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ALAMEDA COUNTY

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CLERK OF THE SUPERIOR COURT
By Vicki Daybell

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA

| CALIFORNIA NURSES ASSOCIATION,<br><br>Petitioner,<br><br>vs.<br><br>COUNTY OF ALAMEDA,<br><br>Respondent. | RG09462329<br><br>ORDER DENYING PETITION FOR WRIT OF MANDATE |
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The Petition of California Nurses Association for Writ of Mandate Pursuant to Public Resources Code §21000 *et seq.* ("CEQA") came on regularly for hearing on March 26, 2010, in Department 31 of this Court, Judge Frank Roesch presiding. Petitioner California Nurses Association ("CNA") represented by Gloria D. Smith, Esq. Respondent County of Alameda ("County") represented by William Fleischacker, Deputy County Counsel. Real Party in Interest Sutter

Health, Inc. ("Sutter") represented by Jonathan Bass, Esq. and Matthew C. Dirkes, Esq. of Coblentz, Patch, Duffy & Bass LLP.

The Court having considered the pleadings, administrative record,[1] and arguments submitted in support of and in opposition to the Petition, and good cause appearing, it is hereby ORDERED that the Petition is DENIED. The reasons follow.

**SUMMARY OF FACTS**

In March 2008, Sutter, Eden Medical Center and Eden Township Health Care District ("ETHCD") entered into a MOU. The agreement called for Sutter to build the replacement hospital for the Eden Castro Valley facility. It also called for ETHCD to lease the San Leandro Hospital to Sutter and to give Sutter an option to buy San Leandro as consideration for the agreement to construct the Eden Castro Valley replacement hospital and adjoining medical office building ("MOB"). On April 2, 2008, Sutter filed a development application with the County to construct a new hospital and medical office complex to replace the existing Eden Medical Center Hospital in Castro Valley ("the Project" or "the Replacement Hospital"). The Project included a new 130-bed inpatient and acute care facility, as well as an 80,000 square foot medical office building.

The existing 178-bed hospital facility does not meet the earthquake standards set forth in the Alquist Hospital Facilities Seismic Safety Act of 1983 as

[1] Petitioner's Motion to Correct the Record was granted at the hearing on this matter. (See Minutes for March 26, 2010.)

amended by State Senate Bill 1953, and is required to be closed no later than January 1, 2013. The Project called for the demolition of the Eden Medical Center Hospital, as well as the demolition of an existing medical office building, the Laurel Grove Rehabilitation hospital and a neighboring apartment complex.

The County issued a Notice of Preparation under CEQA on May 5, 2008, and a Draft Environmental Impact Report (DEIR) on December 4, 2008. The County responded to comments and issued a final environmental impact report (FEIR) on March 13, 2009. Public hearings were held on May 12, 2009, and June 9, 2009. On June 12, 2009, the County filed a Notice of Determination for the Project.

CNA submitted a number of comments in writing on May 5 and 7, and June 5, 2009, and made comments at the public hearings on May 12, and June 9, 2009. Included in those comments were concerns about:

1. groundwater contamination and worker safety risks due to the presence of diesel and other hydrocarbon chemicals at the Project site;

2. traffic circulation impacts and inadequate mitigation measures to address them;

3. impacts on public services, including availability of emergency and hospital services to the community generally and to low-income persons utilizing public insurance programs, including impacts resulting from closure of Eden San Leandro Hospital in addition to the closure and replacement of Eden Medical Center (Castro Valley) and Laurel Grove Rehabilitation hospital.

## DISCUSSION

## I. CNA HAS STANDING TO BRING THIS PETITION

CNA has standing. It has a beneficial interest in the issuance of a writ to compel the County to comply with CEQA, and that interest is within the zone of interests regulated by CEQA. (See *Environmental Protection Information Center v. California Department of Forestry and Fire Protection* (2000) 44 Cal.4th 459, 479-80; *Waste Management of Alameda County, Inc. v. County of Alameda* (2000) 79 Cal.App.4th 1223, 1232.)

## II. THE EIR ADEQUATELY DESCRIBES THE ENVIRONMENTAL SETTING

Petitioner argues that the EIR is inadequate because the County has failed to adequately describe the environmental setting for the Project in the EIR, asserting that the EIR fails to set forth the complete baseline in any one place in the EIR. Petitioner further argues that, with respect to public services, the description of the environmental setting is inadequate because it only considers the immediate Eden Castro Valley area and not San Leandro Hospital. Petitioner argues that the EIR is inadequate because it omitted any consideration of the potentially significant impacts of the "anticipated" closure of the Eden San Leandro hospital in addition to the closure/replacement of Eden Medical Center (Castro Valley) and the Laurel Grove Rehabilitation hospital. Petitioner contends that failure to include the possible closure of the San Leandro facility violated CEQA either as a failure to adequately describe the Project, to adequately describe

the existing environmental setting, or to consider cumulative impacts of the Project.

Section 15125 of the CEQA Guidelines (found in the California Code of Regulations, Title 14, Chapter 3, §15000-15387, hereinafter "Guidelines") requires that an EIR include a description of the local and regional environment in the vicinity of the project as it exists before the commencement of the project. (Guidelines §5125.) CEQA requires that an EIR:

> identify and focus on the significant environmental effects of the proposed project. Direct and indirect significant effects of the project on the environment shall be clearly identified and described, giving due consideration to both the short-term and long-term effects. The discussion should include relevant specifics of the area, the resources involved, physical changes, alterations to ecological systems, and changes induced in ... the human use of the land (including commercial and residential development), health and safety problems caused by the physical changes, and other aspects of the resource base such as water, scenic quality, and public services...."

(Guidelines, § 15126, subd. (a).) As stated in the *San Joaquin Raptor* case:

> Without accurate and complete information pertaining to the setting of the project and surrounding uses, it cannot be found that the FEIR adequately investigated and discussed the environmental impacts of the development project. . . . [failure to describe the] environmental setting is not only inadequate as a matter of law but it also renders the identification of environmental impacts legally inadequate and precludes a determination that substantial evidence supports . . . [the determination that significant impacts have been] mitigated to insignificance.

(*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 729.) The EIR must use the description of the environment as it exists at the time of the Notice of Preparation, rather than a hypothetical

environment. (See *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310, 322; *Woodward Park Homeowners Assoc. v. City of Fresno* (2007) 150 Cal.App.4th 683, 707-08; *Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99.)

With respect to Petitioner's argument that the overall environmental setting (or "baseline") description is not together in one place in the EIR but rather is set forth within each environmental topic section of the DEIR, there appears to be no merit to such a criticism. In the introduction to Chapter IV of the DEIR, a chapter entitled "Environmental Setting, Impacts, and Mitigation Measures," the DEIR notes that it is separating out a baseline description in each subject-area section of the DEIR "in the most reader-friendly format." (AR 3:557.) There is nothing inherently wrong with setting forth the environmental setting within each subject area and Petitioners cite no authority to the contrary.

## III. THE EIR ADEQUATELY IDENTIFIED, INVESTIGATED, AND DISCLOSED IMPACTS OF THE CLOSURE OF SAN LEANDRO HOSPITAL

Petitioners argue that the description and analysis of the environmental setting as concerns public services is inadequate. The Court finds that this claim is without merit.

A project that changes or impacts the available public services in local area or the region must include a description of that local area or region in order for the

EIR to provide a useful analysis and a complete disclosure to the public. (See *Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal.App.4th 1109, 1123.)

The County's analysis of the existing environment for purpose of public services was adequate. The DEIR describes the resources of the Sheriff, Emergency Services Dispatch, Fire Department, as well as the private security personnel Eden Medical Center employs. It indicates that the setting includes reliance on the Alameda County Sheriff's Office and Alameda County Fire Department for police and fire services. (AR 4:829.) It describes their emergency response times. (AR 4:830-834.) It also describes the demands placed on the public services by the existing Castro Valley hospital in terms of police and fire protection calls. (*Id.*)

The County filled any gap in the DEIR with respect to public medical services in its Responses to Late Comments. The County sought and considered analysis of the regional demands on public services from Sutter and from County Emergency Medical Services. (AR 6:1379-97.) The supply and demand analysis from Sutter indicated that, while utilization rates might rise at the Replacement Hospital and other area hospitals, there was still a surplus of available beds. (AR 6:1233.) The emergency medical services analysis indicated that a complete loss of San Leandro Hospital would be felt in adjacent hospitals and emergency rooms, but was still within the regional system's ability to absorb. (AR 6:1233.)

Thus the County both examined the local and regional public service resources (emergency and acute care resources) and considered evidence about the impacts on those resources that might stem from changes at the Castro Valley facility. Those reports were addressed in the Responses to Late Comments document issued by the County on June 4, 2009, and were made available at the June 9, 2009 Board of Supervisor's Planning Meeting. (AR 6:1218 et seq.; AR 16:3596.) These document provide substantial evidence in support of the County's baseline analysis.

## IV. CONSIDERATION OF DIRECT AND INDIRECT IMPACTS OF THE POTENTIAL CLOSURE OF SAN LEANDRO HOSPITAL WAS NOT REQUIRED BECAUSE IT IS NOT A PART OF THE "PROJECT"

Petitioner argues that the County should have evaluated the direct and indirect impacts of the closure of San Leandro Hospital as part of its consideration of the EIR. In essence, Petitioner's argument would have required the County to consider San Leandro Hospital and any prospective changes there as part of the "project" for purposes of CEQA review. County and Sutter argue that any changes at the San Leandro facility are not reasonably foreseeable consequences of the Replacement Hospital and, therefore, prospective changes at San Leandro Hospital are not part of the "project."

Under the Guidelines, the term "project" is defined as "the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the

environment ...." (Guidelines, § 15378, subd. (a).) By contrast, "[a] project involving only feasibility or planning studies for possible future actions which the agency, board, or commission has not approved, adopted, or funded does not require the preparation of an EIR ...." (Guidelines, § 15262.) The standard for determining whether future actions must be included in the description and analysis of a project under CEQA is set forth in *Laurel Heights I*:

> an EIR must include an analysis of the environmental effects of future expansion or other action if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects. Absent these two circumstances, the future expansion need not be considered in the EIR for the proposed project.

*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 396.

In *Laurel Heights I*, the project description in the EIR was limited to a plan to move the research facilities of the pharmacy school to part of a building across town. However, the record there revealed evidence that the Regents had a sufficiently definite plan to expand to the rest of the building once the current tenant's lease ended, and had discussed future expansion and definite plans and proposals for the use of the rest of the building at the time the relocation project was being considered. Further, the evidence showed that the future expansion project was linked to the decision to relocate to that building. Because of that, the

Regents were required to consider the expansion plans as part of the project description in the EIR. (*Laurel Heights I, supra,* at 397-98.)

On the other end of the spectrum is *Berkeley Keep Jets Over the Bay Committee v. Board of Port Comm'rs* (2001) 91 Cal.App.4th 1344, 1361 ("*Berkeley Jets*"). There, the project was described as a long-range expansion proposal to increase capacity for air cargo and passenger operations, including changes to the passenger terminals, air cargo terminals, roadway approaches and parking. Petitioners complained that plans for a new and expanded runway were not included in the project description. The court in *Berkeley Jets* rejected the notion that a potential runway expansion needed to be included in the project description, citing a lack of evidence that the Port was committed to the runway changes. (*Id.*) The court stated that:

> [i]n essence, these runway projects existed only as concepts in long-range plans that were subject to constant revision. The record is silent with regard to any meaningful planning, decisionmaking, or any other activity by the Port moving forward with implementation of any such long-range plans. These are simply statements that at some undefined point in the future, the Port might try to undertake these projects. It is, of course, not necessary that plans for future use be final, or that the precise details of the future use be known, before an analysis of environmental impacts are required. However, the mere fact that a lead agency acknowledges that it contemplates such a long-range goal is not, by itself, sufficient to conclude that it is a "reasonably foreseeable consequence of the initial project."

(*Berkeley Jets, supra,* 91 Cal.App.4th 1344 at 1361 -1362 citing *Laurel Heights I, supra*, 47 Cal.3d at p. 398 and *City of Antioch v. City Council* (1986) 187 Cal.App.3d 1325, 1338.) Additionally, in *Berkeley Jets*, there was no evidence

that the runway changes would be needed as a result of the project, or were linked to the plans that were part of the project: the existing runways were more than adequate to accommodate any increase in air traffic that resulted from the project. (*Id.* at 1362.)

This case is more like *Berkeley Jets* than *Laurel Heights I.* Potential future actions, such as shutting down or reducing services at San Leandro Hospital, are not a reasonably foreseeable consequence of building the Replacement Hospital. The Administrative Record has no evidence of a definite commitment to close San Leandro Hospital. Replacing the Castro Valley facility avoids a mandatory closure of the facility, and concomitant loss of the hospital beds there. There is substantial evidence in the Record to conclude that, despite the change in the number of beds at Castro Valley, the effective capacity of the hospital remains roughly the same. Decisions about the Replacement Hospital Project -- the number of beds, the type of services that will be offered -- do not appear to be linked to, driven by, or related in any way to what will or will not be available at San Leandro Hospital.

The only evidence in the record tying the Replacement Hospital Project to San Leandro Hospital is evidence that: (1) the license under which Sutter operates both hospitals is a single license covering both Eden Castro Valley and San Leandro Hospital; and (2) Sutter acquired a lease and purchase option for San Leandro Hospital, as well as an agreement to shift governing authority to itself, in

consideration for Sutter's agreement to construct the Replacement Hospital. The record shows that Sutter and the Eden Township Healthcare District ("the District") entered into a Memorandum of Understanding ("MOU") and Lease that directly linked construction of the Replacement Hospital to granting Sutter a lease of the San Leandro Hospital. The MOU transferred decision-making power over both the Castro Valley facility and San Leandro Hospital from a shared authority arrangement between the District and Sutter to complete control by Sutter. (AR 25:5464-66.) The terms of the lease specified that Sutter would take over operations at San Leandro for two years and would be given the option to purchase San Leandro at the end of the lease. (AR 25:5463-64, 5504.) If Sutter opts not to purchase San Leandro Hospital, control reverts to Eden Township Healthcare District. (AR 6:1231.)

The option to purchase the hospital, and thereby potentially make changes to the hospital, is not the same as a plan to shut the hospital down. The record is silent as to whether any definite plans for a change in services or shutdown of San Leandro Hospital was certain, or even probable. There is no conclusion of definite action or linkage to be drawn from the fact that two hospitals are under a single license. It cannot be determined from the record whether Sutter intended to buy San Leandro Hospital at the end of the lease, or what it planned to do with San Leandro if it did buy it. Even the statements made at the final hearings on the Project do not indicate that Sutter had made any definite plans for San Leandro Hospital. (AR 16:3592, 3681.) And, in the absence of an exercise of its option to

purchase San Leandro, the healthcare district retained control and could effectuate any one of a number of options. While a change in the operations and control of San Leandro Hospital may have been foreseeable at the time of certification of the EIR, the nature of any change, and its potential to alter the environmental impacts of the Replacement Hospital Project, was speculative. The County had no real ability to conduct an analysis of the effects of unknown, speculative changes at San Leandro Hospital.

Moreover, in connection with its Responses to Late Comments, the County obtained a supply and demand analysis from Sutter, as well as opinions from its traffic and air quality experts, examining a variety of scenarios in which services at San Leandro Hospital were changed or reduced. Those reports were made available at the June 9, 2009 Board of Supervisors Planning Meeting. (AR 3596, see AR 6:1379 *et seq.*)

For those reasons, the County had substantial evidence for its conclusion that a change at San Leandro Hospital would have little to no impact on the physical environment.

## V. THE EIR ADEQUATELY CONSIDERED THE CUMULATIVE IMPACTS OF A POTENTIAL CLOSURE OF SAN LEANDRO HOSPITAL

The foregoing determination does not entirely relieve the County of the duty to conduct an environmental review that considers likely future development. An EIR must include a cumulative impacts analysis, discussing impacts resulting

from the project under review when considered in conjunction with the effects of other past, present or "probable future projects" causing related impacts. (Section 21083(b); see *Berkeley Jets, supra*, at 1362-63.) Such a discussion "need not provide as great detail as is provided for the effects attributable to the project itself, [ . . . but must] reflect the severity of the impacts and their likelihood of occurrence." (Guidelines §15130(b).)[2] While the "project" for purposes of CEQA does not include all possible future projects, CEQA does require consideration of

[2] Section 15130 of the Guidelines states, in pertinent part:

(a) An EIR shall discuss cumulative impacts of a project when the project's incremental effect is cumulatively considerable, as defined in section 15065(a)(3). Where a lead agency is examining a project with an incremental effect that is not "cumulatively considerable," a lead agency need not consider that effect significant, but shall briefly describe its basis for concluding that the incremental effect is not cumulatively considerable.

(1) As defined in Section 15355, a cumulative impact consists of an impact which is created as a result of the combination of the project evaluated in the EIR together with other projects causing related impacts. An EIR should not discuss impacts which do not result in part from the project evaluated in the EIR.

(2) When the combined cumulative impact associated with the project's incremental effect and the effects of other projects is not significant, the EIR shall briefly indicate why the cumulative impact is not significant and is not discussed in further detail in the EIR. A lead agency shall identify facts and analysis supporting the lead agency's conclusion that the cumulative impact is less than significant.

(b) The discussion of cumulative impacts shall reflect the severity of the impacts and their likelihood of occurrence, but the discussion need not provide as great detail as is provided for the effects attributable to the project alone. . . . The following elements are necessary to an adequate discussion of significant cumulative impacts: . . .

(A) A list of past, present, and probable future projects producing related or cumulative impacts, including, if necessary, those projects outside the control of the agency . . .

reasonably foreseeable future projects related to the subject project, with regard to whether the future projects are foreseeable consequences of, or would have foreseeable consequences to, the subject project. (See *Berkeley Jets, supra*, at 1362-63.)[3]

Section 15126.2 of the CEQA Guidelines requires analysis of potentially significant impacts on, *inter alia*, public services. Potentially significant impacts on the level of public services and performance standards of public services must be investigated, disclosed and mitigated in an EIR. (CEQA Guidelines, Appendix G, Section XIII.)

Petitioner argues that the anticipated closure of the San Leandro facility in connection with changes to the Castro Valley facilities' capacity will result in loss of public services, as well as cause impacts on air quality and traffic congestion, as patients are forced to seek care in the remaining available facilities. Petitioner argues that emergency vehicles, patients, and visitors will travel greater distances, vehicle miles traveled will increase, traffic congestion and resultant air pollution will increase. Emergency service vehicles would be required to travel farther, resulting in strain on emergency dispatch times. And the shift in service capacity at the Eden facilities would increase strain on other facilities for provision of psychiatric and acute care, particularly for low-income patients.

[3] A foreseeable future project is also required to be included as part of the consideration of a "no-project" alternative, even if it is not required to be included in the project description. (See *Berkeley Jets, supra*, at 1363.) Petitioner has not raised any objection to the description of the project alternatives in the EIR here.

In addition to their own comments, Petitioners cite to recommendations from members of the Alameda County Planning Commission that the question of consolidation of services in the Castro Valley and San Leandro facilities be considered, as well as a recommendation from the Castro Valley Municipal Advisory Council that the County consider the possibility of the closure of San Leandro Hospital and the cumulative impact on the Sutter Hospital so that it may be addressed in the Environmental Impact Report. However, Petitioners contend, no such consideration was given in the EIR, either as a part of the Project's impacts or as a part of the cumulative impacts to which the Project contributes.

A closure of or change in services at San Leandro Hospital would foreseeably have consequences for the Replacement Hospital making analysis of those consequences necessary under CEQA. Here, while no cumulative impacts analysis was done in the DEIR or FEIR documents, a cumulative impacts analysis appears in the Responses to Late Comments. The County considered the possible effects on traffic, air quality and noise. (AR 6:1234-36.) The County concluded, based upon supplemental analysis by the County's experts and by Sutter, that the environmental effects of a change of use at San Leandro Hospital would not significantly contribute to the impacts of the Replacement Project. The County concluded that: (1) there is sufficient capacity for emergency care and acute care in the area; (2) loss of beds at San Leandro would be absorbed by other hospitals in the area; and (3) any increase in demand at the Replacement Hospital would not be an increase above the levels already assumed for purposes of potential

traffic and air quality impacts in the EIR. The EIR does not explicitly analyze the impact on public services, but the County's discussion of the capacity data and evidence of sufficient capacity of emergency and acute care beds constitutes substantial evidence in support of the County's conclusion that a change in service at San Leandro Hospital would not significantly contribute to the environmental effects otherwise caused by the Replacement Hospital Project.

## VI. THE EIR ADEQUATELY DISCLOSED AND EVALUATED IMPACTS ASSOCIATED WITH SOIL AND GROUNDWATER CONTAMINATION

### A. The County Properly Relied on Substantial Evidence Concerning Potential Groundwater Impacts

Petitioner contends that the EIR did not have an adequate description of the environmental setting with respect to site contamination. Petitioners argue that an accurate environmental setting would require the County to do an investigation of soil and groundwater contamination on the site given the past contamination information that was known.

Section 15125 requires that an EIR include a description of the local and regional environment in the vicinity of the project as it exists before the commencement of the project. (Guidelines 15125.)

Petitioner raised concerns, in its comments that diesel and other associated hydrocarbon chemicals may be contaminating groundwater and soil at the Project site. Removal of four underground storage tanks occurred in 1991 and 1994. In 1995, the San Francisco Bay Regional Water Quality Control Board ("the Water

Board") and the Alameda County Department of Environmental Health ("ACDEH") collected groundwater samples. In 1996, ACDEH published a site assessment finding that the residual levels of diesel components were low risk.

Twelve years later, in 2008, the Water Board adopted environmental screening levels (ESLs) for areas with shallow groundwater that are a potential source of drinking water at 83 parts per million ("ppm").

The 1996 site assessment report indicated that levels of 1500 ppm of diesel components had been present in the soil and 2,500 parts per billion ("ppb") in the groundwater at the Project site prior to remediation. After remediation, the measured levels of diesel fuel hydrocarbons (TPH-d) had decreased to 900 ppb or .9 ppm. (AR 17:0406.) The site assessment was unable to analyze soil where excavation was blocked due to proximity to the existing hospital building and the presence of concrete pads under the area where one of the tanks had been removed. The Water Board reports groundwater at the project site at 8 feet below the surface, and identified this groundwater as a potential source of drinking water for Castro Valley. No new groundwater or soil testing was done since the 1996 site assessment by ACDEH. CNA, through its expert, raised concerns about groundwater contamination, as well as risk to workers of exposure during the demolition phase of the Project.

County and Sutter argue that ACDEH and the Water Board closed their investigation at the site in 1996 and stated that no further action was required related to the release of diesel components from the underground tanks. They

contend that, because the 1996 case closure letter indicated that groundwater concentrations of diesel component chemicals had decreased over time, no additional investigation or remediation was required, and the residual contaminants at the site were found "not [to] pose a risk to human health." In the County's Responses to Late Comments on the EIR, the County states that "actual impacts to groundwater have already been investigated under the review of the ACDEH and RWQCB [Water Board], making the ESL for evaluating potential impacts to groundwater irrelevant." (AR 6:1330.) They further quote the closure letter as stating that "[g]roundwater at this site is not used for drinking water."

CNA's expert Matt Hagemann submitted comments urging the County to undertake sampling of the soil to determine whether there was soil contamination at the site. The comments noted that the levels indicated in the case closure level for the site -- 1500 ppm -- are much higher than the current ESL for diesel contaminants (83 ppm) in soil where the groundwater is shallow and is a potential source of drinking water.[4] Hagemann cited to Water Board information indicating that groundwater at the site is a potential source of drinking water for the area, and to the County's own Site Assessment indicating that groundwater at the site is found at a shallow depth. (AR 6:1286-87.)

[4] The 1500 ppm diesel fuel measurement referred to soil that was excavated from the site and disposed off site. (AR 17:4006.) The same document identifies the post-remediation levels of diesel contaminants as decreasing during the remediation period, following the soil excavation and disposal, from 2.5 ppm of diesel contaminate in the water collected in the groundwater monitoring wells to .9 ppm -- a level well below the ESL of 83 ppm.

The County's response to this information was four-fold. First, the County insisted that no new testing was required because testing had been done, and the site had been found not to pose any risk, prior to the 1996 case closure. Second, the new ESLs from the Water Board are not regulatory cleanup standards, but only indicate a potential for adverse risks. Publishing of different standards after 1996 did not invalidate the prior conclusions. Third, the Project would not constitute a change in the land use such that ACDEH needed to be informed (as stated in the 1996 case closure letter) because "the changes do not constitute a significant environmental impact or potential environmental risk." (AR 6:1331.) Finally, mitigation measures identified in the DEIR -- stockpiling potentially contaminated soil and groundwater before dispersal, and implementing a safety contingency plan for workers at the site should any contamination be discovered -- were sufficient to mitigate any risk of significant environmental impacts. (AR 6:1328-1330.) The County relies upon a May 26, 2009 memorandum from Northgate Environmental Management. (AR 25:5444-46.)

It is well established that disagreement among experts does not make an EIR inadequate. (*Laurel Heights I, supra,* 47 Cal.3d 376, 409.) While, scrutiny of the evidence upon which an expert relies is incumbent upon the court under CEQA, the relevant question is whether the expert opinions relied upon by the agency are sufficiently credible to be considered part of the total substantial evidence the agency used in reaching its conclusions. (*Id.* at 419-10.) "A clearly inadequate or unsupported study is entitled to no judicial deference." (*Id.* at n.12.)

"The absence of information in an EIR, or the failure to reflect disagreement among the experts, does not per se constitute a prejudicial abuse of discretion. A prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process." (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712, citing *Laurel Heights I, supra,* 47 Cal.3d 476 at pp. 403-405 and Pub. Resources Code §21005.)

County and Sutter cite to *Cadiz Land Co., Inc. v. Rail Cycle, L.P.* (2000) 83 Cal.App.4th 74, for the proposition that the County was not required to engage in additional testing but could rely on a prior determination that there was no potential harm to human health. In *Cadiz Land Co.*, the court held that an agency was not required to exhaust all suggested testing before certifying an EIR, "particularly since there was expert opinion indicating that further investigation was not necessary." (*Cadiz Land Co., Inc. v. Rail Cycle, L.P.* (2000) 83 Cal.App.4th 74, 102.) In *Cadiz*, the EIR identified a possible earthquake fault trace requiring further investigation. After initial circulation of the EIR, further geologic testing and investigation was done, including trenching. The agency's experts rendered opinions that the land contour was not a fault, did not extend onto the site based on their trenching. Opponents of the project offered expert testimony that the trenching should have been done in a different area to do a proper analysis. The court in *Cadiz* concluded that there was substantial evidence of an adequate investigation before certification of the EIR. While experts had

offered differing opinions, the agency was entitled to rely on its expert so long as it noted the opposition and was responsive to it. (*Id.* at 102.)

By contrast, in *Berkeley Jets*, failure to consider and disclose a more recent standard established by the regulatory agency was determined to be a failure to comply with the good faith disclosure requirements of CEQA. (*Berkeley Keep Jets Over the Bay Committee v. Board of Port Com'rs* (2001) 91 Cal.App.4th 1344, 1367.) There, the lead agency used a 1991 standard to calculate potential jet emissions in the EIR. Comments were submitted by an expert and by the chief of the regulatory agency, encouraging the lead agency to use the updated standard. The lead agency's response was to indicate that the new standard was not finally published and the agency did not need to follow it. "[W]here comments from responsible experts or sister agencies disclose new or conflicting data or opinions that cause concern that the agency may not have fully evaluated the project and its alternatives, these comments may not simply be ignored. There must be good faith, reasoned analysis in response." (*Berkeley Jets, supra,* 91 Cal.App.4th at 1367 quoting *Cleary v. County of Stanislaus* (1981) 118 Cal.App.3d 348, 357 [italics omitted].) The *Berkeley Jets* court held that "[b]y using scientifically outdated information derived from the 1991 profile, we conclude the EIR was not a reasoned and good faith effort to inform decision makers and the public about the increase in TAC emissions that will occur as a consequence of the Airport expansion." *(Id.)*

Unlike the baseline issue, this case is more like *Cadiz* than *Berkeley Jets*. The County could, in good faith, rely on the 1995 data found in the case closure letter and could rely on its expert's opinion of the adequacy of that data. Here, the evidence is that the contamination levels that had been identified at the site had been reduced to an insignificant or non-detectible level by the time the case closure letter issued. (AR 25:5444-5446.) Specific and actual testing was done at the site at that time, and there is no evidence in the record to suggest that there might have been an increase in diesel fuel contamination since the time of that testing. The County expert's opinion was that, given the prior case closure based upon *actual* contamination at the site, an ESL indicating the presence of *potential* contamination had no relevance. (*Id.*; AR 6:1330.) As the County's expert noted, the 2008 ESLs are not regulatory cleanup standards [and]. . . the presence of a chemical at concentrations in excess of an ESL. . . simply indicates that a potential for adverse risk may exist and additional evaluation is warranted." ("Screening for Environmental Concerns at Sites with Contaminated Soil and Groundwater" California Regional Water Quality Control Board (Revised May 2008), cited at AR:1286, n.3.) In the May 26, 2009 memorandum, Northgate advised that, in their professional opinion, the additional evaluation that would be triggered by exceedance of the ESL had been satisfied by the actual testing and monitoring that was completed in 1995. The 1995 investigation of the underground storage tanks showed no post-remediation contaminants in the soil samples collected and a "low

level of diesel fuel (.9 milligrams per liter, or mg/L) in one well, and no hydrocarbons in the other." (AR 25:5444-5446.)

Absent a fair argument that additional contamination has occurred between 1995 and the time of the NOD,[5] the agency was entitled to rely on the substantial evidence in the Northgate opinion that the newer standard for potential contamination did not invalidate a prior determination that actual contamination did not pose an environmental risk and that past hydrocarbon contamination at the site "does not represent a significant environmental concern." (*Id.* at 5446.)

B. Adequate Mitigation of the Risk of Worker Exposure to Contaminated Soil is Supported By Substantial Evidence

Petitioners argue that a "dig first, assess later" plan to protect construction workers from exposure to potentially contaminated soils fails to mitigate adequately the environmental impact of unearthing soil on the site. The Court must defer to the County's determinations regarding the efficacy of a mitigation measure if there is substantial evidence to support it. Here, there is substantial evidence in the record to conclude that the County was justified in its determination that the probability of encountering diesel hydrocarbon soil contamination at a level higher than the ELS relating to worker exposure was remote and did not constitute a significant environmental concern. (AR 25:5447.) Further, there is substantial evidence in the record to support the County's determination that the preparation of a contingency plan to address an encounter

[5] No party has suggested that there was additional diesel contamination on the site since 1995.

with such contaminated soil if it occurs is an adequate mitigation plan. Although a portion of the site could not be excavated or tested due to the existence of a concrete pad, the highest levels assessed prior to the 1994-95 remediation were 1500 ppm. The ESL for direct exposure to soil by the workers on the project is a much higher level of 4200 ppm. The County was entitled to rely on its expert's opinion that there was no significant concern and that the mitigation contingency plan was sufficient.

## VII. THE COUNTY SUFFICIENTLY IDENTIFIED MITIGATION MEASURES FOR IMPACTS ON TRANSPORTATION AND TRAFFIC CIRCULATION

Petitioner argues that the FEIR identified significant traffic impacts for several intersections, including two nearby freeway ramps,[6] as to which the mitigation measures identified in the FEIR are inadequate. The mitigation measures in the FEIR for the subject intersections were to impose "fair share fees" pursuant to the County's "normal procedure for payment of impact fees." Petitioner submitted comments by way of its expert, Tom Brohard, raising concerns about the adequacy of the mitigation measures in the FEIR and

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[6] The intersections are identified in the Petition as:
Castro Valley Boulevard and Strobridge Avenue
Strobridge Avenue and Stanton Avenue
Strobridge Avenue and the I-580 westbound off-ramp
Strobridge Avenue and the I-580 eastbound ramps at Gary Drive
They appear to be the impacts identified in the Draft EIR and Final EIR as Trans-3a, 3c, and 3d. Petitioner's papers are ambiguous as to whether they also challenge the sufficiency of the mitigation measures for the intersection impacts identified as Trans-1 and Trans-3b. The Court includes discussion of the EIR's discussion of mitigation of traffic impacts at these intersections as well.

proposing alternate measures to mitigate the traffic impacts. The alternative measures were rejected by the County.

While Petitioner concedes that fee-based "fair share" programs for contribution to mitigation of a cumulative impact may be adequate under CEQA, such fees must be part of an actual plan for mitigation that the relevant agency is committed to implementing. (See *Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1188.) Petitioner argues that the mitigation measures identified in the FEIR are insufficiently specific or enforceable, and lack any indication that they will actually result in the reduction of any traffic impacts.

To be sufficient under CEQA, this fair-share mitigation fee measure must (1) specify an amount [of fees to be paid]; (2) specify that the [developer of ] the Project will pay [its share of the costs of the improvements]; and (3) make these fees part of a reasonable, enforceable plan or program that is sufficiently tied to the actual mitigation of the traffic impacts at issue." (*Anderson First Coalition, supra*, 130 Cal.App.4th at 1189 citing *Federation of Hillside & Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1260-1261; and Public Resources Code §§ 21081, 21081.6, subds. (a), (b); CEQA Guidelines §15091, subd. (b).)

Here, the County identified mitigation measures for the intersections at Trans-1 and Trans-3b that it determined would mitigate the particular impacts to a level of insignificance. It also identified traffic impacts (Trans-3a, 3c, and 3d) that

it determined were significant and unavoidable, even with identified mitigation measures.

A. Mitigation of Trans-1 Is Sufficiently Identified

As to Trans-1, the FEIR stated that, "[p]rior to the issuance of a building permit for the New [medical office building], the Project Sponsor shall pay its fair share contribution to" [traffic signal projects], that such fair share would be one percent, and that the County will install the signals as part of a current program for installation. (AR 5:1081) These measures comply with the requirements set forth in *Anderson First* because they include a definite plan, a definite amount of contribution, and a definite time for payment of the fees so as to make the requirement enforceable.

B. Mitigation as to Trans-3b is Sufficiently Identified

As to Trans-3b, the FEIR stated that Sutter will pay the County's traffic impact fee "in accordance with normal procedures" as a fair share contribution to restriping and optimizing of traffic signals called for in the FEIR. The FEIR did not indicate that there was a definite plan on the part of the County to undertake the identified re-striping or signal optimization, nor did it indicate the amount of fees that would be required other than to refer to the "normal procedures."

County and Sutter argue that the County's Cumulative Traffic Impact Mitigation Fee Ordinance ("the Ordinance") is plainly what the DEIR and FEIR referred to as "normal procedures." The Ordinance, though not specifically

identified in the DEIR or FEIR, is found in Chapter 15.44 of the Alameda County Code. Chapter 15.44 specifies fee rates and calculations for different types of uses.

The Ordinance is a comprehensive program designed to apportion the cost of mitigation of traffic impacts amongst those developments that generate additional traffic. It creates a mechanism to determine and apportion any development's cumulative traffic impact, and a mechanism to apportion the fees collected. It provides a method and formula to allocate those fees to roadway capital improvements that are designed to mitigate each development's cumulative traffic impact. The Ordinance limits the use of the fees collected such that they may only be used to fund roadway improvements "directly related to the mitigation of the cumulative traffic impact that the new development has placed and will continue to place" on Alameda County roads. (Ordinance at section 15.44.100.)

Thus, the mitigation measures specified for this impact are tied to a fair share of fees, set by the Ordinance, and specifically tied to mitigation of significant traffic impacts.

C. The County's Consideration of Mitigation as to Trans-3a, 3c, and 3d Complies With CEQA

The County also identified mitigation measures for Trans-3a, 3c, and 3d, but determined that those measures were sufficiently uncertain as to make the identified impacts significant and unavoidable. The FEIR stated that Sutter would

be required to pay cumulative traffic impact fees per the County's normal procedures as a fair share for improvements to decrease the traffic impacts identified. As to Trans-3c, the FEIR stated that the County intended to implement the identified signal and restriping changes as part of its Capital Improvements Program. As to Trans-3d, mitigation measures were identified, but no plan to actually carry them out was indicated. And, as to Trans-3a, the County could not identify any feasible mitigation measures and stated an intent to further study the problems. (AR 5:1082.) As to all three, approval of CalTrans was identified as necessary to make any improvements that might affect the operation of ramps onto the interstate highway, so implementation was considered and is uncertain. The County adopted a statement of overriding considerations as to Trans-3a, 3c, and 3d. (AR 2:229-30, 270-74.)

CEQA permits an agency to adopt mitigation measures that may not be completely effective, so long as the uncertainty is acknowledged and the agency adopts a statement of overriding considerations. (Guidelines 15043, 15091.) However, the agency may not adopt a statement of overriding considerations without first imposing all feasible mitigation measures to reduce a project's impacts to less than significant levels. (Guidelines 15126.4, 15091(f), and 15092(b)(2).) "It is improper for lead agencies to defer formulation of possible mitigation programs by simply requiring future studies to see if mitigation may be feasible." (*Fairview Neighbors v. County of Ventura* (1999) 70 Cal.App.4th 238, 244.)

Here, the County adopted mitigation measures of a sufficiently definite character as to Trans-3c and 3d to satisfy CEQA. As stated above, the requirement that the applicant pay cumulative traffic impact fees is sufficiently tied to the impacts here as to constitute reasonable mitigation. Further, the County identified the uncertainty of the effectiveness of the mitigation measures and adopted a statement of overriding considerations. No more is required.

As to Trans-3a, while it is true that the County deferred further study of mitigation measures, it is not the case that the County did not consider any mitigation measures at all in connection with the EIR. The intersection identified in Trans-3a would have operated at LOS F even under a No Project alternative. (AR 3:627.) No feasible mitigation measures could be identified by the County's experts for the cumulative impact. (AR 3:628.) The County considered the mitigation measures recommended by Petitioner's expert, and concluded that they were not practical solutions and would not address the cumulative traffic issue. (AR 6:1320.) Having considered the alternatives, committed to further study, and determined that cumulative impact fees would be paid by the applicant according to the Ordinance, the County properly proceeded before adopting its Statement of Overriding Considerations.

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## CONCLUSION

For the foregoing reasons, the Petition is DENIED. Respondent shall submit a proposed form of judgment for entry by the Court.

IT IS SO ORDERED.

DATED: June 28, 2010

Frank Roesch
Judge of the Superior Court

## CLERK'S DECLARATION OF MAILING

I certify that I am not a party to this cause and that on the date stated below I caused a true copy of the foregoing ORDER DENYING PETITION FOR WRIT OF MANDATE to be mailed first class, postage pre paid, in a sealed envelope to the persons hereto, addressed as follows:

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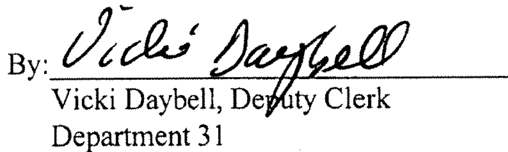
I declare under penalty of perjury that the same is true and correct.
Executed on June 29, 2010

By: 
Vicki Daybell, Deputy Clerk
Department 31