing that these decisions were based on unsupported assumptions which no one had made any effort to evaluate.

Petitioners have thus met their burden. They have cited to numerous portions of the record presenting the Requirements and other aspects of the Amendment, which it is claimed that they are sufficient, but which are wholly devoid of evidence or analysis supporting such conclusions. Moreover, Petitioners point to clear evidence in the record stating that there is no evidence or analysis supporting the Amendment and that such evidence or analysis is necessary in order to determine the efficacy of the Amendment's terms as well as what is feasible. Petitioners' citations further include evidence explaining why at least some of the portions of the Amendment on their face do not make sense and appear incapable of achieving the results [illegible].

Respondent does in part counter with its own citations to the record, but rather than cite to portions of the record which contain evidence, analysis, or methodology, which might support Respondent's decision, it merely cites to pages describing the process for creating the Amendment and, in a few instances, a couple of unsupported conclusions that the methods used are adequate.

Once Petitioners met their burden of showing that no substantial evidence supported the decision, and that the decision was based wholly on assumptions with a known failure to make any effort to collect data or study the conditions and terms of the Amendment, it was incumbent on Respondent to rebut by pointing to evidence in the record countering Petitioners' citations. It failed to do so. Instead, it showed the review process employed. Simply making the effort to obtain input or gather comments from others is not alone sufficient and is instead merely a step. It is not a substitute for basing a decision on substantial evidence, particularly when the sole evidence presented in the record shows that the decision is flawed and requires new evidence and analysis. Respondent does cite to some sections in the record as discussed above which include a detailed description of methodology and evidence, as well as scientific analysis, regarding water recharge and streamflow. However, as explained above, these sections on their face lack a complete analysis while nothing shows that the analysis and evidence was actually used, how it was used, that it supports the decisions, or how it might support the decisions. Even if they were sufficient, finally, those sections are limited solely to Respondent's delineation of the PTRA. They do not have any bearing on the sufficiency of the Requirements or consideration of cumulative impacts.

Discussion: Cumulative Impacts

The other argument which Petitioners raise regarding compliance with the Doctrine is the claim that Respondent failed to consider or address cumulative impacts. As indicated above, the court finds Respondent's argument persuasive to the extent that under Doctrine analysis there is no express requirement or clear mandate to consider cumulative impacts as there is in CEQA, as discussed below. Thus, in the court's view, under the Doctrine, Petitioners cannot show Respondent's decision to have been an abuse of discretion simply because Respondent failed to consider or study cumulative impacts. As this court has also indicated above, however, this does not mean that Respondent had no obligation to make a meaningful consideration of cumulative impacts or to address them if in this instance the record demonstrates a sufficient basis in this specific instance for finding that Respondent should have done so in order to fulfill its obligations under the Doctrine. As discussed above, the Doctrine and the authority articulating it

clearly do not involve or impose any set matrix or mandatory factors to consider but this merely means that the factors or issues an agency must consider will vary on a case-by-case basis. Accordingly, it may be that a record demonstrates that an agency must consider cumulative impacts in order to fulfill its obligations under the Doctrine.

In this instance, Petitioners show that the record indicates that Respondent was required to consider cumulative impacts.

First, the Ordinance itself includes a provision expressly addressing "Cumulative groundwater extraction" at SCC section 25B-13(a), imposing conditions intended to address cumulative impacts. The inclusion of this section requires appropriate inquiry including evidence and analysis.

Second, Petitioners cite to AR 819, 877, 879-880, 886, 913, 3081-3083, 3658, 3661, 3079-3080, 3087, 8959, 1474-1475, 1554-1555, 1568-1569, 2249, 2266, 2573, 3081-3083, 3661, 9683, 9691, 9722, 12398, and 17374. These sections, in short, demonstrate a threat of possible cumulative impacts and that Respondent failed to address or even study these. For example, Respondent's own staff report based on the policy and technical work group studies, states that there is a concern, raised by the CDFW and others, of cumulative impacts which "may not be fully addressed and mitigated" (AR 811); "Adverse impacts include reduction in streamflow due to cumulative groundwater use" (AR 812); "the proposed method estimated county-wide streamflow depletion as the cumulative impact of existing groundwater extraction, a Technical WG member identified a limitation of the current approach that it does not address the fact that new wells outside of the public trust review area could have small but cumulative impacts" (AR 819); "Continued data collection, analysis, and adaptation must be included to achieve public trust protections. Existing uses, cumulative impacts, and climatic changes will require ongoing research to address implementation. As an example, impacts from wells outside the PTRA will occur but won't be accounted for or addressed by this program" (AR 820); a section in the PTRA delineation report prepared for Respondent explains the threat of cumulative streamflow depletion (AR 876) and, when discussing the implications of an equation, explains "Cumulative streamflow depletion increases in proportion to cumulative groundwater pumping" (AR 877).

Comments submitted explain that the Amendment will allow ministerial approval of low water use wells without regard to their cumulative share of groundwater extraction and that Respondent is preventing even the collection of necessary data for assessing cumulative extraction while the Amendment "neglects the cumulative effects of wells...." AR 3079. These are some of the many examples listed above.

Respondent only counters the argument regarding consideration of cumulative impacts under the Doctrine with its assertion that it had no need under the Doctrine to consider cumulative impacts. The court has addressed and rejected this argument above. Respondent cites to no evidence or anything in the record or provides any discussion showing that it in fact did consider cumulative impacts.

The court GRANTS the petition with respect to the claim that Respondent violated its obligations under the Doctrine.

CEQA

The ultimate mandate of CEQA is "to provide public agencies and the public in general with detailed information about the effect [of] a proposed project" and to minimize those effects and choose possible alternatives. Public Resources Code ("PRC") section 21061. The public and public participation, after all, hold a "privileged position" in the CEQA process based on fundamental "notions of democratic decision-making." *Concerned Citizens of Costa Mesa, Inc. v. 32nd District Agricultural Association* (1986) 42 Cal.3d 929, 936. As stated in *Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376, at 392, "[t]he EIR process protects not only the environment but also informed self-government."

An environmental impact report ("EIR") is required for a project which substantial evidence indicates may have a significant effect on the environment. Guidelines for the Implementation of CEQA ("Guidelines"), 14 California Code of Regulations ("CCR") section 15063(b) (hereinafter, the court shall cite to Guidelines simply by stating "Guideline" and the section number); Public Resources Code ("PRC") sections 21100, 21151. EIRs are, in the words of the California Supreme Court, "the heart of CEQA." *Laurel Heights Improvement Assn. v. Regents of the University of California* (1988) 47 Cal.3d 376, 392 (*Laurel Heights I*).

An agency must prepare, cause to be prepared, or certify completion of, an EIR for a project which "may have a significant effect on the environment." See, e.g., PRC sections PRC section 21068, 21100(a), 21151(a); Guideline 15382. CEQA is accordingly concerned with whether an agency action may cause physical effects on the environment, whether direct or indirect. PRC 21080, setting forth the basic standards for determining whether an action implicates CEQA, explains that where an agency is not exempt from CEQA, an agency must prepare an EIR where there is "substantial evidence" in the record "that the project may have a significant effect on the environment." PRC 21080(c). It also provides the definition of "substantial evidence" at subdivision (e), stating at (e)(2) that "substantial evidence" does *not* include "argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly inaccurate or erroneous, or evidence of social or economic impacts that do not contribute to or are not caused by, physical impacts on the environment."

The Supreme Court in *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, at 74, found that CEQA sets forth a three-stage process for determining if environmental review pursuant to CEQA is necessary and, if so, what level is required. This was further explained and clarified in *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, at 1371-1372, which stated that "CEQA lays out a three-stage process" by which 1) the agency must determine whether the particular activity is covered by CEQA, i.e., whether the activity is a "project" being "approved" as defined in CEQA and, if it is, whether it is exempt; 2) if the activity is a "project" and not exempt, the agency must conduct an initial study to determine if it "may have a significant effect on the environment"; and 3) it must then approve an EIR if the project *may* have such an effect, or if it finds that the project *will not* have such an impact, it may prepare a negative declaration ("ND"). See also, *Citizens for Environmental Responsibility v. State ex rel. 14th Dist. Ag. Assn.* (App. 3 Dist. 2015) 242 Cal.App.4th 555, at 568.

Basic Principles Applicable to Review of Agency Decisions Under CEQA

The burden of investigation rests with the government and not the public. *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1378-1379. The court in *Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal.App.4th 1170, at 1202, finding that a city failed to

consider an issue, ruled that the city could not rely on information to make good the gap in its analysis where the record did not show that the information had ever been available to the public. Similarly, as the court explained in *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, at 311, an "agency should not be allowed to hide behind its own failure to gather relevant data.... CEQA places the burden of environmental investigation on government rather than the public." See also *Gentry, supra* (quoting *Sundstrom*).

At the same time, in judicial review, agency actions are presumed to comply with applicable law unless the petitioner presents proof to the contrary. Evid. Code section 664; *Foster v. Civil Service Commission of Los Angeles County* (1983) 142 Cal.App.3d 444, 453. The findings of an administrative agency are presumed to be supported by substantial evidence absent contrary evidence. *Taylor Bus. Service, Inc. v. San Diego Bd. of Education* (1987) 195 Cal.App.3d 1331. Accordingly, the petitioner in a CEQA action has the burden of demonstrating that there was a violation of CEQA. *Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners* (1993) 18 Cal.App.4th 729, 740.

Under CEQA, a court may only issue a writ for any abuse of discretion, including making a finding without substantial evidence, if the error was *prejudicial*. PRC section 21005; *Chaparral Greens v. City of Chula Vista* (1996) 50 Cal.App.4th 1134, 1143. Accordingly, any inquiry into whether an agency has failed to comply with CEQA must determine if the error, or abuse of discretion, was prejudicial. PRC section 21168.5; see also *Save Cuyama Valley v. County of Santa Barbara* (2013) 213 Cal.App.4th 1059, at 1073. When substantial evidence does support a decision, but there is no prejudicial abuse of discretion, the court must defer to the agency's substantive conclusions and uphold the determination. *Chaparral Greens, supra; see* PRC 21168, 21168.5, *Laurel Heights I, supra* 47 Cal.3d 392, fn.5.

An "error is prejudicial 'if the failure to include relevant information precludes informed decision making and informed public participation, thereby thwarting the statutory goals of the EIR process.'" *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, at 721-722, quoting *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, at 712.

CEQA Exemptions

PRC section 21084 is the statutory authority for exemptions from CEQA and exceptions to those exemptions, which forbid an agency to rely on an exemption if an exception applies.

Guideline 15061 governs "Review for Exemption" from CEQA. Guideline 15061(a) states that a lead agency, upon finding that a project is subject to CEQA, "shall determine whether the project is exempt from CEQA", and subdivision (b) sets forth the types of exemptions. Guideline 15061 states, in pertinent part,

> (a) Once a lead agency has determined that an activity is a project subject to CEQA, a lead agency shall determine whether the project is exempt from CEQA.
> (b) A project is exempt from CEQA if:
> ...
> (2) The project is exempt pursuant to a categorical exemption (see Article 19, commencing with Section 15300) and the application of that categorical exemption is not barred by one of the exceptions set forth in Section 15300.2.
> (3) The activity is covered by the common sense exemption that CEQA applies only to projects which have the potential for causing a significant effect on the environment. Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA.

Guideline 15307 sets forth the Class 7 categorical exemption for actions taken to protect natural resources. It states, in full,

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

Guideline 15308 sets forth the Class 8 categorical exemption for actions taken "for Protection of the Environment." Similar to Class 7, it states, in full,

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

The "commonsense" exemption is set forth in Guideline 15061(b)(3). See *Apartment*

Association of Greater Los Angeles v. City of Los Angeles (2001) 90 Cal.App.4th 1162, 1171; *Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 116-117. The Discussion following the Guideline states that this "provides a short way for agencies to deal with discretionary activities which could arguably be subject to the CEQA process, but which common sense provides should not be subject to the act."

Guideline 15061(b)(3) states that the commonsense exemption applies "[w]here it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment." Accordingly, as reflected in its express language, the common-sense exemption may be used "only in those situations where its absolute and precise language clearly applies." *Myers v. Board of Supervisors* (1st Dist. 1976) 58 Cal.App.3d 413, 425. Where one can raise a legitimate question of a possible significant impact, the exemption does not apply and, because it requires a finding that such impacts are *impossible*, it requires a factual evaluation based on evidence which shows that it could have no possible significant impact. *Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 116-117. The agency thus bears the burden of basing its decision on substantial evidence that shows no such possibility. *Ibid.* As the *Davidon* court said at 118, "if a reasonable argument is made to suggest a possibility that a project will cause a significant environmental impact, the agency must refute that claim *to a certainty* before finding that the exemption applies." Emphasis original.

Guideline 15300.2 sets forth exceptions to categorical exemptions and states that if an exception to the exemptions applies, the agency may not rely on an exemption and must conduct further CEQA review. Subdivision (b) sets forth an exception due to cumulative impacts and states, in full, "Cumulative Impact. All exemptions for these classes are inapplicable when the cumulative impact of successive projects of the same type in the same place, over time is significant."

Courts have established an approach for applying the standard of review regarding a determination that a project is exempt from CEQA. See *Azusa Land Reclamation Co., Inc. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165; *Fairbank v. City of Mill Valley* (1999) 75 Cal.App.4th 1243; *Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th

106. Briefly, this has three parts. Initially, the court must determine de novo the scope of the exemption. *California Farm Bureau Federation v. California Wildlife Conservation Bd.* (2006) 143 Cal.App.4th 173, 185. The deferential, substantial evidence standard then applies to the agency determination that a categorical exemption applies to a project. *Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 115; *Fairbank v. City of Mill Valley* (1999) 75 Cal.App.4th 1243, 1251.

Accordingly, where an agency has determined if a project is exempt from CEQA under a categorical exemption, the court must uphold the agency's decision if supported by substantial evidence in light of the whole record. *Citizens for Environmental Responsibility, supra,* 242 Cal.App.4th 568; *Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 115; *Fairbank v. City of Mill Valley* (1999) 75 Cal.App.4th 1243, 1251; *California Farm Bureau Federation v. California Wildlife Conservation Bd.* (2006) 143 Cal.App.4th 173, at 185.

In the words of *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, at 966, " 'Where a project is categorically exempt, it is not subject to CEQA requirements and "may be implemented without any CEQA compliance whatsoever." ' [Citation.] [¶] In keeping with general principles of statutory construction, exemptions are construed narrowly and will not be unreasonably expanded beyond their terms. [Citations.] Strict construction allows CEQA to be interpreted in a manner affording the fullest possible environmental protections within the reasonable scope of statutory language. [Citations.] It also comports with the statutory directive that exemptions may be provided only for projects which have been determined not to have a significant environmental effect. [Citations.]"

As noted above, the court in of *Citizens for Environmental Responsibility v. State ex rel. 14th Dist. Ag. Assn.* (App. 3 Dist. 2015) 242 Cal.App.4th 555, at 568, set forth a detailed description of the steps and necessary determinations which are required when an agency studies an activity to determine if CEQA applies and also what level of review is necessary. It explained, with emphasis added, that if an agency finds a project to be exempt from CEQA, "*no further agency evaluation under CEQA is required*.... If, however, the project does *not* fall within an exemption *and it cannot be seen with certainty that the project will not have a*

significant effect on the environment, the agency takes the second step and conducts an initial study to determine whether the project may have a significant effect on the environment." On the burden and standard of review, it explained, at 568 with emphasis added,

> The lead agency has the burden to demonstrate that a project falls within a categorical exemption *and the agency's determination must be supported by substantial evidence.* [Citation.] Once the agency establishes that the project is exempt, *the burden shifts to the party challenging the exemption to show that the project is not exempt because it falls within one of the exceptions* listed in Guidelines section 15300.2.

Similarly, the court in *California Farm Bureau Federation v. California Wildlife Conservation Bd.* (2006) 143 Cal.App.4th 173, at 185, also explained, with emphasis added,

> Where the specific issue is whether the lead agency correctly determined a project fell within a categorical exemption, we must *first determine as a matter of law the scope of the exemption* and then *determine if substantial evidence supports the agency's factual finding that the project fell within the exemption.* (Citations.) The lead agency has the burden to demonstrate such substantial evidence. (Citations.)
>
> Once the agency meets this burden to establish the project is within a categorically exempt class, "*the burden shifts to the party challenging the exemption to show that the project is not exempt because it falls within one of the exceptions* listed in Guidelines section 15300.2."

Accordingly, "[a]n agency's determination that a project falls within a categorical exemption includes an implied finding that none of the exceptions identified in the Guidelines is applicable. The burden then shifts to the challenging party to produce evidence showing that one of the exceptions applies to take the project out of the exempt category." *Save Our Carmel River v. Monterey Peninsula Water Mgmt. Dist.* (2006) 1412 Cal.App.4th 677, 689; quoted and followed also in *San Francisco Beautiful v. City & County of San Francisco* (2014) 226 Cal.App.4th 1012, at 1022-1023.

The Supreme Court in *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, at 1105, reiterated that "[a]s to projects that meet the requirements of a categorical exemption, a party challenging the exemption has the burden of producing evidence supporting an exception." Nonetheless, the court added, at 1103, that after finding a project to be categorically exempt, the agency must consider evidence in the record which shows that an

exception to the exemption may apply. See also Guideline 15300.2.

The end result of the above authority is that the standard of review and the burden shift for different issues. First, the court reviews and determines the scope of the exemption as a matter of law. Second, should that scope potentially encompass the project, the agency must show that it relied on substantial evidence to support its determination that the project falls within that exemption. Third, petitioners must then point to evidence indicating that an exception to the exemptions applies and an agency must consider such evidence should it be in the record.

Application of the Exemptions

Petitioners argue that the record shows that the Amendment does not fall within any of the three exemptions from CEQA on which Respondent relied. Respondent contends that substantial evidence shows that the Amendment qualifies for these.

As noted above, these are Class 7, Class 8, and the common-sense exemption. Petitioner correctly note that Classes 7 and 8 only apply to a project undertaken to "assure the maintenance, restoration, enhancement, or protection of" natural resources (Class 7) or the environment (Class 8) "where the regulatory process involves procedures for protection of the environment." Class 8 expressly excludes any "relaxation" of protection standards from the scope of the exemption.

The record demonstrates no substantial evidence supporting a finding that the Amendment will "assure the maintenance, restoration, enhancement, or protection of" natural resources or the environment and Respondent cites to none. As discussed regarding the evidence from the record above in the analysis of the Doctrine claim, the record demonstrates a lack of substantial evidence or analysis supporting Respondent's determination that the Amendment will actually protect the trust resources.

As Petitioners argue, the Amendment in fact is a step backwards from the then-existing state of the law in this county regarding well construction. Respondent argues that the Amendment imposes discretionary review for wells within the PTRA, thereby meeting the definition of these two classes. Respondent cites to the prior regulation for the "baseline" by which to judge the Project, the previous ministerial procedure for well permits. However,

Petitioners note that this is not the baseline for the existing regulatory scheme at the time Respondent adopted the Amendment. The regulatory scheme in effect at the time was a moratorium on all new wells except for emergency permits, adopted in October 2022 due to the determination that the prior ministerial scheme, on which Respondent relies, was found to be defective and insufficient for meeting obligations to protect resources or the environment. AR 6-8, 1006-1010, 1387. The moratorium was imposed in the context of a lawsuit against Respondent, challenging the legality of the prior ministerial system as violating the mandate under the Doctrine. AR 1006-1010. Respondent, faced with that lawsuit, found its system to be defective, imposed the moratorium, and settled that prior lawsuit. Ibid. The record indicates that the Amendment also is a "relaxation" of protection standards, so that Class 8 expressly does not apply.

Petitioners also are persuasive in their characterization of the Amendment. Despite Respondent's assertion that the Amendment is a project aimed at protecting natural resources, the nature of the Amendment itself and the record as discussed above indicate that this Amendment is fundamentally being adopted to allow construction of wells, not to protect the environment or trust resources. The Amendment does claim that its purpose is to protect the environment and groundwater resources by imposing standards to regulate well construction. SCC section 25B-2; AR 20. Nonetheless, despite this statement, it is clear that the fundamental purpose of the Amendment is to allow well construction, albeit subject to standards. This is clear from the entire nature of the Amendment, regardless of language claiming its purpose, as well as its context and history. Additionally, the Amendment states that another "purpose" of the Amendment is actually to "document" it's "exercise of discretion regarding how it will evaluate the public trust when considering permits to extract groundwater," revealing another "purpose" unrelated to protecting the resources or environment. Ibid. Moreover, it expressly states that it is intended to allow such construction with ministerial approval *despite* possible negative impacts due to the "overriding" policies or considerations. SCC section 25B-4(e); AR 26.

Respondent also unpersuasively argues that the Amendment meets both classes because Class 7 only requires protection of a "natural resource," not the "environment" as a whole. It

provides nothing showing that the Amendment actually meets the definition of Class 7 for the "natural resource" while it ignores the fact that Class 8 expressly does require such protection of the "environment" and not just a natural resource. Moreover, both classes require "procedures for protection of the environment."

The record, as discussed above regarding the Doctrine, contains no evident support for a determination that the Amendment falls within the common-sense exemption, i.e., that "it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment." As discussed with respect to the Doctrine, there is no substantial evidence or analysis supporting the determinations that it should protect the resources, much less anything which could meet the standard for the common-sense exemption.

Petitioners also specifically cite to portions of the record containing evidence that the Amendment could result in impacts on the environment. See discussion regarding the Doctrine above; see also AR at 26, 885-886, 1011-1015, 2481, 2761-2767, 3073-3074, 15478-15480, 15495, 17360, 17366-17374. These include statements in Respondent's own staff report on the working groups raising the possibility of impacts and the need for more evidence (see, e.g., AR 811-820, 876-878); a staff report stating that "available information indicates the potential for groundwater extraction to impact moderate and high value aquatic habitat for salmonids" (AR 1012) but the Amendment will allow such construction with ministerial approval (e.g., AR 26); and experts provided opinions that the Amendment will exacerbate groundwater depletion (AR 2481, 2761-2767, 3073-3074).

The Amendment, as discussed in the Doctrine section above and based on Respondent's own citations to the portions of the record discussing the delineation of the PTRA, identified the PTRA areas as places of increased likelihood of resource and environmental impacts. See, e.g., 1011-1013. Yet, the Amendment expressly allows ministerial well construction in the PTRA zone, despite possible impacts, if wells comply with the Requirements. AR 26, 1011-1013. As discussed above regarding the Doctrine, there appears to be no substantial evidence regarding the efficacy of the Requirements while the evidence in the record which the court has seen expressly states that evidence and analysis are lacking and are needed to determine their efficacy.

Accordingly, we find that the common sense exemption does not apply.

Notably, as Petitioners point out, the Amendment itself states, at SCC section 25B-4(e), found at AR 26, "Notwithstanding any provision of this Chapter, and notwithstanding location within the Public Trust Review Area, the following proposed wells are exempt from discretionary public trust review due to the low potential for impacts to public trust *resources or due to the overriding public interest* in favor of ensuring adequate water supply." Emphasis added. This demonstrates that Respondent expressly acknowledged that the Amendment may allow wells causing impacts to the trust resources, and thus the environment, yet adopted the Amendment anyway. This itself reveals an admission that the Amendment at the very least could have such impacts, rendering the common-sense exemption inapplicable. It also underscores the inapplicability of the Class 7 and 8 exemptions, which are intended to apply to projects with a purpose of protecting natural resources or the environment, whereas this Amendment is fundamentally intended not to protect these but to allow well construction.

Finally, this is effectively a defective statement of overriding considerations. Under CEQA, when a lead agency *has adopted an EIR but approves a project which will produce unavoidable significant impacts despite those impacts*, the agency must produce a statement of overriding considerations that must state the specific reasons supporting its action based on the EIR and other information in the record. PRC 21081; Guidelines 15091, 15093(b). The statement must be supported by substantial evidence. Guideline 15093(b). This is to reflect the "ultimate balancing of competing objectives." Guideline 15021(d).

In the words of PRC 21081, an agency may approve a project identified as having one or more significant impacts if it satisfies two requirements. Subdivision (a) sets forth the first requirement, which is that either (1) mitigation measures which reduce the impacts to less than significant have been required or are incorporated in the project, or (2) another agency with authority to impose mitigation measures has done so or can and should do so, or (3) the agency has found that mitigation measures are infeasible and the significant impacts unavoidable. The second requirement, in subdivision (b), is that where the agency has found unavoidable significant impacts and no feasible mitigation measures pursuant to (a)(3), the agency must adopt

a statement of overriding considerations. On the requirement of the statement of overriding considerations, 21081(b) states that the agency may approve a project identified as having unavoidable significant impacts as long as the "agency finds that specific overriding economic, legal, social, technological, or other benefits of the project outweigh the significant effects...."

Guideline 15091, also governing approval of a project where the agency has identified one or more significant environment impacts, reiterates this. It mirrors the language of PRC 21081 with some additional explanation and detail, adding that making a statement of overriding considerations pursuant to Guideline 15093 "does not substitute for the findings required by this section."

The finding of overriding considerations focuses on broader reasons for approving the project, such as jobs, housing, or revenue. See *Sierra Club v. Contra Costa County* (1992) 10 Cal.App.4th 1212, 1222-1224.

Here, Respondent has simply claimed that the Amendment is exempt from CEQA yet did so with a terse statement of overriding considerations. This statement on its face fails to meet the requirements which CEQA imposes for such a statement and, more fundamentally, may not be used to justify a project which an agency is claiming is exempt from CEQA. A project which is being approved despite possible environmental impacts based on overriding considerations by definition may not be found to fall within these CEQA exemptions.

Exception for Cumulative Impacts

As discussed above regarding the Doctrine, there is evidence in the record which indicates that the Amendment may result in cumulative environmental impacts. At the same time, there is nothing in the record indicating that Respondent even explored this or obtained evidence, much less addressed the possibility. Respondent states that the record shows that it "considered" cumulative impacts, citing to AR 812, 815, 833, 1081-1082, 1098, and 1110. The citations at 812, 815, and 833 are part of Respondent's staff report on the recommendations of the working groups. As discussed above already in addressing the Doctrine, this document reports issues and concerns, opinions, and recommendations. It contains no actual evidence or analysis supporting the Amendment and with respect to cumulative impacts, it only shows that

Respondent "considered" such impacts by being told that such impacts may occur. This does not support Respondent's position. The citations at 1081-1082 are part of a document setting forth the PTRA delineation, as discussed herein regarding the Doctrine. Respondent is not clear but evidently is relying on the statement, "High risk areas where the entire subwatersheds are included in the PTRA to be protective of both acute and cumulative streamflow depletion impacts include areas classified as Medium resource sensitivity with High existing streamflow depletion and areas classified as High resource sensitivity with Medium or High existing streamflow depletion." This fails to demonstrate that it addressed cumulative impacts or that the record contains evidence supporting a finding that there will be no cumulative impacts. It is also limited to a portion of the methodology for creating the PTRA and establishing the areas within the PTRA to address cumulative depletion only in that regard. It has no bearing on cumulative impacts otherwise, including whether the Requirements are sufficient to prevent them, or whether ministerial permit approval for wells outside the PTRA will contribute to cumulatively significant impacts. The same is true for discussion of cumulative streamflow depletion at AR 1098 and 1110, which are likewise part of a report on the PTRA delineation. Nothing in these supports a finding that the Amendment will not cause cumulatively significant impacts, or even that Respondent studied or addressed the issue at all.

An agency does not satisfy its duty to explore any possible significant impacts under CEQA merely by reading a document which explains that the project may cause such impacts; it must consider and analyze evidence regarding the impacts and substantial evidence must support the conclusions reached. Here, the only evidence is that Respondent was told that the Amendment may cause significant cumulative impacts but that it was impossible to determine these because there was insufficient evidence. Respondent "considered" this issue, in the face of concerns, by apparently deciding not to obtain the evidence and analysis which it was told was needed.

No Reliance on Mitigation Measures for Finding a Project to be Exempt

Petitioners note that an agency may not rely on mitigation measures in order to find a project to be exempt. This position is, first of all, by definition consistent with the spirt and the

letter of CEQA, and the applicable standards of review as well as well-established authority governing the findings for, and review of, the efficacy and legal sufficiency of mitigation measures as well as possible impacts of those mitigation measures. Secondly, this principle is well established, and made clear in decisions such as *Azusa Land Reclamation Co., Inc. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165 and *Salmon Protection & Watershed Network v. County of Marin* (2004) 125 Cal.App.4th 1098 ("*SPAWN*"); see also *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1118, fn.7; *Berkeley Hillside Preservation v. City of Berkeley* (2015) 241 Cal.App.4th 943 (applying the principle from *SPAWN*).

The court in *Azusa*, at 1199-1200, expressly rejected reliance on mitigation measures for finding a project to be exempt, stating, "proposed mitigation measures cannot be used to support a categorical exemption; they must be considered under the standards that apply to a mitigated negative declaration." It further noted that even if reliance on such mitigation measures were theoretically possible in order to find a project exempt, it would be error to do so unless the agency made "the findings and determination that would have been required to support a conclusion that the proposed mitigation was sufficient for a mitigated negative declaration."

In *Salmon Protection & Watershed Network v. County of Marin* (2004) 125 Cal.App.4th 1098 ("*SPAWN*"), petitioner challenged a county's approval of construction of a house in a riparian area where the county found the project to be categorically exempt from CEQA review. The court of appeal affirmed the trial court's decision granting the writ, holding that the project was not categorically exempt. The court found that it was error for the county to rely on mitigation measures in order to find the project to be within a categorical exemption, stating, "Only those projects having no significant effect on the environment are categorically exempt from CEQA review. [Citations.] If a project may have a significant effect on the environment, CEQA review must occur and only then are mitigation measures relevant. [Citation.] Mitigation measures may support a negative declaration but not a categorical exemption. [Citation.]"

Petitioners contend that the Requirements are mitigation measures for the Project, and that these alone prohibit Respondent from relying on exemptions. They are an inherent part of

the Project, the adoption of the Amendment itself. They are not mitigation measures for this Project. The court finds Petitioner's argument on this point to be unpersuasive.

Conclusion: CEQA

The court GRANTS the petition with respect to the claim that Respondent violated CEQA in its determination that the Project is exempt from CEQA review. As explained above, the court rejects Petitioner's argument that the Requirements are mitigation measures which render it improper to rely on exemptions. However, this is immaterial because the court finds that the exemption determination violated CEQA based on all of Petitioner's other arguments: the Amendment does not fall within the scope of the Class 7 or 8 exemptions; there is no substantial evidence to support a the finding that any claimed exemption applies; and the record demonstrates an unexplored and undetermined possibility of cumulative impacts which means that the Amendment falls within the cumulative impacts exception to the exemptions.

Conclusion

The court GRANTS the petition in full.

IT IS SO ORDERED.

Dated: August 21, 2024.

BRADFORD DEMEO
Superior Court Judge

SCV-273415

PROOF OF SERVICE BY MAIL

I certify that I am an employee of the Superior Court of California, County of Sonoma, and that my business address is 3055 Cleveland Ave, Santa Rosa, California, 95403; that I am not a party to this case; that I am over the age of 18; that I am readily familiar with this office's practice for collection and processing of correspondence for mailing with the United States Postal Service; and that on the date shown below I placed a true copy of

ORDER AFTER HEARING

in an envelope, sealed and addressed as shown below, for collection and mailing at Santa Rosa, California, first class, postage fully prepaid, following ordinary business practices.

Date: August 21, 2024

Robert Oliver
Clerk of the Court

By: *Sarah Helstrom*
Sarah Helstrom, Deputy Clerk

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