

June 13, 2011

Via Hand Delivery

Board of Supervisors
County of Monterey
168 West Alisal Street
Salinas, CA 93902

Re: MST/Whispering Oaks Rezone and Use Permit – PLN110231

Dear Members of the Board:

We write on behalf of LandWatch Monterey County regarding the MST/Whispering Oaks development project proposed for the former Fort Ord base (the “Project”). LandWatch has participated in the environmental review of the Project and has opposed it for a number of reasons, including the unnecessary removal of thousands of oak trees and at least 37 acres of oak woodlands. Although there are clearly alternative locations and/or designs for the Project that would avoid this impact, these alternatives were not considered in the EIR. The County cannot comply with CEQA or make the required findings under its tree preservation ordinance based on the record before you.

The EIR fails to evaluate and mitigate impacts to oak woodlands adequately and its alternatives analysis is flawed. The Project does not meet the requirements for a use permit for tree removal. The Project is inconsistent with the Fort Ord Reuse Plan and with the Fort Ord Master Plan, and these plans are themselves inconsistent. Finally, the analysis of water supply impacts is inadequate under CEQA and is insufficient to support findings required by the County’s General Plan.

We ask that the County reject the appeal and deny the Project’s entitlements.

Specific objections are set forth below.

A. EIR’s Analysis And Mitigation Of Impacts To Oak Woodlands Is Inadequate

The announced bases of the EIR’s conclusion that impacts to oak woodlands are less than significant are considerations of the Project’s context, design, and mitigation measures. Unfortunately the Project design is so incomplete and unstable that the EIR is unable to provide an adequate analysis of impacts or to specify required mitigation. The

last minute provision of conflicting accounts of the Project design, accounts that are not part of the EIR, compound this problem.

Critically, the EIR lacks any coherent threshold of significance that would enable the public and decision makers to understand the conclusion that impacts are less than significant. While the DEIR recited CEQA Appendix G standards of significance for biological resources (DEIR, pp. 2-39 to 2-40), it does not actually identify or apply a standard of significance in its discussion of impacts to oak woodlands. DEIR, pp. 2-65 to 2-66. Thus, for example, it is unclear whether the EIR focuses on loss and replacement of individual trees or loss and replacement of acres of habitat, and whether quality of the lost and replaced habitat is a consideration. It is incumbent on the EIR to explain what *would* constitute a significant impact, and, equally importantly, what would constitute adequate mitigation. Without this, the EIR fails as an informational document.

The EIR admits that impacts are significant, but without identifying any objective criteria of significance. Because CEQA only permits an agency to impose mitigation for significant impacts, the public must assume that the EIR proposes just those measures that are essential to meet some unstated but implicit threshold of significance. Thus, if any of the mitigation fails to meet CEQA's requirements, the public can only conclude that impacts remain significant. As discussed below, the mitigation does in fact fail because it does not meet the requirements of the Oak Woodlands Conservation Act, because it is unenforceable, and because it is improperly deferred.

In addition, the EIR misrepresents the Project's context within the Fort Ord Reuse Plan, incorrectly claiming that it fulfills a policy to protect oak woodlands and that the Fort Ord Habitat Management Plan is intended to mitigate the loss of oak woodlands. The EIR also improperly credits the Project with protecting oak woodlands that are already protected and fails to meet the requirements of the Oak Woodlands Conservation Act.

1. Ostensible Basis Of Significance Finding

Project construction would result in the direct loss of 37.4 acres of oak woodlands.¹ DEIR, p. 2-65. The Project would result in additional losses of oak woodlands, which the EIR does not quantify, through construction of required off-site drainage improvements. DEIR, pp. 2-65, 1-43 to 1-59. The EIR announces that the

¹ This estimate is apparently based on Table 1 of the August 2009 MST/Whispering Oaks Business Park Biological Assessment ("Biological Assessment"). DEIR, App. D, Biological Assessment, p. 11. Unaccountably, Table 1-2 of the August 2009 Preliminary Oak Woodland Habitat and Tree Removal Mitigation Strategy Plan for the MST Facility/Whispering Oaks Business Park Site ("Preliminary Mitigation Strategy Plan") identifies only 14 acres of oak woodland habitat acreage at the Project site. DEIR, App. D, Preliminary Mitigation Strategy Plan, p. 3. This inconsistency in concurrent reports by the same consultant undercuts their informational value to the public and decision makers as well as reliance on them to support findings.

Project's impacts to oak woodlands would be rendered less than significant based on the following considerations:

- The Fort Order Reuse Plan EIR determination that oak woodlands habitat impacts would be less than significant due to the establishment of base-wide conservation area required by the Fort Ord Habitat Management Plan ("HMP").²
- The Project's purported consistency "with that HMP and the associated impact analysis of the Base Reuse Plan EIR."
- The Project's purported implementation of Alternative 1 of the permissible mitigation strategies of the Oak Woodlands Conservation Act, Public Resources Code § 21083.4(b)(1), calling for conservation easements to preserve oak woodlands, through the Project's payment of FORA development fees, a portion of which goes to management of the open space, and through establishment of conservation easements on Parcels C and D.
- Mitigation Measures BIO-10, 11, and 12 calling for compliance with planning documents, some of which do not yet exist; protections for retained trees; replanting or replacing some trees on site; preservation of existing trees where that is subsequently found to be "feasible;" "considering" design changes to preserve landmark trees; payment of FORA impact fees for open space maintenance; and off-site replanting and habitat management or payment of in-lieu fees. See DEIR, p. 2-65; FEIR, pp. 4-9 to 4-13 (one version of BIO-10 and 11); Staff Report, June 14, 2011, Exhibit B, pp. 36-37 (another version of BIO-10 and 11).

The EIR's analysis of the significance of the Project's impacts to oak woodlands and its determination of the sufficiency of mitigation are based on the following documents included in Appendix D to the EIR:

- MST Facility/Whispering Oaks Business Park Biological Assessment, August 2009 (Biological Assessment");
- Forest Resources Evaluation, Whispering Oaks Business Park, August 2009 ("Whispering Oaks Forest Resource Evaluation");
- Forest Management Plan for Monterey Salinas Transit Bus Maintenance and Operations Facility, August 2009 (MST Forest Management Plan");
- Preliminary Oak Woodland Habitat and Tree Removal Mitigation Strategy Plan for the MST Facility/Whispering Oaks Business Park Site, August 2009 ("Preliminary Mitigation Strategy Plan").

² I.e., the Army Corps of Engineers 1997 Installation-wide Multispecies Habitat Management Plan, available at http://www.fortordcleanup.com/docreview/reportsviewdoc.asp?document=Habitat_list.

In addition to this material that was included in the EIR, the June 14 Staff Report provides the public for the first time a document titled “Whispering Oaks Oak Tree Preservation and Recovery Strategy.” Staff Report, June 14, 2011, Exhibit P. Although this document has a similar title to the “Oak tree preservation and recovery strategy” referenced in Mitigation Measure BIO-10 and the “Oak Tree Preservation-recovery Strategy” document referenced in Mitigation Measure BIO-11, this document was apparently prepared recently and in connection with the appeal of the Planning Commission rejection of the Project. Furthermore, it is described as an “applicant submittal” and therefore does not appear to constitute a replacement version of the Preliminary Oak Woodland Habitat and Tree Removal Mitigation Strategy Plan for the MST Facility/Whispering Oaks Business Park Site, August 2009, which was prepared by the EIR consultant and which was referenced in the Biological Assessment, the MST Forest Management Plan, the Whispering Oaks Forest Resource Evaluation, and the mitigation measures included in the EIR. Finally, as discussed below, the newly submitted Whispering Oaks Oak Tree Preservation and Recovery Strategy conflicts with the earlier documents that *are* referenced and included in the EIR. Thus, it is not clear whether and to what extent this document is in fact controlling as to mitigation obligations. It is clear, however, that this document was not part of the EIR.

2. The Project Description Is Inadequate To Support Analysis Of Impacts And Mitigation

CEQA requires an accurate, stable project description that provides an adequate basis to evaluate and mitigate project impacts. CEQA Guidelines, § 15124. Here, the EIR fails to provide an adequate description of the Project, because the Project design as it affects oak woodlands had not yet been developed. It still has not been developed. Furthermore, the June 14 Staff Report states that the project description has been changed and provides two conflicting applicant submittals discussing those changes. This is inconsistent with the requirement that the Project be consistently and adequately described in the EIR. Finally, if the Project has changed, then the Planning Commission must review it before action by the Board.

PROJECT FOR WHISPERING OAKS LOTS 2-15 IS UNDEFINED: In particular, there is no design for the Whispering Oaks portion of the Project, representing half of the area to be developed. Thus, the Forest Management Plan required by the County’s tree preservation ordinance could not be prepared. Whispering Oaks Forest Resources Evaluation, p. 1; see Monterey County Code, § 21.64.260.D.3. Instead, the Whispering Oaks Forest Resource Evaluation was prepared. The Forest Resource Evaluation admits that it does not and cannot evaluate “specific impacts to trees relative to construction on the site.” *Id.* The Whispering Oaks Forest Resources Evaluation does not function as a Forest Management Plan. It does not provide any substantive description of the Project or a plan identifying the trees to be removed or retained. It does not identify where trees will be replanted. It references the Preliminary Mitigation Strategy Plan, but it is no longer clear whether and how that document relates to Project mitigation.

Despite this, the June 14 Staff Report and Findings repeatedly and erroneously assert that a Forest Management Plan has been prepared for the Whispering Oaks portion of the Project. See June 14 Staff Report: Exhibit A, p. 10 (discussion); Exhibit B, p. 36 (Mitigation Measure BIO-10, referencing “Forest Management Plans that were prepared for the MST and Whispering Oaks Business park sites); Exhibit R (identifying Whispering Oaks Forest Resources Evaluation as a “Forest Management Plan”); Exhibit D-2, pp 6, and 12 (resolution claiming Forest Management Plans were prepared for both sites and listing a Forest Management Plan for the Whispering Oaks site).

OFF-SITE DRAINAGE SYSTEM UNDEFINED: Furthermore, the DEIR admits that required off-site drainage improvements could result in additional oak tree losses, but it does not even attempt to quantify these losses, and it ignores these losses in discussing the extent of oak tree losses. DEIR, p. 2-65. Three off-site drainage plans have been developed, but the EIR does not identify which alternative will be selected. DEIR, pp. 1-44 to 1-59. No Forest Management Plan or Forest Resource Evaluation was prepared, or is even discussed, for the oak tree losses in connection with off-site drainage.

NEW APPLICANT SUBMITTALS CHANGE PROJECT DESCRIPTION BUT ARE INCONSISTENT WITH THE EIR AND EACH OTHER: The June 14 Staff Report repeatedly states that “the project description has been changed” to show that more trees will be retained. Staff Report, June 14, 2011, Exhibit A, p. 10; see also p. 3 (summary), Exhibit D2, p. 13 (findings). This claim is apparently based on a May 24, 2011 letter from the applicant submitted to support the appeal and another undated recent submittal captioned Whispering Oaks Oak Tree Preservation and Recovery Strategy. Staff Report, June 14, 2011, Exhibits N and P.

These last minute changes to the Project description were not in the EIR and are inconsistent with documents that are in the EIR. Furthermore, the changes are not in fact based on the completion of an adequate project description.

The applicant’s letter claims that tree removal estimates in the DEIR were worst case assumptions and that “a more detained analysis of the likelihood of actual tree removal was undertaken.” Staff Report, June 14, 2011, Exhibit N, p. 1. However this “more detailed analysis” is not in the EIR and it is not included in the applicant’s letter either. The letter provides only an “estimate” that 10-35% of trees within the development parcels can be retained and an “assumption” that 20% will be retained. The applicant’s letter then concludes that “an estimated additional 660 trees will be preserved at the site.” Id. at 2. Unaccountably, the applicant’s letter then purports to commit the Project to reduce the number of trees to be removed by 1,000 – not just the 660 that were “estimated.” Id.

There no actual design basis for this claim. The June 14 Staff Report admits that there are still no plans for the actual development of the Whispering Oaks portion of the Project on lots 2-16. Staff Report, June 14, 2011, Exhibit A, p. 6. The applicant’s letter

contains no factual details to support this analysis, references no fact-based expert opinion, and clearly constitutes a self-interested claim. There is simply no evidence that the claimed level of tree retention is feasible. (Furthermore, there is no evidence that retention of isolated pockets of trees along parking lots and streets retains any habitat value.)

The tree retention estimates in the applicant's letter are also contradicted by the applicant's submittal captioned Whispering Oaks Oak Tree Preservation and Recovery Strategy. For lots 2-14, that document states that "the 'target' for the above preservation strategy is a minimum of 250 resident oaks." Staff Report, June 14, 2011, Exhibit P, p. 1. For the MST lot (Lot 1), that document identifies only 158 trees that can be retained (148+10 in the buffer and east of the buffer). *Id.* at 2. Thus, while the applicant's letter claims retention of 1,000 trees, the applicant's mitigation strategy only identifies 408.

And both of the recent submittals are inconsistent with the MST Forest Management Plan and the Whispering Oaks Forest Resource Evaluation that were contained in the EIR. For example, the MST Forest Management Plan at page 6 states that of the 2568 trees at the site, 2,420 will be removed and only 148 will be retained. The Whispering Oaks Forest Resources Evaluation identifies 3,598 trees at the site (at page 4), but states that the numbers of trees to be removed and replaced cannot be determined without a design plan (at pages 8-9).

The applicant does not and cannot provide any guarantee that any specific number of trees will be retained. In fact, the Staff Report makes it clear that the applicant is welcome to come back to the County for permission to remove additional trees on the site: "[a]s the 15 lots are developed within the business park, a maximum of 1,000 trees could be removed for those developments *before additional tree permitting is required.*" Staff Report, Exhibit A, p. 9 (discussion, emphasis added).

Finally, as discussed below, the new applicant submittal is not consistent with the EIR's provisions for replanting trees on-site and off-site mitigation.

In sum, the project description is inadequate to support analysis of Project impacts; and, in fact, the EIR fails to disclose the extent and location Project impacts.

INADEQUATE PROJECT DESCRIPTION PRECLUDES EFFECTIVE MITIGATION AND ADEQUATE FINDINGS: The County must find that impacts will be mitigated, its findings must be supported with substantial evidence, and mitigation must be feasible. CEQA Guidelines, §§ 15091(a)(1), (b), 15126.4(a). Because the Project is inadequately described, this is not possible.

A portion of the purported mitigation includes the creation of easements on Parcels C and D. As discussed below, the EIR does not identify the oaks on these parcels either by number or by a more meaningful measure such as acres of habitat. Nor does the EIR demonstrate that these parcels will protect oaks that are not already protected. Nor

does the EIR demonstrate that these parcels qualify as conservation easement locations under the Oak Woodlands Conservation Act, because they are identified as replanting sites, which is inconsistent with also treating them as easement locations. However, even if these defects could be overcome, the EIR does not actually identify the easements that would be created, and the conditions of approval make it clear that this determination has not yet been made. Condition 11 calls for conveying an easement on Parcel C. No condition apparently requires conveying an easement on Parcel D. Even if the omission of parcel D is an oversight that is corrected, Condition 11 does not specify the extent and nature of the easement. Instead, it merely states that “[t]he easement shall be developed in consultation with certified professional.” Thus it is entirely unclear how many oaks or how many functional acres of oak woodlands habitat would be conserved.

Furthermore, a portion of the mitigation calls for retention of existing trees where “feasible.” FEIR, pp. 4-9, 4-12 (Mitigation Measures BIO-10 and 11). However, the EIR does not and cannot determine whether or to what extent this proposed mitigation is feasible, because it is unclear how the building pads for subdivision lots 2-16 will be laid out. Thus, it is unclear whether and to what extent it will actually be feasible to retain oak trees. The County cannot reasonably find that the proposed mitigation in BIO-10 and BIO-11 calling for tree retention *is* feasible because the very determination of feasibility must await an adequate project description.

Finally, no reference is made to mitigation of potential losses due to off-site drainage in Mitigation Measures BIO-10, 11, and 12. Again, the absence of an adequate project description precludes effective and complete mitigation.

3. The Fort Ord Habitat Management Plan Is Not Intended To Mitigate Impacts To Oak Woodlands

The Fort Ord Habitat Management Plan expressly covers only a discrete list of individual species (“HMP species”), which does not include oak trees. HMP, p. 1-15. The only habitat types that were analyzed in the HMP were maritime chaparral; coastal strand; dune, scrub; beaches, bluffs, and blowouts; ice plant mats; and disturbed dunes. HMP at 1-16. Impacts to oak woodlands habitat were *not* analyzed.

Thus, while the HMP is intended to provide suitable mitigation for impacts to HMP species (HMP at 4-9), it is not intended to provide mitigation for impacts to oak woodlands. In discussing future regulatory compliance, the HMP states that “[i]ssues, such as oak woodlands mitigation, outside the scope of the HMP would need to be considered under CEQA.” HMP at 4-10, emphasis added. Indeed, the EIR’s Preliminary Mitigation Strategy Plan admits that “[o]ak woodlands is not a habitat considered in the HMP, and therefore, there are no habitat management requirements for oak woodland identified in the HMP.” Preliminary Mitigation Strategy Plan, p. 2.

In sum, it is clear that the HMP does not even address oak woodland loss, much less purport to provide a basis to find that oak woodlands losses are mitigated. It is

disingenuous of the DEIR to cite consistency with the HMP as the basis of any finding that oak woodland losses are less than significant. DEIR, p. 2-65. It is particularly disingenuous to claim that loss of oak trees was addressed in the HMP. DEIR, p. 3-22.

It is equally troubling that the Staff Report states categorically and incorrectly that the HMP was intended to mitigate oak woodlands impacts:

“To mitigate for impacts on various types of habitats including oak woodland, over 17,000 acres of the former military base was set-aside as permanent open space ‘no development’. The HMP addressed the loss of oak woodlands and other resources on properties designated for development, including the subject property, through this mitigation.” Planning Commission Staff Report, March 9, 2011, p. 14.

In its conclusions regarding the significance of the loss of oak woodlands, the Base Reuse Plan EIR mentions that some oaks will be retained within habitat management lands and conservation areas and corridors established by the HMP. See Base Reuse Plan EIR, p. 4-179. However, the mere fact that the Base Reuse Plan does not remove all of the oak woodlands does not constitute mitigation for the loss of the oak woodlands that are removed. And, as discussed below, the Base Reuse Plan EIR does not and can not provide the basis for concluding that project-specific impacts have been adequately mitigated here.

4. Conservation Easements And The Base Reuse Plan Provisions Do Not Mitigate Project Impacts

The EIR cites conservation easements and the Project’s consistency with the Base Reuse Plan EIR in support of its significance finding. DEIR, p. 2-65; Preliminary Mitigation Strategy Plan, pp. 2-4. The Base Reuse Plan EIR admits that planned development on former Fort Ord will destroy 1,584 acres of oak woodlands, representing 34% of the 5,000 acres of oak woodlands habitat in former Fort Ord. Base Reuse Plan EIR, p. 4-175. Note that the Base Reuse Plan EIR identifies the largest contiguous area of coast live oak as an area that includes the Project site at the former landfill. *Id.* at 4-176.

The Base Reuse Plan EIR points out that the plan will not result in the loss of all 5,000 acres of oaks because some will be preserved, but it admits that 1,584 acres of oaks will be lost, which is a potentially significant impact. *Id.* at 4-175. However, the Base Reuse Plan EIR concludes that impacts to oak woodlands caused by the Reuse Plan will be less than significant based on several factors:

- Preservation of some oaks on-site through an oak woodland conservation area. Biological Resources Policy B-2 requires that as site-specific planning for the landfill area (in which the Project is located) proceeds, the County shall designate an oak woodland conservation area connecting the open space lands of the habitat

management lands south of the landfill site and the oak woodlands corridors east of the landfill site to the “oak woodlands surrounding the former Fort Ord landfill in Polygon 8a on the north.” *Id.* at 4-178; see Fort Ord Reuse Plan, p. 382.

- Preservation of some oaks on-site within habitat management lands and other conservation areas and corridors established in the HMP. *Id.* at 4-179.
- Policies requiring careful site design to minimize loss of oak trees, e.g., policies and programs that “encourage” preservation, proposed ordinances “addressing” preservation of oak trees, clustering development “wherever possible,” requiring landscaping with oaks, and protecting retained oaks. *Id.* at 4-176 to 4-177.
- The effective requirement of a 1:1 replacement of all trees removed pursuant to the County ordinance. *Id.* at 4-179.

Thus, in finding impacts less than significant, the Base Reuse Plan EIR counts critically on additional conservation easements and tree planting to replace these lost trees through its assumption that a County ordinance requires 1:1 replacement of lost trees.

Here, the Project’s conservation easements and its purported consistency with the Base Reuse Plan EIR cannot provide an adequate basis to conclude that this Project’s impacts are less than significant for several reasons. First, the conservation easements do not protect any additional oak woodland at risk of development. Second, mitigation in the Base Reuse Plan EIR does not meet the requirements of the Oak Woodlands Conservation Act, Public Resources Code § 21083.4(b)(1). Third, the County has not adequately implemented the Base Reuse Plan Biological Resources Policy B-2 to designate the oak woodland conservation area at the landfill site. Fourth, the County ordinance does not in fact require 1:1 replacement planting, and mitigation for this Project does not clearly require 1:1 replacement planting either.

a. The Project’s Conservation Easements Do Not Protect Unprotected Oaks

Conservation easements identified in the EIR cannot count as effective mitigation because they do not protect additional land, they do not protect land at risk for development, and/or there is no evidence that the land to be protected is in fact oak woodland habitat suitable for a conservation easement under the Oak Woodlands Conservation Act.

PARCEL C CANNOT BE DOUBLE COUNTED AS MITIGATION: In its discussion of the significance of oak woodland impacts, the DEIR claims that the Project would mitigate oak woodlands loss through “conservation easements.” DEIR, p. 2-65. Elsewhere, the DEIR discusses both a 48.91 acre parcel C at the northwest corner of the site and an 8.71 acre parcel D at the eastern end. See DEIR, pp. 1-13, 2-53 to 2-54, and Figure 10.

However, including parcel C as mitigation would be double counting. The DEIR states that “a conservation easement has been recorded for the proposed Parcel C as

habitat mitigation for the Marina Heights residential project to the north of Imjin Parkway." DEIR, p. 1-13. The DEIR states that preservation of this habitat area is consistent with . . . the Marina Heights memorandum of agreement. DEIR, p. 2-54. The DEIR also states that "[a] portion of the area that comprises proposed Parcel C was set aside in a memorandum of agreement between the County, FORA, and Cypress Marina Heights LP to mitigate loss of sand gilia at the Marina Heights residential project to the north of Imjin Road. This area is part of the 227 acres within the landfill parcel that are required to be set aside for habitat conservation in the HMP." DEIR, p. 2-53.

The Marina Heights project Memorandum of Agreement requires FORA and the County to allow implementation of a Mitigation Plan for the Preservation and Habitat Restoration Areas in the landfill site.³ Under the MOA, a conservation easement was established on the Preservation and Habitat Management Areas in order to implement an incidental take permit under the California Endangered Species Act. The Incidental Take Permit for the Marina Heights project requires the Cypress Marina Heights LLP to ensure protection of a 140-acre portion of the landfill site. CDFG, Incidental Take Permit No. 2081-2005-029-03, March 6, 2006, pp. 4-5, excerpts attached as Exhibit 1. Thus, because Parcel C has already been identified as mitigation for another project, this Project cannot take credit for setting it aside – because it is already protected.

PARCEL C IS ALREADY PROTECTED BY ITS HABITAT MANAGEMENT LAND USE DESIGNATION: More fundamentally, since parcel C “is part of the 227 acres within the landfill parcel that are required to be set aside for habitat conservation in the HMP” (DEIR, p. 2-53), then it is not part of the developable area within the landfill. Note that the DEIR reflects the fact that Parcel C is designated as “Habitat Management” and is outside the area designated as Planned Development Mixed Use. Compare DEIR, Figures 8 (Fort Ord Reuse Plan Land Use map) and 10 (vesting tentative map). The land use designation “Habitat Management” is “applied to all open space identified by the Habitat Management Plan as critical to the survival of the natural communities and sensitive species at Fort Ord.” Fort Ord Reuse Plan, Table 3.4-1, p. 102. Uses permitted in this area include only habitat management; ecological restoration activities; environmental educational activities; and passive recreation activities, such as hiking, nature study, horse and bike riding. *Id.* Thus, by virtue of its land use designation, Parcel C’s preservation has already been assumed in the HMP and the Fort Ord Reuse plan, and it is already protected.

PARCEL D IS ALREADY PROTECTED TOO: Parcel D is also designated as “Habitat Management” and is outside the area designated as Planned Development Mixed Use. Compare DEIR, Figures 8 (Fort Ord Reuse Plan Land Use map) and 10 (vesting tentative map). Thus, by virtue of its land use designation, Parcel D’s preservation has already been assumed in the HMP and the Fort Ord Reuse plan, and it

³ See FORA Board Packet for Dec. 12, 2008, draft Memorandum of Agreement Regarding Habitat Management Portions of the LandFill Site at the Former Fort Ord, available at <http://fora.org/Board/bdagendas.htm>. Minutes of that meeting (also available at <http://fora.org/Board/bdagendas.htm>) indicate that this MOA was adopted.

too is already protected. The preservation of Parcel D cannot be treated as mitigation for this Project.

NO EVIDENCE THAT PARCELS C AND D WOULD BE SUITABLE OR SUFFICIENT CONSERVATION EASEMENTS: As discussed, neither the EIR nor the conditions of approval actually delineate the provisions, scope, extent, or actual location of the proposed conservation easements. Furthermore, the EIR provides no information as to the whether Parcels C and D are actually suitable oak woodlands for mitigation credit under Public Resources Code § 21083.4(b)(1). However, there is evidence to the contrary.

First, the EIR calls for planting oaks on Parcel D as part of its mitigation. FEIR, p. 4-12; see also Staff Report, June 14, 2011, Exhibit P, p. 2 (calling for planting 217 trees on Parcel D). The June 14 Staff Report also implies that some replanting may take place on Parcel C. Staff Report, June 14, 2011, Exhibit P, p. 2 (calling for planting 6055 trees on the border of “the County’s sand gilia mitigation area,” which is presumably in Parcel C). If Parcels C and D are part of the tree planting mitigation under Public Resources Code § 21083.4(b)(2) (permitting partial mitigation via tree planting), the Project cannot *also* treat these parcels as mitigation under subdivision (b)(1) (permitting mitigation via conservation easements). Subdivision (b)(2) clearly distinguishes tree planting from other forms of mitigation, including conservation easements under subdivision (b)(1), and provides that at most half of the mitigation can be provided by tree planting. Here, use of Parcels C and D for tree planting forecloses their use as an alternative form of mitigation. (See discussion in next section below.)

Second, Parcel C is designated as mitigation for impacts to *sand gilia* for the Marina Heights project. The HMP indicates that sand gilia habitat is not oak woodlands but sandy openings. HMP, p. 1-7. Furthermore, available habitat mapping indicates that Parcel C is not primarily oak woodland. Compare Base Reuse Plan, Figure 4.4.1 (Oak Woodland Areas) to DEIR Figure 10. Ironically, this mapping demonstrates that the most abundant oak woodlands at the landfill are located in the portion of the Project site proposed for development. *Id.*

b. The Project Is Inconsistent With the Oak Woodlands Conservation Act Because More Than Half Of Its Mitigation Is Through Tree Planting

The Base Reuse Plan and its associated EIR predate the Legislature’s adoption of the Oak Woodlands Conservation Act, Public Resources Code § 21083.4(b)(1). Thus, the Base Reuse Plan EIR did not find, and cannot provide a basis to find, that the Reuse Plan meets CEQA’s *current* specific requirements for mitigation of oak woodlands impacts.

Here, this Project’s EIR acknowledges that CEQA’s Oak Woodlands Conservation Act permits at most one half of mitigation in the form of tree planting.

DEIR, App. D, Preliminary Mitigation Strategy Plan, p. 10. However, the DEIR states that the Project will also provide mitigation through Alternative 1 of the Oak Woodlands Conservation Act (Public Resources Code, § 21083.4(b)(1)), which permits mitigation through conservation easements. DEIR, pp. 2-65; DEIR, App. D, Preliminary Mitigation Strategy Plan, pp. 10-12.

In particular, the DEIR claims that “base-wide conservation easements combined with the proposed on-site easements also satisfy Alternative 1 of PRC 21083.4 with the required payment of FORA development fees, a portion of which goes to management of the open space.” DEIR, p. 2-65. Thus, the DEIR takes credit for at least half of the Project’s mitigation for its destruction of 37.4 acres of oak woodlands in the form of 1) conservation easements for Parcels C and D, and 2) payment of FORA development fees. To qualify under Public Resources Code, § 21083.4(b)(1), the record must show that the Project will create at least 17.2 acres of conservation easement for oak woodlands habitat. But the EIR does not and cannot make such a showing.

As discussed above, the Project cannot take credit for conservation easements on Parcels C and D because Parcel C is already mitigation for another project and both Parcels C and D are already protected by virtue of their land use designations. Furthermore, as discussed in the sections above and below, there is no evidence in the record of the extent of any oak woodlands on these parcels, and there is evidence that they are not suitable sites for conservation easements.

The EIR’s only remaining basis for claiming mitigation for lost trees other than tree planting is payment of FORA developer fees, which the EIR assumes goes toward maintenance of open space areas. However, the payment of FORA development fees, even if some unspecified portion of these fees goes toward maintenance of some unspecified open space areas, does not create a conservation easement. There is no evidence in the EIR that any easement is created through these fees. In fact, the EIR admits that it does *not* present evidence connecting payment of a developer fee with an oak woodland conservation easement. After recommending that the Project take credit for funding conservation measures through payment of developer fees, the EIR states “[i]t is also recommended that the County and the project proponent meet with FORA to obtain a clear understanding of the nexus between the developer fee and funding of habitat management requirements.” DEIR, App. D, Preliminary Mitigation Strategy Plan, p. 12. Thus, the EIR recognizes the need for, but does not actually provide, evidence that Project FORA fees will create sufficient acreage of conservation easements.

Furthermore, available documentation demonstrates that a very small portion of the developer fee actually goes to habitat management. Only 18% of the FORA developer fees go to habitat management activities. FORA, Capital Improvement Program, Fiscal Year 2010/11 through 2021/22, July 9, 2010 (“FORA CIP”), Table 3, p. 12.⁴ The FORA Capital Improvement Program does not indicate what portion of this

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Available at <http://www.fora.org/>.

amount is used to conserve oak woodlands. However, as explained above, the Fort Ord HMP, for which these fees are expended (see FORA CIP, p. 7), was expressly *not* designed to protect oak woodlands. Thus, there is simply no evidence that payment of FORA developer fees sufficiently mitigates at least half of the Project's impacts to oak woodlands – even if there is some incidental benefit to oak woodlands from the HMP.

c. County Has Not Adequately Implemented the Base Reuse Plan Biological Resources Policy B-2 For Oak Woodlands

The DEIR cites the Project's purported consistency with the Base Reuse Plan Biological Resources Policy B-2 protecting oak woodlands as evidence that impacts are less than significant. The EIR contends that the establishment of conservation easements on Parcels C and D "is consistent" with Biological Resources Policy B-2, the HCP, and the Marina Heights memorandum of agreement. DEIR, p. 2-54.⁵

Biological Resources Policy B-2 requires that as site-specific planning for the landfill area (in which the Project is located) proceeds, the County shall designate an oak woodland conservation area connecting the open space lands outside the landfill site to the "oak woodlands surrounding the former Fort Ord landfill in Polygon 8a on the north." Id. at 4-178. Biological Resources Policy B-2 provides in its entirety:

"As site-specific planning proceeds for Polygons 8a, 16, 17a, 19a, 21a and 21b, the County shall coordinate with the Cities of Seaside and Marina, California State University, FORA and other interested entities in the designation of an oak woodland conservation area connecting the open space lands of the habitat management areas on the south, the oak woodland corridor in Polygons 17b and 11a on the east and *the oak woodlands surrounding the former Fort Ord landfill in Polygon 8a on the north*. Oak woodlands areas are depicted in Figure 4.4-1." Fort Ord Reuse Plan, p. 382, emphasis added.

The Project site comprises a significant portion of the oak woodlands surrounding the former Fort Ord landfill site in Polygon 8a. Compare Fort Ord Reuse Plan, Figure 4.4-1 to DEIR, Figure 10.

As discussed above, Parcels D and C are already protected by virtue of their designation as habitat management in the Fort Ord Reuse Plan. Interpreting Biological Resources Policy B-2 merely to permit the designation of oak woodland conservation areas in land that is already protected simply makes no sense.

⁵ The reference to the Marina Heights memorandum of agreement apparently applies to Parcel C, which is mitigation for that project. Thus, it is not clear whether the DEIR claims that Policy B-2 is implemented by *both* parcels C and D, or just by Parcel D. However, the March 9, 2011 Planning Commission Staff report mentions only Parcel D as the basis for meeting Policy B-2. Staff Report, March 9, 2011, p. 37.

Furthermore, on its face, the retention of only *some* of the oak woodlands at the landfill site, while destroying 37.4 acres of oak woodlands surrounding the landfill to the south, cannot reasonably be interpreted as connecting the habitat and corridor areas to the east and south to the “oak woodlands *surrounding the former Fort Ord landfill* in Polygon 8a.” Biological Resources Policy B-2 specifically references a map of the oak woodlands at Fort Ord, clearly implying that the mapped oak woodlands surrounding the landfill site should be designated as oak woodlands conservation area. Elimination of a major portion of the oak woodlands surrounding the landfill site is not consistent with the language of this policy.

Even if Biological Resources Policy B-2 did contemplate the loss of major portions of the oak woodlands at the landfill site and did contemplate the redundant protection of land already designated for habitat management, the EIR provides insufficient information to determine whether Parcel D and/or Parcel C will fulfill the intent of the policy – which is to protect oak woodlands.

As discussed, the applicant proposes to *plant* oaks in Parcels C and D. Policy B-2 is clearly intended to preserve *existing* woodlands.

No information is presented about the location and extent of the oak woodlands at the landfill site other than on the Project site. And the data for oaks affected by the Project is itself incomplete and inconsistent. No estimate is provided of oaks affected by the off-site drainage areas. The DEIR’s estimate of a 37.4 acre loss due to the Project is apparently based on Table 1 of the Biological Assessment. DEIR, App. D, Biological Assessment, p. 11. However, Table 1-2 of Preliminary Mitigation Strategy Plan identifies only 14 acres of oak woodland habitat acreage at the Landfill Parcel in Polygon 8a. DEIR, App. D, Preliminary Mitigation Strategy Plan, p. 3. This 14-acre estimate cannot represent the Project’s destruction of oak woodlands⁶, much less the total oak woodlands in Polygon 8a.

Thus, the EIR fails to present meaningful information about the extent of existing oak woodlands affected by the Project or potentially preserved under the Base Reuse Plan Biological Resources Policy B-2. Since one clear objective of Biological Resources Policy B-2 is to connect areas to the south and east of the land fill site to the oak woodlands surrounding the landfill site, the EIR should have identified the extent and location of the other oak woodlands at the landfill site. And the EIR should have specified the actual scope, extent, and location of the easement areas – not left this to be determined through future consultation with an unaccountable third party.

Furthermore, the EIR does not mention the County’s obligation to ensure continual management and monitoring of the oak woodland conservation area designated pursuant to Biological Resources Programs B-2.1 and B-2.2. See Fort Ord Reuse Plan, p.

⁶ It may be intended to represent the oak woodlands lost for the “west landfill parcel” portion of the project – see Biological Assessment, Table 1.

382. Without enforceable provisions for future management and monitoring, the mere designation of a conservation area does not meet the provisions of the Fort Ord Reuse plan and cannot be relied upon as mitigation.

d. Neither the County Ordinance Nor Project Mitigation Mandates The 1:1 Replacement Planting Assumed In The Fort Ord Reuse Plan EIR

The DEIR finds oak woodlands impacts less than significant in part because of the Project's purported consistency with the Base Reuse Plan and its EIR. The Base Reuse Plan EIR in turn based its significance finding in part on the assumption that oak trees lost due to development would be replaced at a 1:1 ratio based on the Monterey County ordinance. Base Reuse Plan EIR, p. 4-179.

However, the current Monterey County ordinance does *not* require 1:1 replanting of removed trees. Monterey County Code § 21.64.260.D.4 permits an exception to the 1:1 replacement ratio on a showing that the "requirement will create a special hardship in the use of the site or such replacement would be detrimental to the long-term health and maintenance of the remaining habitat." The EIR has made no showing that oaks trees removed for the former Fort Ord have been and will continue to be replaced at a 1:1 ratio – either within County jurisdiction or within jurisdictions of other member agencies.

And despite confused and inconsistent language referencing a 1:1 replacement ratio, it is apparent that the EIR concludes that the Project would be eligible for this exception and that Project mitigation does not actually require 1:1 replacement of removed oak trees.

BIO-10, by referencing the MST Forest Management Plan, requires on-site replanting of only 900 trees to replace the 2,420 trees lost on the MST site. FEIR, p. 4-11; MST Forest Management Plan, p. 11. BIO-10 does not specify the number of replacement trees for the Whispering Oaks site, calling only for "an appropriate number . . . based on available planting space." FEIR, p. 4-12.

BIO-11 passively states that "off-site replanting and habitat management or payment of equivalent in-lieu fees to the Parks Department will occur. The Youth Camp has been identified as an appropriate off-site mitigation area to achieve a minimum 1:1 replacement." FEIR, p. 4-13. This language implies but does not actually require that a 1:1 replanting ratio will be required: it contains no enforceable or mandatory language and does not specify who might be responsible for replanting. Furthermore, notwithstanding the intention that there be "no net loss of trees," as announced in the applicant's recently submitted "Whispering Oaks Oak Tree Preservation and Recovery strategy," any implication that a 1:1 ratio will be required is contradicted by the express provisions for a 3:1 credit for transplants and for reliance on exceptions to the 1:1 replanting requirement, as discussed below.

3:1 CREDIT FOR TRANSPLANTS: Mitigation Measure BIO-10 permits the Project to take credit for transplanted trees at a 3:1 ratio, based on the requirement that the Project comply with recommendations in the MST Forest Management Plan. FEIR, pp. 4-11, 4-9. The MST Forest Management Plan states that because transplants take more growing space, they “should be credited on a 3:1 basis versus seedlings.” DEIR, Appendix D, MST Forest Management Plan, p. 11. In short, mitigation would permit the Project to compensate for the loss of three trees by transplanting a single tree instead of planting three seedlings. Nothing in the Base Reuse Plan EIR or the Monterey County code contemplates relaxing the 1:1 replanting requirement based on the use of transplants versus seedlings.

EXCEPTION FOR HARDSHIP OR LONG TERM HABITAT HEALTH: Mitigation Measures BIO-10 and 11 do not expressly require 1:1 replacement. Instead, they reference documents that expressly permit reliance on the exception for hardship or detriments to long term habitat health.

BIO-10 calls for compliance with “measures included in the Forest Management Plans that were prepared for the MST and Whispering Oaks Business Park sites.” Staff Report, June 14, 2011, Exhibit B, p. 36 (condition 59, BIO-10). BIO-10 expressly references the “mitigation ratios and planting areas” identified in the Forest Management plans. Both the MST Forest Management Plan and the Whispering Oaks Forest Resource Evaluation reference compliance with measures in the Preliminary Mitigation Strategy Plan as mitigation. DEIR, App. D, MST Forest Management Plan, p. 10 and Whispering Oaks Forest Resource Evaluation, p. 10.

The Preliminary Mitigation Strategy Plan in turn concludes that replanting or restoration is “not an appropriate mitigation alternative for the project” for two reasons. DEIR, App. D, Preliminary Mitigation Strategy Plan, p. 11. First, it claims “replanting on site would result in an unhealthy and overcrowded environment and put a special hardship on the proposed use of the site.” Second, it claims “replanting off-site may also result in an unhealthy and overcrowded environment” and “is not needed since the project proponent is already funding protection and management of oak woodland habitat off-site on the former Fort Ord through payment of the FORA development fee.”⁷ Id. For these reasons, the Preliminary Mitigation Strategy Plan concludes that “the county can determine that the project proponent is not required to replace or replant native oak trees at a 1:1 ratio.” Id. at 12.

The announced intention to take advantage of the exception to the 1:1 replanting requirement – even if it were justified under the Project’s circumstances – is simply inconsistent with the notion that the Project will in fact be required to meet the 1:1 ratio. As written, the mitigation is at minimum unclear on this point, and therefore

⁷ The claim that *off-site* replanting may also result in an unhealthy and overcrowded environment is entirely unsupported and unfounded. The EIR does not demonstrate that there are no off-site locations available for replanting oaks in a healthy environment. In fact, the Preliminary Mitigation Strategy Plan specifically identifies mechanisms by which off-site replanting locations can be acquired. Id. at 8-10.

unenforceable. The possibility that the Project will not replant at a 1:1 ratio vitiates reliance on the claim that the Project is consistent with the impact analysis in the Base Reuse Plan EIR that assumed that all lost oaks would be replaced. Furthermore, as discussed below, the exception renders the Project inconsistent with the 2010 Monterey County General Plan Policy OS 5.23(c), which requires replacement on a minimum 1:1 ratio.

5. Mitigation Does Not Meet CEQA's Requirements For Certainty, Enforceability, And Performance Specifications

CEQA requires mitigation be feasible and enforceable. CEQA Guidelines, § 15126.4(a). Formulation of mitigation measures may not be deferred, but an agency may adopt performance standards that would accomplish mitigation in more than one specific way. CEQA Guidelines § 15126.4(a)(1)(B).

CEQA is clear that an agency may only defer the formulation of mitigation measures when it “recognizes the significance of the potential environmental effect, commits itself to mitigating its impact, and articulates specific performance criteria for the future mitigation.” *Gentry v. City of Murietta* (1995) 36 Cal.App.4th 1359, 1411, citing *Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1028-1029; *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 794.

An agency must have, and must articulate, a good reason for deferring the formulation of mitigation. *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 670, 684.

The County may not delegate the formulation and approval of programs to address environmental impacts because an agency's legislative body must ultimately review and vouch for all environmental analysis mandated by CEQA. *Sundstrom v County of Mendocino* (1988) 202 Cal.App.3d 296, 306-308.

Here, Project mitigation for oak woodlands impacts does not meet CEQA's requirements.

First, mitigation is unclear and therefore not enforceable because it references documents that do not exist or, if they do exist, are not included in the EIR, are not accurately identified, and/or were not circulated timely to the public. Mitigation Measure BIO-10 and 11 in the FEIR and the conditions of approval reference the following documents that do not exist:

- “Forest Management Plans that were prepared for the MST and Whispering Oaks Business Park sites.” FEIR, p. 4-9; Staff Report, June 14, 2011, Exhibit B, p. 36 (condition 59, BIO-10). No forest management plan was prepared for the

Whispering Oaks site because, as discussed above, that portion of the Project has not been sufficiently defined.

- The “Oak tree preservation and recovery strategy prepared in compliance with the recommendation of the Forest Management Plan. . .” and the “Oak Tree Preservation-Recovery Strategy for this project . . .” FEIR, pp. 4-9 and 4-12; Staff Report, June 14, 2011, Exhibit B, pp. 35-36 (conditions 59, 60 for BIO-10 and BIO-11). While the DEIR Appendix D contains a document titled “Preliminary Oak Woodland Habitat and Tree Removal Mitigation Strategy Plan for the MST Facility/Whispering Oaks Business Park Site,” the FEIR deletes the DEIR’s earlier reference to this document. FEIR, p. 4-12. As discussed, the applicant recently submitted a document captioned “Whispering Oaks Oak Tree Preservation and Recovery Strategy,” but this document did not exist when the EIR was drafted and appears to have been created to support applicant’s appeal. And it could not have been “prepared in compliance with recommendation of the Forest Management Plan” for Whispering Oaks, because that Forest management Plan does not yet exist. Regardless, it is unclear what “Oak Tree Preservation-Recovery Strategy” or “Oak tree preservation and recovery strategy” document is actually referenced by the Mitigation Measures.

Second, references to compliance with a forest management plan for the Whispering Oaks site is improperly deferred mitigation. “[A]n agency goes too far when it simply requires a project applicant to obtain a biological report and then comply with any recommendations that may be made in the report.” *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 794. Mitigation provisions have not been spelled out and they may be incompatible with other mitigation provisions. And mitigation is improperly delegated because the EIR contains no provision for future approval of the Forest Management Plan by a legislative body of the County.

Similarly, the ambiguous references to the “Oak tree preservation and recovery strategy prepared in compliance with the recommendation of the Forest Management Plan. . .” and the “Oak Tree Preservation-Recovery Strategy for this project . . .” amount to impermissible deferral of mitigation. Even if this reference is now construed as a reference to the applicant’s submittal, the information was not part of the EIR. If the reference is in fact to a strategy document that has yet to be created, then the mitigation is clearly improperly deferred

Third, Mitigation BIO-10 as set forth in the FEIR differs substantially from BIO-10 as set forth in the conditions of approval. Compare FEIR, pp. 4-9 to 4-12 to Staff Report, June 14, 2011, Exhibit B, p. 59. The final version in the conditions of approval omits two and a half pages of detailed provisions covering tree protection measures, replacement and replanting for the MST project, and design measures for the Whispering Oaks project. While those provisions fall far short of CEQA’s requirements for performance specifications, their omission from the final version is unexplained. It is unclear what version would be enforceable.

Fourth, BIO-10, as set out in the conditions of approval improperly defers the formulation of mitigation without providing performance specifications for protection of retained trees, replanting, and project design. A provision in BIO-10 provides that “a qualified arborist shall be consulted as necessary regarding the best removal, protection, transplanting, planting, and irrigation methods as construction proceeds.” CEQA simply does not countenance mitigation calling for complying with recommendations in a study to be provided later.

Fifth, while BIO-10 as set out in the FEIR contains performance specifications to protect trees retained on site, it lacks enforceable performance specifications for project design and replanting requirements:

- MST project design and replanting requirements:
 - The provision that “consideration should be given to redesigning the project to use the existing encroachment from Inter-garrison road in order to preserve landmark-sized trees at this location” is precatory and not enforceable.
 - The provision that “transplants are encouraged” is precatory and not enforceable.
 - As noted, there are no clearly stated requirements for the number and location of replanted trees. For example, as discussed above, Mitigation Measure BIO-10 references documents that expressly except the Project from the requirement to replant lost oaks at a 1:1 ratio. To the extent that other language may imply the contrary, the mitigation is unclear and unenforceable.
 - The provision that replanting numbers may be modified does not provide a formula for determining *how* they may be modified “by additional tree retention.” Will additional off-site plantings be required? How many? 1:1? 1:3?
- Whispering Oaks project design and replanting requirements:
 - The provision that a qualified Arborist shall “assist” in the eventual design, does not include a performance specification because it does not clarify decisional authority or provide specifications to clarify the Arborist’s design authority.
 - The provision that elevations should “match existing terrain to the extent feasible” to preserve trees provides no basis for determining what is “feasible.” Not only does this provision lack a performance specification, but it constitutes an abdication of the County’s obligation to make a determination of feasibility at the time of Project approval. Infeasibility of mitigation must be based on substantial evidence and findings must be made at the time the project is approved. Public Resources Code, § 21081.5; CEQA Guidelines, § 15091(c); *Village Laguna of Laguna Beach, Inc. v. Board of Supervisors* (1982) 134 Cal.App.3d 1022, 1034-1035. Findings of infeasibility must be made for *each* mitigation measure that is

identified but not adopted. For example, if mitigation is found infeasible for financial reasons, the agency must demonstrate that the project would not be viable if the mitigation were imposed. *Citizens of Goleta Valley v. Board of Supervisors* (1988) 197 Cal.App.3d 1167, 1181.

- The provision that “use of the existing encroachment to Inter-Garrison Road shall be considered” is precatory and not enforceable.
- The provision that an “appropriate number” of replacement trees will be made based on available planting space does not supply an enforceable performance specification. Again, there is no clear and enforceable specification for the number and location of replacement trees.

Sixth, the EIR does not present any justification for deferring the formulation of mitigation other than the fact that the Whispering Oaks project has not yet been designed. As discussed above, the lack of a project design for Whispering Oaks results in a failure to provide an adequate project description. There appears to be no justification for deferring the Whispering Oaks project design.

Seventh, if the provisions of the applicant’s “Whispering Oaks Oak Tree Preservation and Recovery Strategy” are meant to be referenced by BIO-10 and BIO-11, then there are additional conflicts in the mitigation specifications. BIO-10 expressly requires compliance with the MST Forest Management Plan. It also appears to require compliance with Whispering Oaks Forest Resource Evaluation, although it misidentifies it as a Forest Management Plan. The applicant’s Whispering Oaks Oak Tree Preservation and Recovery Strategy is inconsistent with both documents with respect to numbers and locations of trees to be retained on-site, and with respect to the numbers of trees to be replanted on-site and off-site. These inconsistencies render the mitigation unenforceable.

B. Alternatives Analysis Is Flawed

The EIR failed to consider an alternative that both meets Project objectives *and* reduces impacts, *e.g.*, the logical alternative of developing the MST facility at MST’s own site at 7th and Gigling and developing a 24-acre business park – the same size as proposed – at the Project site. Thus, the EIR rationalizes a choice to which the agency now claims it is committed. But there is no substantial evidence that the logical alternative is infeasible.

1. Alternatives selection does not meet CEQA’s requirements

CEQA requires that an “EIR shall describe a range of reasonable alternatives to the project, or to the location of the project, which would feasibly *attain most of the basic objectives* of the project but would *avoid or substantially lessen any of the significant effects of the project*, and evaluate the comparative merits of the alternatives.” CEQA Guidelines, § 15126.4(a), emphasis added. Thus, the alternatives must be formulated to (1) meet most basic objectives *and* (2) reduce impacts.

Here, the EIR fails to consider any alternative that would do both, even though such alternatives are available. Instead, the EIR formulates two alternatives that clearly do not meet the Project's objectives and one alternative that clearly will result in greater impacts. In effect, the EIR considers only straw men. This does not meet CEQA's requirements.

Project objectives include both the provision of a new MST facility and a number of economic objectives that effectively require construction of a business park. DEIR, pp. 1-51 to 1-52. As formulated, these objectives cannot be met by any alternative that does not provide both the MST facility and the business park.

Two alternatives predictably fail to meet Project objectives because they simply eliminate the business park portion of the Project. DEIR, Section 4 (Alternative 2 – MST facility only at Project site, no Whispering Oaks; Alternative 4 – MST located at Seventh and Gigling, Project site used for recreation, no Whispering Oaks.) These alternatives were rejected for failure to meet the business park's Project objectives in the draft resolution prepared for the Planning Commission's March 9 hearing (the resolution prepared before the Commission itself rejected the Project). Planning Commission Staff Report, March 9, 2011, pp. 32-33. They are also apparently rejected in the proposed CEQA findings because they would not meet Project objectives and are "financially infeasible." Staff Report, June 14, Exhibit B, pp. 6-7. As discussed below, the financial infeasibility findings are equivocal and inadequate. Regardless, there is simply no point served by evaluation of alternatives that do not meet Project objectives – CEQA is clear that an EIR shall discuss alternatives that "feasibly attain most of the basic objectives of the project." CEQA Guidelines, § 15126.6(a).

The only other alternative considered (other than the required "no project" alternative) predictably increases environmental impacts because it dramatically *increases* the overall scope of development. DEIR, p. 4-7 to 4-8 (Alternative 3). Instead of a single 58-acre development containing a 24.37 acre MST facility and 24.44 acres of business park lots (see DEIR, p. 1-14), Alternative 3 would develop two sites with substantially more total development. The MST facility would be constructed at the same size as the MST facility in the proposed Project (i.e., about 24 acres), but at the Seventh and Gigling site instead. The Whispering Oaks project would then consume the *entire* developable area at the proposed Project site: "[t]his alternative assumes that the entire area proposed at the Project site (about 58 acres including streets) would be developed as a light industrial business park, and that the open space parcels would remain as open space." DEIR, p. 4-8. Thus, this alternative assumes that the business park uses would double in size because that portion of the Project site proposed for the MST use (24.37 acres) would be added to the business park uses.

In short, instead of developing 48 acres at one site, Alternative 3 would develop 64 acres at two sites.

Unsurprisingly, the EIR concludes that Alternative 3 “involves a greater level of development and has greater environmental impacts.” DEIR, p. 4-23. In fact, it has greater impacts in almost every category. DEIR, p. 4-24. Thus, the draft resolution for the Planning Commission’s March 9, 2011 hearing rejects this alternative as having greater impacts. Planning Commission Staff Report, March 9, 2011, pp. 32-33.

Typically, an alternatives analysis considers a “reduced development” alternative, not an “increased development” alternative. While it might have made sense to consider a smaller version of the Project, or locating only a portion of the Project at the site, it is difficult to understand what analytic purpose the EIR proposed to serve through consideration of Alternative 3. Regardless, consideration of Alternative 3 does not fulfill CEQA’s mandate to evaluate alternatives that “would avoid or substantially lessen any of the significant effects of the project.” CEQA Guidelines, § 15126.6(a).

Common sense should have informed the EIR preparers that none of the alternatives considered would meet CEQA’s requirements for alternatives that meet most objectives *and* reduce impacts. It should have been obvious that Alternatives 2 and 4 would not meet most of the Project objectives. And it should have been equally obvious that expanding the overall Project by 50% would increase impacts, even without the cursory qualitative analysis in the Alternatives section of the EIR. Thus, the EIR simply failed to consider a reasonable range of alternatives.

CEQA prohibits the County from approving a project if there are feasible alternatives that would substantially lessen impacts. Public Resources Code, § 21001(d). The EIR should be revised and recirculated to evaluate an alternative that will actually meet Project objectives and reduce impacts. For example, an alternative that locates the MST facility at the 7th and Gigling site (or at the Marina airport) and that locates a 24-acre business park (the same size as in the proposed Project) at the landfill site would reduce impacts, including the otherwise unavoidably significant impacts due to tree removal and the overall size of the Project at the site. For example, cutting fewer trees and developing less space at the Project site would reduce carbon emissions and traffic in the Project vicinity.

2. Findings regarding alternatives are inadequate

Having considered an inadequate range of alternatives, the applicant has been faced with objection from the public and the Planning Commission that there are feasible alternative locations. The CEQA findings conclude that the alternatives that eliminate the business park do not meet Project objectives but that the alternative that would provide the MST facility at their own site at 7th and Gigling does accomplish Project objectives. Staff Report, June 14, 2011, Exhibit B, pp. 6-7. However, the CEQA findings then go on to make confused and unsupported findings regarding economic infeasibility, but these findings do not demonstrate that an alternative location for at least the MST portion of the site is not feasible.

First, it is not clear which alternatives are found to be infeasible. The discussion takes place under the heading “Environmentally Superior Alternative,” which references only the alternative that would locate MST at 7th and Gigling and replace the business park with recreation. However, the CEQA Findings state that “[e]conomic factors exist that make adoption of the alternatives [plural] financially impractical.”

Furthermore, it appears the Findings are intended to address alternatives other than those considered in the EIR. The Findings assert that it would be impractical for MST to enter into another land swap agreement, an apparent reference to an alternative that would locate the MST facility not at 7th and Gigling or the Project site, but elsewhere (e.g., perhaps, the Marina airport). None of the alternatives in the EIR contemplates such a location for the MST facility. However, MST would *not* have to enter a land swap to use the 7th and Gigling site. So this consideration would not apply to the logical alternative that the EIR failed to consider – the MST facility at 7th and Gigling and a 24-acre business park at the Project site.

Second, the Findings claim speculatively that further delay “may” cause the loss of grants and that there would be a loss of unspecified sunk costs of planning. No evidence is provided that grants would in fact be lost, or in what amount, or that the loss would be permanent.⁸ The appeal to sunk costs is not cogent. CEQA does not permit a post hoc ratification of a decision to which an agency has already committed itself. Furthermore, no evidence is presented that losing these sunk costs would render the Project financially non-viable.

Third, the CEQA Findings claim that jobs would be created if the Project goes forward. Again, the logical alternative that the EIR failed to consider – the MST facility at 7th and Gigling and a 24-acre business park at the Project site – would create the same number of jobs. Furthermore, job creation may be an appropriate overriding consideration, but there is no evidence that the Project would be financially infeasible even if fewer jobs were created.

Fourth, the CEQA Findings claim that there would be some infrastructure savings from combining the MST and Whispering Oaks portions of the Project. However, there is no evidence presented to support this claim. The purported savings are not quantified or even qualitatively discussed. It is unclear who would bear additional cost or for what infrastructure if MST were to develop at 7th and Gigling. Critically, there is no evidence that this would render the Project infeasible. In fact, the Findings for the appeal and the Project permits gainsay any conclusion that this is a show-stopper, because they state that the MST site at 7th and Gigling is “economically viable.” Staff Report, June 14, 2011, Exhibit D2, p. 14. A finding that other sites are not “more desirable” does not mean they are “infeasible.” *Id.*

⁸ Four form letters solicited from other agencies repeat word for word that these are \$4.7 million in sunk costs. Staff Report, June 14, 2011, Exhibit N. While this demonstrates effective campaigning, it does not constitute evidence that loss of these sunk costs would render the project non-viable.

Finally, the Staff Report states incorrectly that if the MST facility were to be developed at 7th and Gigling, the net impacts to trees would be “on a similar scale to that proposed at the existing site.” Staff Report, June 14, 2011, Exhibit A, p. 11. Not so. If the business park were developed at the same 24-acre size as in the proposed Project, the tree loss would be substantially less because the 24-acres proposed for the MST facility could be left intact. And even if the entire 48-acre development area were used for business park development, the tree loss would not be as extensive. The EIR admits that the MST project requires much more tree removal and leaves much less opportunity for tree retention than does business park development.

C. The Project Does Not Meet The Requirements For A Use Permit for Tree Removal

In addition to meeting the requirements of CEQA with respect to analysis and mitigation of impacts to oak woodlands, the Project must meet the requirements of the County’s ordinance for preservation of oak trees, County Code § 21.64.260. See also County Code § 16.60.040. As the Planning Commission found, the Project does not do so.

1. The Forest Management Plan May Not Be Deferred

First, the ordinance is clear that a use permit for removal of more than 3 trees requires 1) preparation of a Forest Management Plan following a prescribed format and 2) review under CEQA. Monterey County Code § 21.64.260.D.3. Here, no Forest Management Plan has been prepared for the Whispering Oaks site because the Project description is admittedly not adequate to support the preparation of such a plan. The ordinance simply does not permit the substitution of the “Forest Resource Evaluation” that was prepared instead of a Forest Management Plan.

Furthermore, meaningful CEQA review, as required by § 21.64.260.D.3.d, is not possible without the Forest Management Plan. Here the EIR admits that the Forest Resource Evaluation does not evaluate “specific impacts to trees relative to construction on the site.” DEIR, App. D, Forest Resource Evaluation, p. 1.

Without the required Forest Management Plan and a CEQA review based on that plan, the agency cannot make the specific findings required under § 21.64.260.D.5, including findings that

- The removal is the minimum required under the circumstances of the case, and
- The removal will not cause adverse environmental impacts including soil erosion, water quality impacts, ecological impacts, air movement impacts, and habitat impacts.

As discussed above, there is no provision in the County ordinance for a subsequent review and approval of a deferred Forest Management Plan. With respect to CEQA,

permitting deferral of the Forest Management Plan is an improper delegation of mitigation away from the County's legislative body. And with respect to the ordinance, permitting deferral of the Forest Management Plan would render it a nullity in the County's approval of the use permit for tree removal.

2. Tree Removal Is Not The Minimum Required

As the Planning Commission found, the Project does not meet the requirements of the oak preservation ordinance because the proposed removal is not the minimum required under the circumstances. The Planning Commissions specifically found that there are alternate locations for the Project near the site that could avoid or substantially reduce tree removals.

For example, the MST portion of the Project could have been located at the Seventh and Gigling site that is planned for the MST facility in the Base Reuse Plan. Again, there is no basis to find that the Project is infeasible unless the MST facility and the Whispering Oaks project are co-located. The EIR's alternatives analysis considers an alternative (Alternative 3) that would locate the MST facility at a different site than the business park. The CEQA Findings conclude that this alternative would meet the Project's objectives. The Findings for the appeal and use permit conclude that the 7th and Gigling location is economically viable.

As discussed above, the EIR's alternatives analysis is inadequate for failure to consider a reasonable range of alternatives that *both* meet the Project objectives *and* reduce impacts. Critically, the only alternative that met the Project objectives was not fashioned to reduce tree removal at the Project site, because it simply expanded the business park uses to use the Lot 1 MST site. An alternative that relocates one or both of the proposed uses at the site and that does not increase the scope of either use would clearly reduce the number of trees removed. And, as discussed above, even an alternative that developed a business park that used the entire 48-acre development area now proposed for the MST and business park portions of the Project could retain more trees, because business park development does not require such extensive removal per-acre as does the MST facility.

The Planning Commission also found that alternative designs, including reducing the number of proposed lots, reducing the size of proposed lots, and clustering the lots, could substantially reduce tree removals. Of course, in the absence of an actual design and a completed Forest Management Plan, the proponent is in no position to gainsay this finding. Without an actual design, there can be no basis to find that tree removal has been minimized.

In sum, common sense demonstrates that an alternative location, for at least a portion of the Project, would reduce tree removal and it is clear that there is an available alternative location for at least the MST facility. In addition, common sense

demonstrates that alternative designs would reduce tree removal, and there is no substantial evidence that such designs are not feasible.

3. There Is No Basis For An Exception To The Requirement To Replace Trees On A 1:1 Ratio

As discussed above, the EIR does not actually require that trees be replanted at a 1:1 ratio, and proposed mitigation references plans that specifically conclude that the Project is eligible for the exception to this requirement under Monterey County Code § 21.64.260.D.4. While it may not be possible to replant all trees on-site, there is simply no evidence that off-site replanting is not possible or that it would create a hardship.

4. Tree Removals Will Risk Adverse Environmental Impacts

As the Planning Commission found, the tree removal will involve a risk of adverse environmental impacts. For example, the Forest Management Plan for the MST facility found that the tree removal will “result in localized increased wind velocities: with limb breakage and complete tree failure.” DEIR, App. D, MST Forest Management Plan, p. 10. Thus the County cannot make the required finding under County Code § 21.64.260.D.5.b.5. Similarly, the Project will significantly reduce available oak woodlands habitat and adversely impact this ecological system, as is evident from the fact that it will not adequately mitigate oak woodlands loss. Thus the County cannot make the required finding under County Code § 21.64.260.D.5.b.3 and 6.

D. The Project Is Inconsistent With Relevant Plans And Implicates Inconsistencies Of Those Plans

Development of the Project site is subject to the requirements of (1) the Fort Ord Reuse Plan and (2) the 2010 Monterey County General Plan, which includes the Fort Ord Master Plan. Neither the EIR nor staff reports have provided adequate evaluations of the Project’s consistency with these plans or of the consistency of these plans with each other. In fact, the Project is inconsistent with these plans and these plans are not internally consistent. The County cannot approve the Project under these circumstances.

1. Consistency Requirements

FORT ORD REUSE ACT: The County may not approve a project that is inconsistent with the Fort Ord Reuse Plan. Government Code, § 67675.8(b); FORA Master Resolution (“FMR”), § 8.01.010(f). The County is required to include applicable policies and programs of the Reuse Plan in its General Plan. FMR, § 8.02.020. The County may not approve development entitlements until it has adopted those policies and programs. FMR, § 8.02.040. The County must submit its new or updated General Plan to FORA for certification that it is consistent with the Reuse Plan. Government Code, § 67675.2.

COUNTY ORDINANCES: County Ordinances # 5171 and 5172 provide that project applications are subject to a consistency review process by which county staff are required to determine and make a recommendation concerning project consistency with the County's 2010 General Plan. Ord. # 5171, § 4; Ord. # 5172, § 2. Although a project for which an application predates January 3, 2011 need not submit a General Plan policy "consistency checklist," County staff are required to make a recommendation regarding consistency and the appropriate legislative body is required to make a determination and make a finding as to General Plan consistency. Id.

CEQA requires that an EIR evaluate consistency with applicable regional plans and general plans. CEQA Guidelines, § 15125(d).

2. Failure To Make Required Consistency Determinations

The County has not complied with the consistency requirements outlined above. The County has not submitted its 2010 General Plan to FORA for certification, and FORA has not certified that plan, even though the County adopted the 2010 General Plan more than 9 months ago. This violates Government Code § 67675.2. As discussed below, the County's 2010 General Plan is not consistent with the Reuse Plan, and these inconsistencies implicate the Project.

County staff failed to make a consistency determination and recommendation pursuant to County Ordinances # 5171 and 5172. In response to inquiry from LandWatch requesting the consistency determination, County staff implied that the Project is exempt from a consistency determination because its application predates January 3, 2011. John Ford, e-mail to Amy White, May 25, 2011. While the ordinance may relieve the *applicant* from preparing a checklist related to consistency, it does not relieve County staff from making a recommendation, or relieve the appropriate legislative body from making a determination, regarding consistency with the 2010 General Plan, which contains a number of relevant policies. County staff cannot have meaningfully determined the Project's consistency with the 2010 General Plan without reference to a checklist of applicable policies and cannot have made a meaningful recommendation without furnishing a written analysis to decision makers.

The EIR did not evaluate the Project's consistency with the 2010 General Plan; instead, it evaluated the Project with respect to the 1982 General Plan. See e.g., DEIR, p. 2-116. Thus the EIR is deficient as an informational document. CEQA Guidelines, § 15125(d).

Given the lack of discussion in the EIR and staff's apparent failure to prepare any written analysis of consistency other than conclusory assertions contained in staff reports, there can be no substantial evidence that the Project is consistent with the 2010 General Plan. And as discussed below, the Project is in fact inconsistent with that plan.

3. The Project And the County's Fort Ord Master Plan Are Inconsistent With the Fort Ord Reuse Plan

PLANNING AREA AND LAND USE DESIGNATIONS: The Project site is in the "CSUMB/Recreational Planning Area" in the Fort Ord Reuse Plan. Fort Ord Reuse Plan, Figure 3.10-1. This planning area includes the County portion of the CSUMB site and all of Polygon 8a. Id. Polygon 8a is identified as the County's Recreation/Habitat Protection area. Id. The Reuse Plan describes this planning area as follows:

"The CSUMB/Recreational Planning Area is located in a central position that will dramatically affect the potential surrounding development. It consists of three major resources: 1) the lands conveyed or subject to future public benefit conveyance to CSUMB; 2) the former land fill site; and 3) the planned Marina community park that is composed of two areas north and south of Intergarrison Road and is subject to a public benefit conveyance request." Id. at 172.

The Reuse Plan in turn describes the County's recreational/habitat district as including open space/recreational land uses, habitat protection, and opportunity sites for commercial recreation, a convenience retail center, and 50 acres of office/R&D development at the southwest corner:

"Monterey County Recreational/Habitat District

This District is comprised of two areas. The larger, approximately 340 acres, is the former land fill site. The smaller, approximately 88 acres, stretches both north and south of Intergarrison road. Both of these areas are reserved for a combination of habitat protection and recreational uses.

Projected Land Uses for the Former Land Fill:

Open Space/Recreation Land Use. About 141 acres are reserved for park and open space at the former landfill site. This represents the area included in the planned land fill cap. Region-serving recreation facilities, such as an amphitheater, are appropriate at this location.

Habitat Protection. About 142 acres are reserved for habitat management, including non-invasive and controlled passive uses such as hiking and equestrian trails.

Opportunity Sites. The land fill cap provides an opportunity to locate a range of commercial recreational uses, including a golf course, a region-serving equestrian center and a convenience retail center for up to 10,980 sq. ft.

Approximately 50 acres located at the southwest corner of the former landfill site, adjacent to the Marina City limits and Inter-Garrison Road is suitable for office/R&D development by the University of California." Id. at 175-176.

The Reuse Plan designates most of the former landfill site as Habitat Management. Id., Figure 3.3-1, "Land Use Concept Ultimate Development." The Habitat Management land use designation permits only habitat management, ecological restoration,

environmental education, and passive recreation, such as hiking, nature study, horse and bike riding. Id. at 102.

The Reuse Plan designates two portions of the site as Planned Development Mixed Use, including a small portion on the northeast corner and a larger portion on the southwest corner of Polygon 8a – the Project site. Id., Figure 3.3-1, “Land Use Concept Ultimate Development.” Uses permitted in Planned Development Mixed Use include a variety of retail uses, office uses, entertainment uses, commercial recreational uses, etc. Id. at 100.

PROJECT IS INCONSISTENT WITH FORT ORD REUSE PLAN BECAUSE IT IS NOT OFFICE/R&D OR CONSISTENT WITH PLANNED DEVELOPMENT MIXED USE GOALS AND FLOOR AREA RATIOS: As the EIR admits, the Project is not consistent with the Reuse Plan Commercial Land Use Objective D, which provides the Planned Development Mixed Use Development designation “to encourage the development of pedestrian-oriented community centers that support a wide variant of commercial, residential, retail, professional services, and cultural and entertainment activities.” DEIR, pp. 2-108, 2-112; Fort Ord Reuse Plan, pp. 100, 104. The DEIR admits that the Project “fails to achieve the pedestrian-oriented mixed use design direction provided by the Fort Ord Reuse plan” because it is essentially isolated from existing and planned development with which it might be connected. DEIR, p-112.

The DEIR concludes that the Whispering Oaks 0.6 FAR is consistent with the 0.35 FAR permitted for Planned Development Mixed Use areas because “about half the site is set aside for open space preservation,” which would allow “development of up to a net FAR of 0.7” on the developed portion of the site. DEIR, p. 2-109. The DEIR admits that the Whispering Oaks General Development Plan permits a FAR of 0.6. However, as discussed above, it makes no sense to include Parcels C and D as part of the Project for purposes of determining allowable FAR. First, Parcel C is already committed as mitigation for another project. Second, neither Parcel C nor D should be included in the allowable FAR calculation for the portion of the Project included in the Planned Development Mixed Use area *because they are not included in the Planned Development Mixed Use designated area.*

Furthermore, the maximum FAR for a Business Park/Light Industrial land use is not 0.35 assumed for Planned Development Mixed Use generally, but the 0.20 assumed specifically for Business Park/Light Industrial, which is the actual land use proposed for the Project. Fort Ord Reuse Plan, pp. 104-105 (distinguishing Office/R&D, Planned Development Mixed Use, and Business Park/Light Industrial land uses based on maximum FAR). Thus, the very intensive FAR for the Whispering Oaks use is not permitted at the Project site – even if it were permissible to count the non-developable parcels C and D into the FAR calculation.⁹

⁹ Note that the 0.6 FAR is also inconsistent with the Heavy Commercial Zoning designation. Monterey County Code, § 21.20.070.B.

Indeed, it is clear that the “mixed use village adjacent to the CSUMB” is intended to be used for Office/R&D use, not for Business Park/Light Industrial Use. Fort Ord Reuse Plan, p. 249. The Reuse Plan’s enumeration of locations intended to accommodate Business Park/Light Industrial uses does *not* include the site in its planning area. *Id.* at 258-259. Thus, the light industrial MST use is not consistent with the Reuse Plan and is not properly permitted at this site.

THE PROJECT AND FORT ORD MASTER PLAN RECREATION/OPEN SPACE PROGRAM D-1.4 ARE INCONSISTENT WITH FORT ORD REUSE PLAN RECREATION/OPEN SPACE PROGRAM E-1.3: The Reuse Plan includes Recreation/Open Space Land Use Policy E-1, which provides that “[t]he County of Monterey shall limit recreation in environmentally sensitive areas, such as dunes and areas with rare, endangered, or threatened plant or animal communities to passive, low-intensity recreation dependent on the resource and compatible with its long term protection.” Fort Ord Reuse Plan, p. 272. In support of this policy, the Reuse Plan provides that the County will use the land in planning Polygon 8a only for “remediation and reuse research, habitat management, open space/recreation (including an equestrian center, a golf course opportunity site, and an amphitheater), and a convenience center:”

“Program E-1.3: The County of Monterey shall work with and support the Army to investigate clean-up of the Recreation/HMP District in the CSUMB/ Recreation Planning Area (Polygon 8a). This area is proposed to be used for remediation and reuse research, habitat management, open space/recreation (including an equestrian center, a golf course opportunity site, and an amphitheater), and a convenience center. This proposed use is subject to capping of the landfill and remediation of groundwater beneath it. A minimum of 120 acres will require mitigation by the Army. The polygon is considered for an annexation request by the City of Marina. Drainage, slumping, toxic fumes or gases associated with old landfill need to be considered.” Fort Ord Reuse Plan, p. 272.

Since Program E-1.3 does not include *any* commercial land use for the CSUMB/ Recreation Planning Area (Polygon 8a), other than a convenience center (presumably the 1-acre convenience center designated on the northeast corner of the landfill site), the Project is inconsistent with this Reuse Plan Program and therefore cannot be approved.

By contrast, the Fort Ord Master Plan, adopted by the County as part of the 2010 General Plan, does expressly permits use of this area for commercial development, including the MST and Whispering Oaks projects. The Fort Ord Master Plan adopts Recreation/Open Space Land Use Policy E-1, identical to the Fort Ord Reuse Plan Recreation/Open Space Land Use Policy E-1, calling for limiting recreation in environmentally sensitive areas to passive, low-intensity recreation. However, in support of this Policy, the Fort Ord Master Plan modifies the implementing program calling for

clean up of Polygon 8a and limiting land uses – simply inserting as additional acceptable land uses the MST and Whispering Oaks business park and commercial development:

“Program D-1.4: The County of Monterey shall work with and support the Army to investigate clean up of the Monterey County Recreational/Habitat District in the CSUMB/Recreational Planning Area (Fort Ord Reuse Plan Polygon 8a). This area is proposed to be used for habitat reserve management, the Monterey Salinas Transit Administrative and Maintenance facility, the Whispering Oaks business park and commercial development.” Fort Ord Master Plan, p. FO-23.

Thus, Fort Ord Master Plan Recreation/Open Space Land Use Program D-14 is inconsistent with Fort Ord Reuse Plan Program Recreation/Open Space Land Use Policy E 1.3 because it permits different land uses, and because the land uses it permits are neither recreational nor compatible with environmentally sensitive areas. Since the County’s General Plan, including its Fort Ord Master Plan, must be consistent with the Fort Ord Reuse Plan, Fort Ord Master Plan Recreation/Open Space Land Use Program D-14 is not valid. The County cannot approve the Project on the basis of a General Plan provision in conflict with the Fort Ord Reuse Plan.

THE PROJECT AND FORT ORD MASTER PLAN RECREATION/OPEN SPACE PROGRAM E-2.2 ARE INCONSISTENT WITH FORT ORD REUSE PLAN RECREATION PROGRAM E-2.2: The Reuse Plan contains Recreation Objective E, to encourage commercial recreation. Fort Ord Reuse Plan, p. 328. In support of this objective, Recreation Policy E-2 provides the County must create a “multi-functional recreation area” in the landfill area. Id. And in support of this policy, the Recreation Program E-2.2 provides that the County shall promote the development of commercial recreation uses of this area such as a golf course, an equestrian center, and a region serving amphitheater. Id. In addition, Program E-2.1, requires the County to “create a joint management team with representatives of adjacent agencies to work together institutionally in the planning and development of the landfill, protect oak woodlands, and address potential impacts of planned uses on surrounding neighborhoods.” Here are the relevant policies from the Reuse Plan:

“Recreation Policy E-2: Monterey County shall work with landowners to create a multi-functional recreation area within the former military landfill area.

Program E-2.1: Monterey County shall create a joint management team with representatives of adjacent agencies to work together institutionally in the planning and development of the landfill, protect oak woodlands, and address potential impacts of planned uses on surrounding neighborhoods.

Program E-2.2: Monterey County shall promote the development of commercial recreation uses of this area compatible with the capping of the landfill, including such uses as a golf course, an equestrian center, and a region serving amphitheater.” Fort Ord Reuse Plan, p. 328.

There is no evidence that the Project is consistent with Recreation Policy E-2 and its implementing programs. As discussed above, there is no evidence that the County has created and convened the “joint management team” to protect the oak woodlands and address impacts of planned uses. For example, the County’s approach to implementing the Reuse Plan Biological Resources Policy B-2 calling for designation of an oak woodlands conservation area is apparently to act unilaterally and provide notice to other agencies. While the Staff report claims that the other agencies have “been involved, consulted with, and provided notice of, the proposed project,” there is no evidence of joint institutional management of the oak woodlands resources at the land fill site. Staff Report, June 14, 2011, Exhibit D2, p. 12. It seems unclear that the City of Marina, for example, has condoned the loss of the oak woodlands that the Project would cause given that it has asked the Project proponent to relocate the Project.

Furthermore, the County’s Fort Ord Master Plan is itself inconsistent with the Fort Ord Reuse Plan Recreation Program E-2.2. In support of the same recreation objective (Recreation Objective E – “encouragement of commercial recreation opportunities”) and the same recreation policy (Recreation Policy E-2 – “work with landowners to create a multifunctional recreation area within the former military landfill area”), the Fort Ord Master Plan expressly permits use of the landfill area for *commercial* development, including the MST and Whispering Oaks projects:

“Program E-2.2: Monterey County shall promote the development of commercial uses that are compatible with the capping of the landfill, including such potential uses as habitat management, the Monterey-Salinas Transit Administration and Maintenance Facility, the Whispering Oaks Business Park, and commercial development.” Fort Ord Master Plan, p. FO-32.

Thus, Fort Ord Master Plan Recreation Program E-2.2 is inconsistent with Fort Ord Reuse Plan Program Recreation Policy E-2.2 because it permits different land uses, and because the land uses it permits are not recreational. Ironically, the Staff Report salutes the fact that the Project is compatible with Fort Ord Master Plan Recreation Program E-2.2. Staff Report, June 14, 2011, Exhibit A, p. 5. However, since the County’s General Plan, including its Fort Ord Master Plan, must be consistent with the Fort Ord Reuse Plan, Fort Ord Master Plan Recreation Program E-2.2 is not valid. The County cannot approve the Project on the basis of a General Plan provision in conflict with the Fort Ord Reuse Plan.

4. The Project Is Inconsistent With The 2010 Monterey County General Plan

Open Space Conservation Policy OS 5.23 of the Monterey County General Plan specifically requires that, pending the County’s adoption of an oak woodlands mitigation program within the next five years, projects “shall pay a fee to the state Oak Woodlands Conservation Fund (OWCF):”

“OS 5.23: The County shall prepare, adopt and implement a program that allows projects to mitigate the loss of oak woodlands, while also taking into consideration wildfire prevention/protection. Consistent with California Public Resources Code Section 21083.4, the program shall identify a combination of the following mitigation alternatives:

- a) ratios for replacement,
- b) payment of fees to mitigate the loss or direct replacement for the loss of oak woodlands and monitoring for compliance; and
- c) conservation easements.

The program shall identify criteria for suitable donor sites. Mitigation for the loss of oak woodlands may be either on-site or off-site. The program shall allow payment of fees to either a local fund established by the County or a state fund.

Until such time as the County program is implemented consistent with Public Resources Code Section 21083.4(b), projects shall pay a fee to the state Oak Woodlands Conservation Fund (OWCF). Replacement of oak woodlands shall provide for equivalent acreage and ecological value at a minimum of 1:1 ratio. The program shall prioritize the conservation of oak woodlands that are within known wildlife corridors as a high priority. The oak woodlands mitigation program shall be adopted within 5 years of adoption of the General Plan.” Monterey County 2010 General Plan, p. C/OS-13, emphasis added.

However, despite this clear and mandatory policy, and despite the fact that County has not yet adopted the oak woodlands mitigation program, the Project is not required to make payments to the state Oak Woodlands Conservation Fund. Payments of FORA fees are not payments to the OWCF.

Nor is the Project consistent with the OS 5.23 requirement that “replacement of oak woodlands shall provide for equivalent acreage and ecological value at a minimum of 1:1 ratio.” As discussed above, Project mitigation does not require 1:1 replacement of individual trees, and there is no evidence or requirement that any replacement oaks provide acreage of equivalent ecological value. Replacement of intact oak woodlands with isolated pockets of parking lot and roadside landscaping clearly does not maintain equivalent ecological value. The EIR contains no discussion of the ecological value of the replacement trees to be replanted.

Indeed, the mitigation focus is entirely on replacing *trees* (and planting them as densely as possible to minimize the required replanting acreage), not on replacement of oak woodland *acreage* of equivalent ecological value. While the Whispering Oaks Forest Resource Evaluation indicates that the trees to be removed provide habitat to animal species of special concern, it simply postpones the evaluation and mitigation of impacts to habitat values to some unspecified future “adequate biological study.” Whispering Oaks Forest Resources Evaluation, p. 10. The MST Forest Management Plan admits that “[t]his habitat is particularly viable as it is associated with other intact vegetation types.” MST Forest Management Plan, p. 10. It then admits that “the loss of

functional oak woodland habitat on the site is an unavoidable impact of the project as designed.” Id. However, there is no requirement in that Forest Management Plan, or in other mitigation documents, that the replacement of individual trees result in “equivalent acreage and ecological value at a minimum of 1:1 ratio.”

E. EIR’s Analysis Of Water Supply And Water Supply Impacts Is Inadequate

1. The Project’s 92 afy Water Demand Exceeds The 10 afy Allocation For Project Site In The Fort Ord Reuse Plan

Part of the implementation provisions of Fort Ord Reuse Plan is the Development Resource Management Plan (“DRMP”). Fort Ord Reuse Plan, § 3.11.5. The intent of the DRMP is to ensure that development is managed within the constraints of available resources. Because water supply is a serious constraint on development, one section of the DRMP, § 3.11.5.4, is devoted to Management of Water Supply:

“Water supply is a central resource constraint for development of Fort Ord. Insuring that development does not exceed the available water supply and safe yield is a major component of the DRMP. The following measures ensure that development is managed within this resource constraint.” Fort Ord Reuse plan, p. 196.

Thus, FORA has adopted a program to allocate the existing potable water supply among the competing jurisdictions. The water supply allocation is intended to provide member agencies with certainty as to supply and “to assure that jurisdictions remain within their allocation.” Id. Each agency must make a finding that for development projects that “the project can be served with their jurisdictional water allocation” or by some other form of imported water. Id. at 197. Thus, the Fort Ord Master Resolution requires member agencies to adopt “policies and programs consistent with the Authority’s Development and Resource Management Plan to establish programs and monitor development of territory within the jurisdiction of the Authority to assure that it does not exceed resource constraints posed by water supply.” Fort Ord Master Resolution, §8.02.020(j)(6).

The actual allocation applicable to the Project site is specified in Table 3.11-2. In that table, water is allocated to member agencies for general use within their jurisdictions, and to specific areas within the former Fort Ord. Thus, while the County has a general allocation, the allocation made to the location containing the Project site, “County/Marina Sphere Polygon 8a,” is only 10 acre feet per year (“afy”). Fort Ord Reuse Plan, Table 3.11-2, footnote 3 (indicating Board action reduced the Polygon 8a allocation from 50 to 10 afy on Aug. 14, 1998.)

Because the Project will require 92.72 afy, it will exceed the available 10 afy water allocation. FEIR, App. J, p. 11. Thus, the County cannot approve the Project consistent with the Fort Ord Reuse Plan or consistent with its obligation to assure development does not exceed water constraints.

The Water Supply Analysis (“WSA”) in the EIR fails to disclose the actual water allocation constraint faced by the Project because it ignores the site specific constraint of 10 AFY to the County/Marina Sphere Allocation. Instead, the Water Supply Analysis contends that there is sufficient allocate for the Project because its use would fit within the remaining uncommitted allocation to the County generally. FEIR, App. J, p. 22-23. The failure to disclose and discuss the Project’s actual supply constraint violates SB 610, the statute governing the adequacy of water supply analyses under CEQA. Water Code, 10910(d) (obligation to disclose water supply entitlements).

2. The Water Supply Assessment Fails To Provide Mandated Information About Baseline Conditions

SB 610 mandates that a water supply assessment for a project to be served with groundwater include specific information. Water Code, 10910(f). Here the WSA fails to comply with SB 610 because it does not include the required “detailed description of the amount and location of groundwater pumped by the public water system . . . for the past five years. . .” Water Code, 10910(f)(3). Obviously pumping data for the last five years is not included in the six-year old 2005 Urban Water Management Plan referenced by the EIR; and, at any rate, the statute is clear that the EIR itself must contain this information, not merely reference it. Nor is the required information contained elsewhere in the EIR.

In short, the EIR fails to meet the information disclosure requirements of CEQA because it fails to identify the baseline water use. As discussed below, impacts cannot be meaningfully assessed without reference to baseline use. The EIR must be revised and recirculated to provide the required baseline pumping data for the Salinas Valley groundwater basin. The EIR must also relate and reconcile that baseline pumping to the 2001 Salinas Valley Water Project EIR baseline data, because the EIR relies on that document to support its conclusion that impacts will be less than significant.

3. The EIR and Water Supply Assessment Fail To Provide An Analysis Of Available Supply, Which Requires Disclosure Of The Basin’s Sustained Yield

The EIR and WSA identify the Salinas Valley groundwater basin, consisting of five hydrologically linked sub-areas, as the groundwater basin from which the Project supplies would be obtained. DEIR, App. J, pp 16-17. The EIR admits this aquifer is in an overdraft condition and that sea water intrusion is occurring due to this overdraft. Id; DEIR, pp. 2-97 to 2-98.

SB 610 and CEQA case law are clear that an EIR must identify not just the projected demand from the Project and other projects, but must relate this demand to available supplies. Given that the EIR admits the aquifer is in an overdraft condition and that sea water intrusion is occurring due to this overdraft, there can be no showing that

there is an adequate waters supply over the next 20 years without a discussion that relates projected demand to available sustained yield of the basin.

Furthermore, the 1982 Monterey County General Plan requires a “proven adequate water supply.” DEIR, p. 2-165. The 2010 Monterey County General Plan requires that a project have a “long term sustainable water supply.” 2010 General Plan Policy PS-3.1¹⁰. Monterey County Code § 15.04.140 requires that water sources “shall demonstrate reliability and capability of a long term sustained yield.” The County cannot find that the Project is consistent with these requirements without information about both the projected demand and the sustained yield of the basin from which the Project water supply is taken.

However, the EIR and WSA fail to identify the sustained yield of the basin or sub-basin from which the Project water supply will be taken. Without this information, the WSA and EIR fail to meet CEQA’s requirement to identify available water supplies.

Instead of providing information about the actual sustained yield of the basin, the EIR and WSA simply compare the projected demand of the Project and other sources of future demand to the *allocation* of water made to the County through the FORA process. DEIR, p. 2-172; FEIR, App. J, pp. 22-23.

No information is presented that could demonstrate that the FORA allocation was, is, or will remain consistent with the sustained yield of the basin. The EIR and WSA do reference the analysis of the projected adequacy of efforts to address overdrafting and saltwater intrusion contained in the Salinas Valley Water Project EIR. DEIR, pp. 2-98 to 2-99, 2-173; DEIR, App. J, p. 22. However, as discussed in the section below, this analysis is out of date because it fails to reflect the substantial increases to actual and projected demand since it was prepared.

4. The Water Supply Assessment Uncritically Relies On the Salinas Valley Water Supply Project, Despite Significant Changes To Demand Projections

Just as it did in adopting its 2010 General Plan, the County proposes to rely on the out of date analysis in the Salinas Valley Water Project EIR as the basis to find that the Project’s increased demand will not contribute to the serious existing overdraft and salt water intrusion conditions in the groundwater basin. LandWatch objected to this reliance then, and it objects again now. The Salinas Valley Water Project simply does not deliver enough solution to address the increasing groundwater pumping in the basin.

¹⁰ Policy PS 3.2 requires the County to develop an ordinance setting forth the requirements for an adequate water supply analysis to support the findings required by Policy PS 3.1. The County has not done so. As discussed above, the County has also failed to comply with its Ordinances No. 5171 and 5172 requiring staff to make a recommendation and requiring the Planning Commission to make a determination regarding consistency with the 2010 General Plan. Thus, there is no adequate basis in the record to support a finding that the Project is consistent with Policy PS 3.1.

In its certification of an EIR and adoption of the 2010 General Plan, the County concluded that water supply impacts to the Salinas Valley groundwater basin, including overdrafting and salt water intrusion, would be less than significant through 2030, based on the analysis contained in the 2001 Salinas Valley Water Project EIR. See, e.g., 2010 General Plan FEIR, March 2010, p. 2-66; Revised Supplemental Materials to the Final EIR, Oct. 15, 2010, p. S-11.¹¹ LandWatch and others objected to this conclusion in comments on the Draft EIR, comments on the Final EIR, and in numerous additional letters provided to the Planning Commission and Board of Supervisors during the summer of 2010 as the County deliberated on the 2010 General Plan. LandWatch reasserts these objections here, and incorporates them by reference to the documents identified below, including LandWatch's Petition for Mandate. Petition for Writ of Mandate, LandWatch v. County of Monterey, Monterey County Superior Court No. M109434, attached as Exhibit 2.

One fundamental basis of LandWatch's objection to the County's uncritical reliance on the 2001 SVWP EIR is that its demand assumptions are out of date. The 2001 SVWP EIR was based on the assumption that agricultural acreage would decline by 1,849 acres between 1995 and 2030. However, the 2010 General Plan EIR showed that new agricultural land had actually *increased* by 3,300 acres, just between 1995 and 2006. And the 2010 General Plan EIR projected that from 2008 to 2030 an *additional* 10,253 acres of agricultural land will be converted. The water demanded by this increased agricultural acreage was not assumed in the SVWP EIR demand projections. Had this

¹¹ LandWatch incorporates the following documents herein by reference, and will supply hard copies upon request. Each of the documents referenced is part of the administrative record for the 2010 Monterey County General Plan and has recently been presented to the Board of Supervisors. Most of these documents are also available on the County web site at http://www.co.monterey.ca.us/planning/gpu/GPU_2007/gpu_2007.htm.

- Monterey County Water Resources Agency, Draft EIR/EIS for the Salinas valley Water Project, June 2001 ("SVWP EIR")
- County of Monterey, 2007 Monterey County General Plan Draft EIR, SCH# 2007121001, Sept. 2008 ("2010 GP DEIR")
- County of Monterey, 2007 Monterey County General Plan Final EIR, March 2010 ("2010 GP March FEIR")
- County of Monterey, Supplemental Materials to the Final EIR, September 2010 ("2010 GP September FEIR Supplement")
- County of Monterey, Revised Supplemental Materials to the Final EIR, October 15, 2010 ("2010 GP October FEIR Supplement")
- John Farrow, letter to Jay Brown and Planning Commission, May 24, 2010
- Bill Yeates, letter to Planning Commission, June 14, 2010
- John Farrow, letter to Jay Brown and Planning Commission, July 20, 2010
- John Farrow, letter to Board of Supervisors, August 26, 2010
- Adelia Barber, letter to Julie Engell, September 18, 2010
- Julie Engell, letter to Board of Supervisors, September 21, 2010
- John Farrow, letter to Board of Supervisors, September 21, 2010
- Julie Engell, letter to Board of Supervisors, September 27, 2010
- John Farrow, letter to Board of Supervisors, September 28, 2010
- Michael Stamp ad Molly Erickson, letter to Board of Supervisors, October 26, 2010
- John Farrow, letter to Board of Supervisors, October 26, 2010

increased demand been included, the SVWP EIR could not have projected that the basin demand would be reduced by 2030 to the 443,000 acre-feet level that it identifies as the maximum yield of the basin consistent with avoiding salt water intrusion and overdraft. With this increased demand from unanticipated agricultural pumping, the basin will remain out of balance through 2030 and neither the overdraft nor the salt water intrusion will come to a halt.

LandWatch and others objected to reliance on the SVWP EIR and to the water supply analysis in the 2010 General Plan EIR for a number of additional reasons, including the following reasons that are also implicated here:

- Baseline data were not furnished or reconciled for the SVWP EIR or the 2010 General Plan EIR. Here, the EIR for the MST/Whispering Oaks Project fails even to present baseline data, much less reconcile it to the SVWP EIR baseline data.
- Projected urban demand in the SVWP EIR is inconsistent with the four separate, inconsistent projections of urban demand in the 2010 General Plan EIR. Here, the EIR for the MST/Whispering Oaks Project does not even attempt to reconcile demand projections for the MCWD to the projections assumed in the SVWP EIR.
- Groundwater pumping data since 1995 show that pumping is increasing, not decreasing as projected by the SVWP EIR. Groundwater pumping data for the reporting *portion* of the Salinas Basin since 1995 consistently exceeds the sustained yield of the basin; actual pumping is even higher because this data omits significant portions of the basin. Again, we note that the EIR for the MST/Whispering Oaks Project did not present the required baseline pumping data so this EIR presents no evidence that demand reduction goals of the SVWP EIR have been or can be met.

Because the County offered no adequate analysis or response to LandWatch's objections to the water supply analysis and mitigation in the 2010 General Plan and its EIR, LandWatch has filed litigation seeking to set aside the 2010 General Plan based on the County's failure to recognize that there is not an adequate program in place to halt overdraft and salt water intrusion in the Salinas Valley groundwater basin. Petition for Writ of Mandate, LandWatch v. County of Monterey, Monterey County Superior Court No. M109434, attached as Exhibit 2.

Here, the County's continued reliance on the silver bullet of the Salinas Valley Water Project is as unsupported and unsupportable as it was in the 2010 General Plan. Thus, here the EIR fails to meet CEQA's information disclosure requirements regarding water supply baseline conditions, demand projections, and sufficiency of supply. The EIR fails to provide substantial evidence in support of its facile claim that the Project will not contribute to overdraft and salt water intrusion impacts. Nor does the EIR provide any basis to support a finding that the Project will have a long term sustainable water

June 13, 2011

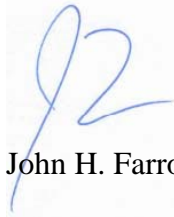
Page 39

supply under any meaningful definition of “sustainable,” a term that the County has yet even to define.

For all of the foregoing reasons, LandWatch asks that the County not approve the Project as proposed. Thank you for the opportunity to submit these comments.

Yours sincerely,

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

A handwritten signature in blue ink, appearing to be 'JH Farrow', is written over a light blue rectangular background.

John H. Farrow

Exhibit 1



**California Department of Fish and Game
P.O. Box 47, YOUNTVILLE, CA 94599
California Endangered Species Act
Incidental Take Permit No. 2081-2005-029-03
CYPRESS MARINA HEIGHTS, L.P.
MARINA HEIGHTS PROJECT**

Authority: This California Endangered Species Act ("CESA") Incidental Take Permit ("permit") is issued by the Department of Fish and Game ("Department") pursuant to Fish and Game Code section 2081(b) and section 2081(c), and California Code of Regulations, title 14, subdivision 3, chapter 6, article 1, commencing with section 783. CESA prohibits the take¹ of any species of wildlife that is included in the list of endangered species, the list of threatened species, or the list of candidate species². However, the Department may authorize, by permit, the take of such species if the conditions set forth in section 2081(b) and section 2081(c) are met.

Permittee: Cypress Marina Heights, L.P.

Name and title of principal officer: Charles R. Lande, Cypress Marina Heights L.P.

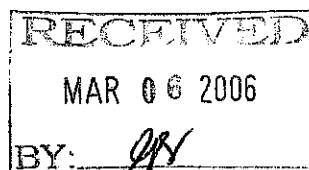
Contact person: Charles R. Lande
Cypress Marina Heights L.P.

Mailing address: 2716 Ocean Park Boulevard, Suite 3025,
Santa Monica, CA 90405
(310) 314-2590
Fax (310) 314-22592
chadmargr@aol.com

Agent for service of process : Michael L. Matkins
515 South Figueroa Street, 7th Floor
Los Angeles, CA 90071-3398
(213) 622-5555; (213) 620-8816 fax

¹Pursuant to Fish and Game Code section 86, "'Take' means hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture or kill."

²"Candidate species" are species of wildlife that have not yet been placed on the list of endangered species or the list of threatened species, but which are under formal consideration for listing pursuant to Fish and Game Code section 2074.2.



- d. Beginning with issuance of the permit and continuing for the life of the project, Permittee shall provide the Department an annual Status Report no later than July 1 of every year. Each Status Report shall include, at a minimum: 1) a general description of the project's status, including actual or projected completion dates, if known; 2) a copy of the MMRP table with notes showing the current implementation status of each mitigation measure; and 3) an effectiveness assessment for each completed or partially completed mitigation measure that compensates for project impacts.
 - e. No later than 45 days after completion of the project, including completion of all mitigation measures, Permittee shall provide the Department with a Final Mitigation Report. The Final Mitigation Report shall be prepared by a knowledgeable, experienced biologist and shall include, at a minimum: 1) a copy of the MMRP table with notes showing when each mitigation measure was implemented; 2) all available information about project-related incidental take of the Covered Species; 3) information about other project impacts on the Covered Species; 4) construction dates; 5) an effectiveness assessment which evaluates how the permit's conditions of approval compensated for project impacts; 6) recommendations on how mitigation measures might be changed to more effectively mitigate the impacts of future projects on the Covered Species; and 7) any other pertinent information. Notwithstanding any expiration date on this permit's take authorization, the Permittee's obligations under this permit do not end until the Department accepts the Final Mitigation Report as complete.
 - f. Permittee shall provide Department representatives with reasonable access to the project site and mitigation lands under its control, and shall otherwise fully cooperate with Department efforts to verify compliance with or effectiveness of mitigation measures.
5. Permittee shall provide for the permanent preservation of 45.2 acres that currently support sand gilia and shall restore and enhance at least 22.6 other acres to support sand gilia by doing all of the following:
- a. Permittee shall enter into one or more agreements with the City of Marina ("City") and the County of Monterey ("County") that commit the City and County to permanently preserve both occupied habitat and the area to be restored, and shall take other necessary actions to ensure those areas are in fact preserved. The Habitat Management Lands ("HM Lands") to be protected include a 140-acre portion of the "Landfill Site" identified in

Attachment 9 of the Mitigation Plan, title to which is being transferred to the County, and the 20-acre "City Site" identified in Attachment 10 of the Mitigation Plan, which will be transferred to the City. The agreements with the City and County must be completed and fully executed no more than six months after the date this permit is issued and must be in a form acceptable to the Department. The agreements shall require the City and County to take all necessary actions to accomplish the transfer of conservation easements over the HM Lands to the Department, or to another entity approved by the Department, as soon as practicable, but in no event more than six months after fee title to the relevant site is transferred to the County or City.

- b. Permittee shall restore or enhance at least 22.6 acres of the Landfill Site to support sand gilia as detailed in the Mitigation Plan. Restoration and/or enhancement includes activities that would make additional habitat available to sand gilia through removal of roads or other facilities, removal of exotic species, or other specific management activities. Restoration and/or enhancement activities shall not include conversion of other sensitive habitats to sand gilia habitat, or otherwise result in loss of other sensitive species or their habitats. The Department shall approve the final area of the Landfill Site to be restored.
- c. The Landfill Site and City Site contain at least 45.2 acres that currently support sand gilia, as required by this Condition 5. In the event that the Department determines that restoration and/or enhancement described in Condition 5-b and in the Mitigation Plan is not feasible, the Permittee shall preserve an additional 22.6 acres of HM Lands that currently support sand gilia. This additional preservation requirement may require the protection of more than 22.6 acres to meet the preservation requirement for occupied habitat because the Covered Species may not occupy all of the area that is preserved.
- d. The Department has approved the Landfill Site and City Site as biologically suitable to mitigate project impacts on the sand gilia. If any other land is proposed to meet the mitigation requirements of this permit, including pursuant to Condition 5-c, Permittee must obtain Department's approval of that land as suitable for the intended sand gilia mitigation.
- e. Permittee shall ensure the Department is provided with a recent preliminary title report, hazardous materials survey report, and other documents for the HM Lands identified in Appendix C at the appropriate



Existing FORA Mitigation Site	Habitat Restoration Area
Maritime Chaparral	Landfill Cap Area
Development Area	Preservation Area
	Landfill

	Monterey Reno San Jose Denise Duffy & Associates, Inc. Environmental Consultants Resource Planners 917 Case Street, Suite 5 Monterey, CA 93940 (408) 372-1311	
	Date: 6/20/2005 Scale: 1 inch equals 30 miles Project: 2467 MARH	
Title: Mitigation Site - Landfill Parcel File: Mitigation Area.mxd		

Exhibit 2

FILED

NOV 24 2010

CONNIE MAZZEI
CLERK OF THE SUPERIOR COURT
S. KELLY DEPUTY

FILED BY FACSIMILE

1 Mark R. Wolfe, CSB No. 176753
2 John H. Farrow, CSB No. 209221
3 M. R. WOLFE & ASSOCIATES, P.C.
4 1 Sutter Street, Suite 300
5 San Francisco, CA 94108
6 Tel: (415) 369-9400
7 Fax: (415) 369-9405

8 Attorneys for Petitioner

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

12 LANDWATCH MONTEREY COUNTY,

13 Petitioner,

14 vs.

15 COUNTY OF MONTEREY;

16 Respondent.

Case No.:

M109434

PETITION FOR WRIT OF MANDATE

(Code Civ. Proc., §§ 1085, 1094.5; California
Environmental Quality Act, Pub. Res. Code, §
21000 *et seq.*; State Planning and Zoning Law,
Gov't Code, § 65000 *et seq.*; SB 610, Water
Code, §§ 10910 *et seq.*)

1 **INTRODUCTION**

2 1. This Petition challenges the October 26, 2010 actions of Respondent COUNTY OF
3 MONTEREY (“County”) adopting the 2010 Monterey County General Plan (“the 2010 General Plan”),
4 certifying an Environmental Impact Report (“EIR”) and adopting a statement of overriding
5 considerations pursuant to the California Environmental Quality Act (“CEQA”) Public Resources Code
6 section 21000 *et seq.* Petitioner LANDWATCH MONTEREY COUNTY alleges that the County’s
7 actions in enacting the 2010 General Plan violate applicable provisions of: (1) CEQA; (2) the State
8 Planning and Zoning Law, Government Code sections 65000 *et seq.*; and (3) Senate Bill 610, Water
9 Code sections 10910 *et seq.*

10 2. Petitioners seek a writ of mandate under Code of Civil Procedure sections 1085 and/or 1094.5
11 commanding the County to set aside its certification of the EIR and its adoption of the 2010 General
12 Plan; commanding the County to bring its general plan into compliance with the requirements of the
13 State Planning and Zoning Law, Government Code sections 65000 *et seq.*, within 120 days; and
14 suspending the County’s authority to issue building permits, zoning changes, zoning variances, and
15 subdivision maps until the County does bring its general plan into compliance. Petitioners also seek an
16 order granting temporary relief during the pendency of this action, including an order suspending the
17 County’s authority to issue building permits, zoning changes, zoning variances, and subdivision maps.

18 **PARTIES**

19 **LandWatch Monterey County**

20 3. Petitioner LANDWATCH MONTEREY COUNTY (“LandWatch”) is a California non-profit
21 public benefit corporation exempt from federal income taxation under section 501(c)(3) of the U.S.
22 Internal Revenue Code. Its principal place of business is Salinas, California. LandWatch’s
23 organizational purpose is to promote sound land use planning and legislation at the city, county, and
24 regional levels, to combat urban sprawl, and to promote livability in the region’s cities and towns,
25 through public policy development, advocacy, and education. LandWatch is dedicated to preserving
26 economic vitality, high agricultural productivity, and environmental health in Monterey County by
27 encouraging effective public participation in the land use planning process.

4. LandWatch’s members, directors, and staff include residents, taxpayers, and electors in Monterey County who currently enjoy the multitude of residential, vocational, aesthetic, recreational, and health benefits stemming from the current state of Monterey County. These include: relatively clean air; relatively preserved natural resources; agricultural productivity; unobstructed views of the natural landscape; hiking trails; and water supply, water quality, and traffic conditions significantly better than those they will experience if the 2010 General Plan proceeds.

5. LandWatch’s members, directors, and staff have a clear and present right to, and beneficial interest in, the County’s performance of its duties to comply with CEQA, the State Planning and Zoning Law, and Senate Bill 610. As citizens, homeowners, taxpayers, and electors, LandWatch’s members, directors, and staff are within the class of persons to whom the County owes such duties.

6. LandWatch's members, directors, and staff will also suffer direct injury as a result of the adverse environmental, public health, aesthetic, and land use impacts caused by the 2010 General Plan. These include: the permanent loss of vast quantities of currently undeveloped open space and agricultural lands, blighting of the area's landscape, air pollution associated with increased vehicle traffic, permanent loss of habitat for plant and animal species including species protected under state and federal law, loss of recreational opportunities, increased traffic congestion in the area, impacts to local water supply and water quality from poorly planned and inefficient land development, and an overall decrease in quality of life.

7. By this action, LandWatch seeks to protect the interests of its members, directors, and staff, and to enforce a public duty owed to them by the County. Because the claims asserted and the relief sought in this petition are broad-based and of a public as opposed to a purely private or pecuniary nature, direct participation in this litigation by LandWatch's individual members is not necessary.

8. LandWatch presented oral and written comments in opposition to the 2010 General Plan to the County prior to and during the public hearings culminating in the County's October 26, 2010 approvals.

County of Monterey

9. Defendant COUNTY OF MONTEREY (“County”) is a political subdivision of the State of California. On October 26, 2010, the County, through its Board of Supervisors, certified the EIR and

1 approved the 2010 General Plan. The County is the “Lead Agency” responsible under CEQA for
2 evaluating the environmental impacts of the 2010 General Plan. The County is also the entity responsible
3 under the State Planning and Zoning Law and Senate Bill 610 for evaluating and approving the 2010
4 General Plan with respect to compliance with all applicable statutory requirements.

5 **Does**

6 10. Petitioners currently do not know the true names of DOES I through XXV inclusive, and
7 therefore name them by such fictitious names. Petitioners will seek leave from the court to amend this
8 petition to reflect the true names and capacities of DOES I through XXV inclusive once ascertained.

9 **JURISDICTION AND VENUE**

10 11. This action is brought pursuant to Public Resources Code sections 21167, 21168, and
11 21168.5, Government Code sections 65750 *et seq.*, and Code of Civil Procedure sections 1085 and
12 1094.5. Venue is proper in the County of Monterey under Code of Civil Procedure sections 393 and 395.

13 **BACKGROUND FACTS, PROCEDURAL HISTORY, AND AGENCY ACTION**

14 12. The County previously adopted a comprehensive General Plan on September 30, 1982.

15 13. On or about June, 1999, the Board of Supervisors directed County staff to prepare for and
16 undertake a community agreement process, to refined and update the 1982 General Plan and Area Plans,
17 and to undertake environmental review of the revised General Plan.

18 14. On October 12, 1999, staff of the Monterey County Planning and Building Inspection
19 Department issued a report on existing conditions, which concludes that land development has not
20 proceeded in accordance with the 1982 General Plan land use and growth management goals, particularly
21 in North County, Greater Salinas, Toro, Carmel Valley, and the Greater Monterey Peninsula. The report
22 further concludes that water demand exceeds supply in the three major supply areas on the County and
23 that a balance has not been achieved.

24 15. The October 12, 1999 report on existing conditions also concludes that roads in many areas of
25 the County are at capacity, that key State Highway facilities are so congested that traffic is diverting to
26 and congesting local County roads, that funding has not kept pace with maintenance needs, that the cost
27 estimated in 1996 to provide additional capacity to impaired State Highway corridors was \$700 million,
28

1 but that State and Federal funding programs provide less than \$8 million a year for capacity-related
2 improvements.

3 16. On or about November, 1999, the Board of Supervisors directed County staff to prepare a
4 comprehensive General Plan to update and replace the adopted 1982 General Plan.

5 17. Between November, 1999 and May, 2004, County staff prepared and circulated three draft
6 General Plan Updates (the “2001 Draft GPU,” “GPU 2,” and “GPU 3”) and associated environmental
7 impact reports. Numerous public workshops and hearings were held, and the Board of Supervisors
8 provided direction to staff to make numerous revisions to the draft general plans.

9 18. In May, 2004, the Board of Supervisors directed staff to cease work on the EIR for GPU3 and
10 to prepare yet another general plan revision. County staff proceeded to do so, and released drafts of the
11 2006 Monterey County General Plan, or “GPU 4,” including an Agricultural Winery Corridor Plan
12 (AWCP) as well as and environmental impact report in 2006 and 2007.

13 19. On January 3, 2007, the County, through its Board of Supervisors, adopted Resolution 07-
14 006, certifying the EIR, and Resolution 07-007, adopting the 2006 General Plan to replace the 1982
15 General Plan. The Board made its adoption subject to voter approval at the June 2007 election.
16 Following adoption of the 2006 General Plan, a citizens’ referendum on whether to repeal the 2006
17 General Plan was qualified and also placed on the June 2007 ballot. Voters indicated that they rejected
18 the 2006 General Plan.

19 20. In July 2007, the Board of Supervisors directed staff to modify the 2006 General Plan,
20 working with an ad hoc committee.

21 21. In December 2007, the County released a new draft general plan, entitled “the draft 2007
22 Monterey County General Plan” or “GPU5.”

23 22. The County released the Draft EIR for GPU5 for public comment on September 5, 2008. The
24 County subsequently provided some additional information, including some updated citations and
25 references and other errata, and commenced a second comment period running from December 16, 2008
26 to February 2, 2009.

27 23. Numerous agencies, organizations, and citizens, including LandWatch, submitted comments
28 on the Draft EIR, objecting to its failure to meet CEQA’s requirements.

1 24. The Planning Commission held workshops and a public hearing on the Draft EIR in 2008 and
2 early 2009.

3 25. In March 2009, the County released revisions to GPU5 and a Final EIR (the “March FEIR”)
4 purporting to respond to public comments and substantially revising GPU5 and the Draft EIR. The
5 March FEIR substantially revised the Draft EIR, for example, by substantially revising projections
6 related to water demand and furnishing analyses of water demand and supply that had not been included
7 in the Draft EIR.

8 26. From April 2010 through August 2010, the Planning Commission held public hearings and
9 made further substantial revisions to GPU5. LandWatch actively participated in those hearings,
10 submitting written and oral comments through its representatives and members.

11 27. On August 11, 2010 the Planning Commission recommended that the Board of Supervisors
12 certify the EIR and approve GPU5, which had been recaptioned the “2010 Monterey County General
13 Plan.”

14 28. In its August 11, 2010 recommendation to the Board of Supervisors, the Planning
15 Commission acknowledged its inability and failure to make recommendations regarding the critical
16 definition of “Long Term Sustainable Water Supply” or to provide substantive criteria for Policy PS-3.2,
17 which purports to require development of criteria for Long Term Sustainable Water Supply.

18 29. From August 31 through October 26, 2010, the Board of Supervisors held a public hearing on
19 the 2010 General Plan, which was continued on several dates during that period. LandWatch actively
20 participated in that hearing, submitting written and oral comments through its representatives and
21 members.

22 30. In September 2010, the County released a document captioned “Supplemental Materials to the
23 Final EIR” (“September FEIR Supplement”), substantially revising the March 2010 Final EIR with
24 respect to numerous issues, including the projected growth of agriculture; the policies governing, and the
25 impacts from, urban development and agriculture on steeply sloped lands; the availability of adequate
26 water supplies; and mitigation of traffic impacts. The September FEIR Supplement substantially revised
27 the projections of water demand and supply in the draft EIR, made further substantial revisions to the
28 draft EIR text, and furnished previously undisclosed reference data related to water supply issues.

1 31. On October 15, 2010, the County released yet another document captioned “Supplemental
2 Materials to the Final EIR” (the “October FEIR Supplement”), again, substantially revising the March
3 2010 Final EIR with respect to numerous issues, including the projected growth of agriculture; the
4 policies governing, and the impacts from, urban development and agriculture on steeply sloped lands; the
5 availability of adequate water supplies; and mitigation of traffic impacts. The October FEIR Supplement
6 yet again substantially revised the projections of water demand and supply in the Draft EIR, made further
7 substantial revisions to the Draft EIR text, and furnished yet more previously undisclosed reference data
8 related to water supply issues.

9 32. In October, during its review of the 2010 General Plan and the EIR, the Board of Supervisors
10 finally defined the critical term “Long Term Sustainable Water Supply” and settled on criteria for, and
11 new exemptions from, Policy PS-3.2, which sets forth the requirement to demonstrate an adequate water
12 supply. However, the Board of Supervisors failed to remand the 2010 General Plan back to the Planning
13 Commission.

14 33. On October 26, 2010, the Board of Supervisors certified the Final EIR and adopted Findings
15 of Fact, a Statement of Overriding Considerations, and a Mitigation Monitoring and Reporting Program
16 for the 2010 Monterey County General Plan.

17 34. On October 26, 2010, the Board of Supervisors adopted the 2010 Monterey County General
18 Plan.

19 35. On October 27, 2010, the County posted a Notice of Determination pursuant to Public
20 Resources Code section 21152 for the 2010 Monterey County General Plan.

21 **FIRST CLAIM FOR RELIEF**

22 **(Violation of CEQA)**

23 36. Petitioners here incorporate by reference all preceding paragraphs in their entirety.

24 37. At all times relevant to this action the County was the “Lead Agency” responsible for the
25 review and approval of the 2010 General Plan under Public Resources Code section 21067.

26 38. Under Government Code section 65350, a Lead Agency may not approve a general plan
27 without performing the environmental review required by CEQA.

1 39. Generally, CEQA requires public agencies to first identify the environmental effects of its
2 project or program, and then to mitigate those adverse environmental effects through the imposition of
3 feasible mitigation measures or the analysis and selection of feasible alternatives. Public Resources
4 Code, § 21002. CEQA requires a lead agency to establish that either (1) impacts will not have a
5 significant effect on the environment or (2) the agency has adopted findings that all significant
6 environmental effects have been avoided or mitigated to the extent feasible, and any remaining effects
7 found to be unavoidable are acceptable due to specific overriding economic, social, technological, or
8 other benefits.

9 40. An EIR must include a finite, stable, accurate and meaningful project description. 14 C.C.R.,
10 § 15124.

11 41. An EIR must include a description of the physical environmental conditions in the vicinity of
12 the project as they existed at the time the notice of preparation is published, with particular focus on the
13 regional setting. 14 C.C.R., § 15125.

14 42. An EIR must identify and evaluate the direct, indirect, and cumulative environmental impacts
15 of all phases of a project. 14 C.C.R., § 15126. The discussion must include relevant specifics of the
16 area, the resources involved, physical changes, alterations to ecological systems, and changes induced in
17 population distribution, population concentration, the human use of the land (including commercial and
18 residential development), health and safety problems caused by the physical changes, and other aspects of
19 the resource base such as water, historical resources, scenic quality, and public services. 14 C.C.R., §
20 15126.2.

21 43. A lead agency must describe and evaluate feasible measures for minimizing or avoiding a
22 project's direct, indirect, and cumulative impacts on the environment. Public Resources Code, §
23 21100(b)(3); 14 C.C.R., § 15126.4.

24 44. A lead agency may not improperly defer the formulation of mitigation measures until a future
25 time. An agency may only defer the formulation of mitigation measures when it "recognizes the
26 significance of the potential environmental effect, commits itself to mitigating its impact, and articulates
27 specific performance criteria for the future mitigation." *Gentry v. City of Murietta* (1995) 36 Cal.App.4th
28 1359, 1411, citing *Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1028-1029

1 (“for the kind of impacts for which mitigation is known to be feasible, but where practical considerations
2 prohibit devising such measures early in the planning process . . . the agency can commit itself to
3 eventually devising measures that will satisfy specific performance criteria articulated at the time of
4 project approval”); 14 C.C.R., § 15126.4(a)(1)(B). Deferral of mitigation requires that the agency specify
5 performance standards and set forth potential mitigation methods. *Sacramento Old City Assn., supra*, 229
6 Cal.App.3d at 1021. An agency must have, and must articulate, a good reason for deferring the
7 formulation of mitigation. *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149
8 Cal.App.4th 645, 670, 684. The County may not delegate the formulation and approval of programs to
9 address environmental impacts because an agency’s legislative body must ultimately review and vouch
10 for all environmental analysis mandated by CEQA. *Sundstrom v County of Mendocino* (1988) 202
11 Cal.App.3d 296, 306-308.

12 45. Mitigation measures, including adopted policies identified as mitigation, must be enforceable
13 and feasible. CEQA Guidelines, § 15126.4(a)(1), (2).

14 46. A lead agency must identify all significant effects on the environment caused by a proposed
15 project that cannot be avoided. Public Resources Code, § 21100(b)(2)(A)

16 47. A lead agency must provide information in the record to justify rejecting mitigation measures
17 as infeasible based on economic, social, or housing reasons. 14 C.C.R., § 15131(c).

18 48. Thus, under CEQA, the County was required to prepare an EIR that described the
19 environmental setting or baseline conditions; that included an accurate, stable, and finite project
20 description; that detailed all significant effects on the environment of the proposed project; that identified
21 any significant effect on the environment that cannot be avoided if the project is implemented; and that
22 identified feasible mitigation measures proposed to minimize significant effects on the environment.

23 49. The EIR was required to contain a statement briefly indicating the reasons for determining
24 that various effects on the environment were not significant and consequently were not discussed in detail
25 in the EIR. Public Resources Code, § 21100(c).

26 50. A lead agency may not approve a project for which an EIR identifies a significant
27 environmental impact unless the impact has been mitigated or avoided by changes in the project, or
28

1 unless the agency specifically finds that overriding benefits outweigh the significant effects on the
2 environment. Public Resources Code, § 21081.

3 51. Recirculation of a revised draft EIR is required whenever there is an addition of significant
4 new information in an EIR after the public comment deadline but before certification. 14 C.C.R., §
5 15088.5(a). Information is “significant” if it shows either that: (1) a new significant environmental
6 impact would result from the project or from a new mitigation measure proposed to be implemented; or
7 (2) a substantial increase in the severity of an environmental impact would result unless mitigation
8 measures are adopted that reduce the impact to a level of insignificance. *Id.* Recirculation is also
9 required if the EIR is changed in a way that “deprives the public of a meaningful opportunity to comment
10 . . .” or when it reveals that the earlier EIR “was so fundamentally and basically inadequate in nature that
11 public comment on the draft was in effect meaningless.” *Id.*

12 52. A lead agency must provide good faith, reasoned analysis in response to comments. 14
13 C.C.R., § 15088(c). The Final EIR must address recommendations and objections raised in comments in
14 detail, giving reasons why they were not accepted. *Id.* Specific responses are required to comments
15 raising specific questions about significant issues.

16 **A. Inadequate Description, Analysis, And Mitigation**

17 **1. Water Supply, Overdrafting, and Salt Water Intrusion Impacts**

18 53. The 2010 General Plan permits substantial expansion of residential, commercial, and
19 industrial development and expansion of irrigated agricultural in the unincorporated area of Monterey
20 County, all of which will require adequate water supplies.

21 54. The Salinas Valley groundwater basin, which is the primary source of water in the Salinas
22 Valley, has been and is in a condition of overdrafting because pumping exceeds recharge; and, as a
23 consequence, the basin is experiencing salt water intrusion as seawater is drawn into the aquifer.

24 55. The Monterey County Water Resources Agency (“MCWRA”) adopted the Salinas Valley
25 Water Project (“SVWP”) to address salt water intrusion caused by overdrafting.

26 56. The SVWP was intended to halt salt water intrusion and overdrafting by retaining up to an
27 additional 30,000 acre-feet of water in dams, providing about 9,700 acre-feet of that to augment the
28

1 Castroville Seawater Intrusion Project, about 10,000 acre-feet to increase groundwater recharge, and
2 another 10,000 acre-feet for in-stream flow augmentation.

3 57. The 2001 Environmental Impact Report for the SVWP (“SVWP EIR”) identifies 443,000
4 acre-feet as the maximum groundwater pumping in the Salinas Valley groundwater basin consistent with
5 avoidance of overdrafting and salt water intrusion. The SVWP EIR projects that groundwater pumping
6 would decline to the target of 443,000 acre-feet by 2030 through a 20,000 acre-foot reduction in
7 groundwater pumping compared to baseline 1995 conditions. The reduction was projected to result from
8 a 60,000 acre-foot reduction in agricultural pumping that would offset a 40,000 acre-foot increase in
9 urban use. The SVWP EIR projected that agricultural pumping would decline as a result of changes to
10 cropping patterns, increased conservation, and an 1,849 acre reduction in irrigated acreage, from 196,357
11 acres in 1995 to 194,508 acres in 2030.

12 58. The Draft EIR failed to present a water balance analysis for the Salinas Valley that compared
13 water demand and supply for the purported 2005 baseline to the water supply and demand for the
14 planning horizon’s future (2030).

15 59. Instead, the Draft EIR for the 2010 General Plan presented the water balance analysis from the
16 SVWP EIR, which compared 1995 conditions to 2030 conditions. The Draft EIR, the March Final EIR,
17 and the October FEIR Supplement each identify the analysis in the SVWP EIR as the basis of the 2010
18 General Plan EIR’s conclusions that water supply would be adequate, and that overdrafting and salt water
19 intrusion impacts would be less than significant, in the Salinas Valley through 2030.

20 60. Despite evidence presented by LandWatch and by other comments that the SVWP EIR did
21 not adequately represent baseline conditions for the 2010 General Plan and that it was based on entirely
22 different and lower projections of total 2030 water demand, the March Final EIR, the September FEIR
23 Supplement, and the October FEIR Supplement clung stubbornly to the SVWP EIR as the analytic basis
24 of these significance conclusions. To do this, these three documents presented entirely new analyses of
25 baseline and projected water demand, which were inconsistent with the SVWP EIR, with the Draft EIR,
26 with each other, and with other evidence in the record.

27 61. As a result of this and other errors and omissions, the EIR fails as an informational document
28 because it does not adequately describe existing baseline conditions and does not adequately describe the

1 project, particularly the projection of future water demand in the Salinas Valley under the 2010 General
2 Plan.

3 62. Furthermore, the analysis of water supply-related impacts is not supported by substantial
4 evidence, *inter alia*, because 1) there is no substantial evidence that the SVWP EIR adequately represents
5 existing and projected conditions for the 2010 General Plan, and 2) the results-driven, shifting, and
6 inconsistent presentation of both existing conditions and future demand vitiate any credible analysis.

7 63. For example, as noted, the Draft EIR simply reprinted the water balance from the SVWP EIR
8 comparing 1995 baseline and 2030 water demand and supply instead of providing a water balance
9 analysis based on the Draft EIR's 2005 baseline and its *own* assumptions about 2030 population and
10 agricultural acreage. Analysis of water demand and comparisons of projected demand and supply based
11 on the EIR's own assumptions were not presented until the March Final EIR.

12 64. The Draft EIR, the March Final EIR, the September FEIR Supplement, and the October FEIR
13 supplement present four different and incompatible projections of urban water demand as of 2030. These
14 analyses use different population assumptions and different per capita water use assumptions. The only
15 consistent thread in these analyses is that they purport to justify continuing reliance on the SVWP EIR.

16 65. The purported baseline water demand data in the Draft EIR consists of pumping data from a
17 single year, 2005, a below-normal water use year. However, the October FEIR Supplement later
18 admitted that this 2005 pumping data is incomplete, both because it omits large portions of the Salinas
19 Valley groundwater basin and because not all wells in the limited reporting area actually reported.
20 Furthermore, the EIR admits that single year water use data do not provide a meaningful basis for
21 comparisons because they do not reflect variations in weather, acreage, and cropping.

22 66. The EIR claims not to rely on the 1995 baseline in the SVWP EIR, a composite figure that is
23 intended to reflect variations in weather, acreage, and cropping patterns and that is based on the extent of
24 irrigated acreage as of 1995. But, because the EIR's analysis of water supply impacts is based on the
25 SVWP EIR, and no analysis of overdrafting or saltwater intrusion impacts was undertaken other than that
26 in the SVWP EIR, the 2010 General Plan EIR does in effect rely on the SVWP EIR's 1995 baseline. The
27 2005 baseline data in the Draft EIR are analytically irrelevant.

1 67. However, because the EIR provides no way to reconcile the 1995 baseline in the SVWP EIR
2 to the EIR's own 2005 baseline, the EIR fails to present an analytically relevant current baseline.

3 68. The SVWP EIR baseline is itself unjustified because it is substantially less than the actual
4 pumping data for prior and subsequent years. Furthermore the SVWP EIR's acreage assumptions were
5 not, and cannot be, reconciled with its own background technical reports or with the acreage assumptions
6 in the 2010 General Plan EIR. In addition, the October FEIR supplement admits that the Salinas Valley
7 Integrated Ground Surface Model ("SVIGSM") used in the SVWP EIR and the model assumptions did
8 not include the entire Salinas Valley groundwater basin. Finally, the County did not make the SVIGSM
9 or its assumptions available to the public.

10 69. The Draft EIR and the March Final EIR understate future water demand from agriculture.
11 Whereas the SVWP EIR projected a 1,849 acre decrease in irrigated agriculture, the 2010 General Plan
12 EIR eventually admitted that irrigated agriculture would increase by 10,253 acres from 2008 to 2030.
13 And even this increase is understated, because it is inconsistent with the recently accelerating rate of
14 agricultural land conversions. The EIR also understates water demand from the Agricultural Winery
15 Corridor Plan ("AWCP"), which was not anticipated by the SVWP EIR.

16 70. The March FEIR dismisses the water demand consequence of admitted increases in irrigated
17 agricultural acreage over the acreage assumed in the SVWP EIR. It does this by double counting
18 projected conservation and by presenting pumping data for the period from 1995 to 2008 purporting to
19 show declining water use. However, the October FEIR Supplement later admits these data are
20 incomplete, because not all wells reported and because the reporting area does not include the entire
21 Salinas Valley groundwater basin. The October FEIR's admission that the pumping data in the Draft EIR
22 and March FEIR are incomplete came only *after* LandWatch presented evidence that this pumping data
23 omits 70,000 acres of the Salinas Valley groundwater basin.

24 71. The October FEIR Supplement, presented days before the EIR certification, belatedly admits
25 that 2030 agricultural water demand will in fact be much higher than the demand projected in the SVWP
26 EIR, the 2010 General Plan Draft EIR, or the March Final EIR – precisely because of the projected
27 increases in agricultural land between 2008 and 2030 that were identified by LandWatch in Draft EIR
28 comments but discounted in the March FEIR comment responses. However, this last-minute analysis

1 still fails to acknowledge the increased water demand due to increases in agricultural land that had
2 *already occurred* between 1995 and 2008 – increases that were also not assumed in the SVWP EIR’s
3 projection of 2030 conditions.

4 72. To offset the admitted increase in projected 2030 *agricultural* water demand, the October
5 FEIR Supplement coincidentally projects a compensating reduction in projected 2030 *urban* water
6 demand, based on the new and unjustified assumption that all 2030 urban water use will decline by 20%
7 by virtue of SBX77.

8 73. There is no justification for this last-minute assumption that urban demand will be reduced
9 20% by virtue of SBX77, an enactment which predated the March FEIR but was not mentioned in that
10 document. For example, SBX77 does not apply to small water suppliers in the Salinas Valley, does not
11 actually mandate a 20% reduction in residential use, and mandates at most a 10% cut to non-residential
12 urban use, which makes up a large portion of urban use.

13 74. In addition, the October FEIR Supplement presents an entirely new analysis that equivocally
14 and inconsistently projects that a substantial portion of water demand previously identified as part of the
15 demand from the Salinas Valley groundwater basin *might* not materialize. The October FEIR
16 Supplement indicates that this demand *might* instead occur in previously undisclosed and unevaluated
17 groundwater basins within the Salinas Valley watershed but purportedly separate from the Salinas Valley
18 groundwater basin. The October FEIR Supplement fails to clarify whether this demand will in fact be
19 relocated, or to discuss the water supply impacts to the Salinas Valley groundwater basin if it is not
20 relocated.

21 75. The October FEIR Supplement provides no information regarding water supply in the newly
22 identified groundwater basins in which future demand might be relocated.

23 76. In effect, the equivocal last-minute analysis in the October FEIR Supplement acknowledges
24 either that there is no known water supply for the demand in these newly identified basins *or* that the
25 supply in the Salinas Valley groundwater basin will not be sufficient. The CEQA findings fail to discuss
26 the significance of impacts to these newly identified basins. The CEQA findings are also inconsistent
27 with the revised data provided in the October FEIR Supplement.

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1 77. The October FEIR Supplement also admits that previous analyses, including the analyses in
2 the SVWP EIR, the 2010 General Plan Draft EIR, the March Final EIR, and the September FEIR
3 Supplement, omit the water demand from significant portions of the Salinas Valley groundwater basin.

4 78. The March Final EIR and the October FEIR Supplement purport to demonstrate that water
5 usage is in line with projections in the SVWP EIR by citing pumping data from 1995 to 2008. However,
6 this data is admittedly incomplete. Furthermore, the trend analyses offered by the March Final EIR and
7 the October FEIR Supplement fail to take into account the variations in weather, cropping patterns, and
8 irrigated acreage – precisely the variations that the EIR argues elsewhere must be taken into account in
9 any meaningful analysis or comparison. For example, the October FEIR Supplement acknowledges that
10 these variations are critical to any analysis when it faults LandWatch for pointing out that the same data
11 demonstrate that water use *per acre* has been increasing.

12 79. As a result of the admitted errors and omissions in previous analyses, the October FEIR
13 Supplement, issued days before certification of the EIR, entirely revises the water demand and water
14 balance analyses for the Salinas Valley groundwater basin and provides an entirely new analysis of water
15 demand for additional groundwater basins in the Salinas Valley watershed.

16 80. In addition to the foregoing and other failures to present an adequate description of existing
17 conditions and the project itself and its failure to provide a credible analysis of impacts, the EIR fails to
18 propose and discuss adequate mitigation for water supply related impacts.

19 81. The EIR and the CEQA findings argue that no additional mitigation for water supply-related
20 impacts to 2030 in the Salinas Valley groundwater basin is required because demand will be consistent
21 with demand projected in the SVWP EIR. As noted, the shifting, inconsistent, and belated analyses in
22 the 2010 General Plan EIR do not provide substantial evidence for this conclusion, and there is
23 substantial evidence that unmitigated demand will exceed the demand projected by the SVWP EIR.
24 Additional mitigation is required.

25 82. 2010 General Plan policies identified in the EIR as mitigation for water supply related impacts
26 are not sufficient to avoid significant impacts. Essentially all of the policies presented as mitigation for
27 impacts to water supplies are deferred mitigation, calling for future development of programs, standards,
28 and regulations that would address, *inter alia*, groundwater recharge, water conservation, well approval,

1 sea water intrusion, water supply assessment procedures, well installation and testing, and groundwater
2 overdrafting.

3 83. The proposed deferred mitigation measures for impacts to water supplies and water resources
4 improperly fail to identify performance standards or alternative means of mitigation and the basis for
5 choosing among them. These policies improperly defer formulation of mitigation despite the evident
6 and acknowledged uncertainty as to the feasibility or efficacy of mitigation. These policies improperly
7 delegate mitigation approval authority away from the Board of Supervisors.

8 84. For example, Policy PS-3.1 requires proof of a Long Term Sustainable Water Supply for new
9 development. Policy PS-3.2 was intended to provide criteria for proof of this Long Term Sustainable
10 Water Supply. However, the Planning Commission was unable to recommend any criteria. As finally
11 drafted, at the last minute by the Board of Supervisors, Policy PS-3.2 does not provide criteria, but
12 merely empty parameters, and defers the actual formulation of criteria to a future ordinance.
13 Furthermore, Policy PS-3.2 as finally drafted does not apply to ministerial permitting decisions and
14 exempts agriculture, even though agriculture accounts for 85% of projected 2030 water demand.

15 85. The 2010 General Plan EIR is also deficient with respect to water supply and water supply
16 related impacts, both in the Salinas Valley and elsewhere within the County, in that it otherwise fails
17 adequately to describe existing conditions, describe the project, identify and evaluate significant impacts,
18 and propose necessary mitigation.

19 86. With respect to water supply and water supply-related impacts, the County abused its
20 discretion by failing to describe adequately the 2010 General Plan; by failing to describe adequately the
21 existing environmental conditions; by failing adequately to evaluate and to identify significant impacts;
22 and by failing to propose and discuss adequate mitigation for significant impacts. Thus, the County's
23 approval of the 2010 General Plan was a prejudicial abuse of discretion and arbitrary and capricious in
24 that the County did not proceed in the manner required by law and its decision and findings are not
25 supported by substantial evidence.

26 **2. Water Quality Impacts**

27 87. The 2010 General Plan permits substantial expansion of residential, commercial, and
28 industrial development and expansion of agricultural in the unincorporated area of Monterey County.

1 Expansion of agriculture and development will result in erosion, sedimentation, and other water quality
2 impacts.

3 88. The 2010 General Plan relaxes current restrictions and permits development and agricultural
4 expansion on slopes in excess of 25%. Such development and agricultural expansion will contribute to
5 erosion, sedimentation, and water quality impairment from other pollutants.

6 89. Many streams and other water bodies in Monterey County are already significantly impaired
7 by sedimentation and other pollutants.

8 90. The 2010 General Plan EIR fails to provide an adequate description of existing conditions
9 with respect to erosion, sedimentation, and other water quality impairments. For example, the Draft EIR
10 does not acknowledge the failure of existing regulatory efforts to prevent significant water quality
11 impacts, and it does not acknowledge that existing development and agricultural operations result in
12 cumulatively significant water quality impacts.

13 91. The 2010 General Plan EIR fails to provide a description of development and agricultural
14 expansion that adequately supports analysis of water quality impacts.

15 92. The 2010 General Plan EIR fails to provide an adequate analysis of water quality impacts,
16 including cumulative water quality impacts. For example, the EIR improperly concludes that existing
17 regulations and a handful of inadequately specified policies will prevent future water quality impacts.

18 93. The 2010 General Plan EIR fails to propose and discuss adequate mitigation of water quality
19 impacts, including cumulative water quality impacts.

20 94. With respect to water quality impacts, the County abused its discretion by failing to describe
21 adequately the 2010 General Plan; by failing to describe adequately the existing environmental
22 conditions; by failing adequately to evaluate and to identify significant impacts; and by failing to propose
23 and discuss adequate mitigation for significant impacts. Thus, the County's approval of the 2010 General
24 Plan was a prejudicial abuse of discretion and arbitrary and capricious in that the County did not proceed
25 in the manner required by law and its decision and findings are not supported by substantial evidence.

26 **3. Biological Resource Impacts**

27 95. The 2010 General Plan permits substantial expansion of residential, commercial, and
28 industrial development and expansion of agricultural in the unincorporated area of Monterey County.

Expansion of agriculture and development will result in impacts to biological resources, including special status species, important habitat, movement corridors, and nursery sites.

96. The 2010 General Plan relaxes current restrictions and permits development and agricultural expansion on slopes in excess of 25%. Such practices lead to loss of habitat and other impacts to biological resources.

97. The 2010 General Plan EIR fails to provide an adequate description of existing conditions with respect to biological resources.

98. The 2010 General Plan EIR fails to provide a description of development and agricultural expansion that adequately supports analysis of impacts to biological resources.

99. The 2010 General Plan EIR fails to provide an adequate analysis of impacts to biological resources, including cumulative impacts.

100. The 2010 General Plan EIR fails to propose and discuss adequate mitigation of impacts to biological resources, including cumulative impacts.

101. With respect to biological resource impacts, the County abused its discretion by failing to describe adequately the 2010 General Plan; by failing to describe adequately the existing environmental conditions; by failing adequately to evaluate and to identify significant impacts; and by failing to propose and discuss adequate mitigation for significant impacts. Thus, the County's approval of the 2010 General Plan was a prejudicial abuse of discretion and arbitrary and capricious in that the County did not proceed in the manner required by law and its decision and findings are not supported by substantial evidence.

4. Other Impacts

102. The 2010 General Plan permits substantial expansion of residential, commercial, and industrial development and expansion of irrigated agricultural in the unincorporated area of Monterey County. This development will result other environmental impacts, including impacts to traffic, air quality, and agricultural land.

103. The 2010 General Plan EIR fails to provide an adequate description of existing conditions that would support the analysis of other environmental impacts.

104. The 2010 General Plan EIR fails to provide a description of development that adequately supports analysis of other environmental impacts.

105. The 2010 General Plan EIR fails to provide an adequate analysis of other environmental impacts, including cumulative impacts.

106. The 2010 General Plan EIR fails to propose and discuss adequate mitigation of other environmental impacts, including cumulative impacts.

107. With respect to other impacts, including impacts to traffic, air quality, and agricultural land, the County abused its discretion by failing to describe adequately the 2010 General Plan; by failing to describe adequately the existing environmental conditions; by failing adequately to evaluate and to identify significant impacts; and by failing to propose and discuss adequate mitigation for significant impacts. Thus, the County's approval of the 2010 General Plan was a prejudicial abuse of discretion and arbitrary and capricious in that the County did not proceed in the manner required by law and its decision and findings are not supported by substantial evidence.

5. Mitigation Inadequately Specified And Improperly Deferred

108. The EIR improperly defers to a future date evaluation of mitigation measures for the impacts caused by the 2010 General Plan.

109. The 2010 General Plan contains inadequately specified policies that amount to nothing more than a promise to look into problems later. These policies lack the essential substantive detail to direct orderly growth, and they lack the performance standards required to mitigate environmental impacts.

110. CEQA does not permit the County to defer the formulation of a mitigation measure where the proposed mitigation measure 1) lacks performance standards, 2) fails to identify alternative means of mitigation and the basis for choosing among them, 3) defers formulation of mitigation in the face of uncertainty as to the feasibility or efficacy of mitigation, or 4) delegates mitigation approval authority away from the Board of Supervisors.

111. The EIR asserts that many of these inadequately specified policies will mitigate environmental impacts from development so that these impacts are less than significant. The Board of Supervisors could not reasonably conclude that eventual implementation of an inadequately specified policy would mitigate impacts.

112. In other instances, the EIR concludes that, despite the incompletely specified policies, impacts must remain significant and unavoidable. The Board could not reasonably conclude that eventual

1 implementation of an inadequately specified policy will result in all feasible mitigation of significant and
2 unavoidable impacts.

3 113. Many 2010 General Plan policies are so vague, incomplete, untested, and unspecified that it
4 was simply impossible for the Board of Supervisors to evaluate their effectiveness.

5 114. Expert opinion and evidence in the record demonstrates that many of the policies cannot be
6 effective in meeting 2010 General Plan Goals.

7 115. Numerous policies in the 2010 General Plan do not meet CEQA's requirements for deferral of
8 mitigation. These policies include, *inter alia*, provisions to regulate loss of agricultural land;
9 development on slopes; hydrologic impacts of slope conversion; runoff and recharge; proof of sustainable
10 water supply; groundwater overdraft; water conservation; water recycling; wastewater treatment; septic
11 disposal facilities; new wells; sea water intrusion to groundwater basins; acceptable traffic levels of
12 service; habitat loss; evaluation of water supply adequacy; landscaping and lighting; agricultural buffers;
13 residential development outside Community Areas and Rural Centers; ridgeline development; best
14 management practices for erosion control; tree removal; invasive species; protection of archaeological
15 and cultural resources; and flooding.

16 116. The County abused its discretion by failing to propose and discuss adequate mitigation for
17 significant impacts. Thus, the County's approval of the 2010 General Plan was a prejudicial abuse of
18 discretion and arbitrary and capricious in that the County did not proceed in the manner required by law
19 and its decision and findings are not supported by substantial evidence.

20 **6. Finding of Overriding Considerations Not A Substitute For Adequate Disclosure**

21 117. An agency may not simply label an impact significant and adopt a statement of overriding
22 considerations without meeting CEQA's information and disclosure requirements. *Berkeley Keep Jets*
23 *Over the Bay Committee v. Board of Port Commissioners* (2001) 91 Cal.App.4th 1344, 1371. CEQA
24 requires that an EIR not only identify impacts, but must also provide "information about how adverse the
25 impacts will be." *Santiago County Water District v. County of Orange* (1981) 118 Cal.App.3d 818, 831.

26 118. The County's failure to disclose the true scope of environmental impacts was not cured by its
27 finding that these impacts are significant and unavoidable.

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1 119. The County abused its discretion by failing to disclose the true scope of environmental
2 impacts. Thus, the County's approval of the 2010 General Plan was a prejudicial abuse of discretion and
3 arbitrary and capricious in that the County did not proceed in the manner required by law and its decision
4 and findings are not supported by substantial evidence.

5 **B. Inadequate Evaluation of Alternatives**

6 120. An EIR must describe a range of reasonable alternatives to the project, or to the location of
7 the project, that would feasibly attain most of the basic objectives of the project but would avoid or
8 substantially lessen any of the significant effects of the project, and must evaluate the comparative merits
9 of the alternatives. 14 C.C.R., § 15126.6. An EIR must include sufficient information about each
10 alternative to allow meaningful evaluation, analysis, and comparison with the proposed project. *Id.* Case
11 law states that alternatives analysis must contain "meaningful detail" and should include quantitative
12 comparative analysis. *Laurel Heights Improvement Association v. Regents of the University of California*
13 (1988) 47 Cal.3d 376, 406; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692,
14 733-734.

15 121. The EIR fails to identify and evaluate a reasonable range of alternatives to the 2010 General
16 Plan and AWCP that would avoid or minimize significant impacts.

17 122. The EIR's descriptions and analyses of alternatives are flawed and do not include sufficient
18 information about each alternative to allow meaningful evaluation, analysis, and comparison with the
19 proposed project.

20 123. The County abused its discretion by failing to describe an adequate analysis of alternatives
21 and to provide an adequate analysis of those alternatives. Thus, the County's approval of the 2010
22 General Plan was a prejudicial abuse of discretion and arbitrary and capricious in that the County did not
23 proceed in the manner required by law and its decision and findings are not supported by substantial
24 evidence.

25 **C. Documentation Improperly Withheld or Not Prepared**

26 124. A lead agency must provide information to support the technical conclusions in an EIR.
27 Public Resources Code section 21092(b)(1) requires that the County provide notice of the address where
28

copies of the draft environmental impact report . . . and all documents referenced in the draft environmental impact report . . . are available for review.

125. The County failed to make all documentation referenced in the EIR available timely, or, in some instances, at all.

126. The omission of this information and refusal to provide it upon request substantially prejudiced the public's opportunity to provide meaningful comments on the Draft EIR and to participate in the environmental review of the 2010 General Plan.

127. The County abused its discretion by failing to provide relevant documentation. Thus, the County's approval of the 2010 General Plan was a prejudicial abuse of discretion and arbitrary and capricious in that the County did not proceed in the manner required by law and its decision and findings are not supported by substantial evidence.

D. Failure to Recirculate Despite Significant New Information

128. Recirculation of a revised draft EIR is required whenever there is an addition of significant new information in an EIR after the public comment deadline but before certification. 14 C.C.R., § 15088.5(a). Information is "significant" if it shows either that: (1) a new significant environmental impact would result from the project or from a new mitigation measure proposed to be implemented; or (2) a substantial increase in the severity of an environmental impact would result unless mitigation measures are adopted that reduce the impact to a level of insignificance. *Id.* Recirculation is also required if the EIR is changed in a way that "deprives the public of a meaningful opportunity to comment . . ." or when it reveals that the earlier EIR "was so fundamentally and basically inadequate in nature that public comment on the draft was in effect meaningless." *Id.*

129. Significant information requiring that the County recirculate the Draft EIR was provided by the public in comments and by the County itself in the March Final EIR, the September FEIR Supplement, and the October FEIR Supplement. For example, the County provided numerous substantive revisions to its analyses of water supply related impacts, including entirely new analyses of urban and agricultural demand, baseline conditions, water supply, and even the location and identity of affected groundwater basins.

1 130. Information that should have been included in the Draft EIR but was omitted and instead
2 supplied later required recirculation, for example, information about cumulative water demand and
3 supply in each groundwater basin.

4 131. Changes to the project description, such as numerous changes made to proposed policies in
5 the 2010 General Plan, required recirculation.

6 132. Revisions made to the Draft EIR by the March Final EIR, the September FEIR Supplement,
7 and the October FEIR Supplement reveal that the Draft EIR is so fundamentally and basically inadequate
8 in nature that public comment on the Draft EIR was in effect meaningless.

9 133. The Board of Supervisors nonetheless improperly found that there was no significant new
10 information that would require recirculation of modified sections of the Draft EIR or the entire document.

11 134. The County abused its discretion by failing to recirculate the EIR for further public comment
12 and response. Thus, the County's approval of the 2010 General Plan was a prejudicial abuse of
13 discretion and arbitrary and capricious in that the County did not proceed in the manner required by law
14 and its decision and findings are not supported by substantial evidence.

15 **E. Failure to Respond Adequately To Comments**

16 135. A lead agency must provide good faith, reasoned analysis in response to comments. 14
17 C.C.R., § 15088(c). The Final EIR must address recommendations and objections raised in comments in
18 detail, giving reasons why they were not accepted. *Id.* Specific responses are required to comments
19 raising specific questions about significant issues.

20 136. The County failed to provide good faith, reasoned analysis in response to comments on the
21 Draft EIR. The Final EIR fails entirely to address numerous specific comments. The Final EIR provides
22 misleading, inconsistent, non-specific, dismissive, or conclusory responses to many other comments.

23 137. The County abused its discretion by failing to provide adequate comment responses. Thus,
24 the County's approval of the 2010 General Plan was a prejudicial abuse of discretion and arbitrary and
25 capricious in that the County did not proceed in the manner required by law and its decision and findings
26 are not supported by substantial evidence.

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1 **F. Unlawful Approval of Unmitigated Project Despite Existence of Feasible Mitigation**
2 **Measures**

3 138. If a mitigation measure is proposed to address a potentially significant impact, that mitigation
4 measure must either be adopted or found to be infeasible. A finding of infeasibility must be supported by
5 substantial evidence in the record.

6 139. Commenters suggested a number of potentially feasible mitigation measures to address
7 significant environmental impacts. For example, comments identified specific water conservation
8 measures that could feasibly have been adopted as mitigation.

9 140. The County failed to identify, evaluate, and adopt all feasible mitigation measures that would
10 reduce or avoid unmitigated significant adverse impacts.

11 141. The County rejected suggested mitigation measures as infeasible without providing
12 substantial evidence in the record to support that conclusion.

13 142. The County abused its discretion by approving a project with unmitigated impacts despite the
14 existence of feasible mitigation. Thus, the County's approval of the 2010 General Plan was a prejudicial
15 abuse of discretion and arbitrary and capricious in that the County did not proceed in the manner required
16 by law and its decision and findings are not supported by substantial evidence.

17 **G. Failure to Adopt Legally Adequate Findings**

18 143. In order to adopt a project or program without mitigating each significant impact to a less-
19 than-significant level, an agency must find for each significant impact that : (1) changes or alterations
20 have been required, or incorporated, which mitigate or avoid or substantially lessen the significant effects
21 on the environment; (2) those changes or alterations are within the responsibility and jurisdiction of
22 another public agency and have been, or can and should be, adopted by that other agency; or (3) specific
23 economic, legal, social, technological, or other considerations, including considerations for the provision
24 of employment opportunities for highly trained workers, make infeasible the mitigation measures or
25 alternatives identified in the environmental impact report.

26 144. These findings must be supported by substantial evidence and the agency must explain the
27 logical relation between the facts in the record and the ultimate finding.
28 /

1 145. The County's CEQA Findings of Fact and its statement of overriding considerations are not
2 supported by substantial evidence and the County failed to explain the logical relation between the facts
3 in the record and its findings.

4 146. For example, the County failed to support its findings regarding the significance of impacts
5 with substantial evidence and its findings are inconsistent with the record. Findings failed to identify
6 some significant impacts and failed to consider feasible mitigation measures for significant impacts
7 despite substantial evidence that the impacts are significant and the availability of mitigation.

8 147. The County abused its discretion by failing to make legally adequate findings or to explain the
9 logical relation between the facts in the record and its findings. Thus, the County's approval of the 2010
10 General Plan was a prejudicial abuse of discretion and arbitrary and capricious in that the County did not
11 proceed in the manner required by law and its decision and findings are not supported by substantial
12 evidence.

13 **SECOND CLAIM FOR RELIEF**

14 **(Violation of State Planning and Zoning Law)**

15 148. Petitioner here incorporates by reference all preceding paragraphs in their entirety.

16 149. Government Code section 65300.5 requires that a general plan and elements and parts thereof
17 comprise an integrated, internally consistent and compatible statement of policies for the adopting
18 agency.

19 150. Government Code section 65302(b) provides that the circulation element of a general plan
20 shall be correlated with the land use element.

21 151. Government Code section 65103(a) requires a local planning agency, including the County, to
22 periodically review, and revise, as necessary, its general plan.

23 152. Government Code section 65751 provides that a writ of mandate under Code of Civil
24 Procedure section 1085 may be obtained to challenge a general plan or element thereof on the grounds
25 that such a plan or element does not comply with the requirements for general plans set forth at
26 Government Code section 65300 *et seq.*

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1 153. Government Code section 65754 requires that where a court finds that a general plan or
2 element thereof does not comply with requirements for general plans set forth at Government Code
3 section 65300 *et seq.*, the County shall bring its general plan into compliance within 120 days.

4 154. Government Code section 65755 provides that the court may also order relief including
5 suspension of authority to issue permits, to grant zoning changes, and to grant subdivision map
6 approvals.

7 155. Code of Civil Procedure section 1085 provides that a court may issue a writ of mandate to a
8 public agency to compel the performance of an act which the law specifically enjoins.

9 **1. Circulation Element Not Correlated With Land Use Element**

10 156. The Planning and Zoning law requires the circulation element to be correlated with the land
11 use element. Gov. Code, § 65302(b). The correlation requirement effectively requires the circulation
12 element to set forth service standards as well as proposals to address changes in roadway demand caused
13 by changes in land use. *Concerned Citizens of Calaveras County v. Calaveras County Board of*
14 *Supervisors* (1985) 166 Cal.App.3d 90, 100.

15 157. The circulation element in the 2010 General Plan is not correlated with its land use element,
16 and fails to comply with all applicable statutory criteria under the State Planning and Zoning Law.

17 158. For example, the 2010 General Plan provides no effective standard of service because policies
18 do not require the County to attain a particular service standard for 20 years, effectively for the duration
19 of the 2010 General Plan's planning horizon.

20 159. The 2010 General Plan fails to meet service standards because the County admits that the
21 standards identified will not be met on numerous roadways despite policies and mitigation measures.

22 160. The County admits that funding is not available to construct needed facilities or ensure service
23 standards are met.

24 161. Policies do not require concurrent mitigation of traffic impacts with new development.

25 162. Furthermore, the 2010 General Plan does not set forth consistent or adequately complete
26 objectives, principles, standards, and plan proposals for both its land use and circulation elements. The
27 objectives, principles, standards, and plan proposals for the circulation element are incomplete and
28 inconsistent, and they do not support the land use element.

1 163. The EIR acknowledges that cumulative impacts to County roads and to regional roads will be
2 significant and unavoidable. However, neither the EIR nor the 2010 General Plan propose mitigation or
3 include program elements that will ensure construction of roadway improvements necessary to meet level
4 of service standards.

5 164. Development impact fees may not be imposed to address roadway deficiencies caused by
6 prior development without violating the nexus and proportionality requirements of CEQA and
7 constitutional case law. 14 C.C.R., § 15126.4(a)(4). Neither the EIR nor the 2010 General Plan includes
8 adequate proposals that would address regional roadways currently operating below acceptable levels of
9 service.

10 165. Development “phasing” policies in the 2010 General Plan that purport to bar development or
11 occupancy until service standards are met does not cure the County’s failure to meet the correlation
12 requirement. Such policies, if actually implemented, would not result in a circulation element that
13 supports the land use element. Such policies would simply result in the failure to attain land use goals
14 rather than circulation goals, and would leave the circulation element uncorrelated with the land use
15 element.

16 166. The County’s approval of the 2010 General Plan was a prejudicial abuse of discretion and
17 arbitrary and capricious in that the County did not proceed in the manner required by law and its decision
18 and findings are not supported by substantial evidence because the circulation element is not correlated
19 with the land use element. The County’s action approving the 2010 General Plan was therefore arbitrary
20 and capricious and constituted a prejudicial abuse of discretion, in that the County failed to proceed in the
21 manner required by the State Planning and Zoning Law, and adopted findings of General Plan
22 completeness and consistency that are not supported by the evidence.

23 **2. Plan Incomplete**

24 167. A general plan and the elements and parts thereof must comprise a complete, integrated,
25 internally consistent and compatible statement of policies for the adopting agency.

26 168. The 2010 General Plan objectives, principles, standards, and plan proposals do not comprise a
27 complete, integrated, internally consistent and compatible statement of policies.

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1 169. For example, as noted above, the 2010 General Plan contains scores of inadequately specified
2 policies that amount to nothing more than a promise to look into problems later. These policies lack the
3 essential substantive detail to direct orderly growth, and they lack the performance standards required to
4 mitigate environmental impacts.

5 170. Many 2010 General Plan policies are so vague, incomplete, untested, and unspecified that it
6 was simply impossible for the Board of Supervisors to evaluate their effectiveness.

7 171. Expert opinion and evidence in the record demonstrates that many of the policies cannot be
8 effective in meeting 2010 General Plan Goals. For example, slope development policies cannot prevent
9 significant erosion and sedimentation impacts.

10 172. Because many policies are so ineffective that they do not support the goals intended to ensure
11 that permitted land uses are accommodated, the General Plan itself is incomplete.

12 173. The County's approval of the 2010 General Plan was a prejudicial abuse of discretion and
13 arbitrary and capricious in that the County did not proceed in the manner required by law and its decision
14 and findings are not supported by substantial evidence because the 2010 General Plan is incomplete. The
15 County's action approving the 2010 General Plan was therefore arbitrary and capricious and constituted a
16 prejudicial abuse of discretion, in that the County failed to proceed in the manner required by the State
17 Planning and Zoning Law, and adopted findings of General Plan completeness and consistency that are
18 not supported by the evidence.

19 **3. Plan Internally Inconsistent**

20 174. Numerous 2010 General Plan policies conflict with other policies and goals.

21 175. For example, 2010 General Plan policies permitting rural sprawl development conflict with
22 policies calling for concentrating growth in Community Areas.

23 176. Policies requiring adequate levels of service on County and regional roadways are in
24 fundamental conflict with land use designations that permit development at an intensity and in locations
25 that cannot be supported by existing or planned roadway improvements, or by improvements that may
26 feasibly be provided through implementation of the 2010 General Plan.

27 177. Policies requiring sustainable water supply for future development are in fundamental conflict
28 with land use designations that permit development and agricultural expansion at an intensity and in

1 locations that cannot be supported by a sustainable water supply. Since the 2010 General Plan purports
2 to require a sustainable water supply, designating permitted land uses that require a sustainable water
3 supply where there is no feasible method of providing such a supply creates an internal inconsistency.

4 178. The 2010 General Plan policies permitting substantial new development conflict with policies
5 requiring prevention of overdrafting of, and seawater intrusion into, groundwater aquifers.

6 179. The 2010 General Plan policies permitting substantial new development conflict with policies
7 requiring protection of water and biological resources.

8 180. The County's approval of the 2010 General Plan was a prejudicial abuse of discretion and
9 arbitrary and capricious in that the County did not proceed in the manner required by law and its decision
10 and findings are not supported by substantial evidence because the 2010 General Plan is internally
11 inconsistent. The County's action approving the 2010 General Plan was therefore arbitrary and
12 capricious and constituted a prejudicial abuse of discretion, in that the County failed to proceed in the
13 manner required by the State Planning and Zoning Law, and adopted findings of General Plan
14 completeness and consistency that are not supported by the evidence.

15 **4. AWCP Internally Inconsistent**

16 181. The County adopted the Agriculture and Winery Corridor Plan ("AWCP") as a part of the
17 2010 General Plan. The AWCP purports to permit certain types of development and activities in the
18 AWCP area with a "ministerial permit," including certain "Artisan Wineries," winery-related events,
19 winery tasting facilities, food service facilities, guesthouses, residential units, and employee housing.

20 182. In response, to public comments, the County acknowledged that these uses will result in
21 significant impacts to traffic and biological resources, impacts that are not adequately identified and
22 mitigated by the 2010 General Plan EIR.

23 183. The County then revised the draft 2010 General Plan to require discretionary review and
24 mitigation of biological and traffic impacts as part of these purportedly "ministerial" AWCP permits.

25 184. Requirements for discretionary review are inconsistent with the AWCP's characterization of
26 permits for AWCP facilities as "ministerial." The AWCP and the 2010 General Plan are therefore
27 internally inconsistent.

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1 185. The County's approval of the 2010 General Plan was a prejudicial abuse of discretion and
2 arbitrary and capricious in that the County did not proceed in the manner required by law and its decision
3 and findings are not supported by substantial evidence because the AWCP is internally inconsistent. The
4 County's action approving the 2010 General Plan was therefore arbitrary and capricious and constituted a
5 prejudicial abuse of discretion, in that the County failed to proceed in the manner required by the State
6 Planning and Zoning Law, and adopted findings of General Plan completeness and consistency that are
7 not supported by the evidence.

8 **5. Planning Commission Recommendation And Referral**

9 186. Prior to adoption or amendment of a general plan, a County's Planning Commission, if it has
10 one, must make a written recommendation to the Board of Supervisors as to the adoption or approval.
11 Government Code, § 65354.

12 187. Any substantial modification proposed by the Board of Supervisors not previously considered
13 by the Planning Commission during its hearings must be referred to the Planning Commission for its
14 recommendation prior to action by the Board of Supervisors. Government Code, § 65356.

15 188. The Planning Commission failed, and acknowledged its failure, to make a recommendation to
16 the Board of Supervisors as to the definition of a Long Term Sustainable Water Supply or as to the
17 content of Policy PS-3.2, which was intended to provide criteria for a Long Term Sustainable Water
18 Supply.

19 189. The Board of Supervisors substantively modified to 2010 General Plan by adopting a
20 definition of Long Term Sustainable Water Supply, by drafting Policy PS-3.2, and by making other
21 substantive changes to the draft 2010 General Plan. However, the Board of Supervisors failed to refer
22 these changes to the Planning Commission for its recommendation prior to action by the Board of
23 Supervisors.

24 190. Because of these procedural errors, the public was denied an opportunity for meaningful
25 participation in the formulation and approval of the 2010 General Plan.

26 191. The County's approval of the 2010 General Plan was a prejudicial abuse of discretion and
27 arbitrary and capricious in that the County did not proceed in the manner required by law and its decision
28 and findings are not supported by substantial evidence because the Planning Commission

1 recommendation and referral were improper. The County’s action approving the 2010 General Plan was
2 therefore arbitrary and capricious and constituted a prejudicial abuse of discretion, in that the County
3 failed to proceed in the manner required by the State Planning and Zoning Law, and adopted findings of
4 General Plan completeness and consistency that are not supported by the evidence.

5 **THIRD CLAIM FOR RELIEF**

6 **(Water Supply – Violation of SB 610 and CEQA)**

7 192. Petitioner here incorporates by reference all preceding paragraphs in their entirety.

8 193. Under the provisions of Senate Bill 610 (“SB 610”), a lead agency is required to prepare or
9 obtain a water supply assessment (“WSA”) for large projects and to include this assessment in the CEQA
10 document prepared for the project. Pub. Resources Code, § 21151.9; Water Code, §§ 10911(b),
11 10912(a).

12 194. The water supply assessment and any plans for additional supplies must be included in the
13 EIR. Water Code, § 10911(b).

14 195. The AWCP is subject to these requirements because, *inter alia*, it is a project that will occupy
15 more than 40 acres, will demand water equivalent to or greater than 500 dwelling units, and purports to
16 be exempt from further CEQA review. Water Code, § 10912(a).

17 196. The EIR did not contain a water supply assessment for the AWCP in compliance with SB610.

18 197. Information in the EIR fails to meet the SB 610 informational requirements.

19 198. Because the EIR fails to present essential information that is statutorily required under SB
20 610, there is no substantial evidence to support a determination that there is an adequate water supply for
21 the AWCP. Most notably, the EIR does not present substantial evidence that essential additional
22 supplies can be developed in light of basin overdrafting and other environmental constraints.

23 199. In approving the 2010 General Plan without preparing an adequate water supply assessment,
24 the County prejudicially abused its discretion by failing to proceed in the manner required by SB 610 and
25 CEQA, and by adopting findings that are not supported by the evidence.

26 **EXHAUSTION OF ADMINISTRATIVE REMEDIES**

27 200. This action is brought consistent with the requirements of Public Resources Code section
28 21177 and Code of Civil Procedure sections 1085 and/or 1094.5. Petitioner objected to the County’s

1 approval of the 2010 General Plan orally or in writing prior to the close of the public hearing on the
2 project before the issuance of the Notice of Determination. Petitioner and/or other agencies and
3 individuals raised the legal deficiencies asserted in this petition orally or in writing prior to the close of
4 the public hearing on the project before the issuance of the Notice of Determination.

5 201. Petitioner has performed all conditions precedent to filing this action by complying with the
6 requirements of Public Resources Code section 21167.5 in serving notice of the commencement of this
7 action November 24, 2010.

8 **INADEQUATE REMEDY AT LAW**

9 202. Petitioner declares that it has no plain, speedy, and adequate remedy in the ordinary course of
10 law for the improper action of the County.

11 **NECESSITY FOR TEMPORARY RELIEF**

12 203. If development consistent with the 2010 General Plan is allowed to commence prior to the
13 Court's final judgment on the merits, Petitioner and the environment will be greatly, permanently and
14 irreparably injured from the resulting unmitigated environmental, aesthetic, recreational, and land use
15 impacts.

16 204. Government Code section 65757 provides that during the pendency of a challenge to a general
17 plan under the State Planning and Zoning Law, the court may, upon a showing of probable success on the
18 merits, grant temporary relief, including suspension of authority to issue permits, to grant zoning
19 changes, and to grant subdivision map approvals.

20 205. Under Code of Civil Procedure section 526, this Court may issue a temporary restraining
21 order and/or a preliminary injunction during the pendency of the proceedings to prevent great or
22 irreparable injury.

23 206. Under Code of Civil Procedure section 1094.5(g), this Court may issue a stay order during the
24 pendency of the proceedings unless it is satisfied that a stay would be against the public interest.
25 Imposition of a stay would not be against the public interest in that the public will derive no benefit from
26 the 2010 General Plan prior to the Court's final judgment.

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2 **ATTORNEYS' FEES**

3 207. Petitioners are entitled to recover attorneys' fees as provided in Code of Civil Procedure
4 section 1021.5 if they prevail in this action and the Court finds that a significant benefit has been
5 conferred on the general public or a large class of persons, and that the necessity and burden of private
6 enforcement is such as to make an award of fees appropriate.

7 **PRAYER**

8 WHEREFORE, Petitioners pray for entry of judgment as follows:

- 9 1. For a peremptory writ of mandate directing the County:
- 10 (a) to set aside its October 26, 2010 action certifying an EIR for the 2010 General Plan;
- 11 (b) to set aside its October 26, 2010 action approving the 2010 General Plan;
- 12 (c) to refrain from issuing permits, granting zoning changes, or granting subdivision map
13 approvals until the County has taken action necessary to bring its approval of a new general plan or
14 general plan amendments into compliance with CEQA, the Planning and Zoning Law, and SB 610;
- 15 (d) to comply with CEQA in any subsequent action or actions taken to approve a general
16 plan;
- 17 (e) to bring its General Plan into compliance with all applicable provisions of Government
18 Code section 65300, *et seq.* within 120 days.
- 19 2. For an order granting temporary relief, including a prohibition of permits, zoning
20 changes, and subdivision map approvals, pending the outcome of this proceeding.
- 21 3. For a preliminary and permanent injunction directing the County to cease and refrain
22 from engaging in any action purporting to be authorized by the 2010 General Plan that could result in
23 any change or alteration in the physical environment until the County takes any necessary action to bring
24 its action into compliance with CEQA, the Planning and Zoning Law, and SB 610.
- 25 4. For their costs of suit.
- 26 5. For an award of attorneys' fees.
- 27 6. For other legal or equitable relief that the Court deems just and proper.

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1 Dated: November 24, 2010

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

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Mark R. Wolfe
John H. Farrow
Attorneys for Plaintiff and Petitioner

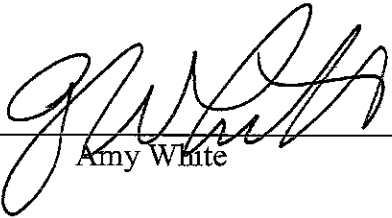
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2 **VERIFICATION**

3 I, Amy White, declare:

4 I am the Executive Director of LandWatch Monterey County, the Petitioner in the above-
5 captioned action. I have read the foregoing PETITION FOR WRIT OF MANDATE and know the
6 contents thereof. The same is true of my own knowledge, except as to those matters which are therein
7 alleged on information and belief, and as to those matters, I believe them to be true.

8 I am signing this document at Salinas, California, and affirm, under penalty of perjury, that the
9 foregoing is true and correct.

10
11 Dated: November 22, 2010


Amy White