C090840 (related Case No. C091012)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

WE ADVOCATE THOROUGH ENVIRONMENTAL REVIEW, INC.; and WINNEMEM WINTU TRIBE
Plaintiffs/Appellants
v.

COUNTY OF SISKIYOU; and SISKIYOU COUNTY BOARD OF SUPERVISORS,
Defendants/Respondents

CRYSTAL GEYSER WATER COMPANY, INC.
Real Party in Interest/Respondent

APPELLATE CASE NO. C090840
Siskiyou County Superior Court Case No. SCCV-CVPT-2018-41
Honorable Karen Dixon

APPELLANTS' REPLY BRIEF

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INTRODUCTION

Respondents' and Real Party in Interest's Joint Brief ("RJB") carries on the same assertions that undercut the sufficiency of the Environmental Impact Report ("EIR") challenged by ("WATER") and the Winnemem Wintu Tribe ("Tribe"). In a revealing portion of the Introduction to the Joint Brief, Respondents and Real Party in Interest ("Respondents") assert that Appellants "cherry pick" data and make speculative and conclusory statements. RJB, p. 16. Then, in a stunning duplication of the way the Project's potential impacts were dismissed in the EIR, Respondents argue that "Crystal Geyser anticipates its groundwater pumping will be consistent with the pumping conducted by the previous Plant operator, resulting in no additional impact." *Id.* The only assurances that pumping will be consistent with previous operations was a biased "opinion" by the applicant (Appellants' Opening Brief ["AOB"], p. 30, and AR 7954-7955 and 9025-9026)[1], and the record is rife with evidence that neighboring wells were *in fact* impacted by previous operations. AOB, p. 18, and AR 1188, 1260, 1356, 27159, 32690, and 39133.

[1] References to the administrative record of proceedings are to "AR" and the page number.

In a footnote, Respondents claim that groundwater in California is not subject to regulation by a County. RJB, p. 16, fn. 2. This broad statement of "the law" surrounding groundwater regulation in California is wrong. This misstatement of the law is at the heart of this case and may not be relegated to one utterly false footnote. Applicable California groundwater law is described accurately in Argument Section I, below. The County has *chosen* not to regulate the extraction of groundwater for water bottling.

CLARIFICATION OF FACTS

Respondents assert that the Project will involve the operation of two bottling lines, and if Crystal Geyser Water Company, Inc. ("Crystal Geyser") wishes to build a third bottling line, it would "require expansion of the existing footprint of the Plant and additional discretionary approvals along with the associated environmental analysis required for such expansion. RJB, p. 18. The claim that "environmental analysis" would be done is misleading. The County insists that it has no authority over the extraction and bottling activities. *See* AR 1624, 1086, 55546, and 55555. If the Plant is expanded in the future, then the County would issue building permits (Crystal Geyser argues these would be ministerial [AR 1086], and the review would

include physical changes made to the structure and the applicable building codes. There is nothing in the record to support a claim that impacts from the increased groundwater extraction resulting from a third bottling line would be evaluated by the County in any way.

Respondents go on to argue that Appellants did not "fairly summarize the underlying facts of the case." RJB, pp. 26-27. The argument is presented without any explanation of what was allegedly left out of the Opening Brief but argues that there was "cherry picking" and "distortion." RJB, p. 26.

These vague accusations are without merit, and the case relied upon by Respondents is not on point. The *Silva* case involved a summary judgment being reviewed by the appellate court. "[W]hen a summary judgment is challenged, a reviewing court must examine the facts presented by the parties to determine whether summary judgment or summary adjudication was warranted. By failing to describe all of the evidence proffered in the proceedings, Silva did not satisfy her appellate burden." *Silva v. See's Candy Shops, Inc.* (2016) 7 Cal.App.5th 235, 260, *disapproved of by Donohue v. AMN Services, LLC* (2021) 11 Cal.5th 58. The circumstances of a summary judgment motion are not present here.

The AOB included a lengthy description of the environmental review, evidence relied upon by the County, comments and responses to comments, and all other relevant material.

ARGUMENT

I. Applicable California groundwater law

In the Introduction to the Respondents' brief, it is asserted that groundwater in California is not subject to regulation by a County. RJB, p. 16, fn. 2.

The County of Siskiyou has *chosen* not to place regulations on water bottlers such as Crystal Geyser and the parcel where the Project is proposed but has full legal authority to regulate the extraction and use of groundwater for use on and off the overlying parcels. Siskiyou County *does* regulate groundwater in certain situations, with Chapter 13 of the County Code of Ordinances entitled "Groundwater Management."

California courts have recognized and upheld the ability of counties, through their police powers, to regulate groundwater extraction and transfer from basins within their boundaries. *See, e.g., Baldwin et al. v. Tehama County* (1994) 31 Cal.App.4th 166, 173-174.

The case relied upon by Respondents, *City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 278, does not hold that "groundwater

pumping and use is not regulated by the County." RJB, p. 16, fn. 2. That case was a groundwater basin adjudication where the court determined relative rights and imposed a physical solution that had been stipulated by the parties. *Id.* at p. 276.

The reason the County was unable to prepare an adequate EIR for the Project is because the County refuses to regulate groundwater extractions by water bottlers, and this false statement that the County has no legal authority over groundwater compounds the errors of the EIR and further confuses the public and the decision makers. Either the County has not recognized that it has authority over groundwater, or it is truly ignorant of applicable law as footnote 2 of the Respondents' brief would suggest. In either case, many of the flaws in the EIR flow directly from this error.

II. The Project Description omits crucial facts.

The EIR described the bottling activities, including the amount of water that would be extracted each year by Crystal Geyser. AR 164, 1631, 1633, 1831, 7954-7955 and 9025-9026. County, however, has repeatedly stated that it has no authority over the amount of water Crystal Geyser extracts from DEX 6, amount bottled, or otherwise used at the Project site or elsewhere. AR 1624, 55546, 55555.

Respondents argue that the Project Description is adequate based upon claims that the estimates of use provided by Crystal Geyser are "substantial evidence". RJB, p. 32.

Respondents also argue that the County was not required to "speculate" about how much water Crystal Geyser may extract in the future. RJB, pp. 31-32. The Project includes unlimited groundwater extraction. Period. There is no limit to what Crystal Geyser may extract, and to redirect attention away from this fact, Respondents argue at length that an "increase" over what the Project applicant says it plans to extract at the outset is "speculative" and not "foreseeable." RJB, pp. 31-32. Nothing in the Project description describes an approved amount of groundwater extraction that one might "speculate" would be exceeded in the future due to expansion. There is no "approved limit," because there is no limit at all.

Respondents cite to *Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437, 1448 arguing that analyzing an "increase" in groundwater extraction at the bottling facility is similar to speculating how many homeowners will build a second unit in the future. RJB, p. 34. The *Round Valley* case is inapposite. In that case, the project approval was for a 27-lot subdivision for single-family

residences. Opponents argued that the EIR should be required to analyze twice that number of units because homeowners could possibly build a second unit in the future. *Id.* at 1443. The court found the question of whether homeowners would choose to build a second unit to be speculative. *Id*. at 1448-49.

In the present case, there is no limit on groundwater extraction, and the EIR analysis is based only on the estimates of production levels provided by Crystal Geyser. Richard Weklych, Executive Vice President of Manufacturing for Crystal Geyser, provided estimates of the production levels that could be anticipated given certain equipment (AR 7954-7955 and 9025-9026), but he did not make a commitment to operate at or below those levels. Unlike *Save Round Valley,* there is no approved limit that could be "expanded" in the future. The approval in this case includes an open-ended authorization to pump unlimited amounts of groundwater. One need not speculate.

This case is more analogous to *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645. In that case, the flawed EIR for a mining project analyzed the level of production the project applicant assured the County would be "average" annual production, *instead* of analyzing the full level of production allowed by

the project approval. *Id.* at 655. It is not a question of whether there will be a foreseeable expansion of operations by Crystal Geyser in the future, the question is why the EIR did not analyze the unlimited groundwater extraction that is allowed. One practice in the water bottling industry is to truck water from one facility to another for bottling (see AR 1082, 19866, and19869), and there is nothing in the approval by the County that would prevent Crystal Geyser from doing just that at any time. For example, Crystal Geyser in Mt. Shasta could truck water extracted from Mt. Shasta to production lines at distant bottling facilities, without any legal limit or regulation. It is not a question of whether or not this is foreseeable, it is part of the Project, and must be analyzed.

California courts have rejected attempts by project applicants and agencies to analyze something less than what is authorized by claiming that the applicant will stick to a certain level of activity that falls below the full level of authorized use. *See San Joaquin Raptor Rescue Center, supra,* 149 Cal.App.4th at 655-656. The record in this matter contains a confusing combination of assurances by Crystal Geyser and County that groundwater extraction would be approximately 129 to 243 acre-feet per year (AR 164, 1633 and 1831), and other assertions by County that it

has no authority to limit Crystal Geyser's groundwater extraction. AR 1624, see 55546 & 55555. Because of these conflicting signals sent to the public and the decisionmakers about the nature and scope of the activity being proposed, the Project Description was fundamentally inadequate and misleading. *San Joaquin Raptor Rescue Center, supra,* 149 Cal.App.4th at 655-656.

The County failed to fully disclose the fact that groundwater extraction is unlimited and hid that fact by inserting extraction and production figures that were implied limits, thereby confusing the public and failing to proceed according to law.

III. The EIR includes impermissibly narrow project objectives.

As set forth in detail in the AOB, because of the narrow set of project objectives, the EIR did not evaluate feasible alternatives as required by CEQA. PRC §§ 21002, 21002.1(b); and AOB, pp. 35-40.)

Respondents defend the narrow project objectives and failure to analyze a reasonable range of alternatives by reiterating the problem: the County created a list of objectives that could only be satisfied by development of one specific location for the business purposes of one company, Crystal Geyser. RJB, pp. 34-35. The Respondents' brief essentially argues that is precisely what the County did, but it was based

on market research, and that this was proper because there was some market "evidence" to support the narrow objectives designed to result in only one feasible project alternative. RJB, pp. 35. Respondents' argument is essentially that the law does not apply when there is a market objective. This is incorrect.

The Project objectives were essentially divided into the County's objectives and Crystal Geyser's objectives. RJB, p. 35-36. One set focused on Crystal Geyser's business interests, and "[t]hese objectives were identified to ensure that Crystal Geyser is able to participate in and take advantage of the current business opportunities in the bottled water and beverage market." *Id.* The other set of objectives included taking advantage of the existing structure on the property, and the "availability and high quality of existing spring water on the property" and providing tax and employment benefits to the County. RJB, p. 36. These objectives focused on developing the existing Plant into a beverage bottling facility. Between the two sets of objectives, there was no feasible alternative that could be evaluated. One set of objectives would go completely unmet so long as Crystal Geyser did not gain a business advantage, and the other set of objectives would go unmet unless the

Project site was approved for beverage bottling activities. No feasible alternatives exist, and so none could be analyzed.

Respondents do not disagree with the assertion that the Crystal Geyser beverage bottling Project was the only feasible alternative, but instead argue that there is nothing wrong with having only one alternative that "offer[s] feasible solutions to the Project's goals." RJB, p. 36. This is a distinction without a difference.

The County's objectives were to take advantage of the project site for "tax and employment" benefits, and the Crystal Geyser objectives were to maximize profits. Respondents site to no case law that supports their novel argument that there is no need to analyze feasible alternatives when there is one that meets all of the goals of the lead agency and the applicant. RJB, p. 36.

Respondents cite case law that does not support their arguments. RJB, p. 36, citing *Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 715 ("*Sequoyah Hills*") and *California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 1000-1001 ("*CNPS*").

In *Sequoyah Hills* the court did not analyze the issue of whether the lead agency had included a reasonable range of alternatives. Rather, the

issue was whether the agency abused its discretion in rejecting a lower-density alternative to the project. *Sequoyah Hills, supra,* 23 Cal.App.4th at 715. In that case, there was evidence in the record that the reduced-density alternative would not be feasible, and CEQA does not require extended consideration of project alternatives that are not "feasible." *Id.* This decision does not support Respondents' claim that it need not evaluate a reasonable range of feasible alternatives.

The decision in the *CNPS* case did evaluate the issue of a reasonable range of alternatives, and the court provided the following as part of its analysis:

> To be legally sufficient, the consideration of project alternatives in an EIR must permit informed agency decision-making and informed public participation. (*Laurel Heights, supra,* 47 Cal.3d at pp. 404–405, 253 Cal.Rptr. 426, 764 P.2d 278; Guidelines, § 15126.6, subds. (a), (f).) What CEQA requires is "enough of a variation to allow informed decision-making." (*Mann v. Community Redevelopment Agency* (1991) 233 Cal.App.3d 1143, 1151, 285 Cal.Rptr. 9.) We judge the range of project alternatives in the EIR against "a rule of reason." (*Laurel Heights* at p. 407, 253 Cal.Rptr. 426, 764 P.2d 278.) The selection will be upheld, unless the challenger demonstrates "that the alternatives are manifestly unreasonable and that they do not contribute to a reasonable range of alternatives." (*Federation of Hillside and Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1265, 100 Cal.Rptr.2d 301).) *CNPS, supra,* 177 Cal.App.4th at 988.

In the present case, Respondents have not attempted to defend the range of alternatives evaluated in the EIR but have instead insisted that there need not be any real analysis of other alternatives if there is only one that would meet the needs of the lead agency and the applicant. RJB, p. 36. As discussed in detail in the AOB, there were no alternatives to the Project that would have been feasible and/or achieved even a few of the "objectives" created by the County. *See* AOB, pp. 36-38.

The analysis in the *CNPS* case cited to by Respondents addresses the issue of whether a lead agency may reject an alternative because it is not feasible or because of overriding considerations. *CNPS, supra,* 177 Cal.App.4th at 1000-1001. The court held that a lead agency does have the ability to reject alternatives on policy grounds or because of overriding considerations. *Id.* This finding does not change the requirement that the EIR must contain a reasonable range of feasible alternatives. In fact, the same decision includes the quoted language above describing what constitutes such a reasonable range. *CNPS, supra,* 177 Cal.App.4th at 988.

The EIR in this case did not contain a reasonable range of alternatives. As set forth in the AOB (and not responded to in the RJB),

the EIR mentioned aquaponics (use of the site to grow fish and plants together), and use of the site for residential purposes, noting that these were rejected out of hand. AR 1982-1984. The EIR evaluated just three alternatives, and when compared with the Project Objectives, they did not contribute to the range. AR 1985-1987.

The three alternatives evaluated were: (1) No Project; (2) use of the site as a trucking terminal/distribution facility; and (3) a "reduced intensity" alternative that would have the operator using one bottling line rather than the projected two. AR 1985-1987. Thus, there were two project alternatives, the trucking terminal that failed to meet the vast majority of the Project Objectives and would also result in terrible traffic and air quality impacts (thus not "avoiding" project impacts), and the reduced intensity alternative that was meaningless in any event because the County has been adamant that it has no control over how much water Crystal Geyser extracts and bottles. Accordingly, there was no reasonable range of alternatives.

IV. The EIR's impacts analysis is insufficient.

A. Impacts to aesthetics.

With respect to aesthetics, Respondents essentially argue that personal observations may be ignored, citing to *Banker's Hill, Hillcrest,*

Park West Community Preservation Group v. City of San Diego (2006) 139 Cal.App.4th 249, 274-275 ("*Banker's Hill*"). RJB, p. 38. The decision in *Banker's Hill* states that "although local residents may testify as to their *observations* regarding existing traffic conditions, 'in the absence of specific factual foundation in the record, dire predictions by nonexperts *regarding the consequences of a project* do not constitute substantial evidence.'" *Banker's Hill, supra,* at 274 (emphasis in original), citing *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1417.

In the present case, *specific evidence in the record* shows that the Plant has a significant aesthetic impact in the area. The County itself found the Bottling Facility has a negative aesthetic impact when the County found that it required mitigation, as set forth in the 1998 Mitigation Agreement. AR 1429, 32198.

Respondents did not address the issues surrounding the 1998 Mitigation Agreement raised in the AOB. *See* AOB, pp. 43-44. The County included compliance with the 1998 Mitigation Agreement as a condition on the CUP for the caretaker's residence, but in Responses to comments on the DEIR, the County claimed that Crystal Geyser would

not be held to comply with the agreement. AR 7-17 at 16; and *cf.* AR 7452.

B. Impacts to Air quality.

Respondents do not explain why the County's air quality experts tweaked the standard fleet mix in the analysis for the DEIR, causing certain "criteria pollutant" emissions to be reported in the DEIR at about half of what the FEIR finally revealed. Respondents also do not explain why the new CalEEMod analysis prepared for the FEIR continued to modify the standard fleet mix to minimize emissions estimates. The record is rife with evidence that the air quality impacts analysis was so utterly flawed that it cannot be relied upon, and yet Respondents argue that the County is entitled to choose the analytical methodology and rely upon its experts. RJB, pp. 45-46. An agency may choose a methodology supported by substantial evidence but may not choose a methodology for the purpose of justifying a no-significance finding. *Center for Biological Diversity v. Dep't of Fish & Wildlife* (2015) 62 Cal.4th 204, 228, *as modified on denial of rehearing* (Feb. 17, 2016).

There is no explanation for the manipulation of the fleet mix as required by the CalEEMod estimation model used in the EIR, nor for the refusal to use established analytical procedures to review the

analysis of the health risks other than that the County wanted to come to certain conclusions. As described in the AOB, the flaws were many in the first analysis, and they were carried over into the second. AOB, pp. 45-50.

Respondents make the standard arguments that the lead agency is entitled to believe its own experts and to choose its methodology, but those arguments do not hold up when the evidence is so clear that the analysis was done to produce a certain result.

With respect to the FEIR abandoning the threshold of significance for mobile sources that had been used in the DEIR, Respondents argue that it was all just a mistake. RJB, pp. 46-47. The County admits that the revised modeling reveals significantly increased emissions from mobile sources but for the FEIR declines to use the threshold of significance that was applied to these emissions *in the Draft EIR*, claiming that numerical thresholds have not been established for mobile emissions. AR 1177 and 1697-1698. Respondents claim that a "qualitative" threshold was applied. RJB, p. 46. The ROB does not describe the subjective, qualitative threshold for air emissions that it claims to have been used by the County. The FEIR does not set forth a

qualitative threshold, in fact, it fails to identify *any* threshold at all for mobile sources.

A lead agency may not analyze an impact without using a threshold of significance, and the fact that another agency has not established a threshold does not excuse the County from this requirement. *Lotus v. Dep't of Transportation* (2014) 223 Cal.App.4th 645, 655-656. The County's actions to avoid making a finding of significance violated CEQA.

With respect to the Health Risk Assessment ("HRA"), Respondents provide a laundry list of excuses for not re-running the HRA (RJB, pp. 47-49) despite receipt of expert comments explaining that the expanded use of heavy diesel truck numbers found in the FEIR will lead to exceedances of the ten-in-a-million cancer risk significance threshold. AR 33119-33132. The fact remains that the new air quality analysis prepared for the FEIR showed a 68% increase in exhaust $PM_{2.5}$ emissions, and Respondents continue to claim that shocking increase noted by the County's own experts does not mean that the health risks near the plant have changed one bit. *Id.* and AR 32212-32213.

Respondents argue that "[f]or this Project the EIR utilized Project-specific data in the CalEEMod to improve the degree of accuracy of the Project's emissions estimates." RJB, p. 45.

However, data which is used to run the health risk model, AERMOD, from the CalEEMod output found in the DEIR was compared to precisely the same data in the FEIR, revealing the 68% increase in mobile PM 2.5 exhaust. *See* AR 29070 [CalEEMod Output DEIR] and AR 4612 [CalEEMod Output FEIR]. Respondents claim the FEIR data is more accurate and includes 50 more truck trips, citing "the addition of propane fuel delivery trips" and "the 24 medium and 23 light duty truck trips associated with local deliveries". RJB, pp. 45 and 49.

Respondents argue that a 68% increase in PM2.5, known by the State of California to be quite harmful to personal health, to be insignificant despite the fact that the Maximum Individual Cancer Risk ("MICR") was already extremely close to the threshold of significance in the DEIR. Both the DEIR and the HRA used 100 HHD (heavy-heavy-duty) truck trips as a mobile emissions calculation basis. The FEIR, however, showed an increase to 150 daily truck trips with 103 HHD truck trips, and 47 more medium and heavy-duty truck trips along with the attendant 68% increase in PM 2.5.

Considering this tremendous increase in estimate toxic mobile emissions, the County has never provided a substantive explanation for failing to re-run the AERMOD health risk model.

This matter is not "a battle of the experts." Appellants have pointed out data that was published in the DEIR compared to the same data in the FEIR (CalEEMod Output attachments) and questioned why the HRA was not revised to reflect the very large variance in this pertinent data between the two documents arising from the increase in truck trips. Had a revised HRA used the new data, it might well have found the same significant health risks as Andrew Gray. AR 33119-33132. Respondents also argue that "If the HRA were re-analyzed with more current 2018 emissions factors,"the resulting diesel emissions would be at least 30% lower". RJB, p. 48. This argument is not well taken because the DEIR's HRA actually relied upon the more conservative, less-polluting emission factors established in the CA Air Resources Board's EMFAC model for the incrementally cleaner heavy-duty trucks operating in model-year 2020. The HRA states as follows: "Emissions from heavy duty trucks were calculated using CARB's Emission Factor (EMFAC2014) Web Database….The emission rate was determined for an initial operating year of 2020". AR 04741.

The County's expert acknowledged that it would take one day to re-run the HRA. AR 35812-13. A single day to ensure the safety of the citizens near the Plant would be worth the time, and it certainly was required by CEQA and common decency.

C. Greenhouse gas emissions

Respondents argue that the FEIR's revelation that the five-fold increase in GHG emissions was adequately addressed by increasing the amount of offset mitigation required. RJB, p. 55. Offset credits address global GHG emissions, but the five-fold increase also indicates what will be endured by the local citizens: five times what was disclosed in the DEIR, and yet Respondents now argue that no matter how great the GHG emissions, adding offset credit requirements dispenses with the problem. The County should have recirculated at least the air quality portion of the DEIR to disclose the true GHG emission levels and considered potential mitigation measures that would not just reduce the global impact but reduce the impact on local citizens as well. PRC § 21092.1; and Guidelines § 15088.5(a)(4).

With respect to the GHG emissions associated with making bottles on site out of plastic bottle "preforms," Respondents argue that these emissions need not be considered for two reasons: (1) there will be no

preforms made on site (they will be made elsewhere); and (2) that there is no basis for requiring a "life-cycle" analysis. RJB, p. 53. Respondents cite to *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 175 ("*Save the Plastic Bag*"), claiming that the increased use of preforms is similar to the increased use of paper bags in that case, and is "an indirect and uncertain consequence." RJB, p. 53.

In *Save the Plastic Bag,* the court addressed the question of whether a City banning the use of plastic bags must analyze the potential for increased demand for paper bags, and the impacts associated with paper bag use elsewhere. The court found that it impossible to predict whether there would be in increase in demand for paper bags, and for accurately estimating the impacts of paper bag manufacturing outside of the City's geographical boundaries. *Save the Plastic Bag, supra,* 52 Cal.4th at 173-174. This is distinguishable from the case at hand.

Crystal Geyser provided estimates to the County of the number of bottles it will use each year (AR 1631-32 and 1633), and so the number of preforms can be estimated. The amount of $C0_2$ generated by the production of preforms is also known. *See* AR 667 and 692. Lastly, California courts recognize that GHG emissions are a global problem

made up of cumulative impacts, and the fact that they "are not contained in the local area of their emission means that the impacts to be evaluated are also global rather than local." *Center for Biological Diversity, supra,* 62 Cal.4th at 219-220. The County may not avoid the analysis of the known cumulative, global impacts associated with the identifiable number of preforms the Project will consume.

D. Noise impacts.

Respondents argue that substantial evidence supports the decision to use outdated noise standards because the County has discretion with respect to methodology. RJB, pp. 57-59. While a lead agency has discretion with respect to choose its analytical methodology, it may not rely on an inapplicable method to justify a no-significance finding. *Center for Biological Diversity, supra,* 62 Cal.4th at 228. The noise analysis in the DEIR and the revised analysis in the FEIR show a concerted effort to avoid a finding of significance. Noise impacts to neighbors in the quiet community near the Bottling Facility will impact their well-being, and the County must engage in an objective analysis that allows for the development of mitigation measures to protect these citizens. Respondents continue to claim that a 1-4 dB exceedance of noise standards is minor. RJB, p. 59; and AR 37345-37346. Even a 1

dB increase in 24-hour levels represents a potentially significant impact to local sensitive receptors that may require mitigation. AR 33262.

Respondents urge the Court to accept the notion that the area around the Bottling Facility is made up of "industrial uses, Interstate 5, and nearby train tracks." RJB, p. 60. In fact, the Bottling Facility is in the midst of a quiet neighborhood in a relatively serene mountain setting, as many comments noted. *See* AR 385, 393, 453, 493, 604, 652, and 656. The noise analysis is inadequate. Case law requires the EIR to provide enough information so readers can determine whether project-related noise would "merely inconvenience" people or "damn them." *Berkeley Keep Jets Over the Bay Comm. v. Bd. of Port Commissioners* (2001) 91 Cal.App.4th 1344, 1371, 1382; see *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1123. The County failed to meet the standard set forth in *Berkeley Jets*.

E. Impacts to hydrology.

Respondents argue that in 2017, the County "studied" the Project's impacts to neighboring wells. RJB, pp. 60-61. In fact, there has never been a study that directly evaluates the potential impacts on neighboring wells. Respondents rely upon Appendices P and W to the EIR, both prepared by the same consultant in 2016 and 2017, respectively. RJB, p. 60. Respondents argue that the County

was entitled to rely upon these expert reports and could ignore conflicting opinions from other experts. *Id.* The trouble with the reports is that, despite Respondents' arguments to the contrary, they did not actually evaluate the potential for impacts to neighboring wells.

The 2017 study (Appendix W) measures the effect of three days of rapid pumping (at 247 gal/min) at the Domestic Well ("DM") upon a number of other Crystal Geyser "observation" wells within a radius of 2200 feet from DM. AR 7371-7404. The main problem is the same as with all previous hydrology tests: neither the pumped well nor the observation wells are the same as or even close to the wells of interest, which are DEX-6 (the Crystal Geyser production well) and residential wells to the east. AR 7391. Moreover, the 2017 test was very short-term (3-day pumping) whereas the effects of concern would develop from almost continuous long-term pumping for months or years. There is no evidence that the theories considered in Appendix W are well founded or relevant for the local geology. In addition, in the DEIR, DEX3A showed a lowered groundwater level from DEX6 pumping. AR 00723. The 2017 test did not include this monitoring well even though the County was aware of the data and the DEIR comments. This analysis may have been avoided because it would likely would have changed the outcome.

The hydrogeology underlying the Southwest aspect of Mt. Shasta volcano is complex and poorly understood. AR 34578. "The hydrogeology is particularly complex leading to significant uncertainty and raising concern that neighboring domestic wells will be impacted." AR 429-436 at 430-431.

What is known about the aquifer is insufficient to support the conclusions made by the County. AR 1061. None of the necessary factors are addressed in Appendix W or anywhere else, because the wrong questions are asked. AR 1060-1065

Richard Slade states although the terms Upper Aquifer System and Lower Aquifer are used locally, "this system has not been designated as such in the available scientific reports and/or literature." AR 04830.

No hydrological studies have ever indicated that the subjects of the 2017 study (the Domestic Well and the various Crystal Geyser-property wells, Appendix W) do or do not share the same aquifer as the residential wells. Residential wells were not considered in the study. One would think that showing this "aquifer sharing" would be a prerequisite for relevant interpretation of measurements described in the 2017 study. The 2017 measurements considered neither DEX-6 nor residential wells, the *only two relevant sites*. Because of the universally

acknowledged nature of the underground channels as a possibly discontinuous complex network in fractured andesite and lava tubes, this question of connectivity or lack thereof cannot be ignored just because it is unknown. AR 429-436, 1060-1065, 4847 and 34578. Yet the 2017 study completely ignores this fundamental question. The 2017 study contains no scientific justification for using any putative DM-to-Crystal Geyser wells connection results to make any conclusions regarding the DEX-6-to-residential well connection. *See* AR 07375.

The 2017 study looked only at the effect of 3 days of pumping, done once in just one season of one year. AR 7376. The community, on the other hand, is concerned about the effect of continuous pumping over many years, a time scale *hundreds or thousands of times* longer than what was tested.

Appendix W says the 3-day pumping period was *deemed* by the consultant to be of sufficient duration to monitor for possible measurable water level drawdown in the nearby water level observation wells, and to check for the possible presence of nearby boundary conditions." AR 7378, emphasis added. Appendix W provides no factual basis for "deeming" 3 days to be sufficient. In fact, the overly brief 3-day period precluded a serious examination of 4 out of 7 of the

wells. AR 7385. The 2017 study (very short-term) is useless in predicting whether the aquifer will be depleted (or not) over the long-term. Whether these extrapolations are actually accurate or even relevant to the real world needs experimental verification at any given set of sites, a project that Crystal Geyser never investigated. Short-term experiments are quicker and cheaper and underestimate worrisome effects and yet may still serve to soothe the public and the decision makers.

A conclusion of the 2017 study was that vigorous pumping at DM had minimal effects on other Crystal Geyser wells nearby, and given some extrapolation in space and time, maybe vigorous pumping at DM would have little effect on a residential well to the northeast. AR 7387. Ironically, the actual well, that would be used for bottled water and should have been pump tested is Dex6 that is approximately a ½ mile away from the DM well used in the study. There is no explanation for why it was determined not to use the well that creates the impact, but instead to use a well that is down gradient. Appendix W does not explicitly extend this conclusion to the expected effect of pumping at DEX-6 upon residential wells in general, but the implication is that there is *little or no* impact. *cf.* AR 3299; and 4867. That is a conclusion

desired by Crystal Geyser now, in order to allay community concerns. AR 12559-12597 (SECOR report attempting to prove *connection* between DEX-6 and Big Springs).

As an alternative to a valid scientific argument, Respondents argue that use of the PUMPIT program was peer reviewed by Geosyntec. RJB, p. 63. Peer review, however, must be independent. It is not to be done by "peers" who themselves were involved in the project. Crystal Geyser paid Geosyntec to produce hydrological reports in 2012 and 2014. See AR 751, 770, 1418, and 1423. Flaws in the Geosyntec Report were extensively discussed in comments on the DEIR. AR 34580; AR 34980 and 33079. Geosyntec is not an unbiased independent party.

The evidence in the record shows that the County never studied the question of whether or not industrial pumping at DEX-6 would impact neighboring wells. The studies in Appendix P and W address the wrong wells at the wrong time of year and for the wrong testing period. There is no substantial evidence to support the County's conclusion of no significant impact to the groundwater aquifer.

Special possible impacts during times of extreme drought (such as the present) are not considered in the FEIR, although these questions

have become pressing in the last several years. Questions such as: (a) How much water can be extracted before residential wells are impacted, given a reduction of rainfall over many years? (b) How much will the percolation of groundwater towards the surface be reduced - percolation that maintains the health of local forests - thereby leading to parching, drying, and death of trees and making them even more susceptible to wildfires? (c) How much will unregulated and possibly large extraction for export affect the local availability of water for fire-fighting? A serious and relevant EIR cannot ignore the combination of drought and industrial extraction. But the present EIR does not even raise the questions. Appendix P mentions historical dry and wet periods, and does use the word "drought," but does not project the consequences of a prolonged dry period**,** aside from asserting that "the ongoing drought is having some effect" on water levels in DEX-6 and DEX-1. AR 4867.

V. The Project violates mandatory General Plan thresholds.

In this case, approval of the Project violates the mandate against approving a project that is inconsistent with a mandatory general plan policy and violates CEQA's requirement that general plan inconsistencies be addressed in the EIR.

As an initial matter, the County did not make General Plan consistency findings relating to the noise impacts that will result from the plant operations. The County did make findings regarding the "caretaker's residence" and its consistency with General Plan policies. AR 7-11. Respondents now argue that the County made "consistency findings" because it "clearly noted that the proposed Plant operations are consistent with the General Plan as a permitted use under the existing zoning for the Plant property." RJB, p. 67, citing AR 1843 and 1845. The reference to the record is to a section of the EIR discussing the zoning designations of the County and the City on the Project site. These are not consistency "findings."

It is not the caretaker's residence that will result in violation of the mandatory noise threshold in the General Plan, it is the operation of the bottling facility. Respondents continue to argue that the exceedance of the noise standard is "not significant." RJB, p. 59. The County's expert acknowledged that City and County General Plan noise standards would be exceeded by the Project (*see* AR 7155 and as revised, AR 1881-82), and under land use planning laws in California, it is not a question of whether the County deems the exceedance "significant," it is the exceedance of the mandatory standard that is prohibited. *Endangered*

Habitats League, Inc. v. County of Orange (2005) 131 Cal.App.4th 777, 782. The FIER acknowledges that the Project continues to violate clear, mandatory noise standards in both the County and City General Plans. AR 1881-82.

Under CEQA, the inconsistency between the noise impacts and the General Plan was required to be analyzed. *Pfeiffer v. City of Sunnyvale City Council* (2011) 200 Cal.App.4th 1552, 1566. Respondents argue that the violation of the noise standards in the County General Plan was remedied through mitigation measures included in the FEIR. RJB, p. 69. In fact, the finding of exceedance was "remedied" by creating a "new" baseline that included a residence immediately adjacent to the railroad tracks and omitted analysis of vibrational noise and decided not to analyze the combined impact of traffic and industrial noise from plant operations. AR 33330-33333 at 33331.

In response to comments regarding the inadequacy the County's review of General Plan consistency, the County states that the Policies of concern were dealt with in the FEIR. AR 32052-53. Unfortunately, there is no meaningful evaluation of the Policies in the FEIR. AR 1849-1850. The EIR dismisses the concerns about compatibility with surrounding land uses with the following statement: "The site does not

have woodland potential where the proposed caretaker's residence is to be built, and development of the site and the caretaker's residence would not decrease the potential for industrial development. AR 1850. The County never made the necessary findings regarding consistency of the bottling plant with the General Plan, particularly with respect to the exceedance of mandatory noise thresholds.

VI. The Mitigation Measures included in the EIR are unenforceable.

The County has taken the position that it has no authority over the bottling plant operations, and so finds itself arguing that it has some "other" mechanism for enforcing mitigation measures identified in the EIR. CEQA requires that all feasible mitigation measures be adopted, and that they be enforceable. PRC §§ 21002, 21002.2(b), 21081; and Guidelines § 15126.4(b). In the final memo to the Board of Supervisors, County staff urged approval of the Project stating that the County has "numerous enforcement mechanisms" and that conditions of approval are enforceable "as a condition of exercise of the permit." AR 3178 and *see* AR 1157 (staff report stating that mitigation measures "will be made Conditions of Approval of the project," which is patently untrue, they will be conditions of the *caretaker's residence permit*). As

noted in the AOB, the caretaker's residence is not habitable as a residence because of the health risks. AOB, p. 13; *see* AR 230-23.

Respondents argue that Crystal Geyser will be bound by the conditions of the CUP because it has "agreed." RJB, p. 71. Respondents cite *County of Imperial v. McDougal* (1977) 19 Cal.3d 505, 510-511, noting that "a landowner or his successor in title is barred from challenging a condition imposed upon the granting of a special permit if he has acquiesced therein by either specifically agreeing to the condition or failing to challenge its validity and accepting the benefits afforded by the permit." RJB, p. 71. California case law holds that conditions of a permit are enforceable where a landowner has "acquiesced" *and* accepted the benefits afforded by the permit. As noted above, the caretaker's residence is not habitable, so it seems rather unlikely that Crystal Geyser will "accept the benefits" of the permit.

Respondents argue that Crystal Geyser has "agreed" to the mitigation measures, but do not cite to any evidence in the record of this agreement. In fact, Crystal Geyser has been clear in its position that the County has no authority over the bottling activities. *See* AR 1086.

There is no evidence in the record that Crystal Geyser will acquiesce to enforcement of mitigation measures, and there is no reason

for the company to construct a caretaker's residence that is not habitable.

CONCLUSION

Appellants respectfully request that this Court reverse the trial court's decision and remand the matter for issuance of a writ of mandate directing compliance with CEQA and the State Planning Laws.

DATED: July 12, 2021

LAW OFFICE OF DONALD B. MOONEY

By /s/
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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, Rule 8.204(c))

I certify that this brief contains 7,122 words, not including tables of contents and authorities, signature block, and this certificate of word count as counted by Microsoft Word, the computer program used to produce this brief.

DATED: July 12, 2021

/s/
Marsha A. Burch

PROOF OF SERVICE

I am employed in the County of Yolo; my business address is 417 Mace Blvd, Suite J-334, Davis, California; I am over the age of 18 years and not a party to the foregoing action. On July 12, 2021, I served a true and correct copy of

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X (by mail) on all parties in said action listed below, in accordance with Code of Civil Procedure §1013a(3), by placing a true copy thereof enclosed in a sealed envelope in a United States mailbox in the Davis, California.

Clerk of the Court
Siskiyou County Superior Court
311 4th Street
Yreka, CA 96097

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on July 12, 2021.

/s/
Donald B. Mooney