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THE SUPERIOR COURT OF CALIFORNIA

COUNTY OF MONTEREY

MONTEREY COURTHOUSE

MEYER COMMUNITY GROUP;

Petitioner,

vs.

COUNTY OF MONTEREY; MONTEREY COUNTY BOARD OF SUPERVISORS,

Respondents,

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

Real Parties in Interest

AND RELATED CONSOLIDATED ACTION.

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

REPLY BRIEF BY LANDWATCH MONTERY COUNTY

Hon. Thomas W. Wills
Dept. 14

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

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af	acre-feet
afy	acre-feet per year
AR	Administrative Record
CDT	Corral de Tierra (Subbasin)
DEIR	Draft Environmental Impact Report
EIR	Environmental Impact Report
FEIR	Final Environmental Impact Report
LOS	Level of Service
LWOB	Opening Brief by LandWatch Monterey County
MCWRA	Monterey County Water Resources Agency
RDEIR	Revised Draft Environmental Impact Report
RPOP	Real Party In Interest's Opposition to LandWatch Monterey County's Petition for Writ of Mandate
SAR	Supplemental Administrative Record
SR68	State Route 68
SVGB	Salinas Valley Groundwater Basin
SVWP	Salinas Valley Water Project
TAMC	Transportation Agency of Monterey County

I. The County failed to proceed as required by CEQA because the EIR's description of the environmental setting and cumulative analysis were inadequate and untimely.

The County failed to proceed as required by CEQA in its analysis of water supply impacts because the EIR's description of the environmental setting and cumulative analysis were neither *adequate* nor *timely*. LandWatch Opening Brief ("LWOB") 8:1-20:12. Contrary to Real Party, this is not a challenge to the County's factual conclusions but to its compliance with CEQA's informational requirements.[1] Thus, non-deferential de novo review applies. LWOB 2:7-3:22, 19:18-20:12.

A. The description of the environmental setting fails to "make further analysis possible" because it does not disclose the very facts on which the EIR purports to determine significance: aquifer depletion causing falling groundwater levels.

The County erred by failing to disclose and describe the *relevant* "regional setting," i.e., the "physical environmental conditions in the vicinity of the project" in order to "permit the significant effects of the project to be considered in the full environmental context."[2] Guidelines, § 15125(a), (c). The critical omission was a description of *50 years of annual net deficits of 500-1,000 af and annual lowering of 0.6-1.8 feet in groundwater levels* (AR 20156), critical because the EIR's threshold for a significant impact *is* substantial aquifer depletion causing "a net deficit in aquifer volume or a lowering of the local groundwater table level . . .." AR 371.

Although the final EIR belatedly acknowledges "overdraft" conditions in the Corral De Tierra ("CDT") Subbasin (AR 363, 375), nowhere does it acknowledge either the fact or the magnitude of the annual aquifer depletion and falling groundwater levels.[3] Instead, it continues to claim an "overall water

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[1] Contrary to Real Party (RPOP 37:15-38:10, 46:1-4), LandWatch does not argue that the County had to *solve* its water problems, only to *disclose* them sufficiently in order to determine if the Project's contribution is considerable. If it were, and could not feasibly be mitigated, the County could still approve the Project if there were overriding considerations. Guidelines, § 15091(a)(3).

[2] Contrary to Real Party (RPOP 30:12-31:24), LandWatch's setting description challenge is not to the EIR's assumption that on-site, pre-project water use was zero but to its description of *other environmental setting information* in the Project vicinity

[3] Contrary to Real Party's citations (RPOP 55:17), the EIR's references to "overdraft" conditions do *not* disclose "associated problems with declining groundwater levels" *in the CDT Subbasin*. *See* AR 825 (reference to unspecified aquifers experiencing localized "overdraft"), 829-830 (reporting seawater intrusion does not occur in El Toro but in northern end of Salinas Valley), 353 ("overdraft" occurring in unspecified "affected aquifers" in Salinas Valley Groundwater Basin); 362-363 (reporting "overdraft"

surplus" because rainfall recharge exceeds pumping. AR 374, 385. This "surplus" claim is fundamentally misleading because it omits a key factor in the water balance: outflows to the downgradient Laguna Seca and Pressure Subbasins.[4] In light of *all* of the "water budget components" (AR 20157), Geosyntec concludes that "the rate of groundwater pumping . . . exceeds the rate of groundwater replenishment" (AR 20163), hardly a "surplus."

Description of the environmental setting must be sufficient to "make further analysis possible." *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 955. Omission of the fact and magnitude of falling groundwater levels and aquifer deficits is a failure to disclose the very facts needed to determine whether there *is* a significant cumulative impact, because the EIR defines a significant impact as net aquifer deficits or falling groundwater levels.[5] AR 371. Because the setting description fails to disclose relevant aquifer conditions in the CDT Subbasin, it does not make further analysis possible. LWOB 17:4-19:17

As in *County of Amador*, the EIR erred because the setting description omitted information about changing water levels necessary to determine impact significance. *Id.* at 952-954. As in *Friends of the Eel River v. Sonoma Cty. Water Agency* (2003)108 Cal. App. 4th 859, 873-875, because the setting description failed to reveal impacts from past and future projects, it "fails to set the stage for a discussion of the cumulative impact." Failure to describe the setting adequately is not an issue of "conflicting expert opinions," which would be subject to deferential review; "[i]nstead the issue is the

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but claiming "*sustained* groundwater levels within the Basin attributed to the Salinas Valley Water Project"), 374 (claiming *surplus* in four interconnected CDT subareas), 375 (reporting "overdraft" conclusion but *not* falling groundwater levels), 377 (claiming *increasing* groundwater levels "within the Salinas Valley Groundwater Basin"). Contrary to the EIR consultant's claim, cited by Real Party, nowhere did the EIR acknowledge that "groundwater levels are predicted to decline into the future." RPOP 55:28, *citing* AR 5147.

[4] Contrary to Real Party (RPOP 57:23-27), outflows are substantial. Geoysntec reports: (1) 525 afy of surface outflow in El Toro Creek (2) 200-500 afy groundwater outflow to the Laguna Seca area; (3) an unspecified amount of groundwater outflow to the northeast to the Salinas Valley; (4) no surface or groundwater *in*flows. AR 20153-20154; *see also* AR 19395, *referencing* AR 20125; AR 830, 363 (EIR). Ignoring outflows and focusing only on the "surplus" of rainfall over pumping erroneously treats the aquifer as a closed box. AR 13147-13148.

[5] As discussed below, Real Party's contention that there is no significant *cumulative* impact unless the Project *by itself* substantially depletes the aquifer causing the net deficits and falling groundwater levels is contrary to logic and CEQA.

adequacy of the information contained in the EIR." *County of Amador, supra,* 76 Cal.App.4th at 954. Failure to describe the setting adequately is a failure to proceed as required by CEQA. *San Joaquin Raptor/Wildlife Rescue Ctr. v. Cty. of Stanislaus* (1994) 27 Cal. App. 4th 713, 728-729; *Galante Vineyards v. Monterey Peninsula Water Mgmt. Dist.* (1997) 60 Cal. App. 4th 1109, 1122; *Envtl. Planning & Info. Council v. Cty. of El Dorado* (1982) 131 Cal. App.3d 350, 354-358.

B. The County failed to provide an adequate cumulative analysis because it failed to assess, first, whether there would be a significant cumulative impact from *all* projects and, if so, second, whether *this* Project makes a considerable contribution.

Preliminarily, the County's reliance on the contention that it is sufficient to identify a *source* of water without evaluating the *impacts of using that source* was a failure to proceed as required by CEQA. Guidelines, § 15126.2 (EIR must identify "effects"); *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 434 ("ultimate question" is impacts, not supply); *Santiago County Water District v. County of Orange* (1981) 118 Cal.App.3d 818, 830-831 (error not to disclose effects); *see* Real Party's Opposition ("RPOP") 41:1-6.

1. The County erred by assuming that there could be no considerable contribution to a significant cumulative impact unless the Project *by itself* "substantially depletes" the aquifer, causing net deficits and falling groundwater levels.

The *premise* of cumulative analysis is that impacts may be "individually minor but collectively significant." Guidelines, § 15355; *Communities for a Better Environment v. California Resources Agency* ("*CBE v. CRA*") (2002) 103 Cal.App.4th 98, 119-120.[6] The *point* of cumulative analysis is to identify such situations. Guidelines, § 15130(a). Thus, CEQA requires, first, that an agency determine whether there is a significant cumulative impact from all projects. Guidelines, § 15130(a). If there is, and the project under review makes some contribution, then the agency must determine in a second step "whether 'any additional amount' of effect should be considered significant in the context of the existing cumulative effect."[7] *CBE v. CRA, supra,* 103 CalApp.4th at 119. As Real Party admitted before (AR

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[6] Real Party's contention that LandWatch did not cite authority regarding cumulative analysis requirements (RPOP 28:19-21) is false. LWOB 8:18-9:9

[7] The agency may forego the second step only if the project makes *no* contribution. Guidelines, § 15130(a)(1). Because this Project will increase groundwater pumping, Real Party's citations to cases

4979), but denies now (RPOP 29:1-19), there is a clear distinction between the two steps.[8] Kostka and Zischke, Practice Under the California Environmental Quality Act (2nd Ed., 2014 Update), § 13.39.

Real Party ignores the distinction between step one and two, i.e., between "significant cumulative impact" and "considerable contribution," to claim that the "relevant standard" for the cumulative analysis is the *single* determination whether the Project, *by itself*, would "substantially deplete groundwater supplies . . . such that there would be a net deficit in aquifer volume or a lowering of the local groundwater table level . . .." RPOP 36:19-37:4, 38:21-22, 55:7-9. But such a substantial depletion is the EIR's express criterion to determine if a project causes a "*significant impact*," not to determine if it makes a "*considerable contribution*" to a significant *cumulative* impact. The County's use of the same threshold to determine if the Project's impact is individually significant (i.e., in Impact 3.6-1, AR 372-377) *and* to determine if it is a "considerable contribution" to a significant cumulative impact (i.e., in Impact 3.6-4, AR 384-387) is legally erroneous: it fails to recognize the paradigm scenario in which an "individually minor" impact may nonetheless be a considerable contribution. *CBE v. CRA, supra*, 103 Cal.App.4th at 119-120; Guidelines, § 15355. Contrary to Real Party (RPOP 53:4-7), it is the *County's* approach that renders the cumulative analysis "surplusage," because it could *never* find a considerable contribution unless a project's impact, by itself, were significant.

The County's error is the same as in *Los Angeles Unified Sch. Dist. v. City of Los Angeles* ("*LAUSD*") (1977) 58 Cal. App. 4th 1019, 1024-1026, in which the cumulative analysis was legally inadequate because the agency considered only whether the project by itself would "substantially" increase the impact, based on the language in the Guidelines Appendix G threshold. Here, the County

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holding that projects would have *no* impact are inapt. *Cherry Valley Pass Acres & Neighbors v. City of Beaumont* (2010) 190 Cal. App. 4th 316, 346–47 (no additional groundwater withdrawals beyond existing conditions); *Watsonville Pilots Ass'n v. City of Watsonville* (2010)183 Cal. App. 4th 1059, 1094 (same); *City of Long Beach v. Los Angeles Unified Sch. Dist.* (2009)176 Cal. App. 4th 889, 908-909 (project *reduces* emissions). Thus, Guidelines § 15064(h)(4) is also inapplicable because the ongoing depletion would not be caused by "other projects alone;" Project pumping would make some contribution to the problem.

[8] Real Party's cases do not eliminate the distinction between steps one and two. *Save Cuyama Valley v. Cty. of Santa Barbara* (2013) 213 Cal. App. 4th 1059, 1065, 1072 and *Citizens for Resp. Growth v. City of Rialto* (2015) 208 Cal.App.4th 899, 933 hold only that an agency may rely on a *numeric* (step two) threshold for "considerable contribution" based on a previous (step one) study that acknowledged the severity of cumulative impacts – which did *not* occur here.

also relies on the Appendix G threshold to argue that there is no cumulative impact unless the Project by itself causes or "substantially" increases the effect. [9] RPOP 36:26-37:4, 37:5-14. Conflation of project-level and cumulative analysis is error.

2. The County erred by failing to determine or disclose whether 50 years of falling groundwater levels in the CDT Subbasin caused by *all* projects is a significant cumulative impact.

An adequate cumulative analysis must determine whether there is a cumulative impact, and, if so, must determine whether the project makes a considerable contribution. Both determinations require an assessment of the actual severity of the cumulative impact: first, to determine if it *is* significant and second to provide required context to determine if the project makes a "considerable contribution." *CBE v. CRA, supra,* 103 Cal.App.4th at 120 ("the greater the existing environmental problems are, the lower the threshold should be for treating a project's contribution to cumulative impacts as significant"). As discussed above (e.g., footnote 3), nowhere does the EIR disclose falling groundwater levels in the CDT Subbasin, the actual severity of the cumulative conditions, or whether even there *is* a significant cumulative impact in the CDT Subbasin. In particular, the EIR fails to disclose that the CDT Subbasin has been depleted by 500-1,000 af and that groundwater levels have been declining at 0.6-1.8 feet annually since the 1960s. The belated reference to an "overdraft" condition fails to *relate* that condition to any threshold for cumulative significance, e.g., substantial depletion of groundwater supplies, falling groundwater levels, or a net deficit in volume. AR 371. The mere reference to "overdraft" conditions does not inform the public how the County made the step one determination whether conditions in the CDT Subbasin constitute a significant cumulative impact.

As LandWatch repeatedly objected (AR 5825, 6790-6791), the EIR and subsequent staff claims equivocated as to whether there is *no* significant cumulative impact (1) because there is a water

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[9] Contrary to Real Party (RPOP 36:9-18), case law does not call for deference to an agency threshold of significance if that threshold errs by confusing determination of an individually significant impact and what counts as a considerable contribution to a cumulatively significant impact. *See, e.g., LAUSD, supra,* 58 Cal.App.4th 1024-1026. *Save Cuyama Valley, supra,* 213 Cal. App. 4th 1059 is inapt. There, the Court excused presentation of a "noncumulative" (project-specific) analysis only because the previously adopted numeric threshold for "considerable contribution" was "undoubtedly more stringent" than a noncumulative (project specific) threshold would be. *Id.* at 1065, 1072. Here, there was no such prior threshold or analysis in the EIR.

"surplus" or (2) because the SVWP avoids that result; or whether there *is* a significant impact, but the Project's contribution is not considerable (3) because payment of impact fees is adequate mitigation, or (4) because it is "minimal."[10] LWOB 17:4-19:17. The EIR is informationally inadequate because it fails to provide assessments required by CEQA. Guidelines, § 15130(a).

3. The County erred by relying on the "ratio" theory to conclude that this Project's contribution to falling groundwater levels and net deficit in the CDT Subbasin is not considerable.

As briefed, the applicant and the County made yet another cumulative impact argument *after* the EIR was final: that the Project impact was less than considerable because its demand is small compared to the overall Salinas Valley Groundwater Basin supply.[11] LWOB 16:12-24. Comparing annual Project demand to the overall Basin supply to determine significance is erroneous as a matter of law because it trivializes the Project impact without reference to the magnitude of the cumulative problem, precisely the "ratio" error in *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App. 3d 692, 718.[12] The relevant question is whether the Project demand of 12.75 afy is a considerable contribution to the "environmental problem." *CBE v. CRA, supra*, 103 Cal.App.4th at 120 (considerable contribution threshold depends on size of "environmental problems"). The environmental *problem* is not the millions of acre-feet in storage in the Salinas Valley Groundwater Basin, but the recurring annual 500-1,000 af net deficit and 0.6-1.8 ft. groundwater decline in the CDT Subbasin.[13] AR 20156. Contrary to Real Party (RPOP 52:22-53:4), LandWatch does not endorse a "one molecule" rule; LandWatch argues that the EIR is informationally inadequate because the County failed to address the "relevant issue:"

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[10] And Real Party *continues* to obscure the distinction between the step one question whether all projects taken together cause a significant cumulative impact and the step two question whether this Project makes a considerable contribution to such an impact. RPOP 24:17, 29:1-19.

[11] This argument presupposes a step one determination, not made by the EIR, that there *is* in fact a significant cumulative impact, otherwise step two is not reached. Guidelines, § 15130(a)(2).

[12] *San Francisco Baykeeper, Inc. v. State Land Comm'n* (2015) 242 Cal.App.4th 202, 223-224 does *not* endorse use of a ratio as "one factor" in analysis; it *excuses* this "irrelevant' and "misleading" ratio where there was *other* sufficient evidence to support a determination.

[13] The DEH statement appended to the DEIR that Project demand was "negligible" was also not made in recognition of the "environmental problem." It was expressly based on the Todd report assumption (AR 1496) that the interconnected areas are in "surplus," not in recognition of the *undisclosed problem* of 50 years of falling groundwater levels and net deficits. AR 842-843 (DEIR) *quoting* AR 1507 (DEH) *in turn quoting* AR 1501 (Todd 2002).

> Likewise, the relevant issue to be addressed in the EIR on the plan is not the relative amount of traffic noise resulting from the project when compared to existing traffic noise, but whether any additional amount of traffic noise should be considered significant in light of the serious nature of the traffic noise problem already existing around the schools. We do not know the answer to this question but, more important, neither does the City; and because the City does not know the answer, the information and analysis in the EIR regarding noise levels around the schools is inadequate.

LAUSD, supra, 58 Cal. App. 4th at 1025–26. And contrary to Real Party (RPOP 53:26-28), the problem *is* ongoing: Geosyntec explains that aquifer depletion correlates with building permits, that more permits will aggravate it, and that permits expected through eventual buildout will increase demand 1.7 times over 1995 levels. AR 20156, 20103-20105, 20158, 20161-20162, 20152. Furthermore, contrary to Real Party (RPOP 50:5-14), continued and increasing overdraft *is* the relevant CDT problem, which cannot be avoided by mining stored water. Mining *causes* further depletion and continuing groundwater declines (AR 20163), which the EIR defines as a significant impact (AR 371).

C. The County failed to proceed as required by CEQA because it failed to provide a *timely* description of the environmental setting and cumulative analysis in the draft EIR.

The final EIR's complete rewrite of the water section violates CEQA. LWOB 10:1-12:19, 14:13-16:11. Contrary to Real Party (RPOP 27:16-18, 35:20), the rewrite was not just for "minor clarifications and corrections." The rewrite makes fundamental changes to the description of the environmental setting and cumulative analysis.

- It admits that the technical reports relied on by the draft EIR have been "superseded" by the Geosyntec report. AR 353; *see also* 373 (striking out prior studies).
- It admits the CDT Subbasin is in overdraft, which is *not* disclosed in the draft EIR.[14]
- It makes the inconsistent new claim that "the aquifer in the immediate vicinity of the project site is hydrogeologically contiguous with the aquifers located to the east in the Salinas Valley *rather than* the less productive areas within the Geosyntec Study Area." AR 375-376, 385 (emphasis added). Real Party cites this as evidence that the Project wells are isolated from the "less productive" and "stressed portions of the Toro Aquifer to the west," claiming they are *not*

[14] Contrary to Real Party (RPOP 36:5-6) the draft EIR does not "adequately describe[] . . . the existing overdraft conditions" because, as Real Party admits (RPOP 33:22-23), it does not disclose that the *Toro Aquifer* (CDT Subbasin) is in overdraft. The draft EIR's only references to "overdraft" do not include the Toro Aquifer. AR 825, 830; *see also* footnote 3, above.

connected. RPOP 40:11-14; *see also* 26:3-9, 27:6-9; 39:14-21. This new claim is inconsistent with the draft EIR and Todd report, which both cite and rely on the purportedly shared "surplus" of the four *hydrologically interconnected* subareas of the Toro Basin.[15] AR 826, 837, 1460.

- It retracts the draft EIR's contention that prior groundwater management efforts through the reservoir projects has resulted in "sustained groundwater levels" in the Toro Basin. *Compare* AR 830 *to* 363.

- It enlarges the geographic scope of the cumulative impact analysis to include the "adjacent subbasins" and the Salinas Valley Groundwater Basin "as a whole."[16] *Compare* AR 842 to 384.

- It relies on the purported mitigation benefits of the Salinas Valley Water Project instead of just the purported "surplus" to find cumulative impacts less than significant. AR 387.

The changes violate CEQA, because description of the environmental setting and the analysis of cumulative impacts must be in the draft EIR, and failure to honor this procedural mandate cannot be cured by belated disclosures and analysis after the draft EIR. Guidelines, § 15120(c); *Save Our Peninsula Comm. v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 120-124, 128; *Communities for a Better Env't v. City of Richmond* ("*CBE v. Richmond*") (2010) 184 Cal. App. 4th 70, 85-89; *Galante Vineyards, supra,* 60 Cal. App. 4th at 1122-1123; *San Joaquin Raptor/Wildlife Rescue Ctr. v. Cty. of Stanislaus, supra,* 27 Cal. App. 4th at 727-729.

D. Failure to provide adequate, timely description of the environmental setting and cumulative analysis in the draft EIR was prejudicial.

Contrary to Real Party's proforma and conclusory claims (RPOP 60:9-61:8), LandWatch showed prejudice from the inadequate and untimely disclosure of environmental setting and cumulative analysis.[17] LWOB 12:1-14:12, 15:13-16:11, 16:24-17:3, 17:4-19:7. A fundamental problem with the

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[15] As discussed in section II.C., below, the new claim is *also* inconsistent with the Geosyntec report and other statements in the final EIR. *See, e.g.*, AR 385 (FEIR: "although the proposed project may contribute to an adverse cumulative impact on some of the individual subareas that are currently stressed, the *four subareas are ultimately interconnected* and will maintain an overall water surplus where recharge exceeds extraction." (emphasis added)).

[16] LandWatch does not dispute the County's discretion to identify (timely) the geographic scope of its cumulative analysis, based on substantial evidence. However, contrary to Real Party (RPOP 32:19-20), the final EIR plainly does *not* limit that scope to the Toro Aquifer. AR 384-387.

[17] Real Party "no prejudice" cases are inapt. Unlike *San Francisco Baykeeper, Inc. supra,* 242 Cal.App.4th at 232, here LandWatch did show "omission of pertinent information from the

tardy and incomplete disclosures was that they frustrated CEQA's procedural mandate to test the new claims through systematic public comment and response. *Save Our Peninsula, supra*, 87 Cal.App.4th at 115, 120, 123, 131, 133; *Schoen v. Dep't of Forestry & Fire Prot.* (1997) 58 Cal. App. 4th 556, 572–73. Here, the draft EIR claims no significant cumulative impact for two reasons: (1) a purported water "surplus" in four interconnected subareas of the El Toro Basin and (2) the claim that groundwater levels had been "sustained" by past groundwater projects. Confronted with the Geosyntec report of 50 years of net deficits and falling groundwater levels, the County completely rewrote the water supply analysis in the final EIR, (1) denying that the Project wells *are* interconnected with the rest of the CDT Subbasin and (2) relying on the Salinas Valley Water Project instead of past groundwater projects. The new water supply analysis raises questions the County was never required to address through comment responses. Why does the County *not* identify the net deficits and falling groundwater levels in the CDT Subbasin caused by cumulative pumping as a significant cumulative impact? What evidence is there that the Salinas Valley Water Project *could* benefit the CDT Subbasin, which is 250-350 feet above the Valley, especially since prior groundwater management projects have not?[18] Why does the EIR claim that the Salinas Valley Water Project will even stabilize *Valley* groundwater levels in light of evidence that its demand assumptions are understated and the County's admission that additional projects are required?

LandWatch posed these questions in four letters and hydrologist Parker posed them in two letters, from May 2014 to April 2015.[19] AR 14147-14153, 13329-13331, 13124-13133, 6785-6791, 13141-13154, 6792-6799. Even though these letters were provided to the County months before it acted on the Project, the County never provided a systematic response – now taking refuge in CEQA's

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environmental review process," e.g., through Parker's two technical letters and other documentation. Unlike *Save Cuyama Valley, supra*, 213 Cal.App.4th at 1073-74, here there was no agency commitment to mitigation that would ensure that the impact would be less than significant. Unlike *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439,464-465, this Court cannot conclude that "under the special circumstances of this case" the EIR shows that the project's impact would be *favorable* or that LandWatch has made no showing to the contrary. And unlike *Rominger v. County of Colusa* (2014) 229 Cal.App.4th 690, 708-710, here LandWatch *did* object to the errors through comments and expert testimony, but there was no adequate response.

[18] The Nacimiento and San Antonio Reservoirs were completed in 1957 and 1967 (AR 13199, 13212), *before* the Geosyntec 50-year period of record of declining CDT groundwater levels.

[19] Real Party's claims that Parker wrote a *single* letter, that the six letters were untimely, or that the County was not on notice of LandWatch's objections are false. RPOP 56:8-10, 56:22-26.

provision that an agency need only provide responses to comments made during the *draft* EIR review period.[20] Guidelines, § 15088; RPOP 61:3-4. Contrary to Real Party (RPOP 61:4-6), the County did *not* address objections to the new analysis. For example:

- The County never discussed objections to the misleading new claim that there was both a "surplus" and an overdraft. AR 13149. Yet this conflicting claim is akin to the "fundamentally inadequate and misleading" description in *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 656, where the EIR claimed both an increase and a decrease in mining operations. Sending such "conflicting signals to decisionmakers" will "mislead the public and thwart the EIR process," prejudicially rendering the EIR "insufficient as an informational document." *Id.* at 655-657.

- The County never addressed Parker's objection that the new analysis ignores depletion from pumping *combined with* surface and groundwater outflows. AR 13147, 13148.

- The County never substantively addressed Parker's objection that maintaining groundwater elevations in the Valley has not benefitted and could not benefit the upgradient CDT Subbasin. AR 13147, 13150, 6795.

It is not sufficient for the County to argue these issue in litigation (*see,* e.g., footnote 4, above) or even at administrative hearings; the discussion was required *in the EIR.*[21] *Santiago County Water Dist., supra,* 118 Cal.App.3d at 831; *Laurel Heights Improvement Assn. v. Regents of University of California* ("*Laurel Heights I*") (1988) 47 Cal.3d 376, 405; *Vineyard, supra*, 40 Cal.4th at 442.

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[20] Contrary to Real Party (RPOP 34:3-35:16), LandWatch does not argue that the County was required to conduct new research. LandWatch and Parker objected that the EIR fails to provide data to support critical conclusions. If data were not available, the County could have retracted the claims, deeming the issue too speculative for analysis. Guidelines, § 15145. But CEQA does not permit the County to rely on opinions without factual foundation. Guidelines, § 15384.

[21] Regardless, the findings and post-EIR staff claims at hearings cited by Real Party (RPOP 43:5-44:2) are simply conclusions without factual support or do not address issues in dispute. Nor does post-EIR staff testimony cited at RPOP 23:23-28 address these objections. AR 1505 (DEH comments on Todd study in *draft* EIR, based on misleading "surplus" claim); 4363-4365 (staff report claiming adequate *supply*, not addressing *impact* to aquifer as a whole from using supply), 4963-4966 (Franklin validating irrelevant short-term local well interference test); 4991-4993 (Novo distinguishing short vs. long term rate of groundwater decline); 5144-48, 5243-44 (Stearn erroneously claiming EIR acknowledges future declines in groundwater levels, repeating EIR claims re SVWP); 5301-02 (Johnson discussing Zone 2C boundaries); 5308 (Planning Commissioner repeating SVWP claim); 5336-40 (Moss explaining CDT connection to SVGB, not in dispute); 5378 (*not* planner Kinnison-Brown, but applicant's attorney discussing unrelated issue of 14 *other* lots).

Informational failures are prejudicial if they prevent relevant information from being presented, "regardless of whether a different outcome would have resulted." P.R.C., § 21005(a). Real Party, focusing on the § 21005 provision that there is no presumption of prejudice, improperly invites this Court decide whether the informational failures here *would* have changed the outcome, implying that otherwise there is no prejudice. But the Supreme Court has held that § 21005 is *not* an invitation for the Courts to engage in hypothetical fact finding, merely permission to excuse *clearly inconsequential* errors or omissions. *Envtl. Prot. Info. Ctr. v. California Dept. of Forestry and Fire Protection* ("*EPIC*") (2008) 44 Cal.4th 459, 486, citing *Envtl. Prot. Info. Ctr., Inc. v. Johnson* (1985) 170 Cal. App. 3d 604, 623 ("enactment of section 21005 was simply a reminder of the general rule that errors which are *insubstantial or de minimis* are not prejudicial," emphasis added); *accord Neighbors for Smart Rail v. Exposition Metro Line Const. Auth.* (2013) 57 Cal. 4th 439, 463. A "determination of whether omitted information would have affected an agency's decision" is "highly speculative, an inquiry that takes the court beyond the realm of its competence." *EPIC, supra,* 44 Cal.4th at 488

Furthermore, it is the agency's burden, which the County has not met here, to demonstrate that its failure to respond to substantive material in comments was not prejudicial, and on narrow grounds:

> ". . . when the material not considered was, on its face, demonstrably *repetitive* of material already considered, or so *patently irrelevant* that no reasonable person could suppose the failure to consider the material was prejudicial, or when the omitted material *supports* the agency action that was taken, then such omissions do not subvert the purpose of the public comment provisions and are nothing more than technical error. Short of these showings, *which the agency that failed to consider the comments would have the burden to make,* the omission of the information *must be deemed prejudicial.*

Id. at 487, emphasis added. Here, the material not considered was *not* "repetitive," "irrelevant," or "supportive:" e.g., information showing that the "surplus" claim is misleading in light of actual long-term annual net deficits and declining groundwater levels; information that additional groundwater management projects are needed; and information contradicting the claim of hydrologic isolation.

E. The final EIR's changes were significant new information requiring recirculation.

Because the draft EIR omits critical environmental setting information and contains a deficient cumulative analysis, a final EIR could not correct those omissions and errors without recirculation. Guidelines, § 15088.5(a)(4); LWOB 20:13-23:5. LandWatch cites the untimely revisions in the final

EIR in support of *distinct* claims that the County (1) failed to proceed as required by CEQA by failing to provide adequate and timely information in the draft EIR *and* (2) failed to recirculate the revised water section.[22] Real Party objects (RPOP 30:5-9) that LandWatch brings both claims only to obtain a non-deferential standard of review. Not so.

First, some of LandWatch's "failure to proceed as required by CEQA" claims are independent of the untimely disclosure claims, e.g., the claims 1) that the environmental setting information in the final EIR is inadequate to support further analysis and 2) that the cumulative analysis ultimately presented is inadequate as a matter of law are both independent of the lack of timeliness.

Second, this Court can and should reject the untimely environmental setting descriptions as a failure to proceed as required by CEQA *without* relying on CEQA's recirculation provisions. *CBE v. Richmond, supra,* 184 Cal. App. 4th at 85-89, 101 (recirculation claim is "moot" in light of holding that EIR failed to provide required baseline information "at the beginning of the CEQA process"); *Galante Vineyards, supra,* 60 Cal. App. 4th at 1122-1123 (holding setting disclosure improperly delayed but without citing recirculation obligation); *San Joaquin Raptor/Wildlife Rescue Ctr. v. County of Stanislaus, supra,* 27 Cal. App. 4th at 727-729 (same).

Third, regardless of the standard of review, Courts do hold that failure to recirculate is an abuse of discretion on similar facts. *Save Our Peninsula* holds recirculation was required because the draft EIR omitted critical information regarding the environmental setting and mitigation.[23] 87 Cal.App.4th at 120-134. *Mountain Lion Coal. v. Fish & Game Com.* (1989) 214 Cal. App. 3d 1043, 1049-1050, 1052, holds recirculation was required because the agency revised the cumulative analysis; and the Court *declined even to review that revision* for adequacy because the agency had erred by nor circulating it for public review and comment. *Spring Valley Lake Ass'n v. City of Victorville* (2016) 248 Cal. App. 4th 91, 108 holds recirculation was required because the final EIR replaced the draft EIR's hydrology

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[22] Real Party's claim (RPOP 59:6) that LW does not cite one example of significant new information in the final EIR is absurd. LWOB 21:15-22:8.

[23] Contrary to Real Party, nothing in *Save Our Peninsula* limits its application to a single type of environmental setting information (i.e., on-site, pre-project water use). Furthermore, *Citizens for a Sustainable Treasure Island v. City & Cty. of San Francisco* (2014) 227 Cal.App.4th 1036, 1063 is inapt because it cites only Guidelines, §§ 15088.5(a)(1)-(3) and *does not address* LandWatch's basis for recirculation, §15088.5(a)(4). Also, unlike here, there petitioner did "not even attempt to make an argument" that impacts would remain significant. *Id.*

analysis with a "globally amended" revision relying on new technical reports. "Given their breadth, complexity, and purpose, the revisions to the hydrology and water quality analysis deprived the public of a meaningful opportunity to comment on an ostensibly feasible way to mitigate a substantial adverse environmental effect." *Id.* at 108–09. Here, too, the globally amended water analysis relies on a new technical report and new mitigation for cumulative impacts. These cases are controlling here, because the final EIR completely revises and reissues the water supply section of the draft EIR, fundamentally changing the setting description and cumulative analysis.

Fourth, a claim under Guidelines § 15088.5(a)(4) that the draft EIR was so fundamentally inadequate and conclusory as to preclude meaningful public comment *is* properly reviewed without deference. Substantial evidence review is intended to afford some deference to the agency's competence in *factual* disputes. However, the issue in section 15088.5(a)(4) claims is whether the agency timely honored CEQA's informational mandates – a fundamentally procedural issue reviewable without deference to the agency. *Vineyard, supra*, 40 Cal.4th at 435. That is why *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.* (1993) 6 Cal.4th 1112, 1130, 1133 expressly acknowledges that the contention that substantial evidence review is inapplicable to procedural violations "may have merit," even while dismissing it as inapplicable under the facts "in this case."[24]

Fifth, even on a substantial evidence standard of review, this Court can and should find that there was "significant new information" warranting recirculation. The substantial evidence test is met if the record shows that an EIR fails adequately to evaluate a "*potentially substantial* adverse environmental effect." *Vineyard, supra*, 40 Cal.4th at 448, fn. 17 (emphasis in original). Here, the EIR's equivocal, incomplete analysis does not provide substantial evidence that there is no *potentially* significant impact. Recirculation is also required if the efficacy of water supply impact mitigation, e.g., here the SVWP, was not adequately evaluated in the EIR. *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1120. Finally, regardless whether the *final* EIR contains substantial evidence for its conclusions, the

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[24] Because the Guidelines are not binding (*California Bldg. Indus. Assn. v. Bay Area Air Quality Mgmt. Dist.* (2015) 62 Cal. 4th 369, 381) and *Laurel Heights* does not *decide* the standard of review applicable to Guidelines § 15088.5(a)(4), § 15088.5(e) is not dispositive as to the standard of review applicable to claims under § 15088.5(a)(4) .

draft EIR did not, because the logic and evidence cited in the draft EIR was fundamentally changed in the final EIR. Recirculation for the new setting description and cumulative analysis was required.

II. The EIR fails to provide substantial evidence that there is no significant cumulative water supply impact or that the Project does not make a considerable contribution to such an impact.[25]

A. Informational inadequacies here preclude substantial evidence.

Because the EIR is prejudicially inadequate as an informational document, this Court need not reach the distinct question whether the EIR provides substantial evidence to support its findings. However, if it does reach this question, it should recognize that substantial evidence review considers whether the EIR actually *presents* the required "facts and analysis" to support its conclusions. *Laurel Heights I, supra*, 47 Cal.3d at 404; Guidelines, §15130(a)(2); *Vineyard, supra*, 40 Cal.4th at 442. Thus, noncompliance with CEQA's informational mandates precludes substantial evidence. *California Oak Foundation v. City of Santa Clarita* (2005) 133 Cal.App.4th 1219, 1226-1227, 1235-1242 (no substantial evidence where EIR did not adequately inform public); *Santa Clarita Org. for Plng. the Envt. v. County of Los Angeles* (2003) 106 Cal.App.4th 715, 720-724 (approval "not supported by substantial evidence" where EIR failed to provide "sufficient detail"). Critically, "factual inconsistencies and lack of clarity" also preclude substantial evidence. *Vineyard, supra*, 40 Cal.4th at 439.

Here, informational omissions and a legally inadequate cumulative impact analysis preclude substantial evidence to support a finding that (1) there is no significant cumulative impact, or (2) if there is one, the Project does not make a considerable contribution to it. First, Real Party's argument that there is no significant cumulative impact unless the Project *by itself* causes substantial aquifer depletion (RPOP 55:7-10) is a fundamental misunderstanding of CEQA's requirements for cumulative analysis, which means that the EIR failed to present the *relevant* evidence because it failed to address the relevant issue. *LAUSD, supra*, 58 Cal. App. 4th at 1025–26; *Kings County, supra*, 221 Cal.App. 3d at 724. Second, the failure to present the fact and magnitude of 50 years of net aquifer deficits and falling groundwater levels is a failure to provide essential evidence to support further analysis, including the step one determination whether there *is* a significant cumulative impact threshold and the step two

[25] Contrary to Real Party (RPOP 16:23 to 17:8), LandWatch systematically identified all evidence related to the significance of water impacts and demonstrated it is not substantial. LWOB 23:6-31:8.

determination whether the Project makes a "considerable contribution," determinations that must reflect the severity of the cumulative problem. *CBE v. CRA, supra,* 103 Cal.App.4th 98, 120. Third, the determination that the Project demand would be less than a considerable contribution because it is relatively small compared to Basin storage is factually irrelevant because it is based on the legally flawed "ratio" theory. *Kings County, supra,* 221 Cal.App.3d 718-720. The County never considered whether the Project demand is a considerable contribution to the cumulative *CDT Subbasin problem*: groundwater declines of 0.6-1.8 ft./yr. and annual deficits of 500-1,000 afy.

B. There is clearly a significant cumulative impact based on the EIR's own criteria.

As argued, CEQA requires that an agency first determine if there is a significant cumulative impact from all past, present, and foreseeable future projects. LWOB 8:15-9:4. Here, 50 years of net deficits and declining groundwater levels (AR 20062, 20156) clearly meet the EIR's threshold for significant impact (AR 371), despite the EIR's failure to disclose this (*see* footnote 3, above).

But Real Party argues that that there *is* no significant cumulative impact because: (1) the Project by itself does not substantially deplete the aquifer (RPOP 36:19-37:4, 38:21-22, 55:7-9), (2) rainfall recharge exceeds pumping (RPOP 53:11-14, 54:5-8); and, (3) water can be mined for decades (55:22-56:7). These claims do not constitute substantial evidence because they are legally and factually irrelevant. First, as argued, the claim that there could be no significant cumulative impact unless the Project itself substantially depletes the aquifer and causes the net deficit or lowers the groundwater level is legally erroneous. *See* section I.B.1, above. Second, the argument that there is no significant cumulative impact because recharge exceeds pumping in some areas is factually incorrect because it ignores substantial outflows to adjacent subbasins, which, combined with pumping, do in fact cause net deficits and declining groundwater levels. *See* footnote 4, above; AR 20062, 20156; LWOB 13:3-17, 25:6-18. Third, the option to mine the aquifer does not mean that cumulative impacts are less than significant: reliance on groundwater storage *causes* long term declines in groundwater levels. AR 20163. Again, the relevant issue is not the availability of supply, but the impacts from *using* that supply. *Vineyard, supra,* 40 Cal.4th at 434.

C. There is no substantial evidence that the Project's supply wells in the San Bernancio Gulch subarea are hydrogeologically isolated from the CDT Subbasin or its "stressed areas."

Real Party repeatedly cites the final EIR's novel and inconsistent contention that "the aquifer in the immediate vicinity of the project site is hydrogeologically contiguous with the aquifers located to the east in the Salinas Valley *rather than* the less productive and stressed areas within the Geosyntec Study Area." AR 375-376, 385 (emphasis added); *see* RPOP 26:3-9, 27:6-9, 39:14-21, 40:11-14, 41:12-15. Real Party argues that this means that the Project is hydrologically isolated from, and therefore will not affect, the "stressed areas" of the CDT Subbasin. RPOP 39:16. Other than the final EIR's bare conclusion, which by itself is not substantial evidence (Guidelines, §15384(a)), Real Party's only purported evidence for the isolation claim is the Project well map (AR 364) and the 2010 Geosyntec update showing a hydrological *connection* from the CDT Subbasin to the Salinas Valley aquifers to the east (AR 4140-4144). RPOP 40:13. But evidence of a connection to the Pressure Subarea to the east is not evidence of the *lack* of connection to *other* areas within the CDT Subbasin.

Real Party incorrectly attributes the isolation conclusion to Geosyntec. RPOP 39:16. In fact, the claim is *contradicted* by Geosyntec and by the rest of the EIR, an inconsistency that precludes substantial evidence. *Vineyard, supra,* 40 Cal.4th at 439. First, the EIR repeatedly states that the San Bernancio Gulch subarea, in which the wells are located, is one of four *hydrologically interconnected* subareas of the CDT Subbasin. AR 826, 837, 843, 1460, 385. The final EIR states the Project may contribute to impacts on "currently stressed" subareas, which are "ultimately interconnected." AR 385. Second, Geosyntec, which was charged to determine "hydrogeologic connectivity between existing subareas" (AR 20059), concludes that both the water chemistry and uniform groundwater levels demonstrate "substantial hydraulic interconnectivity between lithologic units."[26] AR 20136. Geosyntec concludes that continued pumping from the Geosyntec Study Area, which includes the San Bernancio

[26] Contrary to Real Party (RP 40:1-8), the facts in *O.W.L. Foundation v. City of Rohnert Park* (2008) 168 Cal.App.4th 568, 593-594 regarding potential lack of uniformity in a *different* groundwater basin are irrelevant. Here the only evidence shows the four subareas *are* interconnected and have suffered a groundwater decline from cumulative pumping.

Gulch subarea, *will* have impacts on less productive areas.[27] AR 20062, 20163. Third, regardless of impacts to less productive areas, increased pumping will contribute to *overall* net deficits and declining groundwater levels, which the EIR defines as significant. AR 371. And contrary to Real Party, water levels are declining not just in "***other*** portions" of the aquifer (RPOP 52:19), but in the Project wells themselves. AR 6794 (23-25 foot declines in past 12-15 years), *citing* AR 3555, 1453.

D. There is no substantial evidence that the Salinas Valley Water Project will halt continuing aquifer depletion and groundwater declines in the upgradient CDT Subbasin.

The EIR provides no substantial evidence that the Salinas Valley Water Project will in fact halt the continuing depletion and declining groundwater levels in the upgradient CDT Subbasin. LWOB 25:19-28:4. Real Party cites conclusory findings and staff statements (RPOP 43:13-44:9), but these do not provide *evidence* that maintaining groundwater levels in the Valley could maintain groundwater levels 250-350 feet above it in the CDT Subbasin, especially in light of 50 years of falling groundwater levels.[28] The EIR's unsubstantiated claim of a SVWP benefit does not address this question. AR 363; *see* 13149-13151, 6795 (Parker). Contrary to Real Party (RPOP 44:10-45:2), the SVWP Engineers Report (not cited by the EIR) is not evidence that the SVWP would benefit the CDT Subbasin. As Real Party admits, it does not even *discuss* the CDT Subbasin, which was *not* evaluated for the SVWP. AR 8955-8956, 8657-8661 (SVWP EIR, modeling four subbasins but not the CDT Subbasin). Contrary to Real Party (RPOP 45:21-46:1), Geosyntec at AR 3949 and 3952 does not even suggest that the SVWP will halt or slow the projected depletion *of the CDT Subbasin*. LWOB 27:19-23. Geosyntec, aware of the SVWP, nonetheless states that, while continued pumping of stored groundwater is possible, "the most evident problem would be lowering of the water table below the screened intervals of existing

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[27] Geosyntec shows that the four hydrologically interconnected CBT subareas, including the San Bernancio Gulch subarea, contain areas of high and low saturated thickness and production potential. AR 20133-20134 (saturated thickness maps). Geosyntec shows long-term declining water levels of from 0.5 ft. to 2 ft. per year in all of the four interconnected areas. AR 20131.

[28] AR 8, 9, 50 are findings about groundwater levels in the *Valley*, the existence of a hydraulic connection to the CDT Subbasin, and the availability of *supply*. They do not address the critical issue of the 250-350 foot gradient, the lack of *any* evidence of actual *CDT* benefits from Valley groundwater projects, and the fact that CDT groundwater has declined for 50 years despite the existing projects. AR 4912-13, 4970 are staff opinion without any identified factual basis, which is not substantial evidence. Guidelines, § 15384.

wells completed in the shallower portions of the aquifer system." AR 20163. And Geoyntec states that the B-8 moratorium on new subdivisions should be expanded to cover the entire El Toro Primary Aquifer System unless "*long terms declines in groundwater levels* and reliance on groundwater storage are acceptable to the County . . .." AR 20163 (emphasis added.) Finally, contrary to Real Party (RPOP 21:23, 47:20-24, 14:27), long-term declining groundwater levels in the CDT Subbasin are *not* due to a recent drought; Geosyntec's 50-year record of a 0.6 ft/year groundwater decline "is independent of short-term fluctuations associated with rainfall variation." AR 20060-20061, 20115.

Not only does the record contain no analysis or data to support Real Party's claim, Parker has provided substantial evidence to the contrary in two technical letters, to which the County did not respond. And contrary to Real Party (RPOP 45:16-20), Parker does not contend that all of the water in the CDT Subbasin will drain into the Pressure Subbasin; Parker explains that there is no evidence or logic for the claim that maintaining Valley groundwater level *could* support the CDT groundwater level 250 to 350 feet above. AR 13147, 13153, LWOB 27:6-13.

E. There is no substantial evidence that the Salinas Valley Water Project will maintain groundwater levels in the Salinas Valley itself.

Even if there *were* evidence that maintaining groundwater levels in the Valley subbasins could support groundwater elevations in the upgradient CDT Subbasin, there is no substantial evidence that the SVWP *will* actually maintain Valley groundwater levels, and there is substantial evidence to the contrary. LWOB 28:5-29:10. Real Party cites conclusory findings and staff comments (see footnote 28, above), but the only evidence even referenced in the EIR (AR 368, 387, cited at RPOP 46:16-24) is the single wet-period monitoring report for 2009-2011, admittedly *not* indicative of the long-term trend.[29] LWOB 26:11-24. Real Party cannot dispute that the hydrologically interconnected basin as whole is out of balance by 17,000 to 24,000 afy *on a long-term basis* (1944-2013) and that pumping reductions are recommended in the Pressure and East Side Subbasins to address this long-term annual storage loss. AR 6057-6058, 6062. Real Party points to a recent slowing of the *rate* of seawater intrusion, but ignores the evidence that this rate will re-accelerate as a latent response to the drought. AR 6059; AR 5850; *see*

[29] Again, there is no evidence that this unidentified report addresses *CDT Subbasin* groundwater levels and substantial evidence it does not. LWOB 26:11-18.

AR 5826. Real Party cannot dispute that the County made findings that more groundwater projects *are in fact required* ("more are necessary") to maintain Valley groundwater elevations.[30] Second Request for Judicial Notice by Petitioner LandWatch, Exh. 1, p. 17.

In sum, because the SVWP is admittedly insufficient to maintain groundwater levels in the SVGB, the EIR may not conclude that payment of impact fees constitutes adequate mitigation or will avoid a significant impact.[31] *Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1188 (inadequate mitigation because project not required to pay fees for needed second phase of interchange); *Gray, supra,* 167 Cal.App.4th at 1122 (inadequate mitigation because needed projects not defined or adopted); *California Native Plant Society v. County of Eldorado* (2009) 170 Cal.App.4th 1026, 1054-1055 (agency must have committed itself to implement adequate program).

F. Short-term local well interference is not relevant evidence of long-term cumulative impact.

Contrary to Real Party (RPOP 57:5-58:5, 40:15-20), whether the Project causes an immediate, short-term reduction in groundwater levels of wells within 1,000 feet is not relevant to whether it makes a long-term considerable contribution to a cumulative aquifer impact. LWOB 29:19-25. The EIR treats this as a *distinct, project-specific* impact. *Compare* AR 383-384 *to* 384-387. Real Party *admits* that "the Beerman [sic, Bierman] report was never intended to address cumulative impacts." AR 4978. And Real Party's claim that the scope of cumulative analysis is only 1,000 feet (RPOP 57:22-58:2) contradicts

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[30] So Real Party's claim that additional projects "may" be needed (RPOP 48:8) is misleading. *See also* AR 13219 (Johnson), 22546 (Geoscience). Real Party also misleadingly culls *partial* statistics for urban rather than total pumping (RPOP 49:1-8) and for *one* subarea of the SVGB rather than the SVGB as a whole (RPOP 47:15:17). MCWRA admits additional projects are needed because *total* pumping exceeds SVWP demand assumptions. LWOB at 28:14-27.

[31] Real Party's cases (RPOP 48:16-21) are inapt. *Cherry Valley Pass Acres & Neighbors, supra,* 190 Cal. App. 4th at 346–47 and *Watsonville Pilots Ass'n, supra,*183 Cal. App. 4th at 1094 find that the projects will have *no* impact because they *reduce* groundwater use. *Mission Bay All. v. Office of Cmty. Inv. & Infrastructure* (2016) 2016 WL 6962504 at *15 holds only that a guaranteed funding source for needed mitigation need not be specified in the EIR. Real Party's claim that impact fees are not "mitigation" because it is a pre-existing duty (RPOP 51:17-18) is irrelevant. The EIR *characterizes* the Zone 2C assessment as impact fee mitigation (AR 387); and mitigation may be a project feature (Guidelines, § 15126.4(a)(1)(A)). Regardless whether the SVWP is *called* mitigation, there is no substantial evidence that it is effective at avoiding the significant impact.

both the EIR, which purports to evaluate basin-wide cumulative impacts (AR 384-387), and Real Party's brief, which elsewhere claims the scope of cumulative analysis is the "Toro Aquifer" (RPOP 32:19-20).

III. There is no substantial evidence that 2030 traffic impacts are mitigated.

Real Party does not deny that there is no substantial evidence that payment of impact fees would mitigate the level of service ("LOS") impacts at each affected intersection and segment. Instead, Real Party argues that, even though the EIR assesses the *significance* of impacts based on LOS criteria, it assesses the *efficacy of mitigation* using a *different* criterion, corridor travel time. In fact the EIR does *not* apply corridor travel time to assess mitigation efficacy; and, doing so would not comply with CEQA.

Contrary to Real Party, the EIR's reference to "the regional roadway network" (AR 451) does *not* support the claim that the EIR relied on "corridor travel time" to determine mitigation efficacy. The RDEIR actually refers to "unacceptable *levels of service* on the regional roadway network," affirming the relevance of LOS criteria, not corridor travel time. AR 451 (emphasis added). TAMC's and Caltrans' endorsements of impact fees no not even *mention* travel time. AR 201, 273

In fact, the RDEIR identifies adding any traffic to an intersection or segment at LOS F as a significant impact, stating that this threshold is "recognized by Monterey County and consistent with the County's analysis methods." AR 436-437. The RDEIR explains that, although travel time is assessed, "*conventional thresholds of significance are recognized and used in this report.*"[32] AR 436 (emphasis added). Those conventional LOS thresholds were taken from the County's published CEQA thresholds. AR 6839. "Non-compliance" with a published threshold means an effect is significant and "compliance" means it is less than significant, e.g., adequately mitigated. Guidelines, § 15064.7(a). Thus, the County's thresholds document discussion of mitigation measures requires that a project's LOS impacts "be eliminated or reduced to a level of insignificance" to be mitigated. AR 6829.

The RDEIR applies the published thresholds by finding a distinct "significant cumulative impact" at each intersection and segment operating at LOS F to which the Project adds traffic.[33] AR

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[32] LandWatch does not dispute the County's discretion to choose a threshold of significance. RPOP 78:19-24. It is irrelevant that it was "conservative" (RPOP 64:13-66:13) or later changed.

[33] Contrary to Real Party (RPOP 76:22-77:13), the express use of this threshold for its cumulative analysis (AR 472, 490, 452, 455) means the County did in fact use it to determine that any additional traffic from the Project is a "considerable contribution" to the significant cumulative impacts from all

452-456, 472, 490. The RDEIR *establishes what constitutes mitigation* by analyzing both "unmitigated" and "mitigated" cumulative intersection and segment operations in order to identify the *specific improvements needed as mitigation to avoid LOS F*, e.g., additional turn and through lanes. *Compare*, e.g., AR 583 *to* 595 (unmitigated and mitigated TOS analysis for intersection # 1); 584 to 596 (# 2); 585 to 597 (#3); 586 to 598 (#4). The RDEIR summarizes those recommended mitigation improvements and implies they may be included an updated fee program. AR 630, 457-459, 427. Identifying the specific improvements *needed to avoid LOS F at each intersection and segment* as the cumulative mitigation is plainly inconsistent with claiming that the mitigation is based on a *different* criterion. Use of corridor travel time as the cumulative mitigation criterion is also belied by the fact that the EIR does not even *assess* travel time under cumulative conditions.[34] AR 613-614. Furthermore, in responding to LandWatch's specific objection that impact fees would not mitigate *each* cumulative intersection and segment impacts, the final EIR did not even *mention* corridor travel time. AR 270-272.

CEQA does not permit an agency to use a different threshold to determine mitigation efficacy and impact significance.[35] "Compliance" with the significance threshold is required to find an impact less than significant. Guidelines, § 15064.7(a). Mitigation must address the significant impact that is "identified in the EIR," and "*as* identified" in the EIR.[36] Guidelines, §§ 15126.4(a)(1)(A), 15091(a)(1); *see also* § 15130(a)(3) (impact fees must "alleviate *the* cumulative impact," emphasis added); LWOB 41:22-24.

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projects (i.e., the LOS F conditions). Unless there *were* a considerable contribution, no impact fee mitigation could have been required or need have been discussed. Guidelines, § 15126.4(a)(3); 15130(a)(3).

[34] Respondent invites the Court to speculate (RPOP 77:18-22) that even after addition of 184,243 additional cumulative trips (AR 581), travel time on SR 68 would still be improved by the single SR 68 Commuter Improvements project; but such speculation is neither substantial evidence nor the role of the Court. Guidelines § 15384; *EPIC, supra*, 44 Cal.4th at 488. Real Party does not dispute that LOS west of Corral de Tierra will *not* improve above LOS F. RPOP 78:2-3.

[35] Contrary to Real Party (RPOP 75:13-76:4) nothing in CEQA permits an agency to treat impact fees for cumulative impacts differently. LWOB 39:20-40:13.

[36] In the analogous general plan consistency context, an agency errs by using a different threshold to mitigate than to identify traffic impacts. *Endangered Habitats League, Inc. v. Cty. of Orange* (2005) 131 Cal. App. 4th 777, 783-4 (agency "acknowledged the problem under the HCM method and likewise solved it by relying on the V/C analysis").

Furthermore, if the County's actual intent were to use corridor travel time as the mitigation criterion, the EIR fails as a disclosure document because it does not disclose the analytic route that connects its determination of significance to its determination of the adequacy of mitigation, even in response to comments. *California Clean Energy Comm. v. City of Woodland* (2014) 225 Cal.App.4th 173, 205 (EIR must disclose analytic route used to assess alternatives; switch in rationales conflicts with requirement to disclose analytic route); Guidelines, § 15088 (good-faith comment responses required); *see* AR 270-272. An EIR is a "document of accountability" that must inform the public of the "basis on which its responsible officials either approve or reject environmentally significant action," including the "analytic route the ... agency traveled from evidence to action. *Laurel Hts. I, supra,* 47 Cal.3d at 392, 404.

The EIR's flawed discussion of cumulative impacts was prejudicial. The County misled the public to believe that LOS would improve by 2030, and it failed to weigh unmitigated 2030 traffic impacts in its statement of overriding considerations.[37] AR 35; Guidelines, §§ 15091(a)(3), 15092(b)(1)(B), 15093. This Court cannot reweigh the issue.

IV. There is no substantial evidence that 2015 traffic impacts are mitigated.

LandWatch challenges lack of substantial evidence that the SR68 Commuter Improvements would mitigate traffic impacts under 2015 conditions at segment 5 and intersections 5 and 6, because that project is not planned or funded *before 2035*. LWOB 42:7-43:22. Real Party ignores the evidence that needed mitigation will not be available for another 20 years.[38] Instead, it cites *Save Our Peninsula, supra,* 87 Cal.App.4th at 141 to argue that timing of mitigation can never be at issue as long as there is some program for eventual mitigation. But, *Save Our Peninsula* "cannot be read broadly to mean such programs are necessarily or presumptively adequate mitigation under CEQA." *California Native Plant Soc'y, supra*, 170 Cal.App.4th at 1054. *Save Our Peninsula* found that, unlike here, there was a

[37] If the County actually did use travel time to assess mitigation efficacy, it did not disclose this in the EIR. Prejudice would then stem from the fact that the EIR misinformed the public as to "the basis on which its responsible officials either approve or reject environmentally significant action" and thereby failed as a "document of accountability" to protect "informed self-government." *Laurel Heights I, supra*, 47 Cal.3d at 392.

[38] Real Party's argument that there is no prejudice because the County has passed a new tax measure (RPOP 81:15-22) is irrelevant: it requires this Court to speculate impermissibly on factual determinations, such as future changes to existing plans. *EPIC, supra*, 44 Cal.4th at 488.

"reasonable plan for mitigation" *only* because the improvement program provided that improvements would be constructed *when traffic triggered their need*.[39] *Id.* at 140-141.

V. Recirculation is required because staff and findings disclosed new significant traffic impacts after the draft EIR.

Recirculation was required by post-EIR disclosure of new significant impacts when, contrary to the EIR, the findings disclose that 2015 impacts to intersections 5 and 6 and segment 5 are unavoidably significant. LWOB 43:23-44:13. Real Party's claim that this is a scrivener's error is unsupportable. LandWatch repeatedly argued that these impacts *should* be found unavoidably significant (AR 13133-13136, 5830), as they were in the draft EIR (AR 918). Commenting on the draft findings, LandWatch objected that recirculation was required because the RDEIR does not disclose the impacts are unavoidably significant. AR 5830. County staff then responded by *affirming* the draft EIR's finding that impacts are indeed unavoidably significant.[40] AR 4928:12-16 (citing draft EIR page 3.10-20, AR 918). The public should be entitled to rely on findings to discern the basis of the County's action. *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515-517.

VI. The County abused its discretion in general plan consistency findings.

The County's contention that its General Plan consistency findings adequately bridge the analytic gap is unsupportable because *there are no findings* on the traffic policies LandWatch put at issue: the consistency findings do not even *mention* these policies. LWOB 45:19-22; 48:7-49:8. *EPIC, supra,* 44 Cal. 4th at 517, does not excuse the County; *EPIC* found findings barely adequate where they (1) recited the applicable criteria and (2) identified the specific documents that demonstrated fulfillment of those criteria. *Neither* happened here. *EPIC's* holding that "conclusory findings without reference to the record are inadequate" governs here. *Id.* Furthermore, the County's discussion of material in the record that hypothetically might have supported findings is irrelevant: this Court cannot review the County's findings for consistency because there are no findings on the policies at issue to review, and

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[39] And unlike in *City of Marina v. Bd. of Trustees of the California State Univ*. (2006) 39 Cal. 4th 341, 365, here there *is* "reason to doubt" that the "plan for mitigation" is "reasonable." The *plan* for mitigation calls for improvements that will be 20 years too late. SAR 22717, 22867; *see* AR 13135.

[40] Staff's effort to correct the findings expressly purports to be consistent with the *just-referenced draft EIR conclusion of unavoidably significant impacts.* AR 4928:17-23 ("*As such* I would like to recommend a correction…," emphasis added).

the Court may not "hypothesize new findings." *Sierra Club v. City of Hayward* (1981) 28 Cal.3d 840, 849. [41]

County's "no prejudice" argument based on Government Code § 65010(b) fails. First, LandWatch's *unanswered* objections in the record show a different outcome was probable. Second, § 65010(b) does not set aside case law in which *Courts in fact order relief* where petitioners demonstrate failure to meet *Topanga's* substantive requirement to disclose the actual analytic path from evidence to conclusions, coupled with a showing of inconsistency.[42] LWOB 48:9-49:8.

Dated: February 13, 2017

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[41] Contrary to the County (County Opposition to LandWatch 6:9-10), *Sierra Club* is not distinguished; the agency *did* make findings just like the unacceptably generalized findings here – findings that the action was "not inconsistent" with governing requirements (*id*. at 849).

[42] "Section 65010, formerly section 65801, is a 'curative statute' enacted by the Legislature for the purpose of 'terminating recurrence of judicial decisions which had invalidated local zoning proceedings for *technical procedural omissions*. [Citations.]' *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App. 4th 899, 921 (emphasis added). Where § 65010(b) has excused the technical error of failure to make findings, it has only been because the petitioner adduced *no evidence of actual inconsistency* and thus no prejudice. *Id.* at 917, 920, 922-923; *Roberson v. City of Rialto* (2014) 226 Cal.App.4th 1503, 1506-1508.

PROOF OF SERVICE

I hereby declare that I am employed in the City San Francisco, County of San Francisco, California. I am over the age of eighteen years and not a party to this action. My business address is 555 Sutter Street, Suite 405, San Francisco, CA 94102. I am familiar with this firm's practice for the collection and processing of mail sent via U.S. Mail, which provides that mail be deposited with the U.S. Postal Service on the same day in the ordinary court of business. On February 14, 2017, I served the attached **REPLY BRIEF BY PETITIONER LANDWATCH MONTEREY COUNTY** in this action via the U.S. Mail by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid addressed to:

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

for collection and deposit with the U.S. mail on this date according to ordinary business practices. I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed at San Mateo, California on February 14, 2017.

John Farrow