

**SUPERIOR COURT OF CALIFORNIA, COUNTY OF KERN  
METROPOLITAN DIVISION**

DATE: Thursday, May 3, 2001                      COURT MET AT: 8:30 a.m.                      DEPT. 6  
PRESENT: ROGER D. RANDALL, Judge                      CLERK: C. L. Isaac.

<b>TITLE:</b>  CENTER ON RACE, POVERTY & THE ENVIRONMENT, MARIA CRUZ MEDINA, ET AL SIERRA CLUB vs.  COUNTY OF KERN, BOARD OF SUPERVISORS FOR THE COUNTY OF KERN ----- BORBA DAIRY FARMS, ET AL Real Parties in Interest	<b>COUNSEL:</b>  Caroline Farrell, Brent J. Newell, Luke W. Cole Aaron Isherwood  James H. Thebeau  Michael H. Remy, Osha R. Meserve
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**NATURE OF PROCEEDINGS:** No. 242336  
  
PETITION FOR WRIT OF MANDAMUS & COMPLAINT FOR DECLARATORY RELIEF HERETOFORE  
SUBMITTED ON 2/23/01

**DISPOSITION:**  
  
See copy of ruling attached and made a part hereof.

Copies mailed to counsel on this date./cli

MINUTES

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RULING ON CENTER ON RACE, POVERTY & THE ENVIRONMENT, ET AL.  
V. COUNTY OF KERN, ET AL.

(Case No. 242336-RDR)

The Court, having read and considered the briefs of the parties, having reviewed the Administrative Record insofar as it is pertinent to the issues presented in this lawsuit, and being informed by the oral arguments of counsel, makes the following rulings:

I.

THE STANDING OF PETITIONERS TO SEEK RELIEF

Respondents raise two issues concerning the standing of Petitioners. First, they argue that the individually named Petitioners, Maria Cruz Medina, Frances L. Aguilar, and Maria Martinez, lack standing to bring this action because the Administrative Record demonstrates that they never appeared during any of the proceedings before the adoption of the EIR. Petitioners contend that the individual Petitioners do have standing because the Center on Race, Poverty & Environment represented "residents in the Arvin/Lamont Area," among whom were the three named individual Petitioners. However, the Administrative Record lacks any indication that the three individually named Petitioners were being represented during the course of the public comment period in this matter, and counsel at oral argument conceded that a list of individuals submitted to the Board of Supervisors did not contain the names of those individuals. Therefore, the argument of Respondents concerning those individual Petitioners is valid, and

the Court finds they do not have standing to pursue remedies via this Petition.

Respondents further argue that there are certain issues raised by virtue of this Petition which were not set forth by any of the Petitioners bringing this action. Those matters include "the adequacy of the EIR's discussion of  $PM_{10}$  impacts; the adequacy of the EIR's discussion of  $PM_{2.5}$ ; mitigation measures for ammonia emissions; the issue of non-nitrogen salt loading; and expert comments regarding lagoon seepage." Petitioners cite to the record to demonstrate that the enumerated issues were in fact addressed in substance during the course of public comment on the project by themselves or others. The Court has reviewed the pertinent portions of the Administrative Record and has concluded that Respondents' objection based upon the ground that those issues were not addressed during the public comment period should be rejected.

Respondents also argue that, concerning the alleged inadequacy of the EIR's cumulative impact analysis, Petitioners had only asserted in the past that the EIR was flawed because of its lack of analysis of Kern County dairies, but now argue that the analysis should have addressed cumulative air impacts generated by all of the dairies in the eight counties which make up the San Joaquin Valley air basin. Furthermore, that the Petitioners never suggested there was a lack of discussion of a reasonable range of alternatives in the proposed EIR until the issue was raised in the Petition. As to these matters as well, the Court has reviewed the Administrative Record and concluded that there was sufficient

discussion during the course of the public comment period to justify the joinder of those issues in the present mandamus proceeding.

## II.

### DID THE EIR FAIL TO DESCRIBE AND ANALYZE THE CUMULATIVE IMPACTS FROM THE PROPOSED BORBA DAIRIES?

Petitioners allege that "The EIR's scope of cumulative impact analysis listed only Kern County dairies and failed to identify other sources in the region." They also complain that, to the extent that the EIR listed the 34 existing Kern County dairies and three additional recently approved dairies which have not yet been constructed, it made no effort to summarize "the expected environmental effects to be produced by these projects and a reasonable analysis of the cumulative impact" of them. Petitioners assert that rather than providing a comprehensive summary or analysis of the cumulative impacts of the existing and planned facilities, the report simply concludes there will be significant unavoidable impacts from cumulative air pollution from the dairies "but then makes excuses, saying no ready data is available on these kinds of facilities from government agencies, and therefore no assessment of the impact can be done."

Both Petitioners and Respondents rely on the language of CEQA Guidelines, Section 15130, and Respondent quotes as well from the discussion found in the Guidelines concerning section 15130, which clarifies that the cumulative impacts analysis "should include a discussion of projects under review by the Lead Agency and projects

under review by other relevant public agencies, using reasonable efforts to discover, disclose, and discuss the other related projects."

Respondents assert, however, that the paucity of available data made it difficult for the EIR to comprehensively analyze cumulative impacts with regard to the current project. They attempt to demonstrate that that is so by submitting the declaration of Kevin O'Dea, who was the project manager for the preparation of the EIR. An analysis of the efforts undertaken by Mr. O'Dea indicates that he attempted to get dairy information from the Kern County Planning Department and the Environmental Health Services Department; that he then contacted representatives of the Central Valley Regional Water Quality Control Board; and that he then contacted representatives of the California Department of Food and Agriculture Milk and Dairy Food Control Branch, all to no avail in his attempt to collect information which would allow him to do a comprehensive analysis of cumulative impacts. However, none of these sources proved helpful, for reasons set forth in his declaration.

In the meantime, however, it is apparent that much of the information for Kern County dairy herds was available to officials in the County (see AR 5057-5065). Furthermore, as was discussed during oral argument in this case, Respondents were unable to explain why they did not go to traditional sources of farm information such as the UC Extension Service Farm Advisor's office in both Kern County and the other seven Counties in the southern

San Joaquin Valley to obtain the data necessary to make an appropriate analysis.

In Whitman v. Board of Supervisors (1979) 88 Cal.App.3d 397, 411, the Appellate Court said:

"We recognize that the 'sufficiency of an EIR is to be reviewed in the light of what is reasonably feasible' and that perfection is not required (citing authority). On the other hand, the courts have favored specificity and use of detail in EIRs since "[a]" conclusory statement 'unsupported by empirical or experimental data, scientific authorities, or explanatory information of any kind' not only fails to crystallize issues (citation) but 'affords no basis for a comparison of the problems involved with the proposed project and the difficulties involved in the alternatives.'"

In the instant case the inadequacy of analysis of the cumulative impacts of the Borba Dairies and other existing and planned dairies in the basin rendered the EIR deficient insofar as cumulative impacts analyses were concerned.

### III.

#### DID THE EIR'S ANALYSIS OF ALTERNATIVES VIOLATE CEQA?

Petitioners contend that the County violated CEQA because it did not analyze a reasonable range of alternatives to the project as proposed by the Borbas. Three alternatives were presented, being characterized as No Project-No Build; No Project-Planned Build-Out; and Relocated Project Alternative. The Board of Supervisors considered the alternatives and concluded: "For the reasons documented in the EIR and summarized below, the Board of Supervisors finds that adoption and implementation of the project

as approved is appropriate, and rejects each one and any combination of project alternatives as infeasible." There was no discussion regarding why other alternatives, such as a reduced size project, were not considered.

Petitioners assert that in the instant case, the range of alternatives really consisted of two possibilities: No Project, divided in two parts; and a relocated project which all agreed would not in any way mitigate or minimize the environmental impacts of the project.

Respondent argues that CEQA does not demand a minimum number of alternatives be presented. "The purposes of CEQA are not aided by creating more paperwork by formulating additional infeasible alternatives, for the sole reason of having a certain number of alternatives. CEQA requires only that a reasonable range of alternatives be considered. (CEQA Guidelines, Section 15126.6(a))."

In San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus (1994) 27 Cal.App.4th 713, 735, the Court of Appeal observed:

"A major function of an EIR 'is to ensure that all reasonable alternatives to proposed projects are thoroughly assessed by the responsible official.' (Citing authority) As explained by this court: 'An EIR must "[d]escribe a range of reasonable alternatives to the project or to the location of the project, which could feasibly attain the basic objectives of the project and evaluate the comparative merits of the alternatives." (Citing authority) The discussion must "focus on alternatives capable of eliminating any significant adverse environmental effects or reducing them to a level of insignificance,

even if these alternatives would impede to some degree the attainment of the project objectives, or would be more costly." (Citing authority) This discussion of alternatives must be 'meaningful' and must 'contain analysis sufficient to allow informed decision making.' (Citing Authority)"

While it is certainly true that nothing in the CEQA or its guidelines requires that a minimum number of alternatives to a project be discussed, it is also true that the discussion of alternatives must include a discussion of feasible alternatives. In the instant case, the Board of Supervisors did not deal with or discuss in any way alternatives other than the required No Project analysis and the Relocated Project Alternative, nor did it supply any reasons why consideration of other possible alternatives might have been discarded.

Petitioners urge the inadequacy of the treatment of alternatives herein because, inter alia, the EIR failed to discuss the possibility of a reduction in size of the project. Respondents point out that the EIR properly responded to comments suggesting a reduction in the size of the project and that the response was "... that a reduced herd size was considered in developing the alternatives for the EIR." While conceding that a reduced size could create environmental gains, Respondent argues that even so "PM<sub>10</sub> and ROG emissions would remain significant and unavoidable even with a significant herd size reductions (sic)." Respondents appear to be arguing that, unless a reduction in herd size would eliminate negative environmental impacts, there was no need to consider the possibility of a reduced project. In fact, that is



not the law. The law requires that alternatives to the project which would mitigate or alleviate the impact on the environment must be explored so long as they are feasible. From the record before the Court in this matter, there is no demonstration that the feasibility of a reduced herd size model was explored in this case. "Feasible means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social and technological factors." (CEQA Guidelines, section 15364)

While the Board of Supervisors stated that it did consider a reduced herd size alternative, and discussed it in response to Comment 12-55, it then simply concluded that, although a reduction in herd size would result in a reduction in environmental impacts: "...the impact of PM<sub>10</sub> and reactive organic gas emissions would remain significant and unavoidable in both of these cases (different herd size reductions) and neither alternative would meet the primary objectives of the applicants." Absent any evidence which demonstrates why a reduction of herd size would defeat the primary objectives of the applicants, there is no evidentiary authority for the conclusion drawn by the Board.

#### IV.

#### WAS THE ANALYSIS OF AIR QUALITY IMPACTS CONTAINED IN THE EIR INADEQUATE?

Petitioners argue the inadequacy of the air quality impacts discussion in the EIR because they contend that it contains no analysis "... of the health impacts that would result from

admittedly significant emissions of particulate matter (PM<sub>10</sub> and PM<sub>2.5</sub>) due to dairy operations. Indeed, the document did not even estimate the quantity of fine particulate matter (PM<sub>2.5</sub>) that would result from the huge amounts of ammonia emitted by livestock waste." Respondents plead a dearth of available information to allow them to quantify PM<sub>2.5</sub> emissions, and, as to the failure to discuss the potential health impacts of PM<sub>10</sub> and PM<sub>2.5</sub>, assert that "because the project is to be located at least one mile from any sensitive receptors, however, the record contains no evidence that PM<sub>10</sub> generated by the project could result in a significant health impact."

Review of the pertinent portions of the record demonstrates that, while standards have not been adopted by state and federal agencies regarding of the emissions discussed in this case, there is no evidence to indicate that there is an inability to quantify the amount of those emissions. Further, with the exception of a statement in the Administrative Record (2065) that: "...the SJVUAPCD has indicated that dairies located within one mile from a sensitive receptor could generate odors that may be significant," this Court has not been able to find any basis in the record for concluding that no health impacts are to be expected from the emissions under discussion if the nearest sensitive receptor (human habitation, schools, and the like) is located at least a mile away from the project. Finally, the Court would note the Administrative Record reflects (AR 2065) that there is at least one rural residence within .9 miles of the project.

Respondents argue they have done the best they can in conservatively treating issues involving the generation of PM<sub>2.5</sub> by declaring that those emissions would generate a significant impact. The fact that an impact is found to be significant and unavoidable, however, does not gainsay the fact that the EIR itself must detail to the extent possible the significance of the emission so that an informed public may comment upon that information.

V.

**DID THE COUNTY VIOLATE CEQA BY FAILING TO ANALYZE AND ADOPT FEASIBLE MITIGATION MEASURES FOR AIR AND WATER QUALITY IMPACTS?**

Petitioners allege that, while acknowledging the project will generate air pollution in the hundreds of tons of toxic gasses and particulates yearly, the County "... astonishingly found that there was no feasible mitigation for most of this air pollution. The Borbas themselves urged the adoption of a broad air pollution mitigation regime, albeit a vague one. The County ignored even the Borbas and forged blindly ahead in approving the project. The County's action must be remanded to address this critical emission ...."

(A)

Petitioners specifically contend the County neither assessed nor adopted a number of feasible ROG control measures. The EIR originally required the use of an anaerobic digester. This was the only ROG mitigation measure evaluated in the EIR. However, the Borbas opposed the requirement of an anaerobic digester and suggested that they instead commit to using "the best available

economically feasible technology" in lieu thereof. But the Board rejected the anaerobic digester, and ultimately the mitigation measure adopted with regard to ROG was:

"The project shall provide for an aerobic treatment system or equivalent to stabilize the manure generated by the cattle prior to land application. The aerobic treatment system shall be designed to minimize the release of biogasses through conversion of gasses to electrical power or other methods."

Respondents argue that "under this mitigation measure, the Borbas must construct an aerobic treatment system or a system with equivalent results. The reference to 'conversion of gasses to electric power,' which would only be possible with an anaerobic system, makes clear that one way the Borbas may fulfill this mitigation measure is by constructing an anaerobic system. Therefore, petitioners' statement that the County required no mitigation for ROG is blatantly false."

The problem with the state of the record is that there is no adequate discussion within the EIR of available technology involving aerobic treatment. Even if ultimately found to be infeasible, evaluation of an aerobic system as a potential feasible mitigation should have been accomplished to determine whether it would substantially lessen the ROG impact before the mitigation measure was adopted in its final form. Furthermore, nothing in the EIR sets forth the standard to be used to determine that a substitute system would be equivalent to an aerobic treatment system.

(B)

Petitioners next attack the alleged failure of the EIR to assess and adopt feasible particulate matter mitigation measures. They allege that the sole mitigation measure proposed for particulate matter emissions during dairy operations was the application of a chemical stabilizer. Petitioners urge that the EIR should have considered offsets as a feasible mitigation measure for both particulate matter emissions and for ROG emissions.

Respondents reply that in addition to chemical stabilizer application, they also provided Mitigation Measure 4.2.3.3 which required the applicants to plant landscape trees along three sides of the dairy sites. Furthermore, there was a requirement for the regular removal and treatment of manure from the corrals to prevent it from becoming a PM<sub>10</sub> source.

There is ample evidence in the Administrative Record to justify the chemical treatment of particulate matter mitigation contained within the EIR. The suggestion by Petitioners that offsets be used to counter the effects of ROG emissions and particulate matter generation is effectively answered by Respondents' argument that to have a system of offsets there has to be an administering agency with the appropriate authority to supervise the program. Since the record demonstrates no such authority exists in that, for example, the SJVUAPCD does not regulate dairies as point sources, there is no basis in the record to suggest the feasibility of an offset system as a mitigation measure with regard to air quality control.

(C)

Petitioners next address the alleged failure to assess and adopt feasible mitigation measures for ammonia and hydrogen sulfide emissions. Petitioners argue that since ammonia and hydrogen sulfide will not be effectively regulated by the responsible air district and the EIR demonstrates their significance it must evaluate and/or require a mitigation measure for those emissions. Because the Court has already addressed issues concerning the adequacy or inadequacy of the assessment of the effects of the generation of air pollutants and the efficacy of the adoption of an aerobic or anaerobic treatment system, supra, there is no need for further discussion of this issue under this rubric.

(D)

Petitioners turn to a discussion of the alleged failure of the EIR to evaluate feasible mitigation measures for water quality impacts. They argue that the County failed to deal with the comments of the McAllister Ranch Irrigation District and the West Kern Water District regarding provision for the cost of remediation of ground water in the event it becomes polluted by the project operation. Respondents allege that the comments of the McAllister Irrigation Ranch District came late in the process and contend that the County did respond to the concern that the Borbas be held responsible for potential effects on the ground water. However, the portion of the Administrative Record to which they cite (AR 8:4648-4649, 4853) do not deal with the issue presented. Since the recommended solution for the problem of mitigation in the event

groundwater was polluted by the dairies does not appear on the record before the Court to be facially infeasible, it must be addressed. (See Los Angeles Unified School District v. City of Los Angeles (1997) 58 Cal.App.4th, 1019, 1029.)

(K)

Petitioners raise two issues with regard to the question of potential seepage from the dairies' wastewater lagoons. First, they complain that the EIR includes no description or analysis of the soil underlying Dairy #2, and consequently there cannot be an informed evaluation of the water quality impact of that part of the project. Respondents contend that, since Dairy #2 is located adjacent to Dairy #1, the soil characteristics are expected to be nearly identical and therefore should not pose a problem. While this argument is not persuasive, Respondents make a second argument, which is that Mitigation Measure 4.3.3.2 contains performance standards for the hydraulic conductivity of the liner systems for both dairies. Given the state of the record, this Court cannot say that the decision of the Board to accept the mitigation measure and the planning in the EIR for the wastewater lagoon, insofar as Dairy site #2 was concerned, constituted an abuse of discretion, or was made without substantial evidence.

Petitioners second argument concerning the lagoons involves the alleged failure of the EIR to evaluate "... the volume of seepage, the quantity of pollutants and the speed at which they would reach groundwater...." They argue that the result constitutes a failure to include relevant information to allow

informed decision making by the Board, and also appropriate public participation in the project. In this regard they rely on the case of Kings County Farm Bureau v. City of Hanford (1990) 221 Cal.App.3d 692, 712. They also cite the case of Cadiz Land Company v. Rail Cycle (2000) 83 Cal.App.4th 74. The latter citation is appropriately attacked by Respondents who point out that the Petitioners' attempt to argue that the Cadiz case was a case concerning a failure to calculate volume of discharge from a project, when it really dealt with a failure to calculate the volume of a diminishing aquifer to ascertain whether or not the aquifer would disappear before expected pollution from the project reached the level of the groundwater.

Respondents go on to justify their treatment of the issue of leakage and their failure to provide a calculation of that leakage by further distinguishing the project in the Cadiz matter and the current project, pointing out that in Cadiz the EIR concluded groundwater contamination was highly unlikely and therefore not a significant impact, but that the current EIR and project approval "...recognizes that potential contamination is a significant impact and mitigation measures have been incorporated."

Respondents again appear to be of the view that if an EIR concludes a project threatens to create a significant impact upon the environment there is no further information to be provided with regard to that impact. But that is not the state of the law. Here calculation of the volume of seepage from the lagoons was crucial to the public's and the Board's ability to fairly analyze the



sufficiency of the proposed mitigation measures: "A prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decision-making and informed public participation, thereby thwarting the statutory goals of the EIR process." (Concerned Citizens of South Central LA v. Los Angeles Unified School Dist. (1994) 24 Cal.App.4th 826, 838.)<sup>1</sup>

Consequently, the argument of Petitioners regarding the inadequacy of the analysis of the effects of leakage from the wastewater lagoons, although flawed by their distortion of the Cadis holding, accurately characterizes the problem to be dealt with herein.

(F)

Concluding their attack on the alleged failure of the EIR to adequately deal with water quality impacts, Petitioners assert that the EIR does not sufficiently analyze the impacts of non-nitrogen salt loading. Little attention was paid to this issue in the presentation of evidence by Petitioner Sierra Club. Respondents argue that the RWQCB allows salt loading of up to 3,000 lbs/acre/year, whereas the project in question will load an estimated 401 lbs/acre/year. Consequently, it appears there was substantial evidence before the Board to justify the Board's

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<sup>1</sup> While Respondents contend the rate of seepage was reported in the EIR in centimeters per second, and that seepage from the lagoons can then be converted to volume of discharge by accomplishing "a simple conversion using information in the EIR," one purpose of the EIR is to make the public aware of significant environmental issues inherent in the development of a project. When one has to be familiar with mathematic formulas to understand significant information, the EIR does not accomplish one of its requisite goals.

approval of the project insofar as the issue of non-nitrogen salt loading was concerned.

#### CONCLUSION

Based upon the foregoing analysis, the parties to this action are entitled to relief as follows:

1. Individual Petitioners Maria Cruz Medina, Frances L. Aguilar, and Maria Martinez are dismissed from the action for want of standing.

2. The remaining Petitioners are entitled to a Writ of Mandate compelling Respondents/Real Parties to refrain from taking action in furtherance of the project until they comply with CEQA in the following regard:

a. Performing a cumulative impact analysis which includes consideration of the effect of the 34 existing Kern County dairies, the three additional recently approved Kern County dairies, and the existing and approved (but not yet constructed) dairies in the remaining seven counties in the San Joaquin Valley Air Basin;

b. Performing a meaningful analysis of feasible alternatives to the project in question, including the alternative of a reduction in the size of the project;

c. Analyzing the health impacts that would result from the estimated emission of particulate matter due to dairy operations, and in the process estimating the quantity of fine particulate matter ( $PM_{2.5}$ ) that would result from the operation of the project;

d. Analyzing the efficacy and practicality of the utilization of an aerobic treatment system (the mitigation measure adopted by the Board) and including a verifiable standard to be used to determine the basis for finding that a system to be put in place of an aerobic treatment system is an equivalent system;

e. Analyzing solutions for the cost of mitigation in the event groundwater is polluted by the project;

f. Detailing in a fashion comprehensible to members of the public and the Board the volume of leakage anticipated from the lagoons.

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