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THE SUPERIOR COURT OF CALIFORNIA

COUNTY OF MONTEREY

MONTEREY COURTHOUSE

MEYER COMMUNITY GROUP;

Petitioner,

vs.

COUNTY OF MONTEREY; MONTEREY COUNTY BOARD OF SUPERVISORS,

Respondents,

HARPER CANYON REALTY, LLC; and DOES 1-25 inclusive,

Real Parties in Interest

AND RELATED CONSOLIDATED ACTION.

Case No.: M131913
(Consolidated with Case No. M131893)

PETITIONERS' OPPOSITION TO MOTION TO REOPEN THE CASE

Hon. Thomas W. Wills
Dept. 14

Action Filed: May 4, 2015
Trial Date: May 3, 2018

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TABLE OF AUTHORITIES

Statutes

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TABLE OF ACRONYMS

afy	acre-feet per year
AR	Administrative Record
CDT	Corral de Tierra (Subbasin)
DEIR	Draft Environmental Impact Report
EIR	Environmental Impact Report
FEIR	Final Environmental Impact Report
SVGB	Salinas Valley Groundwater Basin
SVWP	Salinas Valley Water Project

Petitioners LandWatch Monterey County and Meyer Community Group offer this joint opposition to the Motion to Reopen the Case by Real Party in Interest Harper Canyon Realty, LLC and the County of Monterey ("Moving Parties").[1]

I. The Motion to Reopen the Case should be denied because Moving Parties do not meet the requirements to reopen the case.

The Motion to Reopen the Case should be denied for (1) lack of diligence in addressing the issues and (2) the irrelevance of the proffered new evidence, which is an inadmissible extra-record declaration.

A. The Motion should be denied because Moving Parties were on notice of each issue on which they now seek to reopen the case and have had ample opportunity to present any relevant evidence from the administrative record.

A motion to reopen should be denied where there is no excuse not to have produced evidence to address the issue at trial, particularly when moving party was on notice of the issue, there is no surprise, and the witness is known. *Stewart v. Cox* (1961) 55 Cal.2d 857, 866 (motion to submit additional affidavits properly denied when defendant was "on notice" of issue); *Keppelman v. Heikes* (1952) 111 Cal.App.2d 475, 484–485 (no excuse for failure to obtain known witness at hearing); *Guardianship of Phillip B.* (1983) 139 Cal.App.3d 407, 428 (no diligence where counsel aware of evidence and issue); *Sanchez v. Bay General Hospital* (1981) 116 Cal.App.3d 776, 793–794 (no good cause to reopen to permit opinion evidence from own witness and where no surprise shown).

Moving Parties identify three issues that they claim "were not previously identified as issues of concern for discussion at the hearing." MPA, p.1:9-14, 22-23. These include (1) the DEIR's failure to disclose that the property was in the Corral de Tierra ("CDT") Subbasin, (2) the FEIR's inconsistency in identifying the Project's subbasin, and, most remarkably, (3) whether substantial evidence supports the EIR's conclusion that the Project would not significantly impact groundwater resources. The Motion to Reopen should be denied because Moving Parties were in fact on notice of all three issues and have had ample opportunity to address them in briefing and oral argument with relevant evidence from the administrative record, if any.

[1] This 16-page joint opposition is consistent with the Court's June 13, 2018 minute order limiting *each* Petitioner to ten pages and is offered as a joint document to avoid duplication of argument.

First, hydrologist Parker put Moving Parties on notice of the DEIR's failure to identify the CDT Subbasin in comments to the Supervisors (AR13142) and LandWatch did so in its opening brief (LW Op. Brf, pp. 6:19-20, 10:10-20). Second, the Court put Moving Parties on notice of the issue of the FEIR's identification of relevant subbasins in question one of its March 14, 2018 Minute Order, and LandWatch pointed out the FEIR's inconsistency in its response (LW Supp. Brf., p. 6:3-12). Third, LandWatch put Moving Parties on notice of the lack of substantial evidence in letters to the Board (AR14149-14153, 13329-13331, 13124-13133), and in each of its briefs (LW Op. Brf., pp. 23:6-31:8; LW Reply, pp. 14:3-20:2; LW Supp. Brf.28:15-30:18). Any contention to the contrary is absurd.

B. The Motion should be denied because the proffered Franklin declaration is neither admissible evidence nor relevant to the issues in this case, which must be decided on the administrative record.

A motion to reopen a case is improper where proffered evidence is not relevant to the allegations or cannot produce a different result. *Gluskin v. Lehrfeld* (1955) 134 Cal.App.2d 804, 810 (nothing in affidavit could compel different decision); *Mayer v. Beondo* (1948) 83 Cal.App.2d 665, 668 (reopening case was error where proffered evidence not responsive to pleadings); *Broden v. Marin Humane Society* (1999) 70 Cal.App.4th 1212, 1222 (upholding trial court refusal to "reopen a case for new evidence that will not produce a different result"). Here, the proffered new evidence, Franklin's declaration, is not relevant to Petitioner's claims and cannot produce a different result because it is not part of the administrative record and is not in fact admissible evidence.

This case is brought under Public Resources Code § 21168, which provides that judicial review must be in accordance with CCP § 1094.5. Here, the Court's inquiry is not independently to make factual determinations, but only to determine whether the County abused its discretion by failing to proceed as required by CEQA or by making findings not supported by substantial evidence. CCP, § 1094.5(b); *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.

Judicial review is therefore ***limited to the record of the County's proceedings***, as provided by CCP § 1094.5(e). Kostka and Zischke, Practice Under the California Environmental Quality Act (2nd Ed., 2017 Update), § 23.49. Exclusive reliance on the record is also separately dictated by CEQA's requirement that all findings "shall be supported by substantial evidence ***in the record***." 14 CCR §

15091(b), emphasis added. Furthermore, Petitioners' independent claims that the EIR is informationally inadequate (simply ignored by Moving Parties) present legal, not factual questions, and these claims must be assessed with reference to the EIR itself, not information outside the EIR. LW Op. Brf, pp. 19:18-20:12; LW Reply, p. 10:13-18; LW Supp. Brf, pp.30:18-31:28.

Thus, CEQA case law is clear that a trial Court may not consider a declaration, even by an expert, that was not before the agency when it made its decision. *Sierra Club v. California Coastal Com'n* (2005) 35 Cal.4th 839, 863 (barring post-hoc declaration); *Fort Mojave Indian Tribe v. Department of Health Services* (1995) 38 Cal.App.4th 1574, 1594-1598 (error to remand case for consideration of an expert's report prepared after agency approved project); *Schaeffer Land Trust v. San Jose City Council* (1989) 215 Cal.App.3d 612, 625, n. 9 (rejecting declaration offered by agency purporting to explain EIR's inaccuracy); *Browning-Ferris Industries v. City Council* (1986) 181 Cal.App.3d 852, 861 (trial Court properly rejected post-approval scientific report and declarations by City staff); *Environmental Protection Information Center v. California Dept. of Forestry and Fire Protection* (2008) 44 Cal.4th 459, 487 (Court "may not accept post hoc declarations of the agencies themselves" regarding information omitted from the record); *Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal.App.4th 1109, 1124 ("Material presented eight months after certification may not be considered on whether certification was proper").

Post hoc scientific opinions are also not allowable evidence in CEQA cases because "allowance of conflicting scientific opinions created after an administrative decision would pose a threat of repeated rounds of litigation, and uncertain, attenuated finality." *Cadiz Land Co., Inc. v. Rail Cycle, L.P.* (2000) 83 Cal.App.4th 74, 120.

CCP § 1094.5(e) permits extra-record evidence *only* if it was improperly excluded or could not have been produced in the exercise of reasonable diligence. *Sierra Club*, *supra*, 35 Cal.4th at 863. Moving Parties have made no showing that Franklin's testimony was improperly excluded or that, in the exercise of reasonable diligence, Franklin could not have testified in administrative hearings on the issues on which Moving Parties now seek to reopen the case. Franklin actually *did* testify to the Board on March 3, 2015 regarding the hydrological analysis, including the location and impacts of the Project wells. AR4963-4966. Because Franklin testified *after* hydrologist Parker's November 28, 2014 and

March 2, 2015 letters and LandWatch's letters, Franklin was on notice, or should have been on notice with reasonable diligence, of (1) objections to the DEIR's failure to identify the CDT Subbasin, (2) issues in the FEIR regarding the Subbasin identification, and (3) the lack of substantial evidence for the EIR's claim that the existing groundwater management projects would halt groundwater declines in the CDT Subbasin. First, Parker had objected that the FEIR fundamentally changed the description of the hydrological setting. AR13142-13147. Parker specifically objected to the DEIR's reference to the "El Toro Groundwater Basin" because "there is no 'El Toro' groundwater basin," and pointed out that "California Department of Water Resources has consistently referred to this area as the Corral De Tierra Area groundwater subbasin since at least 1995 (DWR Bulletin No. 118, September 1975)." AR13142. Second, Parker also specifically challenged the FEIR's discussion of the Project's location within the CDT Subbasin by pointing to the inaccuracy of the FEIR's citations of DWR groundwater basin maps (AR353, 358, 387 - FEIR):

> . . . the FEIR erroneously quotes 2004 and 2010 for DWR. But the Water Code statute recognized publications that define groundwater basins is Bulletin 118 published in 1975, 1980 and 2003 (WC section 10752, and as updated to 10722 with the Sustainable Groundwater Management Act of 2014).

AR13142-13143 (Parker). Third, both Parker and LandWatch had previously and repeatedly objected to the lack of substantial evidence that existing groundwater management projects would halt groundwater declines in the CDT Subbasin or in the rest of the Basin. AR13144-13153, 6792-6793, 6795-6796 (Parker), AR13124-13133, 14149-14153, 13329-13331 (LandWatch).

In sum, Parker and LandWatch had put the County on notice of the very issues on which Moving Parties now seek to introduce extra-record evidence. Franklin had the opportunity to testify at the hearings, so there was no improper exclusion or surprise as to the issues in this case.

More fundamentally, because Franklin's post-hoc declaration is not part of the administrative record, it is simply irrelevant to the issues as to whether the EIR was informationally adequate and as to whether the County had substantial evidence *in the record* to support its conclusions. Thus, this Court should deny the Motion to Reopen the Case without considering further argument on the merits because there is no new admissible, relevant evidence and considering the Franklin declaration cannot produce a different result. Regardless, as discussed below, Moving Parties' further argument is unavailing.

II. Moving Parties discussion of mapping sources misrepresents the EIR and cannot render the EIR adequate or supplement the administrative record.

Moving Parties discussion of "mapping sources employed by the EIR for analyzing groundwater resources" (MPA, pp. 5:2-8:3) misrepresents the EIR. It is not true that the EIR relies on a map of the "Pressure Subarea" and the Salinas Valley Water Project ("SVWP") Engineer's Report. And, contrary to Moving Parties, the draft EIR does not disclose overdraft in the El Toro Basin, does not disclose the salient information in the Geosyntec report, and does not rely on the SVWP to mitigate cumulative impacts to the El Toro Basin.

A. The EIR does not disclose the "Pressure Subarea" or the SVWP Engineers Report.

Franklin and the Moving Parties argue that the Project is within the "Pressure Subarea" identified in the SVWP Engineers Report. Franklin Decl, ¶ 6; MPA, pp. 6:18-7:6. Even if this information were true, it is not in the EIR.[2] The EIR does not disclose a map of the "Pressure Subarea" from the SVWP Engineers Report, does not locate the Project within that Subarea, and does not explain the purported difference between the Pressure *Subbasin* (which does *not* contain the Project wells) and the Pressure *Subarea*. The EIR does not even *mention* the SVWP Engineers' Report or the Pressure Subarea. Moving Parties' citations to AR368, 372-373, 831, 836, and 3935 to imply that the EIR discloses that the Project is in the Pressure Subarea (MPA, p. 6:23-24) are entirely misleading. Those citations do *not* reference the Pressure Subarea, but only Zone 2C and the San Bernancio Gulch subarea of the CDT Subbasin.

Franklin's declaration and Moving Parties' argument cannot supplement what is missing from the record. The California Supreme Court holds that an EIR reader "could not reasonably be expected to

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[2] In addition to Franklin's declaration, the Motion references an attached map of groundwater basins from an unidentified version of DWR Bulletin 118. MPA, p. 6:27, referencing Exhibit A. This map does not disclose the "Pressure Subarea;" nor does it label any of the Subbasins of the Salinas Valley Groundwater Basin. And, even if it did, it is not in the administrative record, and is thus inadmissible for the same reasons that Franklin's declaration is inadmissible.

Remarkably, the attached map is not dated, even though Real Party speculated at the May 3, 2018 hearing that the DEIR omits references to the CDT Subbasin only because DWR had not settled on its boundaries as of the 2008 DEIR. (As Parker explained, DWR had in fact identified the CDT Subbasin as early as 1975. AR13142.) Thus, not only is the attached map inadmissible, it is not even probative of the very argument made by Real Party.

ferret out an unreferenced discussion" in a document that is not in the EIR, and then "interpret that discussion's unexplained figures without assistance, and spontaneously incorporate them into the FEIR's own discussion . . ." *Vineyard, supra,* 40 Cal.4th at 442. *Vineyard* explains:

> The data in an EIR . . . must be presented in a manner calculated to adequately inform the public and decision makers, who may not be previously familiar with the details of the project. "[I]nformation 'scattered here and there in EIR appendices' or a report buried in an appendix, is not a substitute for 'a good faith reasoned analysis.' " [citations] To the extent the County, in certifying the FEIR as complete, relied on information not actually incorporated or described and referenced in the FEIR, it failed to proceed in the manner provided in CEQA.

Id. at 727–728. And here, unlike in the cases cited by *Vineyard*, the missing information is not even in the EIR appendix or referenced by the EIR – it is supplied by an inadmissible extra-record declaration. An agency may not "remedy the inadequacies of the EIR by presenting evidence to the trial court." *Santiago County Water District v. County of Orange* (1981) 118 Cal.App.3d 818, 831.

B. The DEIR does not disclose overdraft in the El Toro Basin, rely on the Geosyntec report, or rely on the SVWP in its analysis of cumulative impacts.

As LandWatch has already explained (LW Reply, pp.1:26-28, 7:27-28) Real Party's repeated claims that the DEIR disclosed overdraft in the El Toro Basin are not true. Yet Moving Parties make this false claim again, citing AR825, 830, and 829. MPA, p. 7:9-10. The DEIR at AR825 and 830 states that "*some of* Monterey County's aquifers" are in overdraft (emphasis added), but it does not mention the El Toro Groundwater Basin. The DEIR quotes the superseded 1996 Fugro study that proposes revising the El Toro Basin subarea boundaries to eliminate what Fugro dismissively refers to in ironic quotes as "*paper* deficits" (AR829, emphasis added), because Fugro found a water surplus in these interconnected subareas (*see* AR838). The DEIR at AR829 does not admit a deficit, it denies it.

Contrary to Franklin's claim (Franklin Decl., ¶ 5), it is not true that "the DEIR used the Geosyntec 2007 investigation to describe the hydrological setting for the project." The DEIR references Geosyntec *once* (AR830), and *only* for the unremarkable proposition that groundwater flows northeast. The DEIR does *not* disclose the Geosyntec conclusions relevant to the DEIR's significance criteria that include falling groundwater levels and aquifer depletion. AR833. In particular, the DEIR does not disclose that the El Toro Primary Aquifer is in overdraft; that the rate of pumping exceeds the rate of replenishment; that groundwater levels have fallen and the aquifer has been depleted for 45 years;

and that the County should expand the B-8 zoning area unless groundwater mining and further harm to the aquifer are acceptable. AR20061-20062, 20120, 20156, 20163.

Moving Parties argue that it was only the *2010* Geosyntec Update that "superseded" the earlier reports, citing AR352-353, and thus implying that the DEIR somehow incorporates the substance of the *2007* Geosyntec report. MPA, p. 5:21-25. In fact, the FEIR states that the DEIR's 2003 hydrology report relied on the 1991 and 1996 reports and that " [b]oth of these reports have since been superseded by the *El Toro Groundwater Study* prepared for MCWRA by Geosyntec in July 2007, and supplemented in June 2010." AR353, italics in original. In short, the FEIR admits that the DEIR's 2003 hydrology report relied on superseded reports, *not on* the 2007 Geosyntec report.

Moving Parties argue that the DEIR concludes that there would be no significant impact because Project wells are in Zone 2C, citing AR837. MPA, p. 7:10-13. The citation to AR837 is to the DEIR's discussion of the project-specific impact to the water supply, *not* to the DEIR's discussion of cumulative adverse effects to surrounding subareas in the El Toro Groundwater Basin (at AR842-843). The DEIR's cumulative analysis did not mention Zone 2C or water management projects; it relied *only* on the purported "net surplus of approximately 314.82 AFY" in the "four interconnected areas" within the "El Toro Groundwater Basin."[3] AR842-843. Indeed, the project-specific analysis also relied on the surplus claim (AR837-838), without disclosing overdraft conditions and declining groundwater levels, leaving the reader with no reason to suspect a water problem that needed a solution.

Furthermore, the DEIR's reference to Zone 2C at AR837 does not acknowledge a water problem *outside* the B-8 area, i.e., at the Project wells, or claim a solution for it. The DEIR is only concerned to explain that the Project's water supply company, which would pump from and serve customers in both the B-8 and Zone 2C areas, will separately account for its pumping of Zone 2C water for the Project and B-8 water for other customers so as not to violate provisions barring the supply of B-8 water outside the B-8 zone. *See* AR140-143 (FEIR explaining water swap issue in detail).

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[3] The DEIR (AR843, 837) also cites the Health Department 2002 memorandum (AR 1507), which was based on the 2002 hydrogeological study with its misleading claim of a "surplus" (AR1496), and without any consideration of the superseding 2007 Geosyntec evidence of 45 years of declining groundwater levels.

Finally, Moving Parties argue that Petitioners were not denied an opportunity to comment because *comments* on the DEIR raised the issue of the El Toro overdraft and cited the Geosyntec report. MPA, p. 7:17-24. But information submitted by project opponents cannot substitute for an EIR's disclosures. *Santa Clarita Organization for Planning the Environment v. County of Los Angeles* ("*SCOPE*") (2003) 106 Cal.App.4th 715, 722 ("it is not enough for the EIR simply to contain information submitted by the public and experts") An agency may not place the "burden of producing relevant environmental information on the public rather than the agency," because the agency could then "avoid an attack on the adequacy of the information contained in the report simply by excluding such information." *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 724. Furthermore, post-DEIR disclosure of groundwater information, e.g., the FEIR's incomplete disclosure of the mere fact of overdraft from Geosntec, cannot cure an informationally inadequate DEIR because it precludes comment and response *in the FEIR*. *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 727 (disclosure untimely because it precluded opportunity for comments and FEIR response); *Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 120, 123, 133 (disclosure must be timely to allow for comment and response). Furthermore, as briefed, the County did not in fact respond to the comments made on the revised water supply analysis in the FEIR. LW Supp. Brf., pp. 28:130:18; LW Reply, p. 10:2-12, 22-28.

III. Petitioners do not dispute that the *final* EIR belatedly discloses that the wells are in the CDT Subbasin; and Petitioners' claims do not depend on the FEIR's equivocation as to whether part of the Project is in the Pressure Subbasin.

Moving Parties vehemently insist on what Petitioners have already explained: the *final* EIR discloses that the wells are in the CDT Subbasin, even though the *draft* EIR does not. MPA, p. 8:16-23; *see* LW Supp. p. 6:18-21.

As Petitioners explained in response to the Court's questions about the changing and uncertain geographic scope of cumulative analysis in the EIR, the FEIR provides a conflicting account as to whether *part* of the Project is in the Pressure Subbasin. LW Supp. Brf., p. 6:3-17. Moving Parties now complain that Petitioners did not identify the FEIR's equivocation on this point until responding to the Court's request for supplemental briefing. MPA, p. 8:6-12. However, Parker's first letter did in fact object to the EIR's changing and uncertain descriptions of the groundwater basins, noting that the

FEIR's cites to DWR Bulletin 118 were erroneous and that the FEIR only "suggests" that a portion of the project is within the 180/400 Foot Aquifer subbasin (i.e., the Pressure Subbasin). AR13142-13143.

Moving Parties argue that Petitioners characterize the FEIR's conflicting account as to whether a portion of the project is in the Pressure Subbasin as a "fatal flaw," implying that Petitioners' claims critically depend on the existence of this flaw. MPA, p. 8:6. Not so. *None* of Petitioners' independent claims that the EIR was inadequate, that recirculation was required, and that the findings are not based on substantial evidence are premised on this flaw in the EIR, which Petitioners identified in supplemental briefing *only because the Court asked* about the EIR's discussion of groundwater basins. Minute Order, March 14, 2018, Water Question 1.

As summarized in the next section, Petitioners' claims that the EIR was inadequate as an informational document turn on much more consequential non-disclosures and untimely disclosures.

IV. The Motion to Reopen fails to address Petitioners' independent claims that the EIR is inadequate as an informational document.

The Motion to Reopen rehashes previous arguments that there is substantial evidence to support findings and that recirculation was not warranted. But Moving Parties simply ignore Petitioners' claims that the County failed to proceed as required by CEQA, which claims are an independent basis to set aside the EIR. Petitioners' claims that the EIR fails to comply with CEQA's requirements are premised on a number of ***untimely*** and ***inadequate*** disclosures.

Disclosures in the EIR's globally rewritten hydrology section were ***untimely*** because:

- the DEIR does not disclose the overdraft condition in the El Toro Groundwater Basin (LW Reply, pp.1:26-28, 7:27-28);
- the FEIR admits that the DEIR's hydrology analysis relies on superseded technical reports (AR353);
- the FEIR changes the identification of the groundwater basin and the geographic scope of cumulative analysis (*compare* AR842-843 *to* AR 384; *see* LW Supp. Brf., pp. 23:13-32:5);
- the FEIR abandons the DEIR's claim that the two reservoirs projects have "sustained groundwater levels" (*compare* AR830 *to* AR 363; *see* LW Op. Brf, p. 11:16-26);

- the FEIR makes the new claim that the Project wells are somehow isolated from the sub-areas of the El Toro Primary Aquifer that the DEIR and FEIR identify as interconnected (AR375-376, 385, 826, 827; *see* LW Supp. Brf, pp. 12:16-15:8; LW Reply, pp. 16:1-17:5); and

- the FEIR makes the new claim that the SVWP will mitigate cumulative impacts (AR384, 387; *see* LW Op. Brf. pp. 14:16-16:11; LW Supp. Brf., pp. 23:13-32:5);.

Disclosures, even after the FEIR's revisions, were ***inadequate*** because

- the FEIR does not disclose the fact of 45 years of falling groundwater levels and aquifer depletion in the El Toro Primary Aquifer System (LW Op. Brf., pp. 12:20-14:12; LW Reply, pp 1:8-3:5)

- the FEIR repeats the DEIR's misleading claims of a "surplus" (AR843, 837-838, 374, 385), despite Geosyntec's empirical conclusion that "the rate of groundwater pumping from the El Toro Primary Aquifer System exceeds the rate of groundwater replenishment" (AR20062);

Based on these untimely and inadequate disclosures, Petitioners have argued that the County prejudicially failed to proceed as required as required by law for three reasons:

- Critical environmental setting information was not disclosed timely, in the *draft* EIR, as CEQA requires. LW Op. Brf., pp. 10:1-12:19

- Environmental setting information in the FEIR was inadequate because it did not support further analysis, as CEQA requires, by failing to disclose the declining groundwater levels and aquifer depletion that the EIR defines as a significant impact. LW Op. Brf., pp. 12:20-14:12.

- The cumulative analysis was untimely because it was not provided in the *draft* EIR, as CEQA requires, and it was equivocal because the FEIR fails to explain the basis for its conclusion, which CEQA requires. Land Watch Opening Brief pp. 14:13-19:17.

Moving Parties argue only that there was no prejudice from the DEIR's non-disclosure of the CDT Subbasin or the FEIR's equivocation as to whether a portion of the Project is in the Pressure Subbasin, as if that were the substance of Petitioners' claims. MPA, p. 14:5-8. Absurd. The County's failure to provide an informationally adequate EIR was prejudicial because it precluded informed public participation and decision making for *all* of the reasons that Petitioners have identified. LW Op. Brf., pp. 3:13-18, 12:1-19, 14:1-12, 15:13-16:11, 16:25-17:3, 19:4-17.

Furthermore, Moving Parties fail to acknowledge that the determination whether the County prejudicially failed to provide an adequate EIR is not judicially reviewed with deference as a question of

substantial evidence. It is reviewable without deference because it is a question of law as to whether the County complied with CEQA's informational mandates. LW Op. Brf., pp. 19:18-20:12.

Because the Motion to Reopen is premised on the post-approval Franklin declaration, it has nothing to say about Petitioners' claims that the EIR was informationally inadequate. Post-EIR information cannot cure an inadequate EIR. *San Joaquin Raptor/Wildlife Rescue Ctr., supra,* 27 Cal.App.4th at 727; *Communities for a Better Env't v. City of Richmond* (2010) 184 Cal. App. 4th 70, 88; *Sierra Club v. Tahoe Regional Planning Agency* (2013) 916 F.Supp.2d 1098, 1139; *Santiago County Water District, supra,* 118 Cal.App.3d at 831. Franklin's post-approval declaration, which is Moving Parties' pretext for rearguing the case, could not possibly remedy the informationally inadequate EIR.

V. Case-law directly supports Petitioners' independent recirculation claim.

Petitioners demonstrate that the County abused its discretion by failing to recirculate the EIR. LW Op. Brf., pp. 20:13-22:27; LW Sup. Brf., pp. 23:13-32:5. Petitioners' recirculation claim is premised on some of the same facts as its claims that the EIR is informationally inadequate, particularly the failure to make timely disclosures of the environmental setting and the basis for cumulative analysis in the *draft* EIR. However, the recirculation claim is independent of Petitioners' other claims, and this Court need not reach the recirculation claim if it finds that the EIR is informationally inadequate. *Communities for a Better Environment, supra,* 184 Cal.App.4th at 101 (recirculation claim "moot" given holding that EIR failed to provide timely baseline information).

Moving Parties argue that substantial evidence supports the County's decision not to recirculate the EIR, because, they argue, none of changes in the environmental setting information, the scope of the cumulative analysis, or the basis of the cumulative analysis were "significant new information" under Guidelines, § 15088.5. However, as LandWatch has argued, a recirculation claim under Guidelines, § 15088.5(a)(4), where the draft EIR is so inadequate as to preclude a meaningful opportunity to comment, should be reviewed as a question of law, not merely as a question of substantial evidence. LW Op. Brf., p. 21:11-14, 28. Although *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.* ("*Laurel Hts. II*") (1993) 6 Cal.4th 1112 adverts to a substantial evidence standard of review for recirculation claims (*id*. at 1130), the recirculation challenges in that case did not implicate the fourth prong of Guidelines, § 15088.5: i.e., there was no claim that " the draft EIR was so fundamentally and

basically inadequate and conclusory in nature that meaningful public review and comment were precluded." Since *Laurel Heights II*, the courts have acknowledged that the failure to include relevant information is a failure to proceed as required by law and is not subject to the substantial evidence standard of review, although these holdings are not in recirculation cases.[4] *Sierra Club v. State Board of Forestry* (1994) 7 Cal.4th 1215, 1236; *Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1391-1392; *Vineyard, supra*, 40 Cal.4th at 435 (standard of review depends on "whether the claim is predominately one of improper procedure or a dispute over facts").

Even on a substantial evidence standard of review, the Court's inquiry in a claim under Guidelines, § 15088.4(a)(4) would be to determine if there is substantial evidence that the new *information* is "significant," not to determine if a previously undisclosed *impact* is significant.[5] Here, fundamental changes to the DEIR and new information regarding the environmental setting, the geographic scope of cumulative effects, and the mitigation for cumulative effects were clearly significant new information. On this record, the County cannot claim that the "information added to the EIR *merely clarifies or amplifies* or makes *insignificant* modifications *in an adequate EIR*." Guidelines, § 15088.5(b), emphasis added.

Regardless of the standard of review, this Court can be guided by CEQA case law. Here, the Court should order recirculation of the FEIR's revised hydrology section for the same reasons the Court ordered recirculation of an FEIR's revised hydrology section in *Spring Valley Lake Association v. City of Victorville* (2016) 248 Cal. App. 4th 91, 106, 108. *Spring Valley* required recirculation because:

- the FEIR presented a "globally amended" hydrology section (*id.* at 108),

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[4] *Laurel Heights II* limited its holding on the standard of review to the facts of that case. *Id.* at 1135 (substantial evidence standard applies "in this case"). The Court expressly acknowledged that the substantial evidence standard of review would not apply "if a procedural violation of CEQA is shown," but found that "this does not apply to the facts of the present case." *Id.* at 1133. In light of the limited scope of the *Laurel Heights II* holding and the lack of any reported decision expressly applying the substantial evidence standard to a claim under § 15088.5(a)(4), the reference to a substantial evidence standard of review in Guidelines, § 15088.5(e) is not dispositive. The Guidelines are to be give great weight only if they are not "clearly unauthorized or erroneous under the statute." *Friends of the College of San Mateo Gardens v. San Mateo County Community College District* (2016) 1 Cal.5th 937, 954.

[5] Otherwise a claim under § 15088.4(a)(4) would require the same showing as, and collapse into, a claim under § 15088.4(a)(1) (requiring recirculation for previously undisclosed significant impact).

- the FEIR relied on new technical reports (*id.* at 108),
- the FEIR failed to provide accurate redlining (*id*. at 108), and
- the FEIR relied on different mitigation (*id.* at 106, 108).

Here, as briefed, the FEIR globally amends the hydrology section, relies on a new technical report, fails to provide accurate redlining, and relies on new mitigation for cumulative impacts. LW Supp. Brf., pp. 25:9-26:16. *Spring Valley* holds that "[g]iven their breadth, complexity, and purpose, the revisions to the hydrology and water quality analysis deprived the public of a meaningful opportunity to comment on an ostensibly feasible way to mitigate a substantial adverse environmental effect." *Id.* at 108-109. Here, the DEIR does not even disclose the *need* for mitigation of cumulative impacts because it claims a water surplus in the interconnected subareas. AR843. Not until the FEIR did the County acknowledge that mitigation was needed for the Project's cumulative impacts to both the CDT Subbasin and the "basin as a whole" (AR384) and that this mitigation would be supplied by the SVWP. Recirculation is required because the public was denied the opportunity for comment and response on this "ostensibly feasible way to mitigate" the Project's cumulative impacts. *Spring Valley*, *supra*, 248 Cal. App. 4th at 108. *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1120 also holds that an EIR's failure to evaluate water supply mitigation requires recirculation.

Moving Parties ignore the substance of *Spring Valley's* directly parallel holding that the hydrology section required recirculation, citing instead its holding that *another* section in the FEIR did not require recirculation, because that section's revisions did not change the "nature of the potential impacts, their likelihood to occur, or the mitigation for them." *Id.* at 108. However, here there *were* in fact changes in the nature, the likelihood and the mitigation of the impact. The DEIR concludes that there *is no* cumulative impact to the El Toro Basin due to a surplus (AR842-843), but the FEIR concluded that there *is* a potential cumulative impact on the CDT Subbasin and the basin as a whole, and that mitigation is required in the form of the SVWP. AR384, 387.

Moving Parties efforts to distinguish *Save Our Peninsula Committee, supra*, 87 Cal.App.4th 99 is also unavailing. *Save Our Peninsula's* recirculation holding is not based *only* on the late-added mitigation measure (*id.* at 128-131) or the proposal to rely on riparian rights for water supply (*id.* at 131-134), although here the late-added mitigation of cumulative impacts via the SVWP is in fact directly

parallel. *Save Our Peninsula's* recirculation holding was also and independently premised on the directly parallel claim that the agency made significant changes to the environmental setting disclosures after the draft EIR, thus precluding "opportunity for comment and meaningful response" on the topic. *Id.* at 123. Here, the draft EIR does not disclose critical environmental setting information that the FEIR belatedly discloses: that the CDT Subbasin is in overdraft (AR36, 375); that the Project site does not "receive benefits of sustained groundwater levels" from prior reservoir operations (*compare* AR830 *to* AR 363); that groundwater pumping for the Project may contribute to cumulative impacts to the CDT Subbasin and "the basin as a whole (AR384);" and that the Project area is somehow isolated from the rest of the CDT Subbasin (AR385, 375-376).

Moving Parties argue without any citation to the record that the County responded to all of Petitioners' comments on the FEIR. MPA, p. 13:2-4. Not so. Even if information outside the EIR *could* remedy an inadequate EIR, and it cannot (LW Supp. Brf., pp. 30:18-31:26), the post-FEIR testimony and findings did not in fact respond to the disputed issues (LW Supp. Brf., pp. 28:15-30:18).

In sum, Petitioners have shown that recirculation is required. Furthermore, Moving Parties do not even cite Franklin's post-approval declaration in their discussion of recirculation, even though Franklin's declaration is Moving Parties' pretext for rearguing the case.

VI. Moving Parties' rehash of its previous substantial evidence arguments should be disregarded because it is not informed by the purported new evidence and has been addressed in prior briefing.

This Court need not reach Petitioners' claim that findings are not supported by substantial evidence if it holds that the EIR is informationally inadequate or that the County abused its discretion by failing to recirculate the EIR. However, Petitioners' briefing does establish the lack of substantial evidence in the record. LW Op. Brf, pp. 23:6-31:8; LW Reply, pp. 14:3-20:2; *see also* LW Supp. Brf., pp.28:1-30:17 (explaining why Real Parties' citations are to conclusions without factual support or do not address issues in dispute). Moving Parties do not rebut Petitioners' prior briefing. And, again, Moving Parties do not even cite the Franklin Declaration in their substantial evidence argument. Indeed, the Franklin Declaration cannot establish that there was substantial evidence *in the record*.

To summarize prior briefing relevant to the bullet points offered by Moving Parties:

- The analysis of the (unidentified) "expert environmental consultant who prepared the EIR" is not substantial evidence because the EIR fails to provide facts and analysis to support its conclusions. LW Op. Brf. pp:24:7-29:10; LW Reply, pp. 14:8-19:10.

- Hydrological *connection* to the Salinas Valley Groundwater Basin ("SVGB") does not imply *isolation* from the CDT Subbasin or that the SVWP will mitigate impacts. LW Reply, pp.16:1-19:10.

- There are no facts or analysis to demonstrate that the upgradient Project wells benefit from the SVWP, just conclusions without evidence. LW Op. Brf., pp. 25:19-29:10; LW Reply, pp. 17:6-19:10.

- Novo's comments about SVWP benefits are also conclusions without evidence. LW Supp. Brf., p. 29:12-14.

- Lawrence's determination of "neglible" effects was based on a superseded 2002 report claiming that the interconnected areas are in "surplus," not in recognition of the *undisclosed* problem of decades of falling groundwater levels and net deficits. LW Reply, p. 6:26-28.

- Staff reports that there is an adequate *supply* of water is not relevant to whether *using* that supply will cause impacts. LW Op. Brf., pp. 24:18-25:5; LW Supp. Brf, p. 29:24-25.

- Neither the SVWP Engineer's Report nor the ordinance establishing Zone 2C provide facts and analysis that the SVWP will mitigate declining groundwater levels or depletion of the upgradient CDT Subbasin. LW Supp. Brf., pp. 15:9-19:16.

- The Board's finding that the groundwater projects will decrease CDT Subbasin outflows is a conclusion without factual support or analysis related to the CDT Subbasin. LW Supp. Brf., pp. 28:17-28, 29:5-11.

An EIR must actually present "facts and analysis" to support its conclusions and inform the public. *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.* ("*Laurel Heights I*") (1988) 47 Cal.3d 376, 404; *Vineyard*, *supra*, 40 Cal.4th at 442. Agency staff's bare conclusions are insufficient. *Santiago County Water Dist*rict, *supra*, 118 Cal. App. 3d at 831. Failures to comply with CEQA's informational mandates preclude substantial evidence. *California Oak Foundation v. City of Santa Clarita* (2005) 133 Cal.App.4th 1219, 1226-1227, 1235-1242 (no substantial evidence due to non-disclosure of water supply information); *SCOPE*, *supra*, 106 Cal.App.4th at 720-724 (approval "not supported by substantial evidence" given inadequate analysis and comment response). And where an EIR contains unexplained discrepancies or conflicting information (e.g. surplus *and* overdraft, hydraulic

isolation *and* interconnection), there is no substantial evidence. *Vineyard*, *supra*, 40 Cal.4th at 439; *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 283-284.

For all of the foregoing reasons, Petitioners respectfully ask that this Court DENY the Motion to Reopen the Case and issue a writ of mandate setting aside the EIR and Project approvals.

Dated: June 22, 2018

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PROOF OF SERVICE

I hereby declare that I am employed in the City San Francisco, County of San Francisco, California. I am over the age of eighteen years and not a party to this action. My business address is 555 Sutter Street, Suite 405, San Francisco, CA 94102. I am familiar with this firm's practice for the collection and processing of mail sent via U.S. Mail, which provides that mail be deposited with the U.S. Postal Service on the same day in the ordinary court of business. On June 22, 2018, I served the attached **PETITIONERS' OPPOSITION TO MOTION TO REOPEN THE CASE** in this action via the U.S. Mail by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid addressed to:

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for collection and deposit with the U.S. mail on this date according to ordinary business practices. I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed at San Mateo, California on June 22, 2018.

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John Farrow