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CALIFORNIA ENERGY COMMISSION

CALIFORNIA NATURAL RESOURCES AGENCY

STATE OF CALIFORNIA
STATE ENERGY RESOURCES
CONSERVATION AND DEVELOPMENT COMMISSION

APPLICATION FOR SMALL POWER PLANT EXEMPTION FOR THE:

GILROY BACKUP GENERATING FACILITY

Docket No. 20-SPPE-03

CEC STAFF'S RESPONSE TO COMMITTEE REQUEST FOR INFORMATION ON MITIGATION FOR PROJECT IMPACTS TO AGRICULTURAL RESOURCES

On September 23, 2021, the Committee presiding over this proceeding issued its Committee Scheduling Order and Further Orders, which among other things requested the following information from the parties:

> Please discuss whether the holdings in *King & Gardiner Farms, LLC v. County of Kern* (2020) (45 Cal.App.5th 814, hereafter *Gardiner*) and *Masonite Corporation v. County of Mendocino* (2013) (218 Cal.App.4th 230, hereafter *Masonite*) regarding the use of agricultural conservation easements to mitigate a significant farmland conversion impact to less than significant, are applicable to this Project. Please discuss whether the Applicant's proposed mitigation, including its proposal to implement the City's Agricultural Mitigation Policy, is legally sufficient to reduce the Project's potential impacts to less than significant in light of the holdings in *King & Gardiner Farms* and *Masonite*.

This is CEC staff's response to the request.

1. <u>The Project will Result in the Loss of Prime Farmland and Farmland of Statewide Importance</u>.

The applicant has concluded the project's impacts to agricultural resources would be significant due to the loss of 32 acres of prime farmland and 22 acres of farmland of statewide importance. (Gilroy Backup Generating Facility Small Power Plant Exemption Application (Application), p. 45.) To mitigate this impact, they propose to implement the City's Agricultural Mitigation Policy by either purchasing an equal amount of land in the "preferred designation areas" identified by the city and transferring this land to the Silicon Valley Land Conservancy (SVLC) or other city approved agency or purchasing development rights for similar land and transferring ownership of these rights to SVLC or other city approved agency. (Application, pp. 45-47.) This mitigation would only conserve existing farmland; it would not restore previously degraded land or create new farmland.

2. Both Cases Cited by the Committee are Applicable to Guide the CEC in its Analysis of this Impact and While the Holdings Might Appear to Conflict, They Ultimately Can Be Reconciled

The holdings of both *Gardiner* and *Masonite* are applicable to the Project as both involve impacts to agricultural resources. While these cases specifically involve the use of agricultural conservation easements (ACEs) and not necessarily the outright purchasing of land (as one aspect of the project's mitigation might entail), staff does not believe this minor difference in detail matters here; the logic of these two cases (and one additional case noted further below) apply to the general concept of preserving existing farmland to mitigate for loss, regardless of what legal mechanism is ultimately employed in such preservation.

In *Masonite*, 45 acres of prime farmland were going to be lost as a result of the proposed project (a quarry). (*Masonite Corporation v. County of Mendocino*, *supra,* 218 Cal.App.4th 230, 233.) The draft and final Environmental Impact Reports (EIRs) stated that acquiring an ACE would not be feasible mitigation because it would not replace the lost farmland, and that the impact of the project would be significant and unavoidable. (*Id.* at pp. 236-238.) The Department of Conservation (DOC), commenting on the draft EIR, stated that ACEs on comparable land of equal size to the project would be a "common and appropriate means of mitigating the loss of prime farmland." (*Id.* at p. 236.) The project was then approved with a statement of overriding considerations. (*Id.* at p. 234.) Masonite appealed, and the Court of Appeal ordered that the certification of the EIR be set aside. The court reasoned:

> We conclude that ACEs may appropriately mitigate the direct loss of farmland when a project converts agricultural land to a nonagricultural use, even though an ACE does not replace the onsite resources. Our conclusion is reinforced by the CEQA Guidelines, case law on offsite mitigation for loss of biological resources, case law on ACEs, prevailing practice, and the public policy of this state.
>
> ACEs preserve land for agricultural use in perpetuity. (See Civ. Code, §§ 815.1, 815.2 [describing agricultural and other conservation easements]; Pub. Resources Code, § 10211 [defining "agricultural conservation easement"].) As the California Farm Bureau Federation (CFBF) observes in an amicus curiae brief advocating for the conclusion we reach: "The permanent protection of existing resources off-site is effective mitigation for [a project's direct, cumulative, or growth-inducing] impacts because it prevents the consumption of a resource to the point that it no longer exists.... If agricultural land is permanently protected offsite at, for example, a 1:1 replacement ratio, then at least half of the agricultural land in a region would remain after the region has developed its available open space." By thus preserving substitute resources, ACEs compensate for the loss of farmland within the Guidelines' definition of mitigation. (Guidelines, § 15370, subd. (e) [mitigation includes "[c]ompensating for the impact by replacing or providing substitute resources or environments"].)

> There is no good reason to distinguish the use of offsite ACEs to mitigate the loss of agricultural lands from the offsite preservation of habitats for endangered species, an accepted means of mitigating impacts on biological resources. (*Citations*.) (*Masonite Corporation v. County of Mendocino*, *supra,* 218 Cal.App.4th 230, 238-239.)

Masonite stands for the narrow proposition that ACEs are legally feasible mitigation measures for direct farmland loss. It cannot, however, be used to stand for the proposition that ACEs can reduce a project's significant impact to agricultural resources to less than significant, as that question was not squarely before the court. The only relevant issue before the court was whether the county's conclusion that conservation easements did not constitute feasible mitigation for farmland impacts was a prejudicial abuse of discretion.

CEQA requires an agency to mitigate where feasible, even if such mitigation would be insufficient to reduce a significant impact to less than significant. (*City of San Diego v. Board of Trustees of California State University* (2015) 61 Cal.4th 945, 967; *Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal.4th 204, 231.) Thus, in order to rule, the court only needed to conclude that ACEs constituted a feasible mitigation measure; it did not need to conclude that such mitigation would be sufficient to reduce the project's impacts to less than significant, nor were the facts presented sufficient for it to reach this conclusion. Thus, the opinion cannot, in and of itself, be relied upon for the proposition that ACEs that simply preserve existing farmland can reduce a project's impacts to agricultural resources to less than significant. (16 Cal. Jur. 3d Courts § 296 ["Language used in an opinion is to be understood in the light of the facts and the issues then before the court, notwithstanding the use of overly broad language by the court in stating the issue before it or its holding or in its reasoning."]) In order to determine whether ACEs may legally be considered to reduce a significant adverse impact to agricultural resources to less than significant, we need to turn to other caselaw.

Gardiner involved a proposed ordinance to streamline oil and gas exploration by amending the county's zoning provisions. (*King & Gardiner Farms, LLC v. County of Kern, supra,* 45 Cal.App.5th 814, 831-835.) The EIR estimated that 7,450 acres of agricultural land would be converted to non-agricultural usage as a result, at a rate of about 289 acres per year, and proposed mitigation by, among other things, the use of ACEs at a 1:1 ratio, which the county determined would reduce the impacts of the loss of the farmland to a less than significant level. (*Id.* at pp. 831-835 and 870-872.) The county certified the EIR and approved the ordinance without a statement of overriding considerations. (*Id*.) Plaintiffs brought suit, alleging that the use of ACEs at a 1:1 ratio would not reduce the impacts of the lost farmland to a less than significant level as described in the EIR, and thus violated the California Environmental Quality Act (CEQA). (*Id.* at p. 872.) The Court of Appeal agreed, and reversed the trial court's denial of Plaintiffs' petition for a writ of mandate, stating:

> Entering into a binding agricultural conservation easement does not create new agricultural land to replace the agricultural land being converted to other uses. Instead, an agricultural conservation easement merely prevents the future conversion of the agricultural land subject to the easement. Because the

> easement does not offset the loss of agricultural land (in whole or in part), the easement does not reduce a project's impact on agricultural land. The absence of any offset means a project's significant impact on agricultural land would remain significant after the implementation of the agricultural conservation easement. Restating this conclusion using the data from this case, the implementation of agricultural conservation easements for the 289 acres of agricultural land estimated to be converted each year would not change the net effect of the annual conversions. At the end of each year, there would be 289 fewer acres of agricultural land in Kern County. Accordingly, under the thresholds of significance listed in the EIR, this yearly impact would qualify as a significant environmental effect. Therefore, we agree with KG Farms' contention that MM 4.2-1. a does not provide effective mitigation for the conversion of agricultural land. (*Id.* at pp. 875-876.)

The court distinguished *Masonite* by stating that *Masonite* did not consider whether the use of an ACE could reduce a significant impact to a less than significant impact, as M*asonite* merely found that the EIR's determination that ACEs were legally infeasible in that particular situation could not be sustained. (*King & Gardiner Farms, LLC v. County of Kern, supra,* 45 Cal.App.5th 814, 875, fn. 2.) The *Gardiner* court did state, however, that restoring previously converted agricultural land to agricultural use at a 1:1 ratio would fully mitigate impacts, as the net change in agricultural land would be zero. (*Id.* at p. 876.) The court concluded:

> Because permit applicants could rely on an agricultural conservation easement under MM 4.2-1.a and because such easements do not actually offset the conversion of farmland, the Board erred when it found the impact to agricultural land would be less than significant with mitigation. Therefore, we conclude the EIR and the Board's finding as to the mitigation of a significant impact on agricultural land do not comply with CEQA. *(Id.* at pp. 878-879.)

3. Other Cases, Including *Citizens for Open Government v. City of Lodi,* are Also Instructive Here

Another case that preceded these also proves informative. *Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296 (hereafter *Lodi*), involved a challenge to a certified EIR approving a project that resulted in the conversion of 40 acres of prime farmland to urban use. The EIR stated that there was no mitigation that could reduce the impact to a less than significant level, and the city required the project applicant to acquire a permanent ACE of 40 acres, providing for partial mitigation at a 1:1 ratio and adopted a statement of overriding considerations. (*Citizens for Open Government v. City of Lodi, supra,* 205 Cal.App.4th 296, 322.) The challengers argued that there was no substantial evidence to support the city's rejection of mitigation that would have required the purchase of ACEs at a higher ratio. The Court of Appeal supported the city's conclusion that there were no feasible mitigation measures, explaining that ACEs:

> [A]re not mitigation in the true sense of the word. They do not lessen the impact to the loss of the farmland.... As such, no ratio, no matter how high[,] will achieve

> a mitigation effect, and no particular ratio can be ultimately justified as the scientifically correct one. For that reason, a statement of overriding considerations is necessary for the loss of farmland. The ratio is therefore a matter of local concern for the council to establish. The standard for California communities is the 1 for 1 ratio and is appropriate in this case. (*Id*.)

The court supported the city's finding that "[t]here were no feasible mitigation measures to avoid the loss of prime agricultural farmland because it was not possible to recreate prime farmland on other lands" but requiring the applicant to acquire an ACE would "minimize and substantially lessen the significant effects of the proposed project." (*Citizens for Open Government v. City of Lodi, supra,* 205 Cal.App.4th 296, 323-324.) Thus, *Lodi* supports the proposition that an ACE can mitigate the loss of farmland to a partial extent, but that a statement of overriding considerations would be necessary to proceed with a proposed project involving the loss of farmland.

A quick survey of recent caselaw shows that regardless of whether mitigation is identified, local agencies generally issue a statement of overriding considerations when a significant impact to agricultural resources has been identified. (*see*, e.g. *Cherry Valley Pass Acres & Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316 and *Friends of the King River v. County of Fresno* (2014) 232 Cal.App.4th 105.)

It should be noted that the CEQA Guidelines (Guidelines) were recently amended to augment the definition of "mitigation" to include specific reference to conservation easements. (Cal. Code Regs., tit. 14, §15370(e) [amended December 28, 2018].) This change was not before the *Gardiner* court. Nevertheless, even if this change had been before the court it would have been unlikely to have changed the decision, as the court's rationale was not dependent on the Guidelines definition of mitigation and did not cite any ambiguity in the definition as a basis for its conclusion. (*King & Gardiner Farms, LLC v. County of Kern, supra,* 45 Cal.App.5th 814*,* 875.) Furthermore, the addition to the definition merely provides an example of how "compensating for the impact by providing substitute resources or environments" might be provided (e.g. "including through permanent protection of such resources in the form of conservation easements.") (*Id.*) This new example does not change the underlying requirement that the mitigation be shown to actually substitute for what was lost. As discussed above, the *Gardiner* court held that ACEs for existing farmland cannot fully substitute for the loss of farmland and the change to the Guidelines does not undermine the logic of this conclusion.

4. <u>It is Reasonable to Apply *Gardiner* to the Analysis of Project Impacts to Agricultural Resources and Conclude that the Impacts Cannot Be Mitigated to Less Than Significant</u>

As discussed above, *Masonite* does not ultimately conflict with *Gardiner,* but even if it did, the CEC should consider that Gardiner prevails and applies here because it is the most recent. (16 Cal. Jur. 3d Courts § 303 ["As a general rule, where there are two or more conflicting decisions rendered by a court or by courts of equal dignity, the decision last rendered should prevail."])

Applying *Gardiner*, then, it is questionable whether substantial evidence can be provided to support a conclusion that the mitigation currently proposed by the applicant to address impacts to agricultural resources is sufficient to reduce those impacts to less than significant. The mitigation proposed only offers to preserve at a 1:1 ratio existing farmland. There is no provision in the proposal to create new land. Thus, because 54 acres of prime farmland or farmland of statewide importance would be lost due to the project, and no new farmland created to replace this loss, the impact cannot be found to be reduced to less than significant by the preservation of already existing farmland.

Nor can the CEC rely on the fact that the city has already adopted a statement of overriding considerations for the loss of farmland when it rezoned the parcel from an agricultural to a non-agricultural designation to avoid having to make a similar statement here by tiering under Public Resources Code section 21094. Even if a prior more general EIR has adopted a statement of overriding considerations for an impact, an agency conducting a subsequent project-level review must still make the findings required in Public Resources Code section 21081 specifically tied to that project, including a statement of overriding considerations. (*Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 122-126 [overturned on other grounds].)

Nevertheless, the city's Draft EIR for its 2040 General Plan (subsequently incorporated into the Final EIR) is instructive in its conclusion regarding farmland impacts. The city notes that "even with implementation of the city's general plan policies and agricultural land mitigation policy that includes purchase of replacement agricultural lands or permanent conservation easement requirements, the loss of important farmland is still considered significant and unavoidable." (Gilroy 2040 General Plan Draft EIR, p. 3-47.)

One area of inquiry not considered in *Gardiner* was the possibility of requiring the land to revert back to farmland at the end of the useful life of the project. If the loss of farmland was only temporary (e.g. fifty years or so) and the conservation easements permanent (i.e. in perpetuity), there could be an argument that a court could find persuasive that on the whole impacts have been sufficiently mitigated. Of course, this would depend on the practical feasibility of enforcing such a measure and the technical feasibility of restoring the farmland and there is a risk that a court would not be so persuaded.

In any other proceeding, staff would recommend carrying forward the mitigation but also adopting a statement of overriding considerations acknowledging the mitigation is not sufficient to fully mitigate the project's impacts to less than significant (assuming facts supported making the required finding that the benefits of the project outweigh its environmental impacts). This approach, however, would not allow the CEC to exempt the project from its jurisdiction. Pursuant to Public Resources Code section 25541, an exemption can be provided only if the CEC can find that "no substantial adverse impact on the environment or energy resources will result from construction or operation of the proposed facility." In staff's view it is not possible to make this finding for a project that also requires a statement of overriding consideration (which by its very nature concedes that an environmental impact will occur).

Therefore, there appear to be three options for moving this project forward: 1. the applicant identifies additional mitigation that would create new farmland in at least an equal amount to what is proposed to be lost; 2. the applicant finds an alternate location for the proposed facility that does not result in the conversion to non-agricultural use of prime farmland, unique farmland, or farmland of statewide importance as shown on the maps prepared pursuant to the Farmland Mapping and Monitoring Program of the California Natural Resources Agency; or 3. the applicant files an application for certification and obtain a CEC license for the facility as it is currently proposed, which would allow the CEC, if the facts supported it, to override any significant unmitigated impacts.

Staff has spoken to the applicant and understands it is investigating the feasibility of complying with option 1, including perhaps improving existing farmland to a higher, more protected status (e.g. turning farmland of statewide importance into prime farmland) or obtaining conservation easements over farmland that has been rezoned to non-agricultural use, thereby potentially reversing the "loss" of that farmland accounted for in the general plan. Without further detail staff cannot here opine as to whether these proposals would mitigate the project's impacts to less than significant under *Gardiner*, but such efforts do appear headed in the right direction and staff is open to engaging in further discussions on the matter.

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Respectfully submitted,

/s/

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