

1 Mark R. Wolfe, CSB No. 176753
2 John H. Farrow, CSB No. 209221
3 M. R. WOLFE & ASSOCIATES, P.C.
4 555 Sutter Street, Suite 405
5 San Francisco, CA 94102
6 Telephone: (415) 369-9400
7 Fax: (415) 369-9405
8 jfarrow@mrwolfeassociates.com

9 Attorneys for Petitioner LandWatch Monterey County

10 THE SUPERIOR COURT OF CALIFORNIA
11 COUNTY OF MONTEREY
12 MONTEREY COURTHOUSE

13 MEYER COMMUNITY GROUP;

14 Petitioner,

15 vs.

16 COUNTY OF MONTEREY; MONTEREY
17 COUNTY BOARD OF SUPERVISORS,

18 Respondents,

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

21 Real Parties in Interest

22 AND RELATED CONSOLIDATED
23 ACTION.
24

Case No.: M131913

(Consolidated with Case No. M131893)

**OPENING BRIEF BY LANDWATCH
MONTEREY COUNTY**

Hon. Thomas W. Wills
Dept. 14

Action Filed: May 4, 2015
Trial Date: April 3, 2017

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afy	acre-feet per year
AR	Administrative Record
DEIR	Draft Environmental Impact Report
EIR	Environmental Impact Report
FEIR	Final Environmental Impact Report
LOS	Level of Service
LW RJN	LandWatch’s Request for Judicial Notice
MCWRA	Monterey County Water Resources Agency
MTP	Metropolitan Transportation Plan
RDEIR	Revised Draft Environmental Impact Report
RDIF	Regional Development Impact Fee
RTP	Regional Transportation Plan
SAR	Supplemental Administrative Record
SR68	State Route 68
SVWP	Salinas Valley Water Project
TAMC	Transportation Agency of Monterey County

1 **INTRODUCTION**

2 The Harper Canyon project (“Project”) is a large lot 17-unit subdivision on 344 acres off
3 State Route 68. The Project is rural sprawl that will further damage an overdrafted groundwater
4 basin and further congest State Route 68. While the County may decide to permit these impacts,
5 CEQA mandates that it do so in an accountable, public process with adequate disclosure. The
6 EIR does not honor this mandate.

7 First, the Project will draw another 12.75 acre-feet per year (“afy”) from the overdrafted
8 Corral de Tierra Subbasin, where overpumping has caused groundwater levels to decline at an
9 increasing rate since the 1960s. Despite this, the DEIR claims a water surplus and finds impacts
10 less than significant. After public objections, the FEIR admits the overdraft, but not that this
11 entails declining groundwater levels and a depleting aquifer, which the EIR defines as significant
12 impacts. Instead, the FEIR continues to find cumulative impacts less than significant based on
13 the claim that there is still, somehow, a water surplus and the new claim that the Salinas Valley
14 Water Project will mitigate cumulative impacts. In public hearings, the applicant later argued
15 that cumulative impacts could be ignored because the Project demand is relatively small.
16 Because the County failed to recirculate these flawed new claims for public comment and
17 response, LandWatch’s objections were never addressed in a final EIR. The County violated
18 CEQA because 1) it presented baseline description and cumulative analysis untimely; 2) baseline
19 information claiming a surplus and an overdraft is contradictory and does not support analysis; 3)
20 the cumulative analysis fails to reach required conclusions and is based on the legally flawed
21 “ratio” theory; 4) the County failed to recirculate a DEIR despite significant new information;
22 and 5) there is no substantial evidence to find cumulative impacts less than significant.

23 Second, the EIR concludes that significant traffic impacts will be mitigated based on the
24 Project’s payment of development impact fees. CEQA permits payment of fees as mitigation
25 only if there is evidence that needed traffic improvement projects are committed and funded.
26 Here, all available evidence shows that the needed projects are neither committed nor funded.
27 The EIR itself admits that needed projects are not feasible because there is no funding. And even
28 though the Project is inconsistent with General Plan policies that bar development without traffic

1 capacity, the County failed to make required findings on the matter.

2 **PROCEDURAL HISTORY**

3 The Project was approved April 7, 2015. Administrative Record, p. 51 (“AR 51”).
4 CEQA review included a 2003 Initial Study, a 2008 draft EIR (“DEIR”), a 2009 recirculated
5 draft EIR for traffic only (“RDEIR”), and a 2013 revised final EIR (“FEIR”). AR 4-5, 412.
6 Relevant facts are set out in the beginning of the argument sections below.

7 **STANDARD OF REVIEW**

8 In deciding whether to grant judgement and issue a peremptory writ, the Court shall
9 decide whether the County committed any prejudicial abuse of discretion. Abuse of discretion is
10 established if the County failed to proceed as required by law, if any of its decisions are not
11 supported by findings, or if its findings are not supported by substantial evidence. Code of Civ.
12 Proc. § 1094.5(b); Public Resources Code (“P.R.C.”), § 21168.

13 The standard of review is determined by the nature of the alleged violations: when the
14 claimed violation is of procedural error, including the adequacy of the EIR, review is under the
15 non-deferential independent judgment standard, while only a claim of unsupported factual
16 determination is reviewed under the more deferential substantial evidence standard. *Vineyard*
17 *Area Citizens for Responsible Growth v. City of Rancho Cordova* (“*Vineyard*”) (2007) 40 Cal.4th
18 412, 435. *Vineyard*’s set-aside of an EIR’s insufficient water supply analysis for failure to
19 proceed as required by law, without deference to the lead agency, provides the rubric that applies
20 to all topics of EIR adequacy.

21 LandWatch anticipates that the Court will be asked to apply the deferential substantial
22 evidence standard to questions of EIR adequacy and process. That would be error. The question
23 of EIR adequacy logically differs from factual findings. CEQA’s statutory and regulatory
24 authorities and implementing case law provide a detailed road map to assess EIR adequacy as a
25 matter of law. Deferring to the agency as to whether it has adequately complied with CEQA’s
26 EIR requirements is illogical because statutory compliance is subject to de novo judicial review.

27 A legally adequate EIR must provide the information required to support informed
28 decision making and public participation:

1 The EIR is the heart of CEQA and the integrity of the process is dependent on the
2 adequacy of the EIR. The ultimate decision of whether to approve a project, be that
3 decision right or wrong, is a nullity if based upon an EIR that does not provide the
4 decisionmakers, and the public, with the information about the project that is required by
5 CEQA. The error is prejudicial if the failure to include relevant information precludes
6 informed decisionmaking and informed public participation, thereby thwarting the
7 statutory goals of the EIR process.

8 *Save our Peninsula Committee v. Monterey County Board of Supervisors* (“*Save Our*
9 *Peninsula*”) (2001) 87 Cal.App.4th 99, 117-118, citations and internal quotations omitted. Thus,
10 claims that an EIR lacks required information and analysis are reviewed non-deferentially
11 because they are claims that the agency failed to proceed as required by CEQA. *Bakersfield*
12 *Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1207-1208;
13 *Madera Oversight Coalition v. County of Madera* (2011) 199 Cal.App.4th 48, 102, overruled on
14 other grounds in *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority*
15 (2013) 57 Cal.4th 439. Such informational failures are presumptively prejudicial if they frustrate
16 the purpose of public comments or preclude meaningful assessment of potentially significant
17 impacts. *Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1236; *see also Association*
18 *of Irrigated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1391-1392.
19 LandWatch demonstrates prejudicial non-compliance with CEQA’s informational requirements
20 regarding water supply baseline information and cumulative analysis in section I.B below.

21 In addition, LandWatch separately demonstrates failure to support findings regarding the
22 significance and mitigation of water and traffic impacts with substantial evidence in sections I.D
23 and III below. LandWatch demonstrates both a failure to proceed as required by CEQA and a
24 lack of substantial evidence to support findings in sections I.C and II below.

25 **ARGUMENT**

26 **I. The County abused its discretion under CEQA in analysis of water supply impacts.**

27 **A. Facts regarding water supply issues.**

28 Groundwater overdraft in El Toro Planning Area: The Project wells are in the San
Bernancio Gulch subarea of what the DEIR identifies as the El Toro Groundwater Basin (AR
826-827, 1197) and the FEIR identifies as the Corral de Tierra (“CDT”) Subbasin of the Salinas

1 Valley Groundwater Basin (“SVGB”) (AR 129, 358, 360). The wells are located just outside of
2 the B-8 zoning overlay that bars subdivision due to a lack of groundwater. AR 362-364.

3 A 2007 report by Geosyntec was commissioned to update Monterey County Water
4 Resources Agency (“MCWRA”) data for the El Toro Planning Area, which includes the Project
5 wells, and to evaluate changes to the B-8 zoning overlay. AR 20072, 132. Geosyntec evaluated
6 well hydrographs showing actual groundwater levels from 1963 to 2007 (AR 20095-20096,
7 20113-20115) and calculated a water balance taking into account pumping, recharge via
8 precipitation, and flows to adjacent basins (AR 20151-20157). Geosyntec concludes that the
9 “the primary aquifer system in the El Toro Planning Area is in overdraft” and “the rate of
10 groundwater pumping . . . exceeds the rate of groundwater replenishment.” AR 20163, 20062.
11 Groundwater level declines averaged 0.6 ft./yr since the 1960s, worsening to 1.8 ft/yr since 1999.
12 *Id.*, AR 20113-20115, 20131-20132. The aquifer is being depleted by 500 to 1,000 af annually.
13 AR 20156. Overdraft, declining groundwater levels, and depletion are correlated with pumping
14 for new development. AR 20156, 20103-20105, 20158, 20161-20162. Although Geosyntec
15 concludes that pumping could be sustained for decades in those “areas with large saturated
16 thickness . . . because of the large volume of groundwater in storage,” this would result in “long
17 term declines in groundwater” and “mining of groundwater” in storage. AR 20062, 20163. The
18 continuing overdraft will “lower[] the water table below the screened intervals of existing wells
19 completed in shallower portions of the aquifer system, which has already occurred in portions of
20 the Corral de Tierra.” AR 20062. That is, wells have failed and will fail. “In addition, with
21 continued overdraft conditions, groundwater production potential would likely decrease
22 relatively quickly in hydrogeologically contiguous areas of less saturated thickness.” AR 20163.
23 That is, wells in less favored positions will produce less water.

24 Groundwater overdraft and seawater intrusion in SVGB: The CDT Subbasin is
25 hydrologically connected to the SVGB. AR 363, 19395. Groundwater flows from the CDT to
26 the SVGB (*id.*), because CDT groundwater levels are 250 to 350 feet higher than levels in the
27 adjacent 180/400 Foot Subbasin of the SVGB. AR 13147, *citing* AR 19394-19396; *see also* AR
28 20125, 1454. Overdraft in the 180/400-Foot Subbasin has averaged about 2,000 afy from 1944

1 to 2014, and the SVGB as a whole is “currently out of hydrologic balance by approximately
2 17,000 to 24,000 afy.” AR 6057-6058. This overdraft condition lowers groundwater elevations,
3 which in turn causes seawater intrusion. AR 22539-22540, 6048, 6054, 8784-8786.

4 Efforts to control seawater intrusion: The Monterey County Water Resources Agency
5 (“MCWRA”) and predecessor agencies have implemented several projects to address seawater
6 intrusion by storing surface water, increasing recharge, and reducing coastal pumping. AR
7 13189-13205, 13249-13254, 367-368. These include the Nacimiento and San Antonio
8 Reservoirs, water recycling to support the Castroville Seawater Intrusion Project, and the 2010
9 Salinas Valley Water Project (“SVWP”). The SVWP was expected to halt seawater intrusion
10 based on the amount and location of 1995 demand (AR 8836), but not to do so through 2030.
11 *Id.*, AR 7849, 13126-13127, 13228. The SVWP EIR projected substantial post-1995 declines in
12 demand (AR 8789), and cautioned that “any additional water needs within an intruded
13 groundwater basin would exacerbate seawater intrusion” (AR 9274). However, post-1995
14 demand increased substantially (AR13126-13131), and MCWRA now agrees that “the amount of
15 pumping that was assumed in those [SVWP] models was, actually, much lower than the amount
16 of pumping that’s being reported.” AR 13227. MCWRA now claims only that groundwater
17 management projects have “slowed seawater intrusion” (AR 13204, emphasis added; *see* SAR
18 22539) and that new projects supplying an additional 48,000 afy of groundwater recharge, over
19 and above that supplied by the SVWP, would be required in order to maintain protective
20 groundwater elevations sufficient to control seawater intrusion. Supplemental Administrative
21 Record (“SAR”) 22546; *see* AR 13204-13205, 13218-13219, 13223-13230.

22 DEIR finds impacts less than significant based on claimed water surplus: Based on the
23 “Project Specific Hydrogeology Report” (Todd 2003, AR 1459-1461), the DEIR states that there
24 would be a surplus of recharge over pumping demand of 29.9 afy in the San Bernancio Gulch
25 subarea and, thus, the project-specific impact would be less than significant. AR 836-837. The
26 DEIR projects a 320.7 afy surplus in the four hydrologically interconnected subareas that include
27 the San Bernancio Gulch subarea (AR 837-838) and, thus, concludes Project demand “would be
28 considered a less than significant cumulative impact.” AR 842-843.

1 The DEIR claims that the Project site receives “benefits of sustained groundwater levels
2 attributed to the operation of both the Nacimiento and San Antonio Reservoirs and will receive
3 benefits of the Salinas Valley Water Project upon completion.” AR 830. The DEIR cites the
4 SVWP and payment of Zone 2C assessments in its project-specific discussion (AR 836), but not
5 in its cumulative discussion, which relies only on the purported surplus. AR 842-843.

6 DEIR comments object that the DEIR fails to disclose that that the area is now in
7 overdraft, not surplus: Comments from the Monterey Peninsula Water Management District and
8 the public objected that the DEIR fails to reflect the Geosyntec analysis and that Geosyntec’s
9 overdraft finding is inconsistent with the DEIR’s surplus claims. AR 156, 161-162, 185, 226,
10 234, 246. Comments identified well failures (AR 193-194, 234) and objected that the DEIR
11 provides no evidence that the SVWP would mitigate Project impacts. AR 161-162, 246.

12 FEIR rewrites water supply analysis: The FEIR responds with a complete rewrite of its
13 water analysis (*see* AR 350-388) “to clarify the relationship of the Geosyntec study with the
14 proposed project.” AR 129. The FEIR makes the following changes:

- 15 • It admits “an overdraft condition within the Geosyntec Study Area,” from which the
16 Project wells would draw water. AR 363; *see also* AR 375, 385.
- 17 • It deletes the tables purporting to demonstrate a surplus (AR 375, 386), but, despite the
18 acknowledged overdraft conditions, it still cites the purported surplus. AR 372, 374, 385.
- 19 • It locates the Project wells in the Corral de Tierra Subbasin of the SVGB instead of the El
20 Toro Groundwater Basin and expands the scope of cumulative analysis to include the
entire SVGB. AR 352-353, 358, 362, 384, 129.
- 21 • It deletes the claim that groundwater levels have been sustained by operation of the
22 Nacimiento and San Antonio Reservoirs and claims only that the site will “indirectly
23 receive benefits of sustained groundwater levels within the Basin attributed to the
Salinas Valley Water Project.” AR 363.
- 24 • It states that the SVWP began operating in 2009-2010, that monitoring data for 2009-
25 2011 show an increase in groundwater levels, that it is “too soon to draw hard
26 conclusions” about the SVWP efficacy, and that the County “could take” unspecified
27 “additional measures” based on a future study. AR 368.
- 28

1 The revision determines that the project-specific and cumulative impact to groundwater
2 resources are less than significant because of the purported surplus and the fact that the wells are
3 within the SVWP assessment Zone 2C. AR372-373, 384-387.

4 Planning Commission denies Project for inadequate water supply, but the applicant
5 appeals: After hearing public objections to the FEIR’s reliance on “surplus” water despite the
6 overdraft (AR 5403-5405) and to its belated and unsupportable reliance on the SVWP to mitigate
7 impacts (AR 5393-5395, 5413, 5416-5417), the Planning Commission denied the Project. AR
8 5303-5312, 4343-4344. The applicant appealed. AR3776-3779.

9 Board of Supervisors votes to deny the Project based on inadequate water supply, but
10 invites applicant to conduct new well test: LandWatch urged the Board to recirculate the water
11 supply analysis, objecting that the FEIR directly contradicts the DEIR’s “surplus” claim and
12 relies on a new, more expansive, and unsupported cumulative analysis untested by comment and
13 response. AR 14147-14153, 5181-5183, 13329-13331. The applicant offered a new basis to find
14 the Project pumping less than significant, the argument that it is a relatively small fraction of
15 total SVGB pumping. AR 5163. The Board directed staff to prepare findings to deny the Project
16 based on known water problems and impairment of a lower income area’s water supplies. AR
17 5199-5201, 5206-5215. The motion permitted the applicant to submit new well tests but without
18 explaining how tests would bear on the decision to deny the Project. AR 5197-5198, 5209-5214.

19 The Board reverses itself: The new tests conclude the wells have sufficient capacity to
20 serve the development and that there is no short-term draw-down on wells within 1,000 feet. AR
21 3550, 3552, 3520-3523. LandWatch submitted comments, including technical memoranda by
22 hydrogeologist Timothy Parker, PG, CEG, CHG, objecting that the FEIR’s water supply analysis
23 is fundamentally new, that there is no evidence of benefit to the CDT Subbasin from the SVWP
24 and substantial evidence to the contrary, and that the short-term well capacity tests are irrelevant
25 to long-term regional impacts. AR 13141-13154, 13124-13133, 6792-6799, 6785-6791, 5824-
26 5830. Nonetheless, the Board reversed itself to approve the Project. AR 4994-5007, 4937. Its
27 findings state that the FEIR did not contain significant new information but merely clarified and
28 amplified the analysis in the DEIR and, thus, recirculation was not required. AR 35-36.

1 **B. The County prejudicially failed to proceed as required by CEQA because**
2 **baseline information was untimely, misleading, and inadequate to support**
3 **analysis and because the cumulative analysis was untimely and inadequate.**

4 **1. CEQA requires adequate, timely baseline and cumulative analysis in the draft EIR.**

5 a. CEQA requires timely disclosure of baseline conditions adequate to support analysis.

6 An EIR must describe the existing environmental setting (“baseline”) so that it considers
7 impacts “in the full environmental context.” Guidelines, § 15125(a), (c). An accurate baseline is
8 critical because impact assessment must be based on “changes in the existing physical conditions
9 in the affected area.” Guidelines, § 15126.2(a); *see Neighbors For Smart Rail, supra*, 57 Cal.4th
10 at 447; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 952.
11 Baseline information must be presented in the draft EIR, not later in the EIR process.

12 Guidelines, § 15120(c) (draft EIR must contain information required by Guidelines, § 15125);
13 *Save Our Peninsula, supra*, 87 Cal.App.4th at 120-124, 128; *Communities for a Better Env't v.*
14 *City of Richmond* (“*CBE v. Richmond*”) (2010) 184 Cal. App. 4th 70, 89.

15 b. CEQA requires timely cumulative analysis that determines first whether there is a
16 significant cumulative impact and second whether the project makes a considerable
17 contribution to that impact.

18 Cumulative impact analysis requires an agency to make two determinations: (1) whether
19 the impacts of the project in combination with those from other past, present, and future projects
20 are cumulatively significant, and (2) if so, whether the project’s own effect is a considerable
21 contribution. Guidelines, § 15130(a); *see Kostka and Zischke, Practice Under the California*
22 *Environmental Quality Act* (2nd Ed., 2014 Update), § 13.39. In step one, the agency must
23 determine whether the combined effect of the project and other projects is significant, because
24 those impacts may be “individually minor but collectively significant.” *Communities for a*
25 *Better Environment v. California Resources Agency* (“*CBE v. CRA*”) (2002) 103 Cal.App.4th 98,
26 119-120. The agency must “define the scope of the area affected by the cumulative effect,”
27 explain “the geographic limitation used,” and provide a “summary of the expected
28 environmental effects to be produced by those projects.” Guidelines, § 15130(b)(3), (4). In step

1 two, if there is a significant cumulative effect, the agency must consider whether the project’s
2 contribution is “considerable,” i.e., “whether ‘any additional amount’ of effect should be
3 considered significant in the context of the existing cumulative effect.” *CBE v. CRA, supra*, 103
4 Cal.App.4th at 119. If so, required mitigation may be provided through impact fees (Guidelines,
5 § 15130(a)(3)); but “payment of fees must be tied to a functioning mitigation program.”
6 *California Native Plant Society v. County of Eldorado* (2009) 170 Cal.App.4th 1026, 1055.

7 Like the description of baseline conditions, an adequate cumulative analysis must appear
8 in the draft EIR. Guidelines, §§ 15120(c)(“Draft EIRs shall contain the information required by
9 Sections 15122 through 15131”), 15130 (cumulative analysis requirements).

10 **2. Informational failures, including tardy baseline and analysis, are prejudicial if they**
11 **preclude informed public participation and decision making.**

12 Failure to include required information in an EIR is error, and “[t]he error is prejudicial if
13 the failure to include relevant information precludes informed decisionmaking and informed
14 public participation, thereby thwarting the statutory goals of the EIR process.” *Save Our*
15 *Peninsula Committee, supra*, 87 Cal.App.4th at 117-118. Provision of untimely baseline
16 information and impact analysis is prejudicial because it frustrates CEQA’s provisions for public
17 participation through comment and response. *Id.* at 123. Provision of tardy baseline information
18 improperly avoids “public scrutiny and preclud[es] the meaningful comparison of preproject and
19 postproject conditions required by CEQA.” *Id.* at 124. Changing the baseline “at the end of the
20 environmental review process without benefit of analysis or public participation does not fulfill”
21 an EIR’s “central function,” which is “to inform decision makers about the impacts of the
22 proposed project on the existing environment.” *Id.* at 127-128; *see also CBE v. Richmond, supra*,
23 184 Cal. App. 4th at 85-88 (CEQA requires identification of the baseline “at the beginning of the
24 CEQA process”); *Galante Vineyards v. Monterey Peninsula Water Mgmt. Dist.* (1997) 60 Cal.
25 App. 4th 1109, 1122-1123 (belated baseline disclosure not cured by belated analysis). CEQA
26 requires baseline information and impact analysis be in the DEIR so that the public can
27 comment, the FEIR can respond, and the agency may have the benefit of that interchange. *San*
28 *Joaquin Raptor/Wildlife Rescue Ctr. v. Cty. of Stanislaus* (1994) 27 Cal. App. 4th 713, 727.

1 **3. The County prejudicially failed to proceed as required by CEQA because critical**
2 **baseline information was not presented until the FEIR.**

3 Description of baseline conditions and the analysis of cumulative impacts were untimely
4 because they were fundamentally changed in the final EIR, precluding an opportunity for public
5 comment and response, prejudicially violating CEQA.

6 a. Baseline information was untimely because the FEIR changes the geographic scope of
7 the Project’s groundwater basin and belatedly acknowledges overdraft conditions, which
8 constitute a significant cumulative impact based on the adopted thresholds of
9 significance.

10 i. *Baseline information was untimely because the DEIR locates the Project in the El*
11 *Toro Groundwater Basin but the FEIR locates it in the Corral de Tierra Subbasin*
12 *of the Salinas Valley Groundwater Basin.*

13 The DEIR locates the Project wells in the El Toro Groundwater Basin. AR 825-829,
14 1197. Although it explains that the El Toro Groundwater Basin is adjacent to the SVGB and that
15 there are no barriers to groundwater flows, it does not identify the El Toro Groundwater Basin as
16 part of the SVGB. AR 825-826, 830. By contrast, the FEIR’s revised Section 3.6 locates the
17 Project wells in the Corral de Tierra Subbasin, which it identifies as a subbasin of the SVGB.
18 AR 352-353, 358, 362. The new baseline description changes the geographic scope of the
19 cumulative impact analysis. In the DEIR that scope is limited to the El Toro Groundwater Basin.
20 AR 842-843. However, the scope of cumulative analysis in the FEIR includes the CDT
21 Subbasin of the SVGB, “the adjacent subbasins and the basin as a whole.” AR 384-387.

22 ii. *Baseline information was untimely because the DEIR fails to disclose what the*
23 *FEIR belatedly discloses: the Project’s groundwater basin is in overdraft.*

24 The DEIR repeatedly references a groundwater “surplus” in the Project area but never
25 discloses that the Project area is in overdraft.¹ In particular, the DEIR states that the four
26 interconnected subareas of the El Toro Groundwater Basin have a water “surplus” of 320.7 afy
27 because the predicted water demand for these subareas is less than the rainfall recharge rate. AR

28 _____
¹ The DEIR discloses only that the adjacent SVGB is in overdraft. AR 830.

1 837-838 (Table 3.6-2, citing Todd 2003, Fugro 1996, Feeney 2000); *see also* AR 842-843. The
2 basis for the DEIR’s conclusion that cumulative impacts are less than significant is the existence
3 of this purported water balance surplus. AR 842-843.

4 In response to numerous comments objecting that the DEIR ignores the substantive
5 finding of the 2007 Geosyntec report (AR 156, 161-162, 185, 226, 234, 246), the FEIR rewrites
6 DEIR Section 3.6, Groundwater Resources and Hydrogeology. The new Section 3.6
7 acknowledges that Geosyntec identifies an overdraft in the area from which the Project wells
8 would procure water.² AR 363, *see also* AR 375, 385. In fact, Geosyntec states “the rate of
9 groundwater pumping in the El Toro Primary Aquifer System exceeds the rate of groundwater
10 replenishment.” AR 20062. Geosyntec documents (1) a net annual deficit in aquifer volume of
11 500 af since the 1960’s, increasing to 1,000 afy since 1999, and (2) an average groundwater level
12 decline of 0.6 ft/yr since the 1960’s, increasing to 1.8 ft./yr since 1999. AR 20061-20062,
13 20068, 20156. The EIR criteria for significant impacts include “a net deficit in aquifer volume
14 or a lowering of the groundwater table.” AR 833, 371. Thus, Geosyntec contradicts the
15 DEIR’s claim that cumulative impacts are less than significant due to a water “surplus.”

16 *iii. Baseline information was untimely because the FEIR abandons the claim that*
17 *prior groundwater management efforts have sustained groundwater levels.*

18 The DEIR claims that groundwater levels in the Project area have all along been
19 sustained by previous groundwater management projects:

20 According to MCWRA, this portion of the El Toro Planning area, including the project
21 site, receive benefits of sustained groundwater levels attributed to the operation of both
22 the Nacimeiento and San Antonio Reservoirs and will receive benefits of the Salinas
23 Valley Water Project upon completion.

24 AR 830. The FEIR retracts this claim and argues only that the Project area will “indirectly
25 receive benefits of sustained groundwater levels within the Basin attributed to the Salinas Valley
26 Water Project.” AR 363.

27
28 ² The four interconnected subareas from which Project wells would draw water are the
major portion of the “El Toro Primary Aquifer System” referenced by Geosyntec and of the
“Geosyntec Study Area” referenced in the FEIR. AR 20064-20067, 354, 356, 360.

1 b. Untimely provision of baseline information was prejudicial because it precluded
2 meaningful comments and response on the adequacy of the water supply analysis.

3 Where the issue is the impact to an aquifer that may be in overdraft, determination of pre-
4 project baseline groundwater conditions is critical. *County of Inyo v. City of Los Angeles* (1981)
5 124 Cal.App.3d 1, 9 (water “project must be compared with its pre-project conditions in order,
6 inter alia, to provide a uniform baseline for the measurement of its impact and to ‘assess the
7 advantage of terminating the proposal’”); see Remy et al, Guide to California Environmental
8 Quality Act (2007 11th ed.) p. 785. Baseline information is also critical to evaluation of
9 cumulative impacts because that analysis must consider the effects of past and present projects,
10 not just future projects. Guidelines, §§ 15355(b), 15065(a)(3), 15130(b)(1)(A); see *Friends of*
11 *the Eel River v. Sonoma Cty. Water Agency* (2003)108 Cal. App. 4th 859, 874-75 (incomplete
12 setting description “fails to set the stage for a discussion of the cumulative impact”).

13 The DEIR’s failure to disclose the overdraft condition of the CDT Subbasin is prejudicial
14 because it fails to disclose that there is already a significant cumulative impact. The DEIR bases
15 its impact analyses on the purported surplus in the San Bernancio Gulch subarea and the four
16 interconnected subareas. AR 836, 842. The DEIR does not even get to step two of the
17 cumulative analysis – determining whether the Project makes a considerable contribution –
18 because it concludes in step one that there is no significant cumulative impact due to the
19 purported “surplus.” These failures foreclosed meaningful comments and response.

20 **4. The County prejudicially failed to proceed as required by CEQA because baseline**
21 **information in the EIR is inadequate to support the cumulative analysis: it**
22 **misleadingly claims a “surplus” in the Project’s Subbasin without revealing the**
23 **declining groundwater levels and aquifer depletion that constitute a significant**
24 **cumulative impact.**

25 Even if CDT Subbasin overdraft condition had been disclosed timely, the County failed
26 to proceed as required by CEQA because the baseline information in the FEIR was contradictory
27 and does not support impact analysis. Despite the FEIR’s acknowledgement of the overdraft
28 condition, the FEIR still cites the Todd 2003 report to claim a 29.9 afy surplus in the San

1 Bernancio Gulch subarea (AR 372) and a 314.82 afy surplus in the interconnected subareas (AR
2 374), and still cites these surpluses in support of its significance conclusions.³ AR 372, 385.

3 As hydrologist Tim Parker explains, the FEIR’s continued claim of a water surplus
4 simply cannot be reconciled with the data and conclusions in Geosyntec, which explains that
5 pumping exceeds replenishment. AR 13148, 20062. The DEIR misleadingly treats the Project’s
6 aquifer as a closed box by reporting only the relation of rainfall recharge to pumping, ignoring
7 groundwater flows to adjacent aquifers. AR 13148. Although Geosyntec acknowledges and
8 incorporates the same recharge and pumping data cited by the DEIR and Todd 2003, Geosyntec
9 also identifies the other factor causing aquifer depletion and falling groundwater levels:
10 outflows from the aquifer. AR 20151-20156, *see also* AR 20157 (water budget components).
11 There are substantial outflows to the northwest to the Laguna Seca area and northeast to the
12 SVGB, with no offsetting groundwater inflow. AR 20154, 20125, 19395. Thus, although
13 Geosyntec reports that rainfall recharge may roughly equal pumping (AR 20154-20156),
14 Geosyntec demonstrates that groundwater levels are declining and the aquifer depleting based on
15 actual well monitoring, due to pumping and outflows to adjacent aquifers. AR 20156-20159,
16 20115, 20131, 20132. The EIR’s surplus claim is misleading and incomplete given empirical
17 data showing worsening annual groundwater level declines and aquifer depletion. AR 20156.

18 The misleading and incomplete baseline information violates CEQA because it is
19 inadequate to support further analysis. *County of Amador, supra*, 76 Cal.App.4th at 954
20 (baseline information insufficient if it does not “make further analysis possible”). Where an EIR
21 fails to provide a complete description of the environmental setting with regard to water supply,
22 it “fails to set the stage for a discussion of the cumulative impact” and it is “an inadequate
23 informational document.” *Friends of the Eel River, supra*, 108 Cal. App. 4th at 874-75, 881-882.
24 “[C]onflicting signals to decisionmakers and the public” render the EIR “fundamentally
25 inadequate and misleading,” that is, inadequate as an informational document. *San Joaquin*
26 *Raptor Rescue Ctr. v. Cty. of Merced* (2007) 149 Cal. App. 4th 645, 655-656.

27 _____
28 ³ The FEIR’s claim of a 314.82 afy surplus represents a purported 320.7 afy surplus (AR
838) less the Project’s 5.88 afy reduction in return flows. AR 374, 385; *see* AR 842-843.

1 Here the baseline information fails to support further analysis because the surplus and
2 overdraft claims are facially inconsistent and because nowhere does the EIR explain that the
3 overdraft causes a “net deficit in aquifer volume” and “a lowering of the local groundwater table
4 level” in the CDT Subbasin, which are the EIR’s criteria for a significant impact. AR 371. The
5 EIR’s surplus claim is particularly misleading because the FEIR cites it in its discussions that
6 conclude that impacts are less than significant, implying that the significance criteria are not met.
7 AR 372, 385. The failure to acknowledge that the overdraft condition is an existing significant
8 cumulative impact and the misleading claim of a surplus could only tend to misinform the public
9 and decision makers. Although hydrologist Parker and LandWatch objected to the FEIR’s
10 misleading claim (AR 13143-13144, 13125), the County did not revise the FEIR to respond to
11 these comments, thereby denying both the public and decision makers of the benefit of a
12 systematic discussion of these issues. This too was prejudicial.

13 **5. The County prejudicially failed to proceed as required by CEQA because**
14 **cumulative impact analysis was untimely and equivocal: after the DEIR, the County**
15 **offered new explanations as to whether there is a significant cumulative impact and,**
16 **if so, why the Project would not make a considerable contribution to it.**

- 17 a. Cumulative impact analysis was prejudicially untimely because the FEIR provides a
18 fundamentally different analysis than the DEIR.

19 The FEIR fundamentally revises the cumulative analysis. *See generally* AR 14147-
20 14153, 13124-13132, 13142-13149. This violates CEQA because cumulative analysis must be
21 in the draft EIR. Guidelines, §§ 15120(c), 15130.

22 The geographic scope of the DEIR’s cumulative analysis, the disclosure and justification
23 of which is mandated by Guidelines § 15130(b)(3), includes only the El Toro Groundwater
24 Basin. AR 842. By contrast, the FEIR’s scope includes the CDT Subbasin of the SVGB as well
25 as “adjacent subbasins and the basin as a whole.” AR 384, *see* AR 387.

26 The DEIR bases its cumulative significance conclusion only on the “net surplus of 314.82
27 AFY” in the four interconnected subareas of the El Toro Groundwater Basin and the “negligible
28 effects on the aquifers in this region” in light of this purported surplus. AR 842-843. Because
the DEIR concludes in the first step of its cumulative analysis that there is no significant

1 cumulative impact it does not proceed to the second step determination as to whether the Project
2 would make a considerable contribution. However, the FEIR's analysis cites different reasons:

- 3 • SVWP MITIGATION: The FEIR claims that the SVWP "provides a regional mitigation
4 strategy" for the SVGB and its subbasins. AR 387.
- 5 • MINING: the FEIR claims that groundwater pumping at the Project site can be sustained
6 for decades because the saturated aquifer happens to be thick at the Project site. AR 385
- 7 • SURPLUS: The FEIR admits that there is an overdraft but still claims that there is "an
8 overall water surplus where recharge exceeds extraction." AR 385.

9 The FEIR concludes that "for all of these reasons, the cumulative effect of the project on water
10 demand is considered less than significant." AR 387, emphasis added.

11 Thus, regardless of its justification of the geographic scope of analysis and the merits of
12 its claims regarding significance, the FEIR presents a fundamentally different cumulative
13 analysis. The untimely new analysis was prejudicial because it denied the public the opportunity
14 for comment and response and resulted in a failure of the EIR to address the evidence offered by
15 the public that the new analysis is inadequate. This evidence includes public comments which
16 demonstrate the following inadequacies:

- 17 • GEOGRAPHIC SCOPE: The EIR fails to provide sustained yield or baseline and
18 cumulative demand data for the SVGB, or any actual data regarding the groundwater
19 flows between the CDT Subbasin and the SVGB, which data are critical to claims of the
20 sufficiency of groundwater management projects to remedy CDT Subbasin overdraft
21 conditions. AR 13329-13331, 13149-13151. The FEIR also fails to disclose and discuss
22 the adverse effect of increased pumping in the CDT Subbasin on the downgradient
23 adjacent 180/400 Foot Subbasin of the SVGB. AR 13147, 13153, 6793, 6796.
- 24 • SVWP MITIGATION: Prior groundwater management efforts in the SVGB have not
25 prevented aquifer depletion and falling water levels in the CDT Subbasin; there is no
26 evidence in the EIR, its appended studies, or the Geosyntec report documenting any
27 potential benefit from the SVWP to the CDT Subbasin; and in fact stabilizing
28 groundwater levels in the SVGB would not benefit the upgradient CDT Subbasin where
water levels are 250 to 350 feet higher. AR 13147, 13150-13151, 6795, 13125-13126.
Even if stabilizing water levels in the SVGB could somehow mitigate overdraft
conditions in the upgradient CDT Subbasin, the SVWP is not expected to stabilize
groundwater elevations in the SVGB without additional groundwater management
projects; thus, payment of Zone 2C assessments for the SVWP is not sufficient
mitigation. AR 13151, 13126-13132, 6788, 5825-5828.

- 1 • MINING: The Project’s ability to mine the aquifer will not preclude cumulative impacts
2 to less fortunately situated groundwater users. AR 4982-4984, *citing* AR 20163.
- 3 • SURPLUS: The claim of a surplus conflicts with the admission of an overdraft condition
4 and misleadingly fails to disclose the actual falling groundwater levels and aquifer
5 depletion, which are defined by the EIR as significant impacts. AR 13143-13144, 13125.

6 The absence of evidence to support the FEIR’s claims, the overwhelming evidence to the
7 contrary, and the evidence of undisclosed harm to the adjacent subbasins is further detailed in
8 section I.D below. Here, the point is that the public was denied a full, systematic response to
9 these objections because the draft EIR failed to disclose the geographic scope of the cumulative
10 analysis and the purported bases for that analysis, prejudicially foreclosing informed
11 participation and decision making.

- 12 b. Cumulative impact analysis was also untimely because the applicant introduced yet
13 another theory why the impact was less than considerable at post-EIR hearings – the
14 argument that Project demand is relatively small as a percent of SVGB capacity.

15 After the EIR was final, the applicant offered another rationale for finding that the Project
16 would not make a considerable contribution to a significant cumulative impact. At post-EIR
17 hearings, the applicant argued that the cumulative impact would be less than considerable
18 because Project demand is a relatively small fraction of the total pumping from the SVGB. AR
19 5163, 4979-4980. Taking its cue from the applicant, County staff later echoed this argument.
20 AR 4913. As discussed in section I.D.3 below, this argument is erroneous because it relies on
21 the legally impermissible “ratio” theory of cumulative analysis. It is also factually irrelevant
22 because it does not assess Project pumping with reference to the relevant problem, which is not
23 the storage capacity or annual pumping of the SVGB, but the magnitude of the ongoing depletion
24 and groundwater declines of the CDT Subbasin.

25 As LandWatch objected (AR 4984), regardless of its merits, the ratio analysis comparing
26 Project demand to SVGB capacity or pumping, is a fundamentally different rationale for the
27 cumulative impact analysis than the analysis presented in the DEIR or the FEIR.⁴ Thus, the

28 ⁴ As discussed in the next section (I.B.5.c), staff misrepresented the EIR in this regard.

1 applicant’s untimely post-EIR ratio theory of cumulative analysis prejudicially denied the public
2 the opportunity for comment and response. Although LandWatch objected that the “ratio”
3 theory is erroneous (AR 5830), the County did not revise the FEIR to address this error.

4 c. Cumulative analysis was equivocal and inadequate because the EIR does not clarify
5 whether there is a significant cumulative impact, and, if so, why the Project
6 contribution is not considerable.

7 An EIR must identify and explain its step one and step two conclusions. In particular, in
8 step one, it must “identify facts and analysis supporting the lead agency's conclusion that the
9 cumulative impact is less than significant,” if that is the EIR’s conclusion. Guidelines, §
10 15130(a)(2). If there is a significant cumulative impact from all projects, an EIR must identify
11 and analyze that cumulative impact (*id.*, §15130(b)(4),(5)); and it must also “identify facts and
12 analysis” in support of its conclusion whether the incremental effect of the project under review
13 is a considerable contribution. *Id.*, § 15130(a)(3). The EIR fails to draw clear step one and step
14 two conclusions. Thus, even if it had been timely, the EIR’s cumulative analysis is inadequate.

15 The FEIR claims that payment of Zone 2C fees serves to mitigate impacts (AR 384, 387),
16 but neither the EIR nor the CEQA findings acknowledge that there is a significant cumulative
17 impact or, if there is, clarify whether the Project would make a considerable contribution absent
18 mitigation.⁵ In particular, the DEIR does not admit a cumulative overdraft; and the FEIR
19 equivocates by claiming both a surplus and an overdraft, and then failing to acknowledge that the
20 overdraft constitutes a significant cumulative impact because it entails falling groundwater levels
21 and aquifer depletion. Thus, the EIR fails to acknowledge or analyze the significant cumulative
22 impact in the CDT Subbasin as required by Guidelines, §§15130(b)(4), (b)(5).⁶ The CEQA
23 findings fail to clarify step one or two conclusions. Since a finding is required when a significant
24 impact is avoided or lessened by mitigation (Guidelines, § 15091(a)(1)), the findings’ omission

25
26 ⁵ The applicant does admit that there is no dispute as to the step-one conclusion (AR 4978-
27 4979), but this admission is not in the EIR or findings, and it is not clear whether it applies to the
28 SVGB, the 180/400 Foot Pressure Subbasin, and/or the CBT Subbasin..

⁶ At a hearing, County staff reported that “the EIR does acknowledge existing overdraft
conditions,” but neither staff nor the EIR acknowledge that this overdraft constitutes a significant
cumulative impact in the CDT Subbasin. AR 4970.

1 of cumulative water supply impacts from its list of potentially significant impacts that are
2 mitigated to a less than significant levels (AR 20-35) implies that there is no significant
3 cumulative impact or need for mitigation. But this is contradicted by the FEIR’s claim that a
4 significant cumulative impact is avoided by the SVWP as a “regional mitigation strategy.” AR
5 387. Finally, taking a different tack, the applicant and County claimed at the hearings (AR 5163,
6 4979-4980, 4913), but not in the EIR or findings, that the Project’s contribution was less than
7 considerable because it is a small percent of the SVGB capacity or total pumping. In sum, it is
8 unclear whether the County concludes in step one that there is no significant cumulative impact
9 (1) because there is a water surplus or (2) because the SVWP prevents that result; or whether the
10 County concludes in step two that the Project contribution is not considerable (3) because
11 payment of impact fees is adequate mitigation, or (4) because it is “minimal.”

12 Post-FEIR comments repeatedly objected to that the basis of the EIR’s cumulative
13 conclusions was unclear. AR 5825, 6790-6791. The County did not revise the FEIR to respond
14 to these comments. Instead, the County misrepresented the EIR’s conclusions at the final
15 hearings. Staff claimed that the EIR identifies payment of Zone 2C fees as one reason why the
16 Project’s impacts are “less than significant.” AR 4912. However, neither the EIR nor the
17 findings clarify that payment of Zone 2C fees is necessary or effective mitigation for a
18 considerable contribution to a significant cumulative impact. Both documents are equivocal as
19 to whether mitigation is needed because neither acknowledge either a significant cumulative
20 impact (step one) or a considerable contribution to such an impact (step two) absent such
21 mitigation. Neither document establishes mitigation success criteria or purport to demonstrate
22 achievement of such criteria.

23 Staff also claimed incorrectly that the EIR identifies the fact that the Project’s uses is
24 only 13 afy “in an aquifer system with over 16 million acre-feet in storage,” i.e., the entire
25 SVGB, as a basis to find the Project contribution less than “substantial.” AR 4912-4913.
26 However, neither the DEIR nor the FEIR claim this. As explained, this claim originated with the
27 applicant after the EIR was final. AR 4979. The EIR itself only reports the Health Department’s
28 conclusion that the Project demand would have a “negligible” effect on the El Toro Groundwater

1 Basin (not the 16 million acre-foot SVGB), and that conclusion was based on the erroneous
2 assumption that the area is in surplus, not overdraft. AR 842-843 (DEIR) *quoting* AR 1507
3 (DEH) *in turn quoting* AR 1501 (Todd 2002); *see also* AR 385 (FEIR).

4 An EIR must first assess significance and then consider mitigation; a failure to do so is a
5 “structural deficiency” that precludes consideration of alternative means of mitigation. *Lotus v.*
6 *Department of Transportation* (2014) 223 Cal.App.4th 645, 655-657. Here the FEIR errs
7 because (1) it fails to define and assess whether the Project contribution would be a considerable
8 contribution to a significant cumulative impact if it were not paying Zone 2C fees toward the
9 SVWP, which the FEIR apparently identifies as mitigation, and (2) it fails to consider alternative
10 mitigation. More fundamentally, the FEIR’s failure to apply its thresholds of significance –
11 declining groundwater levels and depleting aquifer storage – to make a distinct step one
12 determination of cumulative significance is error. Guidelines, §§ 15130(a)(2), (b)(4), (b)(5).
13 And the FEIR’s failure to clarify whether its analysis ends at step one or two, and on what basis,
14 is a failure to provide a coherent cumulative analysis because CEQA requires both
15 determinations unless the step one determination is clearly negative. *Id.*, §§, 15130(a)(2), (a)(3),
16 (b)(4), (b)(5). The belated, piecemeal, and inconsistent presentation of the cumulative analysis
17 was prejudicial because it precluded informed participation and decision making.

18 **6. The Court should review claims regarding untimely and inadequate disclosure of**
19 **baseline conditions and cumulative water supply impacts without deference.**

20 CEQA’s requirements to provide timely baseline information that supports further
21 analysis and to provide a timely, legally adequate cumulative impact analysis are informational
22 mandates. “Where the informational requirements of CEQA are not complied with, an agency
23 has failed to proceed in ‘a manner required by law’ and has therefore abused its discretion.”
24 *Save Our Peninsula, supra*, 87 Cal.App.4th at 118. Such claims are reviewed without deference
25 to the agency. *Save Tara v. City of W. Hollywood* (2008) 45 Cal. 4th 116, 131 (claim as to
26 “required timing of its actions” is not deferentially reviewed because it is not a challenge to the
27 “validity of the agency’s factual conclusions”); *Vineyard, supra*, 40 Cal.4th at 435; *Bakersfield*
28 *Citizens, supra*, 124 Cal.App.4th at 1207-1208. Review of claims regarding the sufficiency of

1 the EIR’s informational disclosures with respect to water supply is non-deferential as a question
2 of law. *Madera Oversight Coalition, supra*, 199 Cal.App.4th at 101-102, overruled on other
3 grounds in *Neighbors for Smart Rail, supra*, 57 Cal.4th 439. Failure to provide essential baseline
4 information or an adequate cumulative water supply analysis renders and EIR inadequate as an
5 “informational document,” and is thus a failure to proceed as required by CEQA. *Friends of the*
6 *Eel River, supra*, 108 Cal. App. 4th at 881; *see also Env’tl. Planning & Info. Council v. Cty. of El*
7 *Dorado* (1982) 131 Cal. App. 3d 350, 358 (EIR will “fail as an informative document” if
8 baseline disclosure inadequate); *San Joaquin Raptor/Wildlife Rescue Ctr. v. Cty. of Stanislaus,*
9 *supra*, 27 Cal. App. 4th at 729 (incomplete or misleading baseline description is “inadequate as a
10 matter of law”); *County of Amador, supra*, 76 Cal. App. at 954-55 (baseline adequacy is not an
11 issue of “conflicting expert opinions”). All of the claims discussed above are informational
12 failures subject to non-deferential review.⁷

13 **C. The County failed to proceed as required by CEQA because it failed to**
14 **recirculate a draft EIR despite significant new information.**

15 **1. CEQA requires an agency to recirculate an EIR for public comment and**
16 **response when significant new information is disclosed subsequent to the DEIR.**

17 An agency must recirculate a draft EIR for public comments and responses when there is
18 significant new information. Guidelines, § 15088.5(a). Significant new information here
19 includes (1) new information showing a new or more severe significant impact resulting from the
20 project (Guidelines, § 15088.5(a)(1); *Laurel Heights Improvement Ass’n v. Regents of the Univ.*
21 *of Cal.* (“*Laurel Heights II*”)(1993) 6 Cal.4th 1112, 1130) and (2) new information showing that
22 the draft EIR was “so fundamentally and basically inadequate and conclusory in nature that
23 meaningful public review and comment were precluded” (CEQA Guidelines, § 15088.5(a)(4);
24 *Mountain Lion Coalition v. Fish & Game Com.* (1989) 214 Cal.App.3d 1043, 1052).

25 Recirculation of a draft EIR for public comment and response is required where the record shows
26 that a potentially significant impact, or the efficacy of mitigation, was not evaluated in the draft
27

28 ⁷ LandWatch’s independent claims the County failed to support its cumulative water
supply impact analysis with substantial evidence are discussed in section I.D below.

1 EIR. *Vineyard, supra*, 40 Cal.4th at 447-448 (potential impact to salmon); *Gray v. County of*
2 *Madera* (2008) 167 Cal.App.4th 1099, 1120 (water supply mitigation). The new information
3 triggering recirculation may appear in the FEIR or in post-FEIR material. *Cadiz Land Co. v.*
4 *Rail Cycle* (2000) 83 Cal.App.4th 74, 95; *Save Our Peninsula, supra*, 87 Cal.App.4th at 131.
5 The purpose of recirculation is to provide the public the same opportunity to evaluate the new
6 information and the validity of the EIR's conclusions as it had for information in the draft EIR.
7 *Save Our Peninsula, supra*, 87 Cal.App.4th at 131; *Sutter Sensible Planning v. Board of*
8 *Supervisors* (1981) 122 Cal.App.3d 813, 822; *Laurel Heights II, supra*, 6 Cal.4th at 1132.

9 Review of a failure to recirculate based on a claim that new information shows a new or
10 more severe impact is on a substantial evidence standard. *Laurel Heights II, supra*, 6 Cal.4th at
11 1130. However, review of a failure to recirculate based on a claim that the draft EIR was
12 fundamentally inadequate as an informational document should be non-deferential because the
13 allegation is that the agency failed to proceed as required by CEQA.⁸ *Bakersfield Citizens,*
14 *supra*, 124 Cal.App.4th at 1207-1208.

15 2. Significant new information required recirculation.

16 As set out in section I.B.3, the FEIR provides a fundamentally new baseline description:

- 17 • identifying the Project's aquifer as a subbasin of the SVGB rather than as a separate
18 aquifer (*compare* AR 825-829 to AR 352-353, 362);
- 19 • admitting that the Project's basin is in overdraft, whereas the DEIR found a surplus
20 (*compare* AR 837-838, 842-843 to AR 363, 375, 385); and
- 21 • abandoning the claim that existing groundwater management projects are sustaining
22 groundwater levels and instead claiming only that the SVWP would "indirectly" do this
23 (*compare* AR 830 to AR 363).

24 Also as set out in section I.B.5, the County provided a fundamentally new cumulative
25 analysis in the FEIR and subsequently, using the new baseline information:
26
27

28 ⁸ *Laurel Heights'* holding excludes procedural violations, such as a failure to provide adequate disclosure, which was not at issue there. *Laurel Heights II, supra*, 6 Cal.4th at 1133.

- 1 • The FEIR evaluates a different geographic scope than the DEIR, including not just the
2 four interconnected subareas of the Project’s local basin but also “adjacent subbasins and
3 the basin as a whole,” i.e., the entire SVGB. *Compare* AR 842 to AR 384-387.
- 4 • The FEIR’s new analysis relies on the efficacy of future groundwater management
5 projects as mitigation whereas the DEIR concludes that there is no significant cumulative
6 impact. *Compare* AR 842-843 to AR 384-387.
- 7 • After the FEIR, the County offered yet another basis to claim there was no considerable
8 contribution to a significant cumulative impact – the argument that the pumping would be
9 a small percent of basin pumping. AR 4913; *see* AR 5163, 4979-4980.

9 Recirculation was required for three reasons.

10 First, these wholesale revisions to the baseline and cumulative analysis were significant
11 new information requiring recirculation under *Save Our Peninsula, supra*, 87 Cal.App.4th at
12 120-134, which is on all fours. There, the agency presented three kinds of critical water supply
13 information untimely: baseline information (*id.* at 120-128), information about mitigation via
14 offset pumping (*id.* at 128-131), and information about riparian rights purportedly relevant to
15 determining the sufficiency of the water supply (*id.* at 131-134). Untimely information denying
16 the public the opportunity for meaningful comment and response required recirculation to ensure
17 that the information was “presented in the EIR and subjected to the test of public scrutiny.” *Id.*
18 at 131, *see id.* at 135. Here, the FEIR and post-FEIR disclosures contain analogous new
19 information that was never tested by the process of public comment and response, including new
20 and inconsistent baseline information, new mitigation, and an entirely new cumulative analysis
21 for an expanded geographic scope. This was significant new information that because it showed
22 that the DEIR was “so fundamentally and basically inadequate and conclusory in nature that
23 meaningful public review and comment were precluded.” Guidelines, § 15088.5(a)(4)

24 Second, recirculation was independently required because the efficacy of the SVWP as
25 mitigation for cumulative impacts to the four local subareas evaluated in the DEIR, or to the
26 SVGB as a whole, was not evaluated in the draft EIR. *Gray, supra*, 167 Cal.App.4th at 1120
27 (failure to evaluate water supply mitigation requires recirculation).

1 Third, recirculation was independently required under Guidelines, § 15088.5(a)(1)
2 because, as discussed in section I.D below, post-DEIR information disclosed a new significant
3 impact: a significant cumulative impact in the CDT Subbasin, based on aquifer depletion and
4 declining groundwater levels, to which the Project will likely make a considerable contribution.
5 *Vineyard, supra*, 40 Cal. 4th at 448 (“potentially substantial” impact requires recirculation).

6 **D. The County abused its discretion under CEQA because there is no substantial**
7 **evidence that the Project does not make a considerable contribution to a**
8 **significant cumulative impact to the Corral de Tierra Subbasin, and there is**
9 **substantial evidence to the contrary.**

10 The County abused its discretion not only because the EIR was inadequate as discussed
11 above, but because there is no substantial evidence to support findings that the water supply
12 impact are less than significant. A lack of substantial evidence may be shown by a failure to
13 ground findings with facts, a failure to disclose the analytic route between facts and conclusions,
14 and/or a lack of clarity or inconsistency in the factual claims. *Laurel Heights Improvement*
15 *Ass’n v. Regents of the University of California* (“*Laurel Heights I*”) (1988) 47 Cal.3d 376, 404;
16 *Topanga Ass’n. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514-
17 515, *Vineyard, supra*, 40 Cal.4th at 439.

18 **1. Step one of an adequate cumulative analysis must find a significant cumulative**
19 **impact in the CDT Subbasin and SVGB based on the EIR’s significance criteria.**

20 The applicant admits “no one really disputes” that “the basin is in overdraft.” AR 4979.
21 The FEIR admits the CDT Subbasin is in overdraft. AR 363, 375, 385. Geosyntec documents
22 increasing annual depletion and declines in groundwater levels since the 1960s and projects
23 continuing declines as more development is approved. AR 20156, 20163, 20062. Thus, under
24 the EIR’s significance criteria, “a net deficit in aquifer volume or a lowering of the local
25 groundwater table level” (AR 371), there is an existing and projected significant cumulative
26 impact in the CDT Subbasin.

27 The cumulative analysis also includes “the adjacent subbasins and the basin [SVGB] as a
28 whole” (AR 384), in which the FEIR acknowledges overdraft conditions and seawater intrusion
(AR 367). The FEIR states that the SVWP is intended to address this impact and identifies one

1 report showing increased groundwater levels for one monitoring period; however, it
2 acknowledges that it is “too soon to draw hard conclusions” and that “additional measures” may
3 be needed. AR 368. As discussed in section I.D.2.c below, the EIR offers no substantial
4 evidence that the SVWP will reverse the long-term overdraft conditions in the SVGB and there
5 is overwhelming evidence to the contrary. Regardless, the admitted overdraft constitutes an
6 existing significant cumulative impact in the SVGB.

7 **2. There is no substantial evidence to support the EIR’s conclusion that the Project**
8 **does not make a considerable contribution to significant cumulative impacts to**
9 **the CDT Subbasin and the SVGB.**

10 In light of indisputable step-one determination that there is a significant cumulative
11 impact, the EIR must address the step-two determination whether the Project makes a
12 considerable contribution to that impact. Guidelines, § 15130(a). As noted in section I.C.5
13 above, the FEIR concludes that “the cumulative effect of the project on water demand is
14 considered less than significant” based on the claims that (1) groundwater can be mined at the
15 Project site (AR 385); (2) there is “an overall water surplus where recharge exceeds extraction”
16 in the four interconnected subareas of the CDT Subbasin (AR 385); (3) the SVWP “provides a
17 regional mitigation strategy” for the SVGB and its subbasins (AR 387). These claims are untrue,
18 unsubstantiated, or irrelevant and therefore do not constitute substantial evidence.

- 19 a. The possibility of mining the aquifer does not provide substantial evidence that there is
20 no cumulative impact from that mining.

21 Geosyntec demonstrates that aquifer mining contributes to a significant cumulative
22 impact as defined in the FEIR. i.e., lowered groundwater levels and aquifer depletion:

23 . . . the primary aquifer system in the El Toro Planning Area is in overdraft. However,
24 current and increasing rates of pumping could be sustained for decades in areas with large
25 saturated thicknesses of the El Toro Primary Aquifer System because of the large volume
26 of groundwater in storage. The most evident problem would be lowering of the water
27 table below the screened intervals of existing wells completed in shallower portions of
28 the aquifer system. This has already occurred in portions of the Corral de Tierra subarea.
In addition, with continued overdraft conditions, groundwater production potential would
likely decrease relatively quickly in hydrogeologically contiguous areas of less saturated
thickness.

1 AR20163, emphasis added. Thus, contrary to the FEIR’s implication (AR 385), the fact that
2 water can be mined is not substantial evidence of no significant impact. “The ultimate question
3 under CEQA . . . is not whether an EIR establishes a likely source of water, but whether it
4 addresses the reasonably foreseeable *impacts* of supplying water to the project.” *Vineyard*,
5 *supra*, 40 Cal.4th at 434 (original emphasis).

- 6 b. The claim of a surplus of rainfall recharge over pumping is not substantial evidence
7 because it is misleadingly incomplete and irrelevant.

8 The FEIR’s discussion of cumulative impacts states that there is “an overall water surplus
9 where recharge exceeds extraction” in the CDT Subbasin. AR 385. As discussed in section
10 I.B.4 above, the relation of pumping to recharge does not account for the overdraft condition of
11 the aquifer because it ignores outflows to adjacent subbasins. Geosyntec demonstrates that a
12 significant cumulative impact, as defined by the EIR, has been occurring since the 1960s due to
13 pumping, given those outflows to adjacent aquifers; and it states unequivocally that “the rate of
14 groundwater pumping in the El Toro Primary Aquifer System exceeds the rate of groundwater
15 replenishment.” AR 20062, 20156; *see* AR 13143. The claim of a surplus of rainfall recharge
16 over pumping is irrelevant, misleading, and inconsistent with the fact that the CDT Subbasin has
17 been, and will remain, in a state of increasing annual overdraft. Such “factual inconsistencies
18 and lack of clarity” preclude substantial evidence. *Vineyard, supra*, 40 Cal.4th at 439.

- 19 c. There is no substantial evidence that the Salinas Valley Water Project has mitigated or
20 will mitigate overdrafting in the upgradient CDT Subbasin.

21 The FEIR claims SVWP “provides a regional mitigation strategy” for the SVGB and its
22 subbasins, presumably including the CDT Subbasin, offering this claim as one basis for
23 concluding there would be no significant cumulative impact. AR 387. The FEIR bases this
24 claim in turn on:

- 25 • the opinion of an unidentified MCWRA spokesperson or document that “[a]ccording to
26 MCWRA” the Project’s well sites “indirectly receive benefits of sustained groundwater
27 levels attributed to the Salinas Valley Water Project” (AR 363);
- 28 • monitoring data for a single two year period between 2009-2011 showing an increase in
groundwater levels (AR 368, 387);

- 1 • the possibility that the County “could take” future “additional measures” (AR368); and
- 2 • a hydrological connection between the Geosyntec Study Area and the SVGB (AR 363).

3
4 None of these claims constitute or are based on substantial evidence as to the CDT Subbasin.

5 Faced with Geosyntec’s report of groundwater declines since the 1960s, the FEIR retracts
6 the DEIR’s claim that previous groundwater management projects have resulted in “sustained
7 groundwater levels” (*compare* AR 830 to AR 363; *see* AR 13146), substituting the weaker,
8 prospective claim that “according to MCWRA” the Project’s well sites “indirectly receive
9 benefits of sustained groundwater levels attributed to the Salinas Valley Water Project.” AR
10 363. This raw conclusion is not substantial evidence. *Laurel Heights I, supra*, 47 Cal.3d at 404.

11 The only factual basis proffered by the FEIR is the claim that a monitoring report for the
12 2009-2011 period shows an increase in groundwater levels and a decrease in the rate of seawater
13 intrusion. AR 368, 387. The FEIR does not identify the data source or the location of this
14 improvement, so there is no evidence of improvement in the CDT Subbasin. The reference to
15 seawater intrusion implies that the monitoring report does not provide data for the CDT
16 Subbasin, which is not covered by MCWRA monitoring reports and where seawater intrusion is
17 “not currently occurring.” AR 367; *see, e.g.*, AR 5978, 5992, 6005, 6018, 6031 (MCWRA
18 reports 2011-2014). Furthermore, it is evident that the data are cherry-picked: all of the post-
19 2011 MCWRA groundwater reports show falling groundwater levels in the adjacent Pressure
20 180/400-foot Subbasin – despite the SVWP. *Id.*; *see* AR 5826. MCWRA admits that the 2009-
21 2011 wet-period data in “no way indicate a long-term trend in groundwater levels” (AR 13390-
22 13391) and that “groundwater level trends long-term are declining” (AR13392). Furthermore,
23 the County admits at least ten years of data are required before any judgment as to the efficacy of
24 the SVWP could be made. SAR 22881; AR 17744, 13229; *see* AR 14150-14152. More recent
25 analysis projects that even the short-term decline in the rate of seawater intrusion reported by the
26 FEIR will reverse due to the latent effect of five years of drought. AR 6132-6133, 5850; *see* AR
27 5826, AR 13229. And, indeed, the FEIR admits “it is too soon to draw hard conclusions” as to
28 the SVWP efficacy. AR 368.

1 The FEIR argues that the County “could take” unspecified “additional measures” based
2 on the results of a future study. AR 368. But the EIR may not rely on a future study: “CEQA's
3 informational purposes are not satisfied by an EIR that simply ignores or assumes a solution to
4 the problem of supplying water to a proposed land use project.” *Vineyard, supra*, 40 Cal.4th at
5 430-431; *see also id.* at 447 (improper to rely on future environmental studies).

6 The FEIR cites the Geosyntec 2010 report of a hydrological connection between the CDT
7 Subbasin and the SVGB, apparently in support of its claim that the SVWP would benefit the
8 CDT Subbasin. AR 363; *see* AR 19395. However, as hydrologist Parker explains, the
9 hydrological connection enables the continued depletion of the overdrafted CDT Subbasin. The
10 connection enables flow from the CDT Subbasin to the SVGB, because CDT Subbasin
11 groundwater levels are 250 to 350 feet higher than SVGB levels. AR 13147, 13150-13151; *see*
12 AR 20125 (elevations), 1454 (same). Thus, even if the SVWP stabilized groundwater levels in
13 the SVGB, benefit to the CDT Subbasin is unlikely. AR 13151.

14 And, as Parker explains, there is no substantive evidence of a potential benefit to the
15 CDT Subbasin from the SVWP in the EIR, its appended studies, or the Geosyntec report. AR
16 13147, 13149-13150, 6795. The EIR contains no information quantifying the relation of CDT
17 Subbasin and the 180/400 Foot Aquifer Subbasin, no modeling, no projections of future
18 cumulative demand for the SVGB, and no information about sustainable yields. *Id.*; *see* AR
19 13329-13331. For example, the Geosyntec Report acknowledges the SVWP (AR 20072), but it
20 does not claim that it will stabilize ground water levels and halt aquifer depletion in the CDT
21 Subbasin. To the contrary, Geosyntec projects that “current and increasing rates of pumping”
22 will result in “lowering of the water table” and “long term declines in groundwater levels.” AR
23 20163. And the SVWP EIR does not model groundwater levels in the CBT Subbasin. AR 8955-
24 8956, 8657-8661. In sum, the EIR provides no evidence that the SVWP would benefit the
25 upgradient CDT Subbasin, even if the SVWP itself were sufficient to stabilize groundwater
26 levels in the downgradient SVGB (which it is not, as discussed in the next section).

27 The lack of evidence in the EIR that the SVWP benefits the CDT Subbasin, and the
28 substantial evidence to the contrary, vitiate the EIR’s claim that the Project’s payment of Zone

1 2C fees toward the SVWP mitigates its impacts on the overdrafted CDT Subbasin. The mere
2 payment of impact fees is not presumptively sufficient mitigation because “payment of fees must
3 be tied to a functioning mitigation program.” *California Native Plant Society, supra*, 170
4 Cal.App.4th at 1055; Guidelines, § 15130(a)(3).

- 5 d. There is no substantial evidence that that groundwater management efforts are sufficient
6 to stabilize groundwater levels in the rest of the SVGB.

7 The FEIR claims that the Project’s payment of Zone 2C fees for the SVWP is sufficient
8 to mitigate impacts to the CDT Subbasin and to “adjacent subbasins and the basin as a whole.”
9 AR 384, 387. As discussed above, there is no evidence that the SVWP, even if it did stabilize
10 groundwater levels in the adjacent SVGB subbasins, could mitigate impacts to the CDT
11 Subbasin, because the CDT Subbasin flows into other subbasins and is not recharged by them.
12 Regardless, there is no substantial evidence that the SVWP will stabilize groundwater levels in
13 the rest of the SVGB. See AR 13126-13132, 13151-13152, 6788, 6795, 5825-5829.

14 First, the SVWP was projected to be effective only on the basis of 1995 demand levels.
15 AR 13126-13127, *citing* AR 8836, 9274, 7849. But demand in the 20 years after 1995
16 substantially exceeded 1995 levels. AR 13127-13130, *citing* AR 8789, 8854, 9264, 9270-9277,
17 12852-13313. MCWRA agrees that “the amount of pumping that was assumed in those [SVWP]
18 models was, actually, much lower than the amount of pumping that’s being reported” and that,
19 contrary to popular understanding, the SVWP would only “halt seawater intrusion based on 1995
20 land use.” AR 13227-13228.

21 Second, MCWRA now admits that existing groundwater management projects, including
22 the SVWP, are not sufficient to stabilize groundwater levels and halt seawater intrusion. AR
23 13204-13205, 13218-13219, 13223-13230. MCWRA’s 2013 study concludes that new projects
24 supplying an additional 48,000 afy of groundwater recharge, over and above that supplied by the
25 SVWP, are required in order to maintain SVGB groundwater elevations and control seawater
26 intrusion. *Id.*, referencing SAR 22546. The adjacent Ferrini project findings admit that
27 additional projects are required. AR 5826.
28

1 Third, the most current 2014 basin study concludes that overdraft in the 180/400-Foot
2 Aquifer has averaged about 2,000 afy from 1944 to 2014, and the Basin as a whole is “currently
3 out of hydrologic balance by approximately 17,000 to 24,000 afy.” AR 6057-6058.

4 Zone 2C fees fund only the existing groundwater management projects, not future
5 projects that the County now admits are needed to stabilize the SVGB. AR 5827-5828, *citing*
6 AR 7707-7709. In light of this evidence, payment of Zone 2C fees cannot be found to be
7 sufficient mitigation because it is clear that the SVWP is not a sufficiently “functioning
8 mitigation program” to maintain groundwater elevations in the subbasins adjacent to the CDT
9 Subbasin and the basin as a whole. *California Native Plant Society, supra*, 170 Cal.App.4th at
10 1055.

11 e. The short-term source capacity well tests do not provide evidence relevant to cumulative
12 impacts.

13 At the eleventh hour, after the Planning Commission and the Board of Supervisors had
14 rejected the Project based on insufficient water (AR 4342-4344, 5132, 5199-5201, 5206-5215),
15 the Supervisors invited the applicant to prepare new source capacity well tests. AR 5197-5198,
16 5209-5214. Ironically, the two tests confirmed the long-term decline of groundwater levels
17 documented by Geosyntec: the depth to groundwater in the Project’s wells declined by 25 and
18 23 feet over the 15 and 12 year periods since the prior tests. AR 6794, *citing* AR 3555, 1453.
19 However, as the applicant admits, “the Beerman [sic, Bierman] report was never intended to
20 address cumulative impacts.” AR 4978. As Parker explained, a source capacity test is intended
21 to ensure a well can meet its daily demand and whether it has short-term interference with
22 immediately adjacent wells. AR13152, 6793. Thus, despite the claim in Bierman that the Project
23 wells will have a “less than cumulative significant offsite impact to other wells” (AR 3531), i.e.,
24 to the wells within 1000 feet considered by Bierman over a 72-hour test, the source capacity test
25 is not relevant evidence of long-term cumulative impacts to the CDT Subbasin or SVGB.⁹

26 _____
27 ⁹ Furthermore, if the 2015 Bierman tests were in fact relevant, they should have been
28 included in the EIR itself. *Vineyard, supra*, 40 Cal.4th at 442 (error to rely on “information not
actually incorporated or described and referenced in the FEIR”); *Environmental Defense Fund,*
Inc. v. Coastside County Water Dist. (1972) 27 Cal.App.3d 695, 706 (same).

1 **3. There is no substantial evidence that the Project contribution to a significant**
2 **cumulative impact is so small as to be less than considerable.**

3 As discussed in section I.B.5.b above, the applicant, and then the County, belatedly
4 argued that the Project’s contribution to a significant cumulative water supply impact is less than
5 considerable because its demand is a relatively small part of the storage capacity of, or annual
6 pumping from, the entire SVGB or its 180/400 Foot Subbasin. AR 5163, 4979-4980, 4913. The
7 argument is legally erroneous and factually irrelevant.

8 An EIR may not conclude a cumulative impact is insignificant merely because the
9 project’s individual contribution to an unacceptable existing condition is, by itself, relatively
10 small. *Los Angeles Unified School Dist. v. City of Los Angeles* (“LAUSD”) (1997) 58
11 Cal.App.4th 1019, 1025-1026; *CBE v. CRA*, *supra*, 103 Cal.App.4th at 117-118, 121. In *Kings*
12 *County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692,718, the Court rejected the
13 agency’s “ratio” theory that found impacts not to be a considerable contribution merely because
14 they were a relatively small percent of the total impact. *Id.* at 720. Because the relevant
15 question was “whether any additional amount” of incremental impact “should be considered
16 significant in light of the serious nature” of the problem (*id.* at 718), a valid determination
17 whether a project’s contribution is considerable must reflect the severity of the cumulative
18 problem. “[T]he greater the existing environmental problems are, the lower the threshold should
19 be for treating a project’s contribution to cumulative impacts as significant.” *CBE v. CRA*,
20 *supra*, 103 Cal.App.4th at 120. Thus, even an “individually minor” impact may be
21 “cumulatively considerable.” *Id.*; *see also* Guidelines, §§ 15355(b), 15065(a)(3); *LAUSD*, *supra*,
22 58 Cal.App.4th at 1024-25.

23 The applicant and County staff make the same error as made in *Kings County* by focusing
24 on the ratio of the Project’s pumping to the overall aquifer pumping or capacity, using these
25 comparisons to “trivialize the project’s impact” without putting Project demand in the context of
26 the serious nature of the cumulative problem. *Kings County*, *supra*, 221 Cal.App.3d at 718. An
27 EIR is legally inadequate if it is “focused upon the individual project’s relative effects and
28 omit[s] facts relevant to an analysis of the collective effect.” *Id.* at 721. Here, the relevant
cumulative problem is not the purported 19 million acre-feet of storage capacity in the entire

1 SVGB claimed by the applicant. AR 4979. The problem is the ongoing 500 to 1,000 afy
2 depletion of the CDT Subbasin, increasing by 20-50 af annually as more permits are issued, and
3 causing well failures and decreased production potential. AR 20156, 20163. This is not
4 disclosed by the EIR, which instead claims a “surplus.” AR 385. In the context of the problem
5 in the CDT Subbasin, the Project’s additional 12.75 afy should be seen as a considerable
6 contribution. AR 6792-6793, 6796. Regardless, there is no substantial evidence to support the
7 contrary claim that the Project contribution is not considerable, because neither the EIR nor staff
8 evaluated it in light of the serious nature of the actual problem in the CDT Subbasin.

9 **II. The County abused its discretion under CEQA in finding that traffic impacts would**
10 **be mitigated by payment of impact fees.**

11 The Project will cause significant traffic impacts to State Route 68 (“SR68”) segments
12 and intersections. The EIR proposes mitigation through traffic impact fees. This mitigation does
13 not meet CEQA’s requirements for certainty because there is no committed plan to construct all
14 needed improvements and funding is insufficient.

15 **A. Facts regarding traffic impacts and mitigation.**

16 Roadways affected. The Project site is off San Bernancio Road to the south of SR68 via
17 Meyer Road. AR 469, 621. The six intersections and five segments evaluated in the EIR are
18 located on SR68, a two-lane rural highway that serves as a commuter route between Salinas and
19 Monterey. AR 417, 419-420, 621-623 (maps).

20 Congestion on SR68. The EIR determines the significance of traffic impacts with
21 reference to Levels of Service (“LOS”), ranging from LOS A (no congestion) to LOS F (highly
22 congested). AR 419, 435-437. The County has established LOS C as the minimum acceptable
23 standard for SR68. AR 419.

24 SR68 is highly congested and projected to deteriorate. In 2010, 5 of the 6 intersections
25 (numbers 2-6) and all 5 of the roadway segments studied were operating below the acceptable
26 LOS standard. AR 423-424. Under so-called “Background Conditions,” i.e., projected 2015
27 conditions (AR 428-429), despite planned improvements assumed completed before 2015 (AR
28 429), increased traffic will cause the same intersections and segments to have worse LOS.

1 AR432-433. LOS will deteriorate even further under so-called “Cumulative Conditions,” i.e.,
2 projected 2030 conditions. AR 488, 452, 454.

3 Regulatory framework and plans for traffic improvements. SR68 is under the jurisdiction
4 of Caltrans, with the Transportation Agency of Monterey County (“TAMC”) responsible to plan
5 and fund improvements. AR 435, 471. TAMC, the state-designated Regional Transportation
6 Planning Agency, prepares a Regional Transportation Plan (“RTP”) to allocate local, state, and
7 federal funding to transportation projects over a 20 year planning-horizon. AR 435; SAR 22596.

8 To attain acceptable LOS on SR68 under existing, background, and cumulative
9 conditions, it would be necessary to widen the existing two-lane segments of SR68 to four lanes
10 or, alternatively, to construct a bypass facility through Fort Ord. AR 426, 441. Neither is
11 financially feasible. The RDEIR explains:

12 . . . there are no short- or long-term funding sources for either of these alternatives.
13 Furthermore, there are no feasible interim improvements that would achieve and maintain
14 the acceptable level of service standards, and widening the entire corridor to a four-lane
15 facility is not feasible at this time.

16 AR 426; *see also* AR 433-434, 441, 444, 473 (additional admissions that widening SR68 is
17 infeasible). Widening SR68 is specifically identified in the RTP as an “unconstrained,” project,
18 i.e., one for which no funding is reasonably expected in the 20-year planning horizon. SAR
19 22720.

20 The TAMC RTP does include a more limited project that would improve LOS for two
21 intersections and one segment. If and when constructed, the “State Route 68 Commuter
22 Improvements” would widen a 2.3 mile section of SR68 between the eastern four-lane segment
23 and Corral de Tierra Road, resulting in acceptable service on intersections 5 and 6 and segment 5
24 under 2015 conditions. AR 427, 441, 447; SAR 22717. However, this project is not funded or
25 scheduled for construction. SAR 22867; Request for Judicial Notice by Petitioner LandWatch
26 Monterey County (“RJN”), Exhibit 1; *see* AR 13135.

27 Development impact fees are determined by TAMC’s nexus studies, the most recent of
28 which were completed in 2008 and 2013. AR 427; SAR 22730. The cost of the State Route 68
Commuter Improvements project was included in determining the current development impact

1 fee, known as the Regional Development Impact Fee (“RDIF”). AR 427; SAR 22751. The
2 RDIF may only be used to fund 17.1% of the cost of the SR 68 Commuter Improvements (SAR
3 22759), because “the RDIF program only represents a portion of the required funding for each of
4 the proposed projects,” i.e., the fair share allocable to new development, and “. . . the share of
5 funding corresponding to existing traffic and out-of-county (and FORA) traffic is planned to
6 come from other sources.” SAR 22730-22731. Thus, the nexus study states that the RDIF
7 cannot “ensure a mechanism for complete funding for all RDIF program projects at this time.”
8 SAR 22765. Although the nexus study lists possible funding sources (SAR 22765), TAMC has
9 concluded that obtaining other sources of transportation funding is a “major challenge” because
10 state and federal sources “are decreasing and becoming less consistent.” SAR 22596. The RTP
11 does not project funding for the State Route 68 Commuter Improvements before 2035. SAR
12 22717, 22867.

13 The superseded DEIR concludes that the Project’s traffic impacts under 2013 and 2030
14 conditions would be significant and unavoidable because needed improvement are not included
15 in a funded, approved plan. Based on a 2008 traffic study (AR 1555 et seq.), the October 2008
16 DEIR identifies significant impacts under “Background plus Project Conditions” to four SR 68
17 intersections (AR 917) and four SR 68 segments (AR 919-921). Because no funding is available
18 to widen SR 68 to four lanes, or to implement the Fort Ord Bypass, or to construct needed
19 intersection improvements, the DEIR concludes that these level of service impact are significant
20 and unavoidable. AR 918, 923. The DEIR also identifies significant impacts to five SR 68
21 intersections and five SR 68 segments under 2030 “Cumulative Project Conditions” conditions.
22 AR 929, 932. Notwithstanding mitigation requiring payment of the TAMC Regional Impact
23 Fee, the DEIR deems all of the cumulative impacts unavoidable because “the timing and extent
24 of physical improvements along the State Route 68 corridor are not known at this time.” AR
25 933. The DEIR’s traffic analysis was superseded when the County recirculated the traffic
26 section of the EIR in December 2009 based on TAMC’s adoption of a new Regional
27 Development Impact Fee (“RDIF”) and the RDEIR’s new traffic mitigation proposals. AR 412.
28

1 The RDEIR concludes that the Project will cause or contribute to significant traffic
2 impacts under both 2015 and 2030 conditions. The RDEIR evaluates Project level of service
3 impacts under two temporal scenarios: 2015 “Background Conditions” (AR 439-447) and 2030
4 “Cumulative Conditions” (AR 451-459). The RDEIR treats both 2015 and 2030 impacts as
5 significant if the Project adds any traffic to an intersection or segment operating at LOS F. AR
6 435-437, 472, 497. In 2015, the RDEIR concludes the Project would significantly impact SR68
7 intersections 2, 4, 5, and 6 and segments 2, 3, 4, and 5, all of which would operate at LOS F. AR
8 439-440, 442-444. In 2030, the RDEIR projects the Project would significantly impact all six
9 intersections and all 5 segments, all of which would operate at LOS F. AR 452, 454-455.

10 Under 2015 conditions, the RDEIR concludes that some impacts will be mitigated by
11 impact fees but that most impacts cannot be mitigated because widening SR68 is not feasible.
12 The RDEIR concludes that the Project’s payment of impact fees would mitigate impacts to SR68
13 segment 5 and intersections 5 and 6 to less than significant, because the SR68 Commuter
14 Improvements Project “is a component of the TAMC RDIF” and construction of those
15 improvements “would effectively mitigate project impacts.” AR 447. The RDEIR
16 acknowledges that the other significant 2015 impacts, including impacts to intersections 2 and 4,
17 and to segments 2, 3, and 4, would remain significant and unavoidable because needed
18 improvements “are not currently included in the RDIF.” AR 447.

19 Under 2030 conditions, the RDEIR concludes that all impacts would be mitigated by fair
20 share payments. The RDEIR proposes as mitigation for all 2030 significant impacts the payment
21 of future fair share traffic fees in effect at the time of building permit applications, including the
22 TAMC RDIF. AR 458-459; *see also* AR 328-329 (FEIR). Unlike the DEIR (AR 933), the
23 RDEIR concludes that cumulative impacts would be “less than significant” because “payment of
24 all regional impact fees will mitigate the proposed project’s cumulative traffic impacts.” AR
25 459.

26 The RDEIR identifies a list of additional improvements that are needed to mitigate 2030
27 LOS impacts to intersections 1, 2, 3, and 4, but concludes that “these improvements are not
28 included in any CIP [capital improvement program]; therefore, are not considered feasible.” AR

1 457-458. Despite this, the traffic study projects acceptable mitigated cumulative level of service
2 by assuming presence of these infeasible improvements in “mitigated” but not “unmitigated”
3 cumulative conditions. AR 582-606. The RDEIR does not analyze cumulative impacts to the
4 SR68 segments with and without mitigation; however the recommended mitigation for each of
5 the five cumulative segment impacts is to “widen Highway 68 to 4 lanes” (AR 630), despite the
6 conclusion that widening is not financially feasible. AR 426, 433-434, 441, 444, 473.

7 LandWatch objects and documents that needed improvements are not funded or
8 committed: LandWatch objected that payment of the RDIF would not mitigate cumulative
9 impacts to intersections and segments west of the SR 68 Commuter Improvements because
10 “[t]here are no projects identified in TAMC’s Strategic Expenditure Plan that address this
11 segment of State Route 68.” AR 270. The FEIR responded “[t]he treatment of cumulative
12 impacts and application of regional mitigation works a little differently than project-specific
13 impacts and project-level responsibility” and that that the County, TAMC, and Caltrans
14 recognize the RDIF as the “appropriate mechanism for mitigating cumulative, regional traffic.”
15 AR 271. LandWatch’s RDEIR comments also asked when the SR 68 Commuter Improvements
16 would be constructed, but the FEIR did not respond. AR 270, 271.

17 LandWatch responded to the FEIR by submitting extensive evidence that the
18 improvements needed to mitigate 2030 impacts are not included in any committed funded plan.
19 AR 13136-13138. LandWatch also documented that the SR 68 Commuter Improvements is not
20 scheduled for construction and will not be funded before 2035. AR 13134-13136.

21 The CEQA findings reflect the RDEIR conclusion that 2030 impacts will be mitigated
22 but change the RDEIR conclusion as to three 2015 impacts: Consistent with the RDEIR, the
23 findings imply that 2030 cumulative impacts are fully mitigated by omitting these impacts from
24 the list of unavoidably significant unmitigated impacts.¹⁰ AR 33. However, the findings
25 contradict the RDEIR with respect to 2015 impacts. Although the RDEIR claims that impacts to
26 SR68 intersections 5 and 6 (at Corral de Tierra and San Bernancio Road) and to segment 5

27
28 ¹⁰ Confusingly, staff testified that cumulative impacts will remain significant and
unavoidable, citing page 3.10-35 of the EIR. AR 4928. While the superseded draft EIR did so
conclude (AR 933 – DEIR p. 3.10-35), the revised draft EIR reversed this conclusion. AR 459.

1 (between them) are mitigated to a less than significant by the SR 68 Commuter Improvements
2 (AR 447), the findings identify these impacts as significant and unavoidable. AR 35.
3 LandWatch objected that admission of new significant impacts required recirculation. AR 5830.

4 **B. Legal standard for impact fee mitigation.**

5 CEQA requires an EIR to describe “feasible measures which could minimize significant
6 adverse impacts.” Guidelines, § 15126.4(a)(1). Mitigation measures must be fully enforceable
7 through permit conditions, agreements, or other legally-binding instruments. *Id.*, subd. (a)(2).
8 When payment of impact fees is proposed, the record must demonstrate that the necessary
9 mitigation will actually be provided. *Kings County, supra*, 221 Cal.App.3d at 728. “A
10 commitment to pay fees without any evidence that mitigation will actually occur is inadequate.”
11 *Save Our Peninsula, supra*, 87 Cal.App.4th at 140. Impact fee mitigation is acceptable only if
12 fees will demonstrably be used to implement a “reasonable, enforceable plan or program that the
13 relevant agency commits itself to implementing.” *Anderson First Coalition v. City of Anderson*
14 (2005) 130 Cal.App.4th 111188. In *Anderson First*, conditions required a project to pay 16.87%
15 of the cost of Phase I improvements to an interchange and “to participate in the program” to
16 provide Phase II improvements to that interchange. *Id.* at 1188. Even though the agency stated
17 that “it is preparing an update to the Traffic Impact Fee Program to include the I-5 interchange”
18 and “condition 16 requires payment of the impact fee,” the court found that this provision was
19 too vague and speculative to constitute a “reasonable, enforceable plan or program.” *Id.* at 1189.
20 The court rejected the agency’s argument that it planned to update its fee program in the future to
21 include the needed improvements. *Id.* at 1188-1189. The Court emphasized that actual
22 construction of the improvements must be “fully enforceable.” *Id.*

23 In *Gray*, the court rejected a mitigation scheme as legally inadequate because neither the
24 agency nor Caltrans had adopted a specific plan for necessary improvements – even though the
25 agency had announced an intent to complete some form of improvements and had a clear
26 methodology for collecting impact fees. *Gray, supra*, 167 Cal.App.4th at 1122. The mitigation
27 was deficient because the EIR did not discuss how or when the fees would be collected and
28 spent, how effective the mitigation would be, or whether the agency could ensure funding for

1 necessary improvements. Regardless of the reasonableness of a developer’s contribution,
2 payment into a fee program is insufficient mitigation where the agency will not have sufficient
3 funds to construct the improvements the program is intended to implement. *Napa Citizens for*
4 *Honest Government v. Napa County Board of Supervisors* (2001) 91 Cal.App.4th 342, 364;
5 *Endangered Habitats League v. County of Orange* (2005) 131 Cal.App.4th 777, 785. In sum,
6 fee-based mitigation of traffic impacts under CEQA requires that (1) the specific needed
7 improvement projects actually be included in a committed, enforceable plan and (2) funding for
8 this plan be sufficient.

9 While the standard for review of the effectiveness of mitigation generally is substantial
10 evidence (*Laurel Heights I, supra*, 47 Cal.3d at 409), an incorrect interpretation of CEQA’s
11 mitigation fee requirements is a “failure to proceed in a manner required by law.” *City of Marina*
12 *v. Board of Trustees of California State University* (2006) 39 Cal.4th 341, 365-366. Thus, such a
13 claim should be reviewed non-deferentially.

14 **C. Impact fees are inadequate mitigation for 2030 impacts because needed**
15 **improvements are not included in a committed, funded plan.**

16 The RDEIR’s 2030 analysis states that the addition of Project traffic “to the LOS F
17 conditions along four of the study segments and the degradation of the level of service on
18 westbound State Route 68 between State Route 218 and York Road would result in the project
19 having a significant cumulative impact.” AR 455. Similarly, the analysis identifies a significant
20 cumulative impact at all six study intersections because the Project would add trips to
21 intersections operating at LOS F. AR 452-454; *see* AR 436-437 (significance criteria).

22 The RDEIR and FEIR conclude that payment of the traffic impact fees including the
23 TAMC RDIR and unspecified future “ad hoc mitigation fees” as required by Mitigation Measure
24 3.10-6 “will mitigate the proposed project’s cumulative traffic impacts to the regional roadway
25 network” to a “less than significant level.” AR 459, 329; *see* AR 33 (findings). The RDEIR
26 assumes in its analysis of “mitigated conditions” that all of the physical improvements identified
27
28

1 as necessary to attain acceptable levels of service (AR 457-458) will actually be in place by
2 2030.¹¹

3 However, the proposed payment of impact fees is insufficient mitigation under CEQA
4 because the needed infrastructure improvements, including specified intersection improvements
5 and widening SR68 to four lanes, are not included in a “reasonable, enforceable plan or program
6 that the relevant agency commits itself to implementing.” *Anderson First, supra*, 130
7 Cal.App.4th at 1188. At most, there may be “a commitment to pay fees without any evidence
8 that mitigation will actually occur;” however, by itself, this “is inadequate.” *Save Our*
9 *Peninsula, supra*, 87 Cal.App.4th at 140. “Payment of fees must be tied to a functioning
10 mitigation program.” *California Native Plant Society, supra*, 170 Cal.App.4th at 1055;
11 Guidelines, § 15026.4(a)(2).

12 The evidence that mitigation of 2030 impacts is not part of a reasonable, enforceable plan
13 or program that the County commits itself to implementing is set out in LandWatch’s comments
14 (AR 13136-13138, 270) and elsewhere in the record, and summarized as follows:

- 15 • **EIR Admissions**: The RDEIR admits the needed improvements to intersections 1, 2,
16 3, and 4 “are not included in any CIP; therefore, are not considered feasible.” AR
17 458. The RDEIR also admit that there is no feasible means to mitigate impacts to the
18 two-lane segments of SR68 west of the SR68 Commuter Improvements project
19 because there is no funding for widening SR68 and no other feasible improvements to
20 maintain level of service standards. AR 426, 433-434, 441, 444, 473. Thus, there is
21 no identified program to mitigate segments 1, 2, 3, and 4.
- 22 • **RTP/MTP**: The necessary improvements for intersections 1-4 and segments 1-4 are
23 not included in the 2014 Regional Transportation Plan or in the 2035 Metropolitan
24 Transportation Plan. SAR 22717-22719, 22783-22802. Indeed, the RTP identifies
25 widening SR68 as an “unconstrained” project, i.e., one for which no funding can be
26 identified. SAR 22720.
- 27 • **RDIF Nexus Study**: As the RDEIR admits (AR 445), even if the SR68 Commuter
28 Improvements were constructed timely by 2030,¹² they would only improve segments

11 ¹¹ Compare AR 589-592 (Appendix H’s cumulative analysis of unmitigated lane
12 configurations, resulting in HCM LOS F, that omits intersection improvements) to AR 601-604
13 (Appendix H’s mitigated lane configurations, resulting in HCM LOS C and B, that includes the
14 improvements); see AR 630 (identifying cumulative mitigation), 276 (referencing “4-lane
15 mitigated level of service analysis”).

1 east of Corral de Tierra; thus, TAMC projects that segments to the west (i.e, segments
2 1-4) will remain at unacceptable LOS in 2030. SAR 22753; see SAR 22747.

- 3 • 2010 General Plan: The County’s 2010 General Plan EIR projects that all of the
4 studied segments of SR68 will operate at LOS F under 2030 conditions due to lack of
5 funding to construct necessary improvements. SAR 22869-22874; see AR 13137.

6 Staff repeatedly acknowledged the basic CEQA principle that if mitigation needed to
7 address an impact is not in an adopted, funded program, that impact must be identified as
8 unavoidably significant. AR 5334-5335, 5369. The superseded DEIR also acknowledged this
9 principle for both project-specific and cumulative impacts. AR 918, 923, 933. Indeed, County
10 Counsel advised the Planning Commission that a fee program “can be relied on as CEQA
11 mitigation” for a “cumulative impact” only if needed improvements “are listed on the fee
12 program and sources of funding and there was environmental review done on that fee program.”
13 AR 5372. Thus, County Counsel explained that the SR68 Commuter Improvements counted as
14 mitigation because that project is on the RDIF project list, but “[i]t would be different if it [the
15 needed improvement] – potentially, if it weren’t on the list.” *Id.*

16 Despite these acknowledgements, and despite the admissions that other needed
17 improvements are not “on the list,” planned, or funded, the FEIR claims that usage or custom
18 somehow justifies reliance on admittedly infeasible mitigation for the 2030 impacts, claiming
19 that TAMC and the County “recognize” impact fee payments to be sufficient mitigation for
20 cumulative impacts, e.g., the 2030 impacts here. AR 271. The FEIR argues that “[t]he treatment
21 of cumulative impacts and application of regional mitigation works a little differently than
22 project-specific impacts and project-level responsibility.” *Id.* Not under CEQA. Contrary to the
23 FEIR’s claim, mitigation of cumulative impacts requires the same level of certainty as mitigation
24 of project-level impacts.¹³ Impact fee case law specifically addresses cumulative impacts:

25
26 ¹² As discussed in section II.D below, the SR68 Commuter Improvements are not projected
to be funded before 2035. SAR 22867.

27 ¹³ Furthermore, the RDEIR evaluates both 2015 and 2030 impacts as cumulative impacts,
28 simply using a different temporal scopes. Both are evaluated with the same thresholds of
significance, which recognize that the worse the condition, the smaller the increment that should
be deemed a considerable contribution. AR 436-437 472; see *CBE v. CRA, supra*, 103

1 When future traffic congestion will result from the cumulative impact of several projects,
2 cumulative traffic mitigation measures for a single project (that is one of the several
3 projects) may be deemed sufficient if those measures are based on a reasonable plan of
actual mitigation that the relevant agency commits itself to implementing.

4 *Anderson First, supra*, 130 Cal.App.4th at 1187 (emphasis added). *Save Our Peninsula* is
5 equally clear that CEQA’s requirements for enforceable and certain impact fee mitigation apply
6 to cumulative impacts. 87 Cal.App.4th at 140, *citing* Guidelines, § 15130(a)(3) (concerning
7 cumulative impact mitigation via impact fees); *see also Napa Citizens, supra*, 91 Cal.App.4th at
8 363 (fee-based mitigation useful where “traffic congestion results from cumulative conditions”).
9 Thus, the EIR’s claim that a lesser degree of certainty or enforceability is required for mitigation
10 of cumulative impacts via impact fees is wrong as a matter of law. The Supreme Court has
11 repeatedly held that an incorrect interpretation of CEQA’s mitigation fee requirements is a
12 “failure to proceed in a manner required by law.” *City of Marina, supra*, 39 Cal.4th at 365-366;
13 *City of San Diego v. Board of Trustees of Cal. State Univ.* (2015) 190 Cal.Rptr. 3d 319, 326-327.

14 The County may contend that its impact fee programs are regularly updated, implying
15 that the mitigation for 2030 impacts will be in place later even if it is not now. Not only is this
16 inconsistent with case law that discounts the mere intention to update fee programs (*Anderson*
17 *First, supra*, 130 Cal.App.4th at 1188-1189), but it is factually belied by the EIR’s admission
18 that “Monterey County recognizes that State Route 68 will not be widened to four lanes in its
19 entirety for various reasons; therefore, it is not likely to fully operate at acceptable levels of
20 service at all locations into the future.” AR 437, emphasis added. It is also belied by the
21 ongoing failure of impact fee programs to maintain service standards in the past, evident from
22 existing deficiencies for SR68 segments and intersections. AR 423-424. Indeed, the RDEIR
23 projects progressively worsening conditions, even assuming construction of planned
24 improvements. *Compare* AR 423-424 (existing conditions) *to* AR 432-433 (2015 conditions) *to*
25 AR 452-454 (2030 conditions).

26
27 Cal.App.4th at 120. Both are evaluated against a baseline that includes past, present and future
28 projects, not just existing conditions. AR 428-434, 482 (background conditions are existing
conditions plus projects to be constructed over the next 5 years); AR 451, 488 (cumulative
conditions are all projects projected in service through 2030); *see* Guidelines, § 15130(a)(1), (b).

1 The EIR and findings fail even to identify all of the needed future impact fees and
2 improvements fee programs. The future “Monterey County ad hoc Traffic Mitigation Fees”
3 included in Mitigation Measure 3.10-6 are nowhere explained or identified. AR 329, 34. Staff
4 admit that needed future improvements for unavoidably significant impacts at intersections 2, 3,
5 and 4 are “not at this time as [sic] identified on the program.” AR 5365. Cumulative impacts
6 cannot be deemed mitigated by “paying an unspecified amount of money at an unspecified time
7 in compliance with an as yet unenforced or unspecified transit funding mechanism.” *San*
8 *Franciscans for Reasonable Growth v. City and County of San Francisco* (1984) 151 Cal.App.3d
9 61, 79. Case law specifically rejects the notion that “any fee program is necessarily or
10 presumptively ‘full’ mitigation.” *California Native Plant Society, supra*, 170 Cal.App.4th at
11 1055. Good intentions do not count: impact fee mitigation must be part of a committed, funded
12 program when the project is approved. *Anderson First, supra*, 130 Cal.App.4th 1188; *Gray,*
13 *supra*, 167 Cal.App.4th at 1121-1122.

14 Finally, the County may argue that a purported improvement in corridor travel time due
15 to the SR 68 Commuter Improvements demonstrates that cumulative impacts are mitigated. *See,*
16 *e.g.*, AR 444-447 (noting reduced travel time reduces 2015 impacts), 496 (same). The claim is
17 unfounded. First, the RDEIR is clear that significance is determined with reference to level of
18 service at specific intersections and segments, not overall corridor travel time. AR 436-437
19 (setting out LOS thresholds and explain that “conventional thresholds of significance are
20 recognized and used in this report”), 447 (“significance thresholds used in this report” include
21 “‘one traffic trip’ entering facility of LOS F”), 452-456 (significant cumulative impacts are due
22 to adding trips to LOS F facilities). Mitigation must address the significant impact that is
23 “identified in the EIR,” and “as identified in the EIR.” Guidelines, §§ 15126.4(a)(1)(A),
24 15091(a)(1). Here, the significant impacts identified in the EIR were impacts to intersection and
25 segment levels of service, not corridor travel time. Second, the corridor travel time study does
26 not even evaluate cumulative 2030 conditions; it assesses only 2015 conditions. AR 613-614.
27 Because cumulative 2030 conditions will include thousands more trips than background 2015
28 conditions (*compare* AR 525 to AR 581), and because the EIR provides no analysis of corridor

1 travel time under cumulative conditions, there is no evidence that the SR 68 Commuter
2 Improvements will reduce travel time for cumulative conditions compared to existing conditions.
3 The evidence is to the contrary because the RDEIR projects much worse intersection and
4 segment level of service under 2030 conditions than under 2015 or existing conditions.
5 *Compare* AR 452, 454 to AR 439, 442. Since LOS measures intersection delay and travel speed
6 (AR 419), worsening LOS means longer travel times.

7 **D. Impact fees are inadequate mitigation for 2015 impacts to intersections 4 and 5 and**
8 **to segment 5 because needed improvements are not included in a committed, funded**
9 **plan.**

10 The EIR concludes that payment of the TAMC impact fee will mitigate impacts under
11 2015 conditions to SR68 segment 5 and intersections 5 and 6. AR 447. The DEIR justifies this
12 conclusion by arguing that the State Route 68 Commuter Improvements are components of the
13 TAMC impact fee. *Id.* However, because this TAMC project is neither funded nor committed,
14 there is no “reasonable, enforceable plan or program that the relevant agency commits itself to
15 implementing.” *Anderson First, supra*, 130 Cal.App.4th at 1188. The evidence that mitigation
16 of impacts to intersections 4 and 5 and to segment 5 is not part of a reasonable, enforceable plan
17 or program that the County commits itself to implementing is set out in LandWatch’s comments
18 and supporting documentation (AR 13133-13136), and summarized as follows:

- 19 • County Admission: In response to comments requesting this information, the FEIR for
20 the adjacent Ferrini Ranch project admits that the SR68 Commuter Improvements project
21 “is not currently funded or scheduled for completion.” RJN, Exhibit 1; *see* AR 13135;
see also AR 5362 (staff admit that there is no “actual schedule”).
- 22 • TAMC RTP: In addition, the TAMC 2014 RTP indicates that the SR68 Commuter
23 Improvements are not currently projected to be funded before the year 2035. SAR
24 22717; *see* AR 13135.
- 25 • TAMC admission: TAMC’s Executive Director confirmed that construction is not
26 scheduled for the SR68 Commuter Improvements and that funding is not planned prior to
27 2035. SAR 22867; *see* AR 13135.

28 TAMC’s Executive Director stated that “[w]e don’t have funding, but plan to fund it from
development impact fees.” SAR 22867. However, TAMC may not legally fund the project from

1 development impact fees alone. Impact fees may be used to fund only 16.5% of the cost of the
2 State Route 68 Commuter Improvements because developer exactions cannot be used to remedy
3 existing deficiencies. AR 13135, *citing* SAR 22730-22731 (nexus study, stating “RDIF program
4 only represents a portion of the required funding for each of the proposed projects”), SAR
5 22759, 22764 (nexus study, listing those portions)]; *see* Gov. Code § 6601(g) (Mitigation Fee
6 Act, limiting use of impact fees). And TAMC’s nexus study admits that the RDIF cannot
7 “ensure a mechanism for complete funding for all RDIF program projects at this time.” SAR
8 22765. The 2014 RTP admits that transportation funding is “decreasing and becoming less
9 consistent.” SAR 22596. Thus, TAMC projects that the SR68 Commuter Improvements will
10 not fund before 2035. SAR 22867, 22717. Indeed, the County admits in the EIR for the adjacent
11 Ferrini project that the SR 68 Commuter Improvements will not be timely mitigation for 2015
12 impacts, stating “[t]he DEIR does not assume completion of these projects under Existing
13 Conditions or Background [2015] Conditions.” RJN, Exhibit 1

14 In sum, there is no identified source for 83.5% of the funding required for the SR68
15 Commuter Improvements, and available evidence indicates that the project is uncertain and will,
16 in any event, not be available to mitigate impacts in 2015. Under these circumstances, the fact
17 that the RDIF includes a portion of the funding for necessary improvements does not provide
18 sufficient certainty. *Napa Citizens, supra*, 91 Cal.App.4th at 364. The EIR fails to recognize
19 that mitigation requires physical improvements not just payment of fees. There is no evidence
20 that mitigation will occur because there is not enough money to build the projects. Here, a
21 “commitment to pay fees without any evidence that mitigation will actually occur is inadequate.”
22 *Save Our Peninsula, supra*, 87 Cal.App.4th at 140.

23 **III. The County abused its discretion under CEQA because it failed to**
24 **recirculate the EIR despite disclosure of new significant traffic impacts after**
25 **the RDEIR.**

26 The RDEIR concludes that the Project’s payment of impact fees would mitigate impacts
27 to SR68 intersections 5 and 6 at Corral de Tierra and San Bernancio Road and to segment 5
28 between these two intersections to less than significant based on the SR68 Commuter

1 Improvements Project. AR 447. Staff confirmed this at hearings. AR 14435, 5242-5243, 5334-
2 5335. Despite this, the CEQA findings identify the 2015 impacts at the Corral de Tierra
3 Road/SR 68 and San Benancio Road/SR 68 intersections and at the SR 68 segment between
4 Corral de Tierra Road and San Benancio Road as significant and unavoidable. AR 35. As
5 LandWatch objected (AR5830), the belated acknowledgement of these new significant impacts,
6 contrary to the RDEIR, required recirculation. Guidelines, §15088.5(a)(1) (disclosure of a new
7 significant impact requires recirculation); *Vineyard, supra*, 40 Cal.4th at 448.

8 Furthermore, the County cannot cure an inadequate analysis simply by labeling an impact
9 unavoidably significant. *Berkeley Keep Jets Over the Bay Committee v. Board of Port*
10 *Commissioners* (2001) 91 Cal.App.4th 1344, 137. The County must disclose its analytic route
11 from evidence to action. *Vineyard, supra*, 40 Cal.4th at 445. The unexplained last-minute
12 reversal in the significance conclusions conflicts with the requirement to disclose the analytic
13 route. *California Clean Energy Comm. v. City of Woodland* (2014) 225 Cal.App.4th 173, 205.

14 **IV. The County abused its discretion under the Planning and Zoning law and**
15 **Subdivision Map Act because the Project conflicts with General Plan traffic**
16 **policies and the County failed to make findings regarding these policies.**

17 **A. Consideration of General Plan traffic policies in the record.**

18 Pre-2007 subdivision applications are governed by the then-applicable General Plan. AR
19 6; *see also* Gov. Code §66474.2. Thus, the EIR and the County's findings purport to determine
20 the Project's consistency with the 1982 General Plan. AR 862-870, 6-13.

21 The public objected as early as 2005 that approval of the Project is inconsistent with
22 General Plan traffic policies because it would aggravate already unacceptable levels of service
23 on SR68. AR18776. Although the 2003 Initial Study argues that payment of impact fees would
24 avoid these conflicts by reducing impacts to a less than significant level (AR 4650, 4654-4658),
25 the subsequent 2008 DEIR admits that payment of impact fees would not in fact mitigate
26 significant impacts to less than significant levels under either 2015 or 2030 conditions. AR 918,
27 923, 933. Despite this conclusion, the DEIR's analysis of General Plan consistency does not
28 even mention the General Plan traffic policies. AR 862-869.

In particular, the DEIR does not address the Policies put at issue by LandWatch:

- 1 • Policy 37.2.1: “Transportation demands of proposed development shall not exceed an
2 acceptable level of service for existing transportation facilities, unless appropriate
3 increases in capacities are provided for.” AR 22231.
- 4 • Policy 39.1.4: “New development shall be located where there is existing road and
5 highway capacity or where adequate road and highway capacity will be provided.” AR
6 22233.
- 7 • Policy 26.1.4: “The County shall designate growth areas only where there is provision for
8 an adequate level of services and facilities such as water, sewerage, fire and police
9 protection, transportation, and schools. Phasing of development shall be required as
10 necessary in growth areas in order to provide a basis for long-range services and facilities
11 planning.” AR 22208.

12 Although the 2009 RDEIR traffic section lists General Plan traffic Policy 37.2.1, it does so
13 without discussion. AR 434. None of the staff reports consider General Plan Policies 37.2.1,
14 39.1.4, or 26.1.4.¹⁴ Neither did the Planning Commission resolution denying Project approvals.
15 AR 4342-4345. Although the public objected to the Planning Commission that the Project was
16 inconsistent with Policies 37.2.1 and 39.1.4 (AR 5288-5289), and the Commission asked staff’s
17 opinion (AR 5297), staff only responded ““I’d have to go back and look at those policies and
18 respond.” AR 5297. Staff did not respond to the Planning Commission, and LandWatch and the
19 public repeatedly objected to the inconsistencies in letters to the Supervisors and testimony. AR
20 13138-13139, 5830, 5184, 5048. The only response from the County was staff testimony that
21 payment of the TAMC RDIF ensured consistency with Policy 39.1.4. AR 5153, 4927. The
22 County’s findings found the Project consistent with the 1982 General Plan without mentioning or
23 making findings related to Policies 37.2.1, 39.1.4, or 26.1.4. AR 6-13, 16.

24 **B. The County abused its discretion by approving a Project inconsistent with General
25 Plan traffic policies.**

26 Claims of general plan inconsistency are reviewed under an abuse of discretion standard,
27 where the inquiry is whether the agency “has not proceeded in a manner required by law, its

28 ¹⁴ See staff reports at AR 1755-1762, 1765-1766, 1781-1782, 3519-3523, 3702-3704, 3706-
3707, 3709-3711, 3713-3717, 3760-3763, 3783-3787, 3789-3791, 4348-4353, 4372-4376, 4379,
4484-4488, 4507, 4580-4583, 2318-2321, 4737-4741, 4789-4793.

1 decision is not supported by findings, or the findings are not supported by substantial evidence.”
2 *Napa Citizens, supra*, 91 Cal.App.4th at 357; *Families Unafraid to Uphold Rural El Dorado*
3 *County v. Board of Supervisors of El Dorado County (“FUTURE”)* (1998) 62 Cal.App.4th 1334,
4 1338. Where a project conflicts with a single general plan policy, its approval may be reversed.
5 *San Bernardino County Audubon Society, Inc. v. County of San Bernardino* (1984) 155
6 Cal.App.3d 738, 753; *FUTURE, supra*, 62 Cal.App.4th at 1341. Consistency demands that a
7 project both “further the objectives and policies of the general plan and not obstruct their
8 attainment.” *FUTURE, supra*, 62 Cal.App.4th at 1336; *see Napa Citizens, supra*, 91 Cal.App.4th
9 at 378. Accordingly, where a petitioner alleges that a project conflicts with general plan
10 circulation element policies, a court need not find an “outright conflict.” *Napa Citizens, supra*,
11 91 Cal.App.4th at 379. “The proper question is whether development of the [project] is
12 compatible with and will not frustrate the General Plan’s goals and policies . . . without definite
13 affirmative commitments to mitigate the adverse effect or effects.” *Id.* In *Napa Citizens*, the
14 court held that an agency could not approve a project that increases traffic congestion in
15 contravention of general plan policies without a “binding commitment” to alleviate that
16 congestion. *Id.* at 380.

17 Here, the Project is inconsistent with 1982 General Plan Policy 37.2.1, which provides
18 that “[t]ransportation demands of proposed development shall not exceed an acceptable level of
19 service for existing transportation facilities, unless appropriate increases in capacities are provide
20 for.” AR 22231. The EIR admits that the Project will result in significant and unavoidable 2015
21 impacts to SR68 intersections 2 and 4 and segments 2, 3, and 4, all of which are projected to
22 operate at unacceptable levels of service. AR 447. The EIR admits that the Project will “further
23 exacerbate an unacceptable LOS F operating condition” at these intersections and segments (AR
24 441, 444) and that additional capacity is infeasible (AR 426, 433-434, 441, 444, 473). In
25 addition, the CEQA findings admit that the Project will also cause unavoidably significant
26 impacts to intersections 4 and 5 due to lack of funding. AR 35; *see also* section II.D above.
27 Admission of these significant and unmitigated 2015 impacts and the infeasibility of providing
28 additional capacity is an admission that the Project conflicts with Policy 37.2.1,

1 In addition to these admitted significant and unavoidable 2015 impacts, it is clear that the
2 increases in capacity cannot be provided to ensure acceptable service levels under 2030
3 conditions. As discussed in section II.C above, payment of existing impact fees cannot be found
4 to ensure acceptable service levels under 2030 conditions because (1) the EIR, the TAMC RTP,
5 and the County’s 2010 General Plan admit that widening SR68 is infeasible, (2) the EIR admits
6 that needed intersection improvements are not planned or funded, and (3) the EIR projects that
7 service levels will continue to deteriorate.

8 Where there is no funding for necessary improvements, mitigation is infeasible, and a
9 project conflicts with general plan policies calling for reducing congestion. *Napa Citizens*,
10 *supra*, 91 Cal.App.4th at 364, 380. Indeed, the County admits it has abandoned the mandatory
11 Policy 37.2.1 requirement for “acceptable” service levels in the SR 68 corridor: “Monterey
12 County recognizes that State Route 68 will not be widened to four lanes in its entirety for various
13 reasons; therefore, it is not likely to fully operate at acceptable levels of service at all locations
14 into the future.”¹⁵ RJN, Exhibit 2, emphasis added. This admission is an acknowledgment that
15 Policy 37.2.1 has been and will continue to be violated by the approval of any additional
16 development.

17 The Project is inconsistent with Policy 39.1.2, requiring that “[n]ew development shall be
18 located where there is existing road and highway capacity or where adequate road and highway
19 capacity will be provided.” AR 22231. The County’s claim that payment of fees is sufficient to
20 ensure consistency with this policy (AR 5153, 4927) is absurd in light of its admission that
21 construction of improvements needed to provide adequate capacity is infeasible. Finally, the
22 Project is inconsistent with Policy 26.1.4 requiring phasing of projects to ensure adequate levels
23 of service for transportation (AR 22208) because it is not required to be phased to ensure
24 sufficient transportation capacity.

25
26 ¹⁵ Furthermore, the EIR makes it clear that the County has failed to enforce Policy 37.2.1 in
27 its recent development approvals. The RDEIR demonstrates that intersections and segments
28 with acceptable service under existing conditions will degrade by 2015 to unacceptable levels
due to buildout of already approved projects. *Compare* AR 423-424 (existing LOS tables) to
432-433 (2015 LOS tables, showing worsening LOS due to approved projects).

1 There is overwhelming evidence that the Project conflicts with traffic policies. And there
2 is no evidence to the contrary because the County ignored the issue with respect to Policies
3 37.2.1 and 26.1.4 and its claim with regard to Policy 39.1.4 is contradicted by its own admissions
4 that capacity cannot be provided . The County abused its discretion by approving a project that
5 is inconsistent with the General Plan. Gov. Code, § 66473.5; *Friends of Lagoon Valley v. City of*
6 *Vacaville* (2007) 154 Cal.App.4th 807, 815.

7 **C. The County abused its discretion by failing to make express findings supported by**
8 **substantial evidence regarding consistency with General Plan traffic policies.**

9 An agency abuses its discretion if either (1) its findings are not supported by substantial
10 evidence or (2) its decision is not supported by findings. C.C.P. §1094.5(b); *Topanga, supra*, 11
11 Cal.3d at 514-515. Findings are required to enable the court to examine and trace the mode of
12 analysis and to enable parties “to determine whether and on what basis they should seek review.”
13 *Id.* at 516-517. An agency “must set forth findings to bridge the analytic gap between the raw
14 evidence and ultimate decision or order.” *Id.* at 515. Failure to make express findings that a
15 subdivision is consistent with relevant general plan policies is an abuse of discretion because the
16 agency decision is not supported by findings. *Woodland Hills Residents Assn., Inc. v. City*
17 *Council of Los Angeles* (1975) 44 Cal.App.3d 825, 837. Perfunctory or conclusory findings are
18 not sufficient because they fail to provide the analytic link demanded by *Topanga* and disable
19 judicial review. *Honey Springs Homeowners Assn., Inc. v Board of Supervisors of San Diego*
20 *County* (1984) 157 Cal.App.3d 1122, 1150-1151; *West Chandler Blvd. Neighborhood Assn. v*
21 *City of Los Angeles* (2011) 198 Cal.App.4th 1506, 1520-1522. Where findings are absent, the
22 court cannot hypothesize findings even if there is evidence in the record that might support
23 findings. *Sierra Club v. City of Hayward* (1981) 28 Cal.3d 840, 859.

24 As in *Woodland Hills Residents Association*, the County simply ignored evidence raised
25 by the public that the Project is inconsistent with the 1982 General Plan traffic Policies 37.2.1
26 and 26.1.4. *Woodland Hill, supra*, 44 Cal.App.3d at 837. Nor, despite perfunctory staff
27 testimony that improperly equates payment of some impact fees with provision of adequate
28 capacity, did the County make any specific finding regarding Policy 39.1.4. The failure to make
specific findings in the face of evidence that the Project is inconsistent is an abuse of discretion.

1 *Id.*; *Honey Spring, supra*, 157 Cal.App.3d at 1150-1151. Here, the Court cannot hypothesize
2 findings of consistency for the County even if there were facts in the record to support such a
3 finding, because judicial review is limited to determining whether necessary findings were made,
4 and, if so, whether they were supported by substantial evidence. *Sierra Club v. City of Hayward,*
5 *supra*, 28 Cal.3d at 859. The County's conclusory umbrella findings of consistency with the
6 1982 General Plan (AR 6, 16) will not suffice because findings must contain reasons and
7 evidence. *Topanga, supra*, 11 Cal.3d at 514-515; *West Chandler, supra*, 198 Cal.App.4th at
8 1520-1522.

9 **CONCLUSION**

10 For all of the foregoing reasons, LandWatch asks this Court issue a writ of mandate
11 setting aside the certification of the EIR and the Project approvals.

12 Dated: August 16, 2016

M. R. WOLFE & ASSOCIATES, P.C.

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Mark R. Wolfe
John H. Farrow
Attorneys for Petitioner LandWatch Monterey
County

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 August 16, 2016, I served the attached **OPENING BRIEF BY PETITIONER LANDWATCH MONTEREY COUNTY** 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:

<p>RUTAN & TUCKER, LLP Matthew D. Francois Five Palo Alto Square 3000 El Camino Real, Suite 200 Palo Alto, CA 94306-9814 mfrancois@rutan.com</p> <p>Michael Cling Cling & Associates 313 Main Street, Suite D Salinas, CA 93901 mdc@michaelcling.com <i>Attorneys for RPI Harper Canyon Realty, LLC</i></p>	<p>Richard Rosenthal Law Offices of Richard Rosenthal, A Professional Corporation 27880 Dorris Drive, Ste. 110 Carmel Valley, CA 93923 rrosenthal62@sbcglobal.net <i>Attorneys for Petitioner Meyer Community Group</i></p>
<p>Kelly Donlon Deputy County Counsel Office of the County Counsel 168 W. Alisal Street, Third Floor Salinas, CA 93901 donlonkl@co.monterey.ca.us <i>Attorneys for Respondent County of Monterey</i></p>	

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 August 16, 2016.



John Farrow