

MEMORANDUM

To: National Parks Conservation Association
Date: August 1, 2016
Re: Analysis of CEQA Requirements for Soda Mountain Solar Project

INTRODUCTION

Pursuant to your request, this memorandum summarizes the requirements of the California Environmental Quality Act (CEQA) as applied to the Soda Mountain Solar Project recently approved by the U.S. Bureau of Land Management (BLM) in its March 28, 2016 Record of Decision (ROD). The County of San Bernardino serves as the “lead agency” for CEQA purposes and, in that role, has a number of state law obligations that go above and beyond BLM’s obligations under federal law. In this memo, we explain those state law obligations, discuss the next steps in the CEQA process, and address the different discretionary actions the County may take and their attendant legal risks.

BACKGROUND

Because the proposed Soda Mountain Solar Project would be located on federal land, BLM must first grant a right-of-way and amend the California Desert Conservation Area Plan to accommodate the new land use. Before making these discretionary federal law decisions, BLM was required to prepare an Environmental Impact Statement (EIS) pursuant to the National Environmental Policy Act (NEPA). But because the proposed project will also require a number of discretionary approvals from state and local agencies, an Environmental Impact Report (EIR) pursuant to CEQA was also required.

Where, as here, both NEPA and CEQA are triggered, state law allows – and indeed encourages – the CEQA lead agency to cooperate, as appropriate, with the federal NEPA lead agency in planning and preparing combined environmental review documents in order to avoid duplication of effort. Cal. Pub. Res. Code § 21083.5; Cal. Code Regs., tit. 14, §§ 15222-15223, 15226 (hereinafter “CEQA Guidelines”). The publication of a joint EIS/EIR does not, however, alter the CEQA lead agency’s separate and more rigorous obligations under state law; it merely allows agency decisionmakers and the public to review one set of documents rather than two. Nelson v. County of Kern, 190 Cal. App. 4th 252, 280 (2010) (“[T]he state or local *lead* agency must still ensure that CEQA is fully complied with, including in those instances where the environmental documents are jointly produced or are produced by the federal agency and subsequently accepted by the state or local lead agency in lieu of an EIR.”).

Here, acting as the NEPA lead agency, BLM prepared a joint EIS/EIR for the Soda Mountain Solar Project. As explained below, the County has functioned as the

CEQA lead agency for the project because the project proponent is seeking water well permits from the County. The Final EIS/EIR (FEIS/FEIR) confirms that the project also will require discretionary approvals from the California Department of Fish and Wildlife (incidental take permit or ESA consistency determination; streambed alteration agreement), the Regional Water Quality Control Board (waste discharge requirements), and Caltrans (encroachment permit). By law, these other agencies must rely on the County's environmental analysis and EIR certification to support their own discretionary decisions, underscoring the County's pivotal role in this matter as CEQA lead agency. Save San Francisco Bay Assn. v. San Francisco Bay Conservation etc. Com., 10 Cal. App. 4th 908, 921 (1992) (lead agency must conduct a thorough review of project, on which responsible agencies will rely).

Notably, BLM's approval under federal law is not sufficient to satisfy CEQA. While a federal agency like BLM may move forward with project approval under NEPA as long as it has fully disclosed all impacts and considered (but not necessarily adopted) mitigation measures or alternatives to reduce those impacts, CEQA imposes more stringent substantive requirements on state and local agencies: A CEQA lead agency may only reject identified mitigation measures for significant impacts if it finds them to be infeasible, and it may only approve a project with unmitigated significant impacts if it finds that, on balance, the project's benefits outweigh its adverse environmental consequences. These additional CEQA steps, which are discussed in more detail below, were not part of BLM's decision process, but they are critical here because the joint EIS/EIR concludes that the Soda Mountain project will have unavoidable significant adverse impacts on air quality and local wildlife.

Most importantly, the FEIS/FEIR finds that the project will have significant impacts on bighorn sheep, a "fully protected" species under the California Endangered Species Act. In its role as the state's wildlife trustee, the California Department of Fish and Wildlife (Department) has raised serious concerns – through a series of several CEQA comment letters on the project over the last three years – about the project's impacts on the genetic viability of bighorn sheep and thus has recommended that the County "require" a number of mitigation measures which, ultimately, were not incorporated into the project as part of BLM's NEPA and ROD process or meaningfully addressed in the FEIS/FEIR.¹ These facts are critical to the County's CEQA process because bighorn sheep are not specially protected under federal law and thus were not a focal point for BLM's decision. The County will, therefore, need to undertake substantial additional CEQA analysis and make explicit findings if it intends to move forward with approval of the project. In other words, BLM's failure to incorporate the Department's proposed mitigation measures into the project FEIS/FEIR shifted the burden onto the County, which now has to satisfy CEQA's additional responsibilities and liabilities.²

¹ See, e.g., Letter from the California Department of Fish and Wildlife to the County Land Use Services Department (Jan. 6, 2014) (stating "The Department recommends the Lead Agency require the applicant implement the above mitigation measures.").

² See Letter from the California Department of Fish and Wildlife to the Project Applicant (Bechtel), BLM, and the County Land Use Department (May 16, 2016) (stating that "In reviewing the ROD [BLM Record

ANALYSIS

I. The County's Robust Obligations as CEQA Lead Agency.

CEQA applies to all “discretionary projects proposed to be carried out or approved by public agencies.” Cal. Pub. Res. Code § 21080(a). The California Legislature enacted CEQA to help ensure that state and local entities “take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state.” Cal. Pub. Res. Code § 21001(a). This overarching policy goal ensures, among other things, that fish and wildlife populations do not drop below self-sustaining levels and that long-term protection of the environment is the guiding criterion in public decisions. *Id.* § 21001(c), (d). Courts, accordingly, interpret the statute to “afford the fullest possible protection to the environment.” Wildlife Alive v. Chickering, 18 Cal. 3d 190, 206 (1976).

“With narrow exceptions, CEQA requires an EIR whenever a public agency proposes to approve or carry out a project that may have a significant effect on the environment.” Laurel Heights Improvement Assn. v. Regents of Univ. of California, 47 Cal. 3d 376, 390 (1988). The EIR is “the primary means” of achieving the Legislature’s CEQA goals. *Id.* at 392. It is an “environmental alarm bell,” alerting the public and its officials to environmental harms before they reach the point of ecological no return. *Id.* Through the EIR process, the statute “compels government first to identify the environmental effects of projects, and then to mitigate those adverse effects through the imposition of feasible mitigation measures or through the selection of feasible alternatives.” Sierra Club v. State Bd. of Forestry, 7 Cal. 4th 1215, 1233 (1994).

Because more than one public agency may have discretionary approval authority for a project, CEQA includes rules for determining each agency’s obligations. The agency with “principal responsibility” for carrying out or approving a project serves as the CEQA “lead agency” for purposes of complying with the statutory requirements. Cal. Pub. Res. Code § 21067. By contrast, a CEQA “responsible agency” is “a public agency, other than the lead agency, which has responsibility for carrying out or approving a project,” *id.* § 21069, and a CEQA “trustee agency” is a state agency that has jurisdiction by law over natural resources affected by a project that are held in trust for the people of the State of California. *Id.* § 21070. Normally, the local land use authority functions as the lead agency, while specialized state agencies (e.g., Department of Fish and Wildlife, Regional Water Quality Control Board, Caltrans, etc.) act as responsible or trustee agencies.³

of Decision] it is clear the Adopted Mitigation Measures are not adequate and do not meet CDFW’s fully mitigated standard [per CEQA regulation].”).

³ The California Department of Fish and Wildlife is a responsible agency to the extent that it must issue approvals for the project, but it also is a trustee agency. CEQA Guidelines § 15386 (“Trustee agencies include: (1) The California Department of Fish and Game with regard to the fish and wildlife of the state, to designated rare or endangered native plants, and to game refuges, ecological reserves, and other areas administered by the department.”).

The lead agency shoulders the burden of complying with CEQA in all respects. In particular, “the lead agency is responsible for considering the effects of all activities involved in a project and, if required by CEQA, preparing the draft and final EIR’s and certifying the final EIR for a project.” Riverwatch v. Olivenhain Mun. Water Dist., 170 Cal. App. 4th 1186, 1201 (2009) (emphasis added). In contrast, “[r]esponsible agencies generally rely on the information in the CEQA document prepared by the lead agency [e.g., an EIR] and ordinarily are not allowed to prepare a separate EIR or negative declaration.” Id. In other words, “while the lead agency is responsible for considering all environmental impacts of the project before approving it, a responsible agency has a more specific charge: to consider only those aspects of a project that are subject to the responsible agency’s jurisdiction.” Id. at 1201, 1206 (emphasis added); see also Cal. Pub. Res. Code § 21002.1(d) (“The lead agency shall be responsible for considering the effects, both individual and collective, of all activities involved in a project. A responsible agency shall be responsible for considering only the effects of those activities involved in a project which it is required by law to carry out or approve.”). Except under exceptional circumstances not found here, once a lead agency is designated, that agency assumes all CEQA obligations for the project.⁴

As part of its basic CEQA obligations, the lead agency must consult with all responsible agencies and all trustee agencies with jurisdiction over resources affected by the project. CEQA Guidelines § 15086(a); Cal. Pub. Res. Code §§ 21080.3, 21080.4, 21081.6; Gentry v. City of Murrieta, 36 Cal. App. 4th 1359, 1387 (1995) (The “broad construction of ‘trustee agency’ serves the statutory purpose of fostering inter-agency consultation.”). Those agencies are charged with providing substantive comments on activities involved in the project that are within their areas of expertise or subject to their approval. CEQA Guidelines § 15086(b). Their submissions to the lead agency should include “complete and detailed performance objectives for mitigation measures which would address the significant effects on the environment identified by the responsible agency or [trustee] agency.” Cal. Pub. Res. Code § 21081.6(c). In the final EIR, the lead agency must provide good faith, reasoned responses to submissions by responsible and trustee agencies and to other public comments on the draft. CEQA Guidelines § 15088. These responses must include detailed reasons why specific comments and suggestions by the expert state agency were not accepted; conclusory statements unsupported by factual information will not suffice.⁵ Id. § 15088(c).

⁴ A responsible agency normally is limited to reviewing the EIR and providing comments on the shortcomings of the EIR and on additional alternatives and mitigation measures that the EIR should include for impacts within the responsible agency’s area of expertise or approval jurisdiction. CEQA Guidelines § 15096(d). Responsible agencies must ultimately make their own findings on those significant impacts that are not mitigated, however. Accordingly, when the lead agency approves a project with unavoidable significant impacts and fails adopt a responsible agency’s recommended mitigation measures, the responsible agency may challenge the EIR in a suit against the lead agency or, under limited circumstances, pursue additional CEQA analysis itself. *Id.* The latter option is only available if the lead agency failed to consult with the responsible agency or the time to challenge the original EIR has expired and subsequent substantial changes or new information indicate that the project will have new or more severe significant impacts than previously disclosed or that new mitigation measures/alternatives not known at the time of the original EIR would reduce significant impacts. *Id.* § 15052(a).

⁵ To date, the County has not responded to CDFW’s concerns, as required under CEQA.

If, after publication of the final EIR, the CEQA lead agency intends to proceed with project approval, it has a number of additional obligations that go considerably beyond federal agency obligations under NEPA. Each of these obligations is mandatory and failure to comply subjects the lead agency to potential legal liability.

First, the CEQA lead agency must “certify” that:

- (1) the final EIR has been completed in compliance with CEQA;
- (2) the final EIR was presented to the decisionmaking body of the lead agency and that the decisionmaking body reviewed and considered the information contained in the final EIR prior to approving the project; and
- (3) the final EIR reflects the lead agency’s independent judgment and analysis.

CEQA Guidelines § 15090(a). “[A] final EIR should not be certified if it is not complete or in compliance with CEQA.” LandValue 77, LLC v. Bd. of Trustees of California State Univ., 193 Cal. App. 4th 675, 682 (2011). Moreover, because responsible agencies generally must and will rely on the EIR once it is certified by the lead agency, any challenge to the adequacy of an EIR and the propriety of its certification will be targeted, first and foremost, at the lead agency.

Second, “[b]efore approving the project, the agency must also find either that the project’s significant environmental effects identified in the EIR have been avoided or mitigated, or that unmitigated effects are outweighed by the project’s benefits.” Laurel Heights, 47 Cal. 3d at 391. In particular, the lead agency may not approve a project for which there is a certified EIR that identifies one or more significant environmental effects unless it makes written findings for each of those significant effects, accompanied by a brief explanation of the rationale for each finding, supported by substantial evidence in the record, that:

- (1) Changes or alterations have been required in, or incorporated into, the project which avoid or substantially lessen the significant environmental effect as identified in the final EIR;
- (2) Such changes or alterations are within the responsibility and jurisdiction of another public agency and not the agency making the finding. Such changes have been adopted by such other agency or can and should be adopted by such other agency; and/or
- (3) Specific economic, legal, social, technological, or other considerations, including provision of employment opportunities for highly trained workers, make infeasible the mitigation measures or project alternatives identified in the final EIR.

CEQA Guidelines § 15091(a). The lead agency may not make a subsection (a)(2) finding, however, if it has authority (as the County does here) to condition its approval on

implementation of the identified mitigation measures or alternatives. Id. § 15091(c).⁶ Moreover, any “infeasibility” finding under subsection (a)(3) “shall describe the specific reasons for rejecting identified mitigation measures and project alternatives.” Id.

Third, the lead and responsible/trustee agencies may not approve a project for which an EIR was prepared unless the agency has (1) eliminated all significant impacts through the adoption of mitigation measures or (2) determined that any remaining unavoidable significant impacts are “acceptable” due to “overriding considerations.” CEQA Guidelines § 15092(b). In order to make the latter finding, the agency must provide a written “statement of overriding considerations” supported by substantial evidence in the record. Id. § 15093.

As the CEQA lead agency for the Soda Mountain project, the County has the legal responsibility to ensure that all of the foregoing statutory requirements are satisfied, including the preparation and certification of a legally adequate EIR and the development of findings supported by substantial evidence, if it chooses to approve the well permits. This is the case, even though the County plays only a relatively minor role in approving a project on federal land, because other responsible and trustee agencies generally must, by law, rely on the County’s full environmental review and its conclusions. That is, the lead agency functions as the focal point for all CEQA compliance and any other state or local agency with discretionary approval authority over the project must look to the work and conclusions of the lead agency. Accordingly, any judicial challenge to the adequacy of the EIR, or the certification and findings, would be filed against the County in its capacity as the CEQA lead agency. Cal. Pub. Res. Code § 21167.

Alternatively, the lead agency has discretion to deny approval of a project based on the results of the EIR process and thereby avoid the additional CEQA obligations. CEQA provides broad authority to a lead agency to disapprove a project in order to avoid significant environmental effects that the project would cause if approved as proposed. CEQA Guidelines § 15042. Specifically, “when an EIR shows that a project could cause substantial adverse changes in the environment, the governmental agency must respond to the information by one or more of the following methods ... [¶] ... [d]isapproving the project.” Id. § 15002(h) (emphasis added.) “Thus, there can be no doubt as to the authority, if not the duty, of the governmental agency to disapprove a project where an EIR – otherwise supported by substantial evidence – shows there are significant, unmitigated adverse environmental effects.” Native Sun/Lyon Communities v. City of Escondido, 15 Cal. App. 4th 892, 907 (1993).

⁶ A finding by a lead agency “disclaiming the responsibility to mitigate environmental effects is permissible only when the other agency said to have responsibility has *exclusive* responsibility.” City of Marina v. Bd. of Trustees of the California State Univ., 39 Cal. 4th 341, 366 (2006) (noting that “The Guidelines’ logical interpretation of CEQA on this point ‘avoids the problem of agencies deferring to each other, with the result that no agency deals with the problem.’”). Here, the County’s public trust responsibilities would give it concurrent jurisdiction to require mitigation measures to protect wildlife.

II. The Next CEQA Steps for Approval of the Soda Mountain Solar Project

A final EIR for the Soda Mountain Solar Project, which includes responses to comments from various responsible and trustee agencies, was published in June 2015. The EIR concludes that the proposed project will have significant, unavoidable adverse impacts on air quality and local wildlife. Final EIS/EIR at ES-14 (criteria air pollutants), ES-31 (burrowing owl), ES-33 (bighorn sheep), ES-36 (cumulative impacts on bighorn sheep). The wildlife impacts are the most significant. In a series of detailed letters between April 2013 and July 2016, responsible and trustee agency California Department of Fish and Wildlife (Department) expressed its strong concerns about project impacts on several wildlife species, including migratory birds, bighorn sheep, desert tortoises, burrowing owls, American badgers, and desert kit foxes. As those letters explain, fish and wildlife resources are held in trust by the state for the people of California, and the Department is the designated trustee agency under both state statute (e.g., Cal. Fish & Game Code §§ 711.7 and 1802; CEQA Guidelines § 15386(a)), and the common law public trust doctrine. See Center for Biological Diversity, Inc. v. FLP Group, Inc., 166 Cal. App. 4th 1349, 1361-64 (2008) (“it is clear that the public trust doctrine encompasses the protection of undomesticated birds and wildlife”). Failure to satisfy common law public trust obligations subjects both the Department and the local entity which authorizes the project to potential liability. Id. (explaining that Alameda County was potential target of public trust litigation in connection with issuance of local permit).

Here, the Department has focused much of its consultation and analysis on the project’s significant impacts on bighorn sheep migration and connectivity. Bighorn sheep are listed as “fully protected species” under the California Endangered Species Act, meaning that “take” of the species is not allowed and may not be authorized by the Department. Cal. Fish & Game Code § 4700. As the Department’s various letters on the project indicate, the North-South Soda Mountains connection is the most important restorable corridor for preserving bighorn sheep connectivity and genetic diversity. To mitigate the project’s significant adverse impacts on bighorn sheep movement within and across the valley, the Department identified and recommended several mitigation measures, including the installation and maintenance of six water developments in the vicinity of the project, the installation of a wildlife bridge, and placement of the project perimeter fence 0.25 miles from the 10 percent slope. The Department further stated that its recommended mitigation measures should “be implemented in conjunction with each other, and not on an individual basis as mentioned in the FEIS/FEIR.” These identified mitigation measures were dismissed without much explanation in the response to comments, and BLM did not incorporate them into its ROD for the project.⁷ As the lead agency under CEQA, however, the County bears the burden to ensure that the FEIS/FEIR complies with these additional state law requirements.

⁷ Although the Peninsular Mountains subpopulation of the bighorn sheep is listed under the federal Endangered Species Act, the population in the Soda Mountain Valley is not federally protected and, therefore, was not evaluated in the biological opinion for the project prepared by the U.S. Fish and Wildlife Service, which is strictly limited to federally listed species. Nevertheless, the National Park Service, which has a broader mandate to protect wildlife resources that use park lands, has consistently expressed concerns about bighorn sheep impacts in its written comments on the proposed project.

Arguably, the absence of a meaningful substantive response to the state trustee agency's scientifically-based comments renders the current FEIS/FEIR legally inadequate and vulnerable to successful judicial challenge. When carrying out its CEQA duties, the lead agency must "give prime consideration to preventing environmental damage," Mountain Lion Found. v. Fish & Game Comm'n, 16 Cal. 4th 105, 112-14 (1997), and "owes no duty to assuage the desires of the potential developer." Mission Oaks Ranch, Ltd. v. Cty. of Santa Barbara, 65 Cal. App. 4th 713, 723-24 (1998). Of particular relevance here, "where 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." People v. County of Kern, 39 Cal. App. 3d 830, 842 (1974) (quoting Silva v. Lynn, 482 F.2d 1282, 1285 (1st Cir. 1973)). There, as here, "[o]nly by requiring the County to fully comply with the letter of the law can a subversion of the important public purposes of CEQA be avoided, and only by this process will the public be able to determine the environmental and economic values of their elected and appointed officials, thus, allowing for appropriate action come election day should a majority of the voters disagree." Id. Thus, the Kern court concluded, "the County's failure to respond with specificity in the final EIR to the comments and objections to the draft EIR renders the final EIR fatally defective." Id.

In any event, before it can approve the project as proposed, the County must (1) certify that the EIR fully complies with CEQA and that the County has exercised its independent judgment and analysis with respect to the final EIR, including its judgment that the Department's suggested modifications were properly ignored; (2) find that economic, legal, social, technological, or other considerations rendered the Department's proposed mitigation measures infeasible; and (3) issue a statement of overriding considerations explaining why the unavoidable significant impacts on bighorn sheep, other wildlife, and air quality are "acceptable" based on the benefits of the project. We briefly discuss each of these requirements below:

(1) Certification of Final EIR and Approval of the Project: The courts have explained that "only through an accurate view of the project may the public and interested parties and public agencies balance the proposed project's benefits against its environmental cost, consider appropriate mitigation measures, assess the advantages of terminating the proposal and properly weigh other alternatives." City of Santee v. County of San Diego, 214 Cal. App. 3d 1438, 1454 (1989). "If a final EIR does not 'adequately apprise all interested parties of the true scope of the project for intelligent weighing of the environmental consequences of the project,' informed decisionmaking cannot occur under CEQA and the final EIR is inadequate as a matter of law." Riverwatch, 170 Cal. App. 4th at 1201. "A lead or responsible agency's 'ultimate decision of whether to approve [all or part of] a project, be that decision right or wrong, is a nullity if based upon an EIR that does not provide the decision-makers, and the public, with the information about the project that is required by CEQA.'" Id. at 1207 (citing Santiago County Water Dist. v. County of Orange, 118 Cal. App. 3d 818, 829 (1981)). In order to move forward with approval of the well permits, the County must first exercise its independent judgment and certify the legal adequacy of the Final EIR. Doing so,

particularly given the absence of detailed substantive response to the Department's bighorn sheep concerns and recommendations, makes the County the potential target of any CEQA suit challenging the adequacy of the EIR.

(2) Findings of Infeasibility: In order to approve the project without the mitigation measures that the Department identified and recommended in its capacity as the expert wildlife agency and state trustee for wildlife resources, the County must make express findings that the proposed mitigation measures are infeasible. This is a substantial burden. The fact that a mitigation measure may make the project more costly or less profitable is not sufficient to support a finding of "infeasibility;" the lead agency must provide substantial, robust analysis of infeasibility to support such a finding. See, e.g., Center for Biological Diversity v. County of San Bernardino, 185 Cal. App. 4th 866, 884 (2010); Uphold Our Heritage v. Town of Woodside, 147 Cal. App. 4th 587 (2007); Save Round Valley Alliance v. County of Inyo, 157 Cal. App. 4th 1437 (2007); Preservation Action Council v. City of San Jose, 141 Cal. App. 4th 1336, 1355-57 (2006); County of San Diego v. Grossmont-Cuyamaca Community College Dist., 141 Cal. App. 4th 86, 108 (2006); Maintain Our Desert Environment v. Town of Apple Valley, 120 Cal. App. 4th 396, 449 (2004); Citizens of Goleta Valley v. Board of Supervisors, 197 Cal. App. 3d 1167, 1181 (1988); Village Laguna of Laguna Beach, Inc. v. Board of Supervisors, 134 Cal. App. 3d 1022, 1 (1982); Sierra Club v. Friends of the West Shore, 916 F. Supp. 2d 1098, 1124-25, 1127-29 (E.D. Cal. 2012).

(3) Statement of Overriding Considerations: Additionally, before it can approve a project with unavoidable significant adverse impacts, the County must provide a specific, detailed written statement of overriding considerations why these impacts are acceptable and the project should go forward. This statement of overriding considerations "is not a substitute for the [infeasibility] findings" but rather, it "supplements those findings and supports the agency's determination to proceed with a project despite adverse effects." California Native Plant Soc. v. City of Santa Cruz, 117 Cal. App. 4th 957, 983 (2009) (quoting Federation of Hillside and Canyon Associations v. City of Los Angeles, 126 Cal. App. 4th 1180, 1201(2004)).

The statement of overriding considerations "is intended to demonstrate the balance struck by the body in weighing the 'benefits of a proposed project against its unavoidable environmental risks.'" Id. (quoting Sierra Club v. Contra Costa County, 10 Cal. App. 4th 1212, 1222 (1992)). It focuses on the "reasons for approving the project, such as the need to create new jobs, provide housing, generate taxes, and the like." Id. (quoting Concerned Citizens of South Central Los Angeles v. Los Angeles Unified School Dist., 24 Cal. App. 4th 826, 847 (1994)). "The override decision 'lies at the core of the lead agency's discretionary responsibility under CEQA and is, for that reason, not lightly to be overturned.'" Id. (quoting City of Marina v. Board of Trustees of California State Univ., 39 Cal. 4th 341, 368 (2006)). The lead agency must demonstrate by substantial evidence in the record that it weighed the project benefits against its unavoidable adverse impacts and "struck the balance" to proceed. Id.

It is important to note that where rejected mitigation measures were feasible, overriding circumstances cannot be used to justify certification of the EIR and approval of the project. City of Marina v. Bd. of Trustees of the California State Univ., 39 Cal. 4th 341, 368-69 (2006). Thus, if an agency fails to consider feasible mitigation or if it improperly determines mitigation to be infeasible, a court may set aside the statement of overriding considerations. See, e.g., City of San Diego v. Bd. of Trustees of California State Univ., 61 Cal. 4th 945, 954-55, 961, (2015) (affirming appellate court ruling that off-site mitigation measures at issue were feasible; therefore statement of overriding considerations to proceed with the project despite the unmitigated environmental effects was not justified.)

III. Options Available to the County at this Point

In light of the additional steps that the County must take before it can approve well permits for the project and the broad discretion the County has to reject the well permits, we believe that the County, as CEQA lead agency, has essentially three options going forward, each with different litigation exposure and risks for the County:

(1) The County may defer to the state's expert wildlife and trustee agency by finding that the project's significant adverse impacts to bighorn sheep and other wildlife, caused by the federal government's agency to locate the project in the Soda Mountain Valley area, are not outweighed by any potential benefits from the project and, for that reason, the County properly may decline to issue a statement of overriding considerations and deny the requested well permits. If it follows this course, the County need not take action to certify the adequacy of the EIR because it is not approving the project. Sunset Sky Ranch Pilots Ass'n v. County of Sacramento, 47 Cal. 4th 902, 907 (2009) (citing Cal. Pub. Res. Code § 21080(b)(5); Main San Gabriel Basin Watermaster v. State Water Resources Control Bd., 12 Cal. App. 4th 1371, 1380 (1993)). As noted above, because the balancing of project benefits against project impacts is within the County's core discretion, such a course of action is unlikely to be vulnerable to successful judicial challenge. If the project proponent elects to obtain water from elsewhere and thereby proceed with the project in the absence of County well permits, other responsible agencies may still be required to make independent CEQA decisions on whether to grant other necessary approvals for the project, but those decisions would no longer concern the County.

(2) If the County decides to approve the project consistent with the Department's recommendations and its own public trust obligations, it may grant the well permits conditioned on all of the mitigation measures proposed by the Department. The project proponent would then decide whether to accept the conditional well permits and implement the mitigation or pursue alternative water sources, thereby ending the County's involvement with the project.

(3) If the County elects to grant the well permits to the project as proposed in BLM's ROD (without the requisite mitigation), it must first find that the mitigation measures proposed by the Department are infeasible. There appears to be little evidence

in the record to support such a conclusion, making the County's decision vulnerable to judicial challenge. Additionally, the County would need to draft and approve a separate statement of overriding considerations, supported by substantial evidence, demonstrating that it has evaluated and balanced project impacts against project benefits. Here again, further identification and analysis of benefits would be necessary to support this statement. Likewise, to satisfy its affirmative common law public trust duty with respect to project impacts on wildlife resources, particularly bighorn sheep, the County would need to show that it fully considered these impacts and protected trust resources to the maximum extent feasible in making its decision. National Audubon Soc. v. Superior Court, 33 Cal. 3d 419 (1983); Center for Biological Diversity, 166 Cal. App. 4th at 1365-66.

CONCLUSION

By locating the proposed project in the Soda Mountain Valley, and then refusing to incorporate the CEQA mitigation measures recommended by the state wildlife trustee agency, BLM has placed the County in a difficult position vis-à-vis its more stringent CEQA lead agency responsibilities. Given the state of the administrative record, the County plainly has discretion to deny well permits for the project and thereby conclude its CEQA responsibilities. If, on the other hand, the County elects to grant well permits for the project, it may either impose the mitigation measures that BLM declined to include or make additional findings regarding the infeasibility of such measures. To pursue the latter course, the County also must document and prepare a statement of overriding considerations that balances project impacts with project benefits. Because there is scant evidence in the administrative record to support either an infeasibility finding or a statement of overriding considerations, those determinations could expose the County to significant litigation risks.