March 28, 2024

To: Sacramento County Board of Supervisors

Re: Sailor Bar – Policy Decision to Open Gravel Roads to Public Vehicles

Dear Sacramento County Board of Supervisors,

We hope that this letter finds you well. We are writing regarding a recent policy decision announced by the County to open certain unimproved roads in Sailor Bar to vehicle traffic. Our law firm, Birch Citadel, P.C., represents the Friends of Sailor Bar, a community grassroots organization concerned about the potential environmental consequences of this decision. As of this writing, just under 2,500 concerned users of the Sailor Bar have signed a petition sharing these concerns.[1]

As noted by the County, Sailor Bar is subject to the 2008 American River Parkway Plan.[2] The gravel roads in question, identified in the attached map (Exhibit A), recognized in the 2008 Plan, were closed in 2009 as the result of a policy decision by the County. We understand that this decision was made at the County's discretion, not as the result of any direction by the 2008 Plan.

Since that policy decision fifteen years ago, the roads in question have become pedestrian walkways relied on and widely used by visitors to Sailor Bar, including those with limited mobility who cannot easily use other hiking trails, and changes to the local habitat have taken place.

We have two concerns about the current policy decision to open these unimproved roads.

Required Public Notification Procedure

First, we have been unable to find any indication that the American River Parkway Public Notification Procedures,[3] adopted by the County March 11, 2009, as directed by the 2008 Plan, were followed with respect to the current policy decision to open the roads.

These notification procedures state:

[1] https://www.change.org/p/save-sailor-bar-from-motor-vehicle-traffic

[2] https://planning.saccounty.gov/LandUseRegulationDocuments/Documents/AmericanRiverParkwayPlan.pdf

[3] https://regionalparks.saccounty.gov/PublicMeetings/Documents/final%20adopted%20early%20notification%20procedures.pdf

> "[a]s required by the [2008] American River Parkway Plan, and as stated in the County of Sacramento Good Neighbor Policy, staff and contractors **will** engage community members in discussions regarding new facilities **or changes in uses** that **could impact the neighborhood and park users**. Adopted public notification procedures for projects on the American River Parkway **require** Regional Parks staff to implement the Good Neighbor Policy and gather public input during the project design phase." (Emphasis added.)

The procedures also require early notification for three project types, including "Significant Changes in Use or Re-modeling of Existing Facilities identified on Local Area Plan Maps", which includes "current and proposed facilities and uses." The plan further requires that "any new facility or use … require[s] a local area plan amendment and must be mapped within the Local Area Plans."

The roads are existing facilities identified on local area plan maps. Further, it is difficult to characterize the proposed policy to convert what are today pedestrian walkways into public roadways open to vehicle traffic as anything other than a significant change in use. The County's own map no longer identifies the roads at issue as Parkway Roads open to public vehicles. [4]

Consequently, we believe that this policy decision is subject to the notification procedures, which requires engagement with community members and stakeholders and discussions regarding the changes in use, which also trigger the Good Neighbor Policy to gather public input during the project design phase.

California Environmental Quality Act

The California Environmental Quality Act, or CEQA, initially passed in 1970, is one of California's core environmental laws,[5] embodying the notion that harm to the environment should be carefully considered and avoided or mitigated whenever possible.[6] Generally, CEQA applies to discretionary actions undertaken by a public agency that could result in a reasonably foreseeable direct or indirect physical change in the environment that are not otherwise exempt from CEQA.[7] Since 1972, courts have consistently recognized that the California State Legislature intended CEQA to be interpreted in a manner as to afford the fullest possible protection to the environment within the reasonable scope of statutory language and the accompanying CEQA Guidelines.[8]

The County has expressly publicly stated that it has not performed any CEQA analysis.[9] The County has stated both on its website and in various emails by the County's Director of Regional Parks, Liz

---

[4] https://regionalparks.saccounty.gov/Parks/Documents/Sailor_Bar_Map.pdf

[5] California Public Resources Code section 21000 *et seq*. See also CEQA Guidelines, Title 14, California Code of Regulations, section 15000 *et seq*., which are generally considered to have the force and effect of regulations.

[6] California Public Resources Code sections 21000-21001.1 (legislative intent). See also *County of Butte v. Department of Water Resources*, 13 Cal.5th 612, 626 (2022) (California Supreme Court echoing this policy sentiment.)

[7] See, e.g., California Public Resources Code section 21080, Title 14 California Code of Regulations, section 15060. See also *Sierra Club v. Napa County Bd. of Supervisors*, 205 Cal.App.4th 162, 176 (2012) (general restatement of this principle.)

[8] *Union of Medical Marijuana Patients, Inc. v. City of San Diego*, 7 Cal.5th 1171, 1184 (2019), citing *Friends of Mammoth v. Board of Supervisors*, 8 Cal.3d 247, 259 (1972) and *Laurel Heights Improvement Assn v. Regents of University of California*, 47 Cal.3d 376, 391 (1988) (additional citations removed).

[9] https://regionalparks.saccounty.gov/Parks/Pages/SailorBar.aspx

Bellas, to concerned citizens that no CEQA review is necessary as the policy decision to change the use of the roads, which were closed to public traffic fifteen years ago, is "deferred maintenance."

Specifically, the County website states in the Frequently Asked Questions (FAQ) section:

> "**Where is the environmental document for this?**
>
> This is maintenance work, and CEQA is not required. No new roads are being made. The un-improved roads are included in the American River Parkway Plan as part of the Sailor Bar Area Plan."

Persons affiliated with the County have made statements including by email, at public hearings, and otherwise, consistent with this statement. Consequently, **we understand that there is no factual dispute that CEQA analysis has not been performed** with respect to the County's policy decision to re-open the roads. The question at hand is whether CEQA is required; we believe that it is.

We believe that there are several possible legal arguments that the County has attempted to make via its claim that CEQA analysis is not required. As best we can tell, these include:

1. The County believes the policy decision to open the roads is not a "project" under CEQA, and so therefore no further action under CEQA is required.
2. The County believes that because the policy decision to open the roads is "deferred maintenance," it is exempt from CEQA review under a statutory or categorical exemption.
3. The County believes that because the 2008 Plan approved the roads for vehicular traffic, no further action under CEQA is required.

We assess each argument below. Because the identity of the lead agency is not in dispute here, we will not discuss the matter further.

A. The decision to open the roads qualifies a project under CEQA.

When a public agency undertakes an activity on its own, that agency must decide whether the proposed activity is subject to CEQA. Practically, this means assessing whether that activity qualifies as a "project" under CEQA[10] as set forth by statute[11] and CEQA guidelines.[12]

Among other definitions not relevant here, a "project" includes activities directly undertaken by public agencies which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.[13]

Policy decisions that grant or restrict rights, akin to ordinances or regulations, also qualify as "projects" under CEQA.[14]

---

[10] *Union of Medical Marijuana Patients, Inc. v. City of San Diego*, 7 Cal.5th 1171, 1185 (2019) (additional citations omitted).

[11] California Public Resources Code section 21065.

[12] Title 14, California Code of Regulations, section 15378(a).

[13] *Id*.

[14] See, e.g, *Apartment Ass'n of Greater Los Angeles v. City of Los Angeles*, 09 Cal.App.4th 1162 (2001) (ordinance passed by city qualifies as project under CEQA.)

Whether an action is a "project" is a categorical *legal question* about the activity, not a specific *factual question* about whether the activity will *in fact* have an environmental impact.[15]

Whether an action qualifies as a "project" or not is given broad interpretation to maximize protection of the environment.[16]

Here, the policy decision to open or close roads at Sailor Bar is an activity directly undertaken by a public agency. This element is met. As the community has repeatedly expressed in emails, phone calls, public hearings, and even meetings, they are concerned about myriad reasonably foreseeable impacts on the environment that could result from the policy decision to open roads at Sailor Bar to vehicular traffic. The County has therefore received actual notice from the community about the potential for significant impacts on the environment, and that this is therefore the categorical type of activity, as a matter of law, that *can* have a significant impact on the environment. Furthermore, a policy decision to open a portion of a public park to vehicular traffic is akin to an ordinance and, we reasonably believe, inherently a kind of activity that could create environmental impacts. Thus, this decision is the kind of decision (akin to an ordinance) that qualifies as a "project" under CEQA.

B. <u>No statutory or categorical exemption to CEQA applies to this policy decision.</u>

Once a public agency has concluded that an action constitutes a "project" under CEQA, the next step is to assess whether the project is exempt from CEQA under either a statutory provision or categorical exemption as set forth in the CEQA Guidelines.[17] Statutory exemptions can be found principally at California Public Resources Code section 21080(b), but may also be found in other specific laws. One of the most widely cited exemptions is for ministerial projects—in other words, nondiscretionary projects.[18] We examine each aspect of the County's plausible argument below.

<u>First, the project is discretionary</u>.

We have been unable to identify any specific command to open or close the roads under certain circumstances, much less any indication that those certain circumstances were triggered in 2009 or recently. Consequently, we assess that the decision to close the roads approximately fifteen years previously was a discretionary policy decision, as is the decision here to re-open them now.

<u>Second, no exemption applies</u>.

The County's "deferred maintenance" explanation may be referring to a Class 1 categorical exemption, which concerns activities related to existing facilities.

---

[15] See, e.g., with respect to land use decisions, *Muzzy Ranch Co. v. Solano County Airport Land Use Com.*, 41 Cal.4th 372 (2007). See also *Lake Norconian Club Foundation v. Department of Corrections and Rehabilitation*, 39 Cal.App.5th 1044, 1049-51 (2019) (whether activity constitutes "project" is categorical question of law, not matter of factual analysis.)

[16] See, e.g., *California Clean Energy Committee v. City of Woodland*, 225 Cal.App.4th 173 (2014). See also *Laurel Heights Improvement Assn. v. Regents of University of California*, 47 Cal.3d 376, 390 (1989) (court should interpret "project" broadly as to afford fullest possible protection to the environment within reasonable scope of statutory language.)

[17] *Union of Medical Marijuana Patients*, 7 Cal.5th at 1186 (2019).

[18] *Id.*

CEQA Guidelines section 15301 exempts activities related to the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, equipment, or features involving negligible or no expansion of existing or former use.

Section 15301(c) explicitly includes existing highways and streets, sidewalks, gutters, bicycle and pedestrian trails, and similar facilities.

However, the text of CEQA Guidelines section 15301 states that the "key consideration is whether the project involves negligible or no expansion of use." To make use of this exemption, the County would need to argue that the conversion of pedestrian walkways in the middle of a pristine park into vehicular roadways constitutes "negligible or no expansion of use."

Third, even if an exemption applies, no notice was filed.

Even if an exemption applies, if a lead agency concludes that a project is exempt from CEQA review, it may issue a notice of exemption citing the evidence relied upon in reaching that conclusion.[19] We have been unable to discover the existence of a Notice of Exemption. If one exists and we, alongside the community, have failed in our search for one, we welcome correction by the County.

This all assumes that categorical exemptions are permissible.

Per CEQA Guidelines section 15300.2(f), categorical exemptions may not be used for projects which may cause a substantial adverse change in the significance of a historical resource. Many members of the Sailor Bar community have raised concerns about potential impacts to Native American cultural resources near the proposed road openings.

C. The 2008 Plan is not the correct baseline for the current policy decision.

Another possible interpretation of the County's statement is that CEQA has already been conducted, or is otherwise not necessary, because the roads were approved for vehicular traffic in 2008, prior to the 2009 policy decision to close them to vehicular traffic and convert them to pedestrian walkways. Although it is true that an EIR was conducted at this time, analysis conducted 15 years ago is an inadequate baseline for discharging the County's obligations under CEQA. Numerous environmental conditions near the trails have noticeably changed over the past fifteen years.

Given the broad range of potential impacts—from exhaust fumes to noise and vibration to the inevitable harm to animals darting across narrow roadways to the impacts of motor oil runoff into nearby sensitive habitat and the cumulative effect of traffic to dust and erosion to numerous other concerns raised by the community—we are concerned that even if the prior analysis were an acceptable baseline, it would still fail to accurately describe the *current* range of potentially significant impacts. Simply put, too much has changed near the trails for the original EIR to assess.

Generally, CEQA requires a public agency to assess potentially significant environmental impacts as compared to existing physical conditions.[20] Existing physical conditions means the conditions that exist at the time the project is being assessed, not previous assessments that fail to account for current conditions. Courts have held that such previous assessments are "illusory" and invalid.

[19] *Id.,* citing *Muzzy Ranch*, 41 Cal.4th at 380, 386-87 (2007), citing CEQA Guidelines sections 15061-62.
[20] See California Public Resources Code section 21060.5 (definition of environment), CEQA Guidelines section 15125 (environmental setting defining baseline for analysis in EIR).

For example, relying on a previously approved EIR that speculates about future growth rather than a simple assessment of existing growth is "illusory" and fails as a CEQA document.[21] In another example, a court sharply criticized a public agency for "shoving existing physical conditions to the margin in [] its measurement of impacts against a baseline."[22] In another example, *Sunnyvale* similarly stands for the proposition that the baseline for analysis of potential environmental impacts is existing physical conditions, not previous analysis, not speculation, not projection.[23]

South Coast Air Quality District

The present situation closely resembles the fact pattern in *Communities for a Better Environment v. South Coast Air Quality District*, 48 Cal.4th 310 (2010), where the California Supreme Court held that baseline considerations apply not only to EIRs, but also to the initial study phase of the CEQA process, and that "existing physical conditions in the affected area…that is, the 'real conditions on the ground', rather than the level of development or activity that *could* or *should* have been present according to a plan or regulation" are what CEQA requires public agencies analyze.[24]

Here, an air quality district had previously permitted certain industrial boilers at a facility to operate at a high level simultaneously. Yet in the intervening years, those boilers never operated anywhere near the level they were previously permitted at, including in part because it was difficult for them to operate simultaneously because of how the plant was designed. The district then received a permit application that would see the boilers operating significantly more than they had been previously, but still well within the theoretical maximum they had been permitted to operate at, and concluded that there was no impact.

The California Supreme Court strongly disagreed, holding that the district erred by failing to examine a project leading to an *actual* increase in emissions, even though it was still within the permitted level. In the Court's words, the district's CEQA analysis

> "did not attempt to justify its maximum permitted capacity baseline as reflecting the actually existing physical conditions … By comparing the proposed project to what *could* happen, rather than to what was actually happening, the District set the baseline not according to established levels of a particular use, but merely hypothetical conditions… Like an EIR, an initial study or negative declaration must focus on the existing environment, not hypothetical situations… An approach using hypothetical allowable conditions as the baseline results in illusory comparisons that can only mislead the public as to the reality of the impacts and subvert full consideration of the actual environmental impacts, a result at direct odds with CEQA's intent."[25] (Emphasis added.)

[21] See, e.g., *Environmental Planning & Information Council v. County of El Dorado*, 131 Cal.App.3d 350, 358-359 (1982).
[22] *Woodward Park Homeowners Assn., Inc. v. City of Fresno*, 150 Cal.App.4th 102, 126 (2007).
[23] *Sunnyvale West Neighborhood Assn v. City of Sunnyvale City Council*, 190 Cal.App.4th 1351, 1373-74 (2010), citing *El Dorado*, *supra*, and CEQA Guidelines sections 15125 and 15126.2(a) ("an EIR must focus on impacts to the existing environment, not hypothetical situations… it is only against this baseline that any significant environmental effects can be determined").
[24] *South Coast*, 48 Cal.4th 310, 321-322 (2010).
[25] *Id*. (Internal citations omitted.)

The County's argument seems to be that because the roads were approved under the 2008 plan for use by vehicular traffic, fifteen years ago, and before a policy decision to close them was made, that there is no need to now re-examine the consequences of the current policy decision on an environment that has noticeably changed from the one analyzed in 2008.

This is essentially the same argument made by the district in *South Coast*, above. Even though the roads were permitted for vehicular traffic years ago, they were in fact not used for vehicular traffic, but instead the much lower-impact pedestrian traffic—*because of the County's own policy decision.*

An approach using the hypothetical allowable conditions as a baseline here, as in *South Coast*, would result in an "illusory comparison" that can only mislead the public and subvert full consideration of the actual environmental impacts—a result at direct odds with CEQA's intent.

Remedy and Proper CEQA Process

If no EIR has been prepared for a nonexempt project, but substantial evidence in the record supports a fair argument that the project may result in significant adverse impacts, the proper remedy is the preparation of an EIR.[26] If an Initial Study indicates that the project will have no significant environmental effects, the agency may state so in a Negative Declaration.[27]

We are aware of a litany of potentially significant impacts on the environment that could result from this policy decision. We encourage the County to engage with the Friends of Sailor Bar and the community, listen to their observations about significant impacts, and then, in the spirit of CEQA, choose how to proceed only once everyone fully understands the "real conditions on the ground."

The community wants communication and collaboration—not litigation.

Since its passage in 1970, courts and legal scholars have agreed that the heart and soul of CEQA is to ensure that public agencies think about the effects of their policy decisions on the environment, and then, with the public's input, make an informed decision on how to proceed.

This is an opportunity for the County and the community to come together and thoughtfully address the impacts of this policy decision. Thank you for your time and attention on this important issue.

Sincerely,

Matthew F. Chalmers, J.D.
CEO and Founder, Birch Citadel, P.C.
Office: (916)-272-1546
matt.chalmers@birchcitadel.com

[26] *Id*. at 319.
[27] *Id*.