B320153 & B320174

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION SIX

CALIFORNIA CONSTRUCTION AND INDUSTRIAL MATERIALS ASSOCIATION and VENTURA COUNTY COALITION OF LABOR, AGRICULTURE AND BUSINESS,
Petitioners and Appellants

v.

COUNTY OF VENTURA,
Respondent

LOS PADRES FORESTWATCH; DEFENDERS OF WILDLIFE; CENTER FOR BIOLOGICAL DIVERSITY; and NATIONAL PARKS CONSERVATION ASSOCIATION,
Intervenors and Respondents

ON APPEAL FROM THE SUPERIOR COURT OF THE COUNTY OF VENTURA, THE HONORABLE MARK S. BORRELL, JUDGE PRESIDING, CASE NOS. 56-2019-00527805-CU-WM-VTA & 56-2019-00527815-CU-WM-VTA

APPELLANTS' OPENING BRIEF

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ATTORNEYS FOR PETITIONER AND APPELLANT
VENTURA COUNTY COALITION AND LABOR AND AGRICULTURE

TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL SECOND APPELLATE DISTRICT **APPELLATE DISTRICT, DIVISION** SIX	COURT OF APPEAL CASE NUMBER: B320153
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.: 133912 NAME: Kerry Shapiro (SBN 133912); Matthew D. Hinks (SBN 200750) FIRM NAME: Jeffer, Mangels, Butler & Mitchell, LLP STREET ADDRESS: 1900 Avenue of the Stars, 7th Floor CITY: Los Angeles STATE: CA ZIP CODE: 90067 TELEPHONE NO.: 310-203-8080 FAX NO.: 310-203-0567 E-MAIL ADDRESS: kshapiro@jmbm.com; mhinks@jmbm.com ATTORNEY FOR (*name*): California Construction and Industrial Materials Association	SUPERIOR COURT CASE NUMBER: 56-2019-00527805-CU-WM-VTA
APPELLANT/ PETITIONER: California Construction and Industrial Materials Association RESPONDENT/ REAL PARTY IN INTEREST: County of Ventura	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS *(Check one):* ☒ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

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1. This form is being submitted on behalf of the following party (*name*): California Construction and Industrial Materials Association

2. a. ☒ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	**Nature of interest *(Explain):***
(1)	
(2)	
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: 11/01/2022

Matthew D. Hinks
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF APPELLANT OR ATTORNEY)

TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL SECOND APPELLATE DISTRICT **APPELLATE DISTRICT, DIVISION** SIX	COURT OF APPEAL CASE NUMBER: B320174
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.: 133912 NAME: Matthew D. Hinks (SBN 200750) FIRM NAME: Jeffer, Mangels, Butler & Mitchell, LLP STREET ADDRESS: 1900 Avenue of the Stars, 7th Floor CITY: Los Angeles STATE: CA ZIP CODE: 90067 TELEPHONE NO.: 310-203-8080 FAX NO.: 310-203-0567 E-MAIL ADDRESS: mhinks@jmbm.com ATTORNEY FOR (*name*): Ventura County Coalition of Labor, Agriculture and Business	SUPERIOR COURT CASE NUMBER: 56-2019-00527815-CU-WM-VTA
APPELLANT/ PETITIONER: Ventura County Coalition of Labor, Agriculture and Business RESPONDENT/ REAL PARTY IN INTEREST: County of Ventura	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS *(Check one):* ☒ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

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1. This form is being submitted on behalf of the following party (*name*): Ventura County Coalition of Labor, Agriculture and Business

2. a. ☒ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

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Date: 11/01/2022

Matthew D. Hinks
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF APPELLANT OR ATTORNEY)

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TABLE OF CONTENTS

TABLE OF CONTENTS
(CONTINUED)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

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OF THE STATE OF CALIFORNIA
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APPELLANTS' OPENING BRIEF

INTRODUCTION

In 2019, the County of Ventura enacted a comprehensive "Habitat Connectivity and Wildlife Corridor" ("Corridor Project"), including zoning and General Plan amendments, over more than 160,000 acres of land. The intent of the Corridor Project is to protect wildlife habitat by discouraging development and imposing new restrictive vegetation modification and other regulations over massive new overlay zones. But the County adopted the Corridor Project without first complying with the

Surface Mining and Reclamation Act ("SMARA") or the California Environmental Quality Act ("CEQA") and thereby violated the law.

Under SMARA, prior to approving a new land use such as a wildlife corridor that threatens the potential to extract "classified" or "designated" mineral resources, the lead agency must prepare and submit to the State a "Statement of Reasons" justifying the approval of the use and balance the use against the regional importance of the mineral resources. Here, even the State Geologist recognized that the Corridor Project poses a threat to the availability of mineral resources and took the extraordinary step of demanding that the County prepare and submit a Statement of Reasons. But the County refused to do so.

Similarly, CEQA required the County to prepare an initial study to determine whether the Project may have a significant effect on the environment. The evidence here discloses the potential for serious fire dangers due to the Corridor Project's restrictions on vegetation removal, and several significant impacts arising from a reduction in the availability of mineral resources. The County refused to conduct CEQA review, ignored potential adverse consequences, and claimed that the Corridor Project is exempt from CEQA solely because it was expected to have beneficial impacts. But by failing to consider the potential adverse impacts of the Corridor Project, the County failed to meet its burden of justifying an exemption.

Appellants are not opposed to protecting wildlife and biological resources. This case is not about whether a wildlife

corridor is a good thing or a bad thing. It's about the County's creation of a wildlife corridor while ignoring its potential adverse impacts and thumbing its nose at State law requirements that the consequences of its actions be considered, disclosed, and balanced against equally important societal needs.

The County violated SMARA and it violated CEQA. The decision of the superior court denying the petition for writ of mandate should be reversed.

STATEMENT OF THE CASE

A. Overview of statutory provisions at issue.

SMARA and CEQA require that local governments consider the broader consequences of local decision making on society and the environment. When it enacted the Corridor Project, the County concluded that it need not conduct any SMARA or CEQA review and thus declined to evaluate the consequences of its new regulations. Because the procedural obligations of SMARA and CEQA are central to this appeal, we provide an overview of each.

1. Overview of SMARA and the mineral classification and designation processes.

As California grew rapidly in past decades, state officials began to recognize the importance of mineral resource

conservation. (AR 2070).[1] Non-fuel mineral resources are used to produce the building materials necessary for the construction and maintenance of roads, buildings, homes, schools, and hospitals. (AR 2119.) Thus, it is vital that urban population centers have an adequate supply. (AR 2098; 2070-2071.)

But urban expansion and pressure from competing land uses has reduced or eliminated access to available mineral resources in many areas. (AR 2070). The loss of these deposits occurred because land use planning decisions were often made with little knowledge of their location and importance. (AR 2070).

The Legislature thus enacted SMARA, Public Resources Code §§ 2710-2796, in 1975 to ensure that significant mineral deposits are identified, their availability protected, and lands used for surface mining are subsequently reclaimed. (AR 53132.) The Legislature recognized in SMARA that, "the state's mineral resources are vital, finite, and important natural resources and the responsible protection and development of these mineral resources is vital to a sustainable California." Pub. Res. Code § 2711(f).

SMARA facilitates a coordinated approach to mineral resource planning by directing the State Geologist and State Mining and Geology Board to undertake and periodically update a two-phased resource evaluation program called classification and designation. (AR 2070.) During the classification phase, the State Geologist inventories select mineral commodities in a

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[1] Citations to the Administrative Record are abbreviated "AR." Citations to the Appellants' Appendix are abbreviated "AA."

defined study area and forecasts area demand. (AR 2070-2071.) Mineral deposits of highest significance are classified as "Mineral Resource Zone-2" or "MRZ-2," which denote areas where "significant mineral resources are present or where it is judged that a high likelihood of their presence exists." (AR 2075.) Once classification is completed, the State Mining and Geology Board may consider designating all or portions of those deposits classified as significant mineral resource zones as being of regional or statewide significance. (AR 2071.)

The classification report and designation information are then transmitted to local government agencies. (AR 2071.) Local governments must incorporate this information into their general planning process and develop resource management policies that emphasize the conservation of these deposits. (AR 2071.) The purpose of this process is to ensure that local lead agencies have information on the location and importance of the mineral deposits available to meet future needs. (AR 2071.)

As particularly relevant here, SMARA also provides that, prior to "permitting a use" that would "threaten" the potential to extract classified or designated mineral resources, the lead agency must prepare a Statement of Reasons justifying the use, and forward it to the California Geologic Survey and the State Mining and Geology Board for review and action. Pub. Res. Code, §§ 2762(d)(1), 2763(a). The Statement of Reasons must be circulated for public review for at least 60 days and considered during at least one public hearing. *Id.*, §§ 2762(d)(3), 2763(a). "[I]f

the lead agency's position on the proposed use is at variance with recommendations and objections raised in the comments, the written response shall address in detail why specific comments and suggestions were not accepted. *Id.*

2. Overview of CEQA.

The purpose of CEQA is to maintain a quality environment for the people of California both now and in the future. Pub. Res. Code § 21000(a). "[T]he overriding purpose of CEQA is to ensure that agencies regulating activities that may affect the quality of the environment give primary consideration to preventing environmental damage." *Save Our Peninsula Committee*, 87 Cal. App. 4th at 117. Public agencies must regulate both public and private projects so that "major consideration is given to preventing environmental damage, while providing a decent home and satisfying living environment for every Californian." Pub. Res. Code § 21000(g).

CEQA involves a three-tier decision-making process to ensure that public agencies inform their decisions with environmental considerations. *Davidon Homes v. City of San Jose*, 54 Cal. App. 4th 106, 112 (1997).

The first tier requires that an agency conduct a preliminary review to determine whether CEQA applies to a proposed activity. *See id.*; CEQA Guidelines § 15060(c).[2] Activities that

[2] The CEQA Guidelines are codified at 14 Cal. Code Regs. §§ 15000, *et seq*.

constitute a "project" within the meaning of CEQA Guidelines § 15378 are subject to CEQA unless the project is ministerial or subject to a statutory exemption. *Davidon Homes*, 54 Cal. App. 4th at 112; Pub. Res. Code § 21080(b); CEQA Guidelines § 15061(b). In addition, the CEQA Guidelines identify a list of projects that are categorically exempt. *Davidon Homes*, 54 Cal. App. 4th at 112; CEQA Guidelines §§ 15061(b)(2); 15300, *et seq*. If the agency finds the project is statutorily or categorically exempt, no environmental review is required. *Davidon Homes*, 54 Cal. App. 4th at 113.

If a project does not fall within an exemption, the agency must proceed with the second tier and conduct an initial study. *Id.* at 113; CEQA Guidelines § 15063.

If the initial study reveals that the project will not have a significant environmental effect, the agency must prepare a negative declaration, describing the reasons supporting that determination. CEQA Guidelines §§ 15063 (b)(2), 15070.

Finally, if the agency determines that the project may entail significant environmental effects that cannot be mitigated to a level of less than significance, the third step in the process is to prepare an environmental impact report ("EIR"). Pub. Res. Code §§ 21100, 21151; CEQA Guidelines §§ 15063(b)(1), 15080.

B. Factual background.

1. CalCIMA and CoLAB.

CalCIMA is a statewide trade association representing construction and industrial material producers. (AR 9323.) CalCIMA's members supply the materials that build our state's infrastructure, including roads, rail, and water projects; help build our homes, schools, and hospitals; help grow crops and feed livestock; and are vital to manufacturing wallboard, roofing shingles, paint, low energy light bulbs, and battery technology for electric cars and windmills. (AR 9323.)

CoLAB is a nonprofit membership organization formed to support land based and industrial businesses in Ventura County, including farming, ranching, oil, mining, and service, and to promote sensible local government. (AR 1812.) CoLAB identifies and researches issues that impact businesses, and works with regulatory agencies, organizes stakeholders, and proposes solutions to problems that impact the County. (AR 1812.) CoLAB advocates for businesses through local regulation, providing expertise, research, and educational campaigns. (AR 1812.)

2. The Corridor Project.

This appeal concerns the County's enactment of the Corridor Project across over 160,000 acres. (AR 2-3.) The purpose

of the Corridor Project was to ensure that development is designed and constructed to permit native wildlife and plant species to move and migrate between natural lands. (AR 1631.) The Corridor Project thus "discourag[es] and requir[es] additional environmental review regarding certain development that could impair wildlife movement." (AR 4.)

The County Board of Supervisors ("Board") initiated the Corridor Project in 2008. (AR 9543, 9557-9558.) After a long period of inactivity, planning staff, in 2017, prepared for the Board a series of regulatory options and measures the County could take to protect wildlife corridors. (AR 9296-9297, 9540, 9558.) In 2017, the Board held a public hearing to review those options and provide direction. (AR 9294-9295.)

Staff's option one was to prepare and adopt a resource protection map and overlay zone with a comprehensive set of policies and standards. (AR 9304-9305.) This option would have three elements:

- A habitat connectivity and wildlife corridors map. The map would delineate the habitat connectivity and wildlife movement corridors of the County for adoption as a resource protection map in the General Plan and as an overlay zone map in the County's Non-Coastal Zoning Ordinance ("NCZO"). (AR 9304.)

- New General Plan goals and policies. The County would prepare and adopt updated goals and policies aimed at the protection of wildlife resources in the mapped areas and that provide specific guidance for retaining habitat and movement corridors. (AR 9304-9305.) The County would also adopt new General Plan policies to address all new development within mapped locations and specific targeted policies to address new development and activities at the time

not subject to discretionary review and would include new regulations regarding noise, lighting, setbacks, invasive plants, vegetation removal, and the development of fences. (AR 9305.)

- New zoning development standards. The County would prepare and adopt new zoning standards to implement the updated General Plan policies. New basic development standards would apply to new development within the mapped corridors to be applied during all permitting processes. New, more detailed, development standards would be adopted to regulate uses and activities that are currently exempt from permitting. (AR 9305.)

Future regulations would be determined through a process including technical reviews, preparation of text amendments, and environmental review. (AR 9093-9094, 9295.)

A planning department memorandum prepared for the hearing noted that the construction of buildings, roads, and fences, can either degrade or eliminate the functionality of a wildlife movement corridor. (AR 9295.)

At the time, the County's regulatory structure did not incorporate review standards or General Plan policies to protect the viability of these corridors. (AR 9525.) The General Plan identified no specific geographic areas that correlated to corridors for the movement of plants and animals. (AR 9314.) The General Plan included only a single, broad biological resource *goal* that mentioned protections for wildlife corridors, but provided no supporting *policies* that addressed development in these areas. (AR 9114-9115, 9525, 9300.) The only General Plan policy addressing wildlife passage applied only in connection with the design of roads and floodway improvements. (AR 9300.)

> Therefore, no guidance, or regulatory framework, [was] provided in the County's existing planning documents to protect these resources. (AR 9525.)

Staff rated as "critical" that the General Plan be amended to implement standards to minimize impacts of mining operations. (AR 9316.)

The Board directed planning staff to proceed with option one. (AR 9084.)

The planning department promised that the Corridor Project would include environmental review before approval. (AR 9295.) But as discussed below, the Project was ultimately approved in 2019 without any environmental review.

3. The County received hundreds of comments on the potential adverse environmental impacts of the Corridor Project.

The County received numerous comments on the Corridor Project, including comments from CalCIMA and CoLAB, their members, and others. (*See generally* Index to Administrative Record, Part B, pp. 4-23.)

a. Impacts to mineral resources.

In the lead-up to a 2019 Planning Commission hearing, CalCIMA submitted a lengthy letter with evidence outlining its concerns. (AR 1878-2202, 8293-8295.) CalCIMA highlighted the potential of the Corridor Project to threaten the extraction of

mineral resources since vast acreage of classified and designated mineral resources are located within the project area. (AR 1878-1908, 2127-2133.)

Evidence submitted by CalCIMA showed that the State Geologist in 1979 conducted under SMARA a mineral resources classification study in Ventura County. (AR 1912-2030.) The study resulted in a 1981 classification report in which the State Geologist recommended that the State Mining and Geology Board designate 10 sectors of aggregate—*i.e.*, construction sand and gravel—located in the County as areas of regional significance. (*Id.*; AR 1923, 2004-2030.)

An areas of regional significance is:

> [A]n area designated by the board … which is known to contain a deposit of minerals, the extraction of which is judged to be of prime importance in meeting future needs for minerals in a particular region of the state within which the minerals are located and which, if prematurely developed for alternate incompatible land uses, could result in the permanent loss of minerals that are of more than local significance. Pub. Res. Code § 2726. (AR 1885.)

In 1982, the State Mining and Geology Board designated the 10 sectors of classified MRZ-2 resource areas as areas of regionally significant mineral resources. (AR 2061-2092.) The County then incorporated these findings into its General Plan, and enacted related Goals, Policies, and Programs for Mineral Resources to help safeguard future access to important mineral resources. (AR 13937-13938; 1885-1886 (County CEQA Guidelines discussing importance of safeguarding MRZ-2 areas).)

The Corridor Project area includes about 14,000 acres of state-classified MRZ-2 areas. (AR 1886.) This amounts to 41% of the County's supply of classified MRZ-2 areas. (AR 1886, 2128.)

CalCIMA explained that by changing permitting standards, the Corridor Project—which according to County documents is intended to discourage development, particularly mining activities—threatens the potential for the extraction of minerals requiring that the County comply with SMARA by preparing a Statement of Reasons. (AR 1879-1881, 1884-1889.)

CalCIMA also submitted evidence showing the negative environmental impacts of reducing the availability of aggregate. (AR 1893-1905.) Sand and gravel is an essential commodity because it provides 80-100% of the material volume of products such as Portland cement concrete, asphaltic concrete, railroad ballast, and road base. (AR 2072.) Portland cement is also used in building materials. (AR 2072.) Aggregate thus provides a wide range of basic, yet necessary, construction material. (AR 2072.)

Aggregate is also important to the economy. (AR 2072.) Aggregate is essential, for example, to the construction industry. (AR 2072.) Developers, building and highway contractors, cement manufacturers, asphalt producers, construction workers, and truck drivers are dependent, either directly or indirectly, on a ready supply of aggregate. (AR 2072.) The availability of aggregate deposits and their proximity to markets are thus critical factors in the strength of the economy. (AR 2072.)

Aggregate is a low unit-value, high bulk-weight commodity. (AR 2093-2126, at 2098.) It must therefore be obtained from nearby sources to minimize economic and environmental costs associated with transportation. (AR 2098.) Transporting aggregate from distant sources results in increased construction costs, fossil fuel consumption, greenhouse gas emissions, air pollution, traffic congestion, and road degradation. (AR 2098.)

Thus, a foundational principle of identifying resources is that "distance matters." (AR 2192-2195.) Our state's Legislature recognizes this principle—that while finding resources is important, it is equally important that those resources be found in the right location:

> [T]he production and development of local mineral resources that help maintain a strong economy and that are necessary to build the state's infrastructure are vital to reducing transportation emissions that result from the distribution of hundreds of millions of tons of construction aggregates that are used annually in building and maintaining the state. Pub. Res. Code § 2711(d).

From 1987 to 2016, California consumed an average of about 180 million tons of aggregate generating around 7.2 million truck trips annually. (AR 2098.) At an average 25-mile haul, that amounts to 360 million truck miles, more than 51 million gallons of diesel fuel used, and more than 570,000 tons of carbon dioxide emissions produced annually. (AR 2098.) If the haul distance is doubled, the numbers double to 720 million truck miles, more than 102 million gallons of diesel fuel used, and more than 1.1 million tons of carbon dioxide emissions. (AR 2098.)

Throughout California, aggregate haul distances have increased as more local sources of aggregate diminish. (AR 2114.) This is especially evident in Ventura County, which experiences aggregate shortages. (AR 2114-2115.)

What's more, California's consumption of mineral reserves is outpacing demand. (AR 2101-2106.) The state is estimated to consume 11,045 million tons of aggregate reserve from 2017 to 2067, but has only 7,628 million tons of permitted reserves, or 69% of demand. (AR 2102.) Ventura County expects to consume 241 million tons of aggregates, while having only 84 million tons permitted. (AR 2102.) Ventura County thus can meet only 35% of its expected consumption based on current forecasts, and reserves will last less than 20 years. (AR 2102.)

b. Impacts upon fire dangers.

CoLAB, its members, and other commenters raised concerns focusing on the Corridor Project's impacts upon fire dangers in the County given the restrictions on vegetation modification and removal. (AR 840-841, 843-844, 1812-1838. 1839-1843, 4490, 8885-8886.)

CoLAB explained that the entire region has been devastated by recent fires that have affected homes, businesses, communities, and wildlife. (AR 1827-1829, 4479-4480.) Close to 100,000 acres within the project area are within the burn area of the recent Thomas, Hill, and Woolsey fires. (AR 1107-1108.)

CoLAB thus raised concerns that the County failed to account for the fact that the Corridor Project's proposed provisions may lead to even more severe fires in the future. (AR AR 1827-1829, 1840-1841.)

Before the Corridor Project, vegetation removal was exempt from permit requirements. (AR 9109.) But the Corridor Project will make it more difficult, not easier, to manage brush-fires, because it prohibits most brush-clearing activities without a discretionary planned development permit and places limits on planting. (AR 509-515, 1114-1120.)

The Corridor Project requires a 200-foot vegetation buffer area surrounding water features, and prohibits brush clearing within 200 feet of any mapped water feature without a planned development permit. (AR 498, 509-515, 1116, 1861.) Depending on the size of the water feature, the required buffer area could extend for thousands of feet, or even acres. (AR 759, 761, 788 (30 acres), 920-921, 8338 (20 acres).) They can also extend to and include structures and residences. (AR 739-740, 4784-4785.)

Brush clearance within 200 feet of wildlife crossing structures is also prohibited without a planned development permit. (AR 513-515, 1118, 1201-1202.) The required buffer must entirely surround the water feature or crossing structure and thus extends, at a minimum, several hundred feet in all directions. (AR 2318.) There are at least 100 crossing structures throughout the Corridor Project area. (AR 1661, 1663.)

The Corridor Project also prohibits the use of machinery to conduct brush clearing in certain areas without a permit, limiting

brush clearing activities to only hand-tools when within buffer areas. (AR 511-512, 1088.)

A planned development permit required to permit these activities is a time-consuming and expensive discretionary process that requires that the applicant:

- Prepare and submit a report from a qualified biologist identifying all surface water features, wildlife crossing structures, and other landscape features that support or block wildlife movement. (AR 518);
- Bear the expense of review and analysis by independent consultants deemed by the planning department to be outside of its expertise (AR 13840 (NCZO § 8111-2.1));
- Prepare and submit accompanying materials such as site plans and floor plans as required by the planning director (AR 13841 (NCZO § 8111-2.3));
- Prepare and submit supporting documentation addressing the project's consistency with development guidelines (AR 518);
- Engage in environmental review under CEQA (AR 518, 1817).

Members of the public stressed to the County the importance of brush clearance and the increased wildfire risk from the Corridor Project's changes in vegetation management and onerous permitting requirements. (AR 724, 738-741, 749, 762, 797-798, 816-817, 837, 839, 843-844, 916-917, 4478-4481, 4542-4543, 4717-4718, 4784-4785 ("brush clearance that saved the [college buildings] from the Thomas Fire would not be possible under" the Corridor Project).) Representatives of the Ventura County Fire Safe Council highlighted the Corridor Project's impacts on fire hazards, asked the Board to dispense

with the "prohibitions and permit requirements" relating to brush clearance and urged it to not "increase any financial burden on the landowners to maintain a reasonable level of safety from wild fires."(AR 816-817, 840-841.)

By imposing barriers to vegetation removal, the Corridor Project will make it less likely that vegetation will be cleared given the significant time and money required to complete discretionary review. (AR 797-798, 1861-1862, 4543-4544.) And the less vegetation and brush removal, the more fuel available for and greater risk of wildfires. (AR 4784-4785, 6465-6467, 7042, 9056, 9059, 52521.)

Further, tens of thousands of acres within the Corridor Project area are designated High and Very High Fire zones. (AR 1840.) The County's CEQA Assessment Guidelines recognize that projects located in high fire zones may have a significant fire hazard impact and require the County to assess the risk for necessary mitigation measures. (AR 14310-14311.) Those mitigation measures call for "the clearing brush"—*i.e.*, the very activity the County proposed to make more onerous in the Corridor Project. (AR 14311.)

The Assessment Guidelines also note that a project is even more likely to have a "potentially significant impact" when they are "located adjacent to lands not subject to local regulations (i.e.: Federal or State property)." (AR 14311.) Thousands of Corridor Project acres are adjacent to lands not subject to local regulations. (AR 1475.)

An environmental consultant explained that the Corridor Project "would change the way vegetation is removed or managed and could result in an increase in fire hazard." (AR 1840.) "[L]imitations on brush clearing in 172,056 unincorporated acres … could change the potential fire regime in this area, causing fire hazard for both humans and wildlife." (AR 1840.)

In 2018, the State Office of Administrative Law revised CEQA Guidelines Appendix G, Environmental Checklist, to add wildfire as a Checklist item. (AR 1840, 1827-1828.) The new CEQA Guidelines require that projects located in or near high fire area be analyzed by the lead agency to determine if the project would exacerbate wildfire risks or expose people or structures to significant risks from post-fire slope instability. (*Id.*)

But, as addressed below, the County conducted no study to analyze how the new regulations might impact fire risks. (AR 1827-1829.)

4. 2019 Corridor Project hearings and approval.

The Planning Commission held a hearing on the Corridor Project in January 2019. (AR 8147-8148.) The event attracted enormous interest with 113 members of the public signed up to testify. (AR 8157.)

The State Geologist, who oversees the California Geologic Survey, submitted a comment letter. (AR 4500-4501.) He explained that the Corridor Project overlies and threatens the extraction of designated mineral resources. (*Id.*) He added that

the County was required under SMARA to prepare a Statement of Reasons and submit it for review prior to Project approval. (*Id.*) He also urged the County to consider the impacts of the Corridor Project on its Minerals Management Policies. (AR 4500.)

The County's mining program manager responded and stated the County would not comply. (AR 4502-4503.)

Staff prepared a report for the hearing and, despite the County's representation that the Corridor Project would be subject to environmental review, recommended that it be approved without CEQA review. (AR 1131-1132.) The staff report claimed that the Project was exempt from CEQA under:

- The so-called "common sense exemption," which exempts a project from CEQA "if it can be seen with certainty that there is no possibility" that it will have a significant effect on the environment. CEQA Guidelines § 15061(b)(3);
- A Class 7 categorical exemption for actions by regulatory agencies that "assure" the protection of natural resources. CEQA Guidelines § 15307; and
- A Class 8 categorical exemption for actions by regulatory agencies that "assure" the protection of the environment. CEQA Guidelines § 15308. (AR 1131-1132.)

After a hearing, the Planning Commission accepted staff's direction and recommended the Board approve the Corridor Project without environmental review. (AR 1138-1139, 8150-8155.)

The matter was set for a Board of Supervisors hearing on March 12, 2019. (AR 588.) Both CalCIMA and CoLAB submitted additional letters urging the County to comply with SMARA and CEQA. (AR 4679-4725, 6433-6480.) Once again, the Corridor

Project generated a tremendous amount of controversy and public participation during a lengthy hearing. (AR 608-1069 (transcript).) The State Geologist submitted a second letter to the Board reiterating his concerns and again instructing the County to prepare and submit a Statement of Reasons. (AR 2834-2835.)

The Board approved the Corridor Project by a 3-2 vote subject to a new hearing on March 19, 2019 to allow for several final amendments. (AR 600.) The Board also approved the final amendments by a 3-2 vote. (AR 267.) The Board adopted staff's recommended finding that the Corridor Project is exempt from CEQA so it conducted no CEQA review. (AR 3-4, 600.) The County did not prepare a Statement of Reasons.

This lawsuit followed.

C. Summary of the key provisions and regulations of the Ordinance.

1. Zoning amendments.

The ostensible purpose of the Corridor Project is to preserve and maintain wildlife habitat by imposing Habitat Connectivity and Wildlife Corridor ("HCWC") and Critical Wildlife Passage Area ("CWPA") overlay zones over broad swaths of the County. (AR 1080-1139.)

The HCWC is the larger of the two zones and is intended to preserve functional connectivity of regional habitats. (AR 1084,

499-500.) It imposes five major regulatory conditions on land, unless the parcel is subject to a specific exemption:

- The HCWC includes expanded surface water feature buffering requirements. The Corridor Project defines a water feature to include the vast "riparian habitat area associated with the feature" and requires a 200-foot vegetation buffer around water features. (AR 498.) Development of new structures, uses of existing structures, or vegetation removal, within 200 feet of a surface water feature is prohibited without a discretionary planned development permit. (AR 497-525.)

- The HCWC also expands the buffers around wildlife crossing structures, meant to "minimize vegetation loss and habitat fragmentation." (AR 1084.) Vegetation removal within 200 feet of a wildlife crossing is prohibited without a planned development permit. (AR 1201-1202.)

- The HCWC prohibits non-commercial planting of invasive plant species to minimize vegetation loss and habitat fragmentation. (AR 1084, 497-525.)

- The HCWC imposes outdoor lighting limitations. (AR 1084. 497-525.)

- The HCWC Limits impermeable fencing to allow wildlife to travel into and through certain areas. (AR 1084.)

The CWPA zones are even more restrictive. The three CWPA zones total 9,311 acres of high value habitat areas. (AR 1122-1129.) They are intended to address habitat fragmentation by requiring that structures be sited in "compact development" patterns to preserve more space for wildlife movement. (AR 1084, 497-525, 1092.)

2. General Plan amendment.

The County also amended its General Plan and General Plan Resources Appendix. (AR 3, 239-249, 1165-1186.) The General Plan amendments incorporated new maps depicting the newly-established zones, and added new conservation-focused and Project-related provisions to the County's Goals, Policies and Programs for biological resources. (*Id*.)

The General Plan amendments imposed new policies across the County to include for the first time the requirement that permitting officials weigh the "project-specific and cumulative impacts on the movement of wildlife at a range of spatial scales including local scales (e.g., hundreds of feet) and regional scales (e.g., tens of miles)." (AR 1173.)

Similarly, the County also replaced the general discussion of wildlife corridors with new sections explaining the nature and purpose of the new overlay zones. (AR 1171-1172, 1180-81.) The County also established new Project-related definitions, including definitions of the HCWC and CWPAs, which did not previously exist. (AR 1175.) Those new definitions replaced the term "wildlife migration corridor," which was nothing more than a general concept previously discussed in the General Plan but not formally recognized or found in any specific location. (AR 1175.)

D. Procedural background.

On April 25, 2019, CoLAB and CalCIMA filed petitions seeking writs of mandate addressing the County's approval of the Corridor Project. (AA 14-34, 35-96.) CoLAB later filed a First Amended Petition. (AA 99-158.)

The County certified the administrative record and a supplement on March 30, 2021, and June 7, 2021. (AA 159-186, 365-416.)

Appellants filed their opening papers in support of their petitions on June 1, 2021. (AA 253-364.) The County and Intervenors filed opposition papers on August 2, 2021, and August 16, 2021, respectively. (AA 417-611, 612-637.) Appellants filed reply papers on September 15, 2021. (AA 638-895.)

The trial court held a hearing on both petitions on November 9, 2021, and issued tentative decisions on February 4, 2022. (AA 919-957.) Appellants filed objections to the tentative decisions and requests for statements of decision. (AA 1002-1017.) The County and Interveners opposed. (AA 1018-1025, 1026-1043.)

The superior court overruled the objections and filed statements of decision on March 14, 2022. (AA 1046-1089, 1093-1133.) The trial court entered a judgment in both actions denying the petitions on April 12, 2022. (AA 1044-1090, 1091-1134.)

STATEMENT OF APPEALABILITY

The judgments entered on April 12, 2022, entirely disposed of both actions in the superior court. (AA 1044-1090, 1091-1134.) The County served notices of entry on April 22, 2022. (AA 1135-1184, 1185-1231.) Appellants timely appealed on May 9, 2022. (AA 1232-1234, 1235-1237.) The judgments are final and appealable under Code of Civil Procedure § 904.1(a)(1).

LEGAL ARGUMENT

A. The County violated SMARA.

1. The County violated SMARA by failing to prepare a Statement of Reasons.

Prior to "permitting a use" that would "threaten the potential" to extract classified or designated mineral resources, lead agencies must prepare a Statement of Reasons justifying the use, and forward it to the California Geologic Survey and the State Mining and Geology Board for review and action. Pub. Res. Code, §§ 2762(d)(1), 2763(a).

A Statement of Reasons is not just a paper exercise. It ensures that local agencies evaluate the importance of mineral resources as part of their decision-making and requires that agencies give careful consideration to proposed land use decisions

affecting designated mineral resources. (AR 2070-2071; 2032; 1927.)

The Statement of Reasons must be published for public comment for 60 days and considered during a public hearing. Pub. Res. Code §§ 2762(d)(3), 2763(a). "[I]f the lead agency's position on the proposed use is at variance with recommendations and objections raised in the comments, the written response shall address in detail why specific comments and suggestions were not accepted." *Id*. And where, as here, a land use decision impacts areas designated as being of regional significance, it must be in accordance with the lead agency's mineral resource management policies and consider the importance of these minerals to their market region as a whole. Pub. Res. Code § 2763(a).

The State Geologist twice directed the County to prepare a Statement of Reasons given the Corridor Project's threat to the potential extraction of classified and designated mineral resources. (AR 4500-4501; 2834-2835.) But the County refused to do so.

Thus, it did not prepare a Statement of Reasons or forward it to the California Geologic Survey and State Mining and Geology Board. And because it did not do so, there is no evidence that the County considered its mineral resource policies as part of its formulation of the Corridor Project or balanced the value of its mineral resources against the use the affected land as a wildlife corridor. The County published no justification for enacting the Corridor Project at the potential expense of mineral

resources and thus did not accept public comment or respond to comments received.

The County violated SMARA.

2. The trial court erred by applying an incorrect standard of review.

The issue before the trial court—whether the Corridor Project is a "use that would threaten the potential to extract minerals in that area"—was one of pure statutory interpretation. It is one that is reviewed *de novo* because "a reviewing court will exercise its independent judgment on pure questions of law, including the interpretation of statutes and judicial precedent." *Cleveland National Forest Foundation v. County of San Diego*, 37 Cal. App. 5th 1021, 1040-41 (2019).

The trial court though erred. It correctly applied the independent judgment standard to the question of whether the Corridor Project is a "use," but it wrongly applied the deferential substantial evidence test to the question of whether the use threatens the potential to extract minerals. (AA 1059-1060.) The trial court reasoned that the County's argument that the issue presented a "factual determination [] entitled to deference [that] must be upheld if it is supported by substantial evidence in the administrative record." (AA 1062.) That was both wrong and outcome determinative.

First, there is neither authority nor logical force to the concept that the test under Pub. Res. Code § 2762(d)(1) be subject

to two different forms of review. There is no suggestion, for example, in SMARA that the Legislature intended to vest local agencies with the power to make factual determinations concerning its obligation to prepare a Statement of Reasons. The County's view that it need not comply with SMARA is reflected in a letter from a staff member and was not arrived as part of a quasi-judicial fact finding process. (AR 4502-4503.) Thus, there is no formal factual determination for the Court to review for substantial evidence.

Even if there were, where the facts surrounding it are undisputed, the matter presents a question of law. *Hensel Phelps Construction Co. v. San Diego Unified Port Dist.*, 197 Cal. App. 4th 1020, 1030 (2011) (whether prevailing wage law applies to a project is question of statutory interpretation); *McIntosh v. Aubry*, 14 Cal. App. 4th 1576, 1584 (1993) (independent judgment to determine whether work performed constituted "public works" within the meaning of a statute).

While the parties may dispute the *conclusion* as to the whether SMARA applies, there was no dispute as to the underlying *facts* and the trial court's statement of decision identified none. As such, the application of the facts in the record to SMARA should have been reviewed independently to determine whether the Corridor Project would threaten the potential to extract minerals.

Nor does the County's refusal to comply with SMARA warrant deference. The amount of deference owed to an agency exists on a spectrum depending on the nature of agency action

and "lies somewhere along a continuum with nonreviewability at one end and independent judgment at the other." *Yamaha Corp. of America v. State Bd. of Equalization*, 19 Cal. 4th 1, 7 (1998). A court may be justified deferring to agency interpretations of the law when the agency formally adopts regulations pursuant to authority granted to them, but not when the agency is merely arriving at "certain conclusions" regarding the interpretation of a statute as a "litigation position" in a given situation. *Id*. at 9.

To determine whether deference is warranted, a court will look to "'whether the agency has a comparative interpretive advantage over the courts, and also whether its interpretation is likely to be correct" based on the technicality, obscurity, and complexity of the legal text to be interpreted. *Tower Lane Properties v. City of Los Angeles*, 224 Cal. App. 4th 262, 276 (2014). A court will also look to whether the agency has "followed any consistent and long-standing interpretation" of the statute. *Id*. at 277.

Additionally, mere "ordinary agency correspondence provides [the court] with little assistance in [the court's] interpretive inquiry," as agency correspondence is not the product of "careful consideration of the legal issue, but instead reflect[s] interpretations prepared in ad hoc advice letters by individual staff members." *McHugh v. Protective Life Ins. Co.*, 12 Cal. 5th 213, 245 (2021); *Heckart v. A-1 Self Storage, Inc.*, 4 Cal. 5th 749 769 (2018) (interpretive views expressed in agency correspondence were not entitled to deference).

The County mining program manager's letter arguing that the County need not comply with SMARA warrants no deference. The letter's interpretation of SMARA was not a formal rule adoption. There is no evidence of a consistent County interpretation of SMARA and the County enjoys no comparative interpretative advantage over the Court. If there is a comparative interpretive advantage, it belongs to the State Geologist who is charged with the enforcement of SMARA and who recognized the County's obligation to prepare a Statement of Reasons. *Cleveland National Forest*, 37 Cal. App. 5th at 1060 (Department of Conservation interpretation of Williamson Act entitled to deference). Instead, the County's interpretation of SMARA was adopted to defend its decision not to prepare a Statement of Reasons and shows no indication that the position taken by the County came after "careful consideration" by someone with expertise on the subject matter. *McHugh*, 12 Cal. 5th at 245.

The superior court erred when it employed a deferential form of substantial evidence review here.

3. The Corridor Project is a use that threatens the potential to extract minerals.

The Corridor Project establishes and permits a "use"—namely, a wildlife corridor.

SMARA does not define the term, but the NCZO defines "use" as the "purpose for which land…is…intended to be used, or for which it is or may be used, occupied or maintained." (AR

13572). The Corridor Project permits a "use" because it changes the regulations governing the use of land throughout the project area to ensure that the land is intended to be used, occupied, and maintained as wildlife habitat for the purpose of "improv[ing] and preserv[ing] habitat connectivity" and ensuring the free passage of wildlife. (AR 2, 5, 6-8.)

The NCZO recognizes and regulates an expansive range of animal-related land uses such as animal husbandry, wild animal keeping, and equestrian uses. (AR 13591-13613). Use of land as a wildlife corridor is just as much a "use" as the use of land for any other animal-related purpose. The County's General Plan identifies "undeveloped, sensitive" areas of land as a type of "land use." (AR 14119.) The Corridor Project permits a use because it includes vast expanses of largely undeveloped lands now part of overlay zones to ensure they are used for wildlife habitat.

The Corridor Project also added "Wildlife Impermeable Fencing in Overlay Zone" and "Vegetation Modification in Overlay Zone" to the County's list of permissible uses. (AR 498-499, 1566, 2355-2356.) Those new uses now require permits. (AR 515-516, 2355-2356.)

The County argued below that the Corridor Project does not permit a use because it is a legislative act and a Statement of Reasons is only required when it permits "specific development" such as "residential subdivisions or commercial uses." (AA 430.) But SMARA is not so limited. SMARA required the County to prepare a Statement of Reasons whenever it "permit[s] a *use* which would threaten the potential to extract minerals in that

area" not a "*specific development*." Pub. Resources Code § 2763(a) (emphasis supplied). Had the Legislature intended a Statement of Reasons only in connection with a "specific development" it would have said so and employed that phrase, or a similar term, such as "development project." The Legislature instead employed the much broader term "use"—*i.e.*, the "purpose for which land … is … intended to be used, or for which it is or may be used, occupied or maintained." (AR 13572.)

New "uses" may be permitted through legislative action just as they may also be permitted through site-specific entitlements. For example, a zoning ordinance establishing "by right" uses in a zone, permits the use. The County's interpretation would permit local governments to avoid a Statement of Reasons for any government project—such as the Corridor Project—that threatens or even eliminates the potential extraction of mineral resources where no site-specific entitlements are ever issued. Limiting a Statement of Reasons to only those situations where a specific development project is proposed would undermine the purpose of the statute because mineral resources may become unavailable due to the adoption of zoning regulations.

Under SMARA, the Legislature intended that the classification and designation processes be a means to protect mineral resources from "incompatible land uses" and "incompatible development." Pub. Res. Code, § 2790. Thus, SMARA generally refers to "[l]ead agency land use decisions" affecting designated mineral resources. *Id*. § 2763(a). This

interpretation is echoed by the County's summary of "SMARA's basic objectives," which references "competing land uses" as a threat to mineral resources. (AR 13937.) The State Mining and Geology Board provides examples of "uses" incompatible with mining, including open space, recreation, and agricultural uses. (AR 2090.) None of these examples require the physical development of land to be considered a "use."

The County also argued that the Corridor Project does not permit a use because it does not require any parcel to be used as a wildlife corridor. (AA 430.) Not true. The Corridor Project imposes overlay zones throughout a large swath of land to ensure wildlife movement on all affected parcels and thus requires *all* rezoned parcels to be used as part of a wildlife corridor. (AR 2-8.)

The purpose of the Statement of Reasons is to ensure that local agencies consider the importance of mineral resources whenever new uses are permitted that would threaten their availability. The County's stilted reading of SMARA is inconsistent with its purposes.

4. The Corridor Project threatens the potential to extract minerals.

Further, the Corridor Project threatens the potential to extract minerals within the project area. The County argued otherwise, stating that, "mineral resource extraction projects will continue to be permitted through the County's existing permitting process applicable to these projects." (AR 4502-4503.)

The County's reasoning though was wrong. SMARA does not require an outright ban on mining before a Statement of Reasons will be required; SMARA requires only that there be a *threat* to the *potential* to extract minerals. The Corridor Project poses such a threat because it changes the standards applicable to mining projects with the intent that they be "discouraged" and made more difficult to approve because of the inherit incompatibility of mining with a wildlife corridor.

The Corridor Project thus rezones 160,000 County acres, applies new development standards, and imposes new conservation-focused General Plan policies, against which mining projects will now be assessed.

The County requires a conditional use permit ("CUP") for surface mining activities. (AR 13598-13599, 13608-13609.) CUPs are a type of discretionary entitlement and "may be denied on the grounds of unsuitable location, or may be conditioned in order to be approved." (AR 13834-13835.) The activity for which a CUP is sought must be consistent with the General Plan. (AR 13836.)

CUP applicants "have the burden of proving" that certain enumerated standards can be met. (*Id*.) Those standards require that:

- "The proposed development is consistent with the intent and provisions of the County's General Plan";
- "The proposed development is compatible with the character of surrounding, legally established development";
- "The proposed development would not be obnoxious or harmful, or impair the utility of neighboring property or uses;

- "The proposed development would not be detrimental to the public interest, health, safety, convenience, or welfare"; and
- "The proposed development is compatible with existing and potential land uses in the general area where the development is to be located". *Id*. at (a)-(e).

To implement the Corridor Project, the County amended the General Plan and General Plan Appendix to incorporate new maps depicting the new overlay zones and add new conservation-focused provisions to the Biological Resource General Plan Policies. (AR 3, 239-249, 1165-1186.) None of these regulations previously existed. (AR 1111.)

The General Plan also did not previously recognize the overlay zones and included only general references to theoretical wildlife corridors. (AR 1171-1172, 1180-1181.) Thus, the County amended the General Plan to include new maps delineating, for the first time, the HCWC and CWPAs, and project-related nomenclature and definitions. (AR 3, 5-8, 1172-75.)

These amendments alter the standards for CUP surface mining applicants who will now have to prove that their activities are "compatible" with and neither "harmful" nor "detrimental" to the use of the project area as wildlife habitat. (AR 13836.) The change in standards also increases the possibility that County decision-makers may deny a CUP in their discretion because wildlife habitat is an "unsuitable location" for a surface mine, or reduce the scope of a proposed mine based on concerns about incompatibility with or impacts to wildlife habitat. (AR 13835.) The changed standards may also make it tougher for County decision-makers to find a surface mining activity "consistent"

with the intent of the overlay zones and General Plan and the use of land as habitat, a finding the decision-makers will now be required to make prior to approving a CUP. (AR 13836.)

These changes to the permitting standards threaten the potential extraction of classified and designated resources because they present the possibility that it will be harder to obtain authorizations for future mining activities. Indeed, that was a stated purpose of the Corridor Project—to "discourage" development and increase the burden of permitting new development. (AR 4.)

Added to this are the new conservation-focused and Project-related provisions added to the County's Biological Resource General Plan Policies. (AR 3.) Those changes include new findings providing that "[h]abitat loss and fragmentation are the leading threats to biodiversity worldwide, including within Southern California." (AR 1171.) The County also determined that roads, nighttime lighting, and noise can disrupt wildlife corridors. (*Id*.) The County thus added a new policy that requires decision makers evaluating a discretionary CUP to weigh the "project-specific and cumulative impacts on the movement of wildlife at a range of spatial scales including local scales (e.g., hundreds of feet) and regional scales (e.g., tens of miles)." (AR 1173.) And because mineral extraction projects require roads, cause noise, and often require nighttime lighting, it is reasonably likely to be tougher for such projects to be deemed "consistent" with these new Biological Resource General Plan policies. (AR 13836.) What's more decision makers must now also consider the

cumulative and "regional" impacts that a single mine will have on the overlay zones and the wildlife that use the Project area as habitat. (AR 1173.)

One of the two "critical linkages" established as a part of the Corridor Project, the Santa Monica-Sierra Madre Connection, overlies the Santa Clara River—the location of most of the County's sand and gravel extraction sites. (AR 5, 1142, 9307, 13937.) The planning department stated that the Santa Monica-Sierra Madre Connection was "of special importance" and explained that the preservation of wildlife corridors is "essential for wildlife survival." (AR 1101.) The new standards will make it more difficult to approve a new mining CUP near the Santa Monica-Sierra Madre Connection.

Further, in addition to the County, a mining operator must seek approvals for mining operations from a broad range of state and local authorities, including, the California Department of Fish and Wildlife ("CDFW"), Regional Water Quality Control Boards, and Air Quality Management Districts. The new wildlife corridor will make it more difficult to obtain approvals from all regulators who must now take the corridors into account in their consistency and project viability determinations.

The CDFW, for example, recently weighed in on a mining expansion project in the County, noting that the project is "within the Habitat Connectivity and Wildlife Corridor overlay zone" and arguing that the project will impact mountain lions and "permanently reduce the width of the existing wildlife corridor." (AA 731, 733; *see also* 733 (project "would also impair a wildlife

corridor" and "permanently impact the County's Wildlife Linkage and [Habitat] Corridor").

Compounding matters are anti-mining groups who are likely to use the Corridor Project standards and findings to apply increased pressure on decision-makers required to make the heightened CUP findings. In fact, one Intervenor recently filed a lawsuit alleging that a housing development "would degrade the Sierra Madre-Castaic Connection wildlife linkage identified by the South Coast Missing Linkages Project." (AA 329-350, at 336.) Similar challenges to mining CUPs are certain to occur.

The County's position that the Corridor Project will not impact mineral extraction is belied by its admission that the Project is intended to "discourage" development activities. (AR 4.) If the Project discourages development, the potential to extract designated mineral resources is "threatened." The planning department in 2017 identified surface mining as a source of impacts to biological resources and wildlife habitat fragmentation and rated as "critical" the importance of minimizing mining-related impacts in what is now the HCWC. (AR 9314-9316.)

That is not surprising. A wildlife corridor is inherently incompatible with mining operations and the removal of vegetation in connection with the development of a quarry. The disturbance and excavation of land and native vegetation required for mining operations will hinder the use of surrounding land as habitat. That conflict will make mine permitting more burdensome and, ultimately, less likely, threatening the extraction of mineral resources. These changes may also make it

more expensive to conduct surface mining activities, leading to less mining due to cost. (AR 1881, 1884, 2179-2191.)

As the County explained in the General Plan Appendix, "undeveloped, sensitive land uses" may impact future mineral development. (AR 14119.) The General Plan also recognizes that such uses are those which "are generally devoid of structures and improvements, but are devoted to activities which utilize the land in a manner which precludes or hinders mining operations." (*Id.*) The Corridor Project introduces a new sensitive use alongside current and potential new mining operations because it includes vast expanses of land "devoid of structures and improvements" and contemplates the use of that land as habitat or "critical linkages" for mountain lions and other wildlife. (AR 1102.) Thus, the Project may "preclude," or, at the very least, "hinder" future mining in that area and "threaten" the potential extraction of mineral resources.

Indeed, history shows that conservation-focused land use plans like the Project consistently "threaten" the potential extraction of mineral resources. For example, the Riverside County Multiple Species Habitat Conservation Plan ("MSHCP") is a conservation-focused land management plan intended to limit development activities and preserve wildlife habitat. (AR 2150-2163.) In an environmental impact report prepared for the MSHCP by the lead agency, it acknowledged that its conservation focus will cause significant and unavoidable impacts to the extraction of mineral resources. (AR 2146.)

Had the County here analyzed the Corridor Project's potential to threaten the extraction of mineral resources, it would likely have reached a similar conclusion. One of the objectives the County seeks to accomplish through the Project is to eliminate "physical barriers to wildlife movement." (AR 3, 1101-1102.) Because quarries and surface mines can serve as such a barrier, there is at least a reasonable possibility that the Corridor Project and its attendant land-use regulations and new Biological Resource policies "threaten" the future extraction of mineral resources.

The County below claimed that it "currently considers the potential environmental impacts that discretionary projects could have on biological resources and wildlife movement within the same wildlife movement corridors that will constitute the proposed overlay zones." (AR 2820.) But as noted above, prior to the adoption of the Corridor Project, the County's General Plan contained no policies supporting wildlife movement against which discretionary mining permits were assessed. Nor did the wildlife corridors exist.

And while perhaps the Planning Department already considered barriers to wildlife movement while reviewing CUP applications, there can be little doubt that the new HCWC and CWPA zones, land use regulations, and Biological Resource policies are intended to "discourage" new development and make it tougher to permit mining activities that hinder wildlife movement. If the Project did not implement a change, there would never have been a need for it to begin with.

In sum, the County's determination that the Corridor Project will not threaten the potential to extract designated mineral resources is wrong. The State Geologist's interpretation, on the other hand, is supported by the record, including information showing that the County's permitting process for surface mining activities will be significantly affected by the Corridor Project, thereby making it harder to mine.

5. The County's failure to prepare a Statement of Reasons and complete the mandated public process was prejudicial.

For these reasons, the County was required to publish a Statement of Reasons for public review and comment for at least 60 days and consider the Statement during a public hearing. Pub. Res. Code, §§ 2762(d)(3), 2763(a). Because the Corridor Project overlies designated mineral resources, the County was also required to show that it was designed in accordance with its mineral resource General Plan policies and explain how it balanced mineral values against alternative land uses and considered the importance of these minerals to their market region as a whole. *Id.*, § 2763(a). The County's failure to comply with SMARA robbed Appellants and the public of their participation in the mandated public process.

The County's failure to comply with the law was thus prejudicial. *See Neighbors for Smart Rail v. Expo Metro Line Const. Auth.*, 57 Cal.4th 439, 463 (2013) ("prejudicial if it

deprived the public and decision makers of substantial relevant information about the project's likely adverse impacts"); *Sierra Club v. State Bd. of Forestry*, 7 Cal.4th 1215, 1236-37 (1994) ("absence of any information…frustrated the purpose of the public comment provisions…It also made any meaningful assessment of the potentially significant environmental impacts [and] specific mitigation measures impossible. In these circumstances prejudice is presumed.").

The trial court's view that the County's failure to comply with SMARA was not prejudicial (AA 1069-1070) is wrong and effectively reads the Statement of Reasons requirement out of the code.

The preparation of a Statement of Reasons is not a formality. In California, state policy assigns lead agencies as the last line of defense responsible for protecting important mineral resources from incompatible uses. State policy also places mineral resource conservation on equal footing with biological resource conservation. Gov't Code § 12605 (defining "natural resources"); Pub. Res. Code, § 2711(f). That is why SMARA requires lead agencies to "balance" mineral values against alternative land uses and consider the local and regional importance of the threatened minerals. Pub. Res. Code, § 2763(a). When these impacts are not carefully considered, both society and the environment suffer.

When important mineral resources are lost due to incompatible uses, lead agencies must source aggregate from other locations. (AR 1915.) This sourcing cannot be accomplished

if there is no analysis of what minerals might be lost. Sourcing from more distant locations requires materials to be transported across longer distances, causing additional negative impacts—especially trucking-related air quality and greenhouse gas emissions. (*Id.*) Both the Legislature and the County recognizes this fact. Pub. Res. Code, § 2711(d). (AR 14114-14115, 13937.)

It is for these reasons why the County's refusal to comply with SMARA undermines state policy and is why Appellants filed this action. The County cannot protect one natural resource at the expense of another without carefully evaluating its decision. And, particularly, the County cannot protect wildlife by rezoning important mineral resources as a wildlife corridor without preparing a Statement of Reasons. The County must comply with SMARA and conduct a public process resulting in findings made elected and accountable County decision makers—not the Planning Department—based on the materials published by the State for use in connection with local land-use decisions affecting mineral resources. (AR 2099.)

The decision of the trial court should be reversed and a writ of mandate should issue directing the County to rescind its approval of the Corridor Project pending its preparation of a Statement of Reasons and compliance with SMARA.

B. The County failed to comply with CEQA.

1. Legal Standard under CEQA.

CEQA appeals are subject to *de novo* review. *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal. 4th 412, 427 (2007). "An appellate court's review of the administrative record for legal error and substantial evidence in a CEQA case, as in other mandamus cases, is the same as the trial court's: the appellate court reviews the agency's action, not the trial court's decision…" *Id.* The appellate court thus reviews the administrative record independently and the trial court's conclusions are not binding. *Gentry v. City of Murrieta*, 36 Cal. App. 4th 1359, 1375-76 (1995).

Courts review agency CEQA determinations for an abuse of discretion. Pub. Resources Code § 21168.5; *Davidon Homes*, 54 Cal. App. 4th at 113-14. An abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence. Pub. Res. Code § 21168.5.

The scope of a categorical exemption presents a question of law, reviewed *de novo*. *Save Our Carmel River v. Monterey Peninsula Water Management Dist.*, 141 Cal. App. 4th 677, 693 (2006). Once construed, whether a given project falls within the scope of a categorical exemption is subject to review for substantial evidence. *Id.* at 694. An exemption will not be upheld

if the record of the agency's proceedings lacks evidence showing that the project satisfies the criteria that must be met to qualify for it. *Save Our Big Trees v. City of Santa Cruz*, 241 Cal. App. 4th 694, 711-12 (2015).

Categorical exemptions from CEQA are authorized by Public Resources Code § 21084(a). That section directs the Office of Planning and Research to develop a list of classes of projects that the agency has determined will not have a significant effect on the environment. *Id.* Exemptions are not intended to apply to projects that have the potential to adversely impact the environment. *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster*, 52 Cal. App. 4th 1165, 1192-93 (1997). Courts thus construe exemptions narrowly to ensure that they are interpreted in a manner affording the greatest environmental protection within the reasonable scope of their language. *Id.* at 697; *LADWP v. County of Inyo*, 67 Cal. App. 5th 1018, 1040 (2021).

2. The Corridor Project is subject to CEQA.

Initially, the Corridor Project is a "project" within the meaning of CEQA and therefore subject to CEQA review. Pub. Res. Code §§ 21065, 21080(a). CEQA applies to the adoption of zoning ordinances that have the "potential" or are "capable" of causing direct or reasonably foreseeable indirect effects on the environment. *Union of Medical Marijuana Patients, Inc. v. City of San Diego*, 7 Cal. 5th 1171, 1198 (2019). A general plan

amendment is also considered a CEQA "project" because such plans "embody fundamental land use decisions that guide future growth and development of cities and counties, [and thus] they have the potential for [causing] ultimate physical changes in the environment." *Black Property Owners Assn. v. City of Berkeley*, 22 Cal. App. 4th 974, 985 (1994).

The County concedes that the Corridor Project is a CEQA "project." (AR 4.)

3. The County failed to establish that the Corridor Project is exempt from CEQA as a project "certain" of having "no possibility" of a significant effect on the environment.

Because CEQA applies to projects that have the "potential" for causing a significant effect on the environment, an agency need not undertake environmental review of a project "if it can be seen with certainty that there is no possibility" that it will have a significant effect on the environment. CEQA Guidelines § 15061(b)(3). This is known as the "common-sense exemption."

Here, despite the scope and breadth of the Corridor Project, imposing new zoning regulations and General Plan policies, over 163,000 acres of land—an area roughly the size of the City of Chicago—the County determined that it was not required to undertake CEQA review under the common sense exemption. (AR 1-4.) And it did so without so much as a single study or a single citation to evidence to support its finding that there is a

"certainty" of "no possibility" of a significant effect on the environment. (AR 4.)

The County's reliance on the common-sense exemption cannot be sustained.

An agency relying on a CEQA exemption bears the burden of establishing the applicability of the exemption, and abuses its discretion if it fails to substantiate an exemption determination with substantial evidence. *Muzzy Ranch Co. v. Solano County Airport Land Use Com.*, 41 Cal. 4th 372, 385-86 (2007).

The common-sense exemption is unlike categorical exemptions. *Davidon Homes*, 54 Cal. App. 4th at 116. When it identifies projects categorically exempt from CEQA, the Office of Planning and Research undertakes an analysis to identify classes of projects that can comfortably be assumed not to cause significant impacts. *Id.* That is not the case when it comes to the common-sense exemption, which is only a contention by an agency that a project will not cause impacts. *Id.* An agency applying the common-sense exemption thus bears the burden of proving with evidence that there is "no possibility" the project will have a substantial impact. *Id.*

The "duty to provide such factual support 'is all the more important where the record shows, as it does here, that opponents of the project have raised arguments regarding possible significant environmental impacts.'" *Muzzy Ranch*, 41 Cal. 4th at 386. An agency may not rely on the absence of evidence of an impact and call it a day because it cannot in that

scenario say with certainty that there is no possibility of significant environmental effect. *Id.*

The common-sense exemption is "reserved for those 'obviously exempt' projects, 'where its absolute and precise language clearly applies.'" *Myers* v. *Board of Supervisors*, 58 Cal. App. 3d 413, 425 (1976). Thus, "[i]f legitimate questions can be raised about whether the project might have a significant impact and there is any dispute about the possibility of such an impact, the agency cannot find with certainty that a project is exempt." *Id.*

The County claimed that the Corridor Project is exempt from CEQA based upon its speculation that, "to the extent the project affects the environment, the effect is expected to be beneficial." (AR 4, 1131-1132.) But this insufficient to satisfy the County's burden "to consider possible environmental effects and to base its decision upon substantial evidence in the record." *Davidon,* 54 Cal. App. 4th at 114.

In the first place, CEQA review may only be dispensed with under the common-sense exemption if a project will have no "significant effect on the environment"—whether beneficial or adverse. CEQA Guidelines 15061(b)(3). The County in its CEQA determination assumed that it need only be concerned with potential adverse consequences. (AR 4.) But that is wrong. The CEQA Guidelines may not exempt a project "where there is any reasonable possibility" that it "may have a significant effect on the environment," adverse or beneficial. *Wildlife Alive v. Chickering*, 18 Cal. 3d 190, 206 (1976); *Mountain Lion*

Foundation v. Fish & Game Com., 16 Cal. 4th 105, 124 (1997). Without actually analyzing the Corridor Project's impact, the County cannot say whether the impact will be solely beneficial.

Second, the County cites no evidence to support its conclusion that the impacts of the Corridor Project will only be beneficial. (AR 4.)

Third, the County fails to consider or support a finding that the Corridor Project will not have adverse impacts. The County's analysis focuses only on the Corridor Project's "beneficial" effects on the environment, ignoring the potential adverse impacts relating to fire hazards and mineral resources, and the indirect effects to traffic, air quality, and greenhouse gases.

Though the County contends that the Corridor Project is exempt just because it is intended to protect the environment, good intentions, standing alone, are not sufficient to justify reliance on the common-sense exemption. Projects designed to protect or improve the environment can have collateral effects, so agencies cannot assume that measures intended to protect the environment are entirely benign. *Practice Under the California Environmental Quality Act*, § 5.112 (2d Ed. Cal. CEB).

For example, the court in *Dunn-Edwards Corp. v. Bay Area AQMD*, 9 Cal. App. 4th 644, 654-58 (1992)[3] overturned the use of the common-sense exemption and Class 7 and Class 8 categorical exemptions (discussed further below) in connection with

[3] Disapproved of on other grounds by *Western States Petroleum Assn. v. Superior Court*, 9 Cal. 4th 559, 576 (1995).

amendments to regulations designed to reduce the amount of volatile organic carbons (VOCs) in architectural coatings because there was evidence that the regulations would require lower quality products and result in a net increase in VOC emissions. In *Chickering*, 18 Cal. 3d at 204-06, the Supreme Court rejected the use of a Class 7 categorical exemption for regulations setting fishing and hunting seasons because of the potential for both beneficial and adverse effects on animals. And in *Building Code Action v Energy Resources Conserv. & Dev. Comm'n*, 102 Cal. App. 3d 577, 590-93 (1980), the court held that the agency violated CEQA when it failed to consider whether its energy conservation regulations establishing double-glazing standards for new residential construction could have a significant impact as result of increased glass production.

Here, the County cites no evidence for its conclusion that all impacts of the Corridor Project will be purely beneficial. The County's failure to consider potential adverse impacts is all the more striking considering the evidence in the record of the potential for significant adverse consequences, including:

- Direct impacts due to the potential loss of available aggregate reserves (*See, e.g.*, AR 1878-2202, 4679-4725, 8293-8295);
- Indirect impacts due to increased mineral reserve haul distances, including increased fossil fuel consumption, greenhouse gas emissions, air pollution, traffic congestion, additional vehicle miles traveled and road degradation (*See, e.g.*, AR 1842-1843, 1878-2202, 4679-4725, 8293-8295);
- Increased risk of wildfires due to restrictions on vegetation removal (*See, e.g.*, AR 1812-1838, 6433-

6480, and additional record citations in Factual Background section B.3, *supra*); and

- Potential impacts on agriculture, including related impacts on community character. (AR 1842-1843.)

The County ignored this evidence and never addressed it. (AR 267 (minutes); AR 276-289 (transcript).)

The evidence also showed that the identified impacts would be significant. For example, under the County's Assessment Guidelines, projects that threaten the availability of mineral resources are presumed to have significant impacts:

> Any land use or project activity which is proposed to be located on or immediately adjacent to land zoned Mineral Resource Protection (MRP) overlay zone, or adjacent to a principal access road to an existing aggregate Conditional Use Permit (CUP), and which has the potential to hamper or preclude extraction of or access to the aggregate resources, shall be considered to have a significant adverse impact on the environment. (AR 1841, 14202-14425 at 14226.)

Similarly, CEQA Guidelines Appendix G requires that any project located in a Very High Fire Hazard Severity Zone be evaluated to determine if the project would exacerbate wildfire risks or expose people or structures to significant risks as a result of post-fire slope instability. (AR 1840.) The County's CEQA Assessment Guidelines also recognize that projects located in such zones are likely to have a significant fire hazard impact. (AR 14311.)

The County failed to negate the possibility that the identified impacts are potentially significant, let alone allow the decision-makers to find with a certainty that there will be no environmental impacts. *Davidon,* 54 Cal. App. 4th at 114.

Just as in *Davidon*, the County "has not attempted to determine whether there will be any adverse impacts" from the regulations imposed by the Corridor Project, relying instead on a blanket assertion that impacts are expected to be beneficial. *Davidon,* 54 Cal. App. 4th at 118. The *Davidon* court held that, "if a reasonable argument is made to suggest a possibility that a project will cause a significant environmental impact, the agency must refute that claim *to a certainty* before finding that the exemption applies." *Id.* (emphasis in original.) The County did not do so.

There is no substantial record evidence supporting its common-sense exemption determination. The County violated CEQA.

4. The County failed to justify Class 7-8 categorical exemptions because it failed to consider potential adverse impacts of the Corridor Project.

The County also concluded that the Corridor Project is exempt from CEQA under Class 7 and Class 8 categorical exemptions. (AR 4.) Class 7 and 8 exemptions are reserved for actions taken by regulatory agencies that "assure the maintenance, restoration, or enhancement of a natural resource" or of "the environment" generally and which include "procedures for protection of the environment." CEQA Guidelines §§ 15307, 15308. The County erred by relying on Class 7 and 8 exemptions

because the Corridor Project has the potential for adverse impacts, which the County ignored.

The issue presented here is one of law and reviewed by this Court independently because it goes to the interpretation of the scope of the exemptions. *Save Our Carmel River*, 141 Cal. App. 4th at 693. The County assumed that any project that is expected to have beneficial effects qualifies for the Class 7 and 8 exemptions regardless of potential adverse impacts. (AR 4, 1094-1095.) The County thus did not consider the potential adverse impacts of the Corridor Project and concluded that it is subject to Class 7 and 8 Exemptions solely because of expected beneficial impacts. (AR 4, 1094-1095.) It made the same argument in the trial court. (AA 470-473.) Staff did not propose findings as to the potential adverse consequences of the Corridor Project and the County made none.

The trial court accepted the County's argument and also did not consider whether the Corridor Project's potential adverse impacts precluded the use of Class 7 and 8 exemptions (AA 1113-117), even despite Appellants' request that it do so. (AA 1006-1008, 1013-1016.)

Both the County and the trial court erred because a project that has both beneficial and adverse impacts does not assure the protection of the environment and thus may not assert Class 7 or 8 exemptions. *Chickering*, 18 Cal. 3d at 206.

The Supreme Court in *Chickering,* 18 Cal. 3d at 190, considered whether the setting of hunting and fishing seasons "with its potential for a significant environmental impact, both

favorable and unfavorable" could be categorically exempted from CEQA by the Secretary of the Resources Agency. It could not. An exemption may not be used where there is a potential for significant environmental impact even where the project also may have beneficial effects:

> When the impact may be either adverse or beneficial, it is particularly appropriate to apply CEQA which is carefully conceived for the purpose of increasing the likelihood that the environmental effects will be beneficial rather than adverse. *Id.* at 206.

Projects that have potential adverse impacts thus do not qualify for Class 7 or 8 exemptions even if part of a larger regulatory scheme designed to protect the environment. *Save Our Big Trees v. City of Santa Cruz*, 241 Cal. App. 4th 694, 707 (2015). The court in *Save Our Big Trees* found that amendments to regulations protecting heritage trees were not subject to Class 7 or 8 exemptions because they would, in part, "diminish existing environmental protections." *Id.* at 707. The court in *Mountain Lion Foundation*, 16 Cal. 4th at 125 similarly held that an action delisting a species as endangered was not exempt from CEQA, rejecting the Commission's argument that such action was exempt because it was part of its larger mission of protecting wildlife. And the Court in *Chickering*, 18 Cal. 3d at 204-06, rejected a Class 7 exemption in connection with a wildlife management program.

The County and the trial court erred. The County failed to consider potential adverse impacts of the Corridor Project. The trial court did too. The Court should thus reverse the judgment and direct a writ remanding the matter to the County to

reconsider whether the Corridor Project is exempt from CEQA considering its potential adverse impacts.

5. The County erred by relying on Class 7 and 8 exemptions because exemptions for habitat maintenance and restoration projects are limited to projects of five acres or less.

Class 7 and 8 exemptions apply to actions by "regulatory agencies" that assure the protection of natural resources or the environment generally where the regulatory process includes procedures for the protection of the environment. By contrast, Class 33 applies specifically to wildlife habitat projects and exempts, "projects not to exceed five acres in size to assure the maintenance, restoration, enhancement, or protection of habitat for fish, plants, or wildlife." CEQA Guidelines § 15333.

Class 33—for which the Corridor Project is ineligible given its five-acre limitation—is the only potentially applicable exemption here, not Class 7 or 8. There are four reasons.

First, as noted above, when it establishes categorical exemptions, the Resources Agency does so by identifying projects it determines will not cause significant impacts. Pub. Res. Code § 21084; *Davidon Homes*, 54 Cal. App. 4th at 116. When the Resources Agency created the Class 33 exemption, it must have determined it could make such a finding only if wildlife habitat projects were limited to five acres in size. The Corridor Project is a project intended to "assure the maintenance, restoration,

enhancement, or protection of habitat for fish, plants, or wildlife." But it is 32,000 times the size for which the Resources Agency has exempted wildlife habitat projects.

Second, wildlife habitat projects must be restricted to Class 33, and not be able to rely on the more generic Class 7 and 8, or else the five-acre limitation of Class 33 would be rendered superfluous. As the Fifth District Court of Appeal recently held, exemption classes tend to be mutually exclusive: "if an activity is potentially covered by one exemption it probably falls outside the coverage of the other exemptions." *LADWP*, 67 Cal. App. 5th at 1018.

Third, the Corridor Project is not undertaken by a "regulatory agency" and it does not have "procedures for the protection of the environment." Most notably, the Corridor Project includes no procedures for the protection of mineral resources.

And fourth, construing Class 7 and 8 to apply to wildlife habitat projects would, in light of Class 33, constitute an expansive interpretation, which is prohibited because exemptions are narrowly construed. *Id.* at 1040.

6. The County's use of the Class 7 and 8 categorical exemptions is not supported by substantial evidence.

For Class 7 and 8 exemptions to apply, it "necessarily mean[s] that the adoption of [the project] would '*assure* the maintenance, restoration, enhancement, or protection of the environment....'" *California Unions for Reliable Energy v. Mojave Desert Air Quality Management Dist.*, 178 Cal. App. 4th 1225, 1245 (2009) (emphasis in original.)

The Appellants "bear[] no burden" to show that the Corridor Project "will degrade the environment or deplete a natural resource." *Save Our Big Trees*, 241 Cal. App. 4th at 710-11. Rather, the County has the burden of proof to establish the exemptions. *Id.*; *Save Our Big Trees*, 241 Cal App. 4th at 710-11.

And to carry its burden of proof, the County was required to establish through substantial evidence that the negative effects of the Corridor Project would not be significant. *California Unions*, 178 Cal. App. 4th at 1245 ("In the *absence* of evidence that the negative environmental effects of Rule 1406 would *not* be significant, the exemption finding cannot be sustained.") (Emphases in original.)

Because the County assumed that it could establish the Class 7 and 8 exemptions solely by looking to assumed beneficial impacts, the County did not even attempt to establish through substantial evidence that the potential adverse impacts effects of the Corridor Project would not be significant. The County thus failed to carry its burden of proof. *California Unions*, 178 Cal. App. 4th at 1245.

What's more, though Appellants "bear no burden" to establish the negative impacts of the Corridor Project, the

evidence they did submit lends additional support to the notion that a Class 7 or 8 exemption is not available here. As discussed above, the record discloses several potentially significant adverse impacts of the Corridor Project, including increased fire hazard risk, adverse effects to mineral resources, and the related impacts to traffic, air quality, and greenhouse gases, all discussed above.

The County thus failed to meet its burden of proof to establish through substantial evidence that the adverse consequences of the Corridor Project would not be significant. *California Unions*, 178 Cal. App. 4th at 1245. Its reliance on Class 7 and 8 exemptions was improper.

7. The Class 7-8 exemptions are inapplicable because there is a reasonable possibility of adverse impacts due to unusual circumstances.

Even if the County had carried its burden to justify the Class 7 or 8 exemptions, the record establishes an exception to the use of categorical exemptions. "A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." CEQA Guidelines § 15300.2.

A petitioner may establish the unusual circumstances exception in one of two ways.

First, the petitioner may show that the project is unusual because it has some feature that distinguishes it from others in the exempt class, such as its size or location. *Berkeley Hillside*

Preservation v. City of Berkeley, 60 Cal. 4th 1086 (2015). In such a case, to render the exception applicable, the party need only show a reasonable possibility of a significant effect due to that unusual circumstance *Id*. at 1105.

Alternatively, a petitioner may establish that the project *will* have a significant environmental effect. *Id*. The one-element alternative alleviates the need to separately establish unusual circumstances. That is because evidence if a project "will" have a significant environmental effect, it "necessarily also establishes 'a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.'" *Berkeley Hillside*, 60 Cal. 4th at 1105.

a. Appellants have established the unusual circumstances exception under the one-element alternative.

The evidence summarized, *supra*, in section B.3 of the Factual Background section and associated with the common sense exemption also establishes that the Corridor Project "*will* have a significant environmental effect."

In short, the Corridor Project is presumed under the County's Assessment Guidelines (AR 14226) to have a "significant adverse impact on the environment" because it is:

- Located on land zoned Mineral Resource Protection (MRP) overlay zone adjacent to a principal access road to an existing aggregate Conditional Use Permit (CUP); and

- Has the potential to hamper or preclude extraction of or access to the aggregate resources for the reasons discussed above.

The Court need go no further. The Corridor Project is ineligible for a categorical exemption even if the County had established one.

b. Appellants have established the unusual circumstances exception under the two-element test.

"A party invoking the exception may establish an unusual circumstance without evidence of an environmental effect, by showing that the project has some feature that distinguishes it from others in the exempt class, such as its size or location." *Berkeley Hillside*, 60 Cal. 4th at 1105. The record shows that when it comes to Class 7 and 8 exemptions, the Corridor Project is unusual in terms of both size and location.

In terms of size, the Corridor Project is significantly larger than other projects in its class. Other types of projects found to be exempt under the Class 7 and 8 categorical exemptions include:

- Ordinances banning the use of plastic bags. *Save the Plastic Bag Coalition v. County of Marin*, 218 Cal. App. 4th 209 (2013); *Save the Plastic Bag Coalition v. City and County of San Francisco*, 222 Cal. App. 4th 863 (2013);
- The *revocation* of a landfill's prior waste discharge requirements. *Main San Gabriel Basin Watermaster v. State Water Resources Control Bd.*, 12 Cal. App. 4th 1371 (1993); and

- An ordinance prohibiting the discharge of sewage sludge. *Magan v. County of Kings*, 105 Cal. App. 4th 468 (2002).

"Whether a circumstance is '*unusual*' is judged relative to the *typical* circumstances related to an otherwise typically-exempt project." *Santa Monica Chamber of Commerce v. City of Santa Monica*, 101 Cal. App. 4th 786, 801 (2002) (emphases in original.)

A useful basis for comparison here is the Class 33 exemption, which limits exemptions for habitat restoration projects to five acres or less. CEQA Guidelines § 15333. By contrast, the Corridor Project is orders of magnitude larger.

In terms of location, the Corridor Project is also unusual because it includes and overlies more than 10,000 acres of classified mineral resources and resources designated as of regional significance. (AR 2061-2092.) It also overlies burn areas of recent wildfires showing that the area is subject to the very type of harms the project threatens. *Calif. Bldg. Industry Assn. v. Bay Area Air Quality Mgmt. Dist.*, 62 Cal. 4th 369, 377 (2015) ("When a proposed project risks exacerbating those environmental hazards or conditions that already exist, an agency must analyze the potential impact of such hazards on future residents or users.").

Though the County analogized the Corridor Project to other wildlife corridors in Southern California, what it actually did was highlight why the Corridor Project and the County's approval process was unusual. A staff report states that other local agencies have purportedly incorporated wildlife corridor policies

into their land use and planning activities. (AR 1103-1104.) The report referenced six projects, and all of them were subjected to environmental review. (AR 1891, 2175.) Further, all other large-scale conservation-focused land management plans referenced in the record were also all subject to CEQA review. (AR 2146, 1890-1892, 2164-2168, 2169-2171.)

Where there are unusual circumstances, a project is not exempt if there is a "fair argument" of a "reasonable possibility of a significant effect on the environment" occurring due to the unusual circumstances." *Berkeley Hillside*, 60 Cal. 4th at 1115. If an agency is presented with a fair argument that a project may have a significant effect, it shall prepare an EIR even if there is substantial evidence that the project will not have a significant effect. CEQA Guidelines § 15064(f).

The evidence discussed above also establishes a "fair argument" of a "reasonable possibility" that the Corridor Project will cause a significant effect on the environment due to unusual circumstances. In fact, the Corridor Project is *presumed* to have a "significant adverse impact on the environment" under the County's Assessment Guidelines. (AR 14226.) The evidence also presents a fair argument that the Corridor Project will result in increased wildfire risks, mineral depletion, and indirect air quality, greenhouse gas emissions, and related impacts. (*See, e.g.*, AR 1897-1900; 9324; 14114; 14115; 2192-93; 2084; 2194-99; Pub. Res. Code, § 2711(d).)

As such, Appellants carried their burden and established a "reasonable possibility" of a significant effect due to the Project's

unusual circumstances precluding the use of a categorical exemption in these circumstances. *Berkeley Hillside*, 60 Cal. 4th at 1105.

CONCLUSION

For all of these reasons, the judgment of the superior court should be reversed. The Court should direct that the superior issue a writ of mandate requiring the County to set aside the Corridor Project until it has complied with SMARA and CEQA.

DATED: November 1, 2022

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.204(c)(1).)

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Dated: November 1, 2022

Matthew D. Hinks

B320153 & B320174

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION SIX

CALIFORNIA CONSTRUCTION AND INDUSTRIAL MATERIALS ASSOCIATION and VENTURA COUNTY COALITION OF LABOR, AGRICULTURE AND BUSINESS,
Petitioners and Appellants

v.

COUNTY OF VENTURA,
Respondent

LOS PADRES FORESTWATCH; DEFENDERS OF WILDLIFE; CENTER FOR BIOLOGICAL DIVERSITY; and NATIONAL PARKS CONSERVATION ASSOCIATION,
Intervenors and Respondents

ON APPEAL FROM THE SUPERIOR COURT OF THE COUNTY OF VENTURA, THE HONORABLE MARK S. BORRELL, JUDGE PRESIDING, CASE NOS. 56-2019-00527805-CU-WM-VTA & 56-2019-00527815-CU-WM-VTA

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(C.C.P. §1013(a), 2015.5)

I, the undersigned, hereby declare under penalty of perjury as follows: I am a citizen of the United States, and over the age of eighteen years, and not a party to the within action; my business address is 1900 Avenue of the Stars, 7th Floor, Los Angeles, CA 90067. On this date, I served the interested parties in this action the within documents: **APPELLANTS' OPENING BRIEF, MOTION FOR JUDICIAL NOTICE, AND APPELLANTS' APPENDIX VOLUMES 1-3,** via the court's online True Filing System as follows:

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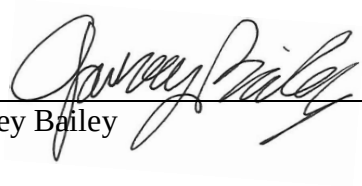

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