

1 Mark R. Wolfe, CSB No. 176753
2 John H. Farrow, CSB No. 209221
3 M. R. WOLFE & ASSOCIATES, P.C.
4 1 Sutter Street, Suite 300
5 San Francisco, CA 94104
6 Telephone: (415) 369-9400
7 Fax: (415) 369-9405
8 jfarrow@mrwolfeassociates.com

9 Attorneys for Petitioner LandWatch Monterey County

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

13 HIGHWAY 68 COALITION;

14 Petitioner,

15 vs.

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

18 Respondents,

19 DOMAIN CORPORATION, FERRINI
20 OAKS, LLC, ISLANDIA 29 A DELAWARE
21 LIMITED PARTNERSHIP and DOES 1-50
22 inclusive,

23 Real Parties in Interest.

Case No.: 130660

**LANDWATCH MONTEREY COUNTY
OPENING BRIEF**

Action Filed: January 15, 2015

Trial Date: None Set

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CALIFORNIA UTILITIES SERVICE, INC.;

Case No.: 130665

Petitioner,
vs.

COUNTY OF MONTEREY; and DOES 1-
25, inclusive,

Action Filed: January 15, 2015
Trial Date: None Set

Respondents

BOLLENBACHER & KELTON, INC.; and
DOES 26-50, inclusive;

Real Parties In Interest.

LANDWATCH MONTEREY COUNTY;

Case No.: 130670

Plaintiff and Petitioner,
vs.

COUNTY OF MONTEREY;

Action Filed: January 16, 2015
Trial Date: None Set

Defendant and Respondent

BOLLENBACHER & KELTON, INC.;
DOMAIN CORPORATION; ISLANDIA 29,
and DOES 1 through 25, inclusive;

Real Parties In Interest.

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afy	acre-feet per year
AR	Administrative Record
CSIP	Castroville Seawater Intrusion Project
D	Design Control [zoning overlay district]
DEIR	Draft Environmental Impact Report
EIR	Environmental Impact Report
FEIR	Final Environmental Impact Report
LOS	Level of Service
LW RJN	LandWatch’s Request for Judicial Notice
MCWRA	Monterey County Water Resources Agency
MTP	Metropolitan Transportation Plan
RDEIR	Revised Draft Environmental Impact Report
RDIF	Regional Development Impact Fee
RTP	Regional Transportation Plan
SAR	Supplemental Administrative Record
SR68	State Route 68
SVWP	Salinas Valley Water Project
TAMC	Transportation Agency of Monterey County
UWMP	Urban Water Management Plan
VS	Visual Sensitivity [zoning overlay district]

1 **INTRODUCTION**

2 The Ferrini project is a large-lot 185-unit subdivision on 870 acres of rolling hills on
3 State Route 68. The project is rural sprawl development that will further aggravate Salinas
4 Valley water supply impacts, further congest State Route 68, and blemish views from the State
5 Route 68 scenic view corridor, Fort Ord National Monument, and Toro County Park. While the
6 County may decide to permit these impacts, CEQA mandates that it do so in an accountable,
7 public process with adequate disclosure. The Ferrini EIR does not honor this mandate.

8 First, the project will draw another 95 acre-feet per year (“afy”) from the 180/400-Foot
9 Aquifer in the Salinas Valley Groundwater Basin. Hydrological reports commissioned by the
10 County in 2013 and 2014 recommend pumping reductions to address the 2,000 afy overdraft that
11 is causing seawater intrusion. However, the EIR’s analysis of cumulative water supply impacts
12 relies on an out-of-date 2002 report to claim that that existing groundwater management projects
13 will hydrologically balance the Salinas Valley Groundwater Basin, halt seawater intrusion, and
14 ensure that the project has no significant impact. Despite LandWatch’s request, the EIR fails to
15 disclose total cumulative demand and supply projections, much less to provide current
16 projections. Yet this information is required for a legally adequate cumulative water supply
17 analysis, and, in particular, required to evaluate the EIR’s claim that it relies on “conservative”
18 assumptions from that 2002 report. The EIR’s informational failure was prejudicial because the
19 record shows that cumulative demand greatly exceeds those “conservative” assumptions.

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

27 Third, the EIR’s analysis of visual impacts is not based on a complete or stable
28 description of the project or its environmental setting, and mitigation was not proposed timely,

1 contravening CEQA. After the EIR was final, staff reports began a musical chairs program to
2 relocate subdivision lots. Changes were required because the EIR relies on a map of the
3 “Critical Viewshed” area, which staff later admitted was wrong, and because the EIR concludes
4 that there would be no ridgeline development, which staff later admitted was wrong too. And the
5 music has not stopped: approval conditions require future lot relocations, with unexamined
6 visual impacts. The EIR also fails to assess the visual impacts of building a mile of freeway and
7 a new signalized intersection on a rural 2-lane road – impermissibly deferring that to future
8 review. Critical mitigation was not discussed in the EIR, but was instead proposed in last-minute
9 staff reports. In sum, the analysis and mitigation of visual impacts that should have been in the
10 EIR was presented instead in a series of confused and conflicting last-minute staff reports, errata,
11 and memoranda, denying the public any meaningful opportunity for informed participation.

12 Fourth, the County failed to explain its rejection of greenhouse gas mitigation proposals
13 as “infeasible” and failed even to respond to the proposals meaningfully, violating CEQA.
14 Finally, the County abandoned without reason the mitigation for park impacts that the EIR
15 identified as essential, again in clear violation of CEQA.

16 For these reasons, LandWatch asks this Court to set aside the EIR and project approvals.

17 **PROCEDURAL HISTORY**

18 The project was approved December 16, 2014. Administrative Record (“AR”), p.
19 000041. CEQA review included a 2012 draft EIR (“DEIR”), a 2014 revised draft EIR
20 (RDEIR”), and a 2014 final EIR (“FEIR”). AR000005. The approved project was a variant of
21 Alternative 5, developed after the FEIR and after the Planning Commission hearings.
22 AR000005. Relevant facts are set out in the beginning of the argument sections below.

23 **STANDARD OF REVIEW**

24 In a case challenging an agency’s compliance with CEQA, the court’s inquiry extends to
25 whether there was a prejudicial abuse of discretion. Code of Civ. Proc. § 1094.5(b); Public
26 Resources Code (“P.R.C.”), § 21168. Abuse of discretion is established if the agency has not
27 proceeded in a manner required by CEQA, or if the determination or decision is not supported by
28 substantial evidence. *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova*

1 (“*Vineyard*”) (2007) 40 Cal.4th 412, 435. The standard of review is determined by the nature of
2 the alleged violations: when the claimed violation is of procedural error, review is under the non-
3 deferential independent judgment standard, while a claim of unsupported factual determination is
4 reviewed under the more deferential substantial evidence standard. *Id.* at 435.

5 *Vineyard’s* dual standard of review reflects CEQA’s dual mandate, one substantive and
6 one procedural. The substantive mandate is to avoid, lessen, or mitigate environmental impacts
7 where feasible. P.R.C., § 21002, *Laurel Heights Improvement Assn. v. Regents of University of*
8 *California* (“*Laurel Hts. I*”) (1988) 47 Cal.3d 376, 390. The procedural mandate is to support
9 informed decision making and public participation through the EIR process:

10 “The EIR is the heart of CEQA and the integrity of the process is dependent on the
11 adequacy of the EIR. The ultimate decision of whether to approve a project, be that
12 decision right or wrong, is a nullity if based upon an EIR that does not provide the
13 decisionmakers, and the public, with the information about the project that is required by
14 CEQA. The error is prejudicial if the failure to include relevant information precludes
15 informed decisionmaking and informed public participation, thereby thwarting the
16 statutory goals of the EIR process.” *Save our Peninsula Committee v. Monterey County*
17 *Board of Supervisors* (“*Save Our Peninsula*”) (2001) 87 Cal.App.4th 99, 117-118,
18 citations and internal quotations omitted.

19 Claims that an EIR lacks required information and analysis are reviewed non-deferentially
20 because they are claims that the agency failed to proceed as required by CEQA. *Bakersfield*
21 *Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1207-1208;
22 *Madera Oversight Coalition v. County of Madera* (2011) 199 Cal.App.4th 48, 102, overruled on
23 other grounds in *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority*
24 (2013) 57 Cal.4th 439. The Supreme Court recognizes that such informational failures are
25 presumptively prejudicial if they frustrate the purpose of public comments or preclude
26 meaningful assessment of potentially significant impacts. *Sierra Club v. State Bd. of Forestry*
27 (1994) 7 Cal.4th 1215, 1236; *see also Association of Irrigated Residents v. County of Madera*
28 (“*AIR*”) (2003) 107 Cal.App.4th 1383, 1391-1392. LandWatch’s claims (in sections IB, IIIC, IV,
VI below) that the County violated the CEQA’s procedural mandates challenge the County’s
compliance with the information disclosure provisions of the CEQA statute and allege that this
non-compliance was prejudicial.

1 In addition, LandWatch does also and independently allege a failure to support findings
2 regarding the significance of impacts and the efficacy of mitigation with substantial evidence in
3 the record (in sections IC, IIIB, V, and VII below).¹ A lack of substantial evidence may be
4 shown by a failure to ground findings with facts, a failure to disclose the analytic route between
5 facts and conclusions, and/or a lack of clarity or inconsistency in the factual claims. *Laurel*
6 *Heights I, supra*, 47 Cal.3d at 404; *Topanga Ass’n. for a Scenic Community v. County of Los*
7 *Angeles* (1974) 11 Cal.3d 506, 514-515, *Vineyard, supra*, 40 Cal.4th at 439.

8 ARGUMENT

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

10 A. Facts regarding water supply.

11 Overview of Salinas Valley Groundwater Basin: The project will obtain its water supply
12 from wells in the 180/400-Foot Aquifer Subbasin (“180/400-Foot Aquifer” or “Pressure
13 Subarea”) at the northwest end of the Salinas Valley Groundwater Basin. AR000452. The
14 180/400-Foot Aquifer is one of the eight subbasins making up the Salinas Valley Groundwater
15 Basin (“Basin”). AR000451-0000459, 016397-016399. Pumping from the Basin has exceeded
16 recharge since the 1930s. AR000465, 016399-016400, 020367-020373. Overdraft in the
17 180/400-Foot Aquifer has averaged about 2,000 acre-feet per year (“afy”) from 1944 to 2014, and
18 the Basin as a whole is “currently out of hydrologic balance by approximately 17,000 to 24,000
19 afy.” AR020371-20372. This overdraft condition lowers groundwater elevations, which in turn
20 causes seawater intrusion. AR000456, 016399-16400, 020367, 020373. Seawater intrusion
21 impairs water supplies 5 miles inland. AR000465-000466, 000469-000471, 004177-004118.

22 Efforts to control seawater intrusion: The Monterey County Water Resources Agency
23 (“MCWRA”) and predecessor agencies have implemented several projects to address seawater
24 intrusion by storing surface water, increasing recharge, and reducing groundwater pumping
25 along the coast. AR005158-005164, 015239-015243, 000466-000467. These include the
26 Nacimiento and San Antonio Reservoirs, water recycling to support the Castroville Seawater
27

28 ¹ Claims in sections ID and II allege both a failure to proceed as required by CEQA and a lack of substantial evidence to support findings.

1 Intrusion Project, and the Salinas Valley Water Project (“SVWP”). The most recent of these
2 projects, the SVWP, was completed in 2010. AR005163.

3 The EIR for the SVWP explains that seawater intrusion is determined by the amount and
4 location of pumping:

5 “[P]umping in the coastal area closest to the seawater intrusion front has a greater
6 influence on seawater intrusion than pumping in a valley area more distant from the front.
7 Nevertheless, pumping in each area affects seawater intrusion because each subarea
8 draws water from the same Basin.” AR026057, emphasis in original.

9 The SVWP EIR predicted that the SVWP could halt seawater based on the amount and location
10 of 1995 demand. AR025281. However, it could not assure that the SVWP would halt seawater
11 intrusion in 2030, even though total demand was projected to decline, because of projected
12 increases in urban demand in the northern end of the Basin. *Id.*; AR015611-015612, 025281,
13 026110. The SVWP also cautioned that “any additional water needs within an intruded
14 groundwater basin would exacerbate seawater intrusion.” AR026057, 025719.

15 The SVWP EIR assumed that Basin groundwater pumping would decline substantially
16 from 1995 to 2030, from 463,000 afy to 443,000 afy, based on large expected reductions in
17 agricultural pumping, which dominates Basin water demand. AR025234, 025299, 025709,
18 025715, 025717, 025719; *see* AR015611-015613. However, groundwater pumping in the 20
19 years since 1995 substantially exceeded 1995 levels, averaging 500,986 afy, not including the
20 non-reporting wells. AR015612-015615, compiling AR016063-016334. MCWRA now agrees
21 that “the amount of pumping that was assumed in those models was, actually, much lower than
22 the amount of pumping that’s being reported” and acknowledges that the SVWP EIR only
23 claimed the SVWP would “halt seawater intrusion based on 1995 land use.” AR005187-005158.

24 MCWRA now claims only that the existing groundwater management projects have
25 “slowed seawater intrusion.” AR005164. Reports show that the rate of seawater intrusion has
26 declined since the last drought-induced spike in intrusion during 1997-1999. AR020373; *see*
27 AR016400, 000467. However, MCWRA has concluded that the “intrusion continues (albeit at a
28 slower rate), migrating inland and salinating fresh-water aquifer systems.” AR016399-013400.
Thus, MCWRA concluded in 2013 that a new project or projects supplying an additional 48,000

1 afy of groundwater recharge, over and above that supplied by the SVWP, would be required in
2 order to maintain protective groundwater elevations sufficient to control seawater intrusion.
3 AR016406; *see* AR005164- 005165, 005178-005179, 005183-005190.

4 Water Service and Urban Water Management Plan: The California Water Service
5 Company (“Cal Water”), which would supply water to the project, serves urban users from wells
6 located in various portions of the Basin. The Cal Water 2010 Urban Water Management Plan
7 (“UWMP”) (mandated by Water Code, § 10644(a)) reports historic and projected pumping for its
8 four non-contiguous urban service areas located in both the 180/400-Foot Aquifer Subbasin and
9 the Eastside Subbasin. Supplemental Administrative Record (“SAR”), pp. 029289, 029316-
10 029319. The UWMP does not serve agricultural customers or report or project any agricultural
11 pumping in the Basin. SAR029304-029306. Thus, the UWMP does not purport to provide a
12 complete statement of historic of future demand for the Basin or the 180/400-Foot Aquifer. The
13 UWMP acknowledges that the Basin is in overdraft and that the Pressure subarea “is a region of
14 gradually declining groundwater elevations.” SAR029316-029319. The UWMP acknowledges
15 that “groundwater production in the north valley continues to add to the overdraft of the Pressure
16 and Eastside aquifers, which permit the seawater intrusion to continue,” and that existing
17 projects do “not provide a complete solution.” SAR0029332. The UWMP states because a
18 second phase of the SVWP has not been funded or “Cal Water can not count on the SVWP to
19 provide future demand in the Salinas District.” SAR029333.

20 DEIR relies Salinas Valley Water Project to find cumulative impacts less than significant:
21 The DEIR admits that the Basin “has experienced overdraft,” which has caused seawater
22 intrusion, rendering areas of the aquifer unusable. AR000451, 000465-000466; *see* 000469-
23 000471. The DEIR identifies the Salinas Valley Water Project and the Castroville Seawater
24 Intrusion Program as programs to address seawater intrusion. AR000466, 000468. The DEIR
25 states categorically that the SVWP will stop seawater intrusion, balance the basin hydrologically,
26 and provide long term water supplies through 2030:

27 “The SVWP provides for the long-term management and protection of groundwater
28 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

1 surface water supply necessary to attain a hydrologically balanced groundwater basin.
2 AR000489, emphasis added.

3 “The SVWP was designed to provide adequate water supplies to meet current and future
4 water demands. The Salinas Valley Integrated Ground and Surface Water Model
5 (SVIGSM), a planning tool, was used to evaluate hydrologic effects of operations under
6 Alternatives A and B of the SVWP (MCWRA 2002). The analysis relied on assumptions
7 about future population growth and water demands in the Salinas Valley, hydrology
8 (patterns of wet and dry years), and regional economic trends, which were based on
9 historic records and predictive tools used by the Association of Monterey Bay Area
10 governments (AMBAG) and local planning departments. [¶] The SVWP was designed to
11 enhance recharge, provide direct deliveries of surface water, reduce pumping in areas
12 prone to seawater intrusion, and provide for projected agricultural water needs now and
13 through the planning horizon (year 2030).” AR000466.

14 The DEIR claims that “since construction of the SVWP, groundwater levels are rising in some
15 areas of the Salinas Valley, and the basin as a whole appears to be becoming more
16 hydrologically balanced.” AR000491-000492. The DEIR cites graphs showing a declining rate
17 of seawater intrusion through 2009 as evidence of “the ability to reduce seawater intrusion,”
18 even though the SVWP was not completed until 2010. AR000466-000467.

19 The DEIR concludes that project-level impacts to the aquifer are less than significant
20 because of the SVWP and the project’s payment of Zone 2C assessments which fund the SVWP.
21 AR000490; *see* AR000467. The DEIR concludes that cumulative impacts of the project and
22 other foreseeable projects are less than significant for the same reason. AR000491-000492.

23 In claiming that the SVWP will “provide for projected agricultural water needs now and
24 through the planning horizon year (2030),” the DEIR cites the SVWP EIR (“MCWRA 2002”)
25 and explains that it “relied on assumptions about population growth and water demand in Salinas
26 Valley.” AR000466. However, it does not set out those assumptions. Nor does the DEIR
27 provide existing baseline demand for the 180/400-Foot Aquifer or the Basin as a whole; instead
28 it provides only the baseline urban demand that happens to be served by California Water
Service Company. AR000460. Nor does the DEIR identify the level of groundwater pumping
that is sustainable over the long term without adverse effects on the aquifer.

DEIR comments object to reliance on SVWP: In DEIR comments, LandWatch objected
to uncritical reliance on the SVWP and its EIR to conclude that the Basin would be

1 hydrologically balanced and seawater intrusion halted by existing projects. AR003555-3556.
2 LandWatch cited evidence that pumping demand and irrigated acreage had grown since 1995
3 and was projected to continue growing through 2030, contrary to the assumptions in the SVWP
4 EIR. AR003558-003560, 003562-003564. LandWatch requested that the EIR state its own
5 assumptions behind its cumulative water supply analysis, including basin yield, baseline year,
6 baseline water demand, future cumulative demand, and a description and justification of the
7 geographic scope of cumulative analysis. AR003558-3560, 003564-003567. LandWatch also
8 objected that the contention that the SVWP has caused the basin to become “more hydrologically
9 balanced” is not adequately supported by the DEIR in light of evidence that it is too soon to
10 make any such determination. AR003570-003572, *citing* AR008887, 009304.

11 FEIR declines to provide future cumulative demand assumptions or to explain how the
12 SVWP EIR assumptions could be relied upon: In response to LandWatch, the FEIR claims that
13 the “growth projections from AMBAG that were used for the SVWP EIR are conservative,” but
14 it does not provide those assumptions or reconcile them with current assumptions about existing
15 and future cumulative water demand as requested by LandWatch. AR004113. The FEIR reports
16 that the 2005 pumping for the 180/400-Foor Aquifer was 118,373 afy and that 2005 “total
17 pumping from the Basin is 500,000 AFY.” AR004114. Again, the FEIR does not reconcile this
18 baseline pumping statistic with the SVWP EIR as LandWatch asked or provide any explanation
19 how pumping 500,000 afy could be consistent with the SVWP EIR, which projected pumping to
20 decline from 463,000 afy in 1995 to 443,000 afy in 2030. AR025234; *see* AR015612-015616.

21 FEIR argues that project demand is insignificant. Instead of the requested data, the
22 FEIR provides three arguments to justify a finding that project demand is “less than significant.”

- 23 • The demand is “insignificant” in relation to total storage capacity of the basin and
24 “small” in relation to annual subbasin demand. AR004114.
- 25 • The project is “consistent” with the Cal Water UWMP and Cal Water has capacity to
26 provide water. AR004114, 004122.
- 27 • There is a “positive influence” from “the suite of projects implemented to combat
28 seawater intrusion; the Salinas Valley Water Project, CSIP, Lake Nacimiento and Lake
San Antonio.” AR004114

1 The FEIR also reiterates that the project’s impacts are mitigated by impact fees:

2 “Through payment of the Zone 2C fees, the property owner funds its proportionate fair
3 share toward regional improvements to help better manage the basin as a whole. This
4 would be similar to paying toward Regional Development Impact Fees for roadway
5 network improvements mitigating for cumulative traffic impacts.” AR004116; *see*
6 AR004113.

7 After the FEIR, MCWRA staff testifies to the Ferrini Planning Commission that existing
8 projects will not halt seawater intrusion: MCWRA’s Rob Johnson was asked to attend the
9 October 29 Planning Commission hearing to address concerns about the efficacy of the existing
10 “suite of projects” to “balance the basin.” AR004188. Johnson confirmed LandWatch’s
11 objections. Johnson acknowledged that pumping assumed in the SVWP modeling was “much
12 lower than the amount of pumping that’s being reported.” AR005187. Johnson explained that
13 MCWRA has now determined that to stop seawater intrusion, new water management projects
14 would be required that would deliver an additional 58,000-60,000 afy of groundwater recharge.
15 AR005164, 005178-005179, 005183-005184, 005189-005190. While other projects are “on the
16 drawing board,” they are costly and require public approval through a Proposition 218 vote.
17 AR005159, 005164-005165, 005183. None of this information is in the EIR.

18 LandWatch presents additional evidence that existing projects will not halt seawater
19 intrusion: LandWatch objected to the Board of Supervisors that the EIR fails to provide a valid
20 cumulative analysis or respond to LandWatch’s comments challenging its uncritical reliance on
21 the SVWP. AR015606-15618, 20362-20363. As detailed in argument below, LandWatch
22 provided evidence that: 1) pumping and irrigated acreage greatly exceed the levels assumed by
23 the SVWP EIR; 2) MCWRA acknowledges that that additional water supply projects or pumping
24 reductions are required to control seawater intrusion; and 3) these new groundwater projects, if
25 built, would themselves cause significant environmental impacts, which are not disclosed in the
26 EIR. AR015607-015618. LandWatch asked that the County revise and recirculate the analysis
27 of water supply impacts. AR020362, 015617, 015577.
28

1 Despite this new information, the County declined to recirculate the EIR. Its CEQA
2 findings regarding recirculation do not address the water supply analysis. AR000018. Nor do its
3 CEQA findings even mention cumulative water supply impacts. AR000007-000011.

4 **B. The EIR’s analysis of water supply impacts fails to meet CEQA’s informational**
5 **requirements; and this failure was prejudicial.**

6 The EIR fails to meet CEQA’s informational requirements for an adequate cumulative
7 analysis of water supply impacts because it uncritically relies on the 2002 SVWP EIR to
8 conclude that existing groundwater management projects will provide a sufficient water supply
9 without significant impacts. The DEIR’s categorical claim that the SVWP will balance the Basin
10 hydrologically and halt seawater intrusion (e.g., AR000466, 000489) implies that there is no
11 significant cumulative impact. However, the DEIR also claims that the project’s impact on the
12 groundwater basin is mitigated by its payment of the MCWRA Zone 2C assessment for existing
13 groundwater management projects (AR000492, 004113, 004116), implying that there is a
14 significant cumulative impact, but that the project mitigates its contribution. The FEIR also
15 contends that the project demand is “less than significant” because it is relatively small compared
16 to subbasin capacity or annual pumping (AR004114), implying yet another basis to find its
17 contribution less than considerable. Because the EIR is equivocal as to whether) there is no
18 significant cumulative water supply impact or 2) there is a significant cumulative impact, but the
19 project contribution is less than considerable, we address the inadequacy of each of the EIR’s
20 possible conclusions.² See AR015606 (LandWatch objecting to equivocation).

21 Regardless which claim the County now advances, the EIR is fundamentally flawed by
22 its failure to disclose cumulative supply and demand information, to disclose the inefficacy of
23 existing groundwater management projects, and to assess the project’s contribution to cumulative
24 impacts in light of that information.

28 ² The CEQA findings do not address cumulative water supply. See AR000007-000011.

1 **1. CEQA’s requirements for an adequate cumulative analysis of water supply**
2 **impacts.**

3 As *Vineyard* explains, the “ultimate question” is whether an EIR “adequately addresses
4 the reasonably foreseeable *impacts* of supplying water to the project.” *Vineyard, supra*, 40
5 Cal.4th at 434. An EIR must “explain the likely sources of water and analyze their impacts.” *Id.*
6 at 441. Thus, as a threshold matter, “some discussion of total supply and demand is necessary to
7 evaluate the long term cumulative impact of development on water supply” and to determine if
8 there is “an approximate long term sufficiency in water supply.” *Id.* If “despite a full discussion,
9 it is impossible to confidently determine that anticipated future water sources will be available,”
10 an EIR must discuss possible replacement supplies and their impacts. *Id.* at 432.

11 Cumulative impact analysis is a two-step process that requires an agency to make two
12 determinations: (1) whether the impacts of the project in combination with those from other past,
13 present, and future projects are cumulatively significant, and (2) if so, whether the project’s own
14 effect is a considerable contribution. CEQA Guidelines (“Guidelines”), 14 C.C.R. § 15130(a);
15 *see* Kostka and Zischke, *Practice Under the California Environmental Quality Act* (2nd Ed.,
16 2014 Update), § 13.39; Remy, Thomas, et al., *Guide to CEQA* (11th Ed., 2007), pp. 474-475.
17 The CEQA Guidelines require an agency to support both its step one and step two
18 determinations with “facts and analysis.” Guidelines, §15130(a)(2) (step one), (a)(3) (step two).

19 In step one, the agency must determine whether the combined effect of the project and
20 other past, present and/or future projects “when considered together” is significant, because those
21 impacts may be “individually minor but collectively significant.” *Communities for a Better*
22 *Environment v. California Resources Agency* (“*CBE v. CRA*”) (2002) 103 Cal.App.4th 98, 119-
23 120. Thus, step one must consider all sources of “related impacts,” including impacts of past,
24 present, and potential future projects. Guidelines, § 15130(a)(1), (b). The agency must identify
25 cumulative impact sources either by listing the cumulative projects or by providing “a summary
26 of projections contained in an adopted local, regional or statewide plan, or related planning
27 document, that describes or evaluates conditions contributing to the cumulative effect.”
28 Guidelines, § 15130(b)(1)(A), (B). To support a step one conclusion, “some discussion of total

1 supply and demand is necessary to evaluate the ‘long-term cumulative impact of development on
2 water supply.’” *Vineyard, supra*, 40 Cal.4th at 441. Demand data is essential to analysis:

3 “Absent some data indicating the volume of groundwater used by all such projects, it is
4 impossible to evaluate whether the impacts associated with their use of ground water are
5 significant and whether such impacts will be mitigated . . .” *Kings County Farm Bureau
v. City of Hanford (“Kings County”)* (1990) 221 Cal.App.3d 692, 728-729.

6 Part of the cumulative demand is the existing, baseline demand from past and present projects.
7 That baseline information, and the cumulative analysis itself, must be presented in the draft EIR,
8 not later in the EIR process. Guidelines, § 15120(c) (DEIR information requirements); *Save Our
9 Peninsula, supra*, 87 Cal.App.4th at 120-124, 128; *Communities for a Better Environment v. City
10 of Richmond (“CBE v. Richmond”)* (2010) 184 Cal.App.4th 70, 89.

11 In step two, if there is a significant combined effect, the agency must then separately
12 consider whether the project’s contribution to that effect is itself considerable, i.e., “whether ‘any
13 additional amount’ of effect should be considered significant in the context of the existing
14 cumulative effect.” *CBE v. CRA, supra*, 103 Cal.App.4th at 119, emphasis added. An EIR may
15 not conclude a cumulative impact is insignificant merely because the project’s individual
16 contribution to an unacceptable existing condition is, by itself, relatively small. *Los Angeles
17 Unified School Dist. v. City of Los Angeles (“LAUSD”)* (1997) 58 Cal.App.4th 1019, 1025-1026;
18 *CBE v. CRA , supra*, 103 Cal.App.4th at 117-118, 121. Instead, a valid determination whether a
19 project’s contribution to a significant cumulative impact is considerable must reflect the severity
20 of the cumulative problem: “the greater the existing environmental problems are, the lower the
21 threshold should be for treating a project’s contribution to cumulative impacts as significant.”
22 *CBE v. CRA, supra*, 103 Cal.App.4th at 120. If mitigation is required, it may be provided
23 through impact fees; however, “payment of fees must be tied to a functioning mitigation
24 program.” *California Native Plant Society v. County of Eldorado* (2009) 170 Cal.App.4th 1026,
25 1055; Guidelines, § 15130(a)(3).

1 **2. The EIR fails adequately to assess cumulative conditions because it does not**
2 **disclose cumulative demand and supply, which is required information in the first**
3 **step of a cumulative water supply analysis.**

4 The County failed to proceed as required by CEQA because the EIR fails to provide a
5 “discussion of total supply and demand . . . necessary to evaluate the long term cumulative
6 impact of development on water supply.” *Vineyard, supra*, 40 Cal.4th at 441. The omission is
7 prejudicial because (1) it frustrates public participation and informed decision making, and, (2)
8 as discussed in section IB3 below, it precludes an adequate second step in cumulative analysis
9 because the EIR fails to assess the impact in the context of the severity of the cumulative
10 problem.

- 11 a. The EIR fails to provide cumulative supply and demand data for the Basin, the
12 180/400 Foot Aquifer, or Zone 2C.

13 Citing the SVWP EIR, the DEIR asserts categorically that “the SVWP provides the
14 surface water supply necessary to attain a hydrologically balanced groundwater basin in the
15 Salinas Valley,” thus, “stopping seawater intrusion and providing adequate water supplies and
16 flexibility to meet current and future (year 2030) needs.” AR000466; *see also* AR000489,
17 000492. Although the DEIR cites and relies on the SVWP EIR and its “assumptions about
18 future population growth and water demand in the Salinas Valley” for this conclusion
19 (AR000466), it does not report or summarize any of the demand or supply information from that
20 prior EIR. In fact, the DEIR does not disclose total existing or future cumulative demand or
21 supply data for the Salinas Valley Groundwater Basin, the 180/400-Foot Aquifer, or Zone 2C.
22 As comments objected, the DEIR did not even identify the baseline year, much less provide
23 baseline and future demand data. AR003558, 003566.

24 The baseline year was not identified until the FEIR. AR004114. While the FEIR
25 provides current demand for the Basin and the 180-400 Foot Subbasin, it omits future demand
26 for these areas. *Id.* Neither the DEIR nor the FEIR provides the amount of groundwater that can
27 be supplied sustainably, i.e. without significant cumulative impacts like overdraft or seawater
28 intrusion. Neither document compares cumulative demand to that sustainable level of supply or
 to the cumulative demand assumed in the SVWP EIR.

1 Thus, the EIR fails to comply with CEQA’s requirement for a “discussion of the total
2 demand and supply” from which the public could determine whether there would be “an
3 approximate long term sufficiency in water supply.”³ *Vineyard, supra*, 40 Cal.4th at 441. The
4 EIR was required to set forth at least in summary the demand projections upon which it relied
5 because CEQA requires a cumulative analysis to identify the projects that contribute to the
6 cumulative effect, either by list (impractical here) or by providing “a summary of projections
7 contained in an adopted local, regional or statewide plan, or related planning document, that
8 describes or evaluates conditions contributing to the cumulative effect.” Guidelines, §
9 15130(b)(1)(A), (B). Merely referencing the SVWP EIR without providing its summary of
10 projections does not comply with the language of the Guidelines or with case law.

11 In *Vineyard*, as here, the EIR relied on a water supply project (the Water Forum
12 Proposal) and its associated EIR to conclude that the long-term cumulative water supply would
13 be sufficient. *Vineyard, supra*, 40 Cal.4th at 423. The Supreme Court held that the reliance was
14 misplaced for precisely the reasons that the Ferrini EIR’s reliance on the SVWP and its
15 purportedly “conservative” demand assumptions (AR004113) is misplaced: the EIR fails to
16 present data “in a manner calculated to adequately inform the public and decision makers.” *Id.* at
17 442. The agency may not rely on “information that is not actually incorporated or described and
18 referenced in the FEIR,” because that is a failure to “proceed in the manner provided in CEQA.”
19 *Id.* If an EIR’s analysis depends on demand and supply data in referenced documents, the EIR
20 must present that information clearly, explain any differences among the figures, and “provide an
21 analytically complete and coherent explanation” of the relation of the referenced documents to
22 the EIR. *Id.* at 439-443. The Ferrini EIR is inadequate because it failed to do so.⁴

23
24
25 ³ Indeed, the tardy provision of even partial demand information violated CEQA because
26 baseline information and a valid cumulative analysis must be presented in the draft EIR.
27 Guidelines, § 15120(c) (draft EIR must contain information required by Guidelines, §§ 15125,
15130); *Save Our Peninsula, supra*, 87 Cal.App.4th at 120-124, 128; *CBE v. Richmond, supra*,
184 Cal.App.4th at 89.

28 ⁴ The *Vineyard* EIR actually presented supply and demand data, albeit without clarity and
without explaining inconsistencies. *Vineyard, supra*, 40 Cal.4th at 438-443. The Ferrini EIR

1 b. Disclosure of a portion of the demand from parts of the relevant aquifers is not
2 adequate disclosure because there is no justification for limiting the geographic
3 scope of cumulative analysis to the Cal Water service area or to urban uses.

4 An agency must “define the geographic scope of the area affected by the cumulative
5 effect and provide a reasonable explanation for the geographic limitation used.” Guidelines, §
6 15130(b)(3); *Citizens to Preserve the Ojai v. County of Ventura* (1985) 126 Cal.App.3d 421,
7 430; *Bakersfield Citizens supra*, 124 Cal.App.4th at 1216. An agency may not arbitrarily limit
8 the geographic scope of cumulative analysis or omit relevant projects. *Kings County, supra*, 221
9 Cal.App.3d at 721-724; *Bakersfield Citizens, supra*, 124 Cal.App.4th at 1213-1214. The DEIR
10 identifies the geographic scope of its cumulative water supply analysis as the Salinas Valley
11 Groundwater Basin, the 180/400-Foot Aquifer, and the Zone 2C assessment district for the
12 Salinas Valley Water Project. AR000492; *see also* AR000451-000460 (hydrological setting).
13 However, neither the DEIR nor the FEIR provide any estimate of total future cumulative demand
14 for these relevant geographic areas – either the Basin as a whole, the 180/400-Foot Aquifer, or
15 Zone 2C.

16 Although the EIR provides some demand data from the Cal Water UWMP, this data does
17 not supply the required disclosure of total cumulative demand because the geographic scope of
18 that data does not include the entirety of Salinas Valley Groundwater Basin, the 180/400-Foot
19 Aquifer, or Zone 2C; and, critically, the data omit the dominant demand source, agriculture,
20 which is 90% of demand (AR015235-015236). In particular, the DEIR reports the existing
21 demand for urban uses from a portion of the 180/400-Foot Aquifer, i.e., the current pumping
22 from two Cal Water wells that will supply the project. AR000460. The FEIR repeats this datum
23 and also reports the projected 2040 demand from the Cal Water UWMP. A R004122. However,
24 the UWMP demand projections include essentially no agricultural water use because Cal Water
25 does not happen to serve such users.⁵ SAR029304-029306. Furthermore, the UWMP urban

26 fails even to present the long-term cumulative supply and demand assumptions from the SVWP
27 EIR, much less reconcile it to current assumptions.

28 ⁵ The FEIR states that Cal Water serves a total of three non-residential customers,
 including one agricultural customer. AR004122.

1 demand projections are for non-contiguous service locations for those urban users who happen to
2 be served by Cal Water wells in “small isolated systems” throughout the Basin; and it includes
3 pumping in both the 180/400-Foot Aquifer and the Eastside Subbasin. SAR029289; *see*
4 SAR029316-029319. Notably, the DEIR did not cite or use this partial demand data from Cal
5 Water as the basis of its conclusion that the Basin will be hydrologically balanced; instead, it
6 cited the SVWP EIR, which evaluates the entire Basin and its subbasins, not just the
7 checkerboard of urban uses served by Cal Water. AR000466.

8 Thus, the UWMP projections do not include all future cumulative pumping in either the
9 180/400-Foot Aquifer or the Basin as a whole. SAR029289, 029315-029319. Failure to provide
10 cumulative projections for the relevant geographic scope of analysis and failure to justify the
11 limited scope of the data provided violates CEQA.

12 Finally, the UWMP directly contradicts the EIR. The EIR claims that the SVWP
13 “provides the surface water supply necessary to attain a hydrologically balanced groundwater
14 basin,” thereby “stopping seawater intrusion and providing adequate water supplies and
15 flexibility to meet the current and future water demand.” AR000489; *see also* AR000466. But
16 the UWMP concludes that “groundwater production in the north valley continues to add to the
17 overdraft of the Pressure and Eastside aquifers, which permits the seawater intrusion to
18 continue.” SAR029332. And, noting that no follow-on project to the SVWP has been approved,
19 scheduled, or funded, the UWMP concludes that Cal Water “cannot count on the SVWP to
20 provide future demand in the Salinas District.” SAR029333, *emphasis added*. While *Vineyard*
21 permits a project-level EIR to “incorporate information and analysis” from a UWMP (*Vineyard*,
22 *supra*, 40 Cal.4th at 434), it does not condone citation of partial demand data and omission of
23 critical conclusions. In light of the Cal Water UWMP’s conclusion that existing water projects
24 are insufficient, it is cynical for the FEIR to cite “consistency with the Urban Water Management
25 Plan” as evidence that impacts are less than significant. AR004114.
26
27
28

- 1 c. The EIR's failure to disclose supply and demand information was prejudicial
2 because without it the EIR fails to disclose cumulative overdraft and seawater
3 intrusion and the need for additional groundwater management projects.

4 Non-compliance with CEQA's informational mandates is presumptively prejudicial if it
5 frustrates the purpose of public comments or precludes meaningful assessment of potentially
6 significant impacts. *Sierra Club v. State Board of Forestry, supra*, 7 Cal.4th at 1236-1237; *see*
7 *also AIR, supra*, 107 Cal.App.4th at 1391-1392. Critically, prejudice does not require a showing
8 that the agency decision would have differed had it complied with CEQA's informational
9 requirements. P.R.C., § 21005; *Bakersfield Citizens, supra*, 124 Cal.App.4th at 1198.

10 Regardless of the decision, CEQA requires adequate disclosure to ensure accountable decision-
11 making. *Laurel Heights I, supra*, 47 Cal.3d at 392 (EIR is a "document of accountability").

12 Non-disclosure of water supply and long-term cumulative demand frustrated public
13 participation and informed decision-making for four reasons. First, the non-disclosure was
14 prejudicial because a current projection of cumulative demand and available supply was critical
15 in view of the EIR's reliance on the purportedly "conservative" demand assumptions from the
16 dated 2002 SVWP EIR. AR004113 (FEIR); *see* 000466 (DEIR). The SVWP EIR's conclusions
17 were based on its assumption that future cumulative demand would be less than the level that can
18 be met without overdraft and seawater intrusion. AR015612-015616, *citing* AR025234, 025717,
19 025722, 025281, 025719. In particular, the SVWP EIR assumed that total pumping would
20 decline from 1995 to 2030, from 463,000 afy to 443,000 afy (AR014612-015613, *citing*
21 AR025234); and it cautioned that pumping in excess of these levels would exacerbate existing
22 overdraft and seawater intrusion (AR015611, *citing* AR025719). At most, the SVWP EIR only
23 claimed the SVWP would "halt seawater intrusion based on 1995 land use." AR005188; *see*
24 AR016611-015612, *citing* AR026101, 026110, 025281. Thus, the Ferrini EIR's reliance on the
25 SVWP EIR was reasonable only if the SVWP EIR's projection of declining post-1995 demand
26 remained accurate.

27 However, all of the evidence in the record shows that demand and irrigated acreage have
28 exceeded, and are projected to continue to exceed, the levels projected by the SVWP EIR:

- 1 • Groundwater pumping data from 1995 to 2013 show average annual pumping to be at
2 least 500,986 afy, well in excess of the 1995 peak pumping of 463,000 afy assumed by
3 the SVWP EIR. AR015612-015615, *citing* AR025234, 016063-016334.
- 4 • MCWRA acknowledges that the SVWP EIR understated future pumping. AR005187.
- 5 • The 2010 General Plan EIR demonstrated net growth in irrigated farmland of 5,372 acres
6 from 1995 to 2006, whereas the SVWP EIR projected that irrigated acreage would
7 decline by 1,849 acres from 1995 to 2030. AR15615, *citing* 2007 Monterey County
8 General Plan Draft EIR, pp. 4.9-46 and 4.2-7.⁶
- 9 • The SVWP Engineers Report shows 212,003 irrigated acres in Zone 2C as of 2003,
10 whereas the SVWP EIR assumed a maximum of 196,357 acres of irrigated land in 1995,
11 declining through 2030. AR015615, *citing* AR016374, 016379, 025722.
- 12 • The FEIR admits that 2005 Basin pumping was 500,000 afy (AR004114), and it fails to
13 reconcile this datum with the fact that the SVWP EIR projected that pumping would peak
14 at 463,000 afy in 1995 and decline thereafter.

15 Contrary to the FEIR, the SVWP EIR assumptions have not proved “conservative.” AR004113.

16 Second, the non-disclosure of cumulative demand was prejudicial because the EIR fails
17 to acknowledge that the unanticipated demand will cause significant impacts, either continuing
18 seawater intrusion or impacts from new infrastructure projects. Had the September 2014 FEIR
19 taken LandWatch’s comments seriously, it would have disclosed that the MCWRA had already
20 determined that the SVWP was not sufficient to balance the Basin or to halt seawater intrusion
21 and that the County must either accept continued seawater intrusion or construct new water
22 supply projects. AR016399-016400, 016406. Only after the EIR was completed did the Ferrini
23 Planning Commission hear from MCWRA that additional projects are needed. AR005164,
24 005178-005179, 005183-005190; *see also* SAR029425-029426. This information was not in the
25 EIR. Ironically, the County’s General Plan consistency findings (but not its CEQA findings)
26 admit that “additional projects” are required to combat seawater intrusion, including streambed
27 maintenance, Arrundo removal, an interlake tunnel, and a second phase of the SVWP.

28 ⁶ *See* Request for Judicial Notice by Petitioner LandWatch Monterey County (“LW RJN”) filed concurrently herewith, Exh. 1, pp. 4.9-46 and 4.2-7.

1 AR000037. But the need for these projects is not disclosed in the Ferrini EIR. These projects
2 will cause environmental impacts, which were also not disclosed or discussed in the Ferrini EIR.
3 AR15616, *citing* AR016427, 016428-016446, 026111, 026262; LW RJN, Exh. 1, p. 4.3-146.
4 Where there is uncertainty as to the sufficiency of existing supplies, an EIR must include a
5 discussion of “possible replacement sources or alternatives to use of the anticipated water, and of
6 the environmental consequences of those contingencies.” *Vineyard, supra*, 40 Cal.4th at 432,
7 emphasis added; *see Santiago County Water District v. County of Orange* (2013) 118
8 Cal.App.3d 818, 831 (EIR must assess effect of using pumping capacity). Thus, the failure to
9 disclose cumulative demand was prejudicial because it short-circuited necessary discussion of
10 impacts, either from continued overdrafting or from additional groundwater projects.

11 Third, the failure to disclose that additional groundwater projects are needed vitiates the
12 EIR’s claim that the project’s payment of Zone 2C assessments adequately mitigates its impacts
13 to the Basin. DEIR 3.6-42, FEIR 4.0-7, 4.0-10. Payment of impact fees can only be considered
14 adequate mitigation under CEQA if the project is approved, funded, and environmentally
15 revised, because “payment of fees must be tied to a functioning mitigation program.” *California*
16 *Native Plant Society, supra*, 170 Cal.App.4th at 1055. Where an EIR concludes that there is no
17 significant impact based on the expectation of future groundwater mitigation projects, it must
18 discuss the projects and show them to be feasible. *Kings County, supra*, 221 Cal.App.3d at 728
19 (“To the extent the GWF-KCWD agreement was an independent basis for finding no significant
20 impact, the failure to evaluate whether the agreement was feasible and to what extent water
21 would be available for purchase was fatal to a meaningful evaluation by the city council and the
22 public.”) Mitigation fees paid must actually constitute a fair share of all needed projects; if the
23 impact fee program does not actually include a fair share of all of the necessary facilities to
24 mitigate cumulative impacts, even the fact that the agency may plan to increase the impact fee to
25 cover them is not sufficient. *Anderson First Coalition v. City of Anderson* (2005) 130
26 Cal.App.4th 1173, 1188. The Zone 2C assessments approved under Proposition 218 fund only
27 existing projects, not future projects. AR016341-016343, 016352, 016365. MCWRA
28 acknowledges the public has not yet agreed to pay for the new projects. SAR029426 (projects

1 will be implemented “if accepted by the public”). In sum, the EIR’s failure to disclose the need
2 for additional water projects was prejudicial because it obscured the fact that the payment of
3 Zone 2C assessments is not adequate mitigation.

4 Fourth, the EIR’s non-disclosure of cumulative demand and supply data and its effect on
5 seawater intrusion was prejudicial because, without it, the EIR lacks the required context to
6 determine whether the project’s incremental demand constitutes a considerable contribution to
7 cumulatively significant overdraft and seawater intrusion. This second step of the cumulative
8 impact assessment must be made with reference to the specific magnitude of the cumulative
9 impact because “the greater the existing environmental problems are, the lower the threshold
10 should be for treating a project’s contribution to cumulative impacts as significant.” *CBE v.*
11 *CRA, supra*, 103 Cal.App.4th at 120. As discussed in section IB3 immediately below, because
12 the EIR fails to identify the extent of existing and projected overdraft that causes seawater
13 intrusion, there could be no adequate second step to the cumulative analysis.

14 **3. The EIR fails to provide a legally adequate assessment of whether the project**
15 **makes a considerable contribution to a significant cumulative impact because it**
16 **fails to evaluate the project in light of the severity of the cumulative problem,**
which is required in the second step of a cumulative analysis.

17 The FEIR argues that the project’s 95 afy demand is less than significant because of the
18 “the insignificant demand (95 acre feet per year) versus the total storage capacity of the
19 subbasin” and the “small demand . . . in relation to the overall annual demand for the subbasin in
20 2005 of 118,372 AFY.” AR004114. The argument is based on (1) a legally inadequate
21 conception of CEQA’s requirements for cumulative analysis, and (2) the failure to disclose the
22 severity of the overdraft condition that drives seawater intrusion.

23 a. The EIR erred legally by using the “ratio” theory to trivialize the project impact.

24 An EIR may not conclude a cumulative impact is insignificant merely because the
25 project’s individual contribution to an unacceptable existing condition is, by itself, relatively
26 small. *LAUSD, supra*, 58 Cal.App.4th at 1025-1026; *CBE v. CRA, supra*, 103 Cal.App.4th at
27 117-118, 121. In *Kings County, supra*, 221 Cal.App.3d at 718, the court specifically rejected the
28 agency’s “ratio” theory, under which the agency held impacts not to be a considerable

1 contribution merely because they were a relatively small percent of the total impact. *Id.* at 720.
2 The Court held that the agency’s focus on “the ratio between the project’s impacts and the overall
3 problem” in determining significance was improper. *Id.* at 720. Instead, the relevant question
4 was “whether any additional amount” of incremental impact “should be considered significant in
5 light of the serious nature” of the problem. *Id.* at 718. Thus, a valid determination whether a
6 project’s contribution to an existing significant impact is considerable must reflect and
7 incorporate the severity of the cumulative problem: “the greater the existing environmental
8 problems are, the lower the threshold should be for treating a project’s contribution to
9 cumulative impacts as significant.” *CBE v. CRA, supra*, 103 Cal.App.4th at 120. Even if a given
10 project has only an “individually minor” impact, its contribution to an existing environmental
11 problem may nevertheless be “cumulatively considerable,” hence significant, and hence
12 requiring mitigation measures under CEQA. *CBE v. CRA, supra*, 103 Cal.App.4th at 120; *see*
13 *also* Guidelines, §§ 15355(b), 15065(a)(3); *LAUSD, supra*, 58 Cal.App.4th at 1024-25.

14 The Ferrini EIR makes precisely the same error as made in *Kings County* by focusing on
15 the ratio of the project’s pumping to the overall aquifer pumping or capacity, using these
16 comparisons to “trivialize the project’s impact” without putting project demand in the context of
17 the serious nature of the cumulative problem. *Kings County, supra*, 221 Cal.App.3d at 718. An
18 EIR is legally inadequate if it is “focused upon the individual project’s relative effects and
19 omit[s] facts relevant to an analysis of the collective effect.” *Id.* at 721. The proper question in
20 the second step of cumulative analysis is whether any additional pumping should be deemed a
21 considerable contribution in the specific context. *Kings County, supra*, 221 Cal.App.3d at 718;
22 *see* AR015618. Furthermore, the EIR does not even focus on the relevant metric. Seawater
23 intrusion is not determined by aquifer capacity or even determined directly by annual pumping.
24 It is determined by overdraft – the excess of pumping over recharge. Thus the EIR’s report of
25 project demand as a percent of aquifer capacity or annual pumping is fundamentally irrelevant.
26 The correct question is whether the project’s marginal impact of 95 afy of additional pumping is
27 a considerable contribution in the specific context of cumulative overdraft causing seawater
28

1 intrusion in the 180/400-Foot Aquifer.⁷ However, the EIR fails to disclose this cumulative
2 overdraft because it does not disclose cumulative demand or supply. Thus, even if the County
3 had wanted to ask the correct question in step two of the cumulative analysis, it had not
4 developed essential information about the cumulative context in a legally adequate step one.

- 5 b. The error was prejudicial because the project pumping may be a considerable
6 contribution to overdraft and seawater intrusion even if it is not a large share of
7 basin capacity or annual pumping.

8 Asking the wrong question premised on a legally incorrect understanding of CEQA was
9 prejudicial because it precluded the potential identification of a considerable contribution to a
10 significant cumulative impact. For example, the 2014 State of the Salinas River Basin report
11 concludes that the 180/400-Foot Aquifer is suffering continued seawater intrusion due to a
12 continuing annual overdraft of just 2,000 afy (AR020371), and it concludes that pumping should
13 be decreased in the 180/400-Foot Aquifer to address this (AR020374). *See also* AR016396
14 (identifying reduction of pumping in the Pressure Area, aka the 180/400-Foot Aquifer, as a
15 method to control seawater intrusion). The SVWP EIR concludes that, even if total water use
16 declines through 2030, seawater intrusion will not be halted if urban demand in the northern end
17 of the Basin increases. AR026110, 025281. Project demand of 95 afy was much more likely to
18 have been found to be a considerable contribution when identified as 5% of the cumulative 2,000
19 afy overdraft condition in the northern end of the Basin, than when irrelevantly identified as a
20 tiny percent of the 7.24 million af overall Basin storage capacity.

21 Under the specific circumstances of a 2,000 afy overdraft that causes seawater intrusion,
22 increasing pumping by 95 afy in the northern end of the Basin to provide water to the project,
23 even though the most recent technical reports recommend decreasing pumping in the area,
24 should have been deemed a considerable contribution. *See* AR20373-20374. Even if the
25 County might have concluded otherwise, reliance on the legally incorrect ratio theory was
26 prejudicial: *Vineyard* holds that prejudice may be found when error or omission fails to disclose
27 a potentially significant impact. *Vineyard, supra*, 40 Cal.4th at 448. A prejudicial abuse of

28 ⁷ In fact, the EIR denies that there is a cumulative problem because it uncritically assumes
that existing groundwater management projects are sufficient to avoid it. AR000466.

1 discretion may be found regardless whether a different outcome would have resulted had the
2 agency complied with CEQA's mandates. P.R.C., § 21005(a); *Bakersfield Citizens, supra*, 124
3 Cal.App.4th at 1198. Asking the wrong question was prejudicial.

4 **4. The FEIR failed to respond adequately to comments seeking cumulative demand**
5 **and supply information.**

6 Responses in a final EIR to substantive comments on a DEIR must contain fact-based
7 analysis. *People v. County of Kern* (1974) 39 Cal.App.3d 830, 841-842 (duty to provide "good
8 faith, reasoned analysis in response"); Guidelines, § 15088(c) ("Conclusory statements
9 unsupported by factual information will not suffice"). For example, in *Cleary v. County of*
10 *Stanislaus* (1981) 118 Cal.App.3d 348, an agency violated CEQA by providing only conclusory
11 responses to comments. The court held the agency had a duty to address comments "in detail,"
12 providing "specific factual information" as had been requested by the commenter. *Id.* at 359.
13 Where comments seek omitted facts or analysis essential to a draft EIR's conclusions, the failure
14 to correct those omissions "renders the EIR defective as an informational document." *California*
15 *Oak Foundation v. City of Santa Clarita* (2005) 133 Cal.App.4th 1219, 1244 (failure to provide
16 reasoned analysis in response to comments pointing out uncertainty of water supply).

17 An agency must provide specific information to support its conclusions as to the
18 adequacy of water supplies. *People v. County of Kern* (1976) 62 Cal.App.3d 761, 772
19 (insufficient to claim that "all available data" showed there was sufficient water supply without
20 providing the data). In *Santa Clarita Organization for Planning the Environment v. County of*
21 *Los Angeles* ("SCOPE") (2003) 106 Cal.App.4th 715, 722, responses to comments questioning a
22 water supply analysis were inadequate because they failed to provide any facts, data, or estimates
23 from the Department of Water Resources, the agency that would supply the water. Citing
24 *Cleary, supra*, 118 Cal.App.3d at 357, the court explained:

25 "Problems raised by the public and responsible experts require a good faith reasoned
26 analysis in response. [Citation.] The requirement of a detailed analysis in response
27 ensures that stubborn problems or serious criticism are not 'swept under the rug.'" *Id.* at
28 723.

LandWatch's comments objected that the SVWP EIR cumulative demand assumptions
are no longer accurate and requested a clear statement of 1) total supply that can be provided

1 without overdraft or seawater intrusion and 2) the Ferrini EIR’s baseline and future demand
2 projections for the Basin, and 3) whether these data are consistent with the SVWP EIR
3 assumptions cited by the EIR. AR003555-003556, 003558-003560, 003562-003564, 003566-
4 003567. The FEIR sweeps the issue under the rug through its conclusory response that the
5 SVWP EIR assumptions are “conservative” (AR004113) without providing these assumptions or
6 comparing them to current assumptions as requested. The FEIR does not identify the level of
7 supply that can be maintained without significant impacts, instead disclosing only that Cal Water
8 has pumping capacity. AR004122. The FEIR does not provide the requested cumulative
9 demand, instead providing only baseline pumping information for a single year (AR004114) and
10 partial future demand for urban users for parts of the relevant aquifers (AR004122).⁸ As in
11 *California Oak Foundation*, the County’s response was “completely devoid of any direct
12 discussion” of the issue raised by LandWatch, i.e., whether new demand information precludes
13 reliance on the SVWP EIR to conclude that the Basin will be in hydrological balance and
14 seawater intrusion halted. *California Oak Foundation, supra*, 133 Cal.App.4th at 1237.

15 **5. The Court should review the deficiencies in the water supply analysis without**
16 **deference because the County failed to proceed as required by law in making**
17 **required disclosures and conducting adequate cumulative analysis.**

18 Review of LandWatch’s claims regarding the sufficiency of the EIR’s informational
19 disclosures with respect to water supply is non-deferential because it presents questions of law as
20 to whether the County proceeded as required by CEQA by disclosing required information and
21 conducting a legally adequate cumulative analysis. *Madera Oversight Coalition* holds that

22
23 ⁸ The FEIR purports to incorporate the 2010 General Plan EIR discussion of water supply
24 by reference but without any discussion or summary of the incorporated material. AR004112.
25 Incorporation by reference without an adequate “road map” or summary of incorporated
26 materials violates CEQA. *Vineyard* at 442-443 (EIR must present data to inform public;
27 information scattered in appendices is insufficient; a brief summary and description of the
28 relationship of the incorporated material is required); *see also SCOPE, supra*, 106 Cal.App.4th at
722-723 (insufficient that responsive information may be contained in referenced documents or
appendices); *Emmington v. Solano County Redevelopment Agency* (1987) 195 Cal.App.3d 491,
502 (agency must summarize or compile referenced prior EIRs). Furthermore, the FEIR states
that “the Ferrini Ranch EIR does not rely on the [2010] General Plan EIR.” AR004112.

1 determining “whether the EIR's disclosures regarding the project's water supply complies with
2 CEQA is a question of law.” *Madera Oversight Coalition, supra*, 199 Cal.App.4th at 101-102,
3 overruled on other grounds in *Neighbors for Smart Rail, supra*, 57 Cal.4th 439. The *Madera*
4 court held that *Vineyard* requires “reasoned analysis,” “full discussion,” and an “analytically
5 complete and coherent explanation” of the factors affecting the reliability and availability of a
6 water supply. *Id.* at 103, *citing Vineyard, supra*, 40 Cal.4th at 432, 440-441. In *Madera*, as here,
7 the EIR failed to disclose information that calls into question the conclusion that there would be
8 no significant cumulative water supply impacts. In *Save Our Peninsula*, as here, the County
9 failed to proceed as required by CEQA because it failed to set out water supply baseline
10 information early in the EIR process, failed to investigate and document baseline conditions, and
11 failed to provide meaningful analysis of baseline conditions. *Save Our Peninsula, supra*, 87
12 Cal.App.4th at 120, 122,124. *Save Our Peninsula* holds that “[w]hen the informational
13 requirements of CEQA are not complied with, an agency has failed to proceed in ‘a manner
14 required by law.’” *Id.* at 117-118; *see also County of Amador v. El Dorado County Water*
15 *Agency* (1999) 76 Cal.App.4th 931, 954 (where baseline water information is not provided so as
16 to “make further analysis possible,” the issue is “the adequacy of the information contained in
17 the EIR,” not a factual dispute); *Stanislaus Natural Heritage Project v. County of Stanislaus*
18 (1996) 48 Cal.App.4th 182, 195-196 (failure to identify water source and impacts of supply
19 defeats CEQA’s informational purposes).

20 In *Vineyard*, the Supreme Court made clear that non-disclosure of required information is
21 a failure to proceed as required by CEQA. The Court set aside an EIR because it relied on
22 another EIR without making a clear and adequate disclosure of long-term demand and supply,
23 holding that “CEQA’s informational purposes are not satisfied by an EIR that simply ignores or
24 assumes a solution to the problem of supplying water to a proposed land use project.” *Vineyard*,
25 *supra*, 40 Cal.4th at 430-431. The Court held that data must be “presented in a manner
26 calculated to adequately inform the public and decision makers” and the agency may not rely on
27 “information that is not actually incorporated or described and referenced in the FEIR,” because
28 that is a failure to “proceed in the manner provided in CEQA.” *Id.* at 442. If an EIR’s analysis

1 relies on water demand and supply data in referenced documents, as here (AR000466, 004113),
2 the EIR must present that information clearly, explain any differences among the figures, and
3 “provide an analytically complete and coherent explanation” of the relation of the referenced
4 documents to the EIR. *Vineyard, supra*, 40 Cal.4th at 439-443. When an agency fails to include
5 information in an EIR that is mandated by CEQA, it has “failed to proceed in the manner
6 required by CEQA.” *Id.* at 435.

7 Furthermore, when an agency misinterprets CEQA’s requirements for cumulative
8 analysis, it is legal error. *LAUSD, supra*, 58 Cal.App.4th at 1025-1026 held that “the
9 information and analysis in the EIR . . . is inadequate” because, as here, the agency failed to ask
10 “whether any additional amount” should be considered significant “in light of the serious nature”
11 of the cumulative problem. *Kings County* holds that the “ratio” approach to cumulative analysis
12 – the approach used here – is legally erroneous. *Kings County, supra*, 221 Cal.App.3d at 721.
13 The Ferrini EIR’s failure to identify and consider all relevant cumulative projects is an
14 “overarching legal flaw.” *Bakersfield Citizens, supra*, 124 Cal.App.4th at 1212-1214. Provision
15 of cumulative demand for a limited geographic scope (just urban demand, just from the Cal
16 Water service area) without justification is a failure to comply with CEQA’s informational
17 mandates. *Citizens to Preserve the Ojai, supra*, 126 Cal.App.3d at 430-432.

18 **C. The County’s failure to make required disclosures and to conduct an adequate**
19 **cumulative analysis precludes substantial evidence with respect to cumulative**
20 **water supply impacts.**

21 Because the County prejudicially failed to proceed as required by CEQA in evaluating
22 cumulative water supply impacts, this Court need not consider whether there was substantial
23 evidence to support a conclusion that there is no significant cumulative impact or that the project
24 will not make a considerable contribution to such an impact. However, it is clear that neither the
25 EIR nor the rest of the record do provide that substantial evidence.

26 An EIR must provide “facts and analysis” to support its conclusions and to inform the
27 public. *Laurel Heights I, supra*, 47 Cal.3d at 404; Guidelines, §15130(a)(2); *Vineyard, supra*, 40
28 Cal.4th at 442 (EIR must actually present data to public). Failure to comply with CEQA’s
informational mandates precludes substantial evidence. *California Oak Foundation* held that

1 there was no substantial evidence of sufficient water supply because the EIR did not adequately
2 inform public about its uncertainty and did not respond adequately to comments, undermining
3 the informational function of the EIR. *California Oak Foundation*, *supra*, 133 Cal.App.4th at
4 1226-1227, 1235-1242. *SCOPE* held that the EIR’s failure to provide adequate analysis or
5 respond to comments concerning reliability of water entitlements was a failure to provide
6 “sufficient detail” and therefore the project approval was “not supported by substantial
7 evidence.” *SCOPE*, *supra*, 106 Cal.App.4th at 720-724. Critically, “factual inconsistencies and
8 lack of clarity” also preclude substantial evidence. *Vineyard*, *supra*, 40 Cal.4th at 439.

9 **1. The EIR fails to present facts and analysis to support the claim that the**
10 **SVWP or other existing groundwater management efforts are sufficient to**
11 **balance the basin or halt seawater intrusion.**

12 The DEIR states categorically that the SVWP will halt seawater intrusion and will
13 balance the Basin. AR000466, 000489. But the EIR fails to provide substantial evidence to
14 support this claim. The DEIR cites a one-year improvement in the groundwater level in the
15 2009-2010 water year, and a slowing in the rate of seawater intrusion through 2009, but those
16 effects are prior to the SVWP becoming operational in 2010. AR000460, 000466-000471. The
17 FEIR states that “[t]he most recent WRA groundwater data (2013) demonstrates near-term
18 benefits of these management efforts. “ AR004114. However, these data are not in the EIR and
19 mapping of the seawater intrusion front shows that intrusion continues to advance. AR004117-
20 004118. Regardless, two years of data cannot constitute substantial evidence in light of
21 MCWRA’s acknowledgement that at least ten years of data are required to determine the effect
22 of the SVWP. AR003570-3572, *citing* AR008887, 009304, 009338; *see* AR005164, 005189 .
23 And increases in the rate of seawater intrusion historically follow on drought periods after a lag
24 of several years. AR020373. The EIR’s promise of “ongoing” monitoring (AR004114) is
25 irrelevant: “CEQA’s informational purpose ‘is not satisfied by simply stating that information
26 will be provided in the future.’” *Vineyard*, *supra*, 40 Cal.4th at 441.

27 The FEIR claims that its conclusion that water supply impacts are less than significant
28 also relies on the Cal Water UWMP, because it identifies “more than sufficient water supply
capacity to serve the proposed project.” AR004113, *emphasis added*; *see also* AR004114. The

1 UWMP does establish pumping capacity to mine the aquifer, but it does not claim that this is
2 without impact. *See* AR015608-015611, AR005445. The “ultimate question” is not pumping
3 capacity but the impact from using that capacity. *Vineyard, supra*, 40 Cal.4th at 434, 441;
4 *Santiago County Water District, supra*, 118 Cal.App.3d at 831. In fact, the UWMP admits that
5 because overdraft and seawater intrusion continue without a complete solution, Cal Water
6 “cannot count on the SVWP to provide future demand in the Salinas District.” SAR029333.
7 Thus, the UWMP undermines the claim that cumulative impacts are less than significant. Such
8 a factual inconsistency precludes substantial evidence. *Vineyard, supra*, 40 Cal.4th at 439.

9 **2. The evidence, and the County’s own admissions, show that existing groundwater**
10 **management projects are *not* sufficient to halt seawater intrusion.**

11 Evidence in the record that is not included in or referenced by the EIR demonstrates that
12 the existing groundwater management projects are not sufficient and are not expected by the
13 County to halt seawater intrusion or hydrologically balance the Basin. As set out above:

- 14 • MCWRA acknowledges that the SVWP was not intended to be final water
15 management project in the Basin. AR005187-005188.
- 16 • The SVWP EIR states that its modeling showed only that seawater intrusion would be
17 halted based on 1995 demand. AR026110, 025281, 015611-015612; AR005188.
18 However, pumping has substantially exceeded the 1995 level assumed by the SVWP
19 EIR. AR005187; AR015612-015615, compiling AR016063-016334.
- 20 • MCWRA acknowledges that additional projects are needed to supply another 58,000
21 afy to control seawater intrusion. AR005164- 005165, 005178-005179, 005183-
22 005190, 016406; *see* AR015616-015617.
- 23 • A report to the Supervisors the day they approved Ferrini states that the Basin is out of
24 balance by 17,000 to 24,000 afy, that the 180/400-Foot Aquifer is overdrafted by
25 2,000 afy, and that current groundwater extractions are “not sustainable.” AR020371-
26 020372, 020374.
- 27 • The Ferrini findings acknowledge that additional groundwater management projects
28 are required to halt seawater intrusion and balance the basin. AR000037.

1 This information contradicts the EIR and there can be no substantial evidence of a long term
2 water supply without significant cumulative impacts given such “factual inconsistencies and lack
3 of clarity.” *Vineyard, supra*, 40 Cal.4th at 439.

4
5 **D. The County failed to proceed as required by CEQA because it did not**
6 **recirculate the EIR in light of significant new water supply information.**

7 An agency must recirculate an EIR when new information shows a new or more severe
8 significant impact resulting from the project. Guidelines, § 15088.5(a)(1), (2); *Laurel Heights*
9 *Improvement Ass’n v. Regents of the Univ. of Cal.* (“*Laurel Heights II*”)(1993) 6 Cal.4th 1112,
10 1130. An agency must also recirculate an EIR if new information shows that the draft EIR was
11 so fundamentally and basically inadequate and conclusory in nature that meaningful public
12 review and comment were precluded. Guidelines, § 15088.5(a)(4); *Mountain Lion Coalition v.*
13 *Fish & Game Com.* (1989) 214 Cal.App.3d 1043, 1052. The purpose of recirculation is to
14 provide the public the same opportunity to evaluate the new information and the validity of the
15 EIR’s conclusions as it had for information in the draft EIR. *Save Our Peninsula, supra*, 87
16 Cal.App.4th at 131; *Sutter Sensible Planning v. Board of Supervisors* (1981) 122 Cal.App.3d
17 813, 822; *Laurel Heights II, supra*, 6 Cal.4th at 1132. Recirculation is required where the record
18 shows that a potentially significant impact or the efficacy of mitigation was not evaluated in the
19 EIR. *Vineyard, supra*, 40 Cal.4th at 447-448 (potential impact to salmon); *Gray v. County of*
20 *Madera* (2008) 167 Cal.App.4th 1099, 1120 (water supply mitigation). The new information
21 triggering recirculation may appear in post-FEIR material. *Cadiz Land Co. v. Rail Cycle* (2000)
22 83 Cal.App.4th 74, 95; *Save Our Peninsula, supra*, 87 Cal.App.4th at 131.

23 Review of a failure to recirculate based on a claim that new information shows a new or
24 more severe impact is on a substantial evidence standard. *Laurel Heights II, supra*, 6 Cal.4th at
25 1130. However, review of a failure to recirculate based on a claim that the draft EIR was
26 fundamentally inadequate as an informational document should be non-deferential because the
27
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1 allegation is that the agency failed to proceed as required by CEQA.⁹ *Bakersfield Citizens,*
2 *supra*, 124 Cal.App.4th at 1207-1208.

3 LandWatch requested recirculation in light of evidence that the DEIR's reliance on the
4 efficacy of the SVWP to mitigate cumulative impacts was misplaced. AR015576-15577, 15617,
5 20362. The new information shows that (1) the SVWP will not halt seawater intrusion if
6 demand exceeds 1995 levels; (2) demand does exceed 1995 levels; (3) post-DEIR studies show
7 that the basin is out of balance, pumping is not sustainable, and additional projects are required.

8 This evidence constitutes significant new information for two reasons. First, the evidence
9 shows there may be potential significant impacts caused by the need to meet cumulative water
10 demand: either continuing overdraft and seawater intrusion or impacts associated with new
11 groundwater management projects. Neither was discussed in the EIR, and *Vineyard* holds that
12 recirculation is required when an EIR fails to discuss a potential significant impact. *Vineyard,*
13 *supra*, 40 Cal.4th at 447-448. The evidence also shows that Zone 2C assessments for the
14 existing water supply projects is not a fair share payment for mitigation of impacts because the
15 existing projects are not sufficient to halt seawater intrusion and overdrafting.

16 Second, the evidence shows that the DEIR is so fundamentally and basically inadequate
17 and conclusory in nature that meaningful public review and comment were precluded.
18 Guidelines, § 15088.5(a)(4). The DEIR omits relevant information about cumulative demand,
19 whereas post-DEIR information reveals that the SVWP EIR's purportedly "conservative"
20 demand assumptions actually understate demand. The DEIR asserts that the SVWP will halt
21 seawater intrusion and balance the Basin, whereas post-DEIR information reveals that it will not.

22 Although LandWatch identified this new information and objected that it required
23 recirculation, the County failed to explain why this evidence would not require recirculation.
24 CEQA finding number 10 regarding recirculation addresses only the recirculation claim related
25 to the shifting project description, which is unrelated to water supply. AR000018. The County
26

27
28 ⁹ *Laurel Heights'* discussion expressly excludes procedural violations, such as a failure to
provide adequate disclosure, which was not at issue there. *Laurel Heights II, supra*, 6 Cal.4th at
1133.

1 made no finding and the record contains no discussion related to LandWatch’s objection that
2 new information required recirculation of the water supply analysis.¹⁰

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

5 The project will cause numerous significant traffic impacts to State Route 68 segments
6 and intersections. For most impacts, the EIR proposes mitigation through traffic impact fees.
7 Impact fee mitigation meets CEQA’s requirements for certainty only when there is a committed
8 plan and sufficient funding to construct needed improvements. Here, mitigation is inadequate
9 because there is no committed plan to construct all needed improvements and funding is
10 insufficient. Most egregiously, after admitting that widening State Route 68 is financially
11 infeasible, the EIR concludes that impacts will be mitigated – by widening State Route 68.

12 **A. Facts regarding the County’s mitigation of traffic impacts.**

13 Roadways affected. The project fronts on State Route 68 (“SR68”). AR001895, 002449
14 (map). Eighteen of the twenty-two intersections affected by the project and evaluated in the EIR
15 are located along SR68 and two are located on Davis Road, at the western edge of Salinas.
16 AR000639-000641, 002455 (map). To the west of the project, SR68 is a two -lane road with
17 signalized intersections, whereas the eastern portion of SR68 includes three segments of four-
18 lane roadway. AR001898-001900, 002455.

19 Congestion on SR68. The EIR determines the significance of traffic impacts with
20 reference to Levels of Service (“LOS”), ranging from LOS A (no congestion) to LOS F (highly
21 congested, e.g., signal waits over 80 seconds). AR000638-000639. Caltrans has established the
22 transition between LOS C and LOS D as the minimum acceptable standard for SR68
23
24

25 ¹⁰ The only response to LandWatch’s December 1, 2014 request for recirculation was
26 testimony by MCWRA staff that the project site would “benefit” from the SVWP; that “those
27 benefits . . . will be coming out in a few years in a study” and that the SVWP modeling used
28 then-current population projections. AR005555-005556. These points are not in dispute. This
testimony did not address LandWatch’s objections that the EIR fails to disclose that SVWP EIR
demand assumptions were wrong and that existing projects will not suffice, which MCWRA
acknowledged in earlier testimony. AR005187, 005179, 005164.

1 intersections and roadway segments. AR000639. The County has established LOS C as the
2 minimum for Davis Road segments and intersections. AR000639, 000644-000645.

3 SR68 and Davis Road are highly congested and projected to remain so. In 2010, 12 of
4 the 22 intersections and 13 of the 17 roadway segments studied were operating below the
5 applicable LOS standards. AR000643, 000645. These include all of the SR68 segments west of
6 the four-lane section (segments 1-10), most of the SR68 intersections west of the four-lane
7 section (intersections 1-2, 5-9, 11), Davis Road (segment 17), and its intersections with
8 Reservation Road and Blanco Road (intersections 20 and 21). AR000643-000645. Under so-
9 called “Background Conditions,” i.e., projected 2015 conditions (AR000650-000651, 001917),
10 11 of 22 intersections and 13 of 17 segments will operate at unacceptable LOS. AR000654-
11 000655. Under so-called “Cumulative Conditions,” i.e., projected 2030 conditions (AR000683-
12 000685, 001925), 19 of 22 intersections and 13 of 17 segments will operate at unacceptable
13 LOS. AR000686-000687.

14 Regulatory framework and plans for traffic improvements. SR68 is under the jurisdiction
15 of Caltrans, with the Transportation Agency of Monterey County (“TAMC”) responsible to plan
16 and fund improvements. AR000664. TAMC, the state-designated Regional Transportation
17 Planning Agency, prepares a Regional Transportation Plan (“RTP”) to allocate local, state, and
18 federal funding to transportation projects over a 20 year planning-horizon. AR016456, 000660.

19 To attain acceptable LOS on SR68, it would be necessary to widen the existing two-lane
20 segments of SR68 to four lanes or, alternatively, to construct a bypass facility through Fort Ord.
21 AR000648 -000649, 000657. Neither is financially feasible. The DEIR explains:

22 “. . . there are no short- or long-term funding sources for either of these alternatives.
23 Furthermore, there are no feasible interim improvements that would achieve and maintain
24 the acceptable level of service standards, and widening the entire corridor to a four-lane
25 facility is not feasible at this time.” AR000648-000649; *see also* AR000657, 000664,
000671, 003403 (additional EIR admissions that widening SR68 is infeasible).

26 Widening SR68 is specifically identified in the RTP as an “unconstrained,” project, i.e., one for
27 which no funding is reasonably expected in the 20-year planning horizon. AR016580.
28

1 The TAMC RTP does include two more limited projects that would improve LOS for
2 several intersections and segments affected by the project. The “State Route 68 Commuter
3 Improvements” would widen a 2.3 mile section of SR68 between the existing four-lane segment
4 and Corral de Tierra Road (segments 10, 9, and 8). AR000650, 016577. The “Marina-Salinas
5 Corridor” project would widen Davis Road to 4 lanes (segment 17) and improve intersections at
6 Blanco and Reservation Roads (intersections 20 and 21). *Id.* However, these projects are not
7 funded or scheduled for construction. AR016728, 003587.

8 Development impact fees are determined by TAMC’s nexus studies, the most recent of
9 which were completed in 2008 and 2013. AR016676, 000649. The cost of the State Route 68
10 Commuter Improvements and the Marina-Salinas Corridor project was included in determining
11 the current development impact fee, known as the Regional Development Impact Fee (“RDIF”).
12 AR016697, 000649. The RDIF may only be used to fund 16.5% of the cost of the SR 68
13 Commuter Improvements and 22.5% of the cost of the Marina-Salinas Corridor project, because
14 “the RDIF program only represents a portion of the required funding for each of the proposed
15 projects . . . the share of funding corresponding to existing traffic and out-of-county (and FORA)
16 traffic is planned to come from other sources.” AR016679, 016710. The nexus study states that
17 the RDIF cannot “ensure a mechanism for complete funding for all RDIF program projects at
18 this time.” AR016711. Although the nexus study lists possible funding sources (AR016711),
19 TAMC has concluded that obtaining other sources of transportation funding is a “major
20 challenge” because state and federal sources “are decreasing and becoming less consistent.”
21 AR016459. The RTP does not project funding for the State Route 68 Commuter Improvements
22 and the Marina-Salinas Corridor project before 2035. AR016577, 016728.

23 The DEIR concludes that the project will cause or contribute to significant traffic impacts
24 under both 2015 and 2030 conditions. The DEIR projects that the project would generate 2,392
25 daily trips.¹¹ AR000664. The DEIR evaluates project impacts under two temporal scenarios:
26 2015 “Background Conditions” (AR000664-000675) and 2030 “Cumulative Conditions”
27

28 ¹¹ Although Alternative 5 would generate fewer trips, the RDEIR does not provide a new
analysis of significant impacts, concluding that all mitigation would still be required. AR002698.

1 (AR000683-000689). The EIR treats both 2015 and 2030 impacts as significant if (1) the
2 project traffic causes intersection or segment service to deteriorate from acceptable to
3 unacceptable LOS; (2) the project traffic increases the volume-to-capacity ratio by 0.01 at
4 intersections operating at LOS D or E; or (3) the project adds any traffic to an intersection or
5 segment operating at LOS F. AR000661-000662, 003588, 001935.

6 In 2015, the DEIR concludes the project would significantly impact intersections on
7 SR68 west of the four-lane section (intersections 1, 2, 5-11) and on Davis Road (intersections
8 20-21). AR000665 (Table 3.12-9). Project traffic would also significantly impact most of the
9 western SR68 segments (segments 1-2, 5-10).¹² AR000670-000671.

10 In 2030, the DEIR projects the project would significantly impact every segment or
11 intersection projected to operate at LOS F.¹³ This includes the SR68 intersections 1, 2, 3, 5, 6, 7,
12 8, 9, 11, 15, 16, 17, 18, 19; SR68 segments 1-10; and Davis Road intersections 20-21.
13 AR000685-000686, 000686-000687; *see* AR002455 (map).

14 Under 2015 conditions, the DEIR concludes that some impacts will be mitigated by
15 impact fees but that most impacts cannot be mitigated because widening SR68 is not feasible.

16 The DEIR concludes that the project’s payment of impact fees would mitigate impacts to SR68
17 segments 8, 9, and 10 and intersections 8, 9, and 11 to less than significant, because the SR68
18 Commuter Improvements Project “is a component of the TAMC RDIF” and construction of
19 those improvements “would effectively mitigate project impacts.”¹⁴ AR000671. Similarly, the
20 DEIR concludes that payment of the TAMC RDIF would adequately mitigate the impacts to
21 Davis Road intersections 20 and 21 because the TAMC RDIF includes the Marina-Salinas
22 Corridor project, which, if built, would mitigate project impacts. AR000672-000673. The DEIR
23

24 ¹² Table 3.12-11 erroneously omits segment 10, but the DEIR text and FEIR acknowledge
25 the impact. AR000670-000671, 003498, 003502-3503.

26 ¹³ The DEIR does not specifically identify each intersection and segment suffering a
27 cumulatively significant impact to which the Project makes a considerable contribution.
28 However, the DEIR’s Cumulative Conditions analysis states that Project trips “would result in a
significant impact” wherever they would “add at least one trip to roadway segments operating at
LOS F” or to “intersections operating at LOS F.” AR000686, 000687.

¹⁴ The DEIR erroneously identifies SR68/Torero Drive intersection as intersection 12; it is
actually intersection 11. AR000671; *see* AR000655 (Table 3.12-8).

1 acknowledges that the other significant 2015 impacts, including impacts to intersections 2, 5, 6,
2 7, and 19, and to segments 1, 2, 5, 6, and 7, would remain significant and unavoidable because
3 needed improvements “are not included in any fee program.”¹⁵ AR000674.

4 Under 2030 conditions, the DEIR concludes that all impacts would be mitigated by fair
5 share payments. The DEIR proposes as mitigation for 2030 impacts the payment of future fair
6 share traffic fees in effect at the time of building permit applications, which “may include” the
7 TAMC RDIF, the City of Salinas Traffic Impact Fee, and Monterey County ad hoc mitigation
8 fees. AR000688. The DEIR also states that the SR68 Commuter Improvements would improve
9 operations at three intersections (intersections 8, 9, 11) under 2030 conditions. AR000687-
10 000688. The DEIR identifies a list of additional improvements “that are not included in any fee
11 program” but that are needed to mitigate 2030 impacts to intersections 3, 4, 13, 14, 15, 16, 17,
12 and 18. AR000688-000689. The DEIR states that “it is recommended that the County of
13 Monterey work toward listing and programming these additional improvements as fee
14 programs.” AR000689. The DEIR does not discuss what would be necessary to mitigate
15 cumulative impacts to the SR68 segments for which the DEIR states that widening is not
16 financially feasible. AR000648, 000657. Nonetheless, the DEIR concludes that “[t]he payment
17 of impact fees mitigates the project’s contribution to cumulative impacts to a less than significant
18 level, as the mitigation fee will be used over the long term to address ongoing improvements to
19 the regional circulation system.” AR000689.

20 The RDEIR proposes a new signalized intersection and 1.2 miles of SR68 widening for
21 Alternative 5. The RDEIR, which proposes Alternative 5, does not re-circulate the traffic
22 analysis. The RDEIR projects that Alternative 5 would reduce daily trips, and lessen traffic
23 impacts, but that “all mitigation measures would still be required.” AR002698. The RDEIR
24 states that impacts would remain significant and unavoidable “at specific locations,” which the
25 RDEIR does not specify. AR002699. The RDEIR proposes that Alternative 5 include a new
26 _____

27 ¹⁵ This list unaccountably omits intersection 1, SR68 at Josslyn Canyon Road, which is
28 identified as significantly impacted (AR000666) and is not identified as being mitigated
(AR000671-000673). However, the CEQA findings do identify unavoidably significant impacts
to intersection 1 under 2015 conditions. AR000010-000011.

1 signalized intersection to replace the Torero Drive intersection. AR002699. The RDEIR also
2 proposes that Alternative 5 widen a 1.2 mile portion of SR68 to 4 lanes. AR002671, 003290.

3 The FEIR admits, and LandWatch documents, that needed improvements are not funded
4 or committed: LandWatch’s DEIR comments object that there was no evidence that impact fee
5 programs would mitigate impacts. AR003547-003548, 003553-003554. The FEIR responds that
6 the County and TAMC have consistently recognized payment of impact fees as adequate
7 mitigation for cumulative impacts, admitting that the needed improvements are not “currently
8 programmed,” but arguing that the fee programs “are continuously updated and refined.”
9 AR003589; *see also* AR003586. The FEIR admits that the SR68 Commuter Improvements
10 project “is not currently funded or scheduled for completion.” AR003587. The FEIR also admits
11 that “no funds are currently available for the implementation of the Marina-Salinas Corridor
12 project,” but it claims that “the project is part of the TAMC RDIF, whose projects, including
13 Ferrini Ranch, will fund over time consistent with the intent of the fee program.” *Id.* Landwatch
14 submitted extensive evidence that the improvements needed to mitigate 2030 impacts are not
15 included in any committed funded plan. AR015627-015630. LandWatch also documented that
16 the SR 68 Commuter Improvements and the Marina-Salinas Corridor project are not scheduled
17 for construction and will not be funded before 2035. AR015630-015634.

18 The County found that impact fees would mitigate most impacts: The CEQA findings
19 conclude that impact fees will mitigate 2030 impacts to all segments and intersections.
20 AR000010. The findings also conclude 2015 impacts to intersections 8, 9, 11, 20, and 21 and
21 segments 8, 9, 10 and 17 would be less than significant.¹⁶ AR000010-000011.

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

23 CEQA requires an EIR to describe “feasible measures which could minimize significant
24 adverse impacts.” Guidelines, § 15126.4(a)(1). Mitigation measures must be fully enforceable
25 through permit conditions, agreements, or other legally-binding instruments. *Id.*, subd. (a)(2).

26 _____
27 ¹⁶ This is implied because the findings do not identify unavoidably significant impacts to
28 these intersections and segments under 2015 conditions, whereas the findings do list impacts to
other intersections and segments as unavoidably significant. AR000010-000011; *see* AR000674
(DEIR, summary of mitigated and unmitigated 2015 impacts).

1 When payment of impact fees is proposed, the record must demonstrate that the necessary
2 mitigation will actually be provided. *Kings County, supra*, 221 Cal.App.3d at 728. “A
3 commitment to pay fees without any evidence that mitigation will actually occur is inadequate.”
4 *Save Our Peninsula, supra*, 87 Cal.App.4th at 140. Impact fee mitigation is acceptable only if
5 fees will demonstrably be used to implement a “reasonable, enforceable plan or program that the
6 relevant agency commits itself to implementing.” *Anderson First, supra*, 130 Cal.App.4th at
7 1188. In *Anderson First*, conditions required a project to pay 16.87% of the cost of Phase I
8 improvements to an interchange and “to participate in the program” to provide Phase II
9 improvements to that interchange. *Id.* at 1188. Even though the agency stated that “it is
10 preparing an update to the Traffic Impact Fee Program to include the I-5 interchange” and
11 “condition 16 requires payment of the impact fee,” the court found that this provision was too
12 vague and speculative to constitute a “reasonable, enforceable plan or program.” *Id.* at 1189.
13 The court rejected the agency’s argument that it planned to update its fee program in the future to
14 include the needed improvements. *Id.* at 1188-1189. The Court emphasized that actual
15 construction of the improvements must be “fully enforceable.” *Id.*

16 In *Gray*, the court rejected a mitigation scheme as legally inadequate because neither the
17 agency nor Caltrans had adopted a specific plan for necessary improvements – even though the
18 agency had announced an intent to complete some form of improvements and had a clear
19 methodology for collecting impact fees. *Gray, supra*, 167 Cal.App.4th at 1122. The mitigation
20 was deficient because the EIR did not discuss how or when the fees would be collected and
21 spent, how effective the mitigation would be, or whether the agency could ensure funding for
22 necessary improvements. Regardless of the reasonableness of a developer’s contribution,
23 payment into a fee program is insufficient mitigation where the agency will not have sufficient
24 funds to construct the improvements the program is intended to implement. *Napa Citizens for*
25 *Honest Government v. Napa County Board of Supervisors* (2001) 91 Cal.App.4th 342, 364;
26 *Endangered Habitats League v. County of Orange* (2005) 131 Cal.App.4th 777, 785. In sum,
27 fee-based mitigation of traffic impacts under CEQA requires that (1) the specific needed
28

1 improvement projects actually be included in a committed, enforceable plan and (2) funding for
2 this plan be sufficient.

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

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

10 The DEIR’s 2030 analysis states that the project “would result in a significant impact”
11 wherever it would add one trip to roadway segments or intersections operating at LOS F.
12 AR000686, 000687. Thus, the DEIR indicates that the project traffic would result in significant
13 impacts to every segment or intersection projected to operate at LOS F under 2030 conditions.¹⁷
14 *Id.* This includes SR68 intersections 1, 2, 3, 5, 6, 7, 8, 9, 11, 15, 16, 17, 18, 19; SR68 segments
15 1-10; and Davis Road intersections 20-21.¹⁸ AR000685-000686, 000686-000687.

16 The CEQA findings and the DEIR conclude that all of these “potentially significant
17 impacts on cumulative traffic have been mitigated to a less than significant level” based on
18 payment of impact fees. AR000010; *see* AR000688. The traffic study in the DEIR assumes in
19 its analysis of “mitigated conditions” that physical improvements needed for acceptable levels of
20 service will actually be in place by 2030. AR015627-015629, *citing* AR002315-002418,
21 002467-00002470. However, the proposed payment of impact fees is insufficient mitigation
22 under CEQA because needed infrastructure improvements, e.g., widening SR68 to four lanes, are
23

24 ¹⁷ As LandWatch objected, the DEIR fails to provide an adequately specific listing of
25 intersections and segments suffering significant cumulative impacts to which the project will
26 make a considerable contribution. AR003552-003553. This error was not rectified by the FEIR.
27 AR003588; *see* AR015644-015648, *citing* AR003588, 002315-002418, 001925-001930. The
28 public was left to infer which facilities were affected by applying thresholds of significance to
data in DEIR tables.

¹⁸ SR68 segments 8-10 are discussed in the next section below because the EIR makes the
specific claim that the SR68 Commuter Improvements project will mitigate impacts for these
segments under both 2015 and 2030 conditions.

1 not included in a “reasonable, enforceable plan or program that the relevant agency commits
2 itself to implementing.” *Anderson First, supra*, 130 Cal.App.4th at 1188. At most, there may be
3 “a commitment to pay fees without any evidence that mitigation will actually occur;” but, by
4 itself, this “is inadequate.” *Save Our Peninsula, supra*, 87 Cal.App.4th at 140.

5 The evidence that mitigation of 2030 impacts is not part of a reasonable, enforceable plan
6 or program that the County commits itself to implementing is set out in LandWatch’s comments
7 and supporting documentation (AR015626-015633) and summarized as follows:

- 8 • EIR Admissions: The DEIR admits there are no identified program for intersections
9 3, 4, 13, 14, 15, 16, 17, 18 (AR000688-000689), even though the project will add
10 traffic to each of these intersections that are projected to operate at LOS F under
11 2030 conditions (AR000685-000686). The DEIR and FEIR also admit that there is
12 no feasible means to mitigate impacts to the two-lane segments of SR68 because
13 there is no funding for widening SR68 west of the SR68 Commuter Improvements
14 project and no other feasible improvements to maintain service standards.
15 AR000648-000649, 000657, 00664, 000671, 003403. Thus, there is no identified
16 program to mitigate segments 1-7.
- 17 • RTP/MTP: The necessary intersection and segment improvements are not included
18 in the 2014 Regional Transportation Plan or in the 2035 Metropolitan Transportation
19 Plan. AR015627, *citing* AR016575-016579, 016661-016665. Indeed, the RTP
20 identifies widening SR68 as an “unconstrained” project, i.e., one for which no
21 funding can be identified. AR016580.
- 22 • RDIF Nexus Study: TAMC’s nexus study projects that SR68 will operate at
23 unacceptable LOS in 2030 west of the existing four lane section. AR016693, 16699;
24 *see* AR015628. Even if the SR68 Commuter Improvements were constructed, they
25 would only improve segments 8-10; thus, TAMC projects that segments 1-7 will
26 operate at unacceptable LOS through 2030. AR016699.
- 27 • 2010 General Plan: The County’s 2010 General Plan EIR projects that all of the
28 studied segments of SR68 will operate at LOS F under 2030 conditions due to lack of
funding to construct necessary improvements. LW RJN, Exh. 1, pp. 4.6-36, 4.6-68 to
4.6-69; *see* AR015630.

25 Discussing 2015 impacts, the FEIR admits that widening SR68 is not feasible mitigation:
26 “As noted on pages 3.12-23 and -37 of the DEIR, the widening of State Route 68 to four
27 lanes, plus the associated intersection improvements, would improve operations along the
28 State Route 68 corridor to acceptable levels of service under Background Plus Project
conditions. However, no funding is available for these improvements or the South Fort
Ord Bypass, nor have these improvements been included in the Regional Transportation

1 Plan. Beyond the funding issue, there are political and environmental constraints to these
2 major capacity-based improvements. For these reasons, there is no “fairshare” calculation
3 for these improvements that are unfunded and unlikely to occur. Therefore, these
4 improvements are not considered feasible mitigation under CEQA. The project therefore
5 has no ability to mitigate for these specific impacts. By CEQA standards, if an impact
6 cannot be mitigated through feasible measures or alternatives, the impact must be
7 considered an unavoidable consequence of the proposal. Such impacts require findings by
8 the approving agency documenting the agency’s overriding considerations for such
9 impacts.” AR003403 (FEIR response to TAMC’s request for mitigation).

10 Despite this admission, the EIR and findings claim that usage or custom somehow justifies
11 reliance on this infeasible mitigation for the 2030 impacts, claiming that TAMC and the County
12 “recognize” impact fee payments to be sufficient mitigation for cumulative impacts, i.e., the
13 2030 impacts here. AR003586, 003589, 000010. However, contrary to the EIR’s claim,
14 mitigation of cumulative impacts requires the same level of certainty as mitigation of project-
15 level impacts.¹⁹ Impact fee case law specifically addresses cumulative impacts:

16 “When future traffic congestion will result from the cumulative impact of several
17 projects, cumulative traffic mitigation measures for a single project (that is one of the
18 several projects) may be deemed sufficient if those measures are based on a reasonable
19 plan of actual mitigation that the relevant agency commits itself to implementing.”
20 *Anderson First, supra*, 130 Cal.App.4th at 1187, emphasis added.

21 *Save Our Peninsula* is equally clear that CEQA’s requirements for enforceable and certain
22 impact fee mitigation apply to cumulative impacts. 87 Cal.App.4th at 140, *citing* Guidelines, §
23 15130(a)(3) (concerning cumulative impact mitigation via impact fees); *see also Napa Citizens,*
24 *supra*, 91 Cal.App.4th at 363 (fee-based mitigation useful where “traffic congestion results from
25 cumulative conditions”). Thus, the EIR’s claim that a lesser degree of certainty or enforceability
26 is required for mitigation of cumulative impacts via impact fees is wrong as a matter of law. The

27 ¹⁹ Furthermore, the EIR’s evaluates both 2015 and 2030 impacts as cumulative impacts,
28 simply using a different temporal scopes. Both are evaluated with the same thresholds of
significance, which recognize that the worse the condition, the smaller the increment that should
be deemed a considerable contribution. AR003588, 001935; *see CBE v. CRA, supra*, 103
Cal.App.4th at 120. And both are evaluated against a baseline that includes past, present and
future projects, not just existing conditions. AR0000664-0000665, 0000683-0000689, 003943
(FEIR, arguing that an “existing plus project” analysis would be “misleading and
uninformative”); *see* Guidelines, § 15130(a)(1), (b).

1 Supreme Court has repeatedly held that an incorrect interpretation of CEQA’s mitigation fee
2 requirements is a “failure to proceed in a manner required by law.” *City of Marina, supra*, 39
3 Cal.4th at 365-366; *City of San Diego v. Board of Trustees of Cal. State Univ.* (2015) 190
4 Cal.Rptr. 3d 319, 326-327.

5 The EIR contends that impact fee programs are regularly updated, implying that the
6 mitigation for 2030 impacts will be in place later even if it is not now. AR003589 , 000689.
7 This is belied by the EIR’s admission that “Monterey County recognizes that State Route 68 will
8 not be widened to four lanes in its entirety for various reasons; therefore, it is not likely to fully
9 operate at acceptable levels of service at all locations into the future.” AR000664, emphasis
10 added. Furthermore, the ongoing failure of impact fee programs to maintain service standards in
11 the past is evident from existing deficiencies for SR68 segments 1-10 and intersections 1, 2, 5-9,
12 11, 19-21. AR000643-000645. If the practices for updating and implementing impact fee
13 mitigation were effective on SR68, service levels would not have deteriorated.

14 The EIR and findings fail even to identify all of the needed future impact fees and
15 improvements fee programs. The referenced future “Monterey County ad hoc Traffic
16 Mitigation Fees” are nowhere explained or identified. AR000010; *see* AR000688. Although the
17 DEIR lists eight sets of improvements needed to mitigate 2030 impacts to intersections when
18 “recommending” that the County somehow get these built (AR000689), it does not identify the
19 improvements needed to mitigate 2030 impacts to segments. Only by reviewing appendices and
20 exhibits to the traffic report can the public discern that the “mitigated conditions” for 2030
21 impacts assume that SR68 will (somehow) be widened to four lanes. AR015627-015629, *citing*
22 AR002315-002418, 002467-00002470. The failure to identify the relevant improvements and
23 impact fee programs violates CEQA: cumulative impacts are not mitigated by “paying an
24 unspecified amount of money at an unspecified time in compliance with an as yet unenforced or
25 unspecified transit funding mechanism.”²⁰ *San Franciscans for Reasonable Growth v. City and*
26

27
28 ²⁰ The findings pay lip service to this principle: “[i]t is County practice to deem the
cumulative traffic impact mitigated through payment of TAMC Fees when they are associated
with an identified TAMC project. The Highway 68 Commuter Improvement Project is an

1 *County of San Francisco* (1984) 151 Cal.App.3d 61, 79. Case law specifically rejects the notion
2 that “any fee program is necessarily or presumptively ‘full’ mitigation.” *California Native Plant*
3 *Society, supra*, 170 Cal.App.4th at 1055. Good intentions and “recommendations” for
4 improvements (AR000689) do not count: impact fee mitigation must be part of a committed,
5 funded program when the project is approved. *Anderson First, supra*, 130 Cal.App.4th 1188;
6 *Gray, supra*, 167 Cal.App.4th at 1121-1122.

7 **D. Impact fees are inadequate mitigation for 2015 and 2030 impacts to intersections 8,**
8 **9, 20, and 21 and to segments 8 and 9 because needed improvements are not**
9 **included in a committed, funded plan.**

10 The EIR concludes that payment of the TAMC impact fee will mitigate impacts under
11 2015 and 2030 conditions to SR68 segments 8, 9, and 10; SR68 intersections 8, 9, and 10; and
12 Davis Road intersections 20 and 21.²¹ AR000671-000673, 000687-000680. The DEIR justifies
13 this conclusion by arguing that the State Route 68 Commuter Improvements and the Marina-
14 Salinas Corridor projects are components of the TAMC impact fee and, if built, these projects
15 would mitigate these impacts. *Id.* However, because these TAMC projects are neither funded
16 nor committed, there is no “reasonable, enforceable plan or program that the relevant agency
17 commits itself to implementing.” *Anderson First, supra*, 130 Cal.App.4th at 1188.

18 These two project proposals do not meet CEQA’s requirements for impact fee mitigation
19 because neither is currently funded or scheduled for construction, and the record demonstrates

20 identified project funded by TAMC Fees.” AR000010. Unfortunately, there are no “identified
21 TAMC projects” to mitigate most of the 2030 impacts.

22 ²¹ LandWatch challenges the sufficiency of mitigation for intersections 8, 9, 20, and 21 and
23 to segments 8 and 9 under 2015 and 2030 conditions. LandWatch does not challenge the
24 sufficiency of mitigation for segment 10 and intersection 11 because the project’s widening of
25 segment 10 and its new intersection to replace the Torero intersection (number 11) may mitigate
26 those impacts. However, the project’s improvements will not improve conditions elsewhere on
27 SR68. AR002698 (RDEIR acknowledging that all other mitigation would still be required even
28 if Alternative 5 traffic improvements are constructed), 005351-005353 (staff acknowledging
intersections will remain at LOS F), 015649. Thus, even after requiring the project to provide a
new intersection at Torrero/SR68 and 1.2 miles of freeway widening in Alternative 5, the County
continued to rely on the SR 68 Commuter Improvements to mitigate impacts to SR68
intersections 8 and 9 and segments 8 and 9 and on the Marina-Salinas Corridor project to
mitigate impacts to intersections 20 and 21.

1 that these projects are not projected for funding before 2035. Thus, there is no reasonable plan
2 that would result in mitigation by either 2015 or 2030. The evidence that mitigation of impacts
3 to intersections 8, 9, 20, and 21 and to segments 8 and 9 is not part of a reasonable, enforceable
4 plan or program that the County commits itself to implementing is set out in LandWatch’s
5 comments and supporting documentation (AR015633-015636), and summarized as follows:

- 6 • FEIR Admission: In response to comments requesting this information, the FEIR admits
7 that the SR68 Commuter Improvements project “is not currently funded or scheduled for
8 completion.” AR003587. The FEIR also admits that “no funds are currently available
9 for the implementation of the Marina-Salinas Corridor project.” *Id.*
- 10 • TAMC RTP: In addition, the TAMC 2014 RTP indicates that both the SR68 Commuter
11 Improvements and the Marina-Salinas Corridor projects are not currently projected to be
12 funded before the year 2035. AR016577-016578 (RTP, listing funding in 2035 column);
13 *see* AR015632, 015634.
- 14 • TAMC admission: TAMC’s Executive Director confirmed that construction is not
15 scheduled for either project and that funding is not planned prior to 2035. AR016728.

14 TAMC’s Executive Director stated that “[w]e don’t have funding, but plan to fund it from
15 development impact fees.” AR016728. However, TAMC may not legally fund the two projects
16 from development impact fees alone. Impact fees may be used to fund only 16.5% of the cost of
17 the State Route 68 Commuter Improvements and 22.5% of the cost of the Marina-Salinas
18 Corridor project because developer exactions cannot be used to remedy existing deficiencies.
19 AR015632-015633, *citing* AR016679 (nexus study, stating “RDIF program only represents a
20 portion of the required funding for each of the proposed projects”), AR016710 (nexus study,
21 listing those portions); *see* Gov. Code § 6601(g) (Mitigation Fee Act, limiting use of impact
22 fees). The EIR’s statement that the project is “not required” to remedy existing deficiencies
23 (AR003586) is also an admission that other funding sources are needed to do this. And
24 TAMC’s nexus study admits that the RDIF cannot “ensure a mechanism for complete funding
25 for all RDIF program projects at this time.” AR016711, *emphasis added*. The 2014 RTP admits
26 that transportation funding is “decreasing and becoming less consistent.” AR016459. Thus,
27 TAMC projects that the two projects will not fund before 2035. AR016728, 016577-016578.

28 Indeed, the RDEIR admits that the projects will not be timely mitigation for 2015

1 impacts, stating “[t]he DEIR does not assume completion of these projects under Existing
2 Conditions or Background [2015] Conditions.” AR003587. While the FEIR claims that the
3 Marina-Salinas Corridor project “will fund over time consistent with the intent of the fee
4 program” (*id.*), the mere intention to update project commitments is insufficient. *Anderson First,*
5 *supra*, 130 Cal.App.4th 1188; *Gray, supra*, 167 Cal.App.4th at 1121-1122.

6 In sum, there is no identified source for the bulk of the funding required for the SR68
7 Commuter Improvements and the Salinas-Marina Corridor project, and available evidence
8 indicates that the projects are uncertain and will, in any event, not be available to mitigate
9 impacts in either 2015 or 2030. Under these circumstances, the fact that the RDIF includes a
10 portion of the funding for necessary improvements does not provide sufficient certainty. *Napa*
11 *Citizens, supra*, 91 Cal.App.4th at 364. The EIR fails to recognize that mitigation requires
12 projects not just payment of fees. No mitigation will occur if there is not enough money to build
13 the projects. Here, a “commitment to pay fees without any evidence that mitigation will actually
14 occur is inadequate.” *Save Our Peninsula, supra*, 87 Cal.App.4th at 140.

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

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

19 The 2010 General Plan provides that pre-2007 subdivision applications are governed by
20 the General Plan in effect at the time of the application. AR000022, 000541; *see also* Gov. Code
21 §66474.2. Thus, the EIR and the County’s findings purport to determine the project’s
22 consistency with the 1982 General Plan. AR000542-000545 000022-000026.

23 The DEIR traffic section lists without discussion General Plan traffic Policy 37.2.1,
24 which provides that “[t]ransportation demands of proposed development shall not exceed an
25 acceptable level of service for existing transportation facilities, unless appropriate increases in
26 capacities are provide for.” AR000659; *see* 023659. The DEIR’s discussion of General Plan
27 consistency does not mention Policy 37.2.1. AR000542-000545. Accordingly, LandWatch
28 objected that the EIR fails to identify inconsistency with Policy 37.2.1, evident from the
acknowledged significant and unavoidable traffic impacts. AR003551. The FEIR responds that

1 the project will contribute to the exceedance of service standards, that feasible mitigation will be
2 provided, but that “increases in capacity, such as widening State Route 68 to four lanes, end to
3 end, is not feasible mitigation.” AR003558. The FEIR acknowledges the County “must make
4 findings regarding General Plan consistency.” *Id.* After the Planning Commission findings
5 ignored traffic policies (AR004359-004350), LandWatch again objected in written and oral
6 comments to the Board of Supervisors that the project is inconsistent with Policy 37.2.1 and with
7 other transportation policies. AR015638-015640, 005444.

8 Despite LandWatch’s repeated objections, the Board of Supervisors found that “[n]o
9 communications were received during the course of review of the project indicating any
10 inconsistencies with the text, policies, and regulations in these documents,” including the 1982
11 General Plan. AR000022. The Board found the project consistent with the 1982 General Plan
12 without discussing or making findings related to the transportation policies identified by
13 LandWatch. AR000023-000026. The Board made an umbrella finding that “no conflicts were
14 found to exist” with the 1982 General Plan. AR000022. In making the consistency findings
15 required for subdivision approval, the Board found that the “project as designed and conditioned
16 is consistent with the 1982 Monterey County General Plan.” AR000031.

17 **B. The County abused its discretion by approving a project inconsistent with General**
18 **Plan traffic policies.**

19 Claims of general plan inconsistency are reviewed under an abuse of discretion standard,
20 where the inquiry is whether the agency “has not proceeded in a manner required by law, its
21 decision is not supported by findings, or the findings are not supported by substantial evidence.”
22 *Napa Citizens, supra*, 91 Cal.App.4th at 357; *Families Unafraid to Uphold Rural El Dorado*
23 *County v. Board of Supervisors of El Dorado County (“FUTURE”)* (1998) 62 Cal.App.4th 1334,
24 1338. Where a project conflicts with a single general plan policy, its approval may be reversed.
25 *San Bernardino County Audubon Society, Inc. v. County of San Bernardino* (1984) 155
26 Cal.App.3d 738, 753; *FUTURE, supra*, 62 Cal.App.4th at 1341. Consistency demands that a
27 project both “further the objectives and policies of the general plan and not obstruct their
28 attainment.” *FUTURE, supra*, 62 Cal.App.4th at 1336; *see Napa Citizens, supra*, 91 Cal.App.4th

1 at 378. Accordingly, where a petitioner alleges that a project conflicts with general plan
2 circulation element policies, a court need not find an “outright conflict.” *Napa Citizens, supra*,
3 91 Cal.App.4th at 379. “The proper question is whether development of the [project] is
4 compatible with and will not frustrate the General Plan’s goals and policies . . . without definite
5 affirmative commitments to mitigate the adverse effect or effects.” *Id.* In *Napa Citizens*, the
6 court held that an agency could not approve a project that increases traffic congestion in
7 contravention of general plan policies without a “binding commitment” to alleviate that
8 congestion. *Id.* at 380.

9 Here, the project is inconsistent with 1982 General Plan Policy 37.2.1, which provides
10 that “[t]ransportation demands of proposed development shall not exceed an acceptable level of
11 service for existing transportation facilities, unless appropriate increases in capacities are provide
12 for.” AR023659. The EIR and the CEQA findings admit that the project will result in
13 significant and unavoidable 2015 impacts to SR68 intersections 1, 2, 5, 6, 7, and 19 to SR68
14 segments 1, 2, 5, 6, and 7, all of which are projected to operate at unacceptable levels of service.
15 AR000674, 000010-000011. The EIR admits that the project will further degrade the already
16 unacceptable service levels, that additional capacity cannot be provided, and that there will be
17 unavoidable and significant impacts. AR000665-000675. Admission of these significant and
18 unmitigated impacts is an admission that the project conflicts with Policy 37.2.1.

19 In addition to these admitted significant and unavoidable impacts, it is clear that the
20 project will also significantly impact intersections 8, 9, 20, and 21 and segments 8 and 9 under
21 2015 conditions and numerous intersections and segments under 2030 conditions. As discussed
22 in section II above, the EIR admits that widening all of SR 68 is infeasible and that State Route
23 68 Commuter Improvements and the Marina-Salinas Corridor project are not funded. The 2010
24 General Plan EIR and the TAMC RTP acknowledge that there is no funding to widen SR68.
25 TAMC acknowledges that the State Route 68 Commuter Improvements and the Marina-Salinas
26 Corridor project will not be funded prior to 2035. Where there is no funding for necessary
27 improvements, mitigation is infeasible, and a project conflicts with general plan policies calling
28 for reducing congestion. *Napa Citizens, supra*, 91 Cal.App.4th at 364, 380. The EIR admits

1 that the County has abandoned the Policy 37.2.1 requirement for “acceptable” service levels in
2 the SR 68 corridor: “Monterey County recognizes that State Route 68 will not be widened to
3 four lanes in its entirety for various reasons; therefore, it is not likely to fully operate at
4 acceptable levels of service at all locations into the future.”²² AR000664, emphasis added. This
5 admission is an acknowledgment that Policy 37.2.1 has been and will continue to be violated by
6 the approval of any additional development.

7 The project is inconsistent with Policy 39.1.2, requiring that “[n]ew development shall be
8 located where there is existing road and highway capacity or where adequate road and highway
9 capacity will be provided.” AR023661; *see* AR0125639. Capacity is not adequate and the
10 County admits it will not be provided. Finally, the project is inconsistent with Policy 26.1.4:

11 “the County shall designate growth areas only where there is provision for an adequate
12 level of services and facilities such as water, sewerage, fire and police protection,
13 transportation, and schools. Phasing of development shall be required as necessary in
14 growth areas in order to provide a basis for long-range services and facilities planning.”
AR023637; *see* AR015640.

15 The project is not required to be phased to ensure sufficient transportation capacity.

16 There is overwhelming evidence that the project conflicts with traffic policies. And there
17 is no evidence to the contrary because the County ignored the issue. The County abused its
18 discretion by approving a project that is inconsistent with the General Plan. Gov. Code, §
19 66473.5; *Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal.App.4th 807, 815.

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

22 An agency abuses its discretion if either (1) its findings are not supported by substantial
23 evidence or (2) its decision is not supported by findings. C.C.P. §1094.5(b); *Topanga, supra*, 11

24
25 ²² Furthermore, the EIR makes it clear that the County has previously failed to enforce
26 Policy 37.2.1 in its development approvals. The FEIR admits, and the DEIR demonstrates, that
27 intersections and segments with acceptable service under 2010 conditions will degrade by 2015
28 to unacceptable levels due to buildout of already approved projects. AR003587; *compare*
AR000643 (Table 3.12-3) to 000665 (Table 3.12-8, showing degradation from LOS C to LOS D
or lower for intersections 1, 6, 20, and 21); *compare* AR000644-000645 (Table 3.12-4) to
000669-000670 (Table 3.12-10, showing degradation of segment 4).

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

14 As in *Woodland Hills Residents Association*, the County simply ignored evidence raised
15 by the public that the project is inconsistent with the 1982 General Plan traffic policies.
16 *Woodland Hill, supra*, 44 Cal.App.3d at 837. The failure to make specific findings in the face of
17 evidence that the project is inconsistent is an abuse of discretion. *Id.*; *Honey Spring, supra*, 157
18 Cal.App.3d at 1150-1151. Here, the Court cannot hypothesize findings of consistency for the
19 County even if there were facts in the record to support such a finding, because judicial review is
20 limited to determining whether necessary findings were made, and, if so, whether they were
21 supported by substantial evidence. *Sierra Club v. City of Hayward, supra*, 28 Cal.3d at 859.
22 The County’s conclusory umbrella findings of consistency with the 1982 General Plan
23 (AR000022, 000031) will not suffice because findings must contain reasons and evidence.
24 *Topanga, supra*, 11 Cal.3d at 514-515; *West Chandler, supra*, 198 Cal.App.4th at 1520-1522.

1 **IV. The County abused its discretion in the analysis and mitigation of visual impacts**
2 **because descriptions of the project and its environmental setting were shifting and**
3 **incomplete and because mitigation was proposed untimely and improperly deferred.**

4 **A. Facts related to visual impact analysis and mitigation.**

5 Existing visual resources. The site is rolling hills and flat meadows with grasslands,
6 seasonal blooms, oak woodlands, savanna, scrub, riparian, and wetland vegetation. AR000239.
7 The site contains “some of the most visually sensitive features within the Toro Planning Area.”
8 *Id.* SR68 is a state-designated scenic highway, so designated in part because of the “lack of
9 visual encroachment.” AR003774, 000240; *see* AR015715-015720. County roadways adjacent
10 to the project are designated as County scenic routes. AR000240. The Toro Area Plan
11 designates most of the site as “Areas of Visual Sensitivity,” the “most sensitive areas” of which
12 it designates as “Critical Viewshed.” AR000239-000243. Areas of Visual Sensitivity and
13 Critical Viewshed are identified in Figure 9 of the Toro Area Plan. AR020455. Toro Area Plan
14 Policy 40.2.5 “require[s] newly created parcels to have building sites outside the critical
15 viewshed.” AR000248. Policy 40.2.4 requires a 100-foot building setback from scenic routes
16 and Critical Viewshed. *Id.*

17 DEIR visual impact assessment. The DEIR assesses visual impacts based on mapping
18 the proposed lots against the Areas of Visual Sensitivity and Critical Viewshed (AR000441-
19 000243, 000256-000260) and presenting photo-simulations from designated viewpoints
20 (AR000253-255, 000261-000280). The DEIR also includes simulations provided by the
21 applicant, purportedly showing mitigated conditions from the same viewpoints. AR000293-
22 000305. The DEIR states that the “County intends to reclassify the entire project site with
23 LDR/2.5-VS-D zoning [Low Density Residential with Visual Sensitivity and Design Control
24 overlays] consistent with the General Plan Land Use map as part of the 2010 General Plan
25 Implementation,” thus making “all development . . . subject to the requirement and standards of
26 Chapters 21.44 and 21.46 of the *Monterey County Zoning Code.*” AR000257. The DEIR
27 concludes that visual impacts from residential structures “can be fully mitigated” based on this
28 zoning and Mitigation Measure 3.1-1a, requiring future relocation of lots within the Critical
Viewshed area so that building sites are not visible from scenic roads. AR000260; *see*

1 AR000281, 000284. The DEIR concludes that a proposed berm would screen lots 20-28 from
2 SR68, and an applicant-provided photo simulation purports to show the effectiveness of that
3 berm. AR000283, 000293. The DEIR concludes that there will be no significant visual impacts
4 from ridgeline development because there is no potential for ridgeline silhouettes visible from
5 SR68 or River Road, except on the eastern Parcel D, where it would be screened by a proposed
6 berm design evaluated in the DEIR with a line of sight analysis. AR000287-000291. The DEIR
7 concludes that impacts to views from Fort Ord National Monument (referred to as “BLM public
8 land”) and Toro County Park will also be less than significant based on the future Visual
9 Sensitivity (“VS”) and Design Control (“D”) overlay zoning. AR000281-000282.

10 RDEIR revision to Alternatives: The County recirculated the Alternatives analysis of the
11 DEIR, but without a new Aesthetics section. The RDEIR identifies the 185-unit Alternative 5 as
12 the environmentally superior alternative, explaining that it was intended to reduce visual and
13 other impacts. AR002685, 002700. Alternative 5 substantially revises the location of
14 development. AR002685, 002689, 002691. Development on Parcel D was scaled back and
15 relocated. AR002686. Although three revised berms are to mitigate Parcel D impacts, no line of
16 sight analysis is provided. AR002686. Alternative 5 provides a new entryway, a new at-grade
17 intersection on SR68, and widening of a 1.2 mile stretch of SR68 from a 2-lane rural highway to
18 a 4-lane highway. AR002686-002687, 002650-2651. Although the RDEIR provides a
19 schematic of the intersection, it does not provide visual analysis of the new entryway or S68
20 traffic improvements. AR002659. The RDEIR concludes that visual impacts under Alternative
21 5 would be lessened because (1) certain lots were removed from prominent view from SR 68; (2)
22 the density of Parcel E was reduced and it would be screened “almost entirely” from SR68; (3) 4
23 lots were removed from other areas, (4) the winery in Parcel D was reduced in scale; and (5) the
24 main access road was removed from Toro County Park. AR000002693-002694.

25 Comments on the DEIR and RDEIR and responses. LandWatch objected that the visual
26 analysis is not based on a complete and stable project description because (1) the EIR fails to
27 identify the location of buildings and landscaping (AR003532, 003908); and (2) thirteen
28 mitigation measures call for post-approval relocation of lots to address various impacts, which

1 may be infeasible or cause secondary impacts (AR003534, 003908). The FEIR responds that (1)
2 building site locations were unnecessary because the analysis assumed that buildings could occur
3 anywhere on the lots (AR003575); and (2) CEQA permits mitigation to revise site plans and the
4 relocations would be feasible (AR003574, 003940-00394). LandWatch objected that building
5 sites in the Critical Viewshed violate Toro Area Plan policies (AR003533); the FEIR responds
6 that mitigation would require that the buildings “not be visible” (AR003577). Caltrans and
7 LandWatch objected that the EIR does not adequately specify the berms proposed to shield
8 development in Parcel D (winery area) and the “lupine field” (sites 20-28), evaluate their
9 secondary impacts, or demonstrate their feasibility. AR003534, 003396, 003774-003775. The
10 FEIR responds by characterizing the berms as “a component of the project description,” not
11 mitigation (AR003577, 003578), but revising Mitigation Measure 3.1-1a to require validation of
12 their efficacy – after project approval (AR003399, 003575-003576). The FEIR cites the
13 applicant-supplied visual simulation as evidence the lupine field berm would be effective.
14 AR003399. Caltrans objected to the lack of analysis of the new entryway and SR68
15 improvements (AR003775); the FEIR responds that this analysis “is more appropriate” in later
16 environmental review (AR003783).

17 October 8, 2014 Planning Commission hearing. In their staff report and at the October 8
18 hearing, staff explained that building sites were in the Critical Viewshed and asked the Planning
19 Commission to “interpret” the General Plan Critical Viewshed policy to find that “area that is not
20 visible should not be included within the critical view shed.” AR004156, AR005012-005014.
21 The commission asked staff to return with a discussion of that issue. AR005135.

22 October 29, 2014 Planning Commission hearing. In staff reports for the October 29
23 hearing, staff disclosed that the EIR relied on an applicant-supplied mapping of the Critical
24 Viewshed area and that the County’s own large-scale map was missing. AR004184-004188.
25 Staff explained that the applicant’s map in the EIR contains errors. AR015183-015185. Based
26 on its interpretation of the “intent” of the Toro Area Plan, staff provided a revised map, which
27 shows proposed lots outside the Critical Viewshed. AR004184-004188. Staff presented the new
28 Critical Viewshed mapping at the hearing, where Planning Commission members expressed

1 substantial confusion about the new information and revisions to the visual analysis. AR005145-
2 005149, AR005196-005198, 005244-005257, 005281-005285.

3 The applicant also presented photo-simulations of the berm's effect on the lupine field
4 (AR15212-15213), which appear identical to the applicant-supplied simulations in the EIR
5 (AR000293). AR005205-005206. Commissioners asked whether "we have any, like, visual
6 simulations of these potentially visually-intrusive parts of this development that have been
7 prepared by staff or by, you know, an independent." AR005234. Staff disclosed for the first
8 time that the applicant-prepared visual simulations in the DEIR, including the lupine field berm,
9 do not in fact represent the same viewpoints or the same two-story structures simulated by the
10 EIR consultant. AR005234-005239. Staff acknowledged that that "there is a distinct difference"
11 in the applicant's simulations because they are for "lower-profile, single-story houses" rather
12 than the two story houses in the EIR consultant's simulations. AR005238. Planning
13 Commission members objected that the applicant-provided simulations purporting to show post-
14 mitigation conditions are not an "apples-to-apples" comparison. AR005239, 005244.

15 The Planning Commission also objected to the lack of flagging and staking and line-of-
16 sight analysis for the berm to shield Parcel D development. AR005239-005240. Staff stated that
17 they had prepared a line of sight study but "unfortunately, I don't think they've been provided to
18 you. I thought they were in the EIR; perhaps they're not." AR005242.

19 After what Commissioners stated was a "confusing afternoon" that made "a lot of us . . .
20 uncomfortable, particularly because of the view-shed issues – view-shed issues and some of the
21 photo simulations" (AR005285) and that "threw me off completely" (AR005294), the
22 Commission asked staff to return with resolutions to recommend Alternative 5B and to provide
23 additional visual analysis and mitigation, including assurances that development behind berms
24 was not visible. AR005285-5289, 005295-005300, 05303-005304, 005312.

25 November 12, 2014 Planning Commission. The staff report for the November 12
26 Planning Commission explained that seven lots "need to be relocated to areas outside the critical
27 viewshed and 100 foot setback or eliminated from the Vesting Tentative Map," that six other lots
28 must be relocated or removed as impermissible ridgeline development; and that another lot must

1 be reconfigured or conditioned to prevent ridgeline development. AR004223-4224. At the
2 hearing itself, Commissioners were given an Errata Memorandum that stated, contrary to the
3 staff report, that only two lots were disapproved as ridgeline development but that five lots
4 needed to be conditioned to avoid ridgeline development. SAR029422-029423; AR005324,
5 005329, 005331. Commissioners were also given one or more versions of a Memorandum
6 proposing new mitigation that would screen development at the perimeter of the lupine field and
7 constrain design of structures and berms on the Parcel D mesa. *Id.*, SAR029419-029420. At the
8 hearing, Staff advised that only five lots would be relocated, then corrected this to nine lots when
9 Commissioner objected that the staff report relocates thirteen lots. AR005403-005407.
10 Commissioners objected that it was unclear where the relocated lots would be placed and what
11 impacts that would cause. AR005339-005342. Commissioners and the public objected to
12 project approval without a map. AR005379-5380, 005393, 005395-005396, 005403-005405.

13 Board of Supervisors hearings. Before the Board hearings, LandWatch again objected to
14 the revisions to the project and environmental setting descriptions and the inadequate visual
15 analysis. AR015577-015597, 005443-005445. The staff report for the December 2 hearing
16 indicates that the initial project description, the subject of the EIR's visual analysis, is "now
17 obsolete" (AR004437) and presents a new site plan, "Alternative Site Plan - #5 PC," dated
18 November 19, 2014, which relocates 9 lots (AR004551-004552²³). At the December 9 hearing,
19 staff argued that the project description was not unstable because the project still has 185 lots and
20 the same roads. AR005548. Staff argued that there had been no error in mapping the Critical
21 Viewshed, just an "interpretation." AR005548-005549. Staff stated that they had not relied on
22 the applicant's photo-simulations, although they were included in the EIR. AR005549. Staff
23 stated that "[s]taff did prepare some visual simulation analysis, which we - - staff would be
24 happy to go through at the direction of the Board," but this did not occur. AR005549. Asked
25 whether staff had obtained independent analysis of the effects of the lot relocations, staff stated
26 that the lots had been relocated pursuant to the Planning Commission's request and that "we
27 know where the sensitive biological areas are." AR005565.

28

²³ Sections of the Record contain multiple Bates numbers. We cite the lower number.

1 **B. The County prejudicially failed to proceed as required by CEQA in the visual**
2 **impact analysis because the descriptions of the project and the environmental**
3 **setting were inadequate and because mitigation was proposed untimely and**
4 **improperly deferred.**

5 The EIR fails to describe the project adequately to support the visual analysis: the actual
6 subdivision map was not provided until after the EIR was completed, and that map is still not
7 final because conditions require lot relocations. The EIR fails to describe the environmental
8 setting adequately because it relies on an erroneous applicant-supplied map of the Critical
9 Viewshed and an incorrect interpretation of the applicable General Plan policies. The EIR fails
10 to discuss the mitigation that was not proposed until last-minute staff reports. The County
11 improperly deferred formulation of mitigation because it was not known to be feasible. These
12 failures precluded informed participation in the visual impact analysis.

13 **1. Requirements for descriptions of the project, setting, and mitigation in the EIR.**

14 a. CEQA requires that the EIR provide a complete and stable project description.

15 An adequate project description must be stable and accurate in order to support public
16 participation and informed decision making. Guidelines, § 15124; *County of Inyo v. City of Los*
17 *Angeles* (1977) 71 Cal.App.3d 185, 192-193, 197-198. An inaccurate project description
18 vitiates the EIR’s analysis; that is, a failure of description causes a failure of analysis. *Laurel*
19 *Heights I, supra*, 47 Cal.3d at 396-397. An inconsistent project description also vitiates adequate
20 analysis. *CBE v. Richmond, supra*, 184 Cal.App.4th at 89; *San Joaquin Raptor Rescue Center v.*
21 *County of Merced* (2007) 149 Cal.App.4th 645, 654-657, 672. A curtailed and shifting project
22 description that precludes informed public participation and decision making is a prejudicial
23 failure to proceed as required by law. *San Joaquin Raptor v. Merced, supra*, 149 Cal.App.4th at
24 655, 672.

25 b. CEQA requires that the EIR provide an accurate disclosure of the environmental
26 setting, including General Plan inconsistencies.

27 A draft EIR must provide a description of the existing environmental setting so that it
28 considers impacts “in the full environmental context.” Guidelines, §§ 15120(c), 15125(a), (c).
 “‘It is only against this baseline that any significant effects can be determined.’” *County of*

1 *Amador, supra*, 76 Cal.App.4th at 952. Because the environmental setting information must be
2 used to assess impacts, the key question is “whether the EIR contains a sufficient description of
3 the baseline environment to make further analysis possible.” *Id.* at 954. The discussion must
4 disclose “any inconsistencies between the proposed project and applicable general plans and
5 regional plans” because that is a factor in determining significant impacts. Guidelines, §
6 15125(d); *Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal.App.4th 1170,
7 1205; *Napa Citizens, supra*, 91 Cal.App.4th at 360–361.

8 c. CEQA requires mitigation be discussed in the EIR.

9 “[T]he development of mitigation measures, as envisioned by CEQA, is not meant to be a
10 bilateral negotiation between a project proponent and the lead agency after project approval; but
11 rather, an open process that also involves other interested agencies and the public.” *CBE v.*
12 *Richmond, supra*, 184 Cal.App.4th at 94. CEQA requires that mitigation be discussed in the EIR
13 itself. Guidelines, § 15120(c) (draft EIR must discuss mitigation); *Save Our Peninsula, supra*,
14 87 Cal.App.4th at 128-131; *Laurel Heights I, supra*, 47 Cal.3d at 404-405. Last-minute changes
15 to mitigation in staff reports and errata cannot substitute for the discussion that is required to be
16 in the EIR. *Save Our Peninsula, supra*, at 130-131, citing *Environmental Defense Fund, Inc. v.*
17 *Coastside County Water District* (1972) 27 Cal.App.3d 695, 706 (“ whatever is required to be
18 considered in an EIR must be in that formal report; what any official might have known from
19 other writings or oral presentations cannot supply what is lacking in the report”). Feasibility of
20 mitigation must be discussed in the EIR as well. *Gray, supra*, 167 Cal.App.4th at 1120.

21 Judicial review of LandWatch’s claims that the County failed to provide adequate
22 descriptions of the project and environmental setting in the EIR and to propose mitigation timely
23 should be non-deferential because the County failed to proceed as required by law. For example,
24 an EIR that fails to provide an adequate project description is inadequate “as a matter of law.”
25 *CBE v. Richmond, supra*, 184 Cal.App.4th at 82-83. Similarly, an incorrect or incomplete
26 project description is inadequate “as a matter of law.” *San Joaquin Raptor Rescue Center v.*
27 *County of Stanislaus* (1994) 27 Cal.App.4th 713, 729.

1 **2. The descriptions of the project and environmental setting in the EIR are**
2 **inaccurate because they rely on an erroneous, applicant-supplied map of**
3 **Critical Viewshed and misinterpret the General Plan policies; thus post-EIR**
4 **changes to the project were required.**

5 The DEIR acknowledges that lots 1, 2, 10 through 12, 82-85, and 144 “are either mostly
6 and/or fully contained within either the Critical Viewshed boundary or 100-setback area;
7 therefore, the building envelopes cannot be relocated without relocating entire lots.” AR000257.
8 The DEIR acknowledges this would be a potentially significant impact. AR000258-000259.
9 However, the DEIR does not bar home sites in the Critical Viewshed, but instead concludes that
10 this impact would be less than significant based on “existing zoning requirements” and on
11 Mitigation Measure 3.1-1a requiring that “buildings on lots where building sites cannot be fully
12 located outside the Critical Viewshed must not be visible from scenic roadways.” AR000259-
13 000260. In effect, the DEIR interprets Toro Area Plan Policies that bar development in the
14 Critical Viewshed and the 100-foot setback to permit such development as long as it is not
15 visible from certain locations. Despite LandWatch’s objections and request that the EIR evaluate
16 a compliant subdivision map (AR003533), the FEIR insists that locating 8 lots within the Critical
17 Viewshed is “consistent” with Policy 40.2.5. AR003577.

18 After the FEIR was completed, staff revisited the issue, asking the Planning Commission
19 to “interpret” the Critical Viewshed policy to find that “area that is not visible should not be
20 included within the critical view shed.” AR005012, 005028-005029; *see also* AR004156,
21 005012-005014. The impetus for revisiting the issue, notwithstanding the FEIR’s dismissal of
22 LandWatch’s concerns, was the applicant’s concern that the Critical Viewshed map might
23 constrain the project. AR005042.

24 The staff report for the October 29 hearing discloses that the EIR relies on an incorrect
25 map of the Critical Viewshed “provided by the applicant.” AR004185; *see* AR006245-006249
26 (map provided by applicant). The report admits that the County’s large-scale drawing of the
27 Critical Viewshed is missing. *Id.* Staff admit that the available drawing “is not precise and at
28 the scale provided is extremely difficult to know for sure where the line should be.” *Id.* The

1 staff report revises the Critical Viewshed map around lots 82-85, about which the applicant had
2 been concerned, thus removing some of the lots from the Critical Viewshed. AR004185-004188.

3 A subsequent Addendum to that staff report provides “recently” prepared maps of the
4 Critical Viewshed for the entire site and admits that the DEIR’s applicant-supplied map is an
5 “estimate” of its “approximate location.” AR015183-015185. Staff explained on October 29
6 that the County had not prepared its own revised map of the Critical Viewshed “until – I want to
7 say Monday.” AR005283. Staff said its new map is “kind of a collaboration for the mapped
8 area of the critical view shed from the 1982 Toro Area Plan Figure 9 . . . and what staff is
9 interpreting to be the intent of the critical view shed” and that the DEIR map was just “a best
10 guess scenario.” AR005146. Confusingly, the Addendum proposes, as did the EIR, that it may
11 be “acceptable to have lots placed in the Critical Viewshed if they cannot be seen” (AR015181),
12 while staff said at the hearing that lots should be barred in the Critical Viewshed (AR005148).

13 Planning Commission members expressed substantial confusion about the revision of the
14 mapping; the effect on allowable lots; the interpretation of the Critical Viewshed policy; the
15 changing explanations of the effect of the map revisions on the number of allowed lots; and the
16 staff report itself, which staff admitted had omitted explanatory information about the effect of
17 the map revision. AR005196-005198, 005244-005257. One Commissioner objected:

18 “So when it was going through the process in the EIR, none of this came before? I’m
19 surprised. . . . Because it seems like you’re changing the rules in the middle of the game
20 so I’m not too sure what’s going on here. . . . I’m not too sure what we are approving
anymore.” AR005252-005253.

21 LandWatch also objected to the last-minute revision of the Critical Viewshed. AR005268.

22 The staff report for the November 12 Planning Commission hearing explained that,
23 “based on the interpretation provided in the October 29, 2014 staff report,” seven lots “need to
24 be relocated to areas outside the Critical Viewshed and 100 foot setback or eliminated from the
25 Vesting Tentative Map[.]” AR004233-004244. Proposed conditions called for relocating these
26 lots after project approval. SAR029421-029423. The public and Commissioners objected to
27 approving a subdivision without knowing where the lots were. AR005379-005380, 005393,
28

1 005395-005396, 005403-005405 (“What are we approving?”) Staff promised a new map later,
2 but acknowledged that the Planning Commission would not see it. AR005405, 005408.

3 The staff report for the December 2, 2014 Board of Supervisors hearing replaces the
4 “now obsolete project description” used in the EIR (AR004437) with a Revised Vesting
5 Tentative Map dated November 19, 2014, the “Alternative Site Plan - #5 PC,” which relocates
6 nine lots. AR004551-004552. Staff reviewed the changes to the subdivision map with the
7 Board, but did not present revised photo-simulations or other analyses of the effect of the
8 changes. AR005417-005418, presenting AR020255-020259. Furthermore, in explaining the
9 revision of the Critical Viewshed, staff presented the unrevised map of lots 82-85, i.e., the
10 “obsolete” map considered by the Planning Commission. AR005418-005419, presenting
11 AR020261 (*compare* AR004186-004187). Thus, no map was ever presented that relates the lot
12 locations in the “revised” November 19 subdivision map, which was approved, to the “revised”
13 Critical Viewshed map.

14 The County failed to proceed as required by CEQA. First, the EIR’s description of the
15 environmental setting is materially incorrect because it misrepresents the location of the Critical
16 Viewshed and misrepresents the consistency of the proposed project with the General Plan
17 policies protecting this “most sensitive” (AR000240) visual resource. Guidelines, § 15125(a),
18 (c), (d). This environmental setting information must be in the EIR itself, not in documents or
19 testimony outside the EIR. *San Joaquin Raptor Rescue Center v. County of Stanislaus, supra*, 27
20 Cal.App.4th at 727; *Save Our Peninsula, supra*, 87 Cal.App.4th at 120-124, 128; Guidelines, §
21 15120(c) (draft EIR must contain information required by Guidelines, § 15125). Second, the
22 EIR’s description of the project was materially incorrect and shifting because the map it assessed
23 was changed after the EIR was final. *See, e.g., County of Inyo, supra*, 71 Cal.App.3d at 192-193,
24 197-198; *CBE v. Richmond, supra*, 184 Cal.App.4th at 89. The informational failures were
25 prejudicial because they frustrated public participation by offering only conflicting, confusing,
26 and untimely analysis of this important issue.

1 **3. The project description in the EIR is inaccurate and incomplete because it**
2 **incorrectly states that there would be no ridgeline development; thus post-EIR**
3 **changes to the project and untimely mitigation proposals were required.**

4 The DEIR concludes that ridgeline development impacts would be less than significant,
5 stating categorically that there is no potential for ridgeline silhouettes visible from SR68 or River
6 Road, except on the eastern Parcel D, where potential ridgeline silhouettes would be screened by
7 a berm. AR000287-000291. Despite this, the staff report for the November 12 hearing
8 discloses significant ridgeline visual impacts for the first time, stating that six lots on the western
9 parcel must be relocated or removed as ridgeline development and that another lot must be
10 reconfigured or conditioned to prevent ridgeline development. AR004224.

11 Subsequent staff reports offer conflicting conclusions, but no actual analysis. For
12 example, the November 12 Errata memo, distributed at the hearing itself, states that two lots are
13 disapproved entirely and that five lots should be conditioned through a “note” on the final map to
14 require “alternative designs” to avoid ridgeline development. SAR029422; *see* AR005324,
15 00005329, 005331 (distributing “replacement memos”). The December 2 staff report, presenting
16 a final subdivision map to replace the “now obsolete project description,” relocates nine lots due
17 to impingement into the Critical Viewshed or due to ridgeline development, but without analysis
18 of ridgeline impacts. AR004437, 004441, 004551-004552. Final condition 18 states that three
19 lots are “not approved for ridgeline development and home design must not result in ridgeline
20 development;” states that one lot must be “reconfigured” or have an easement placed on it; and
21 limits where “relocated lots shall be placed.” AR000050. At the December 2 hearing, staff
22 attributed map revisions to its revision of the Critical Viewshed, but without any discussion of
23 ridgeline development constraints. AR005416-005419.

24 The untimely revelation of ridgeline visual impacts was due to the County’s stubborn
25 refusal to provide an adequate project description, even in in response to timely comments.
26 LandWatch requested the location of buildings and landscaping, as required by the County
27
28

1 subdivision ordinance, without which it is impossible to determine if a lot is buildable.²⁴
2 AR003532-003534, 003908. The FEIR’s response – that the visual analysis was adequate
3 because it assumed that building sites could occur anywhere on the lots (AR003575) – is belied
4 by the subsequent admissions that development could not occur anywhere on a number of lots
5 without significant ridgeline impacts. AR000050, 004224; SAR029422-029423. The FEIR also
6 refused to provide the slope overlay map of the alternatives requested by LandWatch, even
7 though the overlay would have revealed ridgeline development. AR003908, 003941. Thus, the
8 County failed to meet CEQA’s requirement for good faith, reasoned comment response.

9 The untimely changes to the project and mitigation were also due to the County’s failure
10 to provide routine flagging and staking information in describing the project, which would have
11 revealed the ridgeline impacts. LandWatch and members of the Planning Commission and the
12 Land Use Advisory Committee all objected to the omission. AR015584-015585, 004328,-
13 004329, 005240. The County’s Staking and/or Flagging Criteria specifically require flagging
14 and staking for projects – not photo-simulation – within the area designated Visually Sensitive in
15 the Toro Area Plan. *See* AR015584, *citing* AR015710, 015714. The Monterey County Zoning
16 Ordinance requires flagging and staking to approve “all developments and subdivisions.”
17 SAR028977 (§ 21.46.060A, emphasis added). It is not sufficient to flag and stake after the
18 subdivision is approved, because the analysis is required in order to design the subdivision itself,
19 e.g., to determine how to configure buildable lots and roads. *See* AR015585, *citing* SAR028977-
20 028978 (§ 21.46.060(C)). The County routinely does require flagging and staking before
21 subdivision approval to evaluate and avoid ridgeline development and other visual impacts. *See*
22 AR015584, *citing* AR015683-015686, 015707, 015698 (CEQA reviews of three other
23 subdivisions in project area). Despite this, no flagging and staking information was provided;
24 nor could it have been provided because the applicant failed to provide building site locations as
25 required by the subdivision ordinance.

26
27
28 ²⁴ The Monterey County Subdivision Ordinance requires a subdivision applicant to submit a
“to scale site plan showing proposed building foot prints and landscaping . . .” (SAR029186 - §
19.05.040L.3.C.(3)) as well as lot layouts and other infrastructure (SAR029181 - § 19.05.035L).

1 The shifting and incomplete project description is a failure to proceed as required by
2 CEQA. *See, e.g., County of Inyo, supra*, 71 Cal.App.3d at 192-193, 197-198; *CBE v. Richmond,*
3 *supra*, 184 Cal.App.4th at 89. The last-minute proposal of mitigation is also a failure to proceed
4 as required by CEQA. *See, e.g., Save Our Peninsula, supra*, at 130-131. The informational
5 failure was prejudicial. Not only is the description in the EIR inadequate to support analysis, but
6 the County has never provided a description of the project that would enable to public to verify
7 or understand its confusing and untimely post-FEIR determinations that the project requires
8 changes and mitigation to avoid ridgeline impacts. Nothing provided to the public explains the
9 differing conclusions and mitigation conditions in the DEIR, the November 12 staff report, the
10 November 12 Errata, the December 2 staff report, or the final conditions of approval.

11 **4. The project description is incomplete and shifting because conditions of**
12 **approval require post-approval changes to lot locations, which may have**
13 **undisclosed visual impacts.**

14 The final conditions of approval 85, 86, and 95 require relocations of lots and proposed
15 improvements to avoid impacts to special status plant species and wetlands. AR000074-000075,
16 000083-000084. Conditions 105 and 106 require relocation of lots and improvements to avoid
17 impacts to cultural resources. AR000090-000091. Conditions 80 and 94 require additional lot
18 relocation; and, although they may be clerical errors, that cannot be determined on this record.²⁵
19 Although condition 95 calls for review and approval of lot relocations by the Planning
20 department, conditions 85, 86, 105 and 106 do not; and, in any event, none of the conditions
21 requires any consideration of visual impacts in relocating the lots.

22
23 ²⁵ Condition of approval 80 requires relocation of lots outside the Critical Viewshed and
24 100-foot setback, and, separately, requires relocation of lots 83, 83A, 84, 82A, 138, 138a, and
25 139, even though the revised map was supposed to have addressed this issue. AR000071.
26 However, on this record, it is impossible to determine if this is a genuine requirement or a
27 clerical error, because, as discussed in section IVB2 above, the County has never provided an
28 overlay of the revised Critical Viewshed and the revised subdivision map.

29 Condition of approval 94 requires relocation of lots 1-15 “as shown in the vesting
tentative map for Alternative 5-PC” to avoid riparian habitat. This condition may be a clerical
error since the lots designated 1-15 were previously located near riparian areas in the west end of
the site. AR000219. However, the specific reference to the “Alternative 5-PC” map
(AR000108) implies that lots on the map that was actually approved must be relocated.

1 As LandWatch repeatedly objected, lot relocations to address impacts to one resource
2 may not be feasible without undisclosed impacts to other resources, including visual resources;
3 and it is improper to delegate this determination to staff outside the EIR process. AR003532,
4 003534, 003906-003909; *see Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296,
5 307 (improper to delegate mitigation to staff in post-CEQA review). The FEIR's response that
6 the site plan revisions are "feasible and reasonable" merely identifies three examples of revisions
7 made in Alternatives 3 and 5. AR003940-003941. This does not demonstrate that all of the
8 remaining lot relocations are feasible without visual impacts.

9 The project description is incomplete because it does not specify final lot locations.
10 This violates CEQA's requirements for a stable and complete project description. *See e.g., CBE*
11 *v. Richmond, supra*, 184 Cal.App.4th at 89. The inconsistency and omission is prejudicial
12 because, without specifying lot locations, the visual impact analysis is incomplete and the photo-
13 simulations are inaccurate. Analysis based on a shifting project description is a prejudicial abuse
14 of discretion. *San Joaquin Raptor v. Merced, supra*, 149 Cal.App.4th at 654-657, 672.

15 **5. Mitigation was proposed untimely because the lupine field berm is not**
16 **identified or specified as mitigation in the EIR; and formulation of**
17 **mitigation was improperly deferred because the berm is not known to be**
18 **feasible.**

19 The DEIR concludes that visual impacts to SR68 will be less than significant in part
20 because an 800-foot berm will screen lots 20-28, citing the applicant's photo-simulation showing
21 complete screening as evidence. AR000283, 000293. Caltrans and LandWatch objected that the
22 berm was not enforceable mitigation, was not adequately specified, and may not be feasible, and
23 requested consideration of alternative mitigation. AR003534, 003396, 003774-003775. The
24 FEIR denies that the berm is mitigation, characterizing it merely as "part of the project
25 description" (AR003577), and again cites the applicant's simulations to claim it is effective
26 (AR003399). The FEIR adds a requirement for validation of this claim, but not until after
27 project approval. AR003399, 00003575. At the October 29 hearing the applicant presented its
28 own photo-simulations of the lupine field berm, which were apparently the same photo-
simulations that appeared in the DEIR. AR005205-005206, 015212-015213, 000293. After a

1 Commissioner objected to the lack of independent simulation and challenged the berm
2 simulation (AR005234), staff admitted applicant’s simulation did not represent the same project
3 or the same viewpoints as the simulations prepared by the EIR consultant. They “were prepared
4 from different viewpoints;” it “could be correct” that houses would remain visible even with the
5 berm; and “there is a distinct difference” because the applicant’s simulations are of “lower-
6 profile, single-story houses” rather than of the two-story houses in the consultant’s simulations.
7 AR005237-005238. Commissioners objected that the EIR failed to provide an “apples-to-
8 apples” comparison of unmitigated and mitigated conditions. AR005239, 005244. In response,
9 staff proposed new mitigation for the lupine field, adopted as conditions 17 and 19, including,
10 *inter alia*, requirement for complete screening of lots 16-28, a revegetation plan, retention of
11 “gentle slope,” and a building height limit. SAR029419-029420, AR000050-000051.

12 The County failed to proceed as required by CEQA for four reasons. First, an EIR may
13 not conflate determination of significance and discussion of mitigation simply by characterizing
14 mitigation as a project feature and concluding that impacts are not significant. *Lotus v.*
15 *Department of Transportation* (2014) 223 Cal.App.4th 645, 653-658. Such conflation is a
16 “structural deficiency” in the EIR that makes it “impossible to determine whether mitigation
17 measures are required or to evaluate whether other more effective measures than those proposed
18 should be considered.” *Id.* at 657, 656, emphasis added. Here, the EIR insisted that the berm
19 was not mitigation but “part of the project description,” and thus it did not respond to requests to
20 demonstrate its feasibility or consider alternative measures if it were not. AR003396.

21 Second, the mitigation eventually proposed in staff reports was untimely. CEQA requires
22 that mitigation measures be proposed and discussed in the EIR itself and not in last minute staff
23 reports and errata. *Save Our Peninsula, supra*, 87 Cal.App.4th at 128-131; *Laurel Heights I,*
24 *supra*, 47 Cal.3d at 404-405. The feasibility of mitigation must be discussed in the EIR as well.
25 *Gray, supra*, 167 Cal.App.4th at 1120. The County frustrated informed participation because
26 comments had specifically sought this information. Thus, third, the FEIR’s failure to provide
27 berm specifications and its misleading claim that the applicant’s simulation show the berm to be
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1 effective violate the requirement for “good-faith reasoned analysis in response to comments.”
2 *People v. County of Kern, supra*, 39 Cal.App.3d at 841-842; Guidelines, § 15088(c).

3 Fourth, design of the berm is improperly deferred because it is not known to be feasible.
4 *CBE v. Richmond, supra*, 184 Cal.App.4th at 94; *Sundstrom, supra*, 202 Cal.App.3d at 308-309.
5 Here, comments questioned the feasibility of an effective berm and objected that the EIR had not
6 demonstrated that a site plan complying with all mitigation measures calling for relocation of
7 project features would be feasible. AR003396, 003534, 003774-003775, 003905, 003908; *see*
8 *also* 015589-015590. The FEIR’s response was to propose that feasibility be determined after
9 project approval. AR003399, 00003575. But the record shows that an effective berm may not
10 be feasible. Conditions 105 and 106 require compliance with the cultural resource mitigation
11 plan, which in turn calls for moving or shortening the lupine field berm because it is in the
12 cultural resource deposit area. AR000090-000091, 001378-001382, 001357, 001366, 000219
13 (map), 000107 (map). Conditions 85, 86, and 95 also call for relocating lots and infrastructure in
14 the vicinity of the lupine field berm to avoid biological resource impacts. AR000074-000075,
15 000083. In short, the entire configuration of development around the lupine field remains
16 subject to post-approval revisions that may render the lots undevelopable and/or an effective
17 berm infeasible. Under the circumstances, the EIR’s failure to demonstrate that the berms are
18 feasible mitigation violates CEQA.

19 **6. Mitigation was proposed untimely because the Parcel D berm is not**
20 **identified as mitigation or specified in the EIR; and formulation of**
21 **mitigation was improperly deferred because the berm is not known to be**
22 **feasible mitigation.**

23 The RDEIR revises the development plan for Parcel D, including the location of the
24 proposed berms. AR002686, 002689. Again, in response to comments seeking specification of
25 this critical mitigation (AR003534), the FEIR denies that the berms are mitigation. AR003577,
26 003578. Caltrans objected to the lack of analysis for the RDEIR’s visual impact conclusions,
27 e.g., a line of sight analysis like the one provided in the DEIR for the originally proposed Parcel
28 D berm, objecting that “the reader must rely solely on the personal opinion of the author.”
AR003775. The Planning Commission also objected to the lack of evidence showing that the

1 Parcel D berms would actually be effective. AR005239-005244. Staff acknowledged that a line-
2 of-sight study had not been presented to the Planning Commission for Alternative 5 and was
3 “perhaps not” in the EIR.²⁶ AR005242. Staff then presented more last-minute mitigation to
4 rectify the lack of analysis, including lower building heights, a requirement for complete
5 screening of buildings, lighting conditions, landscaping conditions – and a potentially infeasible
6 requirement to maintain “the existing slopes and topographic features of the natural hillside.”
7 SAR029420; AR000051, 000072. No evidence was presented that the berms could feasibly
8 screen development and maintain the natural hillside; this was to be determined after project
9 approval by flagging and staking. AR000051. Again, this mitigation was proposed untimely
10 and its formulation was improperly deferred, violating CEQA and precluding informed public
11 participation and decision-making.

12 **7. Mitigation was proposed untimely because post-FEIR staff reports proposed**
13 **new mitigation that replaces the EIR’s reliance on zoning.**

14 The DEIR’s conclusion that visual impacts will be less than significant relies repeatedly
15 on the promise that the County will zone the currently unzoned site with Visual Sensitivity and
16 Design Control overlays. AR000257, 000260, 000281, 000284; *see* AR000201-000202,
17 AR000249-250 SAR028968-028971, 028975-028978. Because the DEIR states that the zoning
18 is not part of the project but merely part of the future implementation of the 2010 General Plan
19 (AR000201-000202, 000236), LandWatch sought a commitment that the Board would actually
20 zone the site as promised. AR003531. The FEIR responded equivocally that the Planning
21 Department, but not the Board of Supervisors, intended to apply a VS overlay to the project
22 site.²⁷ AR003574. LandWatch objected that unless the zoning were made part of the project it
23 would not be enforceable: the County expressly exempts the project from the 2010 General Plan
24 and its implementing zoning because the application was completed in 2005. AR015593-
25 015594; *see* AR000022. Furthermore, a vesting tentative map is subject only to ordinances,

26 ²⁶ The line of sight study in the DEIR for the Parcel D berm was for the initially proposed
27 project. AR000288-000289. No such analysis was provided in the EIR for alternative 5.

28 ²⁷ The response fails to meet CEQA’s requirements for good-faith reasoned analysis,
because it simply does not answer the question LandWatch posed. Guidelines, § 15088(c).

1 policies, and standards in effect when its application is completed. Gov. Code § 66498.1; *Bright*
2 *Development Co. v. City of Tracy* (1993) 20 Cal.App. 4th 783, 788-789, 792-793.

3 After the EIR was completed and without addressing LandWatch’s objection, staff
4 proposed another last-minute mitigation scheme purporting to provide the same level of
5 protection as zoning: the County, as party to the CC&Rs, could impose some specific Design
6 Criteria on future development in areas of visual sensitivity and Parcel D. SAR029419-029420;
7 AR004441, 000051, 000072. The CEQA findings disavow the EIR’s reliance on zoning to find
8 impacts less than significant, claiming the belated “Design Criteria . . . provide an equal level of
9 protection to visual resources.” AR000007-000008.

10 This introduction of new mitigation after the EIR was final through last-minute staff
11 reports violates CEQA. *See, e.g., Save Our Peninsula, supra*, 87 Cal.App.4th at 128-131. It is
12 prejudicial because the public sought assurances that the promised zoning would occur and there
13 is no evidence that the Design Criteria are equivalent to the zoning protections promised by the
14 EIR. Equivalence is doubtful: conditions 19 and 83 enumerate just five specific Design Criteria
15 to be applied (e.g., a 20 foot height limit, non-contrasting colors) (AR000051, 000072), but the
16 Zoning Ordinance permits plenary review and imposition of conditions that are unrestricted as to
17 type through the Visual Sensitivity, Site Plan Review, and Design Control overlays. *See*
18 SAR028968-028978 (Zoning Ordinance, Chapters 21.44, 21.45, 21.46). Regardless, the bait
19 and switch denied the public the opportunity for comment and response on this issue.

20 **8. The EIR improperly piecemeals visual analysis because off-site traffic**
21 **improvements were not included in the project description that was**
22 **evaluated for visual impacts.**

23 The RDEIR proposes a new intersection for project access and widening 1.2 miles of
24 SR68. AR002650-002651, 002659, 002686. The RDEIR provides no analysis of visual impacts
25 from widening SR68. For the new intersection, it merely observes that the impact would be
26 comparatively less than the unavoidably significant impact from the initially proposed access.
27 AR002622, 002694. Caltrans objected to the lack of analysis, explaining that the intersection
28 would degrade visual qualities and compromise the scenic highway designation. AR003775.

1 The FEIR refused to provide the analysis, arguing that it “is more appropriate for a NEPA
2 document (or a Caltrans CEQA clearance document)” as may be required later. AR003783.

3 CEQA requires an EIR to evaluate the whole of a project. CEQA Guidelines, §§ 15378,
4 15126, 15165. An agency may not split up a project into pieces in order to avoid environmental
5 review of the whole project. *Orinda Ass’n. v. Board of Supervisors* (1986) 182 Cal.App. 3d
6 1145, 1171. If a project is conditioned on construction of a traffic improvement project the
7 applicant must fund or construct, impacts from that improvement must be evaluated in the
8 CEQA document. *Plan for Arcadia v. City Council of Arcadia* (1974) 42 Cal.App.3d 712, 720,
9 723, 726; *see also Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora*
10 (2007) 155 Cal.App.4th 1214, 1231. Whether the improvement is part of the project is a
11 question of law. *Tuolumne, supra*, 155 Cal.App.4th at 1224.

12 Here the SR68 traffic improvements are part of the project because they are an express
13 condition of approval and the developer must construct or pay for them. AR000066-000069.
14 The failure to provide visual impact analysis of these improvements in the EIR was a failure to
15 proceed as required by CEQA because the EIR does not evaluate the whole of the project.
16 Furthermore, the observation that the new intersection would have a comparatively lesser impact
17 than the previously proposed access, even if true, does not provide a visual analysis of the new
18 intersection. CEQA requires that impacts be evaluated by comparing them to the existing
19 environmental setting, not to a hypothetical condition such as the potentially more adverse visual
20 impacts of the originally proposed project. *Woodward Park Homeowners Ass’n., Inc. v. City of*
21 *Fresno* (2007) 150 Cal.App.4th 683, 707-710.

22 **C. The County prejudicially failed to proceed as required by CEQA by failing to**
23 **circulate an adequate and objective draft EIR that reflected its independent**
24 **judgement, instead relying on erroneous applicant-prepared materials.**

25 P.R.C. § 21082.1(c)(2) requires a lead agency to “circulate [CEQA] documents that
26 reflect its independent judgment.” This specifically requires the agency to vet the draft EIR:

27 “Before using a draft prepared by another person, the lead agency shall subject the draft
28 to the agency's own review and analysis. The draft EIR which is sent out for public
review must reflect the independent judgment of the lead agency. The lead agency is
responsible for the adequacy and objectivity of the draft EIR.” Guidelines, § 15084(e).

1
2 Case law is in accord. *Mission Oaks Ranch Ltd. v County of Santa Barbara* (1998) 65 Cal.App.
3 4th 713, 723 (statutory duty is to public, not applicant), disapproved on other grounds in *Briggs*
4 *v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123 n10.; *Friends of La Vina*
5 *v. County of Los Angeles* (1991) 232 Cal.App.3d 1446, 1452. While an applicant may provide
6 information, “[i]f information is provided in the form of a draft EIR, the lead agency may not use
7 a draft EIR as its own without independent evaluation and analysis.” *People v. County of Kern,*
8 *supra*, 62 Cal.App.3d at 775. An agency may not delegate its duty to gather information to the
9 applicant; the applicant’s vested interest may render its representations questionable. *Save Our*
10 *Peninsula* , *supra*, 87 Cal.App.4th at 121-122.

11 The County failed to proceed as required by CEQA because it used two sets of applicant
12 submissions without exercising independent judgment. First, as staff acknowledged after the
13 FEIR was final, the DEIR provided misleading applicant-supplied photo-simulations that
14 represented smaller houses and a different angle or perspective. AR005237-005238; *compare,*
15 e.g., AR000265 to AR000293. Second, as staff also acknowledged after the FEIR was final, the
16 DEIR included and relied on an incorrect map of the Critical Viewshed supplied by the
17 applicant, which it did not and could not verify because the County’s large scale drawing was
18 missing. AR004185, 015183. As discussed above, both of these errors in the DEIR resulted in
19 substantial revisions of the project description, the environmental setting, and the adopted
20 mitigation – all made through ad hoc staff reports, errata, and presentations at hearings after the
21 FEIR had been released. The need to make these changes demonstrates both that the County had
22 failed to exercise independent judgment about the contents of the DEIR and that this failure was
23 prejudicial to informed public participation.

24 **V. There is no substantial evidence to support the conclusion that visual impacts to Fort**
25 **Ord National Monument and Toro Park would be less than significant.**

26 The DEIR’s conclusion that visual impacts to the hiking trails of the two major parks
27 adjacent to the project would be less than significant is not supported by substantial evidence
28 because: (1) it rests on the unsupportable claim that hiking trails are not “common public

1 viewing areas,” (2) it claims that views will be protected by existing zoning, even though that
2 zoning only protects common public viewing areas and will not even apply to the project.

3 The DEIR concludes that the visual impacts to Toro County Park and the Fort Ord
4 National Monument (the “BLM land”) are less than significant because their trails are not
5 considered to be “common public viewing areas’ as defined by Title 21” due to the “physical
6 challenges of accessing the higher BLM trails.” AR000281-000283. However, the Zoning
7 Ordinance defines “common public viewing area” to include a “public park from which the
8 general public ordinarily views the surrounding viewshed.” SAR028845 (§ 21.06.195, emphasis
9 added.) It is clear from evidence in the EIR and submitted with comments that large numbers of
10 the general public do use the trails, specifically to enjoy the surrounding viewshed. The DEIR
11 admits that the trails in these parks are used by hikers, mountain bikers, and horseback riders,
12 including 120,000 annual visitors to Toro Park and 75,000 annual visitors to Fort Ord National
13 Monument. AR000245. BLM’s 2013 tracking data show the Fort Ord National Monument
14 actually receives 325,000 annual visitors – based on monitored trailheads. AR015595, *citing*
15 AR015749-015755. BLM has recently invested in improved parking facilities on SR68 to
16 accommodate demand for use of the hiking trails. SAR029390-029393. The DEIR admits that
17 most Fort Ord visitors do in fact use the 50 miles of trails, that the most popular hiking and
18 riding areas are those directly across SR68 from the project. AR000245. The DEIR
19 acknowledges that “[h]igh quality views from recreation trails and areas . . . are generally
20 considered visually sensitive.” AR000253. The public, who are qualified to opine on the
21 significance of visual impacts, testified to the extensive use of the Fort Ord trails and the visual
22 importance of the views of the Ferrini Ranch to park users. *See e.g.* AR003496-003498, 003898,
23 004008; *Pocket Protectors v City of Sacramento* (2004) 124 Cal.App.4th 903, 932, 937; *Ocean*
24 *View Estates Homeowners Ass’n v. Montecito Water Dist.* (2004) 116 Cal.App.4th 396, 402.

25 Despite this, the DEIR argues that the trails are not common public viewing areas due to
26 the “physical challenges of accessing the higher BLM [and Toro Park] trails.” AR000281-
27 000282. The DEIR offers no evidence for the claim that the higher trails are not used – a claim
28 that originated with the applicant. AR8703 (applicant, arguing that only views from roads are

1 common public viewing areas, ignoring inclusion of parks in ordinance). The implication that
2 thousands of hikers confine their use to the lower trails is on its face absurd given the
3 acknowledged purpose of these parks and the visitor statistics based on trailhead monitoring.
4 But even if it were true that the hikers only used the lower reaches of the Fort Ord trail system,
5 the DEIR's Viewpoint Map and its visual simulations from Viewpoints 7 and 8 demonstrate that
6 the project development would be highly visible even at the lower level Fort Ord trails.
7 AR000261, 000277. Furthermore, even if the trails were not "common public viewing areas,"
8 the County may not simply dismiss impacts to the areas by establishing a threshold of
9 significance that only considers effects to common public viewing areas as potentially
10 significant. CEQA does not permit an agency to rely uncritically on a significance threshold that
11 "would foreclose consideration of other substantial evidence tending to show the environmental
12 effect to which the threshold relates might be significant." *Protect the Historic Amador*
13 *Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1109; *see Mejia v. City of*
14 *Los Angeles* (2005) 130 Cal.App.4th 322, 341-342. The record establishes that there may be
15 significant impacts to thousands of trail users regardless of the EIR's strained interpretation of
16 "common public viewing area." *See* AR008703, 008709.

17 CEQA requires that significance findings be supported by substantial evidence that
18 includes facts. Guidelines, §§ 15064(f), 15384(b), 15091(b). "Unsubstantiated opinion," like the
19 applicant's speculation here, is not substantial evidence. P.R.C., §§ 21080(e), 21082.2(c). An
20 EIR "must contain facts and analysis, not just the agency's bare conclusions or opinions." *Laurel*
21 *Heights I*, 47 Cal.3d at 404-405; *Citizens of Goleta Valley v. Bd of Supervisors* (1990) 52 Cal. 3d
22 553, 568. And a court need not defer to opinion unsupported by facts:

23 "We do not suggest that a court must uncritically rely on every study or analysis
24 presented by a project proponent in support of its position. A clearly inadequate or
25 unsupported study is entitled to no judicial deference." *Laurel Heights I* at 409-410, fn.
12, emphasis added.

26 Here no facts and analysis support the EIR's claim that the hiking trails are not common public
27 viewing areas, or that the higher elevations are not frequently used, or that the visual impacts
28 only occur at higher elevations. The facts showing intensive use of the trails, presented by the

1 public and by the EIR itself, are directly inconsistent with the EIR’s conclusions, and that
2 inconsistency precludes substantial evidence. *Vineyard, supra*, 40 Cal.4th at 439.

3 Furthermore, the EIR’s claim that visual impacts to the parks will be prevented by the
4 existing zoning (AR000281, 000291, 003574) is absurd if in fact the trails are not common
5 public viewing areas. The VS and D zoning overlays and ridgeline development standards are
6 specifically intended to protect only those visual resources visible from a common public
7 viewing area. SAR028975 (§ 21.46.010), SAR028969 (§ 21.44.040E), SAR029077 (§
8 21.66,010D). The County cannot have it both ways; it is disingenuous to claim that ordinances
9 designed to protect common public viewing areas will protect parks while denying that these
10 parks are common public viewing areas. AR015596.

11 Finally, although CEQA requires mitigation be fully enforceable (Guidelines, §
12 15126.4(a)(2)), there is no certainty that the project will be subject to zoning overlays. As
13 discussed above, the project is not subject to any existing or future zoning. And there is no
14 evidence that conditions 19 and 83 are equivalent to existing zoning protections.

15 **VI. The County failed to proceed as required by CEQA because it failed to respond to**
16 **proposed greenhouse gas mitigation and failed to make findings that it is infeasible.**

17 LandWatch proposed specific mitigation measures for greenhouse gas impacts. The
18 failure to respond to each proposal and to find each rejected proposals infeasible violated CEQA.

19 The RDEIR concludes that GHG impacts will remain significant and unavoidable
20 because operational emissions will exceed the adopted threshold of significance, despite
21 proposed mitigation and compliance with regulatory requirements. AR002632. The RDEIR
22 proposes only a handful of mitigation measures, including preferential parking, an alternative
23 transportation plan, recycling storage, “energy efficient technology” for commercial uses, “water
24 conservation,” a ban on wood burning fireplaces, and outdoor plugs for landscaping.

25 AR002630-002631. LandWatch proposed numerous additional mitigation measures, including,
26 for example, a ban on lawns, a ban on use of water for outdoor cleaning, a requirement to
27 exceed Title 24 energy efficiency standards by 20%, mandatory solar power units, alternative
28 fuel use, and electrical vehicle recharging facilities. AR003918-003920. The FEIR declined to
address these proposals individually, merely arguing generally that “many are duplicative of

1 other mitigation measures or standard requirements, such as Title 24 standards, including the
2 new California Building Code.”²⁸ AR003944. The FEIR also argued generally that “[o]ther
3 measures suggested, such as requiring recycled water, would not be feasible to the subdivision.”

4 *Id.* LandWatch objected to the FEIR’s failure to be specific, explaining that most of the
5 proposed measures were not in fact included in the Title 24 standards or the California Building
6 Code and that the FEIR provides no evidence of infeasibility. AR015620-015624. Despite this,
7 the CEQA findings that GHG impacts could not be mitigated to less than significance made no
8 findings regarding infeasibility of proposed mitigation. AR000011. Staff reports did not address
9 the proposed mitigation. AR004442, 004159-004160. Staff merely reported its conclusion:
10 “[t]he key here is what’s feasible for a single-family residential subdivision. We believe that the
11 feasible mitigation measures have been implemented.” AR005552.

12 CEQA bars project approval “if there are feasible alternatives . . . or mitigation measures
13 available” that would substantially lessen the project’s significant environmental effects. P.R.C.,
14 § 21002; Guidelines, § 15021(a). To ensure this, an agency must make findings that either
15 mitigation will avoid or substantially lessen significant impacts or that specific economic, legal,
16 social, technological or other considerations make infeasible the mitigation measures or project
17 alternatives identified in the EIR. P.R.C., § 21081(a)(1)-(3); Guidelines, § 15091(a).

18 All findings under P.R.C. § 21081(a) must be supported by substantial evidence in the
19 record. Guidelines, § 15384(b). Moreover, conclusory findings or findings that do not reference
20 substantial evidence in the record are insufficient. *Environmental Prot. & Info. Center v. Cal.*
21 *Dept. of Forestry & Fire Prot.* (“EPIC”) (2008) 44 Cal.4th 459, 515-517; *see generally*
22 *Topanga, supra*, 11 Cal.3d 506. Thus, if an agency approves a project based on a finding that
23 one or more mitigation measures are infeasible, the agency must “describe the specific reasons
24 for rejecting identified mitigation measures.” Guidelines, § 15091(c); *Village Laguna of Laguna*
25 *Beach, Inc. v. Board of Supervisors* (1982) 134 Cal.App.3d 1022, 1034-1035; *Burger v County*
26 *of Mendocino* (1975) 45 Cal.App.3d 322, 326-327. Separate findings of infeasibility must be

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28 ²⁸ Responding to the Air District, the FEIR asserts that solar panels may be implemented
“voluntarily,” but it does not address feasibility of mandated mitigation. AR003831.

1 made for each mitigation measure that is identified but not adopted, *Village Laguna, supra*, 134
2 Cal.App.3d at 1034, and these findings must be based on facts in the record and must disclose
3 the connection between those facts and its finding. *Id.* at 1034-1035.

4 Here, the findings entirely fail to address the infeasibility of proposed GHG mitigation.
5 AR000011. Even if the findings had repeated staff’s blanket conclusion that “[w]e believe that
6 the feasible mitigation measures have been implemented” (AR005552), neither the FEIR, the
7 staff reports, nor the staff presentations provided any substantial evidence to support such a
8 conclusion. The omission violates CEQA’s requirement that agencies make a specific finding of
9 infeasibility for each rejected mitigation measure, and that this finding be supported by and
10 reference substantial evidence in the record. *Village Laguna, supra*, 134 Cal.App.3d at 1034;
11 Guidelines, § 15384(b); *EPIC, supra*, 44 Cal.4th at 516-517.

12 Furthermore, the County failed to consider and respond to the public’s mitigation
13 proposals in a meaningful way in the final EIR. Guidelines, § 15204(a). “[A]n adequate EIR
14 must respond to specific suggestions for mitigating a significant environmental impact unless the
15 suggested mitigation is facially infeasible. [Citations]. While the response need not be
16 exhaustive, it should evince good faith and a reasoned analysis.” *LAUSD, supra*, 58 Cal.App.4th
17 at 1029-1030. An agency may not dismiss issues raised by the public without appropriate
18 analysis. *SCOPE, supra*, 106 Cal.App.4th at 722-723; *Cleary, supra*, 118 Cal.App.3d at 357..

19 Here, the dismissal of LandWatch’s proposals was conclusory. The response claimed
20 that “many” of the measures were duplicative of Title 24 standards or California Building Code
21 requirements, but it did not identify which were duplicated and which were not. AR003944.
22 LandWatch subsequently demonstrated that most of the proposed measures were not in fact
23 included in the Title 24 standards or the California Building Code. AR015620-015624. The
24 FEIR’s failure to respond with specificity and to address each proposed measure violates
25 CEQA’s requirement that an agency respond in good faith to each mitigation suggestion
26 proposed during an EIR’s public review period, thereby frustrating CEQA’s public-participation
27 objectives. *LAUSD, supra*, 58 Cal.App.4th at 1029.

1 **VII. There is no substantial evidence that the impact to parks is less than significant**
2 **because the County abandoned essential mitigation proposed in the DEIR**
3 **without explanation.**

4 Discussing Impact 3.1-3, Increased Demand for Park Services/Facilities, the DEIR
5 acknowledged that the project would have a significant impact unless Mitigation Measure 3.10-3
6 is adopted, which would require the applicant to “modify the site plan to include and dedicate a
7 minimum of 2 acres of onsite parkland to serve project residents.” AR000577. Based on
8 analysis by the County Parks Planning Manager (AR006037-006038, 008835-008837), the DEIR
9 specifically concluded that mere payment of in-lieu fees, without dedication of on-site parkland ,
10 would not be sufficient mitigation because the project creates more than 50 homes. AR000576.
11 Despite this, at the last minute the County abandoned Mitigation Measure 3.10-3 without
12 explanation; and the conditions of approval merely require payment of an in-lieu fee.
13 AR000099, 015589. The CEQA findings state that that MM 3.10-3 was revised, but do not
14 explain why in-lieu fees would now be acceptable. AR000017. The only evidence in the EIR
15 establishes that dedication of on-site parkland is required and that in-lieu fees are not sufficient
16 to avoid a significant impact. There is no evidence in the EIR to support a finding that the park
17 impact would be less than significant with payment of an impact fee, and this failure to provide
18 evidence violates CEQA. *Laurel Heights I, supra*, 47 Cal.3d at 404-405; *Vineyard, supra*, 40
19 Cal.4th at 442. The evidence is to the contrary, and the unexplained inconsistency precludes
20 substantial evidence. *Vineyard, supra*, 40 Cal.4th at 439.
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1 **CONCLUSION**

2 For all of the foregoing reasons, LandWatch asks this Court issue a writ of mandate
3 setting aside the certification of the EIR and the project approvals.

4 Dated: September 24, 2015

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

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10 Mark R. Wolfe
11 John H. Farrow
12 Attorneys for Petitioner LandWatch Monterey
13 County

1 **PROOF OF SERVICE**

2 I hereby declare that I am employed in the City San Francisco, County of San Francisco,
3 California. I am over the age of eighteen years and not a party to this action. My business address
4 is 1 Sutter Street, Suite 300, San Francisco, CA 94108. I am familiar with this firm's practice for the
5 collection and processing of mail sent via U.S. Mail, which provides that mail be deposited with the
6 U.S. Postal Service on the same day in the ordinary court of business. On September 24, 2015, I
7 served the attached **OPENING BRIEF BY PETITIONER LANDWATCH MONTEREY**
8 **COUNTY** in this action via the U.S. Mail by placing a true copy thereof enclosed in a sealed
9 envelope with postage thereon fully prepaid addressed to:

<p>10 RUTAN & TUCKER, LLP 11 Matthew D. Francois 12 Five Palo Alto Square 13 3000 El Camino Real, Suite 200 14 Palo Alto, CA 94306-9814</p> <p>15 Anthony Lombardo 16 ANTHONY LOMBARDO & ASSOC., INC. 17 144 Gabilan Street 18 Salinas, CA 93901 19 <i>Attorneys for Real Parties</i></p>	<p>Richard Rosenthal Law Offices of Richard Rosenthal, A Professional Corporation 27880 Dorris Drive, Ste. 110 Carmel Valley, CA 93923</p> <p>Alexander T. Henson Law Offices of Alexander Henson 13766 Center Street, Ste. 27 Carmel Valley, CA 93924 <i>Attorneys for Highway 68 Coalition</i></p>
<p>17 Michael J. Whilden 18 Deputy County Counsel 19 Office of the County Counsel 20 168 W. Alisal Street, Third Floor 21 Salinas, CA 93901 22 <i>Attorneys for Respondent County of Monterey</i></p>	<p>Michael Zischke Christian Cebrian Daniel Kolta Cox, Castle & Nicholson, LLP 555 California Street, 10th Floor San Francisco, CA 94104-1513 <i>Attorneys for California Utility Service</i></p>

23 for collection and deposit with the U.S. mail on this date according to ordinary business practices. I
24 declare under penalty of perjury that the foregoing is true and correct and that this declaration was
25 executed at San Francisco, California on September 24, 2015.

26 

27 _____
28 John Farrow