# TENTATIVE RULINGS

## FOR: May 23, 2019

The Court may exercise its discretion to **disregard** a late filed paper in law and motion matters. (Cal. Rules of Court, rule 3.1300(d).)

**Unlawful Detainer Cases –** Pursuant to the restrictions in Code of Civil Procedure section 1161.2, no tentative rulings are posted for unlawful detainer cases and appearances are required.

**Court Reporting Services –** The Court does not provide official court reporters in proceedings for which such services are not legally mandated. Parties are responsible for either making the appropriate request in advance or arranging for their own private court reporter. Go to http://napacountybar.org/court-reporting-services/ for information about local private court reporters. Attorneys or parties must confer with each other to avoid having more than one court reporter present for the same hearing.

## PROBATE CALENDAR – Hon. Victoria Wood, Dept. A (Historic Courthouse) at 8:30 a.m.

**In the Matter of The Estate of Keith, Edward A.** **26-36111**

STATUS CONFERENCE

**APPEARANCE REQUIRED**. On March 29, 2019, the Court ordered trustee Celeste White to file a verified accounting covering the entire period of her administration of the trust. On May 13, 2019, White filed a document entitled "Verified Submission Re Trust Accounting." White's "submission" does not comply with the Court's order because there currently is no formal trust accounting on file in response to the Court's order.

Attached as Exhibits C-D are copies of the purported accountings White provided to petitioner and the Attorney General on March 1 and March 4, 2019. Attached as Exhibit E is a purported reformatted accounting based on petitioner's complaints. White does not declare, under penalty of perjury, that any of these exhibits serve as the verified accounting ordered on March 29, 2019. Nor are these exhibits relevant. What White may have previously provided to other parties has no bearing on the accounting the Court ordered on March 29, 2019.

Even if one of these exhibits was intended to comply with the Court's ruling, there is no verified statement that her administration of the trust ended on January 15, 2013. Moreover, White has not verified the contents of any of the exhibits. White also has not stated that the accounting is a true and correct statement of all charges against the trustee and credits to which the trustee is entitled. In fact, White placed disclaimers throughout the exhibits by stating "[t]he summary of account was not subjected to an audit, review, or compilation engagement and accordingly, we do not express an opinion or a conclusion, nor provide any form of assurance," and providing on each page that "no assurance is provided." These statements in effect nullify

any verification, if there even is one, and directly contradicts the Court's request for a verified accounting.

Although not ordered, White's submission does not contain a report in narrative form to explain all items that are not self-explanatory from the schedules. White instead used the opportunity to take umbrage with the Court's order as not applying to co-trustee Richard Keith as well as petitioner's motives in filing the petition. The Court understands White takes issue with the footnote contained in the March 29, 2019 Order, which provides: "The Court understands there were two co-trustees during the period at issue, but that there was agreement between them for only Ms. White to handle trust administration. For that reason, the order pertains to Ms. White only." If a co-trustee remains, that co-trustee may well have a legal duty to assist White with preparing an accounting. That obligation, however, does not alter the fact that it is White who has been ordered to prepare an accounting based on the petition before the Court.

The parties' appearance is required to discuss the status of the matter in light of the Court's indicated position regarding the adequacy of White's "submission."

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***At 1:30 p.m.***

**In the Matter of Annalise L. Liskey Special Needs Trust** **16PR000058**

REVIEW HEARING

**APPEARANCE REQUIRED**

## CIVIL LAW & MOTION CALENDAR – Hon. Victoria Wood, Dept. A (Historic Courthouse) at 8:30 a.m.

**Vannessa Scott-Allen v. KRM, Inc., et al.** **16CV000854**

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION

**TENTATIVE RULING:** Defendants French Laundry Partners, L.P. (dba the French Laundry) (FLP), TKNYC LLC (dba Per Se Restaurant) (Per Se), French Laundry Restaurant Corporation (FLRC), KRM, Inc. (KRM), Michael Minnillo, and Thomas Keller's motion for summary judgment is DENIED. Defendants move for summary judgment on the ground plaintiff Vannessa Scott-Allen cannot establish the elements of any of the causes of action contained in the first amended complaint. This is not a valid ground for summary judgment. (See Code Civ. Proc., § 437c, subd. (a) [a motion for summary judgment asks the Court to determine the entire *action* has no merit and to terminate the action without the necessity of a trial].) Defendants also did not advance any evidence in their separate statement as to why the entire action has no merit.

Per Se, FLRC, KRM, Minnillo, and Keller's alternative motion for summary adjudication is deemed MOOT as to the third cause of action for violation of pregnancy disability leave law pursuant to FEHA (issue 8), fourth cause of action for negligent misrepresentation (issue 2), sixth cause of action for promissory estoppel (issue 9), seventh cause of action for breach of implied contract (issue 10), eighth cause of action for breach of the implied covenant of good faith and fair dealing (issue 11), ninth cause of action for CFRA retaliation in violation of FEHA (issue 12), tenth cause of action for CFRA interference in violation of FEHA (issue 13), and eleventh cause of action for wrongful termination and other employment practices in violation of public policy (issue 14). Plaintiff represents she is withdrawing these claims. (Opp. at p. 7:8-10.)

The motion for summary adjudication as to the first cause of action for fraud and deceit (issue 1 – brought by Per Se, FLRC, KRM), second cause of action for sex discrimination in violation of FEHA (issue 7 – brought by Per Se, FLRC, and KRM), fifth cause of action for misrepresentation in violation of Labor Code section 970 (issues 3-6 – brought by all defendants[1]), and twelfth cause of action for failure to prevent discrimination in violation of FEHA (issue 15 – brought by Per Se, FLRC, and KRM) is DENIED. The moving defendants argue the claims fail because plaintiff cannot produce evidence showing the individual defendants made any misrepresentations, and the entity defendants were neither involved in plaintiff's alleged employment offer nor liable through a secondary liability theory such as integrated enterprise, joint employment, or agency. For the fifth cause of action, the moving defendants further contend the claim fails because: (1) plaintiff cannot produce evidence showing the individual defendants made any misrepresentations; (2) defendants do not constitute a single integrated enterprise because plaintiff cannot prove they have centralized control of labor relations, common management, interrelation of operations, or common ownership and financial control; (3) defendants do not constitute joint employers as plaintiff's sole employer controlled and supervised her employment; and (4) defendants are not agents of one another as they did not assent to such agency and they operate separately and independently of one another.

The Court limits its ruling to a procedural argument and declines to address the moving defendants' substantive contentions relating to each claim. A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or issue of duty. (Code Civ. Proc., § 437c, subd. (f)(1); *Hood v. Super. Ct.* (1995) 33 Cal.App.4th 319, 323; see *Catalano v. Super. Ct.* (2000) 82 Cal.App.4th 91, 96 [the clear intent of Code of Civil Procedure section 437c, subdivision (f), is to stop the practice of adjudication of facts or adjudication of issues that do not completely dispose of a cause of action or defense].) Addressing the moving defendants' arguments will not fully dispose of the entirety of each claim. It is true that plaintiff pled alternative theories of liability, including integrated enterprise doctrine, agency, and joint employer. Plaintiff, however, also alleges the moving defendants were co-conspirators. For example, plaintiff asserts that after Minnillo and Julie Secviar learned of her pregnancy, they conspired to set up a sham interview with other managers to protect themselves from a discrimination suit by tricking plaintiff into believing she had the opportunity to work at the French Laundry restaurant when they knew plaintiff never would be hired. The moving defendants did not challenge this theory of liability in their motion. Indeed,

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[1] The Court notes FLP moved for summary adjudication only as to the fifth cause of action, and then only as to issues 4-6.

plaintiff raised the co-conspirator liability issue in her opposition. The moving defendants elected not to respond to the issue in their reply thereby conceding it is meritorious. Because the moving defendants are seeking partial adjudication of the remaining causes of action, the motion necessarily fails.

Defendants' motion for summary judgment/adjudication additionally fails because they seek summary judgment/adjudication against the "complaint." (See Ntc. at pp. 1-2 [moving for summary judgment and adjudication against each cause of action contained in "Plaintiff's Complaint"].) This may be nothing more than a drafting error, but, technically, it warrants a denial the motion because the "complaint" is no longer the operative pleading after the filing of the first amended complaint on January 18, 2017.

Plaintiff's request for judicial notice contained in her response to the separate statement is DENIED. The request is not code-compliant. (See Cal. Rules of Court, rule 3.1113(l) [any request for judicial notice must be made in a separate document listing the specific items for which notice is requested].)

The Court elects not to address plaintiff's nine evidentiary objections as they are not pertinent to resolution of the motion.

## PROBATE CALENDAR – Hon. Monique Langhorne, Dept. B (Historic Courthouse) at 8:30 a.m.

**Conservatorship of DeLong, George** **26-58383**

FOURTH ACCOUNT AND REPORT OF CONSERVATORS, REQUEST FOR PAYMENT OF ATTORNEY'S FEES, AND REQUEST FOR BOND INCREASE

**TENTATIVE RULING:** GRANT petition, including fees as prayed. The bond shall increase to $313,241.50. After a review of the matter, the Court finds the co-conservators are acting in the best interest of the conservatee. Thus, the matter is set for a biennial review hearing and an accounting in two years on May 28, 2021, at 8:30 a.m. in Dept. B. All accounting documents must be filed at least 30 days prior to the hearing. The court investigator shall prepare a biennial investigator report for the next hearing date. The clerk is directed to send notice to the parties.

# TENTATIVE RULING
**FOR: May 29, 2019**

## CIVIL LAW & MOTION CALENDAR – Hon. Victoria Wood, Dept. A (Historic Courthouse) at 1:30 p.m.

**Stop Syar Expansion v. County of Napa, et al.** **16CV001070**

PETITION FOR WRIT OF MANDAMUS (Violation of California Environmental Quality Act)

**APPEARANCE REQUIRED**. The Court will hear argument from the parties regarding the below tentative ruling on May 29, 2019, 1:30 p.m. in Dept. A. The parties need not request or notice a request for oral argument, as otherwise required by Local Rule.

Stop Syar Expansion petitions the Court for a writ of mandate, under the California Environmental Quality Act (CEQA), directing respondent County of Napa (County) to set aside and vacate its certification of the Final Environmental Impact Report (EIR) and project approvals for the Napa Syar Quarry Expansion Project. Upon review of the moving papers, the Court tentatively agrees with Petitioner on two grounds: (1) the EIR fails to provide sufficient evidentiary support for the County's decision to use the five-year averaged operations baseline for measuring air quality impacts; and (2) the EIR fails to adequately discuss inconsistencies with Napa County's General Plan.

### Jurisdictional and Procedural Issues Raised by Respondents

A. Waiver of Claims

The Court agrees with Respondents that Petitioner's Statement of Issues and Opening Brief do not perfectly track the issues raised in the Petition. The Court is analyzing herein only those claims properly addressed in Petitioner's Opening and Reply Briefs and considers Petitioner to have waived any other issues.

B. Res Judicata

As an initial matter, we address Respondents' claim that certain issues asserted by Petitioner (that the EIR is inadequate based on the County's failure to adequately analyze water impacts and land use consistency) are barred by the doctrine of res judicata. Respondents argue that the dismissal with prejudice of the CEQA action, which was concurrently filed by Skyline Park Citizens Association (SPCA), constituted a judgment on the merits as to those claims and, as a result, Petitioner is barred from (re)litigating the claims. Respondents argue that Petitioner was in sufficient privity with SPCA because each was representing the public throughout the respective administrative/legal processes.

While the Court agrees with Respondents that there was a final judgment on the merits of some of the same claims raised herein, it is not persuaded that Petitioner and SPCA are in privity for purposes of barring Petitioner's claims in the current action.

As recognized by our Supreme Court, "[p]rivity is not susceptible of a neat definition, and determination of whether it exists is not a cut-and-dried exercise." (*Clemmer v. Hartford Insurance Co*. (1978) 22 Cal.3d 865, 875.) Rather, the determination of privity ultimately turns on due process and the fairness of binding a party with the result obtained in an earlier proceeding in which it did not participate. (*Citizens for Open Access etc., Tide, Inc. v. Seadrift Assn*. (*Tide, Inc.*) (1980) 60 Cal.App.4th 1053, 1070.) In *Tide, Inc*., the Court found privity and applied res judicata to bar a subsequent action where the barred party had been adequately represented in the settlement agreement that appeared to be "the product of a reasonable compromise," reached after the parties "engaged in a lengthy, vigorous conflict," that yielded favorable results for the shared interests. (*Id*. at 1072.)

In this case, Respondents have not provided the Court with sufficient information to support a conclusion that SSE's interests were adequately represented in SPCA's CEQA case, such that due process would not be offended by application of res judicata to bar SSE from pursuing its claims in the instant action.

C. Beneficial Interest/Standing

Respondents next argue that the petition should be summarily denied for lack of standing. The Court disagrees. There is indication in the record that at least some of the members of the Petitioner organization live within geographical proximity to the project. "[I]n a writ of mandate against a municipal entity based on alleged violation of CEQA, a property owner…who establishes a geographical nexus with the site of the challenged project has standing." (*Citizens Assn. for Sensible Dvlpt. of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 158.) This can be true even when the geographical nexus is attenuated. (*Ibid*.)

But even if the geographical nexus and Petitioner's beneficial interest were deficient, the Court would nevertheless exercise its discretion to find standing here under the public interest exception. The issues raised in the petition clearly address important public concerns. And for the reasons discussed above regarding res judicata, the Court does not find that the other, related legal actions should foreclose the opportunity for this petitioner to have the merits of its claims fully adjudicated. (See *McDonald v. Stockton Metro. Transit Dist.* (1973) 36 Cal.App.3d 436, 440 (the "exercise of jurisdiction in mandamus rests to a considerable extent in the wise discretion of the court").)

D. Exhaustion of Remedies

Respondents also raise failure to exhaust administrative remedies as a jurisdictional bar to Petitioner's claims. The exhaustion requirement, where raised by Respondents with sufficient specificity, will be addressed in relation to particular issues in the "CEQA Issues" section of this tentative ruling.

E. Citation to Evidence in the Record

As a final preliminary jurisdictional/procedural issue, Respondents contend that Petitioner has failed to adequately and fairly summarize the Administrative Record, thereby waiving its right to challenge certain findings. This requirement, where raised by Respondents with sufficient specificity, will be addressed in relation to particular issues in the "CEQA Issues" section of this tentative ruling.

## CEQA Issues

A. Standards of Review

"A public agency's decision to certify the EIR is presumed correct, and the challenger has the burden of proving the EIR is legally inadequate." (*Santa Monica Baykeeper v. City of Malibu* (2011) 193 Cal.App.4th 1538, 1546.) In order to prevail, a petitioner must show that the lead agency prejudicially abused its discretion by either (1) failing to proceed in a manner required by law or, (2) not supporting its determination with substantial evidence. (Pub. Resources Code § 21168.5.)

Very different standards of review apply to these two categories of error. The court reviews de novo whether the agency has correctly followed CEQA procedures, "scrupulously enforc[ing] all legislatively mandated CEQA requirements." (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.)

Courts are to accord greater deference to questions of whether the lead agency's substantive factual conclusions are supported by substantial evidence. (*Santa Monica Baykeeper v. City of Malibu, supra,* 193 Cal.App.4th at 1546.) In this context, "substantial evidence" is "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (*Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 393.) The reviewing court must resolve all reasonable doubt in favor of the administrative finding and decision. (*Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514.) On such questions, the court "may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable," because the court has "neither the resources nor scientific expertise" to "weigh conflicting evidence and determine who has the better argument." (*Laurel Heights Improvement Assn. v. Regents of Univ. of Cal., supra,* at 393.) Moreover, "CEQA does not require a lead agency to conduct every recommended test and perform all recommended research to evaluate the impacts of a proposed project. The fact that additional studies might be helpful does not mean that they are required." (*Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1125.)

The substantial evidence test applies not only to conclusions and findings, but also to "the scope of an EIR's analysis of a topic, the methodology used for studying an impact, and the reliability or accuracy of the data upon which the EIR relied because these types of challenges involve factual questions." (*City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176 Cal.App.4th 889, 898.) "'Disagreement among experts does not make an EIR inadequate, but the EIR should summarize the main points of disagreement among the experts. The courts have looked not for perfection but for adequacy, completeness, and a good faith effort at full disclosure.'" (*Town of Atherton v. Cal. High-Speed Rail Authority* (2014) 228 Cal.App.4th 314, 349, quoting Cal. Code Regs., tit. 14, § 15151.)

The petitioner bears the burden of showing that the administrative record is bereft of sufficient evidence justifying approval of a contested project. (*Latinos Unidos de Napa v. City of Napa* (2013) 221 Cal.App.4th 192, 206.) "To do so, an appellant must set forth in its brief all the material evidence on the point, not merely its own evidence. [Citation.] A failure to do so is

deemed a concession that the evidence supports the findings." (*Citizens for a Megaplex-Free Alameda v. City of Alameda* (*Megaplex-Free*) (2007) 149 Cal.App.4th 91, 112–113.) As explained by the court in *Megaplex-Free*, "'if the appellants fail to present us with all the relevant evidence, then the appellants cannot carry their burden of showing the evidence was insufficient to support the agency's decision because support for that decision may lie in the evidence the appellants ignore.' [Citation.] This failure to present all relevant evidence on the point 'is fatal.' [Citation.] 'A reviewing court will not independently review the record to make up for appellant's failure to carry his burden.' [Citation.]" (*Ibid*.)

Whether the breadth and content of the EIR's *discussion* of environmental impacts is adequate falls into a third category of review. It requires the court to determine "whether the EIR includes enough detail 'to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.'" (*Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 516, quoting *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal., supra*, 47 Cal.3d at 405.) The EIR must include "a disclosure of the analytic route the agency traveled from evidence to action. [Citation.]" (*Id.* at 513.) There are times when the question of whether an EIR's discussion is sufficiently detailed implicates a factual question that makes substantial evidence review appropriate. (*Id*. at 514 ("[f]or example, a decision to use a particular methodology and reject another is amenable to substantial evidence review…").) Finally, failure to comply with information disclosure requirements may constitute prejudicial abuse of discretion regardless of whether a different outcome would have resulted if the agency had complied. (*Id*. at 515.) Omission of material necessary to informed decision-making and informed public participation is prejudicial. (*Ibid*.)

B. Air Quality Impacts

1. Use of Annual Aggregate Base Line

CEQA requires the lead agency to include a baseline of physical conditions against which a project is analyzed for environmental impacts. (Cal. Code Regs., tit. 14, § 15125, subd. (a).) "Generally, the lead agency should describe physical environmental conditions as they exist at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced." (*Id*. at subd. (a)(1).) However, "[w]here existing conditions…fluctuate over time, and where necessary to provide the most accurate picture practically possible of the project's impacts," the agency may define baseline physical conditions by reference to historical, or anticipated future conditions "that are supported with substantial evidence." (*Ibid*.)

"[A]n agency enjoys the discretion to decide, in the first instance, exactly how the existing physical conditions without the project can most realistically be measured, subject to review, as with all CEQA factual determinations, for support by substantial evidence. [Citation.]" (*San Francisco Baykeeper, Inc. v. State Lands Comm.* (2015) 242 Cal.App.4th 202, 218.) However, "while an agency preparing an EIR does have discretion to omit an analysis of the project's significant impacts on existing environmental conditions and substitute [a different baseline], the agency must justify its decision by showing an existing conditions analysis would be misleading or without informational value." (*Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 457.)

The notice of preparation in this case was published in 2009. However, the EIR does not rely on 2009 production levels as its baseline, but instead uses an annual aggregate production level as the "existing conditions."

Petitioner contends the County erred by failing to provide evidentiary support for its decision to use the averaged baseline. The Court agrees. First, Respondents point to no language in the EIR that tends to "justify [the County's] decision by showing an existing conditions analysis would be misleading or without informational value." (*Neighbors for Smart Rail v. Exposition Metro Line Construction Authority, supra,* 57 Cal.4th at 457.)

It appears from the Court's review that the only statements in the EIR relating to this decision are: "[e]xisting conditions were based on a recent five-year average of operations"; and, "[s]ource: Annual data provided by Syar was used to determine baseline and project levels of activity." (AR 1078.) These statements are not sufficient to demonstrate, as required under CEQA, "the analytic route the [County] traveled from evidence [that an existing conditions analysis would be misleading or without informational value] to action [use of five-year average]." (*Sierra Club v. County of Fresno, supra,* 6 Cal.5th at 513.) Thus, the County's failure to provide evidentiary support for its decision to use the averaged baseline constitutes prejudicial abuse of discretion.

Petitioner further contends that the County's conclusions are not supported by substantial evidence because it failed to include in the EIR the "[a]nnual data provided by Syar [that] was used to determine baseline and project levels of activity."

Respondents argue the County was prohibited from disclosing such data on two grounds. First, Respondents contend such data constituted "trade secrets," as defined in Government Code section 6254.7. Production data constitutes trade secrets under that provision only where the data "is known only to certain individuals within a commercial concern who are using it to fabricate, produce, or compound an article of trade or a service having commercial value and which gives its user an opportunity to obtain a business advantage over competitors who do not know or use it." (*Ibid.*) Respondents make no such showing in their opposition papers herein, nor do they point to any discussion in the EIR of any such showing.

Second, Respondents contend that Public Resources Code section 2207 prohibits the disclosure of such data. That section is part of the statutory scheme governing the requirement of mine operators to submit annual reports to the California Division of Mine Reclamation. It provides "any information in reports submitted pursuant to subdivision (a) that includes or otherwise indicates the total mineral production, reserves, or rate of depletion of any mining operation may not be disclosed to any member of the public…." (Pub. Resources Code § 2207, subd. (g).)

It is evident that the prohibition on public disclosure in section 2207, subdivision (g), applies to the California Division of Mine Reclamation, to whom data is required to be reported pursuant to section 2207. Respondents fail to provide authority for, or otherwise convince the Court of the exigency of reading section 2207(g) to prohibit disclosure by a CEQA lead agency

of mineral production data submitted by a real party in interest in support of its own project application. The Court declines to do so and finds that the County's failure to disclose the annual data provided by Syar, or at least adequately explain its rationale for withholding that data, constitutes prejudicial abuse of discretion.

To be clear, the Court does not here find that the data is *not* subject to trade secret protection and is not *requiring* its inclusion in the EIR. Rather, the Court finds that the County failed to provide adequate justification, in the EIR, for withholding such data. There may be no such justification, in which case disclosure would be required. However, the Court withholds judgment on that issue, pending remand to the County for revision of the EIR's discussion relating to the baseline for air quality analysis.

2. Analysis of Daily Emissions Impacts

Petitioner next argues the County abused its discretion because the EIR fails to analyze whether the project could result in exceedance of daily emissions thresholds, instead relying on annual thresholds. The Court disagrees.

Agencies have broad discretion in selecting appropriate thresholds of significance for purposes of evaluating the severity of a particular impact. (*Mission Bay Alliance v. Office of Community Investment & Infrastructure* (2016) 6 Cal.App.5th 160, 192.) "'Disagreement among experts does not make an EIR inadequate, but the EIR should summarize the main points of disagreement among the experts. The courts have looked not for perfection but for adequacy, completeness, and a good faith effort at full disclosure.'" (*Town of Atherton v. Cal. High-Speed Rail Authority, supra,* 228 Cal.App.4th at 349, quoting Cal. Code Regs., tit. 14, § 15151.)

The EIR contains substantial evidence explaining the methodology used by the County, its rationale for choosing the methodology, and the supporting data. (See, *e.g.*, AR 608-9, 1057-1104, 2891-3339, 3969-73.)[2] Of note, the Air Quality and Health Impact Risk Assessment (AQHIRA), prepared by the County's air quality expert, and serving as the evidentiary and analytical basis of the air quality sections of the EIR, incorporates standards published by the Bay Area Air Quality Management District (BAAQMD)[3] as part of its May 2010 update to its CEQA Guidelines (BAAQMD Guidelines). (AR 2901.) The EIR recites that the BAAQMD Guidelines is "an advisory document that provides the lead agency, consultants, and project applicants with uniform procedures for addressing air quality in environmental documents." (*Ibid.*) The Court therefore finds that substantial evidence exists to support the scope of the EIR's analysis of emissions impacts, the methodology used, and the reliability and accuracy of the data

[2] As Petitioner concedes, the EIR found that mitigated annual PM10 emissions were below the significance threshold. (AR 1093.) The Court's finding that the EIR adequately supports (both in terms of providing adequate information and in citing substantial evidence in support) the methodology and conclusions used to arrive at this conclusion dispenses with Petitioner's PM10 Modeling claims.

[3] The EIR provides, "the BAAQMD attains and maintains air quality conditions in the [San Francisco Bay Area Air Basin] through a comprehensive program of planning, regulation, enforcement, technical innovation, and promotion of the understanding of air quality issues. The clean air strategy of the BAAQMD includes the preparation of plans for the attainment of ambient air quality standards, adoption and enforcement of rules and regulations concerning sources of air pollution, and issuance of permits for stationary sources of air pollution. The BAAQMD also inspects stationary sources of air pollution…." (AR 2901.)

relied upon. (See *City of Long Beach v. Los Angeles Unified School Dist., supra,* 176 Cal.App.4th at 898.)

Petitioner argues, "BAAQMD has established daily and annual emissions thresholds for criteria pollutants…" and, "the EIR fails to analyze whether the Project could result in exceedances of daily emissions thresholds…." (Opening Brief at 13:2-6.) From the Court's reading of the administrative record, Petitioner's argument misconstrues the BAAQMD Guidelines in a subtle but important way. Petitioner's argument appears premised on BAAQMD having established a daily emissions threshold that is independent of the annual threshold. The Court does not find evidence of this in the record.[4]

In each of the portions of the administrative record cited by the parties, the BAAQMD Guidelines discuss maximum operational emissions in terms of "Maximum Annual Emissions" and "Average Daily Emissions." (See e.g. AR 002984.) These categories do not appear to be independent guidelines. Rather, they appear to be two articulations of the same threshold. The "average daily emissions" number appears to be the "maximum annual emissions" number divided by 365. This interpretation is reinforced by interpretations of the BAAQMD Guideline contained in the record. (See e.g. AR 1077, "[o]perational emissions are evaluated using only the maximum annual thresholds because the average daily thresholds are equivalent." See also AR 8268-70, County's air quality expert discussing, at some length, his methodology in using a 365-day year to develop the average daily emission from the annual emission and concluding, "from my perspective, we did include the daily threshold because it's the same as the annual threshold when you look at it the way we looked at it.") Finally, the BAAQMD submitted comments on the Notice of Preparation and received a draft EIR together with the AQHIRA and did not take issue with the methodology or analysis of the threshold of significance for project emissions. (AR 609, 3971.) This constitutes additional evidence supporting the County's approach. (CEQA Guidelines § 15207.)

Petitioner cites the analysis of its own air quality expert, Greg Gilbert as demonstrating the importance of analyzing daily thresholds of emissions, in addition to annual thresholds. (Opening Brief at 15:15-24.) Mr. Gilbert's analysis may well be as reasonable, or more reasonable than those published in the BAAQMD Guidelines and followed by the County. But even if it were, that would be insufficient grounds for the Court to find the EIR inadequate for the Court "may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable…." (*Laurel Heights Improvement Assn. v. Regents of Univ. of Cal., supra,* 47 Cal.3d 376 at 393.)

3. Disclosure of Potential Health Impacts

Petitioner argues that "the EIR fails to analyze all sources and receptors of potential health impacts, making it informationally deficient." (Opening Brief at 16:4-5.) Petitioner cites several specific topics on which it claims the EIR is "informationally deficient": particulate matter-10 modeling; health impacts of emissions at the future Napa jail; health impacts of

[4] Petitioner refers to a table in the EIR that sets out 1-hour, 8-hour, and 24-hour "standards," and which appear to be culled from research conducted by or sponsored by the California Air Resources Board. But there is no evidence cited to support Petitioner's contention that these "standards" have been adopted by BAAQMD.

respirable crystalline silica; the failure to disclose reclamation emissions; and analysis of cumulative health impacts.

The County is not required to analyze "all sources and receptors" of potential health impacts. Again, determination of whether the EIR is informationally deficient turns on "whether the EIR includes enough detail 'to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.'" (*Sierra Club v. County of Fresno, supra,* 6 Cal.5th 502, 516, quoting *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal., supra,* 47 Cal.3d at 405.)

On the issue of the potential air quality impacts on health, the EIR exhaustively discusses the methodologies used, the County's rationale for choosing the methodologies used, and the evidence supporting those decisions. (See, *e.g.,* AR 1057-1104, 2891-3292, 3967-79.) The Court finds the County has thereby satisfied its duty to include enough detail to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project. (See *Sierra Club v. County of Fresno, supra*, 6 Cal.5th at 516.)

The Court is inclined to view Petitioner's claims as to each of the specific issues raised (*e.g. PM10 modeling, impacts of respirable crystalline silica, etc.*) as inviting the Court to second guess the County's approach to analyzing the air quality impacts of the project. Because the Court finds, as discussed above, that the County's decision-making (in selecting its methodology, etc.) is both supported by substantial evidence, and sufficiently explained in the EIR, the Court finds such invitation inconsistent with its defined role in the CEQA process. (See *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova, supra,* 40 Cal.4th at 435, "the reviewing court 'may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable,' for, on factual questions, our task 'is not to weigh conflicting evidence and determine who has the better argument.' [Citation.]")

Moreover, the subject of each of Petitioner's specific arguments was specifically addressed in the EIR. (PM10 – AR 001081, 002926-29; AR Respirable Crystalline Silica – AR 1075, 1080, 2898, 2927, 3120-25; Cumulative Health Impacts AR 1077, 1096-1102; Emissions from Trucks – AR 1078-79, 3685-86, 2922-25, 2927-29.) The Court finds these discussions sufficiently informative to satisfy the County's obligations under CEQA as to each.

4. Analysis of Health Impacts at Napa Jail

Petitioner's argument that the County abused its discretion because the EIR fails to analyze the potential health impacts relating to a jail the county plans to build adjacent to the project site sometime in the future fails for an additional reason. As noted above, in its review, the agency "should normally limit its examination to changes in the existing physical conditions in the affected area as they exist at the time the notice of preparation is published…." (Cal. Code Regs., tit. 14, § 15125, subd. (a).)

Respondents contend that omission of such analysis is proper because the jail was not reasonably foreseeable at the time the notice of preparation was published in 2009.

Petitioner counters by providing authority relating to what projects should be included in an EIR's cumulative impacts analysis. (Reply Brief at 17:19-22.) Petitioner fails to persuade the Court that this authority is apposite to the present question. The subject of an EIR's cumulative impacts analysis is the change in the environment from the incremental impact of the project when added to foreseeable probable future projects. (Cal. Code Regs., tit. 14, §§ 15130, 15355, "[c]umulative impacts refer to two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts.") CEQA regulations require an agency to include in a cumulative impacts analysis "a list of past, present, and probable future projects producing related or cumulative impacts…." (Cal. Code Regs., tit. 14, § 15130, subd. (b)(1)(A).) Pursuant to that authority, "[a]ny future project where an applicant has devoted significant time and financial resources to prepare for any regulatory review should be considered as probable future projects for the purposes of cumulative impact." (*Gray v. County of Madera*, *supra*, 167 Cal.App.4th at 1127-28.)

Petitioner does not argue that the County abused its discretion by failing to include the jail in a cumulative impacts analysis. Petitioner also does not provide any explanation for why the standard for including probable future projects in such cumulative impacts analysis should be applied here, to require the County to analyze the particular environmental impact of the project *on* the probable future project. For these reasons, Petitioner fails to show how the County's failure to consider the potential impact on the probable future jail constitutes abuse of discretion.

5. Evidentiary Support for Projected Emissions Levels

Petitioner next argues that the County erred because the EIR's "[e]stimates for on-road emissions rely on unsupported and contradictory claims and incomplete analysis." (Opening Brief at 19:18.) Petitioner asserts that both: (1) the value the County used for "average vehicle trip length" (14.7 miles) is inappropriate because it is not a distance "established by actual practices at the Quarry" (Opening Brief at 19:21); and (2) the projected number of on-road truck trips is unsupported because the number of trips is a function of the estimated load size (16.2 tons) and there is no substantial evidence supporting this estimate. (*Id*. at 20:10-11.)

Again, the Court's role is to determine whether substantial evidence exists to support the County's decision to use the projected values. As discussed above, "substantial evidence" is "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (*Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.*, *supra*, 47 Cal.3d at 393.) And again, we are required to resolve all reasonable doubt in favor of the administrative finding and decision. (*Topanga Association for a Scenic Community v. County of Los Angeles*, *supra*, 11 Cal.3d at 514.)

In light of the foregoing, the Court finds there is substantial evidence to support the County's reliance on a trip distance of 14.7 miles (AR 1078-79, 3685), and an estimated load size of 16.2 tons. (AR 2047.) Moreover, the Court finds that the EIR, at AR 3685, adequately discloses "the analytic route the agency traveled from evidence to action [citations omitted]."

(*Sierra Club v. County of Fresno, supra,* 6 Cal.5th at 413.)[5] The EIR is not as clear in illuminating the analytic route relating to estimated load size. However, it does articulate that the Quarry's average annual sales were approximately 810,000 tons, and that 100,000 total truck trips per year related to the hauling of sold materials. (AR 2047.) From here, the EIR explains that 8.1 tons per truck trip equates to 16.2 tons of material per truck leaving the Quarry.[6] Therefore the Court finds the EIR "includes enough detail 'to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.'" (*Sierra Club v. County of Fresno, supra,* at 516.)

Finally, the EIR does account for increased asphalt importation under the RAP program. (AR 978.)

6. Mitigation Measures for Air Quality

Petitioner contends that the mitigation measures for the project's air quality impacts "rely on several layers of self-reporting and are thus not fully enforceable." (Opening Brief at 21:3-4.) Petitioner provides no authority in support of its assertion that self-reporting vitiates the enforceability of mitigation measures.

CEQA requires an agency to adopt feasible mitigation measures that would substantially reduce or avoid otherwise significant adverse environmental impacts. (Pub. Resources Code § 21002.) For mitigation measures to be legally adequate, they must be capable of: "(a) Avoiding the impact altogether by not taking a certain action or parts of an action. (b) Minimizing impacts by limiting the degree to or magnitude of the action and its implementation. (c) Rectifying the impact by repairing, rehabilitating, or restoring the impacted environment. (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action." (Cal. Code Regs., tit. 14 § 15370.) Allegations that mitigation measures are inadequate fail where the court finds substantial evidence supporting the agency's conclusion that the mitigation measures will be effective. (*Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1027.)

"Mitigation measures must be fully enforceable through permit conditions, agreements, or other legally-binding instruments. In the case of the adoption of a plan, policy, regulation, or other public project, mitigation measures can be incorporated into the plan, policy, regulation, or project design." (Cal. Code Regs., tit. 14, § 15126.4, subd. (a)(2).) Mitigation measures are considered enforceable where they are incorporated as part of conditional approval of the use permit. (*Gray v. County of Madera, supra,*167 Cal.App.4th at 1116; Pub. Resources Code § 21081.6, subd. (b).) "The purpose of these requirements is to ensure that feasible mitigation measures will actually be implemented as a condition of development, and not merely adopted

[5] Petitioner counters that the EIR expressly states that the 14.7-mile distance is an appropriate estimate, "[i]n the absence of specific data for the actual average trip distance." While Petitioner contends that such data is available in the form of Syar weigh tags, it points to no evidence in the record supporting this contention.

[6] The Court is unable to find support at the cited portions of the record for Petitioner's claim that the "EIR contains contradictory information regarding the actual load size for haul trucks, ranging between 7.9 and 25 tons." (Opening Brief at 20:14-15. Moreover, the Court notes that an estimated average of 16.2 tons is perfectly consistent with an actual range of between 7.9 and 25 tons. The Court is similarly unable to find support at the cited portions of the record for Petitioner's claims relating to the distinction between extracted material and saleable materials. (Opening Brief at 20:17-23.) Without such support, Petitioner's arguments on this point are vague and unpersuasive.

and then neglected or disregarded." (*Federation of Hillside & Canyon v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1261.)

The Conditions of Approval of the project explicitly require Syar to comply with all "the mitigation measures and the mitigation monitoring and reporting program adopted in connection with the project." (AR 880.) In addition, Syar is required to file an Annual Compliance Report "demonstrating compliance with all of the conditions of approval and mitigation measures for this Permit." (AR 884.) Finally, the County is responsible for verifying Real Party in Interest's compliance with the mitigation measures. (AR 930-35, 885.)

Based on the foregoing, the Court finds the mitigation measures are fully enforceable. (Pub. Resources Code § 21081.6, subd. (b).)

Finally, the Court finds that the air-quality mitigation measures are neither deferred nor uncertain. "'Deferral of the specifics of mitigation is permissible where the local entity commits itself to mitigation and lists the alternatives to be considered, analyzed and possibly incorporated in the mitigation plan.'" (*Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 793, quoting *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275.) The Court finds that the each of the County's mitigation measures 4.3-2A, 4.3-2B, and 4.3-3 lists several alternatives to be considered, analyzed and possibly incorporated in the mitigation plan with sufficient certainty to satisfy CEQA. (AR 830-835.)[7]

C. Green House Gasses

Petitioner asserts that full disclosure and mitigation of greenhouse gas emissions was required in the EIR, but not provided. (Opening Brief at 23:1-2.) The Court disagrees.

The EIR's analysis of greenhouse gas emissions includes the following discussions: existing emissions (AR 1415-16); the relevant regulatory framework including California Executive Order S-02-05, the California Global Warming Solutions Act of 2006, the Bay Area Air Quality Management District Guidelines, and Napa County's General Plan and Climate Action Plan (AR 1416-21), and project impacts and mitigation measures (AR 1421-25). The Court finds the County has thereby satisfied its duty to include enough detail to enable those who did not participate in its preparation to understand and to consider meaningfully the greenhouse gas emissions issues raised by the proposed project. (See *Sierra Club v. County of Fresno*, *supra*, 6 Cal.5th at 516.) The Court further finds that the County's methodologies and conclusions are supported by substantial evidence. (See *City of Long Beach v. Los Angeles Unified School Dist.*, *supra*, 176 Cal.App.4th at 898.)

Again, the Court is inclined to view Petitioner's claims regarding each of the specific sub-issues raised (*e.g., biogenic emissions from oak removal and underestimation of truck trips*) as inviting the Court to second guess the County's approach to analyzing the greenhouse gas

[7] The Court notes that, in advancing this argument, Petitioner selectively quotes sentences from the County's Conditions of Approval in a manner that ignores the overall meaning of the cited sections of those Conditions, arguably misrepresenting the Record. (Opening Brief at 22:1-6.) Petitioner's failure to present all relevant evidence on the point is fatal to Petitioner's claim. (*Citizens for a Megaplex-Free Alameda v. City of Alameda*, *supra*, 149 Cal.App.4th at 112–113.)

emissions impacts of the project. Because the Court finds, as discussed above, that the County's decision-making (in selecting its methodology, etc.) is both supported by substantial evidence, and sufficiently explained in the EIR, the Court finds such invitation inconsistent with its defined role in the CEQA process. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova, supra*, 40 Cal.4th at 435, "the reviewing court 'may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable,' for, on factual questions, our task 'is not to weigh conflicting evidence and determine who has the better argument.' [Citation.]")

1. Biogenic Greenhouse Gas Emissions from Forest Conversion

Petitioner contends that the EIR fails to disclose, analyze or mitigate additional greenhouse gas emissions due to conversion of oak woodlands into quarry. (Opening Brief at 23:4-6.) Not so.

The EIR follows the Bay Area Air Quality Management District (BAAQMD) Guidelines in organizing its analysis of greenhouse gas emissions into two categories – land use and stationary sources. (AR 1414-25.) Among these, the EIR specifically analyzes greenhouse gas emissions resulting from changes in land cover, including removal of oak woodlands and the consequent biogenic greenhouse gas emissions and loss of carbon sequestration. (AR 1415, 1421-22.) However, the BAAQMD guidelines specifically provide that, "[b]iogenic CO2 emissions should not be included in the quantification of [greenhouse gas] emissions for a project." (AR 20635.) In accordance with these guidelines, the County engaged in a qualitative analysis of the direct and indirect impact of the project on oak woodlands. (AR 751-54, 785-86, 1107-10, 1114-15, 1170, 1179-81, 1188, 1190-91, 1415, 1419-22, 1774-76, 1807, 3948-51.) The analysis concluded that the project would have a significant impact. (AR 1421.) The EIR's Mitigation Measure 4.4-9 specifically addresses this impact through permanent preservation of some 145 acres of existing oak woodlands and planting of an additional 12 acres of woodlands at the project site, and preservation of 85 acres offsite by conservation easement. (AR 752-54, 876, 1179-81, 1190-91.) The EIR analyzes the impact of the project with this mitigation and concludes that it would be less than significant. (AR 1179-81, 1170.) Among these are permanent preservation of some 145 acres of existing oak woodlands and planting of an additional 12 acres of woodlands at the project site, and preservation of 85 acres offsite by conservation easement. (AR 752-54, 876, 1190-91.) Finally, the conditions of approval of the project incorporate the mitigation measures. (AR 751-54, 785.)

As with the global discussion of greenhouse gas emissions, the Court finds in the EIR's discussion of biogenic greenhouse gas emissions from forest conversion sufficient detail to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project. (See *Sierra Club v. County of Fresno, supra*, 6 Cal.5th at 516.) The Court also finds that substantial evidence exists to support the County's conclusions and findings. (See *City of Long Beach v. Los Angeles Unified School Dist., supra*, 176 Cal.App.4th at 898.)

Petitioner further claims that the measures adopted in the EIR are insufficient to adequately mitigate the impact on greenhouse gas emissions relating to the forest conversion, citing experts' criticisms of the mitigation measures. (Opening Brief 24:23 – 25:16.) Again,

"'[d]isagreement among experts does not make an EIR inadequate, but the EIR should summarize the main points of disagreement among the experts." (*Town of Atherton v. Cal. High-Speed Rail Authority* (2014) 228 Cal.App.4th 314, 349, quoting Cal. Code Regs., tit. 14, § 15151.) Petitioner's references to competing experts' opinions within the administrative record demonstrate that the EIR satisfies this requirement. As discussed above, the Court finds the County's analysis of mitigation measure 4.4-9 sufficiently supported by substantial evidence.

2. Emissions Due to Truck Trips

Petitioner contends that the greenhouse gas emissions analysis is further defective because of the asserted underestimation of length and number of truck trips discussed in detail in Section B.5 herein above. This argument lacks merit for the reasons set forth therein.

3. Greenhouse Gas Mitigation Measures

Finally, Petitioner argues that the mitigation measures set out in the EIR and conditions of project approval are not concrete and fully enforceable. Specifically, it argues that mitigation measure 4.4-9 will be ineffective at reducing greenhouse gas emissions attributable to woodland loss, and measure 4.17-2 is defective because it is speculative and deferred. (Opening Brief at 26:6-7.)[8] The Court disagrees.

Mitigation measure 4.17-2 recites that the County "has identified significance criteria for GHG emissions resulting from land use projects (1,100 Metric Tons (MT) per year) and stationary source projects (10,000 MT per year)." (AR 1422.) Stationary source emissions for the project were found to be less than 10,000 MT per year, and therefore less than significant. (AR 1423.) The EIR then provides as follows:

- "The Applicant shall prepare a Greenhouse Gas Reduction Plan (GHG Reduction Plan)."
- "The GHG Reduction Plan shall identify the measures to be used to reduce the GHG emissions…below the 1,100 MT CO2e annual land use threshold…."
- "The effectiveness of each measure in the GHG Reduction Plan shall be quantified…."
- "The Applicant shall choose from, but not be limited to, the following measures to incorporate into the GHG Reduction Plan…." (AR 1424)

The EIR goes on to list eight specific measures that may be used to satisfy the mandate for emissions reduction set out in the mitigation measure. (AR 1424.) The EIR further provides that the GHG Reduction Plan "shall be reviewed and approved by Napa County and shall be updated as necessary to address changing conditions and regulations." (*Ibid.*)

The Court finds the foregoing mitigation measure fully enforceable. (Pub. Resources Code § 21081.6, subd. (b).) While the specific details of the GHG Reduction Plan are deferred, the County set a concrete and measurable cap on emissions, compels a monitoring and reporting program, and specifically enumerates eight possible courses for reduction of emissions. "'Deferral of the specifics of mitigation is permissible where the local entity commits itself to

[8] Petitioner's arguments regarding mitigation measure 4.4-9 are set forth in the section of its Opening Brief addressing biogenic greenhouse gas emissions from forest conversion and are discussed in section C.1 herein above.

mitigation and lists the alternatives to be considered, analyzed and possibly incorporated in the mitigation plan.'" (*Endangered Habitats League, Inc. v. County of Orange, supra,*131 Cal.App.4th at 793, quoting *Defend the Bay v. City of Irvine, supra,*119 Cal.App.4th at 1275.) Where an agency has analyzed available mitigation measures and has committed itself to implementation of measures sufficient to attain a specifically defined mitigation goal, an EIR's identification of a list of options for achieving such goal does not render the mitigation measure fatally speculative or uncertain. (*Sacramento Old City Assn. v. City Council*, *supra,* 229 Cal.App.3d at 1029.)

D. Traffic Impacts

1. Baseline

Petitioner contends that the EIR's baseline for traffic impacts is improper because it uses an estimate, rather than an actual trip count, and "provides no reasoning why an actual trip count at the Quarry would be misleading." (Opening Brief at 27:25-26.) Petitioner then discusses its own traffic expert's criticisms of the County's analysis and determination of a baseline. (*Id.* at 28:1-11.)

Again, "[a]n agency enjoys the discretion to decide, in the first instance, exactly how the existing physical conditions without the project can most realistically be measured, subject to review, as with all CEQA factual determinations, for support by substantial evidence. [citation omitted.]" (*San Francisco Baykeeper, Inc. v. State Lands Comm., supra,* 242 Cal.App.4th at 218.) However, "while an agency preparing an EIR does have discretion to omit an analysis of the project's significant impacts on existing environmental conditions and substitute [a different baseline] the agency must justify its decision by showing an existing conditions analysis would be misleading or without informational value." (*Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 457.)

The County commissioned and included in the EIR a Traffic Impact Study by qualified engineers. (AR 2029-2216.) The Study includes a thorough analysis of existing traffic volumes. (AR 2056-70, 2047-55.) This analysis is based on peak AM and PM traffic counts on two dates in Fall, 2009. (AR 2066.) The analysis explains in detail how the baseline is calculated from the results of the peak traffic counts, and the rationale for the calculation. (AR 2066, 2047, 2039.)

Based on the foregoing, the Court finds substantial evidence to support the County's methodology in deciding how the existing physical traffic conditions without the project could be most reasonably measured. (*San Francisco Baykeeper, Inc. v. State Lands Comm., supra,* 242 Cal.App.4th at 218.) Again, "disagreement among experts does not make an EIR inadequate…." (*Town of Atherton v. Cal. High-Speed Rail Authority*, *supra,* 228 Cal.App.4th at 349.)

2. Passenger Car Equivalency[9]

Similarly, Petitioner's assertions of error relating to passenger car equivalency consist of reference to its expert's criticisms of the County's approach to analyzing the project's impact on traffic. The Court finds that the traffic analysis relied on by the County and incorporated into the EIR includes enough detail to enable those who did not participate in its preparation to understand and to consider meaningfully the traffic impact issues raised by the proposed project. (See *Sierra Club v. County of Fresno, supra,* 6 Cal.5th at 516.) The Court further finds that the methodologies and conclusions are supported by substantial evidence. (See *City of Long Beach v. Los Angeles Unified School Dist., supra,* 176 Cal.App.4th at 898.)

3. Cumulative Traffic Impacts

Petitioner fails to carry its burden of showing that the issue of cumulative traffic impacts was raised below, and as a result, the Court is without jurisdiction to consider it. "'No action or proceeding may be brought pursuant to Section 21167 unless the alleged grounds for noncompliance…were presented to the public agency orally or in writing….' (Pub. Resources Code § 21177, subd. (a).)" (*Sierra Club v. City of Orange, supra,*163 Cal.App.4th at 535.) Exhaustion of administrative remedies is a "jurisdictional perquisite to maintenance of a CEQA action." (*Citizens for Responsible Equitable Environmental Development v. City of San Diego* (2011) 196 Cal.App.4th 515, 527.) "The petitioner bears the burden of demonstrating that the issues raised in the judicial proceeding were first raised at the administrative level. [Citation.]" (*Sierra Club v. City of Orange, supra,* at 536.)

Petitioner's opening brief does not cite to any portion of the administrative record showing that the present issue was raised before the County. Respondent, in its Opposition Brief at 35:3-4, argued that Petitioner failed to exhaust its administrative remedies on this issue. Petitioner's Reply Brief is silent on the issue. For these reasons, the Court finds that it is without jurisdiction to consider whether the EIR is deficient on grounds that it fails to discuss cumulative traffic impacts.

E. Water Supply Analysis

1. Inclusion of Information in EIR and Water Supply Assessment

Petitioner first argues that the EIR and the water supply assessment (WSA) upon which it is based fail as informational documents because they fail to provide information required by the Water Code. (Opening Brief at 30:24-25.)[10] The relevant provisions of the Water Code address

[9] Respondents argue that Petitioner failed to exhaust its administrative remedies by failing to raise this issue below. "'No action or proceeding may be brought pursuant to Section 21167 unless the alleged grounds for noncompliance…were presented to the public agency orally or in writing….' (Pub. Resources Code § 21177, subd. (a).)" (*Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 535.) Petitioner's Opening Brief cites to the writing by which the issue of passenger car equivalency was raised below: The Review of the Syar Napa Quarry Expansion Project Environmental Impact Report (EIR) Traffic Impact Study, by Minager & Associates, Inc., which was attached as Exhibit 3 to Petitioner's August 11, 2015 letter to the Napa County Planning Commission. (AR 14671.) The Court acknowledges that a discussion on the ninth page of a 62-page report attached as the third of 12 exhibits to a submitted letter is not the ideal means of raising an important issue before the reviewing agency. However, the Court finds that it is sufficient to overcome Respondents' jurisdictional objection.

[10] Respondents argue that Petitioner failed to exhaust its administrative remedies by failing to raise this issue below. Petitioner's citation to AR 14459-62 and 14647 in its Reply Brief are sufficient to sustain its burden of showing that the issue was raised before the County. (See *Sierra Club v. City of Orange, supra,* 163 Cal.App.4th at 535.)

water supply planning relating to certain defined projects. (Water Code § 10910, *et seq.*) These provisions apply to, "a proposed industrial, manufacturing, or processing plant, or industrial park…occupying more than 40 acres of land…." (Water Code § 10912, subd. (a)(5).) Where a city or county determines that any such project is subject to CEQA, but is unable to identify a public water system that may supply water for the project, "the city or county shall prepare the water assessment required by this part…." (Water Code § 10910, subd. (b).) Where, as here, no public water supply system is identified that may supply potable water to the project, then the water assessment "shall include a discussion with regard to whether the total projected water supplies, determined to be available by the city or county for the project during normal, single dry, and multiple dry water years during a 20-year projection will meet the projected water demand associated with the proposed project, in addition to existing and planned future uses, including agricultural and manufacturing uses." (Water Code § 10910, subd. (c)(4).) CEQA requires compliance with the above referenced provisions of the Water Code, and the water assessment must be included in any CEQA document prepared for the project. (*Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 886.)

Respondents contend that the County is not required to produce such water assessment in this case because the proposed "project" does not include any "new 'proposed' plant, and because the plants that currently exist at the site do not occupy more than 40 acres." (Opposition Brief at 36:7-11.) Respondents' argument is unsustainable. The "project" is a 124-acre expansion of an industrial campus that includes processing plants, and that anticipates the inclusion of new processing facilities for recycled asphalt. (AR 971, 3463.) Even if the project's new asphalt recycling processing equipment did not constitute a new plant, the Court is disinclined to read the statute as narrowly as Respondents. Specifically, the Court finds no support in the statute for Respondents' interpretation that the significant expansion of an industrial operation involving currently operating plants should be excluded from the water assessment requirement, unless such expansion also includes the construction of a new "plant" facility.

Petitioners contend that the County failed to comply with these provisions of the Water Code because the water assessment included in the EIR, "fails to address multiple dry years, the cumulative effect of continued groundwater usage, or the declining state of the basin." This argument is hyper-technical and ignores the context of the quoted phrase.

The water assessment details the proposed project's water demands. (AR 3465-69.) It analyzes dry year supply as follows:

> "A large portion of the proposed project water demand will be met through groundwater supply, up to the baseline condition extraction rate…. Through the many years that the site has been in operation water has always been available in abundance; therefore, a dry year is not expected to negatively impact water production related to groundwater. Groundwater levels observed in the area of Latour Court Well show little variation seasonally and annually, including in dry years. This indicates stability in the elevation of groundwater in the regional aquifer."

This assessment clearly articulates a conclusion that, based on the groundwater levels through the history of the site's operation, water has "always been available in abundance." This period of operation includes multiple periods of multi-year drought conditions. The analysis further provides that the subject well shows little variation "in dry years." The water assessment does not fail to satisfy the requirements of Water Code section 10910 simply because it does not include the phrase, "multiple dry years" verbatim. For the foregoing reasons, the Court concludes that the water analysis included in the EIR satisfies the technical requirements of the Water Code.

While the County is required to satisfy the requirements of the Water Code discussed herein, it is important to place this requirement into context. The County's overarching responsibility to produce a factually sufficient document is satisfied where it includes enough detail in the EIR 'to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.'" (*Sierra Club v. County of Fresno, supra,* 6 Cal.5th at 516, quoting *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal., supra,* at 405.)

The EIR contains extensive analyses of the source and volume of the current water supply, the baseline water usage, the project's water demand, the regulatory framework regarding hydrology and water quality, and sets out conclusions regarding the project's impact on water supply and quality, mitigation measures, and the impact of the project as mitigated. (AR 975, 1239-1289, 3343-3397, 3465-69.)

The Court finds the County satisfied its duty to include enough detail to enable those who did not participate in its preparation to understand and to consider meaningfully the water supply issues raised by the proposed project. (See *Sierra Club v. County of Fresno, supra*, 6 Cal.5th at 516.) The Court further finds that the County's methodologies and conclusions are supported by substantial evidence. (See *City of Long Beach v. Los Angeles Unified School Dist., supra,* 176 Cal.App.4th at 898.)

Again, the Court is inclined to view Petitioner's claims regarding each of the specific sub-issues raised (*e.g. failure to include in the water analysis discussions of the cumulative effect of continued groundwater usage and the declining state of the basin, improper reliance on hypothetical water-use baseline, improper reliance on water usage estimates, and uncertain and unanalyzed mitigation*) as inviting the Court to second guess the County's approach to analyzing the water usage impacts of the project. Because the Court finds, as discussed above, that the County's decision-making (in selecting its methodology, etc.) is both supported by substantial evidence, and sufficiently explained in the EIR, the Court finds such invitation inconsistent with its defined role in the CEQA process. (See *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova, supra,* 40 Cal.4th at 435 "the reviewing court 'may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable,' for, on factual questions, our task 'is not to weigh conflicting evidence and determine who has the better argument.' [Citation.]")

2. Water Use Baseline and Estimates

Petitioner argues the "EIR fails to use the existing conditions as the baseline water usage for the Project and thus fails as an informational document." (Opening Brief 31:17-18.)

Again, "[a]n agency enjoys the discretion to decide, in the first instance, exactly how the existing physical conditions without the project can most realistically be measured, subject to review, as with all CEQA factual determinations, for support by substantial evidence. [citation omitted.])" (*San Francisco Baykeeper, Inc. v. State Lands Comm., supra,* 242 Cal.App.4th at 218.)

The Court finds that the EIR for the instant project clearly articulates the rationale behind the method the County undertook to estimate a baseline water usage and further, that substantial evidence supports its decision. (AR 3363-99, 3466-67, 3980.)

Petitioner claims that the EIR "relies on conflicting water usage estimates, making its analysis inadequate and misleading." (Opening Brief at 31:19-20.) The thrust of Petitioner's argument appears to be the inclusion in the EIR of two independently developed expert analyses of baseline water usage. (Opening Brief at 31:22-32:8.) In support of its argument, Petitioner relies on caselaw holding that an EIR fails as an information document if its characterization of the project is so inadequate and/or inconsistent as to "mislead the public" thereby thwarting the EIR process. (*San Joaquin Raptor Rescue Center v. Cnty. of Merced* (2007) 149 Cal.App.4th 645, 656.)

Again, as discussed in detail herein above, the Court finds that the methodology the County followed to establish a baseline for water usage is thoroughly described in the EIR and supported by substantial evidence. The fact that the County collected two independent expert reports tends to justify the County's methodology by demonstrating an effort to accurately estimate baseline usage. The fact that experts differ in their estimations does not undermine the County's process or its baseline estimate – it strengthens confidence in both, by providing access to additional information. The Court does not find that the difference in expert estimates produced by the County in support of its baseline water use determination renders the characterization of the proposed project inadequate or misleading to the public.

3. Water Use Mitigation

Finally, as to water use, Petitioner argues that the mitigation measures set out in the EIR and conditions of project approval are uncertain and deferred. Specifically, it argues that mitigation measure 4.8-4 is uncertain because it "does not specify how Syar would achieve groundwater use reductions." (Opening Brief at 34:10.)

Mitigation measure 4.8-4 explicitly states that "[t]he maximum allowable annual usage is 45.8 million gallons (140.6 acre-ft) per year" and "all consumptive use of groundwater shall not exceed 140.6 acre-feet per year." (AR 917, 1267.) It requires Real Party in Interest to "continuously monitor, meter and maintain records of all water use" at the project site. (AR 917.) It explicitly identifies several permitted water savings and reduction measures that may be implemented. (*Ibid.*) Finally, it anticipates that if such measures are not sufficient, then production will need to be reduced in order to meet the maximum usage permitted. (*Ibid.*)

The Court finds the foregoing mitigation measure fully enforceable. (Pub. Resources Code § 21081.6, subd. (b).) While the specific details of how the Real Party in Interest will meet the maximum allowed usage are deferred, the County set a concrete and measurable cap on usage, compels a monitoring and reporting program, and specifically enumerates possible courses for usage reduction. "'Deferral of the specifics of mitigation is permissible where the local entity commits itself to mitigation and lists the alternatives to be considered, analyzed and possibly incorporated in the mitigation plan.'" (*Endangered Habitats League, Inc. v. County of Orange, supra,*131 Cal.App.4th at 793, quoting *Defend the Bay v. City of Irvine, supra,*119 Cal.App.4th at 1275.) Where an agency has analyzed available mitigation measures and has committed itself to implementation of measures sufficient to attain a specifically defined mitigation goal, an EIR's identification of a list of options for achieving such goal does not render the mitigation measure fatally speculative or uncertain. (*Sacramento Old City Assn. v. City Council, supra,* 229 Cal.App.3d at 1029.)

F. Water Quality

Petitioner fails to carry its burden of showing that the issues relating to water quality raised in its Opening Brief were raised below, and as a result, the Court is without jurisdiction to consider them. "'No action or proceeding may be brought pursuant to Section 21167 unless the alleged grounds for noncompliance…were presented to the public agency orally or in writing….' (Pub. Resources Code § 21177, subd. (a).)" (*Sierra Club v. City of Orange, supra,*163 Cal.App.4th at 535.) Exhaustion of administrative remedies is a "jurisdictional perquisite to maintenance of a CEQA action." (*Citizens for Responsible Equitable Environmental Development v. City of San Diego, supra,*196 Cal.App.4th at 527.) "The petitioner bears the burden of demonstrating that the issues raised in the judicial proceeding were first raised at the administrative level. [citation.]" (*Sierra Club v. City of Orange, supra,* at 536.)

G. Biological Impacts

Petitioner next argues that the EIR "fails to analyze the direct or cumulative impacts on sensitive steelhead and pond turtle population found in the watershed from polluted runoff or altered hydrology caused by mining." (Opening Brief at 38:1-3.) Not so.

The EIR discusses the potential impacts of the project on steelhead populations at AR 1156-57, 1790. It concludes that steelhead are not known to occur within the creeks on the project site. (AR 1157.) The EIR also discusses the potential impacts of the project on Western pond turtles at AR 1158, 1792, 1805-06 and 1917-18. It concludes that the pools on site are generally not suited to provide optimum habitat for the species. (AR 1158.) The EIR specifically reported that no Western pond turtles were observed on site during either the preliminary survey, or the follow up six-week survey. (AR 1792, 1917.) The EIR's conclusions and methodologies relating to surveys are supported by substantial evidence. (AR 1761-1938.)

The Court finds the County has thereby satisfied its duty to include enough detail to enable those who did not participate in its preparation to understand and to consider meaningfully the biological impact issues raised by the proposed project. (See *Sierra Club v. County of Fresno, supra,* 6 Cal.5th at 516.) The Court further finds that the County's

methodologies and conclusions are supported by substantial evidence. (See *City of Long Beach v. Los Angeles Unified School Dist., supra,* 176 Cal.App.4th at 898.)

Petitioner further claims that the "EIR ignores the Project's significant cumulative contribution to deforestation" specifically relating to the removal of oak woodland. [11] The specific arguments raised by Petitioner here were discussed at length, in section C.1 herein above. For the reasons set forth in that section, the Court rejects Petitioner's contention that the EIR "ignores" the subject.

H. Noise Impacts

Petitioner argues that the EIR establishes a threshold for significant impact, but then fails to apply it. Specifically, Petitioner contends that the EIR provides that "the Project would have a significant adverse noise impact if it would increase noise levels 5DBA over existing conditions." (Opening Brief at 40:14-15.)

Petitioner oversimplifies and misrepresents the EIR, which provides:

> "Typically, in higher noise environments (e.g. where the day-night average noise level would exceed the 'normally acceptable' level established by the lead agency), the impact would be considered significant if the $L_{dn}$[12] due to the project would increase existing noise levels by 3dBA $L_{dn}$ or remain at or below the normally acceptable level (e.g., 60 dBA $L_{dn}$ or less), a somewhat higher increase can be tolerated up to 5 dBA $L_{dn}$) before a significant impact would occur. *It is generally accepted that in quiet to moderate noise environments (i.e., 60 dBA* $L_{dn}$*, or less), a 5 decibel increase in the day/night average noise level is necessary for a significant noise impact to occur (Napa County 2007).*" (Emphasis added.)

Petitioner's assertion that this complex analysis of day/night average noise levels can be reduced to the bright line rule Petitioner attributes to the EIR ("Project would have a significant adverse noise impact if it would increase noise levels 5 dBA over existing conditions") arguably constitutes a failure to cite to all material evidence, which failure would be fatal to Petitioner's claims on that ground alone. (See *Citizens for a Megaplex-Free Alameda v. City of Alameda, supra,* 149 Cal.App.4th at 112–113.)

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[11] Respondents argue that Petitioner failed to exhaust its administrative remedies by failing to raise this issue below. Petitioner's Reply Brief cites to the writing by which the issue was raised below: December 5, 2013 letter from the State of California Natural Resources Agency, Department of Fish and Wildlife to the County of Napa. (AR 3521.) Again, "'[n]o action or proceeding may be brought pursuant to Section 21167 unless the alleged grounds for noncompliance…were presented to the public agency orally or in writing….' (Pub. Resources Code § 21177, subd. (a).)" (*Sierra Club v. City of Orange, supra,*163 Cal.App.4th at 535.) No authority has been presented suggesting that the raising of an issue by a governmental agency is insufficient to present the alleged non-compliance to the reviewing agency. For this reason, the Court finds the letter sufficient to overcome Respondent's jurisdictional objection.

[12] Defined as "the equivalent noise level for a continuous 24-hour period with a 10-decibel penalty imposed during nighttime and morning hours (10:00 PM to 7:00 AM). (AR 1308.)

Even if Petitioner's claim sufficiently cites to all material evidence, the Court nevertheless finds that the EIR engages in a thorough analysis of the potential noise impacts of the project. (AR 1307-68.) The County adopted the significance thresholds for noise impacts provided on the Environmental Checklist Form of the CEQA Guidelines. (AR 1318, Appendix G to the CEQA Guidelines.) It analyzed the project's impact, adopted mitigation measures, and concluded that the noise impact of the project would be less than significant as mitigated. (AR 1318-31.) The Court finds that substantial evidence supports the County's methodologies and conclusions in this regard. (See *Ibid.*)

Petitioners argue that the EIR fails because it does not contain an analysis of sleep-disturbance impacts, citing *Berkeley Keep Jets Over the Bay Committee v. Bd. of Port Commissioners* (2001) 91 Cal.App.4th 1344, 1382. In that case, the agency conceded that implementation of the project would increase existing noise levels for quiet neighborhoods. (*Ibid*.) "Despite this acknowledgement, the EIR contained no quantitative discussion of ambient noise levels in any nearby community." (*Ibid*.) The court in that context found that further study of the potential noise impacts was mandated. (*Ibid*.)

The facts of the present case are distinguishable. Here, the EIR contains analysis of noise level surveys that include data from areas very near the residential community identified by Petitioner. (AR 1311-16.) The surveys were conducted both during daytime and nighttime hours. (*Ibid.*) The EIR presents analysis of potential noise impacts at the surrounding area with the least amount of intervening acoustical shielding and concluded that the project would have a significant impact. (AR 1320-21) It implements noise restrictions in Mitigation Measure 14.11-1, specifically to reduce the identified impacts. (AR 1323.)

Again, the Court finds the County's methodologies and conclusions are supported by substantial evidence and, therefore, rejects Petitioner's argument that the failure to conduct specific sleep disturbance studies renders the EIR informationally defective. (See *Gray v. County of Madera, supra*, 167 Cal.App.4th at 1125, "'CEQA does not require a lead agency to conduct every recommended test and perform all recommended research to evaluate the impacts of a proposed project.' [Citation.]")

Petitioner next effectively second guesses several details of mitigation measure 4.11-1. (Opening Brief at 41:23–42:23.) Because the Court, as discussed above, finds that the mitigation measure is supported by substantial evidence, it is without authority to overturn the County's decisions simply because "other conclusions might also be reached." (*Laurel Heights Improvement Assn. v. Regents of Univ. of Cal., supra*, 47 Cal.3d at 393.)

I. Vibration Impacts

Petitioner asserts that the EIR's analysis of the project's vibration impacts is deficient because it fails to specifically address potential damage to aging gas pipelines in the area. (Opening Brief at 42:26-43:2.) Petitioner further claims that the mitigation measures relating to vibration impact are inadequate and unenforceable. (*Id*. at 43:5-20.)

The EIR contains a thorough analysis of surveys of blasting at the current project. (AR 1314-16.) The result of the survey was vibration levels collected at five monitoring locations that

fell into the "barely perceptible" category pursuant to standards published by the California Department of Transportation (CalTrans). (AR 1316, 1311.) The EIR also contains an analysis of vibrations from operation of the project. (AR 1323-26.) It found the potential for significant impact. (*Ibid*.) The County established a concrete upper limit for vibrations, intended to avoid cosmetic damage to sensitive structures, based on levels recommended by CalTrans. (AR 1324.) Mitigation measure 4.11-2 mandates restrictions on blasting (*e.g.*, charge weight, hours) designed specifically to reduce vibration impacts to surrounding areas. (AR 1326.) It requires monitoring, record keeping, and provides for reporting to the County. (*Ibid*.) The EIR concludes that, after mitigation, the vibration impacts of the project would be less than significant.

The Court finds the County has thereby satisfied its duty to include enough detail to enable those who did not participate in its preparation to understand and to consider meaningfully the vibration impact issues raised by the proposed project. (See *Sierra Club v. County of Fresno, supra*, 6 Cal.5th at 516.) The Court further finds that the County's methodologies and conclusions are supported by substantial evidence. (See *City of Long Beach v. Los Angeles Unified School Dist., supra*, 176 Cal.App.4th at 898.) For these reasons, the Court rejects Petitioner's claim that the EIR's failure to address gas pipelines renders the document deficient. (See *Gray v. County of Madera, supra*, 167 Cal.App.4th at 1125 ("'[t]he fact that additional studies might be helpful does not mean that they are required'[Citation]").)

J. Aesthetic Impacts

Petitioner argues that "[t]he EIR fails to adequately analyze the dramatic aesthetic impacts associated with the Project's expansion of mining activities…." (Opening Brief at 43:22-23.)

The EIR contains a thorough discussion of aesthetic impacts of the project. (AR 998-1046.) The discussion includes analysis of the regional setting of the project, and state and county regulatory frameworks relating to aesthetics. (AR 998-1005.) It incorporated the standards set out in the CEQA Guidelines. (AR 1005, Appendix G to the California Environmental Quality Act Guidelines.) The EIR goes into great detail regarding the methodology the County followed in analyzing the aesthetic impact of the project, which was based on an aesthetics study commissioned for the project. (AR 1006-24, 1989-2027.)

Based on the foregoing, the County concluded that the project would have a less than significant aesthetic impact. (AR 1025-29.) As Petitioner notes, the County found that the project would have certain aesthetic impacts. But the County defends its conclusion by pointing out that, "the current excavation areas [baseline] are visible under existing conditions and the visual character of the project site and its surroundings would not be substantially changed by implementation of the proposed project…." (AR 3770.)

The Court finds the County has thereby satisfied its duty to include enough detail to enable those who did not participate in its preparation to understand and to consider meaningfully the aesthetic impact issues raised by the proposed project. (See *Sierra Club v. County of Fresno, supra*, 6 Cal.5th at 516.) The Court further finds that the County's methodologies and conclusions are supported by substantial evidence. (See *City of Long Beach v. Los Angeles Unified School Dist., supra*, 176 Cal.App.4th at 898.)

The Court finds that Petitioner's specific arguments regarding particular views of the Pasini Knoll area of the project, and criticisms of the vegetation screening and reclamation techniques, are no more than invitations for the Court to substitute the County's amply-supported decisions with the Court's, Petitioner's, and/or Petitioner's experts' judgments regarding the potential aesthetic impact of the project. Because the County's decisions in this regard are supported by substantial evidence, doing so would be improper. (*Laurel Heights Improvement Assn. v. Regents of Univ. of Cal., supra,* 47 Cal.3d at 393.)

K. Consistency with General Plan

Petitioner claims that the EIR fails as an informational document because it fails to discuss inconsistencies with Napa County's General Plan. The Court agrees.

An EIR "shall discuss any inconsistencies between the proposed project and the applicable general plans, specific plans and regional plans." (Cal. Code Regs., tit. 14, § 15125, subd. (d).) An agency's decision to approve a project, even if justifiable and correct, is nullified if it is based on an EIR that does not provide information that is required by CEQA. (*Napa Citizens for Honest Government v. Napa County Bd. Of Supervisors* (2001) 91 Cal.App.4th 342, 356.)

That agricultural preservation is central to the Napa County General Plan is beyond question. (See, *e.g.,* AR 24020, 24038-110.) The second bullet point on the first page of the General Plan states that it (the General Plan) "[p]rotects agriculture and agricultural, watershed, and open space lands by…limiting uses allowed in agricultural areas, and designating agriculture as our primary land use." (AR 24006.) The General Plan's Agricultural Preservation and Land Use Goals include: "Goal AG/LU-1: Preserve existing agricultural land uses and plan for agriculture and related activities as the primary land uses in Napa County"; and, "AG/LU-2: Concentrate urban uses in the County's existing cities and town and urbanized areas." (AR 24038.) Several of the Plan's Agricultural Preservation Policies seek to implement these goals. For example, Policy AG/LU-4 provides that, "[t]he County will reserve agricultural lands for agricultural use including lands used for grazing and watershed/open space, except for those lands which are shown on the Land Use Map as planned for urban development." (AR 24039.) Policy AG/LU-7 provides, "[t]he County will research, evaluate, and pursue new approaches to ensure ever stronger protections for the County's finite and irreplaceable agricultural resources." (*Ibid*.)

One of the principal project locations is the so-called Pasini Parcel, which has a General Plan designation of Agricultural, Watershed, and Open Space (AWOS). (AR 803, 1299.) Of note, it appears as though the EIR contains no discussion of the apparent inconsistency between the General Plan's stated goal of preserving agricultural land use, and the conversion of this parcel into use for mining operations.

Respondents contend first that mining is an open-space use under the General Plan. (Opposition Brief at 55:7-8.) That may be. It is not, however, an "agricultural use." And the General Plan is extremely clear that preservation of "agricultural land" and "agricultural land uses" is a priority. Respondents next argue that the Pasini Parcel's lack of designation as a

mineral-resource area does not prohibit mining thereon. (*Id.* at 55:8-10.) This argument has no relevance to the present question. To be clear, Respondent may be correct that the apparent inconsistency between the project and the General Plan may be justified, or even illusory. But this discussion is precisely what that the CEQA Guidelines require be included in the EIR.

Respondents next contend that "the County's Board of Supervisors found the Project consistent with the General Plan and concurred with a 26-page analysis that supports that finding." (Opposition Brief at 55:17-18, AR 800, 803-828.) The Court understands this analysis to be the memorandum prepared by city staff *after* close of public hearing on the project. (Opening Brief at 48:9-11.) The Court concurs with Petitioner's position that such memorandum fails to satisfy CEQA's informational goals because it was presented too late in the process to provide the opportunity for public input on its subject. (*Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 120.) The court reviews de novo whether the agency has correctly followed CEQA procedures, "scrupulously enforc[ing] all legislatively mandated CEQA requirements." (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.)

Even if the Board's decision that the project is consistent with the General Plan is correct, there is no evidence, let alone substantial evidence in support of that decision in the EIR. (*City of Long Beach v. Los Angeles Unified School Dist.*, *supra*, 176 Cal.App.4th at 898.) Moreover, because the EIR fails to include any discussion of whether the project is consistent with the General Plan, it fails to provide enough detail "to enable those who did not participate in its preparation to understand and to consider meaningfully" the "analytic route the [County] traveled from evidence to action" and, therefore, it fails as an informational document. (*Sierra Club v. County of Fresno, supra,* 6 Cal.5th at 516, quoting *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal., supra,* 47 Cal.3d at 405.)

## Conclusion

Of all the claims of error raised by Petitioner in this matter, the Court agrees with two: (1) the EIR fails to provide sufficient evidentiary support for the County's decision to use the five-year averaged operations baseline for measuring air quality impacts; and (2) the EIR fails to adequately discuss inconsistencies with Napa County's General Plan. On these issues, the court concludes that the EIR does not include enough detail "to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project." (*Laurel Heights Improvement Assn. v. Regents of Univ. of Cal., supra,* 47 Cal.3d at 405.)

Under these circumstances, pending hearing on the matter, the Court is inclined to GRANT the petition, and to issue a writ of mandate directing Napa County to set aside and vacate its certification of the EIR and approval of the project and to prepare a legally adequate EIR consistent with the foregoing.

In addition to the issues discussed herein above, at the hearing the parties should be prepared to discuss further proceedings on the following issues:

- Whether any facts exist that would counsel against the Court's enjoining the County and Real Party in Interest Syar Industries, Inc. from taking any action in furtherance of the project unless and until a lawful approval is obtained from the County after the preparation and consideration of a legally adequate EIR;
- Relating to the foregoing, whether any reason exists for the Court to retain jurisdiction pending the remand and reconsideration by the County, and/or whether there should be a time limit placed on the County for subsequent action; and,
- Petitioner's prayer for attorneys' fees and costs.