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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yuba)

FOREST TULL et al.,

Petitioners and Appellants,

v.

YUBA COUNTY et al.,

Defendants and Respondents;

A. TEICHERT & SON, INC.,

Real Party in Interest and Appellant.

C068607

(Super. Ct. No. 03-000774)

FOREST TULL et al.,

Plaintiffs and Appellants,

v.

YUBA COUNTY et al.,

Defendants and Respondents;

A. TEICHERT & SON, INC.,

Defendant and Appellant.

(Super. Ct. No. 07-000762)

A. Teichert & Son, Inc. (Teichert), operates a gravel mine in Yuba County that produces enough aggregate to fill about 600 large trucks per day. Teichert's gravel trucks carry the gravel to market by driving through a residential neighborhood on Hallwood Boulevard and Walnut Avenue. Responding to pleas to circumvent the Hallwood neighborhood, Teichert bought land and started building a private haul road toward the intersection of Kibbe Road and State Road 20. Although Teichert secured a grading permit from Yuba County (County), no environmental impact study was done before road construction began.

Forest and Bobbie Tull (the Tulls¹) own property adjacent to the haul road. They filed a petition for writ of mandate on grounds that Teichert and the County failed to comply with the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21050 et seq.).² The trial court dismissed the petition as moot because the County began work on a draft environmental impact report (EIR). We reversed in *Tull v. Yuba County* (Jan. 31, 2006, C047900) [nonpub. opn.] (*Tull I*), holding that the County violated CEQA by issuing a grading permit before studying alternate routes and that the Tulls' petition was not mooted by the work on the draft EIR.

¹ The Kibbe Area Planning and Protection Association joined Forest and Bobbie Tull in this action. Based on their assertion of the same claims in the trial court and on appeal, we refer to plaintiffs and petitioners collectively as the Tulls. This action involves a complaint joined with a petition for writ of mandate. Thus, for the sake of convenience and because the gravamen of the Tulls' claims are set forth in the petition, we refer to their hybrid complaint/petition as their petition for writ of mandate.

² Undesignated statutory references are to the Public Resources Code. References to Guidelines are to those located in California Code of Regulations, title 14, sections 15000 and following (Guidelines). These Guidelines are promulgated by the secretary of the California Resources Agency in order to implement CEQA requirements. (§ 21083, subd. (e); *Center for Sierra Nevada Conservation v. County of El Dorado* (2012) 202 Cal.App.4th 1156, 1161, fn. 1 (*Center for Sierra Nevada Conservation*).

Following remand, the Tulls sought attorney fees under the public attorney general doctrine. The trial court awarded fees to the Tulls in an amount substantially less than they sought. The Tulls appealed, and this court reversed in *Tull v. Yuba County* (July 7, 2008, C054917) [nonpub. opn.] (*Tull II*).

After the remittitur issued in *Tull II*, a final EIR was certified by the County's planning commission. Among the final EIR's more important findings was that no feasible alternative existed to Teichert's already partially completed private haul road. The Tulls challenged the certification of the final EIR — first before the County's board of supervisors and then in superior court. The Tulls' operative petition for writ of mandate alleged five causes of action for (1) several violations of CEQA, including inadequacy of the final EIR regarding drainage, noise, traffic safety, and feasibility of alternate routes for the haul road, (2) declaratory relief regarding Teichert's ongoing mining operations at the Hallwood site, (3) issuance of a vested rights letter by the County to Teichert in violation of this court's decision in *Calvert v. County of Yuba* (2006) 145 Cal.App.4th 613 (*Calvert*), (4) improper reissuance of a grading permit to Teichert after *Tull I* but before a final EIR had been properly certified, and (5) declaratory relief challenging Yuba County ordinance 11.10.580 as violating CEQA Guidelines section 15090, subdivision (a).

The trial court ruled the Tulls' writ petition set forth several valid CEQA claims. However, the court found that the Tulls' cause of action challenging the vested rights letter was barred by the statute of limitations, and that the challenged County ordinance did not violate CEQA.

On appeal, Teichert contends the trial court erred because (1) substantial evidence supports the County's conclusion that alternate routes are infeasible, (2) the EIR properly studied the traffic noise impacts expected to result from the project using the correct threshold of significance standard for assessing the noise generated by the project, (3) the

EIR properly analyzed drainage impacts, and at no point in the proceedings before the County did the Tulls raise this issue, and (4) traffic safety impacts were also properly analyzed in the EIR.

The Tulls cross-appeal, arguing the trial court should have granted relief on the entirety of their operative petition because (5) the County reissued the grading permit in violation of *Tull I*, (6) the delayed discovery rule renders timely their challenge to the vested rights letter to Teichert, and (7) the County's ordinance conflicts with CEQA by giving the planning commission authority to certify a final EIR even though it lacks power to approve or reject a project.

As to the appeal by Teichert, we conclude the final EIR did not properly consider all feasible alternate routes to Teichert's private haul road, how the project would result in noise and vibration impacts, or how the County's plan to condemn land for an undisclosed drainage pond would affect the area's hydrology and hydraulics. However, the final EIR properly assessed and responded to concerns about the traffic safety impacts arising out of locating the haul road at the intersection of Kibbe Road and State Road 20.

As to the Tulls' cross-appeal, we conclude the County erroneously reissued a grading permit for the private haul road before all feasible alternatives have been properly assessed in the EIR process. We also conclude the trial court correctly dismissed the Tulls' challenge to Teichert's vested rights letter on grounds that it was barred by the statute of limitations. Finally, we invalidate Yuba County ordinance 11.10.580 because it allows a final EIR to be certified without ever being reviewed and considered by a decisionmaking body with power to approve or disapprove the project. As this case illustrates, the County's procedure allows certification of a final EIR even in the absence of compliance with Guidelines section 15090, subdivision (a)(2).

Accordingly, we reverse and remand the matter with instructions.

BACKGROUND

The Haul Road's Initial Negative Declaration

As the trial court recounted, the following facts regarding the haul road are undisputed: “Teichert owns and operates an aggregate surface mine operation approximately 8 miles east of Marysville on the north side of the Yuba River, known as the Hallwood mine. Teichert uses existing roads through the Hallwood neighborhood to the west to haul its gravel to market.

“On June 12, 2000, the County — without providing public notice or holding a public hearing — issued a letter to Teichert, purporting to ‘confirm’ Teichert’s ‘vested rights’ under SMARA [the Surface Mining and Reclamation Act (. . . § 2710 et seq.)] to conduct surface mining operations at its Hallwood mine site.

“In March 2003, Teichert commenced construction of a new, private access road for its Hallwood mine site. If completed, Teichert’s new road will route approximately 600 gravel trucks per day through [the Tulls’] neighborhood. After completing the road to within approximately 50 feet of the [State Road] 20/Kibbe [Road] intersection, Teichert applied for, and the County summarily issued, a grading permit for the road portion of Teichert’s private project. Teichert then applied to the County for the encroachment permits from the County and Caltrans needed to connect its newly constructed road to [State Road] 20 at the Kibbe Road intersection.

“In June 2003, the County released a draft initial study/mitigated negative declaration (‘MND’) pursuant to CEQA, discussing the road project’s potential impacts at the intersection of [State Road] 20 and Kibbe Road. The study described the project as involving only the intersection improvements required to connect the new road to [State Road] 20, but asserted that the road Teichert had built was not part of the project because the road had already been completed under the grading permit.

“In October 2003, [the Tulls] filed this action, challenging the County’s violations of CEQA in issuing its 2003 grading permit with no environmental review, and by improperly segmenting or ‘piecemealing’ its CEQA review for the project by limiting its MND to considering only the intersection improvement portion of the project. In May 2004, Judge Timothy Evans of the Yuba County Superior Court dismissed [the Tulls’] action as moot, reasoning that the County had commenced (but not yet completed) the preparation of an environmental impact report (‘EIR’) for the ‘whole’ of the project.”

Tull I

The Tulls appealed and argued that the County violated CEQA by segmenting Teichert’s new road project into two projects for purposes of environmental review and by issuing the grading permit for the haul road before completing CEQA review of the entire project. (*Tull I, supra*, C047900.) The Tulls also argued that their petition was not mooted by the County’s eventual decision to prepare an EIR for the haul road. (*Tull I, supra*, C047900.)

On January 31, 2006, this court reversed the judgment of dismissal. (*Tull I, supra*, C047900.) We concluded that the project had been improperly segmented by the County because “the undisputed facts demonstrate the project consisted of providing Teichert a new road from its mine to State Route 20. The grading and construction of the road, along with the intersection improvements necessary to connect the road to State Route 20, were all part of the same project. The plans submitted to the County for the grading permit disclosed this fact. They expressly contemplated connecting the road to State Route 20 as part of the project of constructing the road. Moreover, while the road was being constructed, the County was already preparing the initial study for the intersection improvements. There can be no dispute the grading and construction of the road and the construction of the intersection improvements connecting the road to State Route 20 were one and the same project. The County erred by segmenting the project and excluding the

grading permit from environmental review of the whole project.” (*Tull I, supra*, C047900.)

In so holding, we rejected Teichert’s argument that the grading permit did not trigger the EIR requirement because its issuance by the County was ministerial in nature. We explained that “[e]ven if the grading permit was ministerial -- an issue we do not decide -- it still would be part of the whole project. Because part of the project required discretionary government permits that were not exempt from CEQA, the whole project, including portions that individually would be exempt from CEQA, was subject to environmental review. (*Association for a Cleaner Environment v. Yosemite Community College Dist.* (2004) 116 Cal.App.4th 629, 640.)” (*Tull I, supra*, C047900.)

Tull I also found that the Tulls’ original petition was not rendered moot by the ongoing EIR process. This court noted that “the County has prepared a draft EIR which addresses many of plaintiffs’ issues. However, the document is a *draft* EIR. It still is subject to revision, completion as a final EIR, and certification by the County. The need for the court’s continuing jurisdiction thus still exists.” (*Tull I, supra*, C047900.) We explained the gravamen of the problem with the County issuing the grading permit before engaging in the EIR process as follows: “Here, the error occurred when the County allowed construction to proceed on the new road without first analyzing it as part of the entire road and interchange improvement project in an appropriate environmental document. *Had the County complied with CEQA, the County may not have approved the road in its current location or may have imposed mitigation measures which the road does not now incorporate.* Thus, the grading permit cannot be allowed to stand when the potential remains for the County to alter the project or deny the encroachment permits in order to comply with CEQA.” (*Tull I, supra*, C047900, italics added.)

Accordingly, this court remanded the matter to the trial court with directions “to reinstate and grant the petition and order issuance of a peremptory writ of mandate in

accordance with the requirements of . . . section 21168.9 and consistent with the instructions contained in [our] opinion.” (*Tull I, supra*, C047900.)

Certification of the Final EIR

While the appeal in *Tull I* was pending, the County’s planning commission certified the final EIR over the Tulls’ objection in January 2006. As the trial court found, the Tulls “appealed the Planning Commission’s certification of the EIR to the Board of Supervisors. On June 6, 2006, the Board denied [the Tulls’] administrative appeal, but made no decisions regarding 1) whether the Project should be approved; or 2) if so, whether the Project should be approved at an alternative location, in order to reduce or avoid the significant impacts identified in the EIR.

“On or about November 13, 2006, the County’s Public Works Director issued a new grading permit for the Project. On November 22, 2006, [the Tulls] filed this supplemental proceeding challenging, *inter alia*, 1) the validity of the County’s June 2000 vested rights letter; and 2) the County’s failure to comply with CEQA or the Court of Appeal’s January 31, 2006 decision, before summarily re-issuing the invalidated grading permit.

“In August 2007, the Board of Supervisors met and issued an encroachment permit for the project over [the Tulls’] continued objections.” (Citations to the administrative record omitted.)

Tull II

After remand in *Tull I*, the Tulls moved for attorney fees under Code of Civil Procedure section 1021.5. (*Tull II, supra*, C054917.) The trial court awarded fees but “instead of determining and using reasonable market rates to calculate the fees to be awarded, the court used the rates found in the contract between plaintiffs and their attorneys. It used this method of reducing the requested rates after determining that part

of the litigation was unnecessary.” (*Ibid.*) The Tulls appealed, and we reversed in July 2008.

In *Tull II, supra*, C054917 we held that the trial court erroneously determined part of the Tulls’ action to have been unnecessary. (*Ibid.*) Consequently, we reversed with directions that the trial court make “an award of attorneys’ fees based on reasonable market rates, as required by section 1021.5.” (*Ibid.*)

The Operative Petition

In March 2009, the Tulls filed a first amended supplemental petition for writ of mandate and complaint for declaratory and injunctive relief. The petition named as defendants: Yuba County, the Yuba County Board of Supervisors (Board), the Yuba County Planning Commission, and the Yuba County Community Development Department (collectively, County agencies). Teichert was listed as the real party in interest. The petition alleged five causes of action for (1) violations of CEQA due to inadequate EIR for the proposed haul road, (2) declaratory relief regarding Teichert’s ongoing mining operations at the Hallwood site, (3) a mandamus violation due to the vested rights letter issued by the County to Teichert, (4) a mandamus violation in the County’s reissuance of a grading permit to Teichert, and (5) declaratory relief challenging the County (planning commission) authority to approve the haul road project.

Teichert and the County demurred to the third, fourth, and fifth causes of action. The trial court sustained the demurrers with leave to amend as to the third cause of action and without leave to amend as to the fourth and fifth causes of action. The court stayed the second cause of action for declaratory relief pending resolution of the Tulls’ first and third causes of action. The Tulls amended their petition, restating their third cause of action. After briefing by the parties and a hearing, the trial court dismissed the third cause of action on the merits after finding that the statute of limitations had expired. The

trial court subsequently ruled the County committed several procedural violations of CEQA in certifying its EIR and approving the project.

After the Tulls voluntarily dismissed their second cause of action for declaratory relief, the trial court entered a final judgment. From the judgment, Teichert appealed, and the Tulls cross-appealed.³

OVERVIEW OF CEQA

“[T]he purpose of CEQA is to protect and maintain California’s environmental quality. With certain exceptions, CEQA requires public agencies to prepare an EIR for any project they intend to carry out or approve whenever it can be fairly argued on the basis of substantial evidence that the project may have a significant environmental effect” (*Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 106–107, fns. omitted.) The California Supreme Court has ‘repeatedly recognized that the EIR is the “heart of CEQA.” [Citations.] “Its purpose is to inform the public and its responsible officials of the environmental consequences of their decisions *before* they are made. Thus, the EIR ‘protects not only the environment but also informed self-government.’”” (*Center for Sierra Nevada Conservation, supra*, 202 Cal.App.4th at p. 1169, quoting *Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1123 (*Laurel Heights II*) fn. omitted.)

³ The County did not file a notice of appeal. Nonetheless, the County purports to join in the arguments advanced in Teichert’s opening brief. However, the claims set forth in Teichert’s opening brief are available only to parties that have filed a notice of appeal. (*Stott v. Johnston* (1951) 36 Cal.2d 864, 877 [a judgment will not be disturbed in favor of a respondent unless the respondent has also filed a notice of appeal].) As a respondent, the County is allowed to join in the briefs of another party. (Cal. Rules of Court, rule 8.200(a)(5).) Consequently, we deem the County’s joinder to refer only to Teichert’s arguments set forth in the cross-respondent’s reply brief to the extent it defends the trial court’s final judgment.

To comply with CEQA, “[p]ublic agencies must ‘prepare, or cause to be prepared by contract, and certify the completion of, an [EIR] on any project that they intend to carry out or approve which may have a significant effect on the environment.’ (§ 21151, subd. (a).) Section 21065 defines ‘project’ to include ‘an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is any of the following: [¶] (a) An activity directly undertaken by any public agency. [¶] . . . [¶] (c) An activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies.’ The Guidelines further define project 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, and that is any of the following: [¶] . . . [¶] (3) An activity involving the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies.’ (Guidelines, § 15378, subd. (a)(3).) Under CEQA, “‘Project’ is given a broad interpretation . . . to maximize protection of the environment.”” (*Center for Sierra Nevada Conservation, supra*, 202 Cal.App.4th at pp. 1169-1170, quoting *Riverwatch v. Olivenhain Municipal Water Dist.* (2009) 170 Cal.App.4th 1186, 1203.)

“In reviewing an agency’s compliance with CEQA in the course of its legislative or quasi-legislative actions, the courts’ inquiry ‘shall extend only to whether there was a prejudicial abuse of discretion.’ (. . . § 21168.5.) Such an abuse is established ‘if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence.’ [Citations.]” (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 426–427 (*Vineyard*), fns. omitted.) “Judicial review of these two types of error differs significantly: while we determine de novo whether the agency has employed the correct procedures, ‘scrupulously enforc[ing] all legislatively mandated CEQA requirements’

[citation], we accord greater deference to the agency’s substantive factual conclusions. In reviewing for substantial evidence, the reviewing court ‘may not set aside an agency’s approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable,’ for, on factual questions, our task ‘is not to weigh conflicting evidence and determine who has the better argument.’ [Citation.]” (*Id.* at p. 435.) “A public agency’s decision to certify the EIR is presumed correct, and the challenger has the burden of proving the EIR is legally inadequate.” (*Santa Monica Baykeeper v. City of Malibu* (2011) 193 Cal.App.4th 1538, 1545-1546, citing *Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 530; *Save Our Peninsula Com. v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 117.)

In reviewing the record in a CEQA case, we review the agency’s action rather than the trial court’s subsequent decision. We “resolve the substantive CEQA issues on [appeal] by independently determining whether the administrative record demonstrates any legal error by the County and whether it contains substantial evidence to support the County’s factual determinations.” (*Vineyard, supra*, 40 Cal.4th at p. 427.) Mindful of these principles of review, we proceed to consider Teichert’s contentions.

APPEAL BY TEICHERT

I

Whether the County Properly Considered Alternative Routes for the Haul Road

Teichert contends the trial court erred in requiring the County to reassess alternate routes to the private haul road, including a route along an irrigation canal (Cordua Canal route), because substantial evidence supports the County’s conclusion that these alternate routes are infeasible. We disagree. As we explain, after characterizing the Cordua Canal route as “environmentally superior,” the County rejected it as infeasible because eminent domain proceedings would be required to acquire the land. This was error because the

County was perfectly willing to use eminent domain proceedings to acquire land to complete the private haul road.

A.

The County's Rejection of the Cordua Canal Route as Infeasible

In *Tull I*, this court held that the County violated CEQA requirements by issuing a grading permit to Teichert before properly assessing the project to determine where the haul road would best be located. (*Tull I, supra*, C047900.) On this point, we noted that “[h]ad the County complied with CEQA, *the County may not have approved the road in its current location* or may have imposed mitigation measures which the road does not now incorporate.” (*Ibid.*, italics added.)

During the EIR process, several alternatives to Teichert’s private haul road were proposed. One of the alternatives called the “alternative haul road” was analyzed in the EIRs. A similar route (Cordua Canal route) that closely followed the Cordua irrigation canal also was proposed.⁴ The Cordua Canal route presents a slightly longer distance for Teichert trucks to travel between the gravel mine and State Road 20. However, unlike the existing Hallwood neighborhood or Teichert’s private haul road to Kibbe Road and State Road 20, the Cordua Canal route does not route trucks in close proximity to residences.

The draft EIR acknowledged the merit of the Cordua Canal route by stating: “When comparing the alternatives, the [Cordua Canal route] would best meet the project objectives. The No Project/No Development Alternative fails to meet the first and second objectives because the existing traffic and noise impacts to the residential

⁴ The County considered the Cordua Canal route as being environmentally “substantially the same” as the alternative haul road that was already analyzed in the EIR. Thus, the County’s findings and environmental analysis for the alternative haul road apply to the Cordua Canal route.

neighborhoods along Hallwood Boulevard and Walnut Avenue would continue and a portion of the trucks associated with Teichert’s Hallwood facility would continue traveling a long, indirect route to access and exit the site. Conversely, the [Cordua Canal route] includes a more direct route than currently exists, although less direct than the private haul road associated with the proposed project, and does not pass by any sensitive receptors, minimizing noise impacts. The [Cordua Canal route] generally meets all of the project objectives, except the second and third objectives,⁵ because it offers a longer haul route than does the proposed project and because the property owner has indicated that the land required to implement the [Cordua Canal route] is not available.” Although the draft EIR “considered [the alternate route] *environmentally superior to the proposed project* [on Teichert’s private haul road]” (italics added), the draft EIR rejected it as “potentially infeasible in light of the difficulty of property acquisition.”

Commenters on the draft EIR noted the inconsistency in the County’s approach to eminent domain. Specifically, the County indicated that it was willing to exercise its power of eminent domain to complete Teichert’s private haul road at the Kibbe Road intersection but was not willing to consider eminent domain to acquire the Cordua Canal route. As one commenter stated, “it is absolutely clear that if you can exercise the power of eminent domain for the preferred project, you can also do so for the environmentally superior one.”

Charles Matthews, the Cordua Irrigation District chairman, stated at a hearing on the project: “[W]hen I read your environmental document, it said that there was no alternatives [*sic*] and, I guess, the first alternative we would wonder about is why the, the road didn’t curve on the south side of a thing and keep Kibbe Road straight on the north

⁵ The second project objective was stated to be “the shortest possible route from Teichert’s on-site scale house to State Route 20.” And, the third project objective was to “[a]cquire property from willing property owners.”

so it was not impacting the people there. I don't know if this is enough of an alternative that it would be mentioned and I know you're having the way [*sic*] to make a negative declaration so you don't have to do anymore environmental work and I would urge you to make sure that, in that part, that says there's no alternatives [*sic*] that somehow it's discussed."

The Tulls argued that "if acquiring a right-of-way over the [Cordua Canal route] through eminent domain is infeasible because this is a 'private project,' then the project cannot be approved in the first instance, regardless of location. On the other hand, if the project is sufficiently 'public' to justify the exercise of eminent domain, then the County's and CalTrans' power to condemn applies equally to the proposed project and the alternative analyzed in the EIR. The only reason that the Draft EIR presents for the 'Potential infeasibility' of the [Cordua Canal route], is that there is no willing seller. Therefore, *if* a sufficiently public purpose exists to justify condemnation in support of the project as proposed, the EIR's determination that the [Cordua Canal route] may be infeasible is unsupported by substantial evidence." (Footnotes omitted.)

The final EIR's response to the Tulls' argument states, in its entirety: "All of the areas of the project site that are proposed to be privately owned were acquired from willing sellers. The use of eminent domain is only proposed for those portions of the project site sought for acquisition by Caltrans or Yuba County." The County thus proposed to exercise its power of eminent domain only as to the private haul road's intersection at Kibbe Road and State Road 20. As the final EIR states: "The proposed intersection improvements at Kibbe Road and [State Road] 20 would serve the public purposes of improving traffic safety at that intersection." Notably, the improvement of traffic safety is not among the County's stated objectives for the project.

The final EIR expressly rejects the use of eminent domain for the Cordua Canal route where it states that this route "would require condemnation of private property for

private haul road purposes (i.e., those areas outside of and not proposed for inclusion within state and County rights-of-way).” Thus, the Cordua Canal route was rejected because it did not appear feasible without eminent domain proceedings.

In denying the Tulls’ appeal of the certification of the final EIR, the County explained that “County staff researched the feasibility of the Cordua Canal [route], including a map of the canal right-of-way and the original 1876 deed granting a 20-foot wide ‘strip of land’ for ‘the purpose of a water ditch.’ Based on this information, the Cordua Canal [route] is not feasible for two reasons. First, the canal right-of-way is too narrow to accommodate the proposed haul road. The canal right-of-way is 20 feet wide, as clearly stated in the original 1876 grant deed. The proposed haul road is more than twice as wide, with a minimum width of 40 feet, not including required side slopes and drainage features. . . . Thus, even if the existing Cordua Canal were placed in [a] culvert underneath the haul road, the width of the haul road alone would far exceed the width of the Cordua Irrigation District’s right-of-way.

“Second, the use of the Cordua Canal right-of-way for haul road purposes would appear to conflict with the requirements of the 1876 grant deed. Specifically, the 1876 grant deed included the express requirement that the right-of-way be used for ‘the purpose of a water ditch.’ The use of the Cordua Irrigation District’s right-of-way for a private haul road appears to be inconsistent with this requirement. Thus, the Cordua Canal [route] proposed by Charles Matthews is not a feasible alternative to Teichert’s proposed private haul road at Kibbe Road.”

In reviewing the final EIR, the trial court in this case “agree[d] broadly with the [Tulls’] criticisms of the EIR’s treatment of the alternative routes for the haul road.” In particular, the court noted that two issues needed to be further addressed by the County in an EIR:

“The first issue is the impact of the United States Supreme Court’s decision in *Kelo v. City of New London, Connecticut* (2005) 545 U.S. 469. If a project, taken as a whole, has a public purpose it may be possible for a public agency to use its takings power to condemn private property, even though the project may benefit a private party. *Kelo*, at 480-481, cf: *Golden Gate Bridge Highway and Transportation Dist. v. Muzzi* (1978) 83 Cal.App.3d 707, 713-714. Thus, Response 3-2 [citation] seems to be predicated on an erroneous interpretation of existing law. While the Court does not purport to determine whether the project, as a whole, has a ‘public purpose,’ the County’s evaluation of alternative routes must be reconsidered in light of a proper understanding of the law in this regard.

“The second salient issue concerns the Cordua Canal [route], and the recitation in the EIR that construction of the haul road there would be inconsistent with the stated purpose of a ‘water ditch’ in the original grant deed of 1876. The referenced deed does not appear in the record. It may be, or maybe not, that restrictive language in the deed precludes any use other than a ‘water ditch.’ The mere recitation of the existence of a deed conveying the land for a ‘water ditch’ does not constitute substantial evidence that the land cannot also be used as a haul road.”

B.

CEQA Requires Consideration of Feasible Alternatives

As the California Supreme Court has explained, “[T]he core of an EIR is the mitigation and alternatives sections. The Legislature has declared it the policy of the State to ‘consider alternatives to proposed actions affecting the environment.’ (. . . § 21001, subd. (g); *Laurel Heights, supra*, 47 Cal.3d at p. 400.) Section 21002.1, subdivision (a) . . . provides: ‘The purpose of an [EIR] is to identify the significant effects of a project on the environment, *to identify alternatives to the project*, and to indicate the manner in which those significant effects can be mitigated or avoided.’

(Italics added. See also . . . § 21061 [‘The purpose of an [EIR] is . . . to list ways in which the significant effects of such a project might be minimized; *and to indicate alternatives to such a project.*’ (Italics added.)].)

“In determining the nature and scope of alternatives to be examined in an EIR, the Legislature has decreed that local agencies shall be guided by the doctrine of ‘feasibility.’ ‘[I]t is the policy of the state that public agencies should not approve projects as proposed if there are *feasible alternatives* or *feasible mitigation measures* available which would substantially lessen the significant environmental effects of such projects. . . . [I]n the event specific economic, social, or other conditions make infeasible such project alternatives or such mitigation measures, individual projects may be approved in spite of one or more significant effects thereof.’ (. . . § 21002, italics added.)” (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564-565 (*Goleta Valley*).)

CEQA does not require a public agency to consider every imaginable alternative. “CEQA establishes no categorical legal imperative as to the scope of alternatives to be analyzed in an EIR. Each case must be evaluated on its facts, which in turn must be reviewed in light of the statutory purpose.” (*Goleta Valley, supra*, 52 Cal.3d at p. 566.) Nonetheless “an EIR for any project subject to CEQA review must consider a reasonable range of alternatives to the project, *or to the location of the project*, which: (1) offer substantial environmental advantages over the project proposal (. . . § 21002); and (2) may be ‘feasibly accomplished in a successful manner’ considering the economic, environmental, social and technological factors involved. [Citations.]” (*Ibid.*) And, as our high court noted, “the government’s power of eminent domain and access to public lands suggest that alternative sites may be more feasible, more often, when the developer is a public rather than a private agency.” (*Id.* at pp. 574-575 [collecting authority].) Thus, the willingness to resort to eminent domain to complete a project demands that the other alternatives made possible by eminent domain must also be considered.

C.

The County Failed to Properly Consider the Cordua Canal Route

The County improperly dismissed the Cordua Canal route as infeasible. The impetus for Teichert's search for an alternate route arose out of the noise, vibration, and safety problems that arose when hundreds of gravel trucks traveled through the residential neighborhoods of Hallwood Boulevard and Walnut Avenue. The neighbors around Kibbe Road feared that the same problems would plague the use of Teichert's private haul road. Thus, the Tulls and others suggested a route that would largely avoid any private homes by following an existing irrigation canal.

The Cordua Canal route requires consideration under CEQA because the County's own analysis acknowledged it to be an environmentally superior route. Even so, the alternate route is not perfect. From an environmental perspective, the Cordua Canal route is slightly longer than Teichert's private haul road route. However, the search for an alternative to the Hallwood Boulevard and Walnut Avenue route does not originate from a quest for a shorter route, but from a search for a route that eliminates the disturbance of many heavy trucks rumbling past private homes. To this end, the Cordua Canal route appears to offer a viable alternate to the Kibbe Road location -- which would simply shift the noise and safety risks from one set of homes to another.

In the final EIR, the reasons stated for rejecting the Cordua Canal route as infeasible are inconsistent with other parts of the EIR. The final EIR characterizes the Cordua Canal route as infeasible on grounds that eminent domain proceedings would be necessary to acquire the land. However, Teichert's private haul road is endorsed by the EIRs as the best route even though eminent domain would be necessary to complete the road. It is logically inconsistent for eminent domain to be an option for one route but not another route. Moreover, as the California Supreme Court has held, the exercise of eminent domain power for a project means that a public agency errs insofar as it fails to

consider other alternatives that may be possible with the same eminent domain power. (*Goleta Valley, supra*, 52 Cal.3d at pp. 574-575.) Here, the environmentally superior route was excluded through selective omission of eminent domain as an option.

The County attempted to justify the use of eminent domain for the private haul road route but not the Cordua Canal route. It reasoned that eminent domain would only be necessary for the Kibbe Road/State Road 20 intersection if the private haul road route were employed. Such reasoning perpetuates the County's error in attempting to segment the project into two separate parts: the intersection and the private haul road. We rejected such improper segregation of the project in *Tull I, supra*, C047900. The only reason for use of eminent domain for the Kibbe Road intersection is to complete Teichert's haul road. There would be no need for a new intersection in the absence of the private haul road.

Either the County is willing to exercise the power of eminent domain for this project or it is not. If so, the County cannot be willing to condemn land for the private haul road route but not the Cordua Canal route. (*Goleta Valley, supra*, 52 Cal.3d at pp. 574-575.) If not, then the project cannot be approved because the record is clear that the private haul road cannot connect to State Road 20 without the County or CalTrans resorting to eminent domain.⁶

The County's steadfast willingness to resort to eminent domain at the proposed Kibbe Road intersection means that the rejection of the same for the Cordua Canal route

⁶ On appeal, the parties have asked us to consider only whether the final EIR was properly certified. Neither Teichert nor the Tulls argues whether eminent domain is available to complete this project. Accordingly, we — like the trial court — do not reach the issue of whether the County or CalTrans may employ eminent domain proceedings to complete a new haul route for Teichert's gravel trucks. We deny the Tulls' request for judicial notice of eminent domain proceedings that occurred after the filing of the notice of appeal in this case.

was error. Consequently, the final EIR failed to properly consider the viability of the Cordua Canal route. “Certification of an EIR which is legally deficient because it fails to adequately address an issue constitutes a prejudicial abuse of discretion regardless of whether compliance would have resulted in a different outcome.” (*Citizens to Preserve the Ojai v. County of Ventura* (1985) 176 Cal.App.3d 421, 428.) The trial court correctly concluded the County erred in certifying the final EIR for failure to properly consider feasible alternate routes.

II

Traffic Noise and Vibration Impacts Analysis

Teichert asserts the final EIR properly studied the potential noise and vibration impacts of the private haul road project. While we agree with Teichert that the County used an appropriate threshold of significance standard for assessing noise generated by the project, we must disagree that the final EIR properly accounts for all potentially significant noise and vibration impacts.

A.

Noise and Vibration Impacts from Teichert’s Trucks

Teichert began exploring alternates for its haul route because of complaints from the residents of Hallwood Boulevard and Walnut Avenue.

The draft EIR referred to the degraded noise environment in selecting its threshold of significance for the project. As the draft EIR explained: “[B]ecause the measured ambient noise levels currently exceed the County’s objectives prior to the construction of the proposed project, this analysis focuses on the change in ambient conditions [in the project vicinity]. [¶] In general, an increase of at least 3 dB is usually required before most people will perceive a change in noise levels, and an increase of 5 dB is required before the change will be clearly noticeable. A common practice in cases where existing traffic noise levels without the project exceed the local noise standards is to assume that a

clearly noticeable increase of 5 dB is required for a finding of significance. [¶] . . . [T]he County’s Noise Element was adopted in 1978; the noise level objectives are not in keeping with current convention. Nonetheless, for residential uses, the objective is 50 dB for both day and nighttime periods. . . . The measured ambient noise levels . . . are already well in excess of these objectives. As a result, this analysis focuses on the degree by which the proposed project would cause ambient noise levels to increase at existing noise-sensitive land uses located along the segment of Kibbe Road south of the [State Road] 20/Kibbe Road intersection and along [State Road] 20 itself, as required by CEQA.”

The draft EIR concluded that no mitigation measures were necessary because the private haul road would generate only an average of 68 decibels of noise — only 1 decibel higher than the ambient at State Road 20. That conclusion, however, did not reveal the results of a study of slow-moving trucks on Walnut Road. That study measured the noise of 33 trucks at a distance of 50 feet from the center of the road. The noise ranged from a low of 76 decibels to a high of 85 decibels — all in excess of both the 50-decibel County standard and the 68-decibel average used in the draft EIR.

At hearings on the proposed project, residents of the Hallwood area described the noise and vibration disturbances caused by the Teichert trucks. One Hallwood Boulevard resident stated: “[The Teichert trucks] line up at 5:20 (am) at my house and we have them from 5:30 (am) all the way to 8:00 at night. On a slow day, we have 85-90 trucks and on a real busy day, when they haul two types of material we have about 150-160.”

Another Hallwood resident complained: “I don’t need an alarm clock anymore. I get one at 5:18 every morning. The trucks come except Sunday.”

Similarly, a Walnut Avenue resident stated that the trucks are “[I]ined up ready to go at 5:30 and they start and you want to talk about noise, at 5:30 am we get vibrated out of our beds practically every morning including Saturday.”

At one of the hearings, Forrest Tull stated that “if Teichert is permitted to use the Kibbe haul road it will impact the noise in our area greatly as trucks will be using Jake brakes to slow down as well as trucks engines [*sic*] roaring as they gear down and accelerate from this intersection.” The Tulls also provided additional argument that the “County failed to adequately disclose or analyze the subject project’s potentially significant noise impacts including invocation of a higher ‘threshold of significance,’ failing to consider the effects of ‘single event’ noises, and failure to consider or address how the use of ‘jake brakes’ may increase noise.”

The final EIR rejected these concerns of traffic noise and vibration by concluding that Teichert’s trucks already exceeded Yuba County noise standards. Specifically, the final EIR found: “In this case, the existing noise levels along [State Road] 20 already exceed the applicable Yuba County General Plan Standards, so the project would not ‘result’ in that exposure. Accordingly, the noise analysis for the project addressed whether the project would result in a ‘substantial permanent increase’ in ambient noise levels. The noise analysis prepared for this project indicates that the project will result in an increase of approximately 1 dB on [State Road] 20 west of Kibbe Road, 0 dB on [State Road] 20 east of Kibbe Road, and decreases ranging from 2 to 20 dB on the roadways currently utilized by Teichert truck traffic which will no longer be utilized following implementation of the project. Because traffic noise level increases of 1 dB or less are not considered to be substantial or, for that matter, perceptible, no finding of significant noise impact was warranted for those roadways. Because the traffic noise level increase on the new haul road is predicted to be substantial (5 dB) with the project, a significant impact was identified for that segment.”

In response to Forrest Tull’s statements, the final EIR responded: “The commenter is correct in noting that the use of engine brakes generates higher noise levels than trucks decelerating without engine brake usage. The extent by which trucks utilizing

engine brakes are louder is partially a function of the age of the truck. BBI [the County's acoustic consultant's] experience has been that newer generation trucks have considerably quieter engine brakes than older trucks. BBI is unaware of information that states the majority of trucks will utilize engine brakes at the site. BBI's experience has been that engine brake usage is typically observed in locations where more rapid deceleration is required (such as at locations where the stopping point is not visible from a distance and drivers are unaware a stop is coming). Engine brake usage is often observed on steep downgrades where additional braking power is necessary. However, at locations where the stopping point is visible from a distance, or where steeper grades do not exist, such rapid deceleration is usually unnecessary. Because the proposed intersection improvements and private haul road are located in an area with adequate site distance, as discussed on pages 3.3-24 and 25 of the DEIR, and is not characterized by steep grades, the noise analysis appropriately assumed that use of Jake brakes for trucks traveling to the Hallwood plant from locations east of the project site would not be substantial and that traffic noise impacts along [State Road] 20 east of the project site are less than significant."

The trial court concluded that the "County's analysis impermissibly focuses on 'project level, not cumulative impacts,' whereas analysis of the cumulative impacts is required. [Citation.] [¶] Moreover, given the comments in the record concerning persistent, even daily 'single event' disruptions [citations], the County prejudicially abused its discretion in certifying an EIR which relied only on averages without taking into account single event disruptions. [Citation.]"

B.

An EIR Must Accurately Describe the Potentially Significant Environmental Impacts of a Proposed Project

For purposes of CEQA, “[a] project will have a significant effect on the environment if it will cause ‘a substantial, or potentially substantial, adverse change in’ ‘the physical conditions which exist within the area which will be affected by [the] project, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance.’ (CEQA, §§ 21060.5 [defining ‘environment’], 21068 [defining ‘significant effect on the environment’].)” (*Protect The Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1106 (*PHAW*)).

To comply with CEQA, “in preparing an EIR, the agency must consider and resolve every fair argument that can be made about the possible significant environmental effects of a project, irrespective of whether an established threshold of significance has been met with respect to any given effect. Once the agency has determined that a particular effect will not be significant, however, the EIR need not address that effect in detail. Instead, the EIR need only ‘contain a statement briefly indicating the reasons for determining that various effects on the environment of a project are not significant and consequently have not been discussed in detail in the environmental impact report.’ (CEQA, § 21100, subd. (c); see also Guidelines, § 15128.)” (*PHAW, supra*, 116 Cal.App.4th at p. 1109.)

The EIR must properly account for potentially significant environmental effects of a project because “““[o]nly through an accurate view of the project may affected outsiders and public decision-makers balance the proposal’s benefit against its environmental cost, consider mitigation measures, assess the advantage of terminating the proposal . . . and weigh other alternatives in the balance.””” (*Center for Sierra Nevada Conservation, supra*, 202 Cal.App.4th at p. 1171, quoting *City of Redlands v. County of*

San Bernardino (2002) 96 Cal.App.4th 398, 406.) In short, “the EIR ‘protects not only the environment but also informed self-government.’” (*Center for Sierra Nevada Conservation, supra*, at pp. 1177-1178.)

C.

The EIRs Failed to Properly Assess the Noise and Vibration Impacts for the Private Haul Road

A review of the draft and final EIR’s explanations for the conclusion that the private haul road would not result in any significant noise or vibration impacts leaves us perplexed. While the County used an appropriate threshold of significance standard for assessing noise generated by the project, the County’s reasoning in the draft and final EIRs does not follow.

1. The Five-Decibel Threshold of Significance

The parties spar over whether the County erred in selecting a 3-decibel or a 5-decibel threshold of significance for the project. As Teichert notes, under either standard the difference between the ambient noise at State Road 20 and the impact of the project at Teichert’s private haul road site, the same conclusion of no significant impact is the result. The Tulls argue that the County arbitrarily selected 5 decibels based on the already-degraded sound environment near State Road 20. As the Tulls note, a degraded environment does not justify further degradation on that basis. In *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, the Court of Appeal rejected reliance on bad air quality for a region as a grounds for allowing further pollution. The *Kings County* court recounted that “the EIR reasons the air is already bad, so even though emissions from the project will make it worse, the impact is insignificant. [¶] The point is not that, in terms of ozone levels, the proposed Hanford project will result in the ultimate collapse of the environment into which it is to be placed. The significance of an activity depends upon the setting. (Guidelines, § 15064, subd. (b).) The relevant

question to be addressed in the EIR is not the relative amount of precursors emitted by the project when compared with preexisting emissions, but whether any additional amount of precursor emissions should be considered significant in light of the serious nature of the ozone problems in this air basin.” (*Id.* at p. 718.)

Nonetheless, we are not persuaded by the Tulls that the selection of 5 decibels is clearly premised on the violation of Yuba County standards. Instead, the draft EIR explained that it selected 5 decibels as the differential in noise that is clearly noticeable to the average person. We must defer to the County’s reasoned analysis of its choice to employ 5 decibels as the threshold of significance.

However, even accepting the County’s conclusion that a 5-decibel change in noise in the environment is significant, we must reject the County’s conclusion that the project at Kibbe Road will not have a potentially significant impact. As we explain more fully below, at a minimum, the quietest of the Teichert trucks will be 8 decibels louder than the ambient noise at the State Road 20 interchange and the loudest Teichert trucks will be 17 decibels louder.

2. Failure to Account for the Changes around the Private Haul Road

The draft EIR is unclear about the scope of the environment considered for the noise and vibration impact from Teichert’s trucks. The EIRs appear to rely on the 67 decibels that are the ambient noise for the busy State Road 20 in order to extend that degraded noise environment onto what is now an incomplete (and therefore unused by Teichert) haul road. The final EIR also seems to assume that the Teichert trucks already generate noise and vibration that would remain largely the same regardless of the location of their route to market. The EIRs are evasive about the true noise and vibration impact on homes around Teichert’s private haul route that will result with the addition of hundreds of gravel trucks.

The significant impact from turning a largely unused route into a haul road for gravel trucks is obvious. As noted by Steve Pettyjohn, an acoustics consultant for the Tulls: “The DEIR starts by saying that sound can interfere with sleep and can cause stress. Then it states that because levels at which stress occurs varies [*sic*] too much so they will ignore it and they say nothing about sleep disturbance. This does not meet the requirements of CEQA for discussing the impacts. Neighbors along the existing route have discussed the stress and negative impacts that the heavy truck movements have on their lives. Expecting anything less for those living along the proposed private haul road would be incomprehensible.”

Teichert attempts to defend the EIRs on the issues of noise and vibration by pointing out that the issues were studied and analyzed. Without citing authority in support of the proposition, Teichert asserts that “[o]nly outright omissions can . . . be employed to establish a procedural violation and no such outright omissions occurred with respect to these matters.” An EIR must include the potentially significant impacts from a project to be certified. (*Laurel Heights II, supra*, 6 Cal.4th at p. 1123.) Here, the EIRs do not adequately describe the noise and vibration impacts to the environment surrounding the private haul road that would result if Teichert were to begin using it as its route for transporting gravel to market.

3. Selection of a Measure that Disguises the Noise Impact of the Project

The EIRs employ a measure of noise that the County itself acknowledged masks the full impact of the trucks on the surrounding environment. Specifically, the EIRs use a 24-hour average that artificially lowers the decibels that can be expected to result from the project. The County’s own noise analysis acknowledged the “24-hour average . . . tends to disguise short-term variations in the noise environment.” The County used this 24-hour average even though a study of 33 slow-moving trucks on Walnut Avenue

showed that not a single one of them fell below the 24-hour average. Instead, the study showed that even the least loud truck generated 76 decibels. The three loudest trucks generated 85 decibels -- significantly more than the County's average figure. The selection of an average that tends to disguise short-term but very loud noises means that the EIR conveys an inaccurate description of the expected environmental consequences. (*Berkeley Keep Jets Over the Bay Com. v. Board of Port Cmrs* (2001) 91 Cal.App.4th 1344, 1380-1382.)

4. Analysis of "Jake Brakes"

The trial court concluded the County erred in failing to "address how the use of 'jake brakes' may increase noise" resulting from the project. We agree.

The Tulls objected to certification of the final EIR, in part based on the failure to adequately address the issue of noise arising from the use of "jake brakes" as follows: "It is a fact, as personally observed by [Forest Tull], based on his long time experience from living in the [State Road] 20 / Kibbe Road neighborhood, walking along [State Road] 20, and observing the trucks that do turn from [State Road] 20 onto Kibbe Road, that a majority of trucks turning onto Kibbe Road from [State Road] 20 do use Jake brakes to slow for such turns. It is also a fact that 1) the entire intersection portion of the project will, at least initially, be entirely unsignalized, and 2) the proposed right turn lane that will connect eastbound [State Road] 20 [/] Kibbe Road south, and provide access for approximately 75% of the trucks seeking to enter the Hallwood mine site is designed to be a through turn that will not require stopping even after the intersection is signalized. It is reasonable to infer, from this combination of facts, that a majority of the hundreds of gravel trucks that will be entering Kibbe Road south from [State Road] 20 at the very early hours of the morning will slow to make this turn using their Jake brakes, thus inducing low frequency sounds and vibrations that are not at all disclosed, analyzed or mitigated in the EIR." (Italics omitted.)

Teichert dismisses the Tulls' concerns that are founded on their observations of the gravel trucks. However, it is well established that personal observations by area residents are properly considered for this purpose. (*Pocket Protectors v. City Of Sacramento* (2004) 124 Cal.App.4th 903, 932.) Consequently, the final EIR was required to provide an adequate and considered response to the Tulls' noise and vibration concerns. It did not do so.

Teichert defends the final EIR by touting the expertise of the County's acoustic consultants. Teichert relies on *Apartment Assn. of Greater Los Angeles v. City of Los Angeles* (2001) 90 Cal.App.4th 1162, a case in which a residential landlord association sued to oppose a proposed code enforcement program on grounds that the City had to first assess its impacts in an EIR. (*Id.* at p. 1165.) The association introduced an expert's declaration to the effect that repairs *might* have "a significant effect on the environment because these construction and repair projects will involve 'use [of] hazardous chemicals to control pests and rodents, and *potentially* disturb hazardous building materials (e.g., asbestos and lead paint) in older structures.'" (*Id.* at p. 1175.) The expert's speculation was held not to constitute substantial evidence of potentially significant environmental effects. As the *Apartment Assn.* court elaborated: "[A]n expert's opinion which says nothing more than 'it is reasonable to assume' that something 'potentially . . . may occur' constitutes the substantial evidence necessary to invoke an exception to a categorical exemption. 'Substantial evidence' is defined in the CEQA guidelines to include 'expert opinion supported by facts.' It does not include '[a]rgument, speculation, unsubstantiated opinion or narrative.'" (*Id.* at p. 1176, fns. omitted.)

The County's reliance on the acoustics expert in this case is similarly unavailing. Here, the County recognized the use of jake brakes yields noise greater than the noise that results if only wheel brakes are used. Although "newer" generation trucks are purported to be quieter, the EIR contains no information as to whether Teichert employs the quieter

trucks or how much less noise such trucks make than older vehicles. The consultant is cited as stating that jake brakes are “typically” used on steep inclines and “usually unnecessary” when the stopping point is visible from a distance. However, BBI did not consider whether the Kibbe Road intersection had an atypical or unusual factor that might result in frequent use of the jake brake. By contrast, the Tulls submitted information based on personal observation and long-time experience of trucks employing jake brakes at exactly the intersection at issue.

There is no indication the County properly considered whether the Kibbe Road intersection in specific would likely yield jake brake usage. Moreover, the final EIR does not assesses the level of noise currently generated by jake brakes at the intersection or how that ambient level would be affected by completion of the project at that site. Consequently, the final EIR does not contain substantial evidence in support of its conclusion that jake brake usage would be nonexistent or insignificant for the project if located at Kibbe Road.

III

Drainage Analysis

Teichert also contends drainage impacts of completing the project at the intersection of Kibbe Road and State Road 20 were properly assessed in the final EIR. We are not persuaded.

A.

The Undisclosed Drainage Pond

The draft EIR did not analyze or discuss the cumulative drainage impacts for the project if located at Kibbe Road and State Road 20. After releasing the draft EIR, the County received several comments urging the study of hydrology for completion of the private haul road. For example, CalTrans commented: “The Draft EIR for the proposed project at the intersection of [State Road] 20 . . . and Kibbe Road is incomplete.

Anticipated project impacts on hydrology/hydraulics in the project area were not addressed in the report. The alteration of this intersection could have significant impacts on drainage pathways inside and outside of the State’s highway right of way.”

In the final EIR, the County responded that “[t]he [draft] EIR does not include a chapter dedicated to hydrologic impacts because the Initial Study . . . determined that the proposed project would not result in potentially significant impacts to hydrology and water quality” However, in another part of the final EIR, the need to build drainage facilities was disclosed for the first time as follows: “The applicant would comply with Caltrans requirements regarding design of drainage facilities, including the submission of appropriate calculations to the Hydraulics Branch. In addition, the project applicant would be required to apply for and comply with all conditions of a NPDES Construction General Permit. As described in the project Initial Study [citation], with implementation of Best Management Practices, compliance with County and Caltrans standards, and acquisition of the appropriate permits, the project would not result in significant adverse impacts.”

The trial court noted that “between the time the Initial Study was conducted and before the Final EIR was adopted, Caltrans made [the County] aware of the need to construct facilities, i.e., detention/retention ponds or basins, sub-surface galleries, on-site storage or infiltration ditches. The [Tulls introduced an exhibit that] shows, marked as ‘drainage easement,’ what appears to be detention or retention pond or basin or like facility measuring about 2,525 square feet, the land which the County is seeking to condemn.”

The exhibit to which the trial court referred surfaced in an eminent domain proceeding in which the County sought to condemn the land necessary for a 2,525-square-foot drainage pond next to the Kibbe Road and State Road 20 intersection.

Although the County produced a map of the proposed drainage pond for the eminent domain case, it did not disclose the plan for the drainage easement in the final EIR.

Due to the failure of the final EIR to disclose the drainage pond or discuss the mitigation measures planned for drainage around the proposed intersection, the trial court concluded that “a proper EIR should have disclosed the need for such facilities and analyzed the impacts of the various alternatives. The County should have recirculated a Draft EIR. Failure to do so, constituted a failure to proceed in the manner required by law.”

B.

Preservation of the Issue for Appeal

We begin by rejecting Teichert’s contention that the Tulls failed to preserve the issue for appeal by failing to object to the lack of discussion regarding the hydrology/drainage pond impact of the project prior to certification of the final EIR. Specifically, Teichert argues the Tulls “could . . . have generically indicated that the mitigation measures for dealing with construction sediment might themselves have potential adverse environmental impacts which ought to be studied.”

As the Tulls point out, the final EIR does not disclose the drainage pond being planned by the County. On this point, Teichert suggests that “[p]erhaps that was somewhat justifiable in the context of the issuance of the grading and encroachment permits since the rice field easement was unknown at that time.” We disagree. To credit Teichert’s argument would be to shift the burden of identifying potential environmental impacts for a project from the preparers of an EIR to anyone that might ultimately challenge the study’s adequacy. CEQA, however, places the burden of identifying and analyzing potential impacts on the agency preparing the EIR. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 396 (*Laurel Heights I*); *Vineyard, supra*, 40 Cal.4th at p. 428.)

Moreover, there *was* an objection to the adequacy of the final EIR on grounds that it failed to properly assess the potentially significant impacts to hydrology and drainage resulting from the project. As mentioned, in response to the draft EIR, CalTrans commented: “The Draft EIR for the proposed project at the intersection of [State Road] 20 . . . and Kibbe Road is incomplete. Anticipated project impacts on hydrology/hydraulics in the project area were not addressed in the report. The alteration of this intersection could have significant impacts on drainage pathways inside and outside of the State highway right of way.” Although the final EIR noted the objection, it did not study the issue. This objection sufficed to preserve the claim because “the issues raised before a court must first have been raised during the administrative process, although not necessarily by the person who subsequently seeks judicial review.” (*Citizens for Open Government v. City of Lodi* (2006) 144 Cal.App.4th 865, 875.) We conclude the County was apprised of potential hydrology and drainage concerns arising out of the project.

C.

EIR Analysis of a Project Must Include Integral Components

Under CEQA, it is well established that “[a] project description that omits integral components of the project may result in an EIR that fails to disclose the actual impacts of the project.” (*Dry Creek Citizens Coalition v. County of Tulare* (1999) 70 Cal.App.4th 20, 26 (*Dry Creek*)). Instructive on this point is the case of *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818 (*Santiago County*). *Santiago County* involved a water district’s challenge to the certification of an EIR for a proposed sand and gravel mining operation. (*Id.* at p. 822.) The EIR for the mining operation was held inadequate because it failed to describe or analyze water delivery facilities that would be required for the mining operation. (*Id.* at p. 829.) Existing water delivery equipment was not sufficient to supply the water needs of the project. (*Ibid.*) The water district pointed

out the omission of the water facilities from the EIR process. The County provided a response that, “instead of specifying the equipment that will be needed, merely state[d] that “(t)he developer will furnish the District with detailed plans of works.”” (*Ibid.*) This response, the *Santiago County* court held, was “not nearly enough.” (*Ibid.*) Due to the omission of the water facilities from the EIR, “some important ramifications of the proposed project remained hidden from view at the time the project was being discussed and approved. This frustrates one of the core goals of CEQA. ‘Only through an accurate view of the project may affected outsiders and public decision-makers balance the proposal’s benefit against its environmental cost, consider mitigation measures, assess the advantage of terminating the proposal . . . and weigh other alternatives in the balance. An accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR.’” (*Santiago County*, at p. 830, quoting *County of Inyo v. City of Los Angeles*, *supra*, 71 Cal.App.3d 185, 192-193.)

As another court noted, the omission of an integral part of a project from consideration renders the EIR fatally defective. “[T]he ultimate decision of whether to approve 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.” (*San Joaquin Raptor/Wildlife Rescue Ctr. v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-722, quoting *Santiago County*, *supra*, 118 Cal.App.3d at p. 829.)

D.

The Drainage Pond and Hydrology Impacts Should Have Been Discussed and Analyzed by the County

In this case, the trial court correctly concluded the final EIR did not properly assess the hydrology impacts arising out of the project at the Kibbe Road and State Road 20 intersection. The County was sufficiently certain of the necessity for the drainage

pond and its location to engage in an eminent domain proceeding to condemn the land for the project. Moreover, the final EIR notes the County was aware that CalTrans required hydrology mitigation measures for the project. However, the final EIR does not describe or analyze the necessary hydrology mitigation measures. The final EIR does not even hint that the project at Kibbe Road and State Road 20 would require a 2,525-square-foot drainage pond even though the County appears elsewhere to have understood the pond to be a necessary part of the project. As in *Santiago County*, the promise of forthcoming details about mitigation measures fails to satisfy CEQA’s EIR requirements. (*Santiago County Water Dist.*, *supra*, 118 Cal.App.3d at pp. 829-830.) The final EIR in this case did not provide for informed decision-making about the full extent of impacts arising from locating the project at the Kibbe Road and State Road 20 location.

IV

Traffic Safety Impacts

Teichert next contends the final EIR properly analyzed traffic safety impacts for the route to the Kibbe Road and State Road 20 intersection. We agree.

A.

Traffic and Safety Analyses by the County

1. Proposed Intersection Location on State Road 20

The draft EIR concluded that “[t]raffic-related safety hazards at the proposed intersection location” would be “less-than significant.” (Italics omitted.) This conclusion was based on the fact that “all five study intersections meet the Caltrans minimum requirements for both corner and stopping sight distance. The proposed project would relocate the existing [State Road] 20/Kibbe Road intersection to over 100 feet west of its current location, which would increase both the stopping sight distance and the corner sight distance. Figures 3.3-7 and 3.3-8 show the stopping sight distance and corner sight distance for the [State Road] 20/Kibbe Road intersection. The relocated [State Road]

20/Kibbe Road intersection would meet the stopping sight distance requirements for a 70 m.p.h. design speed, and corner sight distance requirements for a 60 m.p.h. design speed.” The draft EIR further noted that “the California Highway Patrol Information Division provided accident summaries for [State Road] 20 between Walnut Road and Kibbe Road. Table 3.3-9 shows the 51 reported accidents, separated by location, during that 39-month period.”

On this basis, the draft EIR concluded that “because [the] California Highway Patrol has indicated that accident rates are lower along [State Road] 20 between Walnut Avenue and Kibbe Road than the statewide average for similar roadway segments, the proposed project would result in a *less-than-significant* impact on traffic-related hazards.”

2. Bus Stop Safety Concerns

At one point, the County believed that a school bus stop was located on the north side of State Road 20 near the Kibbe Road intersection. However, the County eventually learned that “there is not a bus stop on the south side of [State Road] 20/Kibbe Road. However, as shown in the photographs a bus does drop off students on the south side of [State Road] 20. A follow-up call to the Marysville Joint Unified School District in October 2005 resulted in the verification of a bus stop on the south side of [State Road] 20/Kibbe Road, and an apology for the previous oversight.

“The dispatcher that responded to the inquiry stated that the buses must pull off the highway and they would most likely continue to use the existing location, as long as adequate pavement width remains, and not the new intersection to drop off the one or two students in the afternoon. Trucks accessing [State Road] 20 via Kibbe Road to go eastbound would be moving at a slower speed than under existing conditions.” Accordingly, the County concluded that no mitigation was required.

3. Vehicle Turns on State Road 20

The County also considered the safety of residents making turns into their properties from State Road 20 and concluded as follows: “Properties on the north side of [State Road] 20 will be allowed to turn onto their properties from the eastbound lanes. The amount of vehicles on [State Road] 20 in front of these residences should not change. The projected truck volume that will access the mining site from the east is approximately 85 for the day or about 9 trucks during the AM peak hour or an average of 1 truck every 6 or 7 minutes. During the PM peak hour approximately 3 trucks, or an average of 1 truck every 20 minutes, would make the left turn onto Kibbe Road from eastbound [State Road] 20. The proposed left-turn pocket has adequate capacity to accommodate anticipated truck traffic without blocking access to existing driveways on [State Road] 20. The proposed left turn pocket has approximately 475 feet of storage length plus a 120-foot bay taper. Without using the potential storage in the bay taper, the left-turn pocket could accommodate nine 50-foot-long trucks. Thus, even if the anticipated AM peak hour’s worth of 9 trucks were to arrive within a very short period of time, they could all be accommodated within the proposed left-turn pocket.” Ultimately, the County concluded that turns off of State Road 20 would be safe.

4. Trial Court Finding

The trial court found that “the County prejudicially abused its discretion in certifying the [final] EIR . . . after the Draft EIR did not disclose or analyze alleged traffic and safety impacts. The *factual dispute* as to the striping in the ‘safe harbor’ area,^[7] the initially-erroneous, then conclusory assurances attributed to an unnamed bus dispatcher concerning the bus stop, and conclusory assertions relating to the movement of trucks

⁷ The “safe harbor” refers to a planned center lane that allows turning vehicles to safely stop in the middle of State Road 20 while waiting for oncoming traffic to clear.

demonstrate why disclosure and a reasoned response to comments is required under CEQA. Relief will be granted on this ground.” (Emphasis changed.)

B.

Review of Claims of Omission from EIR Study

“[I]t ‘frequently occurs’ that ‘the major disputes are over whether relevant information was omitted from the EIR.’ [Citation.] Many CEQA challenges thus concern the amount or type of information contained in the EIR, the scope of the analysis, or the choice of methodology. These are factual determinations. [Citation.] ‘A project opponent cannot obtain a more favorable standard of review by arguing that the EIR failed to disclose the conflicting evidence, and therefore the lead agency has not proceeded in a manner required by law; the project opponent must *also* show that the failure to disclose the conflicting evidence precluded informed decisionmaking or informed public participation.’” (*California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 986-987 (*Native Plant Soc.*), quoting *Barthelemy v. Chino Basin Mun. Water Dist.* (1995) 38 Cal.App.4th 1609, 1620; accord *National Parks & Conservation Assn. v. County of Riverside* (1999) 71 Cal.App.4th 1341, 1353; but see, *Association of Irrigated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1392; see generally, Remy et al., *Guide to California Environmental Quality Act* (11th ed. 2007) pp. 826–828.)

C.

The County Properly Studied the Traffic and Safety Issues

As the administrative record shows, the County properly considered the traffic and public safety for the Kibbe Road intersection at the location where the private haul road would connect with State Road 20. The County studied the safety of traffic turning onto and off of State Road 20. Moreover, the County also assessed the safety concerns that might arise from the location of a school bus stop in the vicinity of the intersection.

Thus, traffic and safety was not an issue *omitted* from study or analysis. Indeed, the trial court did not find that these issues were ignored. To the contrary, the trial court rejected the County's conclusions on the basis of a "factual dispute" on the issue.

In responding to the draft EIR and on appeal, the Tulls advance criticisms of the County's conclusions that the Kibbe Road intersection would not increase traffic risks if connected to the private haul road. For example, they detail how they believe that "real world" conditions will result in high-speed westbound drivers on State Road 20 running into the rice field to the right of the highway. Also, the Tulls contend that the striped, safe-harbor in the middle of State Road 20 is inadequate to protect residents when turning onto their properties.

We reject the Tulls' contentions because we do not reweigh conflicts in the evidence. (*Native Plant Soc.*, *supra*, 177 Cal.App.4th at pp. 986-987.) The County studied the traffic safety impacts for the proposed intersection — including analysis of charts, safety data, and requirements imposed by the Vehicle Code. The County also considered the safety risks associated with the location of a bus stop near the intersection. Although the Tulls disagree with the County's conclusions, their disagreement is one of a factual dispute. Likewise, the trial court's basis for finding error expressly rests on the "factual dispute" over traffic safety contained in the record. Accordingly, we conclude the trial court erred in finding the County did not properly study or address traffic safety in its EIR.

The Tulls object to the County's responses to concerns about the bus stop by pointing out they are not contained in the draft EIR. True, the responses are not contained in the draft EIR. Moreover, the draft EIR considers the bus stop based on what might have been on the wrong side of State Road 20. However, "CEQA does not require a lead agency to revise a final EIR to include any new information or project changes that arise after the EIR is released but prior to certification before the agency determines

whether the information is significant enough to require the EIR be recirculated.”
(*Western Placer Citizens for an Agricultural & Rural Environment v. County of Placer*
(2006) 144 Cal.App.4th 890, 903.)

Here, the County fully considered the bus stop concerns for locations on the north and south side of State Road 20 prior to certification of the final EIR. “The court does not pass on the correctness of an EIR’s environmental conclusions, but determines whether the EIR is sufficient as an informational document.” (*Dry Creek, supra*, 70 Cal.App.4th at p. 26.) Here, the County adequately described and analyzed the potential safety risks attending the bus stop near the Kibbe Road intersection.

In sum, the County properly considered the traffic and public safety risks for the haul road route to the Kibbe Road intersection.⁸

Conclusion

As we have discussed, the final EIR did not properly assess and discuss the following potentially significant environmental impacts to be expected from the project: alternative routes; traffic and noise vibration; and hydrology and drainage. “Because the EIR is invalid in part, a new EIR must be prepared, submitted for public review and comment, and certified in accord with CEQA procedures.” (*Laurel Heights I, supra*, 47 Cal.3d at p. 388.)

⁸ Our conclusion is limited to the intersection of the private haul road with State Road 20 at Kibbe Road. As explained in part I, above, the County failed to consider the impact of locating the alternate haul route at Cordua Canal. Consequently, the County has not considered the traffic and public safety impacts that might arise out of locating the intersection at this alternate site.

CROSS-APPEAL BY THE TULLS

V

Reissuance of the Grading Permit for the Private Haul Road

The Tulls contend the County erred in reissuing a grading permit for the private haul road after this court's decision in *Tull I, supra*, C047900 required the County to consider all feasible alternate routes for Teichert's haul route. In support, they argue that the reissuance of the grading permit (1) violates the law of the case established in *Tull I*, and (2) impermissibly preceded a resolution of necessity that the County would have to issue prior to condemning property to complete the private haul road. We agree that the reissuance of the grading permit conflicts with *Tull I*.⁹

A.

Tull I and the Trial Court's Ruling

In January 2006, this court concluded — in *Tull I* — that “[h]ad the County complied with CEQA, the County may not have approved the road in its current location or may have imposed mitigation measures which the road does not now incorporate. Thus, the grading permit cannot be allowed to stand when the potential remains for the County to alter the project or deny the encroachment permits in order to comply with CEQA.” (*Tull I, supra*, C047900.)

Following remand, the County indicated its readiness to reissue the grading permit for the private haul road. The Tulls objected on grounds that “[t]he Public Works Department may not approve the grading permit application, because no portion of the project may be approved until the lead agency has issued findings as to the alternatives’

⁹ Our conclusion that our prior decision governs the County's prerogative to issue a grading permit prior to proper consideration of all feasible alternative routes obviates the need to consider whether the ministerial duty to issue a grading permit may be exercised prior to the issuance of a resolution of necessity for eminent domain. (*Redevelopment Agency v. Norm's Slauson* (1985) 173 Cal.App.3d 1121, 1125 (*Redevelopment Agency*)).

feasibility, and approved the project. As stated in the Court of Appeal’s ruling against the County and Teichert [¶] . . . the grading permit cannot be allowed to stand when the potential remains for the County to alter the project or deny the encroachment permits in order to comply with CEQA.” Thus, the Tulls asserted that “the potential still remains for the County to alter the project, or to require Teichert to carry out the project in one of the two environmentally superior locations identified in the EIR that the County has prepared, because the County has not yet issued findings as to the feasibility of those project alternatives.”

County counsel disagreed, explaining: “The decision to have the Director of Public Works consider the issuance of the grading permit before the consideration of either County or Caltrans encroachment permits was made after careful consideration and consultation between the County and Caltrans. Caltrans, as the responsible agency in the CEQA process, requested that the County, as CEQA lead agency, certify the EIR, adopt CEQA findings, and issue a notice of determination (NOD) prior to Caltrans action. [Citation.] Also, County staff concluded that the approval of a County encroachment permit or commencement of eminent domain proceedings associated with the proposed intersection improvements would be premature, because the Caltrans encroachment permit decision could alter the locations at which County right-of-way and encroachment would be sought, thereby likely necessitating a subsequent County encroachment permit modification. [Citation.] For these reasons, County staff elected to consider the grading permit first, because that action would allow Caltrans to proceed with the ability to review and potentially rely upon the County’s CEQA findings and without requiring that the County go through an unnecessary and likely wasteful consideration of a County encroachment permit that could be superseded by the Caltrans encroachment permit decision.”

County counsel also opined that “whether the issuance of a grading permit is ministerial or discretionary under the County’s ordinance is not relevant to the Director of Public Works’ authority to adopt CEQA findings. Rather, [Guidelines section] 15091 states that a public agency must adopt findings for each significant effect before it can ‘approve or carry out’ a project. Consistent with this authority, the Director of Public Works would be approving or carrying out a portion of the project when he [or she] issues a grading permit or encroachment permit for the project.” (Fn. omitted.) Counsel thus concluded the “issuance of a grading permit for the private haul road in no way ‘locks’ in future Caltrans or Yuba County decisions regarding the Project.”

The grading permit was reissued by the County on November 9, 2006.

In the trial court, the Tulls relied on *Redevelopment Agency, supra*, 173 Cal.App.3d 1121 to argue that the grading permit had been erroneously reissued before the County had properly considered all feasible alternatives to Teichert’s private haul road. They also argued that the grading permit should not have been issued before the Board issued a resolution of necessity for the taking of the land necessary to connect the private haul road with State Road 20.

The trial court rejected the Tulls’ claim as follows: “[The Tulls] contend that the Board . . . of respondent County . . . prejudicially abused its discretion in that it failed to issue a Resolution of Necessity before reissuing the grading permit at issue in this action. [¶] [*Redevelopment Agency, supra*, 173 Cal.App.3d 1121] is not on point. In that case the respondent had executed [a] contract and issued revenue bonds before, and, therefore, ‘irrevocably committed’ itself to taking the property in question before it conducted its hearing on the resolution of necessity. *Id.*, at 1127. In this case respondent took no such actions. [The Tulls] fail[] to demonstrate that the County’s actions ‘irrevocably committed’ it to the subject project.”

B.

The Doctrine of Law of the Case

“Under the law of the case doctrine, when an appellate court “states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout [the case’s] subsequent progress, both in the lower court and upon subsequent appeal” [Citation.] Absent an applicable exception, the doctrine ‘requir[es] both trial and appellate courts to follow the rules laid down upon a former appeal whether such rules are right or wrong.’ [Citation.]” (*People v. Barragan* (2004) 32 Cal.4th 236, 246.) “‘The principle applies to criminal as well as civil matters [citations], and to decisions of intermediate appellate courts as well as courts of last resort. “Where a decision upon appeal has been rendered by a District Court of Appeal and the case is returned upon a reversal, and a second appeal comes to this court directly or intermediately, for reasons of policy and convenience, this court generally will not inquire into the merits of said first decision, but will regard it as the law of the case.’”” (*Clemente v. State of California* (1985) 40 Cal.3d 202, 211-212, quoting *People v. Shuey* (1975) 13 Cal.3d 835, 841; see also *Price v. Civil Service Com.* (1980) 26 Cal.3d 257, 267, fn. 5; *Davies v. Krasna* (1975) 14 Cal.3d 502, 507; *Talley v. Ganahl* (1907) 151 Cal. 418, 421.)

C.

The Effect of Tull I on the County’s Prerogative to Reissue the Grading Permit for the Private Haul Road

As the trial court properly noted in resolving another contention of the parties: “In revisiting the issue of alternative routes, the County must be mindful of the directive of the Court of Appeal [in *Tull I*]: The EIR is to review the entire project as if no part of the project had yet been commenced.” The trial court’s observation comports with our prior holding that the original grading permit had been issued in violation of CEQA because it

committed the County to a route before proper review of alternate routes had been completed. (*Tull I, supra*, C047900.) And, as we explain in part I, above, the County has not yet properly considered all feasible alternatives to Teichert's haul road. Consequently, the County impermissibly reissued the grading permit for the private haul road.

Teichert argues the County was not required to secure permits or approvals from all agencies before reissuing the grading permit for the haul road. Specifically, Teichert asserts that the County could pursue, in any order, the acquisition of the right-of-way, the encroachment permit, the lot line adjustment, and the grading permit. Regardless of whether Teichert is correct about the order of these steps under normal circumstances, the effect of our decision in *Tull I, supra*, C047900 is that all of these steps are premature when the County has not yet properly studied *where* the haul road should be located.

At best, the reissuance of the grading permit for the location at Teichert's private haul road represents a premature action. At worst, it commits the County to a route even though the Cordua Canal route might be both feasible and environmentally superior to the location for which the grading permit was reissued. Accordingly, the County must rescind the grading permit that was issued in conflict with our prior decision in *Tull I*.

VI

Timeliness of the Tulls' Challenge to the Vested Rights Letter

The Tulls also claim the delayed discovery rule renders timely their challenge to the vested rights letter. Not so.

A.

Yuba County's Issuance of a Vested Rights Letter to Teichert

In June 2000, the County issued a vested rights letter to Teichert for its Hallwood aggregate mine. The letter from the principal planner for the County's Community Development Department to Lillie Noble, the project director for Teichert, Aggregates,

states: “We have reviewed your request and supporting materials including but not limited to a four-page letter dated April 5, 2000 with exhibits A, B and C which are hereby incorporated by reference. Staff has reviewed the materials in order to confirm whether a vested right to mine exists under [SMARA] and local ordinances. Based on our review of those submittals, and materials contained in the County’s own files, the Community Development Director finds that Teichert Aggregates has a vested right to conduct mining operations on property in the Yuba Goldfields in which Teichert Aggregates and predecessors, owns (owned) an interest, also defined in the above referenced submittal. [¶] . . . This is a private project which received an entitlement for use, via a vested right, from the County prior to April 5, 1973, as a result of existing mining uses.”

The vested rights letter indicates that a copy was sent to the Office of Mine Reclamation. No public hearing was conducted prior to the issuance of the vested rights letter to Teichert.

B.

The Tulls’ Challenge to Teichert’s Vested Rights Letter

On November 22, 2006, the Tulls first asserted a cause of action that challenged the validity of the County’s vested rights letter. The Tulls’ cause of action regarding the vested rights letter preceded this court’s decision in *Calvert, supra*, 145 Cal.App.4th 613 by approximately two weeks. There, we held that Yuba County’s determination of a mining company’s vested rights claim substantially affected the property rights of adjacent landowners, requiring reasonable notice and an opportunity to be heard in a public hearing. (*Id.* at pp. 626-627.)

Teichert demurred to the cause of action under SMARA on grounds that the statute of limitations to bring the claim had expired. The trial court sustained the demurrer but granted the Tulls leave to amend to allege the applicability of the delayed

discovery rule. The Tulls then filed their second amended supplemental petition to assert their SMARA-based claim was timely.

In their second amended supplemental petition, the Tulls alleged “[t]he County did not provide public notice or conduct an evidentiary hearing for members of the affected public to comment or be heard before the County issued its June 2000 letter purporting to confirm Teichert’s vested right to mine at the Hallwood site. [The Tulls] did not discover the existence of the County’s June 2000 letter or its issuance by the County until after November 22, 2003. [The Tulls] originally filed their Third Cause of Action in this Second Amended Complaint on November 22, 2006, within three years of [the Tulls’] discovery of the existence of the County’s June 2000 letter or its issuance by the County.”

The trial court dismissed the cause of action under SMARA, explaining that even if a three-year statute of limitations and the delayed discovery rule applied, the Tulls’ cause of action was still time-barred. The trial court reasoned:

“The question at bar is if [the Tulls] were put on inquiry as to whether . . . Teichert’s mining activities gave rise to a cause of action. [The second amended supplemental petition] discloses that [the Tulls] were aware that Teichert had ‘abandoned’ the mine for most of the 1990’s and then recommenced in 2000 by mining for 24 hours per day, six days per week, which was much larger in ‘scope and scale’ than they had done since mining operations began in 1976. [The Tulls] claim that observing the mining ‘would not inform an observer . . . that the County’s Planning Department had issued a letter purporting to confirm Teichert’s “vested rights” to mine at the site because there was no[] public announcement, notice, or hearing regarding the decision.’ [Citation.] However, all that is required for a plaintiff to be put on notice is that ‘he [or she] at least suspects . . . that someone has done something wrong’ to him [or her], ‘wrong’ being used, not in any technical sense, but rather in accordance with its ‘lay

understanding.’ [Citation.] [The Tulls] may have been ignorant of the legal significance of the fact that Teichert started mining again, but as [*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103], noted at [page] 1112, such ignorance will not delay the running of the statute. The fact that [the Tulls] observed Teichert mining beyond the scope and scale they had previously been operating at would likely be enough for [the Tulls] to be put on notice that something was amiss.

“[The Tulls] also claim[] that they were not put on notice of the letter at the County Clerk’s office, as they ‘had no reason to be reviewing or monitoring the Clerk Recorder’s files’ [Citation.] The court in *Util. Const Mgmt. v. Indian Wells Valley Water Dist.* (2001) 26 Cal.4th 1185, 1197 noted that the delayed discovery rule was not applicable where the public utilities company being sued had information available, as required by law, about their fees that were the issue of the suit. The court noted that a diligent plaintiff should have been able to discover, within the statutory period, whether a cause of action existed. [Citation.] The court went on further to mention that there are public policy rationales that support denying the application of the delayed discovery rule where the information necessary to discover a cause of action is provided, as public utilities need some degree of ‘certainty with respect to the enforceability of their fee ordinances and resolutions.’ [Citation.]”

The trial court concluded, “the evidence in the record, such as but not limited to the neighbors’ letters [citation] demonstrate the intensive and intrusive nature of Teichert’s ramped up mining operations. [¶] Under the facts, the Court concludes that for far longer than three years before the petition was filed, *viz.*, for somewhere in the neighborhood of six years, the [Tulls] were on inquiry notice of the existence of the cause of action, such that the Third Cause of Action [under SMARA] is time-barred.”

C.

Whether the Tulls Timely Filed their SMARA Claim

We begin with the general rule that “a statute of limitations begins to run when a cause of action accrues, even though the plaintiff is ignorant of the cause of action or of the identity of the wrongdoer. A cause of action invariably accrues when there is a remedy available.” (*Community Cause v. Boatwright* (1981) 124 Cal.App.3d 888, 898 (*Community Cause*)). As the California Supreme Court has elaborated, “the limitations period begins once the plaintiff ““has notice or information of circumstances to put a reasonable person *on inquiry*. . . .”” [Citation.] A plaintiff need not be aware of the specific ‘facts’ necessary to establish the claim; that is a process contemplated by pretrial discovery.” (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1110-1111 (*Jolly*)).

Here, the gravamen of the Tulls’ third cause of action is that the County failed to provide the requisite notice and opportunity to be heard prior to the issuance of the vested rights letter to Teichert. The Tulls’ petition seeks redress for the same problem addressed in *Calvert*, namely the failure of the County to comport with constitutional due process requirements prior to issuing a vested rights letter for mining in California. (*Calvert, supra*, 145 Cal.App.4th at pp. 621, 630.) Thus, the issuance of the vested rights letter to Teichert represents the allegedly wrongful act for which their third cause of action accrued.

The Tull’s cause of action was subject to a three-year statute of limitations period as “[a]n action upon a liability created by statute, other than a penalty or forfeiture.” (Code Civ. Proc., § 338, subd. (a); see also *Peles v. LaBounty* (1979) 90 Cal.App.3d 431, 435 [holding that an action founded on constitutional rights and on the Education Code was subject to the three-year limitations period of Code of Civil Procedure section 338].) In the absence of any other consideration, the Tulls’ cause of action would have expired

in June 2003 (three years after the County issued the vested rights letter) — long before the Tulls actually filed their cause of action for the first time in November 2006.

The Tulls contend they timely asserted the cause of action on the basis of the delayed discovery rule. They assert that they did not discover Yuba County was issuing the private vested rights letter until they came across a newspaper article about the Superior Court’s decision in *Calvert, supra*, 145 Cal.App.4th 613 around May 2004. After investigating, the Tulls discovered that a similar letter had been issued to Teichert in June 2000. They deny that the filing of Teichert’s vested rights letter with the County clerk/recorder gave them any notice of the wrong “because the Tulls had no reason to be daily reviewing or monitoring the Clerk Recorder’s files in the first instance.” We are not persuaded.

“Under the discovery rule, the statute of limitations begins to run when the plaintiff suspects *or should suspect* that [his or] her injury was caused by wrongdoing, that someone has done something wrong to [him or] her.” (*Jolly, supra*, 44 Cal.3d at p. 1110, italics added.) “Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, [he or] she must decide whether to file suit or sit on [his or] her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; [he or] she cannot wait for the facts to find [him or] her.” (*Id.* at p. 1111.)

A claim of permissibly “delayed discovery requires a plaintiff to plead facts showing an excuse for late discovery of the facts underlying his cause of action. The plaintiff must show ‘that [he or she] was not at fault for failing to discover it or had no actual or presumptive knowledge of facts sufficient to put him [or her] on inquiry. [Citations.]’” (*Prudential Home Mortgage Co. v. Superior Court* (1998) 66 Cal.App.4th 1236, 1247 (*Prudential*), quoting *Community Cause, supra*, 124 Cal.App.3d at p. 900.) Here, the Tulls’ pleading states only that they “did not discover the existence of the County’s June 2000 letter or its issuance by the County until after November 22, 2003.”

We agree with the trial court that the resumption of Teichert's mining activities should have aroused suspicions about the permissibility of the mining. As the trial court noted, the mining occurred 24 hours a day, 6 days per week. Moreover, as the record makes clear, Teichert was driving hundreds of loud and large trucks each day through residential neighborhoods. The aggregate mining was anything but hidden.

Granted, the Tulls do not directly seek to stop Teichert's mining. However, their cause of action does challenge the legitimacy of "the scope, nature, or extent of mining that occurred at the Hallwood site" For this reason, the obvious and adverse changes in the mining at the site -- especially when compared to the mine's dormancy during the 1990s -- were sufficient to trigger the limitations period for challenging the legitimacy of the mining.

Although the County's issuance of a vested rights letter to Teichert appears to have run afoul of this court's guidance in *Calvert*, we note that our decision did not create the right to a public hearing prior to the issuance of a vested rights letter under SMARA. (*Calvert, supra*, 145 Cal.App.4th at p. 617.) During the time pertinent to this appeal, SMARA has required at least one public hearing prior to the issuance of a vested rights letter for a gravel mine. (§ 2774, subd. (a) [requiring "at least one public hearing"]; see also Stats. 1994, ch. 1208, § 2 [same]; Stats. 2003, ch. 794, § 4 [same].) For this reason, we reject the Tulls' attempt to cast the *Calvert* litigation as the event that triggered their duty to investigate whether they too had a similar cause of action. Although they may have actually learned of the County's practice of issuing private vested rights letters from a newspaper description of the *Calvert* case, their suspicions should have been aroused by Teichert's resumed mining activities at the Hallwood site.

We also reject the Tulls' contention they did not have a duty to monitor documents filed with the County clerk/recorder on a daily basis. Without more, the Tulls did not

have any such duty. However, the Tulls' duty to investigate arose out of Teichert's energetic resumption of mining.

Our conclusion is bolstered by the fact that the vested rights letter in this case was filed as a document accessible to the public at the County clerk's office. "When a plaintiff has notice or information of circumstances to put a reasonable person on inquiry, or has the opportunity to obtain knowledge from sources open to his [or her] investigation (*such as public records* or corporation books), the statute applicable to the cause of action commences to run." (*Community Cause, supra*, 124 Cal.App.3d at p. 902, italics added; see also *Prudential, supra*, 66 Cal.App.4th at p. 1247; *Kline v. Turner* (2001) 87 Cal.App.4th 1369, 1374.)

In this case, both triggers were present: Teichert's mining operations occurred at such a scale as to put a reasonable person on inquiry *and* the vested rights letter was readily discoverable as part of the County's public records. Consequently, the limitations period commenced in 2000 when both circumstances occurred. In so concluding, we reject the Tulls' reliance on *Gryczman v. 4550 Pico Partners, Ltd.* (2003) 107 Cal.App.4th 1, involving a breach of contract claim for failure to allow a right of first refusal — an injury that the Court of Appeal characterized as "difficult for the plaintiff to detect." (*Id.* at p. 5.) There, the court rejected the defendant's claim that the breach could have been detected by continually monitoring public records for offers on the property inconsistent with plaintiff's right of first refusal. (*Id.* at p. 6.) It is one thing to require a party to watch for violations of *private* contractual rights by monitoring *public* records, but quite another to require a potential plaintiff to examine the public records of the very governmental entity against which the legal claim is asserted. Given the level of mining activities at the Hallwood site, it is not too much to ask the Tulls to check the public records of the defendant County.

Finally, we reject the Tulls' reliance on cases in which a limitations period was held to be tolled on the basis of a fiduciary relationship between parties. (See, e.g., *Hobart v. Hobart Estate Co.* (1945) 26 Cal.2d 412, 439-440 [fiduciary relationship]; *Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4th 282, 297-298 [same]; *Eisenbaum v. Western Energy Resources, Inc.* (1990) 218 Cal.App.3d 314, 325 [same].) We decline to impose a fiduciary relationship between a county and every one of its residents for purposes of tolling a statute of limitations.

In sum, the trial court correctly dismissed the Tulls' third cause of action for failure to conduct at least one public hearing prior to issuing a vested rights letter to Teichert for its Hallwood aggregate mine. The claim was untimely, having been filed after the three-year limitations period expired in June 2003.

VII

Certification of the Final EIR

The Tulls challenge the validity of Yuba County ordinance 11.10.580 as violating CEQA Guidelines section 15090, subdivision (a). Their argument has merit.

A.

Required Findings for Certification of a Final EIR under CEQA

Guidelines section 15090, subdivision (a), sets forth three mandatory findings that must be made before approving a project for which CEQA requires an EIR. The subdivision states:

“Prior to approving a project the lead agency shall 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.”

As a leading treatise on CEQA explains: “Before approving the project analyzed in the EIR, the lead agency must ‘certify’ the final EIR. According to the CEQA Guidelines, ‘certification’ consists of three separate steps. The agency’s decision-making body must conclude, first, that the document ‘has been completed in compliance with CEQA’; second, that the body has reviewed and considered the information within the EIR prior to approving the project; and third, that ‘the final EIR reflects the lead agency’s independent judgment and analysis.’ CEQA Guidelines, § 15090, subd. (a). The certification of a legally inadequate EIR is a prejudicial abuse of discretion. . . . § 21005, subd. (a); *Citizens to Preserve the Ojai v. County of Ventura* (2d Dist. 1985) 176 Cal.App.3d 421, 428.” (Remy, *supra*, at p. 374, fns. omitted.)

As to delegation of authority, the treatise continues: “The decision-making body need not necessarily be the lead agency’s elected officials. *El Moro Community Assn. v. California Department of Parks and Recreation* (4th Dist. 2004) 122 Cal.App.4th 1341, 1349-1350 (*El Moro Community Assn.*) (delegee of appointed state official is proper decision-making body where the appointed official is vested with authority by law (i) to make the decision on the project and (ii) to delegate that decisionmaking). *See also* . . . § 21151, subd. (c) (‘[i]f a nonelected decisionmaking body of a local lead agency certifies an [EIR], approves a negative declaration or mitigated negative declaration, or determines that a project is not subject to’ CEQA, ‘that certification, approval, or determination may be appealed to the agency’s elected decisionmaking body, if any’). The CEQA Guidelines define ‘decision-making body’ as ‘any person or group of people within a public agency permitted by law to approve or disapprove the project at issue.’ CEQA Guidelines, § 15356. *Thus, for example, a city council may delegate the EIR certification function to an appointed body such as its planning commission, if the relevant city ordinance empowers the planning commission to approve or disapprove the project at issue.*” (Remy, *supra*, at pp. 375-376, italics added.)

In this case, the County’s draft EIR correctly described these requirements of Guidelines section 15090, subdivision (a), as follows: “Once the lead agency is satisfied that the EIR has adequately addressed the pertinent issues in compliance with CEQA, a Final EIR will be prepared, which is made available for review by the public or commenting agencies. Before approving a project, the lead agency shall certify that the Final EIR has been completed in compliance with CEQA *and has been presented to the decisionmaking body of the lead agency and has been reviewed and considered by that body*, and that the Final EIR reflects the lead agency’s independent judgment and analysis.” (Italics added.)

B.

County Ordinances 11.10.580 and 11.10.581

In Yuba County, two ordinances inform the process of certifying EIRs for projects within the County. At the time the final EIR was certified, these sections provided¹⁰:

“11.10.580 Certification by Planning Commission. The Planning Commission shall consider a Final EIR which has been prepared pursuant to §11.10.570 and shall either certify it as adequate or shall return it for corrections prior to certification. A copy of the certified, Final EIR shall be distributed to each member of all decision making bodies. The project proponent shall provide a copy of the certified, Final EIR to each responsible agency as required by §15095(d) of the Guidelines. . . .

“11.10.581 Appeal to the Board of Supervisors. The action of the Planning Commission to certify a Final EIR shall be final unless appealed to the Board of

¹⁰ References to ordinances 11.10.580 and 11.10.581 are to the versions in effect at the time the County’s planning department certified the final EIR for the haul road. The parties have not raised and we have no occasion to consider the effect of any subsequent amendment of the ordinances.

Supervisors within 10 days in accordance with the procedure established in §11.10.391 of this chapter. . . .”

Consistent with ordinance 11.10.580, the County planning commission in this case found that the final EIR for the haul road “reflects the independent judgment of the County” and that “the requirements of CEQA have been satisfied for the proposed project.” And, under ordinance 11.10.581, the Tulls filed an appeal to the Board from the action of the planning commission in certifying the final EIR. The Board denied the appeal, noting that the planning commission “correctly determined that the Final EIR reflects the independent judgment of the County” and that “the final EIR satisfies the requirements of CEQA for the proposed project.”

On June 6, 2006, the Board found that “the issues raised in the [Tulls’] appeal do not constitute ‘significant new information’ that would require revisions to the Final EIR.” Although the Board considered and incorporated a lengthy set of “findings in support of the denial of the appeal of the certification of the final [EIR] for the SR20/Kibbe Road intersection improvements and private haul road project,” the Board did not announce that the decisionmaking body had reviewed and considered the final EIR before approving the project. Thus, the Board did not find that “the decisionmaking body reviewed and considered the information contained in the final EIR prior to approving the project.” (Guidelines, § 15090, subd. (a)(2).)

The Tulls challenged the lack of a finding by the County under Guidelines section 15090, subdivision (a)(2), but the trial court denied their claim. In doing so, the trial court reasoned:

“The parties agree that EIR certification requires three separate findings: (1) that the final EIR has been prepared in compliance with CEQA; (2) that the decision-making body has reviewed and considered the information contained in the final EIR prior to

approving the project; and (3) that the final EIR reflects the lead agency's independent judgment and analysis.

"The [Tulls'] Fifth Cause of Action challenges section 11.10.5[8]0 of the Yuba County Code, which delegates to the Planning Commission the first of the three findings.

"CEQA Guidelines, section 15025 bars delegation of the second finding by the decision-making body. Petitioners have cited no statute, provision of the Guidelines, or case law, that bars delegation of the first and third findings, nor have they offered to amend to recite such authority."

Consequently, the trial court sustained the demurrer as to the fifth cause of action without leave to amend.

C.

Review of Dismissal after the Sustaining of a Demurrer without Leave to Amend

As the California Supreme Court explained in the case of *Blank v. Kirwan* (1985) 39 Cal.3d 311, review of an order sustaining a demurrer on grounds that the complaint fails to state a cause of action is governed by the following well-established principles: "We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed." (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591.) Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. (*Speegle v. Board of Fire Underwriters* (1946) 29 Cal.2d 34, 42.) When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. (See *Hill v. Miller* (1966) 64 Cal.2d 757, 759.) And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm.

(*Kilgore v. Younger* (1982) 30 Cal.3d 770, 781; *Cooper v. Leslie Salt Co.* (1969) 70 Cal.2d 627, 636.) The burden of proving such reasonable possibility is squarely on the plaintiff. (*Cooper v. Leslie Salt Co., supra*, at p. 636.)” (*Id.* at p. 318.)

D.

***Delegation of CEQA Duties Regarding a Final EIR
by the Lead Agency***

County ordinance 11.10.580 conflicts with the CEQA Guidelines, specifically section 15090, subdivision (a). Although the ordinance charges the County planning commission with the duty to “consider a Final EIR” to determine whether to “certify it as adequate or [to] return it for corrections prior to certification,” the ordinance does not give the planning commission authority to approve the project. Combined with County ordinance 11.10.581 — which deems an EIR’s certification to be final if no appeal of the planning commission’s certification is taken within 10 days — an EIR in Yuba County may become “final” without any decisionmaking body ever making the finding that “[t]he 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” (Guidelines, § 15090, subd. (a)(2).)

The combined operation of County ordinances 11.10.580 and 11.10.581 allows for the result that if the decisionmaking body for the County believes that an EIR conflicts with its independent judgment or failed to comply with any CEQA requirements, the decisionmaking body would nonetheless be bound by the planning commission’s certification of the EIR even though the commission is charged with making only two of the three findings required by subdivision (a) of Guidelines section 15090.

The problem would not be remedied if the County’s decisionmaking body were to act before the planning commission undertakes certification under County Ordinance 11.10.580. County ordinance 11.10.710 presupposes that the final EIR has already been

certified.¹¹ Further, the ordinance allows only the planning commission to make the findings as to the EIR being prepared in conformity with CEQA or reflects the lead agency's independent judgment. Such a process improperly segregates environmental review from consideration of project approval.

However, “environmental review is not supposed to be segregated from project approval. ‘[P]ublic participation is an “essential part of the CEQA process.”’ (*Laurel Heights II, supra*, 6 Cal.4th at p. 1123.) . . . ‘If an agency provides a public hearing on its decision to carry out or approve a project, the agency should include environmental review as one of the subjects for the hearing.’ (Guidelines, § 15202, subd. (b).) Since project approval and certification of the EIR generally occur during the same hearing, the two events are sometimes treated as interchangeable. (See, e.g., [*Federation of Hillside and Canyon Associates v. City of Los Angeles* (2000)] 83 Cal.App.4th [1252,] 1257 [final EIR certified at same hearing during which project was approved]; [*Association of Irrigated Residents v. County of Madera* (2003)] 107 Cal.App.4th [1383,] 1389 [same].)” (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1200 (*Bakersfield Citizens*).

In *Bakersfield Citizens*, a nonprofit citizens group sued for violations of CEQA after the City of Bakersfield approved two large retail shopping centers to be built approximately 3.6 miles from each other. (124 Cal.App.4th at p. 1193.) The Court of Appeal concluded the EIRs for the projects were erroneously certified. (*Ibid.*) The real party in interest, Castle and Cooke Commercial–CA, Inc. (C & C), claimed that the

¹¹ County ordinance section 11.10.710 provides, in pertinent part: “Before reaching a decision, the decision making body shall consider the environmental effects of the project as shown in the EIR and shall not approve the project if feasible alternatives or feasible mitigation measures within the County’s powers which have not been implemented or required are found to exist that would substantially lessen any significant effect the project would have on the environment.”

nonprofit group failed to exhaust its administrative remedies prior to filing suit. As the *Bakersfield Citizens* court noted, “C & C disparagingly refers to [the nonprofit group’s] oral presentation and its submission of evidence at the February 12, 2003 City Council hearing as a last minute ‘document dump’ and an intentional delaying tactic, pointing out that EIRs had been certified prior to opening of the public hearing.” (*Id.* at p. 1200.) The Court of Appeal rejected the assertion “because C & C omitted the key fact that the City had improperly segregated environmental review from project approval in contravention of Guidelines section 15202, subdivision (b). The planning commission bifurcated the process by agendizing certification of the EIRs as nonpublic hearing items and separately agendizing project approval and related land use entitlements as public hearing items.” (*Id.* at p. 1200.)

Here, County ordinance 11.10.580 also impermissibly segregates certification of the EIR as complying with CEQA and representing the lead agency’s independent judgment from consideration of project approval. Under this segregated process, the decisionmaking agency can be bound by an EIR that it finds fatally flawed or misrepresentative of the County’s independent judgment. Moreover, County ordinance 11.10.581 allows the planning commission’s certification of EIRs to become final in the absence of any finding the EIR was considered by a decisionmaking body.

County ordinance 11.10.580’s conflict with Guidelines section 15090, subdivision (a), is not merely theoretical. Here, the Tulls and the draft EIR both pointed out section 15090’s requirement of a finding that the final EIR was considered by a decisionmaking body prior to approval of the project. Nonetheless, our review of the administrative record in this case did not locate any finding made by any County agency, staff, or Board that the final EIR was reviewed and considered by a decisionmaking body before approving the haul road project. The only mention in the administrative record of the final EIR being considered refers to the review conducted by the planning commission —

a body without power to approve or deny the project at issue in this case. The allowance of a final EIR to be certified by the County without ever having been reviewed and considered by a decisionmaking body directly conflicts with CEQA.

The trial court erred when it sustained the demurrer to the Tulls' fifth cause of action challenging the County's ordinance that relates to the certification of EIR's by the planning commission.

DISPOSITION

The judgment is reversed and the matter remanded to the trial court to: (1) grant Forest and Bobbie Tulls' and the Kibbe Area Planning and Protection Association's second amended supplemental petition for writ of mandate and complaint for declaratory and injunctive relief on grounds that the final environmental impact report violates the California Environmental Quality Act by failing to properly assess alternate routes, analyze traffic noise and vibration, and describe hydrology and drainage impacts of the project; (2) deny the Tulls' challenge to the adequacy of the final Environmental Impact Report's analysis of traffic safety impacts arising out of locating the private haul road at the Kibbe Road and State Road 20 intersection; (3) order Yuba County to rescind the reissued grading permit for A. Teichert & Son, Inc.'s, private haul road to the Kibbe Road and State Road 20 intersection until a final Environmental Impact Report is properly certified; (4) dismiss the Tulls' challenge to Yuba County's issuance of a vested rights letter under the Surface Mining and Reclamation Act (Pub. Resources Code, § 2710 et seq.) to A. Teichert & Son, Inc., for its Hallwood mine site; and (5) declare invalid Yuba County ordinance 11.10.580 to the extent that it conflicts with California Code of Regulations, title 13, section 15090, subdivision (a).

The trial court shall retain jurisdiction over this action to specify promptly, after notice and hearing, a date by which Yuba County must certify a new environmental impact report in accordance with the California Environmental Quality Act standards and

procedures. (Pub. Resources Code, § 21168.9, subd. (b); *Laurel Heights Improvement Assn. v. Regents of University of California, supra*, 47 Cal.3d at p. 428.)

Forest and Bobbie Tull and the Kibbe Area Planning and Protection Association shall recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(3) & (5).)

_____ HOCH _____, J.

We concur:

_____ BLEASE _____, Acting P. J.

_____ NICHOLSON _____, J.