

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT**

HIGHWAY 68 COALITION, et al.,

Plaintiffs and Appellants,

v.

County of Monterey et al.,

Defendants and Respondents;

DOMAIN CORPORATION et al.,

Real Parties In Interest and
Respondents.

Case No. H045253

Appeal from Monterey County
Superior Court
Cases No. M130660 and
M130670, consolidated for trial
only

Hon. Thomas Wills, Judge of the
Superior Court

**APPELLANT LANDWATCH MONTEREY COUNTY'S
OPENING BRIEF**

JOHN H. FARROW, SBN 209221
MARK R. WOLFE, SBN 176753
M. R. WOLFE & ASSOCIATES, P.C.
555 Sutter Street, Suite 405
San Francisco, CA 94102
Tel: (415) 369-9400; Fax: (415) 369-9405
Email: jfarrow@mrwolfeassociates.com

Attorneys for Petitioner and Appellant LandWatch Monterey County

Received by Sixth District Court of Appeal

TABLE OF CONTENTS

INTRODUCTION 12

STATEMENT OF THE CASE..... 12

FORM OF CITATIONS 15

STATEMENT OF FACTS..... 16

 A. Seawater intrusion has contaminated the Salinas Valley Groundwater Basin due to decades of overdraft..... 16

 B. Hydrological modeling for the 2002 Salinas Valley Water Project (“SVWP”) EIR projected that seawater intrusion could be halted based on 1995 water demand, but not if demand increased. 17

 C. As the County now admits, SVWP modeling underestimated Basin demand, and seawater intrusion will continue unless additional groundwater management projects are constructed..... 17

 D. Relying on the outdated SVWP EIR demand assumptions, the Ferrini Project’s 2012 DEIR states categorically that the SVWP *will* halt seawater intrusion and therefore concludes that the Project will mitigate its cumulative impact by paying SVWP assessments. 19

 E. LandWatch’s DEIR comments object to reliance on the SVWP EIR demand assumptions and request analysis based on realistic cumulative demand data. 20

 F. Instead of providing analysis based on realistic cumulative demand assumptions, the 2014 FEIR calls the SVWP EIR assumptions “conservative.” 21

 G. The FEIR claims that the EIR relies on other factors than the SVWP “for the adequacy of the water supply;” but it does not relate these factors to its analysis of cumulative overdraft and seawater intrusion impacts. 22

H.	<i>After</i> the final EIR was issued, County staff acknowledged that the SVWP EIR underestimates demand and that more water management projects would be required to halt intrusion.....	22
PROCEEDINGS BELOW		23
STANDARD OF REVIEW		24
ARGUMENT		27
I.	The EIR is prejudicially inadequate because it does not disclose cumulative water demand and supply, or the need for additional groundwater projects, or respond adequately to comments seeking this information	28
A.	CEQA’s requirements for cumulative analysis and description of the environmental setting	28
1.	CEQA requires that an EIR disclose cumulative water demand and supply if impacts depend on this relationship, and that it evaluate the significance of a project’s demand in light of the severity of the environmental problem caused by cumulative demand	28
2.	CEQA requires an adequate, timely description of the environmental setting	30
B.	The EIR fails to disclose the cumulative demand assumptions of the SVWP EIR, on which it relies, or to provide current assumptions.	30
1.	The cumulative analysis relies on the efficacy of existing groundwater management projects, including the most recent project, the SVWP.	30
2.	The EIR expressly relies on the cumulative demand assumptions from the 2002 SVWP EIR.	32
3.	The EIR fails to disclose the SVWP EIR demand and supply assumptions or to provide new cumulative projections, despite requests for this data.	32

C. The EIR fails to provide a <i>legally adequate cumulative analysis</i> because it does not disclose the cumulative demand and sustainable supply data on which it relies, which data understate demand.	34
D. The EIR fails to provide the <i>legally required roadmap to the earlier EIR on which it relies</i> because it does not provide and explain the SVWP EIR demand assumptions.	35
E. The EIR fails to provide a <i>legally adequate setting description</i> because it does disclose current Basin demand timely, in the draft EIR, and does not provide the supply and demand information actually used in the analysis.	37
F. The 2014 EIR fails to provide <i>legally adequate responses to comments</i> because it does not disclose available demand and supply data requested by comments, and it does not acknowledge that 2013 modeling had already determined that additional water projects are necessary.	38
G. The EIR’s failure to disclose supply and demand information was prejudicial because the EIR thereby fails to disclose the magnitude and persistence of the cumulative impact and the need to construct additional groundwater management projects.	40
1. Non-disclosure of cumulative demand and supply was prejudicial because current data demonstrate that the EIR’s reliance on the SVWP EIR demand assumptions was misplaced and that additional water management projects must be constructed.	41
2. Non-disclosure of cumulative demand and the need for additional groundwater management projects was prejudicial because the EIR thereby fails to disclose impacts from continuing seawater intrusion and/or new water projects.	42
3. Non-disclosure of the need for additional groundwater management projects was prejudicial because that need vitiates the EIR’s reliance on payment of Zone 2C assessments as an adequate mitigation.	43
4. Non-disclosure of the shortfall between sustainable supply and cumulative demand was prejudicial because the EIR fails to disclose the magnitude of the cumulative problem.	44

H. Post-EIR disclosures could not cure the prejudice as a matter of law and did not cure it as a matter of fact.	46
1. Prejudice from an informationally inadequate EIR cannot be cured by post-EIR disclosures as a matter of law.	46
2. Prejudice was not cured by post-EIR disclosures as a matter of fact, because the County did not provide required information.	47
II. The EIR’s cumulative analysis errs to the extent it relies on the “ratio” theory because that improperly trivializes the Project’s contribution to cumulative overdraft and seawater intrusion impacts.....	48
A. The EIR errs legally to the extent it uses the ratio theory to assess the Project’s contribution to overdraft and seawater intrusion.	49
B. Reliance on the ratio theory would be prejudicial.	50
III. Recirculation was required because new information shows that the draft EIR was so inadequate as to preclude meaningful comment.	51
IV. Substantial evidence does not support a finding that payment of Zone 2C fees adequately mitigates Project impacts.	52
A. The EIR fails to present facts and analysis to support its claim that existing groundwater management projects will balance the basin and halt seawater intrusion.	53
B. Evidence and admissions show that existing groundwater management projects are not sufficient to halt seawater intrusion.	54
C. Paying impact fees for existing groundwater management projects is not adequate mitigation because those projects will not halt seawater intrusion.	55
D. The “ratio” analysis and the UWMP pumping capacity cited by the FEIR are not substantial evidence that the Project’s contribution to seawater intrusion is not considerable	55

E. Recirculation was required because new information shows a new or more severe impact not disclosed in the EIR.56

INCORPORATION57

CONCLUSION57

TABLE OF AUTHORITIES

Federal Cases

<i>Sierra Club v. Tahoe Regional Planning Agency</i> (2013) 916 F.Supp.2d 1098, 1139	47
---	----

California Cases

<i>Anderson First Coalition v. City of Anderson</i> (2005) 130 Cal.App.4 th 1173	27, 43, 48,55
--	---------------

<i>Association of Irrigated Residents v. County of Madera (“AIR”)</i> (2003) 107 Cal.App.4 th 1383	27, 40, 41, 51
--	----------------

<i>Bakersfield Citizens for Local Control v. City of Bakersfield</i> (2004) 124 Cal.App.4 th 1184	26, 35, 39
---	------------

<i>Berkeley Keep Jets over the Bay Committee v. Board of Port Commissioners</i> (2001) 91 Cal.App.4 th 1344	40
---	----

<i>Cadiz Land Co. v. Rail Cycle</i> (2000) 83 Cal.App.4 th 74	51
---	----

<i>California Native Plant Society v. City of Santa Cruz (“CNPS”)</i> (2009) 277 Cal.App.4 th 957	43, 44, 48, 55
---	----------------

<i>California Oak Foundation v. City of Santa Clarita</i> (2005) 133 Cal.App.4 th 1219	38, 39, 47, 53
--	----------------

<i>Citizens To Preserve the Ojai v. County of Ventura</i> (1985) 176 Cal. App. 3d 421	25, 35, 39
--	------------

<i>Cleary v. County of Stanislaus</i> (1981) 118 Cal.App.3d 348	38
--	----

<i>Cleveland National Forest Foundation v. San Diego Association of Governments</i> (2017) 3 Cal.5th 497	44, 49
---	--------

<i>Communities for a Better Environment v. California Resources Agency (“CBE v. CRA”)</i> (2002) 103 Cal.App.4 th 98,	29, 45, 40
---	------------

<i>Communities for a Better Environment v. City of Richmond</i> (“CBE v. Richmond”) (2010) 184 Cal.App.4th 70	30, 37, 47, 51
<i>County of Amador v. El Dorado County Water Agency</i> (1999) 76 Cal.App.4th 931	<i>passim</i>
<i>Environmental Protection Information Center v. California Dept. of Forestry and Fire Protection</i> (2008) 44 Cal.4th 459	45
<i>Friends of the Eel River v. Sonoma Cty. Water Agency</i> (2003) 108 Cal. App. 4th 859	30, 35, 37
<i>Kings County Farm Bureau v. City of Hanford</i> (1990) 221 Cal.App.3d 692	<i>passim</i>
<i>Galante Vineyards v. Monterey Peninsula Water Management District</i> (1997) 60 Cal.App.4th 1109	44
<i>Gray v. County of Madera</i> (2008) 167 Cal.App.4th 1099	43, 48
<i>Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal. (“Laurel Heights I”)</i> (1988) 47 Cal.3d 376	46, 51, 53
<i>Laurel Heights Improvement Ass’n v. Regents of the Univ. of Cal. (“Laurel Heights II”)</i> (1993) 6 Cal.4th 1112	51, 56
<i>Los Angeles Unified School Dist. v. City of Los Angeles (“LAUSD”)</i> (1997) 58 Cal.App.4th 1019	29, 49, 50
<i>Madera Oversight Coalition v. County of Madera</i> (2011) 199 Cal.App.4th 48	26
<i>Napa Citizens for Honest Government v. Napa County Board of Supervisors</i> (2001) 91 Cal.App.4 th 342	27
<i>Neighbors for Smart Rail v. Exposition Metro Line Construction Authority</i> (2013) 57 Cal.4th 439	26

<i>People v. County of Kern</i> (1974) 39 Cal.App.3d 830	38
<i>People v. County of Kern</i> (1976) 62 Cal.App.3d 761	38
<i>Preserve Wild Santee v. City of Santee</i> (2012) 210 Cal.App.4th 260	42, 53
<i>San Joaquin Raptor Rescue Center v. County of Stanislaus</i> (1994) 27 Cal.App.4th 713	35, 46, 48
<i>Santa Clarita Organization for Planning the Environment v. County of Los Angeles (“SCOPE”)</i> (2003) 106 Cal.App.4th 715	38, 47, 53
<i>Santiago County Water District v. County of Orange</i> (1981) 118 Cal.App.3d 818	42, 44, 47
<i>Save Our Peninsula Committee v. Monterey County Board of Supervisors</i> (2001) 87 Cal.App.4th 99	<i>passim</i>
<i>Sierra Club v. State Bd. of Forestry</i> (1994) 7 Cal.4th 1215	27, 40
<i>Spring Valley Lake Ass'n v. City of Victorville</i> (2016) 248 Cal. App. 4th 91	51
<i>Stanislaus Natural Heritage Project v. County of Stanislaus</i> (1996) 48 Cal.App.4th 182	26
<i>Sutter Sensible Planning v. Board of Supervisors</i> (1981) 122 Cal.App.3d 813	51
<i>Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova</i> (2007) 40 Cal.4 th 412	<i>passim</i>

Statutes

Code of Civil Procedure
 § 1094.5.....12, 24

Public Resources Code
 § 21000 et seq.12
 § 21005.....41, 51
 § 21083.....39
 § 21168.....24

Regulations

14 Cal.Code.Reg.
 § 15065.....49
 § 15088.....28, 38
 § 15088.5.....15, 51, 52, 56
 § 15091.....30
 § 15120.....37
 § 15125.....28
 § 15126.2.....30
 § 15126.4.....
 § 15130..... *passim*
 § 15150.....36
 § 15355.....39, 49

Treatises

Kostka and Zischke, *Practice Under the California Environmental Quality Act*
(2nd Ed., 2014 Update).....28

Remy, Thomas, et al., *Guide to CEQA* (11th Ed., 2007).....28

TABLE OF ACRONYMS

af	acre-feet
afy	acre-feet per year
AR	Administrative Record
CEQA	California Environmental Quality Act
CT	Clerk's Transcript
CSIP	Castroville Seawater Intrusion Project
DEIR	Draft Environmental Impact Report
EIR	Environmental Impact Report
FEIR	Final Environmental Impact Report
LW RJN	Appellant LandWatch Monterey County's Motion To Augment Record, Exhibit 1 ("Request for Judicial Notice by Petitioner LandWatch Monterey County" [inadvertently omitted from Clerk's Transcript])
MCWRA	Monterey County Water Resources Agency
PRC	Public Resources Code
SVIGSM	Salinas Valley Integrated Ground and Surface Water Model
SVWP	Salinas Valley Water Project
UWMP	Urban Water Management Plan

INTRODUCTION

Petitioner and Appellant, LANDWATCH MONTEREY COUNTY (“LandWatch”), appeals the August 16, 2017 final judgment of the Monterey County Superior Court denying LandWatch’s petition for writ of mandate, brought under Code of Civil Procedure Section 1094.5. LandWatch’s petition sought to overturn the December 16, 2014 action by the COUNTY OF MONTEREY (“County”) certifying an environmental impact report (“EIR”) under the California Environmental Quality Act (“CEQA”), Public Resources Code section 21000 *et seq.*, and approving entitlements for the Ferrini Ranch Subdivision (“Project”). The Project proponents are Real Parties In Interest Domain Corporation, Bollenbacher & Kelton, Inc., and Islandia 29 (“Real Parties”).

LandWatch’s petition alleged violations of CEQA. The Trial Court’s August 16, 2017 judgment, notice of which was served on LandWatch September 8, 2017 (Clerk’s Transcript (“CT”) VII:1480-1631), finally disposed of all issues among the parties and is therefore appealable. LandWatch filed its Notice of Appeal on November 2, 2017. CT VII:1635. The appeal is therefore timely.

STATEMENT OF THE CASE

This case concerns the County’s failure to meet CEQA’s mandates in evaluating the impacts of supplying water to the Project. LandWatch asks this Court to set aside the EIR and Project approvals because the EIR fails to disclose information mandated by CEQA and because the findings are not supported by substantial evidence.

The Project would take another 95 acre-feet/year (“afy”) from the Salinas Valley Groundwater Basin, where decades of overdraft conditions have caused seawater intrusion, rendering groundwater unusable eight miles inland.

The County has implemented groundwater management projects hoping to balance the Basin hydrologically to halt seawater intrusion. The central issues in this case stem from the EIR’s insistence that these existing groundwater projects

are sufficient to meet these goals, despite LandWatch’s objections, and despite the County’s *post*-EIR admission that this is not true.

The efficacy of the most recent groundwater project, the Salinas Valley Water Project (“SVWP”), was predicated on modeling assumptions, set out in the 2002 SVWP EIR, which projected that Basin demand would decline from 463,000 afy in 1995 to 443,000 afy by 2030. The County now acknowledges that those assumptions understate actual demand, which has actually averaged over 500,000 afy since 1995. The County determined through new modeling in 2013 that existing groundwater management projects are not sufficient to balance the Basin and halt seawater intrusion and, thus, additional projects are necessary.

However, expressly relying on the cumulative demand assumptions in the 2002 SVWP EIR, but without providing them, the 2012 Ferrini draft EIR (“DEIR”) concludes that the SVWP *will* balance the Basin and stop seawater intrusion. Thus, the DEIR concludes that the Project’s payment of its fair share assessment for existing groundwater management projects mitigates its contribution to cumulative impacts.

LandWatch’s DEIR comments object to the DEIR’s reliance on the SVWP EIR, citing evidence that its cumulative demand assumptions understate actual demand. LandWatch requested that the EIR identify current cumulative demand, project foreseeable future demand, compare these data to the SVWP EIR demand assumptions, and identify the groundwater supply that is sustainable without overdraft or seawater intrusion.

In response, the final EIR (“FEIR”) provides historic cumulative demand for a single year. The FEIR fails to project foreseeable future cumulative demand, to identify sustainable groundwater supply, or to compare cumulative demand to the 2002 SVWP EIR assumptions. Even though actual demand has substantially exceeded the undisclosed SVWP EIR demand assumptions, the FEIR characterized these assumptions as “conservative.” The 2014 FEIR reiterates that assessments for existing groundwater projects are sufficient mitigation, without

disclosing that 2013 modeling demonstrates that existing groundwater projects will not halt seawater intrusion.

Only *after* the EIR was final did County staff acknowledge to the Planning Commission that the SVWP EIR demand assumptions were understated and that additional projects are needed.

On December 16, 2014, the Supervisors received the *State of the Salinas River Groundwater Basin Report*, concluding that the Basin remains out of balance and recommending pumping *reductions* in the Pressure Subarea from which the Ferrini Project would draw water. That same day, the Supervisors certified the Ferrini EIR, finding that payment of impact fees for existing projects mitigated cumulative water supply impacts, even while finding that these projects were *not* sufficient to balance the Basin or halt seawater intrusion.

In failing to present cumulative demand and supply data, even after it was requested, and failing to acknowledge that existing groundwater projects will not balance the Basin and stop seawater intrusion, the County failed to honor CEQA's procedural mandates, which are intended to ensure that the public has access to the facts and analysis on which an agency must base its conclusions, and that the public has an opportunity to comment and receive responses regarding those facts and analysis. The County also failed to present substantial evidence to justify its findings. Accordingly, LandWatch brings four claims, each of which is sufficient grounds to set aside the EIR.

First, the EIR is inadequate as an informational document because it does not fulfill CEQA's mandates to (1) disclose cumulative water demand and supply, (2) explain its reliance on an earlier EIR in sufficient detail, (3) provide adequate environmental setting information to support its analysis, and (4) respond to comments seeking relevant information. The failure to provide adequate comment responses was particularly egregious because the requested demand data, and the 2013 modeling that concludes more groundwater projects are necessary, were available on the County's website prior to the 2014 FEIR.

Non-disclosure was prejudicial because the EIR fails to disclose the magnitude of the cumulative overdraft that drives seawater intrusion, the need for additional and currently uncertain water projects, or the impacts of providing additional projects or of *failing* to provide them. Non-disclosure was also prejudicial because it undermines reliance on existing impact fees as adequate mitigation.

Second, the EIR is legally inadequate as an informational document to the extent it relies on the “ratio” theory to trivialize the Project’s contribution to cumulative overdraft and seawater intrusion. Furthermore, the EIR’s comparison of Project demand to irrelevant statistics (subbasin storage capacity and annual pumping) fails to assess whether its impact is a considerable contribution to the relevant environmental *problem*, i.e., the overdraft that drives seawater intrusion.

Third, the County failed to recirculate the DEIR for comment and response under 14 CCR (“Guidelines”) section 15088.5(a)(4), even though significant new information – the underestimation of cumulative demand and the need for additional groundwater projects – revealed that the DEIR’s discussion was so conclusory and inadequate as to preclude meaningful comment.

Fourth, there is no substantial evidence to support a finding that payment of impact fees for existing projects is adequate mitigation and there is significant new information to the contrary. Thus, the County abused its discretion because (1) its findings were not supported by substantial evidence as required by Guidelines section 15091(b) and (2) the County failed to recirculate the EIR in light of a new significant impact as required by Guidelines section 15088.5(a)(1).

FORM OF CITATIONS

Citations to the Clerk’s Transcript will take the form: “CT xx:nn,” where “xx” is the volume and “nn” the page. Citations to the Administrative Record will take the form: “AR123,” where “123” is the Bates page number.

STATEMENT OF FACTS

A. Seawater intrusion has contaminated the Salinas Valley Groundwater Basin due to decades of overdraft.

The Project will obtain water from wells in the 180/400-Foot Aquifer Subbasin, also termed (and hereinafter) the “Pressure Subarea,” at the northwest end of the Salinas Valley Groundwater Basin. AR452, 4111, 4116, 25349. The Pressure Subarea is one of the eight subbasins making up the Salinas Valley Groundwater Basin (“Basin”). AR451-459, 16397-16399. Pumping from the Basin has exceeded recharge since the 1930s. AR465, 16399-16400, 20367-20373. Overdraft in the Pressure Subarea has averaged about 2,000 acre-fee per year (“afy”) from 1944 to 2014; and the Basin as a whole is “currently out of hydrologic balance by approximately 17,000 to 24,000 afy.” AR20371-20372. Overdraft lowers protective groundwater elevations causing seawater intrusion. AR456, 16399-16400, 20367, 20373.

Groundwater is the primary water supply in the Salinas Valley. AR25299. Seawater intrusion renders this groundwater unfit for human or agricultural use, requiring abandonment of existing wells. AR25229. Ongoing seawater intrusion has impaired groundwater supplies underlying thousands of acres, up to eight miles inland in the Pressure Subarea. AR25229, 20367, 20381-20382. The State Water Resources Control Board calls this “one of the most critical water resources issues in California” and has threatened to adjudicate the Basin unless the County achieves a “viable solution to *stop* seawater intrusion” with a “workable cost distribution” and a “schedule of implementation.” AR25235, emphasis added.

The Monterey County Water Resources Agency (“MCWRA”) and predecessor agencies have implemented projects to address seawater intrusion by storing surface water, increasing recharge, and delivering surface water to coastal areas to reduce groundwater pumping. AR5158- 5164, 15239-15243 (MCWRA);

AR466-467 (DEIR). These include the Nacimiento and San Antonio Reservoirs, the Castroville Seawater Intrusion Project (“CSIP”), and, most recently, the Salinas Valley Water Project, completed in 2010. AR5158-5164, 15239-15243.

B. Hydrological modeling for the 2002 Salinas Valley Water Project (“SVWP”) EIR projected that seawater intrusion could be halted based on 1995 water demand, but not if demand increased.

The modeling for the SVWP EIR assumed that Basin groundwater pumping would decline substantially, from 463,000 afy in 1995 to 443,000 afy in 2030, based on expected conservation and reductions in irrigated acreage. AR25234, 25299, 25709, 25715, 25717, 25719, 25722 (SVWP EIR); *see* AR15611-15613 (LandWatch), 15235-15236 (MCWRA).

Pumping throughout the Basin causes seawater intrusion because it is interconnected; however pumping in the northern end of the Basin – where the Ferrini Project would get water – contributes more to seawater intrusion. AR26056-26057 (SVWP EIR). The SVWP EIR projected that seawater intrusion would be halted only based on the amount and location of 1995 water demand (AR25281, 26110), and it cautioned that “any additional water needs within an intruded groundwater basin would exacerbate seawater intrusion.” AR25719.

C. As the County now admits, SVWP modeling underestimated Basin demand, and seawater intrusion will continue unless additional groundwater management projects are constructed.

Basin pumping has not declined as projected by the SVWP EIR modeling. Instead of dropping toward 443,000 afy, pumping averaged 500,986 afy from 1995 to 2013. AR15612-15615 (LandWatch), *compiling* AR16063-16334 (MCWRA data). Estimating non-reporting wells, the average is 533,273 afy. AR15614 (LandWatch).

MCWRA acknowledges that, while some people have *read* the SVWP EIR to say that the SVWP would halt seawater intrusion, it claims only to halt intrusion based on 1995 land use. AR5188 (MCWRA testimony). MCWRA now agrees

that “the amount of pumping that was assumed in those [SVWP] models was, actually, much lower than the amount of pumping that’s being reported.” AR5184-5187 (testimony). MCWRA also acknowledges that CSIP water deliveries have been less than projected. AR5188.

MCWRA now claims only that the existing groundwater management projects have “slowed seawater intrusion.” AR5164 (testimony). MCWRA concluded in 2013 that the “intrusion continues (albeit at a slower rate), migrating inland and salinating fresh-water aquifer systems.” AR16399-16400 (*Protective Elevations to Control Seawater Intrusion in the Salinas Valley*, MCWRA technical report, hereafter “*Protective Elevations*”). The rate of seawater intrusion began to decline after its accelerated, and latent, 1997-1999 response to the last extended drought of 1984-1991. AR20373 (*State of the Salinas River Groundwater Basin Report*, hereafter “*State of the Basin*”). MCWRA predicted in 2014 that a latent response to the most recent drought would result in a similar acceleration of seawater intrusion “over the coming years.” *Id.*

MCWRA had concluded by 2013 that a new project supplying 48,000 afy of groundwater recharge, *in addition to* the 12,000 afy of recharge from the SVWP, would be required to control seawater intrusion. AR16406 (*Protective Elevations*); *see* AR5164-5165, 5178-5179, 5183-5190 (testimony). This conclusion was based on the Salinas Valley Integrated Ground and Surface Water Model (“SVIGSM”), the same model used for the 2002 SVWP EIR and referenced in the DEIR. AR16406 (*Protective Elevations*), 466 (DEIR), 25299 (SVWP EIR). Alternatively, the County was advised that seawater intrusion could be mitigated by reducing pumping in the Pressure Subarea. AR20374 (*State of the Basin*).

D. Relying on the outdated SVWP EIR demand projections, the Ferrini Project’s 2012 DEIR states categorically that the SVWP *will* halt seawater intrusion and therefore concludes that the Project will mitigate its cumulative impact by paying SVWP assessments.

The Project DEIR admits that the Basin “has experienced overdraft,” which has caused seawater intrusion, rendering areas of the aquifer unusable. AR451, 465-466; *see* AR469-471. The DEIR identifies the SVWP and CSIP as programs to address seawater intrusion. AR466, 468.

The DEIR states categorically that the SVWP will stop seawater intrusion, balance the basin hydrologically, and provide long term water supplies through 2030:

“The SVWP provides for the long-term management and protection of groundwater resources *by stopping seawater intrusion* and providing adequate water supplies and flexibility to meet current and future water demand. In addition, *the SVWP provides the surface water supply necessary to attain a hydrologically balanced groundwater basin.*”

AR489 (emphasis added).

The DEIR cites the declining *rate* of seawater intrusion from 2007- 2009 as evidence of “the ability to reduce seawater intrusion,” although the SVWP was not completed until 2010. AR466-467; *see* AR492. The DEIR claims that “since construction of the SVWP, groundwater levels are rising in some areas of the Salinas Valley, and the basin as a whole appears to be becoming more hydrologically balanced.” AR491-492. Noting that the “project applicant contributes financially to the SVWP and its groundwater management strategies” through payment of the Zone 2C assessments, the DEIR’s cumulative analysis concludes that “the project’s impact on the groundwater basin is therefore mitigated by this contribution.” AR492; *see* AR467.

The DEIR notes that the SVWP “was developed to meet projected water demands based on development and population forecasts.” AR492. The DEIR

expressly relies on the modeling in the 2002 SVWP EIR, including its water demand assumptions:

The SVWP was designed to provide adequate water supplies to meet current and future water demands. The Salinas Valley Integrated Ground and Surface Water Model (SVIGSM), a planning tool, was used to evaluate hydrologic effects of operations under Alternatives A and B of the SVWP (MCWRA 2002). *The analysis relied on assumptions about future population growth and water demands in the Salinas Valley*, hydrology (patterns of wet and dry years), and regional economic trends, which were based on historic records and predictive tools used by the Association of Monterey Bay Area governments (AMBAG) and local planning departments.

AR466.

However, the DEIR does not *provide* the SVWP EIR's ten-year old demand assumptions. Nor does the DEIR provide current baseline demand for the Pressure Subarea or the Basin as a whole; instead it provides only the baseline *urban* demand, and only for that area that happens to be served by California Water Service Company. AR460. Nor does the DEIR identify the level of groundwater pumping that is sustainable over the long term without adverse effects on the Basin.

E. LandWatch's DEIR comments object to reliance on the SVWP EIR demand assumptions and request analysis based on realistic future cumulative demand assumptions.

In timely comments, LandWatch objected to the DEIR's uncritical reliance on the SVWP EIR to conclude that the Basin would be hydrologically balanced and seawater intrusion halted. AR3555-3556. LandWatch cited evidence that, contrary to the assumptions in the SVWP EIR, the Basin's pumping demand and its irrigated acreage had grown since 1995, not shrunk, and were projected to continue growing through 2030. AR3558-3560, 3562-3564. LandWatch asked that the EIR provide actual pumping data since 1995 and compare it to the 2002

SVWP EIR projections. AR3558-3560, 3566-3567. LandWatch asked that the EIR provide realistic projections of foreseeable *future* water demand, taking into account the growth in irrigated acreage not predicted by the SVWP EIR. AR3562-3564, 3566-3567. LandWatch also asked that the EIR report the amount of pumping sustainable without overdraft and seawater intrusion. AR3558.

F. Instead of providing analysis based on realistic cumulative demand assumptions, the 2014 FEIR calls the SVWP EIR assumptions “conservative.”

Responding to LandWatch, the FEIR reiterates that the SVWP EIR was based on AMBAG “growth assumptions” and claims that the “growth projections from AMBAG that were used for the SVWP EIR are conservative.” AR4116, 4113. However, the FEIR does not *provide* those growth projections, either for urban or agricultural water demand.

Responding to the request for current baseline pumping, the FEIR reports that the 2005 pumping for the subbasin was 118,373 afy and that 2005 “total pumping from the Basin is 500,000 AFY.” AR4114. However, the FEIR does not reconcile this baseline pumping statistic with the SVWP EIR projections as LandWatch asked or explain how pumping 500,000 afy *could* be consistent with the SVWP EIR’s projection that pumping would decline from 463,000 afy in 1995 to 443,000 afy in 2030. AR25234 (SVWP EIR); *see* AR15612-15616 (LandWatch).

The FEIR claims that the Project demand was “already analyzed and disclosed through preparation of the UWMP [California Water Company Urban Water Management Plan] and SVWP EIR.” AR4114. However, the FEIR does not acknowledge that *cumulative* pumping from 1995-2012 greatly exceeds the SVWP EIR projections. Nor does the FEIR acknowledge that irrigated acreage is increasing, not decreasing as the SVWP EIR projected.

The FEIR reiterates that the Project’s impacts on the Basin are mitigated by Zone 2C impact fees, which it claims represent a “proportionate fair share toward

regional improvements to help better manage the basin as a whole.” AR4116; *see* AR4113.

G. The FEIR claims that the EIR relies on other factors than the SVWP “for the adequacy of the water supply;” but it does not relate these factors to its analysis of cumulative overdraft and seawater intrusion impacts.

The FEIR claims that it “does not rely solely on the SVWP and SVWP EIR for the *adequacy of water supply*.” AR4113 (emphasis added). The FEIR claims that in addition to the “positive influence of the suite of MCWRA projects implemented to combat seawater intrusion,” there are three other factors to justify a finding that Project “demand on the subbasin was less than significant:”

- Project demand is “insignificant” compared to total storage capacity of the subbasin;
- Project demand is “small” compared to annual subbasin demand;
- The Project is “consistent” with the Urban Water Management Plan (“UWMP”).

AR4114 (emphasis added); *see also* AR4122 (DEIR states UWMP demonstrates “pumping capacity”).

The FEIR’s discussion of these three factors is focused on “the adequacy of water supply.” AR4113. The discussion does not mention *impacts* from using that supply, such as overdraft or seawater intrusion. AR4113-4114, 4116, 4122. Nor does the discussion of these three factors mention *cumulative* analysis.

H. After the final EIR was issued, County staff acknowledged that the SVWP EIR underestimates demand, that more water management projects would be required to halt intrusion, and that the Basin remains out of hydrological balance.

At the Planning Commission’s request, MCWRA’s Executive Director, Rob Johnson, testified at its October 29 regarding the efficacy of the existing “suite of projects” to “balance the basin.” AR4188. Johnson confirmed LandWatch’s objections. Johnson acknowledged that pumping assumed in the

SVWP modeling was “much lower than the amount of pumping that’s being reported.” AR5187. Johnson explained that MCWRA has now determined that to stop seawater intrusion, new water management projects would be required that would deliver an additional 58,000-60,000 afy of groundwater recharge. AR5164, 5178-5179, 5183-5184, 5189-5190. While projects are “on the drawing board,” they are costly and would require public approval through a Proposition 218 vote. AR5159, 5164-5165, 5183. None of this information is in the EIR.

On the same day it approved the Ferrini Project, the Supervisors received the *State of the Basin* report (AR20364-20382), which concludes the Basin is out of balance and that current pumping is not sustainable and recommends a reduction in pumping in the Pressure Subarea. AR20373-20374.

Despite these post-EIR disclosures, the Supervisors certified the EIR and approved the Project. AR3-41. This suit followed.

PROCEEDINGS BELOW

LandWatch Monterey County v. County of Monterey was consolidated, for trial only, with *Highway 68 Coalition v. County of Monterey* and *California Utilities Service, Inc. v. County of Monterey*, which also arose from the Project. CT I:117. The County lodged the certified administrative record in the Trial Court on June 22, 2015 supplementing it on September 2 and November 6, 2015. CT, I:237-240, II:461-464, VII:1660-1662. After briefing, the Trial Court (Hon. Thomas Wills) heard oral argument on September 6, 2016, December 5, 2016, February 21, 2017, and March 6, 2017, and provided an Intended Statement of Decision denying LandWatch’s writ petition on August 3, 2017. CT V:1185-1288. A final judgment was entered on August 16, 2017. CT VII:1483-1631. LandWatch timely appealed. CT VII:1635-1638.

The Trial Court held that the EIR is not informationally inadequate, that there was substantial evidence to support the findings, and that recirculation was not required. CT VII:1509-1531. As discussed below, the Trial Court erred by holding that the EIR does not rely on the claimed efficacy of current groundwater

projects to halt seawater intrusion, that the EIR's disclosures of cumulative conditions were adequate, and that payment of impact fees for existing projects is sufficient mitigation regardless whether they are effective.

STANDARD OF REVIEW

In a case challenging agency compliance with CEQA, the court's inquiry extends to whether there was a prejudicial abuse of discretion. C.C.P. § 1094.5(b); Public Resources Code ("PRC"), § 21168. Abuse of discretion is established if the agency has not proceeded in a manner required by CEQA or if the determination or decision is not supported by substantial evidence. *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* ("Vineyard") (2007) 40 Cal.4th 412, 435. Courts resolve CEQA issues "by independently determining whether the administrative record demonstrates any legal error by the [agency] and whether it contains substantial evidence to support the [agency's] factual determinations." *Id.*

The standard of review is determined by the nature of the alleged violations: when the claimed violation is of procedural error, *including the adequacy of the EIR*, review is under the non-deferential independent judgment standard, while only a claim of unsupported factual determination is reviewed under the more deferential substantial evidence standard. *Id.*

Vineyard's set-aside of an EIR's water supply analysis for failure to proceed as required by law, without deference to the lead agency, provides the rubric that applies to all topics of EIR adequacy. In *Vineyard*, the Supreme Court held that non-disclosure of required information is a failure to proceed as required by CEQA. The Court set aside an EIR because, like the Ferrini EIR, it relied on another EIR without making a clear and adequate disclosure of long-term cumulative demand and supply, holding that "CEQA's informational purposes are not satisfied by an EIR that simply ignores or assumes a solution to the problem of supplying water to a proposed land use project." *Id.* at 430-431. The Court held

that the relevant data must be “presented in a manner calculated to adequately inform the public and decision makers” and the agency may not rely on “information that is not actually incorporated or described and referenced in the FEIR,” because that is a failure to “proceed in the manner provided in CEQA.” *Id.* at 442. If an EIR’s analysis relies on water demand and supply data in referenced documents, as here (AR466, 4113), the EIR must present that information clearly, explain any differences among the figures, and “provide an analytically complete and coherent explanation” of the relation of the referenced documents to the EIR. *Id.* at 439-443. When an agency fails to include information in an EIR that is mandated by CEQA, it has “failed to proceed in the manner required by CEQA.” *Id.* at 435.

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

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

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

Save Our Peninsula Committee v. Monterey County Board of Supervisors (2001) 87 Cal.App.4th 99, 117-118, citations and internal quotations omitted. Thus, claims that an EIR lacks required information and analysis are reviewed non-deferentially because they are claims that the agency failed to proceed as required by CEQA. *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1207-1208.

“Whether the EIR’s disclosures regarding the project’s water supply complies with CEQA is a question of law.” *Madera Oversight Coalition v. County of Madera* (2011) 199 Cal.App.4th 48, 102, *disapproved of on other grounds by Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439. In *Madera*, as here, the nondisclosure of available information that called the water supply analysis into question failed to meet *Vineyard’s* requirements that an EIR provide “reasoned analysis,” “full discussion,” a “good faith effort at full disclosure,” and an “analytically complete and coherent explanation.” *Id.* at 103.

In *Save Our Peninsula*, as here, the County failed to proceed as required by CEQA because it failed to set out water demand information early in the EIR process and failed to investigate and document baseline conditions. *Save Our Peninsula, supra*, 87 Cal.App.4th at 120, 122, 124. *Save Our Peninsula* holds that “[w]hen the informational requirements of CEQA are not complied with, an agency has failed to proceed in ‘a manner required by law.’” *Id.* at 117-118; *see also County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 954 (where baseline water information is not provided so as to “make further analysis possible,” the issue is “the adequacy of the information contained in the EIR,” *not* a “factual dispute”); *Stanislaus Natural Heritage Project v. County of Stanislaus* (1996) 48 Cal.App.4th 182, 195-196 (failure to identify water source and impacts of supply defeats CEQA’s informational purposes).

An EIR’s informational failures are presumptively prejudicial if they frustrate the purpose of public comments or preclude meaningful assessment of

potentially significant impacts. *Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1236; *see also Association of Irrigated Residents v. County of Madera* (“AIR”) (2003) 107 Cal.App.4th 1383, 1391-1392.

LandWatch demonstrates prejudicial non-compliance with CEQA’s informational requirements regarding water supply setting information and cumulative analysis. In addition, LandWatch *separately* demonstrates the County’s failure to support its findings regarding the significance and mitigation of water supply impacts with substantial evidence.

Appellate review of the legality of agency action is de novo. *Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1178. This Court is not bound by the Trial Court’s determinations because the Trial Court does not decide questions of fact. *Napa Citizens for Honest Government v. Napa County Board of Supervisors* (2001) 91 Cal.App.4th 342, 357.

ARGUMENT

I. The EIR is prejudicially inadequate because it does not disclose cumulative water demand and supply, or the need for additional groundwater projects, or respond adequately to comments seeking this information.

The “ultimate question” is “not whether an EIR establishes a likely source of water, but whether it adequately addresses the reasonably foreseeable impacts of supplying water to the project.” *Vineyard, supra*, 40 Cal.4th at 434. Thus, the EIR was required to determine whether Project pumping contributes considerably to a significant cumulative Basin overdraft condition and associated seawater intrusion. Here, the threshold question for cumulative analysis is whether total pumping demand exceeds the water supply sustainable without overdraft and seawater intrusion. If so, the secondary question is whether the Project would make a considerable contribution to that cumulative impact. The EIR prejudicially fails to provide the information and analysis required to make these determinations.

The EIR's failure to disclose cumulative water demand and supply was a failure to (1) provide an adequate description of the conditions contributing to the cumulative impact, (2) explain the EIR's reliance on another EIR, (3) provide an adequate, timely description of the environmental setting, and (4) respond adequately to comments. Guidelines, § 15130(b)(1), 15125, 15088; *Vineyard, supra*, 40 Cal4th at 439-443. The EIR fails informationally because it relies on the outdated 2002 SVWP EIR's demand assumptions without evidence that these assumptions remain current; fails to provide current demand assumptions; and fails to reconcile current demand data with the SVWP EIR assumptions – despite comments seeking this information. The failure was prejudicial because available pumping reports, statements by MCWRA, and technical reports prepared for MCWRA and the Board of Supervisors demonstrate that the SVWP EIR cumulative demand assumptions are no longer valid, that existing groundwater projects will not halt seawater intrusion, and that additional projects are needed.

A. CEQA's requirements for cumulative analysis and description of the environmental setting.

- 1. CEQA requires that an EIR disclose cumulative water demand and supply where impacts depend on this relationship, and that it evaluate the significance of a project's demand in light of the severity of the environmental problem caused by cumulative demand.**

Cumulative impact analysis is a two-step process that requires an agency to determine: (1) whether the impacts of the project in combination with those from other past, present, and future projects are cumulatively significant, and (2) if so, whether the project's own effect is a considerable contribution. Guidelines, § 15130(a); see Kostka and Zischke, *Practice Under the California Environmental Quality Act* (2nd Ed., 2014 Update), § 13.39; Remy, Thomas, et al., *Guide to CEQA* (11th Ed., 2007), pp. 474-475. CEQA requires an agency to support both

its step one and step two determinations with “facts and analysis.” Guidelines, §15130(a)(2) (step one), (a)(3) (step two).

In step one, the agency must determine whether the combined effect of the project and other past, present and/or future projects “when considered together” is significant, because those impacts may be “individually minor but collectively significant.” *Communities for a Better Environment v. California Resources Agency* (“*CBE v. CRA*”) (2002) 103 Cal.App.4th 98, 119-120. Thus, step one must identify all sources of “related impacts,” either by listing projects causing the cumulative impact or by providing “a summary of projections contained in an adopted local, regional or statewide plan, or related planning document, that describes or evaluates conditions contributing to the cumulative effect.” Guidelines, § 15130(b)(1)(A), (B). Identifying these *sources* of the cumulative effect is a distinct requirement from identifying the cumulative effect itself. Guidelines, § 15130(b)(1), (4). Omission of sources of cumulative impact without justification is error. *Citizens To Preserve the Ojai v. County of Ventura* (1985) 176 Cal. App. 3d 421, 428-432. Where relevant to cumulative impacts, an EIR must disclose cumulative water supply and demand. *Vineyard, supra*, 40 Cal.4th at 441; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 728-729.

In step two of a cumulative analysis, the agency must separately consider whether a project’s contribution to a cumulatively significant effect is “considerable.” This determination must be made in the “context of the existing cumulative effect” because “the greater the existing environmental problems are, the lower the threshold should be for treating a project’s contribution to cumulative impacts as significant.” *CBE v. CRA, supra*, 103 Cal.App.4th at 119-120. Thus, an EIR may not dismiss a project’s contribution simply because it is relatively small. *Id.* at 117-118, 121; *Kings County, supra*, 221 Cal.App.3d at 720-721; *Los Angeles Unified School Dist. v. City of Los Angeles* (“*LAUSD*”) (1997) 58 Cal.App.4th 1019, 1025-1026.

2. CEQA requires an adequate, timely description of the environmental setting.

An EIR must describe the existing environmental setting so that it considers impacts “in the full environmental context.” Guidelines, § 15125(a), (c); *see* Guidelines, § 15126.2(a) (assessment must be based on “changes in the existing physical conditions in the affected area”). An adequate setting description must “make further analysis possible.” *County of Amador, supra*, 76 Cal.App.4th 931, 954 (error because hydrological setting information does not support required analysis). An incomplete disclosure of water demands violates CEQA’s requirements for a description of the environmental setting because it “fails to set the stage for a discussion of the cumulative impact.” *Friends of the Eel River v. Sonoma Cty. Water Agency* (2003) 108 Cal. App. 4th 859, 874-875 (failure to disclose all water diversions).

The description of the environmental setting must be presented in the *draft* EIR, not later in the EIR process. *Save Our Peninsula, supra*, 87 Cal.App.4th at 120-124, 128; *Communities for a Better Environment v. City of Richmond (“CBE v. Richmond”)* (2010) 184 Cal.App.4th 70, 89.

B. The EIR fails to disclose the cumulative demand assumptions of the SVWP EIR, on which it relies, or to provide current assumptions.

We summarize salient facts in this section I.B to support argument in sections I.C-H.

1. The cumulative analysis relies on the efficacy of existing groundwater management projects, including the most recent project, the SVWP.

The DEIR states the SVWP “provides for the long-term management and protection of groundwater resources by stopping seawater intrusion.” AR489; *see also* AR466, 492. The DEIR repeatedly and categorically asserts that “the SVWP provides the surface water supply necessary to attain a hydrologically balanced groundwater basin.” AR466, 489. Relying on the SVWP and previous

groundwater management projects, the DEIR concludes that pumping for the Project and “all other reasonably foreseeable projects” is “a less than significant cumulative impact.” AR491-492. Thus, the EIR identifies the Project’s payment of Zone 2C assessments for existing groundwater projects as mitigation via impact fees. AR492, 4116; *see* Guidelines, § 15130(a)(3) (“fair share” mitigation of significant cumulative impacts).

The final EIR claims that it “does not rely solely on the SVWP and the SVWP EIR for the adequacy of water supply.” AR4113. The FEIR identifies four factors to find Project “demand on the subbasin is less than significant:” (1) the ratio of Project demand to subbasin capacity, (2) the ratio to annual pumping, (3) Project consistency with the Cal Water UWMP, and (4) the “positive influence of the suite of projects implemented to combat seawater intrusion,” i.e., the SVWP, CSIP, and the two reservoirs. AR4114.

The FEIR’s fourth factor, the suite of groundwater projects, does not add new information to the DEIR’s claim that the SVWP will balance the Basin and prevent seawater intrusion, because the SVWP and its EIR *assume and include* the continued, integrated operation these prior groundwater management projects. AR25213.

As the Trial Court held, the other three factors – the ratio claims and the UWMP-consistency claim – address only the adequacy of water *supply*, not the *impact* from *using* that supply. CT VII:1517-1520, 1526-1527. Nothing in the FEIR’s discussion relates the ratio claims or the UWMP-consistency claim to cumulative analysis of overdraft or seawater intrusion. AR4113-4114, 4116, 4122. Nonetheless, the County may now contend the EIR relies on the ratio and UWMP claims to conclude the Project’s contribution to significant cumulative overdraft and seawater intrusion impacts is less than considerable. If so, sections II and IV.C below explain that the ratio claims are legally erroneous and factually irrelevant to such a conclusion and that the UWMP directly *contradicts* such a conclusion by acknowledging the inefficacy of existing groundwater projects.

In sum, despite the FEIR's recitation of three new "factors" relevant to water *supply*, the EIR's claim that the cumulative *impacts* from *using* that supply are less than significant depends critically on the claim that the existing groundwater management projects will balance the Basin hydrologically and stop seawater intrusion.

2. The EIR expressly relies on the cumulative demand assumptions from the 2002 SVWP EIR.

In claiming that the SVWP will "attain a hydrologically balanced groundwater basin" (AR466), the Ferrini EIR expressly relies on the water demand assumptions in the SVWP EIR ("MCWRA 2002," referenced at AR494):

The SVWP was designed to provide adequate water supplies to meet current and future water demands. The Salinas Valley Integrated Ground and Surface Water Model (SVIGSM), a planning tool, was used to evaluate hydrologic effects of operations under Alternatives A and B of the SVWP (MCWRA 2002). *The analysis relied on assumptions about future population growth and water demands in the Salinas Valley*, hydrology (patterns of wet and dry years), and regional economic trends, which were based on historic records and predictive tools used by the Association of Monterey Bay Area governments (AMBAG) and local planning departments.

AR466 (emphasis added). The DEIR again references these assumptions in claiming the SVWP was "developed to meet projected water demands based on development and population forecasts." AR492.

3. The EIR fails to disclose the SVWP EIR demand and supply assumptions or to provide new cumulative projections, despite requests for this data.

The DEIR does not report or summarize the demand or supply assumptions from the SVWP EIR. Nor does the DEIR disclose current or future cumulative

demand for the Salinas Valley Groundwater Basin or the groundwater supply that is sustainable without overdraft or seawater intrusion.¹

Despite comments challenging the 2002 SVWP EIR demand assumptions as outdated, and asking the EIR to reconcile those ten-year old assumptions with current and foreseeable future demand data (AR3554-3568), the only statistics the FEIR provides for cumulative demand are for a single year, 2005. AR4114 (reporting 500,000 af for the Basin and 118,372 af for the Pressure Subarea). And the FEIR does not compare this data to the SVWP EIR demand assumptions, e.g., by acknowledging that pumping 500,000 af in 2005 was inconsistent with the SVWP EIR demand assumptions, which projected Basin pumping to decline from 463,000 afy in 1995 to 443,000 afy in 2030. AR25234 (SVWP EIR); *see* AR15612-15616 (LandWatch).

The EIR does not provide *any* projection of foreseeable *future* cumulative demand for the Basin or Pressure Subarea. The EIR's provision of future urban demand data from the Cal Water UWMP does not disclose *cumulative* demand because (1) the data do not include the entire Basin as evaluated by the SVWP EIR and purportedly evaluated by the Ferrini EIR, and (2) the data omit the dominant demand source, agriculture.² Furthermore, the EIR does not actually *use* the FEIR's partial demand data to evaluate Basin overdraft or seawater intrusion; it relies on the SVWP EIR's undisclosed demand assumptions.³ AR466.

¹ The DEIR reports only demand for *urban* uses from a *portion* of the Pressure Subarea, i.e., the pumping from two wells that will supply the Project. AR460.

² The FEIR reports projected 2040 *urban* demand from the Cal Water UWMP. AR4122. Those UWMP projections are for "small isolated systems" in two separate subbasins, and they omit agricultural demand, which is 90% of Basin demand. AR29289, 29304-29306, 29316-29319 (UWMP), 4114 (FEIR), 15235-15236 (MCWRA).

³ The FEIR cites UWMP demand projections only to demonstrate adequate *supply*, not the impacts from using that supply. AR4122; CT VII 1517-1519.

The FEIR simply fails to respond to comments seeking the groundwater *supply* that is sustainable without overdraft and seawater intrusion. AR3558.

In sum, the EIR fails to disclose the SVWP EIR demand assumptions, fails to provide the actual cumulative demand data, fails to compare actual demand to the SVWP EIR assumptions, fails to project foreseeable future demand, and fails to disclose the sustainable water supply. As discussed in section I.G below, these failures were prejudicial because the omitted information demonstrates that the EIR's reliance on the existing groundwater management projects is misplaced.

C. The EIR fails to provide a *legally adequate cumulative analysis* because it does not disclose the cumulative demand and sustainable supply data on which it relies, which data understate demand.

To evaluate the significance of cumulative water supply impacts, CEQA requires an EIR to disclose water demand from all relevant projects:

Absent some data indicating the volume of groundwater used by all such projects, it is impossible to evaluate whether the impacts associated with their use of ground water are significant and whether such impacts will be mitigated . . .

Kings County Farm Bureau, supra, 221 Cal.App.3d at 728-729. Setting aside an EIR for failure to provide a coherent accounting of long-term demand and supply, *Vineyard* holds that “some discussion of total supply and demand is necessary to evaluate the long term cumulative impact of development on water supply.” *Vineyard, supra*, 40 Cal. at 441.

The EIR's failure to provide cumulative demand and supply information violates both this case law and CEQA's express requirement that a cumulative analysis identify all sources of related impacts, either by listing all of the projects causing the cumulative impact or by providing “a summary of projections contained in an adopted local, regional or statewide plan, or related planning document, that describes or evaluates conditions contributing to the cumulative effect.” Guidelines, § 15130(b)(1). Here, since identification of all cumulative

water-using projects is impractical, the EIR should have provided the summary of demand projections in the SVWP EIR, as required by Guidelines, § 15130(b)(1)(B), *because that is the planning document on which it relies*. The failure to identify the SVWP EIR demand projections is a failure to make required information disclosure.

Furthermore, as MCWRA acknowledged and the pumping data demonstrate, the undisclosed SVWP EIR demand projections on which the EIR relies greatly understate cumulative demand. AR5184-5187 (MCWRA testimony); AR15612-15615 (LandWatch), *compiling* AR16063-16334 (MCWRA data). It is error to rely on a summary of projections when evidence shows that the summary “is inaccurate or outdated.” *Bakersfield Citizens, supra*, 124 Cal.App.4th at 1216-1218 (omission of future development projects). A court must invalidate an EIR where evidence shows the cumulative impact analysis omits the contribution of other relevant projects. *Friends of the Eel River, supra*, 108 Cal.App.4th at 868-872 (other water demands); *San Joaquin Raptor Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 739-741 (other development projects); *Citizens to Preserve the Ojai* at 430 (offshore emissions); *Kings County, supra*, 221 Cal.App.3d at 721-724 (out-of-county air emissions).

D. The EIR fails to provide the legally required roadmap to the earlier EIR on which it relies because it does not provide and explain the SVWP EIR demand assumptions.

In *Vineyard*, as here, the EIR relies on a water supply project (the “Water Forum Proposal”) and its associated EIR to conclude that the long-term cumulative water supply impacts would not be significant. *Vineyard, supra*, 40 Cal.4th at 423. The Supreme Court held that the reliance was misplaced because the EIR failed to present data “in a manner calculated to adequately inform the public and decision makers.” *Id.* at 442. The agency may not rely on “information that is not actually incorporated or described and referenced in the

FEIR,” because that is a failure to “proceed in the manner provided in CEQA.” *Id.* If an EIR’s analysis depends on demand and supply data in referenced documents, the EIR must present that information clearly, explain any differences among the figures, and “provide an analytically complete and coherent explanation” of the relation of the referenced documents to the EIR. *Id.* at 439-443. In short, the EIR must provide a “road map to the information it intends to convey,” and merely referencing the source document is not adequate. *Id.* at 443.

As in *Vineyard*, the Ferrini EIR is inadequate because it relies on cumulative demand and supply data from another document, without expressly incorporating that document by reference and without summarizing or presenting that data (AR466), both of which were required. *Id.* at 443, *citing* Guidelines, 15150(c). Indeed, whereas the *Vineyard* EIR actually *presented* some of the supply and demand data from the referenced document, albeit without clarity and without explaining inconsistencies (40 Cal.4th at 438-443), the Ferrini EIR *fails even to present* the long-term cumulative supply and demand assumptions from the SVWP EIR.

Contrary to the Trial Court (CT VII:1516), the Ferrini EIR does not rely only on the SVWP EIR’s “computer model.” It also specifically relies on its *data*, specifically its “assumptions about . . . water demand in the Salinas Valley.” AR466. And, contrary to the Trial Court (CT VII:1516), the six pages of the SVWP EIR the Ferrini EIR references do *not* set out those demand assumptions. AR494 (DEIR) *citing* AR26063-26069 (SVWP, pp. 2-42 to 2-48, discussing modeling but not presenting demand assumptions); *see Vineyard, supra*, 40 Cal.4th at 443 (error not to provide “explicit reference . . . to the particular portions incorporated”). Even if the SVWP EIR’s computer model “includes data equivalent to an EIR’s summary of projections” (CT VII:1516, fn. 9), the Ferrini EIR errs because it neither provides nor accurately references that summary of projections – even in response to comments challenging and requesting its demand assumptions.

E. The EIR fails to provide a *legally adequate setting description* because it does disclose current Basin demand timely, in the draft EIR, and does not provide the supply and demand information actually used in the analysis.

Both the cumulative analysis and the description of the environmental setting must be presented in the *draft* EIR, not later in the EIR process. Guidelines, § 15120(c) (information required in draft EIR); *Save Our Peninsula, supra*, 87 Cal.App.4th at 120-124, 128; *CBE v. Richmond, supra*, 184 Cal.App.4th at 89. Thus, the belated disclosure of *some* demand information in the *final* EIR (AR4114: 2005 pumping volumes, but not foreseeable future pumping), and the eventual admission in hearings that the SVWP EIR demand assumptions are understated (AR5187) did not rectify the failure to present demand information in the draft EIR. *See also* section I.H below (belated disclosure could not and did not cure inadequate EIR).

Furthermore, the EIR entirely fails to disclose the level of *supply* sustainable without overdraft or seawater intrusion, which is critical setting information.

Finally, the EIR errs because the 2005 Basin pumping volume belatedly disclosed in the FEIR (AR4114) was not the data *used* in the EIR's analysis of water supply impacts. Both the DEIR and the FEIR rely on the SVWP EIR modeling assumptions – not the incomplete demand data identified in the FEIR. AR466, 4115-4116. The FEIR does not even acknowledge that the 500,000 afy pumped in 2005 is substantially more than the SVWP EIR's assumption. Since the purpose of a setting description is to “make further analysis possible,” the disclosure of data that is *not used in the analysis* on which the EIR relies cannot be sufficient. *County of Amador, supra*, 76 Cal.App.4th at 954. As in *Friends of the Eel River, supra*, 108 Cal. App. 4th 874-875, provision of this water demand data “fails to set the stage for a discussion of the cumulative impact.”

F. The 2014 FEIR fails to provide *legally adequate responses to comments* because it does not disclose available demand and supply data requested by comments, and it does not acknowledge that 2013 modeling had already determined that additional water projects are necessary.

Responses in a final EIR to substantive comments on a DEIR must contain good-faith, fact-based, reasoned analysis, not conclusory statements. *People v. County of Kern* (1974) 39 Cal.App.3d 830, 841-842; Guidelines, § 15088(c). Failure to address comments “in detail,” providing “specific factual information” requested by the commenter, violates CEQA. *Cleary v. County of Stanislaus* (1981) 118 Cal.App.3d 348, 359. Where comments seek omitted facts or analysis essential to an EIR’s water supply conclusions, the failure to correct those omissions “renders the EIR defective as an informational document.” *California Oak Foundation v. City of Santa Clarita* (2005) 133 Cal.App.4th 1219, 1244. It is not sufficient to claim that “all available data” shows a sufficient water supply without *providing* that data. *People v. County of Kern* (1976) 62 Cal.App.3d 761, 772. In *Santa Clarita Organization for Planning the Environment v. County of Los Angeles* (“SCOPE”) (2003) 106 Cal.App.4th 715, 722, comment responses were inadequate because they failed to provide any facts, data, or estimates from the agency that would supply the water. The Court explained that the “requirement of a detailed analysis in response ensures that stubborn problems or serious criticism are not ‘swept under the rug.’” *Id.* at 723.

LandWatch’s comments objected that the SVWP EIR cumulative demand assumptions on which the DEIR relies are outdated and requested a clear statement of 1) supply sustainable without overdraft or seawater intrusion and 2) current and future cumulative demand, and 3) whether these data are consistent with the SVWP EIR assumptions. AR3555-3556, 3558-3560, 3562-3564, 3566-3567. The FEIR sweeps the issue under the rug through its conclusory response that the SVWP EIR assumptions are “conservative” (AR4113), but without

providing these assumptions or comparing them to current assumptions as requested:

- The FEIR provides foreseeable future demand only for scattered parts of the Basin and only for urban demand (AR4113, 4115-4116, 4122), even though comments sought *total* cumulative demand, including agricultural demand, which accounts for 90% of demand (AR4114).
- The FEIR does not provide the requested comparison of current demand with the SVWP EIR projections.
- The FEIR does not identify the level of supply that can be maintained without significant impacts as LandWatch requested (AR3558), instead disclosing only that Cal Water has adequate pumping capacity (AR4122), which was not at issue.

Here, the purported geographic scope of the cumulative analysis is the Basin. AR491-492. Overdraft and seawater intrusion are driven by *total* Basin pumping. AR26057 (SVWP EIR). The EIR's provision of incomplete cumulative data without justifying its limited geographic scope is error. *Citizens To Preserve the Ojai, supra*, 176 Cal. App. 3d at 429 (improper to rely on plan document omitting air pollution sources without explanation); Guidelines, § 15130(b)(3) (agency must “define the geographic scope of the area affected by the cumulative effect and provide a reasonable explanation for the geographic limitation used”); *Bakersfield Citizens, supra*, 124 Cal.App.4th at 1212-1214 (failure to identify and consider all cumulative projects contributing to impacts is an “overarching legal flaw”).

The EIR's failure to provide a projection of *future cumulative* demand for the Basin or Pressure Subarea also violates CEQA's requirement to identify foreseeable future sources of cumulative impacts. PRC, § 21083(b)(2); Guidelines, §§ 15130(b)(1), 15355(b).

More problematically, as in *California Oak Foundation, supra*, 133 Cal.App.4th at 1237, the County's response was “completely devoid of any direct discussion” of the issue raised by LandWatch, i.e., whether the substantially

greater pumping than assumed in the SVWP EIR precludes reliance on existing projects to balance the Basin and halt seawater intrusion. LandWatch’s DEIR comments objected to the County’s “uncritical reliance on the SVWP and the SVWP EIR despite unanticipated changes to existing and projected land use and water demand.” AR3555. But the 2014 FEIR failed to disclose that the County *already knew* from 2013 modeling that additional water management projects were required to prevent seawater intrusion and was already seeking surface water rights for that purpose. AR16437 (*Protective Elevations*).

Contrary to the Trial Court (CT VII:1522), the information LandWatch sought was not “unduly onerous.” Data demonstrating that SVWP EIR substantially understates 1995-2013 demand were posted on the County’s website. AR15612-15615 (LandWatch), *compiling* AR16063-16334 (MCWRA). The 2013 *Protective Elevations* report, concluding that additional groundwater projects were required, was also available on the County website. AR15616, *citing* AR16391-16426.

G. The EIR’s failure to disclose supply and demand information was prejudicial because the EIR thereby fails to disclose the magnitude and persistence of the cumulative impact and the need to construct additional groundwater management projects.

Non-compliance with CEQA’s informational mandates is presumptively prejudicial if it frustrates the purpose of public comments or precludes meaningful assessment of potentially significant impacts. *Sierra Club, supra*, 7 Cal.4th at 1236-1237; *see also AIR, supra*, 107 Cal.App.4th at 1391-1392. Prejudice occurs if the EIR fails to provide “sufficient information about a proposed project, the site and surrounding area and the projected environmental impacts arising as a result of the proposed project or activity to allow for an informed decision.” *Berkeley Keep Jets over the Bay Committee v. Board of Port Commissioners* (2001) 91 Cal.App.4th 1344, 1355-1356.

Prejudice does not require a showing that the agency decision would have differed had it complied with CEQA's informational requirements. PRC, § 21005; *County of Amador, supra*, 76 Cal.App.4th at 946; *AIR, supra*, 107 Cal.App.4th 1092.

1. Non-disclosure of cumulative demand and supply was prejudicial because current data demonstrate that the EIR's reliance on the SVWP EIR demand assumptions was misplaced and that additional water management projects must be constructed.

The Ferrini EIR's reliance on the SVWP EIR to conclude that the SVWP will halt seawater intrusion is reasonable only if the SVWP EIR's demand assumptions remain accurate. Indeed, the SVWP EIR cautioned that pumping in excess of assumed levels would exacerbate existing overdraft and seawater intrusion. AR25719.

However, uncontroverted evidence shows that the SVWP EIR assumptions understate actual pumping and irrigated acreage:

- 1995-2013 pumping averaged 500,986 afy, well over the SVWP EIR's assumed 1995 *peak* pumping of 463,000 afy. AR15612-15615, *compiling* AR16063-16334 (MCWRA) and *citing* AR25234, 25717, 25722 (SVWP EIR).
- MCWRA admits the SVWP EIR understates future pumping. AR5187.
- Irrigated farmland increased 5,372 acres from 1995 to 2006, whereas the SVWP EIR assumed it would *decline* 1,849 acres from 1995 to 2030. AR15615, *citing* AR25722 and Appellant LandWatch Monterey County's Motion To Augment Record, Exhibit 1 ("Request for Judicial Notice by Petitioner LandWatch Monterey County" (hereinafter "LW RJN"), Exh. 1, pp. 4.9-46 and 4.2-7 (2010 General Plan EIR: acreage increases)).
- By 2003, there were 212,003 irrigated acres in Zone 2C, well over the SVWP EIR assumed *peak* of 196,357 acres of irrigated land in 1995. AR15615, *citing* AR16374, 16379, 25722.

Thus, contrary to the EIR (AR466, 489), the County now admits that the SVWP is *not* sufficient to balance the Basin or to halt seawater intrusion and that additional

projects are needed. AR5164, 5178-5179, 5183-5190 (MCWRA testimony); AR29425 (MCWRA memo); AR37 (findings).

2. Non-disclosure of cumulative demand and the need for additional groundwater management projects was prejudicial because the EIR thereby fails to disclose impacts from continuing seawater intrusion and/or new water projects.

Because it assumes existing projects are sufficient, the EIR fails to disclose that overdraft and seawater intrusion will continue if the necessary additional water projects are not constructed. The EIR also fails to disclose that these necessary additional water supply projects, which are not yet funded or environmentally reviewed, would themselves cause potentially significant environmental impacts. AR15616-15617 (LandWatch), *citing* AR16427 (SVWP Phase II status), 16428-16446 (SVWP Phase II notice of preparation of EIR, identifying potential significant impacts), LW RJN, Exh. 1, p. 4.3-146 (2010 General Plan EIR: future water projects' impacts are significant); *see* AR29426 (MCWRA: future projects would be implemented only "if accepted by the public," i.e., approved and funded).

In light of the evident inefficacy of existing projects, the EIR should have discussed "possible replacement sources or alternatives to use of the anticipated water, and [] the *environmental consequences* of those contingencies." *Vineyard, supra*, 40 Cal.4th at 432 (emphasis added); *see also id.* at 434 (EIR must disclose "foreseeable environmental effects" of needed projects); *Santiago County Water District, supra*, 118 Cal.App.3d at 831 (EIR must assess *effect* of pumping); *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 286 (same). Thus, the failure to disclose cumulative demand was prejudicial because it short-circuited necessary discussion of impacts, either from continued overdraft and seawater intrusion or from additional groundwater projects.

3. Non-disclosure of the need for additional groundwater management projects was prejudicial because that need vitiates the EIR's reliance on payment of Zone 2C assessments as an adequate mitigation.

In light of the need for additional water management projects, the EIR's reliance on payment of Zone 2C assessments as sufficient mitigation is prejudicially misplaced. AR492, 4113, 4116 (EIR). A Zone 2C assessment represents only a fair share of the *existing* water supply projects identified for the assessment's Proposition 218 approval, and those Zone 2C assessments will not fund necessary *future* projects. AR4113 (FEIR), 16341-16343, 16352, 16365 (2003 SVWP Engineer's Report). Here, 2013 modeling shows that an additional 48,000 afy of groundwater recharge is "needed to maintain protective elevations," which would represent a fourfold increase in the SVWP's 12,000 afy groundwater recharge. AR16406 (*Protective Elevations*); see AR5164-5165, 5178-5179, 5183-5190 (MCWRA testimony). Impact fees must include a fair share of *all* the improvements necessary to mitigate the cumulative impact because "payment of fees must be tied to a functioning mitigation program." *California Native Plant Society v. City of Santa Cruz* ("CNPS") 170 Cal.App.4th 957, 1055-1056. CNPS cites *Anderson, supra*, 130 Cal.App.4th at 1188, which holds that an impact fee was not adequate mitigation because, as is the case here, it did not include a share of the second phase of the improvements needed to mitigate cumulative impacts. "*Anderson* did not hold that any fee program is necessarily or presumptively 'full' mitigation." CNPS at 1055.

Mitigation must be "fully enforceable." Guidelines, §15126.4(a)(2). An agency's mere intent to make necessary improvements, without a "definite commitment," is insufficient. *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1122; *Anderson, supra*, 130 Cal.App.4th at 1188-1189 (stated plan to update impact fee to include needed project insufficient). Here, although additional water projects are needed to mitigate cumulative impacts, there is no enforceable commitment to these projects.

Furthermore, an agency must demonstrate the efficacy of impact fee mitigation programs through CEQA review:

For an in-lieu fee system to satisfy the duty to mitigate, either that system must be evaluated by CEQA (two tier approval for later, more specific, projects) or the in-lieu fees or other mitigation must be evaluated on a project-specific basis.

CNPS, supra, 170 Cal.App.4th at 1055. Where an EIR’s significance conclusion relies on future groundwater mitigation projects, it must discuss those projects and show them to be feasible; failure is “fatal to a meaningful evaluation by the city council and the public.” *Kings County, supra*, 221 Cal.App.3d at 728. Here, the EIR fails to disclose the *need* for future water projects, much less discuss their efficacy and feasibility.

Thus, nondisclosure of the need for additional water projects was prejudicial because it obscures the inadequacy of the identified mitigation. The projects funded by existing impact fees are admittedly insufficient; the Ferrini Project is not obliged to pay any share of the needed future projects; those future projects are not committed; and the EIR does not discuss the efficacy of needed projects.

4. Non-disclosure of the shortfall between sustainable supply and cumulative demand was prejudicial because the EIR fails to disclose the magnitude of the cumulative problem.

It is not sufficient merely to label an impact significant; the EIR must “reasonably describe the nature and magnitude of the adverse effect.” *Cleveland National Forest Foundation v. San Diego Association of Governments* (2017) 3 Cal.5th 497, 514; *see Galante Vineyards v. Monterey Peninsula Water Management District* (1997) 60 Cal.App.4th 1109, 1123 (EIR must disclose “how adverse the impact will be”); *Santiago County Water Dist., supra*, 118 Cal.App.3d at 831.

In cumulative analysis, the determination whether the Project's incremental demand is a considerable contribution must be made with reference to the *actual magnitude* of the cumulative impact because "the greater the existing environmental problems are, the lower the threshold should be for treating a project's contribution to cumulative impacts as significant." *CBE v. CRA, supra*, 103 Cal.App.4th at 120.

The SVWP EIR establishes bounds for the magnitude of the cumulative problem by projecting that seawater intrusion may be halted based on the size and location of 1995 demand (AR25281, 26110), assumed to be 463,000 afy (AR25234), but not if demand exceeds this assumption (AR25719). Here, the EIR's failure to disclose that cumulative demand *substantially* exceeds the SVWP EIR's assumptions and that current pumping is not sustainable was prejudicial: the EIR fails to disclose how adverse the cumulative impact is and thereby fails to provide the essential context to determine if the Project's incremental demand is a considerable contribution. *See* section II below.

Finally, the EIR's failure to disclose the information requested in LandWatch's comments "must be deemed prejudicial" unless the County meets *its* burden to show that the comments were duplicative or irrelevant, or the omitted information *supported* the agency action. *Environmental Protection Information Center v. California Dept. of Forestry and Fire Protection* (2008) 44 Cal.4th 459, 487. The County cannot meet that burden here because LandWatch's comments were not duplicative or irrelevant and the omitted information does not support the County's action.

H. Post-EIR disclosures could not cure the prejudice as a matter of law and did not cure it as a matter of fact.

1. Prejudice from an informationally inadequate EIR cannot be cured by post-EIR disclosures as a matter of law.

Post-EIR disclosures, e.g., the oral testimony offered by MCWRA (AR5149-5194), cannot cure the EIR’s failure to disclose the cumulative demand or the need for additional water projects. The California Supreme Court has repeatedly held that oral presentations or information in post-EIR reports cannot cure the failure to provide an adequate EIR. *Vineyard* holds that an EIR’s misplaced reliance on water supply and demand data from another environmental document cannot be cured post-EIR information:

To the extent the County, in certifying the FEIR as complete, relied on information not actually incorporated or described and referenced in the FEIR, it failed to proceed in the manner provided in CEQA.

Vineyard, supra, 40 Cal.4th at 442. Elsewhere, the California Supreme Court admonishes that

. . . whatever is required to be considered in an EIR must be in that formal report; what any official might have known from other writings or oral presentations cannot supply what is lacking in the report.

Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal. (“*Laurel Heights I*”) (1988) 47 Cal.3d 376, 405.

The Sixth District holds that post-EIR disclosure of groundwater information cannot cure an informationally inadequate EIR because it precludes comment and response. *Save Our Peninsula, supra*, 87 Cal.App.4th at 117-118, 128. Similarly, *San Joaquin Raptor/Wildlife Rescue Ctr., supra*, 27 Cal. App. 4th at 727 holds that post-EIR testimony cannot make up for an inadequate EIR because it precludes comment and response: “[w]hatever is required to be

considered in an EIR must be in the report itself. Oral reports cannot supply what is lacking.”

In *CBE v. Richmond*, *supra*, 184 Cal. App. 4th at 88 the Court rejected the agency’s offer of post-EIR testimony to cure EIR omission regarding baseline conditions, again citing the Sixth District in *Save Our Peninsula. Sierra Club v. Tahoe Regional Planning Agency* (2013) 916 F.Supp.2d 1098, 1139 also cites *Save Our Peninsula* in holding that the adequacy of mitigation measures must be reviewed solely on the basis of information in the EIR because “[a]dditional documentation in the record, however, does not make up for the lack of analysis in the EIR.” *Santiago County Water Dist.*, *supra*, 118 Cal.App.3d at 829 also rejects the relevance of information outside the EIR regarding water resources because “[i]t is the adequacy of the EIR with which we are concerned . . .”

Where the EIR itself does not adequately disclose critical water supply information, especially in response to comments, it “fails in its function as an informational document,” and this cannot be cured by information provided by the public or not in the EIR. *California Oak Foundation*, *supra*, 133 Cal.App.4th at 1240, *see also SCOPE*, *supra*, 106 Cal.App.4th at 722-723.

2. Prejudice was not cured by post-EIR disclosures as a matter of fact, because the County did not provide required information.

Even if untimely disclosure were permissible, the post-FEIR information here did not disclose essential information. First, while finally admitting that additional projects are necessary, the County did not disclose their environmental impacts or point to their environmental assessments, which CEQA requires. *Vineyard*, *supra*, 40 Cal.4th at 432, 434, 446; *CNPS*, *supra*, 170 Cal.App.4th at 1055. Second, although additional projects are not funded and will be implemented only if “accepted by the public” (AR29426; *see also* AR29333 – SVWP Phase II not funded), the County did not acknowledge their uncertainty, which CEQA requires. *Vineyard*, *supra*, 40 Cal.4th at 434, 439, 446. Uncertainty is critical here because the EIR relies on payment of water project assessments as

mitigation, but mitigation must be certain (14 C.C.R. § 15026.4(a)(2)) and “payment of fees must be tied to a functioning mitigation program.” *CNPS, supra*, 170 Cal.App.4th at 1055; *see Anderson, supra*, 130 Cal.App.4th at 1188-1189; *Gray, supra*, 167 Cal.App.4th at 1122.

Finally, although LandWatch objected to reliance on unfunded projects without environmental review (AR15616-15617), and provided evidence that these projects would have potentially significant environmental impacts (AR16428-16446; LW RJN, Exh. 1, p. 4.3-146), the County made no response to these comments. The mere opportunity to comment *without response* is insufficient. *Save Our Peninsula, supra*, 87 Cal.App.4th at 123, 131, 133; *San Joaquin Raptor/Wildlife Rescue Ctr., supra*, 27 Cal. App. 4th at 727.

II. The EIR’s cumulative analysis errs to the extent it relies on the “ratio” theory because that improperly trivializes the Project’s contribution to cumulative overdraft and seawater intrusion impacts.

The FEIR argues that the Project’s 95 afy demand is less than significant because of the “the insignificant demand (95 acre feet per year) versus the total storage capacity of the subbasin” and the “small demand . . . in relation to the overall annual demand for the subbasin in 2005 of 118,372 AFY.” AR4114. As noted, the Trial Court held these ratio claims are relevant only to the adequacy of water *supply*, not the *impact* from *using* that supply (CT VII:1517-1520, 1526-1527) and the FEIR does not claim that the ratio claims are relevant to whether the Project’s contribution to cumulative overdraft and seawater intrusion is considerable (AR4113-4114, 4116, 4122).

Regardless, the EIR’s ratio claims cannot support a conclusion that the Project’s contribution to these impacts is less than considerable because the claims are based on a legally inadequate conception of CEQA’s requirements for cumulative analysis. Reliance on the ratio claims for such a conclusion would be prejudicial error because the EIR fails to disclose the critical context required to

determine whether the contribution is considerable: the magnitude of the cumulative overdraft that drives seawater intrusion.

A. The EIR errs legally to the extent it uses the “ratio” theory to assess the Project’s contribution to overdraft and seawater intrusion.

An EIR may not conclude a cumulative impact is insignificant merely because the project’s individual contribution to an unacceptable existing condition is relatively small. *LAUSD, supra*, 58 Cal.App.4th at 1025-1026; *CBE v. CRA, supra*, 103 Cal.App.4th at 117-118, 121; *Cleveland National Forest Foundation, supra*, 3 Cal.5th at 515. In *Kings County, supra*, 221 Cal.App.3d at 720, the court specifically rejected the agency’s “ratio” theory, under which the agency held impacts not to be a considerable contribution merely because they were a relatively small percent of the total impact. The relevant question is “whether any additional amount” of incremental impact “should be considered significant in light of the serious nature” of the problem. *Id.* at 718. Thus, a valid determination must reflect the severity of the cumulative problem: “the greater the existing environmental problems are, the lower the threshold should be for treating a project’s contribution to cumulative impacts as significant.” *CBE v. CRA, supra*, 103 Cal.App.4th at 120. Even an “individually minor” impact may nevertheless be “cumulatively considerable.” *Id.*; *see also* Guidelines, §§ 15355(b), 15065(a)(3); *LAUSD, supra*, 58 Cal.App.4th at 1024-25.

To the extent that the EIR relies on its ratio claims to assess overdraft and seawater intrusion *impacts* (as opposed to supply availability), the EIR makes the *Kings County* error. Focusing on the ratio of Project pumping to total aquifer pumping or capacity would “trivialize the project’s impact” without reference to the serious nature of the cumulative problem. *Kings County, supra*, 221 Cal.App.3d at 718; AR4114. An EIR is legally inadequate if it is “focused upon the individual project’s relative effects and omits facts relevant to an analysis of the collective effect.” *Id.* at 721. The EIR fails to ask the relevant question – whether any additional pumping is a considerable contribution in the context of

the severity of the environmental problem. *Id.* at 718. Where the EIR fails to ask *this* question, “the information and analysis in the EIR . . . is inadequate.” *LAUSD, supra*, 58 Cal.App.4th at 1025-1026.

Comparison of Project pumping to aquifer capacity or annual pumping omits facts relevant to the analysis because it does not place the Project’s impact in the context of the “environmental problem,” as required by *CBE v. CRA, supra*, 103 Cal.App.4th at 120. Here, the environmental *problem* is not aquifer capacity or annual pumping, it is seawater intrusion, which is determined by the magnitude of overdraft. AR24229-25230 (SVWP EIR); AR20369 (*State of the Basin*: relevant analysis is determining storage *changes*, not absolute storage). The EIR’s report of Project demand as a small percent of total aquifer storage capacity or annual pumping is irrelevant.

The relevant question is whether the Project’s 95 afy is a considerable contribution to cumulative *overdraft* that causes seawater intrusion. But the EIR fails to disclose the magnitude of the cumulative overdraft because it does not disclose cumulative demand and sustainable supply. As in *Kings County*, “the EIR is inadequate” because “the record does not provide information” regarding severity of the problem. 221 Cal.App.3d at 724.

B. Reliance on the ratio theory would be prejudicial.

Making an irrelevant comparison premised on a legally incorrect understanding of CEQA is prejudicial because it precludes potential identification of a considerable contribution to a significant cumulative impact. For example, *State of the Basin* concludes that the Pressure Subarea suffers seawater intrusion due to an average overdraft of 2,000 afy (AR20371), and it recommends pumping *reductions* in that Subarea (AR20374). *See also* AR16396 (*Protective Elevations*, recommending Pressure Subarea pumping reductions). Under the circumstances, *increasing* the 2,000 afy overdraft by another 95 afy for the Project’s water supply should have been deemed a considerable contribution. And even if the County

might have concluded otherwise, accountable decision-making required disclosure of relevant information. *Laurel Heights I, supra*, 47 Cal.3d at 392. A prejudicial abuse of discretion may be found regardless whether a different outcome would have resulted had the agency complied with CEQA's mandates. PRC, § 21005(a); *County of Amador, supra*, 76 Cal.App.4th at 946; *AIR, supra*, 107 Cal.App.4th at 1392.

III. Recirculation was required because new information shows that the draft EIR was so inadequate as to preclude meaningful comment.

An agency must recirculate an EIR if new information shows that the draft EIR was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded.⁴ Guidelines, § 15088.5(a)(4). Recirculation is intended to provide the public the same opportunity to evaluate the new information and the validity of the EIR's conclusions as it had for information in the draft EIR. *Sutter Sensible Planning v. Board of Supervisors* (1981) 122 Cal.App.3d 813, 822; *Laurel Heights Improvement Ass'n v. Regents of the Univ. of Cal.* ("Laurel Heights II") (1993) 6 Cal.4th 1112, 1132.

Courts require recirculation where a draft EIR's water supply disclosures are inadequate, even if the information is provided later. *Cadiz Land Co. v. Rail Cycle* (2000) 83 Cal.App.4th 74, 95 required recirculation because a key hydrological parameter, the volume of the aquifer, was not disclosed until post-EIR reports and testimony. *Save Our Peninsula* required recirculation because critical information regarding the hydrological setting and proposed mitigation was not disclosed timely. 87 Cal.App.4th at 122-123 (new setting information), 128-131 (new mitigation). *Spring Valley Lake Ass'n v. City of Victorville* (2016)

⁴ This Court need not reach the recirculation claim if it finds that the EIR is informationally inadequate, as argued above. *CBE v. Richmond, supra*, 184 Cal. App. 4th at 85-89, 101 (recirculation "moot" given holding that EIR failed to provide timely baseline information).

248 Cal. App. 4th 91, 108 required recirculation where the agency amended the hydrology analysis to rely on additional technical reports and new mitigation. *See also Gray, supra*, 167 Cal.App.4th 1099, 1120 (recirculation required because EIR failed to discuss feasibility of water supply mitigation). In each case, recirculation was required *even though the post-EIR disclosure did not alter the EIR's conclusions*. The Courts ordered recirculation because the new information denied the public a meaningful opportunity for comment and response. *See* Guidelines, § 15088.5(a)(4).

These cases are controlling. First, not until post-EIR testimony did the County disclose a key hydrological parameter, by admitting that the SVWP EIR demand assumptions were understated, even though the DEIR relies on them and the FEIR calls them “conservative.” AR5187 (MCWRA testimony), 466 (DEIR), 4113 (FEIR). Second, not until post-EIR testimony did the County disclose that its hydrological analysis showed the need for additional mitigation, even though the EIR concludes that existing projects are sufficient mitigation. AR5164, 5178-5179, 5183-5184, 5189-5190 (MCWRA testimony), *referencing* AR16391-16426 (modeling); AR466, 489, 492 4116 (EIR). Finally, meaningful comment and response was denied because, as discussed in section I.H.2 above, the County did not respond to objections that the future projects were not approved, funded, or environmentally reviewed, and that the EIR fails to disclose the impacts of providing these future projects or of *not* providing them.

IV. Substantial evidence does not support a finding that payment of Zone 2C fees adequately mitigates Project impacts.

Because the County prejudicially failed to proceed as required by CEQA in evaluating cumulative water supply impacts, this Court need not consider whether there was substantial evidence to support a finding that the Project would mitigate its contribution to a significant cumulative impact, as required by CEQA. Guidelines, § 15091(b). However, neither the EIR, nor the rest of the record, do provide that substantial evidence.

A. The EIR fails to present facts and analysis to support its claim that existing groundwater management projects will balance the basin and halt seawater intrusion.

The EIR's conclusion that the Project's contributions to overdraft and seawater intrusion are less than considerable depends on its categorical claims that (1) the SVWP will balance the Basin and halt seawater intrusion, and (2) the "project's impact on the groundwater basin is therefore mitigated" by its payment of Zone 2C assessments for the existing groundwater management projects. AR466, 489, 492.

An EIR must actually present "facts and analysis" to support its conclusions and inform the public. *Laurel Heights I, supra*, 47 Cal.3d at 404; Guidelines, §15130(a)(2); *Vineyard, supra*, 40 Cal.4th at 442. Thus, the failures discussed above to comply with CEQA's informational mandates preclude substantial evidence. *California Oak Foundation, supra*, 133 Cal.App.4th at 1226-1227, 1235-1242 (no substantial evidence because EIR fails to disclose supply uncertainty); *see also SCOPE, supra*, 106 Cal.App.4th at 720-724 (approval "not supported by substantial evidence" given inadequate analysis and comment response).

Furthermore, where water demand estimates conflict, there is no substantial evidence. *Vineyard, supra*, 40 Cal.4th at 439; *Preserve Wild Santee, supra*, 210 Cal.App.4th at 283-284. Here, the conflict between the purportedly conservative 2002 SVWP EIR demand projections cited by the EIR, actual pumping records, and MCRA's acknowledgement that the SVWP EIR underestimates demand precludes substantial evidence.

In addition to its failure to make required and consistent disclosures, the EIR also fails to provide substantial evidence to support its central claim that payment of impact fees for existing groundwater projects is sufficient mitigation for seawater intrusion. The DEIR cites a one-year improvement in the

groundwater level in the 2009-2010 water year, and a recent slowing in the *rate* of seawater intrusion. AR460, 466-471. The FEIR states that “[t]he most recent WRA groundwater data (2013) demonstrates near-term benefits of these management efforts.” AR4114. However, the referenced data are not in the EIR; the seawater intrusion front has in fact continued to advance (AR4117-4118); and, on the very day it approved the Ferrini project, the County was advised that seawater intrusion will accelerate again in a latent response to the drought (AR20371, 20373 – *State of Basin*). Furthermore, two years of data is not substantial evidence in light of MCWRA’s acknowledgement that at least ten years of data are required to determine the efficacy of the SVWP. AR8887, 9304, 9338, 5164, 5189; *see* AR3570-3572.

B. Evidence and admissions show that existing groundwater management projects are *not* sufficient to halt seawater intrusion.

Evidence that is not included in or referenced by the EIR demonstrates that existing groundwater projects are *not* sufficient to balance the Basin or halt seawater intrusion. As argued:

- The SVWP EIR claims only that seawater intrusion would be halted based on 1995 demand of 463,000 afy. AR26110, 25281; *see* AR5188 (MCWRA). Pumping from 1995-2013 substantially exceeded this. AR5187; AR15612-15615, *compiling* AR16063-16334.
- MCWRA acknowledges that additional projects are needed to supply another 58,000 afy to control seawater intrusion. AR5164- 5165, 5178-5179, 5183-5190 (MCWRA), referencing AR16391-16426 (*Protective Elevations*).
- *State of the Basin* concludes the Basin is out of balance by 17,000 to 24,000 afy, the Pressure Subarea is overdrafted by 2,000 afy, overdraft will increase in response to the drought, current pumping is “not sustainable,” and pumping reductions are needed. AR20371-20372, 20374.
- The Ferrini *findings* admit that additional groundwater management projects are necessary to halt seawater intrusion and balance the basin. AR37.

This information directly contradicts the EIR’S claim that the SVWP will halt seawater intrusion and any claim that Project pumping will not contribute to overdraft or seawater intrusion. Such “factual inconsistencies and lack of clarity” preclude substantial evidence. *Vineyard, supra*, 40 Cal.4th at 439.

C. Paying impact fees for existing groundwater management projects is not adequate mitigation because those projects will not halt seawater intrusion.

As argued in section II.G.3 above, the Project’s Zone 2C assessments represent only its share of the *existing* groundwater projects, and those fees will not go to fund necessary future projects. AR4113 (FEIR), 16341-16343, 16352, 16365 (2003 SVWP Engineers Report re assessments). Impact fees are not adequate mitigation unless they constitute a fair share of *all* of the improvements necessary to mitigate the cumulative impact. *CNPS, supra*, 170 Cal.App.4th at 1055-1056; *Anderson, supra*, 130 Cal.App.4th at 1188. Accordingly, payment of Zone 2C fees for existing projects is not sufficient to render its impact less than significant, because existing projects are admittedly insufficient.

D. The “ratio” analysis and the UWMP pumping capacity cited by the FEIR are not substantial evidence that the Project’s contribution to seawater intrusion is not considerable.

In addition to the existing Zone 2C projects, the FEIR identifies three other factors related to a finding that Project “demand on the subbasin was less than significant:” the ratio of Project demand to subbasin capacity, the ratio to pumping, and the Project’s consistency with the UWMP. AR4114. As argued in sections I.B.1 and II above, these claims relating to the availability of water *supply* do not inform an analysis of the Project’s contribution to the cumulative *impacts* of *using* that supply. *See also* CT VII:1517-1520, 1526-1527 (Trial Court). Regardless, the ratio analysis is legally erroneous and factually irrelevant to cumulative impact analysis because the EIR fails to assess Project pumping in the

context of the cumulative *problem*, the overdraft condition that drives seawater intrusion. *See* section II above.

Furthermore, the UWMP *directly contradicts* the EIR’s claim that the existing groundwater management projects will balance the Basin and prevent seawater intrusion, concluding instead that “groundwater production in the north valley continues to *add to the overdraft* of the Pressure and Eastside aquifers, *which permits the seawater intrusion to continue.*” AR29332 (emphasis added). The UWMP concludes that, because a second phase of the SVWP has not been approved, scheduled, or funded, Cal Water “cannot count on the SVWP to provide future demand in the Salinas District.” AR29333.

E. Recirculation was required because new information shows a new or more severe impact not disclosed in the EIR

An agency must recirculate an EIR when new information shows a new or more severe significant impact resulting from the project. Guidelines, § 15088.5(a)(1), (2); *Laurel Heights II, supra*, 6 Cal.4th at 1130. A decision not to recirculate must be supported by substantial evidence that there is neither a “substantial” nor a “potentially substantial” new impact. *Vineyard, supra*, 40 Cal.4th at 447-448.

In *addition* to requesting recirculation because the draft EIR was conclusory and inadequate, as discussed in section III above, LandWatch *also* requested recirculation because there was no substantial evidence to support the EIR’s reliance on the efficacy of existing groundwater management projects to mitigate cumulative impacts. AR15576-15577, 15617, 20362. As argued, the EIR does not present such evidence. And significant new information – post-EIR testimony and admissions – demonstrate that the County no longer believes that existing water projects will balance the Basin and halt seawater intrusion. AR5164- 5165, 5178-5179, 5183-5190 (MCWRA); AR37 (findings). Significant new information also demonstrates that there will be impacts if new projects are

built. *See* section I.G.2 above. Because these significant impacts were not disclosed in the EIR, recirculation is required.

INCORPORATION

LandWatch incorporates herein Highway 68 Coalition's Appellant's Opening Brief.

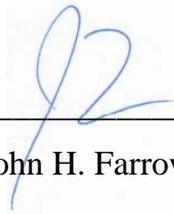
CONCLUSION

For all of the foregoing reasons, LandWatch respectfully requests this Court to REVERSE the Trial Court's August 16, 2017 order and REMAND the matter to the Trial Court with instructions to issue the writ sought.

Dated: July 10, 2018

Respectfully submitted,

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



John H. Farrow

Attorneys for Appellant

LANDWATCH MONTEREY COUNTY

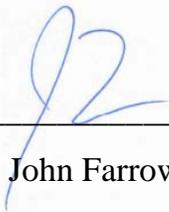
CERTIFICATION OF LENGTH

I, John Farrow, declare:

In accordance with Rule 8.204(c)(1) of the California Rules of Court, I hereby certify that the length of this brief excluding tables, as calculated by the word processing software with which it was produced, is 13,830 words.

I affirm, under penalty of perjury, that the foregoing is true and correct.

Dated: July 10, 2018

By:  _____
John Farrow